

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

SHAPING SOVEREIGNTIES: THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS IN CONSTITUTION-MAKING

*Gaurav Mukherjee**

How do international financial institutions such as the World Bank and the International Monetary Fund influence constitution-making processes? In this essay on Anna Saunders’s “Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance,” I argue that the material dimensions of constitution-making are profoundly influenced by the discursive environment that institutions like the World Bank help create for political elites. I show how these institutions operate in opaque ways that are difficult to capture in the results of that constitutional process but serve to facilitate, expand, or contract the options available to constitution-makers to engage with material questions, especially those that involve historic injustice. My argument adds nuance to Saunders’s claim that constitution-making traditions display a “relative separation from projects of global economic ordering.”¹ Drawing on an example that Saunders uses, this essay engages with how an international financial institution—the World Bank—acted in a *facilitative* modality and influenced constitutional history and the current practices of land reform in South Africa since its negotiated transition in 1994. I then show how international financial institutions acted in a more *prescriptive* modality during the constitution-making processes in Hungary. I choose these countries as examples due to their canonical status for studying the influence of international assistance for constitution-making in the post-1991 moment. What these examples show is that while international financial institutions can guide “post-sovereign” constitution-making states toward better integration into the global economic framework, the sustainability of their constitutional arrangements often depends on broader domestic consensus.²

Constitution-Making in the Democratic Transition Moment: Promises and Constraints

The apogee of the so-called “third wave of democratization” occurred in the late 1980s and the early 1990s, in which many countries transitioned to democracies after periods of internal conflict, decolonization, and military dictatorships. One of the techniques that constitution-makers used to ameliorate the possibility of future conflict was institutional design and the use of constitutional “best practices.”³ This helped influence significant transitions

* *Hauser Global Postdoctoral Fellow, New York University Law School, New York, New York, United States. I am grateful to the symposium editors and Rosalind Dixon for helpful comments on previous drafts of this essay.*

¹ Anna Saunders, *Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance*, 117 AJIL 251, 254 (2023).

² Andrew Arato, *Introduction: Beyond the Paradox of Constitutionalism*, in *POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY* (2016).

³ Tom Ginsburg & Rosalind Dixon, *Comparative Constitutional Law: Introduction*, in *COMPARATIVE CONSTITUTIONAL LAW* 3 (Tom Ginsburg & Rosalind Dixon eds., 2011).

in the form and content of constitutions. Within this context, guidance documents from international financial institutions, like the World Bank, considered constitution-making as “part of a suite of solutions that afford an opportunity to end or prevent conflicts occurring within states, to enable peaceful political transitions, or to consolidate peace.”⁴ Yet, how these institutions enabled these conditions at the stage of constitution-making is far less clear.

Some scholars of comparative constitution-making assert that Bretton Woods Institutions, primarily the World Bank and the International Monetary Fund, can influence constitution-making processes considerably.⁵ This influence is channeled through their function as enablers of structural reforms involving conditional lending, broader access to international financial markets, and policy advice on key areas of the Bank’s concern, such as land reform, housing, healthcare, public works, infrastructure, industrial development, and macroeconomic policy.⁶ The existing literature on the effects of international financial institutional policies—on social protection, macroeconomic policy, and a range of other areas,⁷ as well as their relative lack of democratic legitimacy—focuses primarily on the institutional interaction with countries *after* their constitutions are finalized.⁸ What is less well understood is how these institutions influence the making of the constitution itself. This inquiry is in line with Saunders’s call for greater scrutiny of how these institutions enable the “continuation of patterns of international trade, development finance, and legal protections for foreign investment that were developed from the second half of the twentieth century.”⁹ Studying their influence is crucial to engage with critical studies of international and constitutional law that often cast international financial institutions as shadowy agents that shift the “priorities of states, particularly in the Global South, by making them more predisposed to serve the narrow profit-making interests of capital rather than those of the majorities of their populations.”¹⁰

Two epistemic factors complicate the assessment of international financial institutions’ influence on constitution-making. The first is the interplay of formal and informal interactions between international financial institutions and states. These institutions form legally binding relationships with states through multilateral and bilateral agreements relating to borrowing and provide less formal policy guidance and advice. While the former are publicly accessible and compliance with their terms is mandatory, the latter is less readily visible to the public. Consequently, their influence is harder to measure. A second, related factor is the uncertain normative force of many of the policy guidance documents of international financial institutions, parts of which often end up in lending documents.¹¹

Although international financial institutions may influence constitution-makers in a variety of ways with respect to the design of institutions and rights in constitutional documents, it is important to stress that these choices are not (usually) set in stone. The choices that constitution-makers make in the areas where international financial institutions exert influence can be contested down the line through democratic politics, as will be seen in the case of South Africa discussed below. South African domestic politics has witnessed considerable churn around

⁴ Saunders, *supra* note 1, at 252.

⁵ Cheryl Saunders, *International Involvement in Constitution Making*, in *COMPARATIVE CONSTITUTION MAKING* 73 (David Landau & Hanna Lerner eds., 2019).

⁶ Anne Orford & Jennifer Beard, *Making the State Safe for the Market: The World Bank’s World Development Report 1997*, 22 MELB. U. L. REV. 195 (1998).

⁷ M. Rodwan Abouharb & David L. Cingranelli, *The Human Rights Effects of World Bank Structural Adjustment, 1981–2000*, 50 INT’L STUD. Q. 233 (2006).

⁸ Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT’L L. 221 (2008).

⁹ Saunders, *supra* note 1, at 303.

¹⁰ James Thuo Gathii, *Beyond Color-Blind International Economic Law*, 117 AJIL UNBOUND 61, 64 (2023).

¹¹ JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAWMAKERS* 236 (2005).

the issue of land reform, with social movements exerting pressure on the political process that has kept questions of redistribution at the center of political discourse. This makes the issue of land reform a key concern for transformative constitutionalism—which stands for the idea that legally bounded, rather than violent, revolutionary processes can help dismantle entrenched structures of injustice and exclusion.

The sections below use South Africa and Hungary as examples to recount how international financial institutions create a discursive environment that influences elites who participate in constitution-making. The ideas and informal policy guidance these institutions provide play an essential role in shaping the bounds of what is possible, or at least what is considered possible, in the constitutional imagination.

Land Redistribution and Reform in South Africa: Facilitative Interaction

South Africa presents a particularly salient case study for the operation of international governance institutions since it exemplifies the success of inclusive constitution-making processes toward peaceful democratic transitions. Yet, South Africa today is among the most economically unequal countries in the world, and the concentration of wealth and land-holding is in the hands of its white minority.¹² The dispossession of land from the native population of the country had been a central project of settler colonialism and the apartheid government. Enacting forms of restitution and reparation of this historic injustice was crucial to the legitimacy and durability of the negotiated settlement and the constitution-making process that began in 1993, involving members of the African National Congress (ANC), the National Party (NP), which was the party in power during apartheid, and other representatives of smaller parties.

Land reform therefore came to represent a recurrent dilemma for institutional design in post-conflict societies. How should constitution-makers balance the impulse to repair historical injustice—a key plank of the ANC's mandate—with the need to protect property rights—a pillar of the NP's agenda? In Heinz Klug's influential account of the South African constitution-making process, the struggle between two competing visions of the future direction of land reform comes into focus.¹³ The ANC, steeped in mistrust of the Bretton Woods institutions,¹⁴ initially refused to dialogue with the World Bank, but later opted to engage with it, motivated by concerns about losing the ability to influence the institution's future policy direction in South Africa.

The World Bank's post-apartheid era entanglement with South Africa's negotiated transition began in the 1990s, when it embarked on a network of policy and training initiatives for ANC members. The majority of these members viewed the sprawling capitalist infrastructure set up by the apartheid government as being intimately tied to racism¹⁵—a precursor to current debates around racial capitalism. These initiatives occurred against the backdrop of the collapse of the Soviet Union, which led many to reconsider the wisdom of a centralized, communistic economic system. In its stead, what would come to overpower the ANC's economic thinking would be a free market, capitalistic system that would not break significantly from the apartheid-era government's macroeconomic policies. This break was no doubt influenced by implicit threats from the IMF and the World Bank that financial support for the newly formed government would be withdrawn should social welfare policies be too generous.¹⁶

¹² VICTOR SULLA, PRECIOUS ZIKHALI & PABLO FACUNDO CUEVAS, [INEQUALITY IN SOUTHERN AFRICA: AN ASSESSMENT OF THE SOUTHERN AFRICAN CUSTOMS UNION](#) (2022).

¹³ HEINZ KLUG, [CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION](#) 130–33 (2000).

¹⁴ This was primarily on account of the World Bank's continued sidestepping of extant sanctions upon the apartheid-era government by lending to it. See African National Congress, [Reconstruction and Development Programme](#) (1994).

¹⁵ Sagie Narsiah, [Neoliberalism and Privatisation in South Africa](#), 57 *GEOJOURNAL* 29, 31 (2002).

¹⁶ Danelle Fourie, [The Neoliberal Influence on South Africa's Early Democracy and Its Shortfalls in Addressing Economic Inequality](#), *PHIL. & SOC. CRITICISM* (2022).

Yet, the Bank found itself at odds with the NP when it stated that policies of land reform, which should include restitution and ways to manage land invasions, could provide the foundations for sustained economic growth after the fall of apartheid. The NP, by comparison, advocated for much more restrictive forms of restitution. Motivated by a desire to effect robust land reform and restitution, the ANC initially insisted that no property clause be included in the constitution, and contested the NP's demands that land be purchased according to the property's market value with a willing buyer and a willing seller. However, it was the World Bank's formulation of demand-driven land reform to be carried out in accordance with the parameters of the market that came to stick with the NP. The final property clause of the South African Constitution provided for the protection of property rights and a range of factors that needed to be considered to determine compensation in case of expropriation.¹⁷ However, Klug notes that the "willing-buyer/willing-seller" formulation, as first devised in a series of World Bank documents, and later taken up by the NP, never found its way into the final Constitution.

Yet, since the negotiated transition, public discourse and policy practice have erroneously fixated on the "willing-buyer/willing-seller" method, with compensation determined by market rates, to effect land redistribution. This focus has paralyzed policy and unjustifiably foreclosed more robust governmental action aimed at redistributing land in equitable ways. Saunders outlines how, amidst "widespread concern over the distribution of land in the post-apartheid settlement, forms of international consensus over formal rights provisions came at the expense of a thicker understanding of 'ownership' of that settlement."¹⁸ The World Bank's market-driven formulation of how land reform should be conducted also exemplifies Saunders's assertion that constitution-making sees societal conflict more as a "question of contemporary struggles over 'resources' than 'historic' tensions between social groups."¹⁹

Latest reports on South Africa indicate that people of European descent constitute only about 9 percent of the total population but own 72 percent of the total farms and agricultural holdings.²⁰ The last decade has seen a sustained discourse about the failed project of land reform, with anti-systemic political parties—like the Economic Freedom Fighters—calling for the expropriation of white-owned lands without compensation. In 2022, the National Assembly adopted a new law, which awaits confirmation by its Upper House, that permits expropriation without compensation in certain cases such as where the land in question has been abandoned or is held for speculative purposes.²¹

The public debate surrounding expropriation has been polarized, with critics pointing to the experience of radical, short-sighted land reform in the early 2000s in Zimbabwe,²² and cautioning against such a disruptive move's potential to discourage foreign investment in the country,²³ threaten food security, and negatively affect economic activity and job creation. South Africa's economy today is in a tight spot, with youth unemployment and inequality at historic highs. According to many, its negotiated Constitution has failed to deliver equitable access to land and alleviate extreme poverty for its majority Black population. Some blame the Bretton Woods institutions for

¹⁷ Mark Heywood, *Economic Policy and the Socio-Economic Rights in the South African Constitution, 1996–2021: Why Don't They Talk to Each Other?*, 11 CON. CT. REV. 1 (2021).

¹⁸ Saunders, *supra* note 1, at 300.

¹⁹ *Id.* at 263.

²⁰ Department of Rural Development and Land Reform, South Africa, *Land Audit Report Phase II: Private Land Ownership by Race, Gender and Nationality* (2017).

²¹ Marianne Merten, *Controversial Expropriation Bill Is Finally Approved After Navigating a 14-Year Rocky Road*, DAILY MAVERICK (Sept. 22, 2022).

²² Bekezela Phakathi, *Don't Compare SA's Land Reform to Zimbabwe's, Says Ad Hoc Committee*, BUS. DAY (Dec. 5, 2019).

²³ Abdul Hamid Kwarteng & Thomas Prehi Botchway, *State Responsibility and the Question of Expropriation: A Preliminary to the Land Expropriation Without Compensation Policy in South Africa*, 12 J. POL. & L. 98 (2019).

inserting market-driven solutions to the land question.²⁴ Yet, paradoxically, the failure to effect more robust land reform may lie in political inaction that has little to do with the final text of the Constitution's property provisions, which would not impede more radical solutions, like expropriating land without compensation.

What these debates show is that ideas have a stickiness and attach themselves to constitutional discourse even if they are not formally present within constitutional texts. A recent account of South Africa's macroeconomic policy until the fall of formal apartheid argues that there was "no credible evidence that the International Monetary Fund and the World Bank had any suitable vehicle through which they exerted any direct influence on ANC economic thinking," and that in fact, "the World Bank adopted a fairly sympathetic and accommodative stance towards the ANC."²⁵ However, as I have shown, the World Bank *did* reorient the ANC's economic thinking by leading it away from more radical and potentially disruptive redistributive policy and constitutional initiatives, to ones that were more incremental, market-oriented, and status-quoist.

Toward a Granular Understanding of the Role of International Financial Institutions in Constitution-Making

International financial institutions, like the World Bank, provided prescriptive policy advice aimed at aiding post-Soviet countries' transition to market-oriented democracies following the collapse of the Soviet Union. In Hungary's transition, the role of the World Bank was not just that of a lender, but also as a purveyor of global economic ideologies. As the Bank saw extensive structural reforms guided by market-oriented liberalism as crucial for the economic success of post-Soviet economies, Central and Eastern European countries stood at a crossroads: they had to balance the allure of Western economic models with the entrenched values and policies from their communist pasts. The immediate post-Soviet era witnessed these nations grappling with economic instability, political transformation, and societal upheaval. Some nations, like Poland, eagerly embraced the Bank's recommendations, hoping for swift economic integration with the West and the global economic order. Others, like Hungary, treaded more cautiously, negotiating the space between external advice and domestic imperatives.

Hungary's social policy reform provides a contrasting example from that of South Africa, of the tension between democratic responsiveness and technical expertise. Following its democratic transition away from a Soviet satellite state in 1989, Hungary retained its Soviet-era Constitution with a range of amendments certified by its newly minted Constitutional Court, while most other countries in post-Soviet Central and Eastern Europe adopted new constitutions. At the time, the country's high internal and international sovereign debt made reform to its generous, yet unsustainable social policy a pressing priority, while also rendering it particularly vulnerable to the influence of the World Bank.²⁶ Hungarian leaders initially resisted reform due to the considerable political capital attached to these policies' popularity, but restructuring the economy became imperative in the face of a deep economic recession.²⁷ Surprisingly, it was the Constitutional Court that pushed back, ruling that proposed cuts to social security along the lines advised by the World Bank would violate legal certainty, legitimate expectations, and property protection.

²⁴ PATRICK BOND, [AGAINST GLOBAL APARTHEID: SOUTH AFRICA MEETS THE WORLD BANK, IMF AND INTERNATIONAL FINANCE](#) (2003).

²⁵ VISHNU PADAYACHEE & ROBERT VAN NIEKERK, [SHADOW OF LIBERATION, CONTESTATION AND COMPROMISE IN THE ECONOMIC AND SOCIAL POLICY OF THE AFRICAN NATIONAL CONGRESS \(1943–1996\)](#) 232 (2019).

²⁶ András Sajó, [How the Rule of Law Killed Hungarian Welfare Reform](#), 5 E. EUR. CONST. REV. 31 (1996).

²⁷ World Bank, [Hungary – Structural Reforms For Sustainable Growth](#) 25 (1995).

Conclusion

This essay shows that while acting in facilitative and prescriptive modalities in their interaction with states, international financial institutions create a discursive environment that constitution-makers and the political elite inhabit. The formation and maintenance of this environment are not always carried out in transparent or publicly accountable ways and heighten concerns around how technocratic economic decisions that profoundly impact broader society are shielded from ordinary politics. Yet, as the South African example shows, the influence of international financial institutions should not, and cannot, be beyond discursive democratic contestation. The Hungarian example points to the capacity of coordinate institutions like courts to be surprising enablers of legal challenges to economic and social policy dictated by international financial institutions. At a time when the global economic order shows signs of strain, greater transparency as to the role that international financial institutions play in structuring the constitutional imagination of states can help boost their authority and legitimacy.