

INTRODUCTION TO THE SYMPOSIUM ON ANNA SAUNDERS,
“CONSTITUTION-MAKING AS A TECHNIQUE OF INTERNATIONAL LAW:
RECONSIDERING THE POST-WAR INHERITANCE”

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In her thought-provoking article on the role of international institutions in constitution-making around the world in the post-war era, Anna Saunders critiques the dominant approach to constitution-making for its emphasis on certain formal, procedural questions (what she calls “selective technicity”) to the neglect of an open engagement with material issues and underlying economic structures. Tracing the recent history of constitutional ideas, she suggests that key post-war German and U.S.-based lawyers and constitutional thinkers are likely to have influenced modern practices of constitution-making, including this procedurally dominated approach adopted by international organizations to these practices. Saunders’s rich article raises an array of interesting questions, including: the power of and problems with international organizational assistance in post-conflict constitutional contexts; the implications of the dominant model of constitutionalism underpinning international constitutional-assistance efforts, and its relationship to neoliberal economic ideas and commitments; the relationship between liberal constitutionalism and underlying economic structures and patterns of distribution and power; the limits and possibilities of the “rule of law” in righting injustice and facilitating constitutional transformation; and the relationship between historical and colonial exploitation and contemporary Western-led “assistance” to the renewal of political institutions and structures in post-conflict settings.

In their responses to Saunders, six authors have taken up some of the questions she poses and the arguments she advances in a variety of ways. Some contributors build on and amplify Saunders’s critique to argue that the core problem with international constitution-making processes is their fundamental Eurocentricity, one that denies meaningful agency to the people in post-conflict societies. Several other contributors also endorse Saunders’s basic argument and extend it in various ways, for example, by examining the economic implications of the gendered assumptions underpinning the liberal constitutional model, or probing the indirect and background influence of international financial institutions beyond the constitution-making process. A number of other authors question or challenge Saunders’s thesis either descriptively, by asking whether the ideas of liberal constitutionalism advanced by post-war theorists really did mean the neglect of material and distributive questions, or normatively, by suggesting that international practices of constitutional assistance should not address material issues of economic structure. Finally, some authors are overtly skeptical about the usefulness of constitutionalism for addressing the multiplicity of social and economic issues arising in post-conflict situations.

Babatunde Fagbayibo of the Faculty of Law at the University of Pretoria takes up Saunders’s invitation to critique the existing approach of international institutions toward post-conflict constitutional assistance.¹ Fagbayibo

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¹ Babatunde Fagbayibo, *The (Not So Hidden) Elephant in the Room: Confronting International Constitution-Making’s Eurocentric Gaze*, 117 *AJIL UNBOUND* 240 (2023).

contends that the deeply Eurocentric approach of existing international practices has involved the imposition of a set of preconceived and rigid ideas about “permissible juridical and politico-economic” alternatives onto the unjust and exploitative conditions left by colonialist structures, while denying any real agency to the people for whom and ostensibly by whom the constitution is being drawn up. He argues that the Eurocentrism that characterizes international constitutional processes is sustained by the presentation of specific neoliberal ideas as objective and immutable, as well as by policing and excluding the publication and production of alternative ideas, and erasing or ignoring non-Eurocentric perspectives. Emphasizing the dignity of agency, and the importance of genuine trust, inclusion, and visibility, Fagbayibo argues that any meaningful approach to constitution-making must give a central place to the dispossession and marginalization of the people of the Global South both historically and at present, and abandon the Eurocentric superiority complex.

Michele Krech of the University of Chicago Law School endorses and furthers Saunders’s critique of the model of constitutionalism informing international constitution-making practice, and its selective technicity. Krech draws attention to the deeply gendered underpinnings of the dominant liberal constitutional model, and the implications for distributive issues and questions of political economy of its reliance on the assumption of the nuclear family at the core of the constitutional state.² She brings together the burgeoning literature on comparative gender constitutionalism with the critical post-colonial scholarship in international law and development to highlight how the gender bargain at the heart of Western constitutional thought implicates fundamental questions of economic power and structure. In other words, Krech takes up Saunders’s argument that deeply material issues are always already implicated in and built upon by the supposedly technical and procedural practices of constitution-making, and uses the lens of gender to provide a powerful but often overlooked illustration of this. Acknowledging that the removal of the nuclear family and its centrality to modern liberal constitutionalism may not be easily imaginable, she suggests that even the act of training our attention on the way it has served as an important link between constitution-making and the global economic order should be illuminating, and should help in imagining other kinds of global order. Krech’s argument about the effective invisibility of gender despite its deep significance to the economic structures being maintained and advanced through constitution-making processes chimes with Fagbayibo’s arguments about the need for the invisible, the dispossessed, and the marginalized to be brought to the front and center of these processes.

In his essay, Gaurav Mukherjee of New York University Law School also seeks to expand and add nuance to Saunders’s core thesis by showing that it is not only through the formal observable practices of constitution-making that international organizations influence and shape domestic policy and government, but also through less visible but powerful channels by which the parameters of political possibility during constitution-making processes are set.³ He uses the example of the World Bank’s intervention at the time of constitution-drafting in South Africa. In this context, the Bank’s market-driven view on land reform, even though it had been rejected by the African National Conference when the constitution was drawn up, nonetheless came subsequently to dominate and shape subsequent policy choices through the discursive and financial power of the Bank, and to preclude more equitable redistributive approaches which might have been possible under the Constitution’s terms. Mukherjee then uses the example of Hungarian judicial resistance to World Bank influence in that jurisdiction to suggest, however, that some forms of resistance through independent institutions may be possible in certain contexts and circumstances, even when a state is heavily dependent, economically or politically, on international financial institutions.

² Michele Krech, *International Constitution-Making as a Technique of Gender Ordering: Considering the Role of the Nuclear Family in Global Economic Relations*, 117 AJIL UNBOUND 245 (2023).

³ Gaurav Mukherjee, *Shaping Sovereignities: The Role of International Financial Institutions in Constitution-Making*, 117 AJIL UNBOUND 251 (2023).

Hannah Birkenkötter of the Law Department at the Instituto Tecnológico Autónomo de México draws on the history of UN involvement in constitution-making in Namibia (UNTAG) to show that the engagement of international institutions in such constitutional assistance was not only a post-Cold War phenomenon, as Saunders suggests and as is generally assumed in the literature.⁴ Birkenkötter traces the early engagement of the United Nations with constitution-making in Namibia from the 1960s onward, and not only in the 1980s, when its involvement in Namibia is better known. She suggests that elements of this early example of constitutional assistance have influenced later instances of UN involvement in constitution-making, including in Kosovo and East Timor, and makes the point that unlike U.S. involvement in constitution-making in Germany and Japan in the post-World War II era, the engagement of the United Nations with Namibia was a case of international constitution-making with and for a formerly colonized territory which was gaining independence. Birkenkötter cautions, however, against one of the apparent implications of Saunders's argument, which is that international involvement in constitution-making should openly address material and economic issues, and she argues instead that international constitutional assistance should leave these economic and structural choices to the local actors and the actual authors of the constitution.

Bojan Bugarič of the School of Law at the University of Sheffield shares Saunders's critical perspective on the limits of constitutionalism in advancing political and economic projects, but takes it further by casting doubt on what constitutionalism and constitution-making can actually achieve, even if a constitutional text were to address material and distributive questions more directly.⁵ In other words, he is skeptical of the project of constitutionalism more generally. However, he also suggests that the answer to designing better internationally assisted projects of economic development is, drawing on a suggestion toward the end of Saunders's article, and building on contemporary law and development scholarship, to facilitate local experimentation and the trial of different solutions for different contexts. More generally, he advocates for an experimentalist conception of constitutionalism that would promote flexibility and local diversity rather than one which privileges entrenchment and stability.

If Babatunde Fagbayibo's essay is the one that most strongly endorses and amplifies Saunders's critique of the nature of international constitution-making assistance, the contribution of David Dyzenhaus of the University of Toronto Faculty of Law is perhaps the most skeptical of some of her claims.⁶ Dyzenhaus challenges Saunders's argument that the dominance of liberal constitutional ideas with their primary focus on issues of procedural legality, as advanced by Ernst Fraenkel and others, results in a deliberate avoidance of underlying economic and material issues and leaves existing structures of power in place. Adopting a similar biographical approach to that which Saunders does in her intellectual historical analysis—and extending this to the autobiographical—Dyzenhaus describes his time as a young legal scholar in apartheid South Africa. He draws on these experiences to argue that the activism of those he worked with, and those who mobilized for social, economic, and material justice, was underpinned by a deep and genuine belief in the power of the rule of law, as defended by Fraenkel (and Kelsen, among others), to advance those goals and to constrain political power. Ideas of liberal constitutionalism, Dyzenhaus argues, did not and do not equate to a technocratic focus on institutions and on rights, but rather they reflect a belief in and commitment to a space in which law can constrain arbitrariness, and within which transformative political projects of equality and freedom can be best advanced.

Saunders's article and the responses it has generated have created rich material for further research and debate. Dyzenhaus's argument about the promise of the liberal constitutional model and the rule of law to create and protect an important space within which emancipatory political and social projects can be fairly pursued is

⁴ Hannah Birkenkötter, *Beyond Peace and Security: The UN Transition Assistance Group in Namibia as a Frame for Contemporary Constitution-Making*, 117 AJIL UNBOUND 257 (2023).

⁵ Bojan Bugarič, *The False Promise of Constitutionalism*, 117 AJIL UNBOUND 263 (2023).

⁶ David Dyzenhaus, *Franz Neumann and Ernst Fraenkel on the Liberal Democratic Constitutional Project*, 117 AJIL UNBOUND 269 (2023).

interestingly in tension—at least on first glance—with Fagbayibo’s argument that international constitutional assistance, with its procedural model of constitutionalism, has invariably imposed prescriptive and rigid models of juridical and socioeconomic structure. Similarly, Bugarič’s skepticism about whether constitutionalism is at all useful for the kinds of projects of political and economic renewal that international assistance pursues is somewhat in tension with his argument—and that of Saunders—that international constitution-making assistance should be designed in an experimentalist way that enables genuine choice about what structures, policies, and institutions best suit a given context or state. Birkenkötter’s argument that international constitutional assistance with and for the formerly colonized is very different from the post-war processes of constitutional reconstruction in Japan and Germany also opens some interesting questions and debates, and her suggestion about the important role of individual civil servants and actors in shaping approaches to international constitution-making over time calls for further study. Mukherjee’s insights about the less visible but powerful discursive influence of international financial institutions on fundamental economic and distributional choices and structures in transitional societies, even outside the formal constitution-making process, invite further investigation and case studies. Finally, Krech’s integration of insights on the gendered nature of constitutionalism with those of critical international law and economy opens up important avenues of inquiry. These include questions about the ways in which the assumptions about economic ordering on which both domestic and international political and constitutional processes build are often hidden from view, and require excavation and determination to reveal.