

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

THE (NOT SO HIDDEN) ELEPHANT IN THE ROOM: CONFRONTING INTERNATIONAL CONSTITUTION-MAKING’S EUROCENTRIC GAZE

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Anna Saunders’s article, “Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance,” is an important addition to the literature that problematizes the idea of international constitution-making.¹ At the heart of Saunders’s critique of international constitution making—defined as the involvement of international institutions in national constitution-making processes—is the point that the parameters of what constitutes “local ownership” of the constitution-making process is detached from debates on rethinking neoliberal economic structures and material interests.² As a result, constitutions in post-conflict societies fail to speak to the socio-economic realities of a people and, most importantly, diminish their agency to envision alternatives. Saunders offers a detailed historical account of why such failure, or what she refers to as “selective technicity,” has become standard practice, and then goes further to stress the imperative of reimagining the vocabulary of what constitutes “local ownership” in the context of meaningful societal transformation. In this essay, I extend Saunders’s thesis to argue that if the international constitution-making process does not shed its Eurocentric gaze, we will be unable to proffer sustainable suggestions to make the process responsive to the realities of a people.

Through its Eurocentric gaze, international constitution-making is rooted in fixed, prefabricated ideas of permissible juridical and politico-economic structures. Although the epistemic agency of the people to determine their constitutional destiny is often discussed, in reality such agency is expected to operate within strict neoliberal politico-economic tenets. The result of this contradiction is a dialogue of the deaf, where the so-called “international experts” together with compromised national elites speak around and past the people whose existence depends on the stipulated constitutional norms. This essay unpacks the Eurocentric gaze and suggests a fundamental rethink, one that privileges the “dignity of agency.” I owe this terminology to the Prime Minister of Barbados, Mia Mottley. Writing about the need to envision a new kind of internationalism, she argued that the pervading distrust in national governments and global institutions stems from feelings of exclusion.³ The alternative is an “ethical compass” that sees trust and inclusion as indivisible, one that “involves giving individuals . . . the *dignity of agency*, a say in their own affairs, and a stake, above all else, in their own society and economy.”⁴ As such, dignity of agency speaks to two interrelated issues: how a people, without manipulation, shape the parameters of discussions on ideas that affect their existential concerns; and how they see themselves in normative outputs.

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¹ Anna Saunders, *Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance*, 117 AJIL 251 (2023).

² *Id.*

³ Mia Mottley, *A Call to Action for a New Internationalism*, KOFFI ANNAN LECTURE SERIES (Sept. 23, 2022).

⁴ *Id.* at 6 (emphasis added).

The Eurocentric Gaze—“I Am Right, You Are Definitely Wrong”

Through a detailed historical analysis of post-war constitution-making processes in Germany and Japan, Saunders shows how conversations between, and works of, German émigré scholars and members of the U.S. politico-legal academe shaped the contours of what we today know as “international constitution-making.”⁵ An important element of this activity is how their scholarship, which significantly affected the post-war constitutions in both Germany and Japan, positioned neoliberal market fundamentalism as the panacea for instability.⁶ This thinking not only shaped the vocabulary of constitutionalism in neoliberal terms, but also constituted a civilizational endeavor, with Eurocentric values presented as the apex of acceptable societal ordering.

In this respect, I argue that Eurocentrism mediates and moderates the procedural and substantive ecosystem of the international constitution-making through three interrelated techniques: ideological fixity, gatekeeping, and epistemic erasure. Ideological fixity presumes unchanging dominant frames of analyzing and understanding what constitutes civilized and acceptable laws. As André du Pisani argues, ideological fixity is obsessed with defining the parameters of the constitutive elements and application of the law while ignoring the colonial underpinnings of such laws and, importantly, the moral arguments that can ensure just and fair outcomes.⁷ Any country that wants to be taken seriously, and fêted by the international community (read: the Global North) as an exemplar of best practice, must enshrine neoliberal politico-economic principles, such as individual (intellectual) property rights, free market, and limited state regulation of economic activities in its constitution. Relatedly, the setting up of democratic institutions and policies are also expected to conform to neoliberal principles. In what Thandika Mkandawire rightly describes as “choiceless democracies,” governments are adjudged on how best they serve the global capitalist financial system rather than the citizens that elected them into office.⁸ The moral question of how these rules impoverish citizens is often relegated to the periphery, with ahistorical assumptions and false categorizations guiding the debate on solution strategies.⁹ For example, in South Africa, where there continue to be debates on how constitutional rules on land and socio-economic rights have had little impact on the material existence of the majority of the population,¹⁰ the counterargument has mainly centered around the need to not engage in legal reforms that might upset or scare off investors.¹¹

⁵ Saunders, *supra* note 1, at 273.

⁶ *Id.* at 285.

⁷ André du Pisani, *From Ideological Fixity to Moral Argument*, VÖELKERRECHTSBLOG (Nov. 19, 2019).

⁸ Thandika Mkandawire, *Crisis Management and the Making of “Choiceless Democracies,”* in *STATE, CONFLICT, AND DEMOCRACY IN AFRICA* (Richard Joseph ed., 1999). Ake described this as “the democracy of alienation.” See Claude Ake, *The Unique Case of African Democracy*, 69 INT’L AFF. 244 (1993).

⁹ This includes debates on migration, climate change, and sovereign debt. For example, a 2021 United Nations report was unequivocal in its criticism of the three big credit rating agencies, Standard & Poor’s, Moody’s, and Fitch Ratings, for their lack of accountability and more importantly, the non-consideration of how their assessments impoverish the population in the developing world. See *Report on the Role of Credit Rating Agencies in Debt Relief, Debt Crisis Prevention and Human Rights*, UN Doc. A/HRC/46/29 (Feb. 17, 2021) [hereinafter Report on the Role of Credit Rating Agencies].

¹⁰ Tshepo Madlingozi, *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution*, 28 STELLENBOSCH L. REV. 123 (2017); Joel Modiri, *Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence*, 34 S. AFR. J. HUM. RTS. 300 (2018).

¹¹ Andriaan van Niekerk, *The Proposed Section 25 Amendment: To Enable Expropriation Without Compensation?*, WITHOUT PREJUDICE (Mar. 2020); Annelie Lotriet, *Failure to Pass the Section 25 Amendment Bill a Victory for South Africa’s Constitutional Order*, DEMOCRATIC ALLIANCE (Dec. 7, 2021).

If ideological fixity presents Eurocentric ideas as immutable prescripts, gatekeeping is the tool that ensures that none (read: the Global South) deviates from such rules. In other words, the logic is that where Eurocentrism has determined and defined what qualifies as civilized, good laws, corresponding institutions for assessing compliance with these standards have to exist. I have described this in an earlier writing as the “Euro-America Validation Cathedral.”¹² This is a gatekeeping arrangement comprising international organizations, scholars, and publication outfits who ensure that the “expected standards” are met. Whether through official guidelines provided by international organizations,¹³ assessments by credit rating agencies,¹⁴ statements by Global North politicians and technocrats, and traditional modes of scholarship, the goal is to provide metrics and define the scope of acceptance. The role of the so-called leading academic journals, mostly situated in the Global North, in marginalizing voices and ideas from the Global South, either through rejecting their works on flimsy grounds or refusing to cite or recognize their ideas, has been highlighted by many scholars over the years.¹⁵ In the context of constitutionalism, such gatekeeping tendencies exist in how the contributions of Global South scholars on the need to deconstruct the neoliberal understanding of constitutional concepts such as sovereignty, self-determination, equality, legitimacy of nation states, and popular participation are considered peripheral and substandard. As Bonilla rightly notes, the “authoritative interpretation” of such constitutional concepts is often understood as the preserve of institutions such as the Supreme Court of the United States, the European Court of Human Rights, and the German Constitutional Court.¹⁶ Similarly, in what James Gathii refers to as (international) law’s “limited geography of places and ideas,” there is the tendency to consider jurisprudence, scholarly works, and practice emanating from the Global South as not consisting of serious contributions to the field.¹⁷

The result of the two techniques highlighted above is epistemic erasure. This speaks to the arrogant posture of the Eurocentric gaze in ignoring the epistemic principles and agency of others, which forecloses alternatives and multi-perspectival ideas on constitution-making. Epistemic principles either in the context of historic and contemporary socio-cultural practices or critical scholarly outputs from Global South scholars are relegated to the periphery, subsumed under “universal” Eurocentric ideas. As referred to in the preceding paragraphs, it is either that the research coming from the Global South is not published in “international” (read: Global North) journals or no acknowledgement is given to Global South scholars when their ideas are cited. Saunders is right to suggest that Global North scholars have to be critically introspective about how their works are shaped by hegemonic assumptions that erase the epistemologies of non-European worldviews.¹⁸ It, for example, speaks to a purposeful and

¹² Babatunde Fagbayibo, *“Thus Saith the Euro-America Validation Cathedral”—The Task of Challenging and Changing the Narrative of Eurocentric International Law in Africa*, OPINIO JURIS (Aug. 31, 2020).

¹³ Although there have been some critical reports by special rapporteurs and independent experts on the problematics of the international system, the reality is that these reports have not been mainstreamed into the global politico-economic architecture. Some of the important reports include *Report on the Role of Credit Rating Agencies*, *supra* note 9; *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance E. Tendayi Achiume to the United Nations Human Rights Council*, UN Doc. A/77/549 (Oct. 25, 2022); *Report of the Independent Expert on Human rights and International Solidarity Obiora Chinedu Okafor to the United Nations Human Rights Council* (Apr. 13, 2021).

¹⁴ *Report on the Role of Credit Rating Agencies*, *supra* note 9. Similar to this is the discussion on the unsustainability of African sovereign debt, especially the way debt repayments negatively impact the ability of African states to provide basic social services. For a database of opinions on this subject, see generally, Afronomicslaw, *African Sovereign Debt Justice Network (ASDJN)* (n.d.).

¹⁵ See, e.g., Franklin Obeng-Odoom, *The Intellectual Marginalisation of Africa*, 17 AFR. IDENTITIES (2019); Stanislas B. Baganda, *How the Global North Marginalises Local Researchers in the Global South*, LSE BLOGS (Jan. 4, 2021).

¹⁶ Daniel Bonilla, *Toward a Constitutionalism of the Global South* (n.d.).

¹⁷ James Thuo Gathii, *Promise of International Law: A Third World View*, 114 ASIL PROC. 165 (2020).

¹⁸ *Saunders*, *supra* note 1, at 307.

non-patronizing consideration of alternative ideas by Global South actors on issues such as human rights, self-determination, minority rights, and, importantly, the inseparability of economic interests and political contestations in framing constitutionalism. In other words, it points to the recognition and acceptance of the need to deconstruct the pillars of neoliberal constitutionalism. Such an exercise cannot take place without humility. This point is further expanded on below.

Thinking beyond the Eurocentric gaze is both ethical and necessary. It allows for a new kind of engagement, one that transcends the rigidity of “I am right, you are definitely wrong.” Such engagement cannot exist outside the recognition of a people’s dignity and their right to exercise the agency of action in terms of articulating *what* they want and *how* they want it.

“You Cannot Cut a Person’s Hair in Their Absence”.¹⁹ *Advancing the Dignity of Agency*

To rid international constitution-making of its Eurocentric gaze, it is important to situate the discourse within the context of the dignity of agency. As noted in the introduction, Mia Mottley’s conceptualization of dignity of agency centers meaningful inclusion. Meaningful inclusion cannot be achieved without privileging what Saunders refers to as the understanding of “historical dispossession or exploitation, as well as a greater focus on the ways that private law structures preclude social ownership or political choice.”²⁰ This task, as Mia Mottley admonishes, must be grounded in the ethical paradigm of the indivisibility of trust and inclusion.²¹ As she explains:

Deep and increasing distrust occurs when citizens believe that their governments, national, and global institutions, are disconnected from them, do not represent them, do not represent their views and are not concerned about them; they don’t *see* them, they don’t *feel* them, they don’t *bear* them.²²

Building on Mia Mottley’s conceptualization, I want to advance the imperative of creating three ethical zones of engagement in the context of the discourse on international constitution-making: the ethics of seeing, feeling, and hearing.

The ethics of seeing is about visibility. It demands that we understand a people beyond abstractions and generalizations. Reliance on statistics and neoliberal metrics in analyzing what is good for the people in the Global South has resulted in several ruinous politico-economic policies over the years. The problem with such reliance is that it detaches a people from their socio-cultural contexts and realities. To paraphrase Claude Ake, it is a paternalistic process that deals with a people on the basis of what they *ought to be* rather than what they *are*.²³ Seeing a people for what they are ensures that they are not mere props but active participants in articulating the specific norms that reflect their existential concerns. Without pre-packaged neoliberal prescriptions, it allows a people to determine their participatory models, especially the nature and effect of normative rules and how such rules are assessed. For example, it affirms the constitutional right of the people to determine how their government engages in decisions on sovereign debt and debt restructuring. This goes beyond the recognition of abstract political rights; it places the people at the core of political decisions that shape their socio-economic concerns.

The ethics of feeling speaks to empathy. It is a recognition of the effects of prescriptive neoliberal policies on citizens in the Global South. Reflecting on the devastating impact of the infamous Structural Adjustment

¹⁹ A Yorùbá saying.

²⁰ [Saunders](#), *supra* note 1, at 306.

²¹ [Mottley](#), *supra* note 3, at 5.

²² *Id.* at 5–6 (emphasis added).

²³ Claude Ake, *Is Africa Democratising?*, in [CRISES AND CONTRADICTIONS IN NIGERIA’S DEMOCRATISATION PROGRAMME: 1986–1993](#) 249 (Nahzeem O. Mimiko ed., 1995).

Programs (SAP) on African countries, Chinua Achebe, in 1990, asked the architects of the program: “Would you recommend a similar remedy to your own people and your own government?”²⁴ This same question is as relevant today as it was then as rich countries, credit rating agencies, and international financial institutions continue to turn a blind eye to the ruinous effect of their policies and actions in developing countries.

Rich countries in the Global North continue to resist the acknowledgement of how historic and contemporary actions such as slavery, colonialism, agricultural and energy subsidies, monopolization of the control of global governance structures, and refusal to contribute to climate finance initiatives pauperizes citizens of the Global South. Where such citizens have demanded alternative and nuanced interpretation of their constitutional rights, they are ignored. Empathy calls for a renewed engagement, one that replaces condescension with sensitivity to solidarity. Mia Mottley noted that solidarity encompasses the twin cause of togetherness and fairness: “fairness—that every child knows—and togetherness because nobody small can achieve anything without cooperation from somebody else.”²⁵ For example, in the context of the land question in South Africa, the ethics of empathy requires that the answer to the demands of the dispossessed does not begin with the fear of losing investors but rather the moral imperative of the meaningful restoration of dignity.

The ethics of hearing demand humility. Humility in this sense is beyond some patronizing, ticking the box “exercise.” It speaks to genuinely embracing the idea of incompleteness, one that emphasizes that no knowledge is absolute.²⁶ It emphasizes that the voices of the people of the Global South are not only heard but respected enough to shape solutions on many global issues. It replaces the Eurocentric superiority complex of “I know all” with meaningful, continuous cross-civilizational dialogue on sustainable approaches to issues ranging from poverty, climate change, sustainable development, global health, and reforms of global governance architecture. Such dialogue, as Bhupinder Chimni rightly pointed out, must

be conducted in good faith and that each party considers the proposals it advances as defeasible . . . allow[ing] all participants, howsoever, devoid of power, to try and influence the outcome through advancing persuasive reasons for adopting a particular course of action.²⁷

Conclusion

I have argued in this essay that international constitution-making must confront its Eurocentric, neoliberal underpinnings. At the core of such confrontation is the need to advance the dignity of agency, one that demands the meaningful and sustainable presence of the people of the Global South in the articulation and implementation of issues that impact their existential realities. The legitimacy deficit of the procedural and substantive arenas of international constitution-making can only be cured by centering ethical considerations of historical and contemporary dispossessions and marginalization of the people of the Global South. Without such a conscious and deliberate approach, the Eurocentric gaze remains, continuing to entrench the ideology of global apartheid.

²⁴ CHINUA ACHEBE, [THE EDUCATION OF A BRITISH-PROTECTED CHILD](#) 157 (2009).

²⁵ [Mottley](#), *supra* note 3, at 8.

²⁶ Nyamnjoh described incompleteness as “normal and universal, not as a negative attribute of being, but as something to embrace and celebrate, as we, in all humility seek to act and interact with one another, with the things we create to extend ourselves, and with the natural and supernatural worlds relevant to our sense of being and becoming.” Francis Nyamnjoh, [Cecil John Rhodes: “The Complete Gentleman” of Imperial Dominance](#), THE JUGAAD PROJECT (Feb. 23, 2021).

²⁷ Bhupinder Chimni, [Reforming the International Refugee Regime: A Dialogic Model](#), 14 J. REFUGEE STUD. 151, 152–53 (2001).