

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

THE FALSE PROMISE OF CONSTITUTIONALISM

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Constitutional engineering is a complicated practice, and much less is known about the relationship between constitutionalism and democracy than many are willing to admit. A cursory look at the political science literature reveals that constitutional design has only a moderate to small impact on the stability of a democratic regime. This is not to suggest that constitutionalism is altogether irrelevant, but the findings of different social scientists suggest that we should be humbler and more realistic about the role of constitutionalism and institutions in fostering peace, democracy, and development. Anna Saunders’s article, “Constitution-Making as a Technique of International Law: Reconsidering the Post-War Inheritance,” provides an important contribution to such a realistic reassessment of constitutionalism.¹ Nevertheless, her critique of constitutional assistance needs to be developed further, examining the limitations of constitutional law in itself as a promoter of peace and democracy, rather than just the fact that material and economic questions are often neglected in international constitution-making. A key question is not so much whether and how to create a better constitutional design that would integrate economic and structural issues more openly, but, more fundamentally, whether traditional constitutional approaches are in fact appropriate for the promotion of peace, democracy, and development in post-conflict settings. In this essay, I argue for a democratic and experimentalist form of constitutionalism, which is often at odds with the core ideas of traditional constitutionalism, namely, rigidity and entrenchment.²

Constitutionalism in the Age of Populism

The rise of new autocrats, reactionary populists, and new radical progressives has increased the expectations that these divergent political forces have of constitutionalism. Liberals would like to use constitutionalism to prevent any further rise of autocrats (“how to prevent a comeback of Trump,” “how to stop Orbán,” etc.) and reactionary/authoritarian populists use it to entrench their undemocratic practices, while progressives expect that constitutionalism will help them solve many “crises of constitutional democracy.”³ Americans are divided

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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 See Michael C. Dorf & Charles E. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 284–85 (1998). For the importance of experimentalist approach to transnational governance, see Gráinne de Búrca, Robert O. Keohane & Charles F. Sabel, *Global Experimentalist Governance*, 44 *BRIT. J. POL. SCIENCE*, 477 (2014); Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

³ See MARK TUSHNET & BOJAN BUGARIĆ, *POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM* (2021); Jonathan Gould, *Puzzles of Progressive Constitutionalism*, 135 *HARV. L. REV.* 2054 (2022).

between conservative originalists, traditional liberals, progressive defenders of democratic and popular constitutionalism, and, more recently, proponents of “anti-constitutionalism,” each group advancing their own version of constitutionalism. Brexit revived long standing British debates about the merits of a written constitution, raising the question whether a new written constitution is needed to control the “constitutional vandalism” of the Conservative party.⁴ The Chilean constitutional proposal rejected in 2022 represents the latest example of high expectations for a “thick” version of progressive and transformative constitutionalism.

We seem to be back in a moment of “grand scale” constitutional experiments and innovations,⁵ typical of the 1920s and 1930s interwar Europe, when leading constitutional scholar Boris Mirkin-Guetzevitch found no fewer than twenty-two separate cases of new constitutions to discuss, and when “the jurist was the king.”⁶ This role of constitutionalism as a tool for promoting democracy, consolidation of peace, and conflict prevention acquired a special role after 1945, when constitutional law emerged as the preeminent field of global legal discourse.⁷ After the end of the Cold War, this role further increased and cemented the role of constitutional law in both the national and international legal space.⁸

Anna Saunders’s article provides a critical examination of this role, uncovering certain deep contradictions and shortcomings in the practice of constitutional assistance. While Saunders’s article deals primarily with constitution-making as a technique of international law used to promote peace and security in post-conflict societies, her findings and insights in many ways intersect with more general literature researching the links between constitutionalism, democratization, and development. In her detailed analysis of this technique, she uncovers a deeply flawed version of a particular style of constitutionalism that prioritizes the procedural and formal aspect of constitution-making at the expense of a “thicker” version, which, according to Saunders, should take more fully into account the implications of material interests and international economic structures for “local politics and local questions of distribution.”⁹ While international institutions, organizations, and advisers emphasize the importance of “local ownership” and “local context” for constitutional design, their actual practice, described by Saunders as “selective technicity,” often leads to a narrow account of what a constitutional process should consider, neglecting the relevance and impact of material political economic questions for constitutional outcomes.¹⁰ Many of her findings strongly resonate with the law and development literature, which, like Saunders, considers the political economy issues as central for the study of the role of law in economic and political development of developing countries.¹¹

While Saunders’s insights provide a rich terrain for further investigation of “what constitutionalism had meant and might yet mean in the coming decades, and where it might be found and practiced,”¹² they need to be developed further, examining the limitations of constitutional law as a promoter of peace and democracy.¹³ Here, the

⁴ See Thomas Poole, *Constitutional Vandalism Is Inherent to the Johnson-Cummings Project*, PROSPECT (Dec. 19, 2022).

⁵ On the promise (and limits) of constitutional and institutional design, see, for example, TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Rosalind Dixon & David Landau, *Healing Liberal Democracies: the Role of Restorative Constitutionalism*, 36 ETH. & INT’L AFF. (2022).

⁶ MARK MAZOWER, *DARK CONTINENT: EUROPE’S TWENTIETH CENTURY* 7 (1998).

⁷ Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006).

⁸ Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. (1997).

⁹ Saunders, *supra* note 1, at 253.

¹⁰ *Id.*

¹¹ David M. Trubek, *The Political Economy of the Rule of Law: The Challenge of the New Developmental State*, 1 HAGUE J. RULE L. (2009).

¹² Saunders, *supra* note 1, at 308.

¹³ I explore some of these questions in my forthcoming book with Mark Tushnet, *CONSTITUTIONALISM AND ITS DISCONTENTS* (2024).

main question is not so much whether and how to create a better constitutional design, suited for a particular context and purpose, but, more fundamentally, whether constitutionalism matters at all.

Constitutional Realism

The findings of social scientists in recent years indicate that the relationship between constitutional frameworks and democracy remains uncertain. Studies suggest that “changing the constitutional framework of a country has a moderate to small impact on the stability of a democratic regime,”¹⁴ that the evidence supporting the claim that constitutional constraints against majorities have a strong effect on democratic stability “turns out to be surprisingly inconclusive,”¹⁵ and that constitutional entrenchment per se does not guarantee that democracy will be able to sustain itself.¹⁶ In other words, social scientific research suggests that we should be humble and realistic about the role of constitutionalism and constitution-making in fostering peace, democracy, and development, including in post-conflict settings of the kind Saunders discusses. These findings refer to general limits of constitutionalism in democracy promotion.

The law and development literature, which discusses closely related projects of international assistance in similar settings, shows the evolution over time of a more modest approach of this kind to the role of international institutions and intervention. The argument here is more specific and addresses the way international institutions have a tendency to push a one-size-fits-all model. For several decades, the international community—including international financial institutions and donor states—tended to generate a development agenda from the “developed” world perspective, which became a fairly fixed model to be implemented in “developing” countries.¹⁷ But more recent research and practice has argued that successful development agendas should primarily emerge and grow locally,¹⁸ with top-down approaches being replaced by interactive, dialogic, and genuine debate between recipients and donors of aid in shaping agendas.

The failure of international actors to take local context seriously when engaging in projects of assistance is equally visible in the constitutional-assistance practices that Saunders describes, perhaps most clearly visible in her portrayal of international organizations’ persistent failure to deliver on their ostensible commitment to the importance of “local ownership” of constitutional design. As she shows, “local ownership” according to the United Nations and other international institutions has meant primarily “an emphasis on political inclusion rather than social ownership or economic self-determination,”¹⁹ utilizing a procedural understanding of the constitution-making process with an almost exclusive focus on “the identification of relevant marginalized groups” at the expense of consideration of “material” issues.²⁰ As a result, proposed constitutional solutions have failed to tackle the main problems, which often concerned various socio-economic issues disregarded by international actors as not relevant to what they perceived as “the main goal,” i.e., political inclusion of various groups in the process.²¹

¹⁴ Alicia Adsera & Carles Boix, *Constitutions and Democratic Breakdowns*, in *CONTROLLING GOVERNMENTS: VOTERS, INSTITUTIONS, AND ACCOUNTABILITY* (José María Maravall & Ignacio Sánchez-Cuenca, eds. 2007).

¹⁵ DANIEL ZIBLATT, *CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY* 365 (2017).

¹⁶ MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 203 (2007).

¹⁷ See WILLIAM EASTERLY, *THE WHITE’S MAN BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2007). One of the first leading economists to criticize the “one-size-fits-all” model approach was Joseph Stiglitz. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 180–82 (2002).

¹⁸ *LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP* (Randal Peerenboom & Tom Ginsburg eds., 2014).

¹⁹ Saunders, *supra* note 1, at 255.

²⁰ *Id.* at 260.

²¹ *Id.* at 264.

Experimentalist Constitutionalism

A parallel critique to the development economists' and law and development scholars' critique of the one-size-fits-all approach has been developed by Roberto Unger in the field of legal institutionalism. Unger has argued that the identification of institutional conceptions, like representative democracy or a market economy, with a single set of institutional arrangements represents a theoretically and historically flawed version of "institutional fetishism."²² Advancing his theory of "democratic experimentalism," Unger has argued that "representative democracies, market economies, and free civil societies can assume legal-institutional forms very different from those that have come to prevail in the rich industrial democracies."²³

Drawing inspiration from Unger's work on democratic experimentalism, the proponents of "constitutional experimentalism" have argued that there is an affinity between a more pragmatic and experimentalist approach to constitutional reform and the principle of democratic self-government.²⁴ Such an experimentalist approach is said to be more in accord with democratic ideals than the mainstream constitutional law scholarship, because it does not purport to offer fixed and abstract legal answers as correct solutions to legal and political problems. Instead of seeking a single right answer, proponents of experimentalist jurisprudence point to the "alternative pluralisms" ever present in our conceptualizations of legal institutions and ideals.²⁵ The ideas of flexibility, adaptation to context, and revisability, which underpin constitutional experimentalism, are very different from the notion of entrenchment, which characterizes traditional constitutional ideas, and which seems to have influenced international approaches to a fixed model of constitutional assistance and constitution-making.

Indeed, Saunders's critique of the international practice of constitution-making provides ample evidence of how international designers fell victim to various forms of what Unger would consider as institutional fetishism. Instead of trying to reimagine property rights for different local contexts and different histories, advisers and practitioners focused on traditional constitutional issues ensuring "predictability of state action and the security of private transactions through the legal system."²⁶ An experimentalist approach, however, would replace the institutional fetishism of the one-size-fits-all model of legal and political institutions with a plurality of different models, which could be chosen, adapted, or devised by a particular country or a group of countries.

The importance of a more experimentalist approach to legal design is well illustrated by Gunther Teubner's metaphor of "legal irritants."²⁷ Teubner argues that the theory of legal transplants wrongly suggests that "after a difficult surgical operation the transferred material will remain identical with itself, playing its old role in the new

²² ROBERTO M. UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 2, 39, 130 (1996).

²³ *Id.* at 7. For a similar argument about the different institutional forms of rich industrial economies, see *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (Peter A. Hall & David Soskice eds., 2001).

²⁴ *Dorf & Sabel*, *supra* note 2; *De Búrca, Keohane & Sabel*, *supra* note 2. For a discussion of experimentalist approach in the context of socio-economic rights, see Sandy Liebenberg & Katharine Young, *Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?*, in *SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES* (Helena Alviar García, Karl Klare & Lucy A. Williams eds., 2015); Natalia Angel-Cabo, *The Constitution and the City: Reflections on Judicial Experimentalism Through an Urban Lens*, in *EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 2020: THE CITY IN CONSTITUTIONAL LAW, VOL. 2* (Ernst Hirsch Ballin, Gerhard van der Schyff, Maarten Stremmer & Maartje De Visser eds. 2021). On constitutions and experimentalism more generally and in the U.S. context, see BRIAN BUTLER, *THE DEMOCRATIC CONSTITUTION: EXPERIMENTALISM AND INTERPRETATION* (2017). On experimentalist approaches to the governance of cities and regions, see David A. Wolfe, *Experimental Governance: Conceptual Approaches and Practical Cases*, OECD.

²⁵ The core of the idea of alternative pluralisms is that representative democracies and market economies can assume a plurality of constitutional forms. See ROBERTO M. UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 3 (1998).

²⁶ *Saunders*, *supra* note 1, at 264.

²⁷ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 MOD. L. REV. 11 (1998).

organism.”²⁸ Instead, he argues, “when a foreign rule is imposed on a domestic culture . . . something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events.”²⁹ Encouraging post-conflict societies to experiment with various forms of institutional configuration, including those which are likely to trigger new developments suited to their distinctive context and history, seems more likely to advance and promote their development in ways that serve their people. Saunders in fact offers such a suggestion in the final section of her article, presenting her vision of a “thicker” version of constitutionalism that would be more attentive to social and class issues and, crucially, more appropriately tailored to specific contexts.³⁰

For example, in her critique of property clauses in the Namibian Constitution, she argues that excessively strong protection of property rights, modeled upon the idealized version of “Western constitutionalism,” in practice impeded “scholarly critique of the implications of property clauses for broader questions of justice.”³¹ She goes further and argues that the specific “economic context” may prompt the designers to choose “differently from among the menu of constitutional design options,” implying that there is no one right set of options appropriate for this issue.³² Saunders’s arguments are very much aligned with the recent literature on successful development models which reminds us that new development policies are by their nature experimentalist and procedurally open.³³ Moving away from the model of international best practices decided from above, new development policies require learning, innovation, and extensive local input.

The practice of constitution-making in the developing world should, just as economic development policy has begun to do, follow an experimentalist strategy. What matters is that constitution-making projects actually work well for the developing countries, even if they look different than their Western counterparts. And, as Saunders suggests, the choice of the most suitable development model, including the constitutional system, is as such an expression of the right of self-determination.³⁴

Conclusion

Saunders’s article does an excellent job in demystifying the international practice of constitution-making as deeply contradictory, thus contributing to more realistically oriented constitutional scholarship that reveals some of its limitations and inadequacies. However, as I argue in recent work, such constitutional realism needs to be developed further, examining the many limitations of constitutional law as a promoter of peace and democracy.³⁵ Here, the main question is how to avoid the fetishism of constitutional entrenchment without sacrificing the emancipatory and experimentalist potential of constitutionalism.

The questions that need to be asked include: how much can constitution-making really deliver in the post-conflict contexts Saunders considers? Is constitutionalism, and constitution-making, really that important for democracy, peace, and prosperity? Is constitutionalism better at empowering democracy (positive, emancipatory, transformative constitutionalism), restraining democracy (negative constitutionalism), or at stabilizing/

²⁸ *Id.* at 12.

²⁹ *Id.*

³⁰ Saunders, *supra* note 1, at 298–307.

³¹ *Id.* at 300.

³² *Id.* at 300–01.

³³ Nancy Birdsall & Francis Fukuyama, *The Post-Washington Consensus*, FOR. AFFS. (Mar./Apr. 2012).

³⁴ Saunders, *supra* note 1, at 302–03.

³⁵ TUSHNET & BUGARIĆ, *supra* note 13.

maintaining democracy? What are the limits and advantages of constitution-making in these struggles, and in the context of the post-conflict processes that Saunders describes?

Finally, even if constitutional processes are to include questions of material distribution and economic structure, it would, from an experimentalist perspective, be mistaken to entrench one particular economic ideology or policy in the Constitution. To include a particular economic doctrine at the constitutional level may shrink the space for constitutional pluralism and democratic deliberation processes, potentially impoverishing public discourse on alternative possibilities and weakening the level of constitutional democracy.