
Book Reviews

Vijayashri Sripathi. ***Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands***. Oxford: Oxford University Press, 2020. Pp. 320. £49.99. ISBN: 9780199498024.

Did you know that the United Nations, the International Monetary Fund (IMF) and the World Bank (the Bretton Woods Institutions or BWIs) have commandeered constitution-making in over 50 sovereign states? I did not until I read Vijayashri Sripathi's *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands*. This rich text draws from public international law (PIL), constitutional law and political economy scholarship. It weaves a complex tapestry depicting the roles of the United Nations (UN) and related institutions in perpetuating trusteeship relations with underdeveloped states. This is a new civilizing mission, with a new standard of civilization: the transparent, inclusive and participatory constitution. Unfortunately, the actual content of this constitution is predetermined, and the process is either a sham or is enabled by 'tutoring' local actors to behave appropriately.

There is much new content in this book that many international lawyers will learn and benefit from, including the concept of 'policy institutions', which is central to Sripathi's work. While I learned much, it also confirmed many of my suspicions about the international constitution-making processes. The fingerprints of the IMF and the World Bank, whose insidious interventions in underdeveloped states form a key theme of my own research,¹ are all over this process. I must admit, however, that I found the argumentative structure of the text confusing. Perhaps it is my preference for a more didactic style, but I found the arguments scattered and often underdeveloped, only to be picked up chapters later and further refined.

Sripathi's mapping of all 56 UN Constitutional Assistance (UNCA) interventions and projects is both empirical and normative. She is foraying in enemy terrain and gaining unpleasant insights in the process. However, her approach is neither systematic nor linear but, rather, symptomatic, exploring similarities of conduct over time and space. While confusing at times, I am glad I persevered as there is much to learn from this rich, complex text. The overall message is clear: UNCA is imposing the Western liberal constitution (WLC) on underdeveloped states.

I have tried to reconstruct and summarize the arguments to something more suited to my own approach. I will not dwell on omissions from a text that is already 455 pages long. Nor will I explore the wealth of empirical detail that Sripathi provides in her extensive analysis, but it is to be commended for both its scope and its detail. The book provides a multitude of examples to demonstrate how the UN/BWI interventions

¹ Beckett, 'Harry Potter and the Gluttonous Machine', 8 *Trade, Law, and Development* (2021) 317.

have led to ‘internationalised constitution-making’, displacing or tutoring local actors and imposing standard-form international content through ostensibly ‘participatory’ processes.

This has been a discrete enterprise. The novelty of Sripati’s approach lies in its demonstration of a historical and practical continuity between formal international territorial governance (trusteeship) and contemporary UN/BWI practices of informal territorial governance – that is, in presenting constitutional assistance as a form of subjugation rather than as a fresh start from which development can be pursued. Sripati identifies a lack of attention to this subjugation, which she attributes to the parallel evolutions of constitutional and international law scholarship. Since the 1980s, there has been little interaction between the two domains (at 5–6). Neither constitutional scholars nor international lawyers have studied the UN’s constitutional practice in its own right. But this practice is consistent, and it imposes a neo-liberal form of constitution without meaningful local consultation or international scrutiny.

Sripati traces the origins of UNCA to the mandate system of the League of Nations as it evolved into UN trusteeship. Her basic argument is that UNCA is the most salient of the contemporary forms of trusteeship – another iteration of the civilizing mission, tutoring and ‘civilizing the natives’. This book is very much in the tradition of Third World approaches to international law (TWAIL), drawing particularly on Antony Anghie, B.S. Chimni and Sundhya Pahuja. It is a critique of the internationalized governance of underdeveloped states and an analysis of its effects in ‘fostering dependence’. Two key questions emerge:

- How does the international system justify interfering with the sovereign decision to craft a constitution?
- What are the results of these interventions?

The answer to the first question lies in economic coercion and the intersection of consent with (unmanageable) debt. The answer to the second is ‘a consistent, neo-liberal, internationalised constitution’ (at xx). Between them they form a trusteeship structure.

This analysis opens a dialogue with Ralph Wilde’s *International Territorial Administration How Trusteeship and the Civilizing Mission Never Went Away*.² Sripati offers an extended engagement with Wilde because she adopts his narrative and analysis. Wilde focuses on international territorial administrations (ITAs) and ‘conceptualizes them collectively as a “Family of Colonial Trusteeship ITA Policy Institutions”’ (at 105–106). Sripati extends Wilde’s analysis to include the UNCA process. Once the salience of the constitution is understood, one can see that there are many more interventions (institutions) in ‘Wilde’s family’ than he realized. His lens was perhaps too narrowly focused. De facto trusteeship is a widespread phenomenon, and Sripati wishes to expose this in order to ‘map out all the UNCA activities ... and tabulate the

² R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008).

constitutional commonalities produced by UNCA. This will make evident how the UN helped shape both the constitution-making process and the constitutional content' (at 54).

1 What UNCA Is and Is Not

UNCA, like ITA, is not a thing or an organization, but it is an institution nonetheless. Sripati relies heavily on the concept of a 'policy institution' that Wilde had imported from international relations scholarship. An 'institution' in this sense is an 'established practice' that 'is, or reflects, a binding principle'.³ An institution is an established practice that has accrued binding force or at least normative pull: it is the established practice, the way things are done and the way things should be done. UNCA is not a smattering of interventions by disparate entities over time but, rather, a coherent set of practices and knowledges that form a discrete, if non-corporeal, institution: 'UNCA projects ... can be considered collectively as an institution or "established practice": They all: (1) have taken place periodically, since the birth of the UN; and more importantly, they (2) involve a distinctive activity. That distinctive activity is the Constitution's internationalized making' (at 328).

A policy institution pursues 'common policy roles and common purposes' (at 342). These 'ostensible' purposes form a 'justificatory structure' (at 339), which 'has significance in its own right' regardless of whether they were realized in practice or not.⁴ UNCA, and ITA, are responses to perceived problems of either sovereignty or governance; they continue the tradition of 'tutoring the natives' whose own governance practices are deemed inadequate and whose sovereignty is in doubt. Sripati details clear historical continuities in how these institutions have been implemented and justified, not least at the 'elemental level' where they function to displace local actors.⁵ UNCA – and ITA, which it sires – together substitute for the default method and normal model (governance by local actors) respectively, and work towards common purposes: democracy, free markets, the rule of law, good governance and women's rights (at 342).

Consequently, 'UNCA is defined as a set of activities undertaken to produce/internationalize the Western liberal constitution' (at 11). This 'policy institution' was 'revived to enable conflict-torn and stable debtor states to produce this constitution, in return for debt-relief' (at 12). It is a stable and predictable practice, a form of tutelage or governance by remote control, whereby 'the Constitution sets a global standard for state governance in a swath of poor and politically weak states. And, what produces its specific blueprint is UNCA' (at 395). UNCA, as a policy institution, defines what a state should be, and it imposes this definition on underdeveloped states in the same way as its forebear – trusteeship – imposed its definition of civilized governance.

³ *Ibid.*, at 36.

⁴ *Ibid.*, at 39.

⁵ *Ibid.*, at 233.

2 What UNCA Does

UNCA and its interventions are justified by a set of ‘ostensible ends’, which Sripathi takes at face value. These ‘ends’ offer a ‘justificatory structure’ and, thus, a yardstick against which to measure individual interventions or the policy institution as a whole. I do not understand this concession, though it is obviously inherited from Wilde. The justificatory structure offers no explanation for 40 years of continuous ‘failure’ to achieve UNCA’s own ostensible ends: development (understood as market-oriented poverty reduction). This suggests that UNCA’s true function differs from its justificatory structure.

The refusal to speculate on motive is especially difficult to understand as Sripathi emphasizes that the outcomes of UNCA intervention are consistently in favour of the overdeveloped states. We need a more sceptical engagement with the purported justifications of this institution. UNCA sits within a larger system of global governance that has been charted by many scholars.⁶ This is an imperial system of oppression and exploitation, a continuity of the extractive function for which PIL was created.⁷ It is a system that has accumulated and maintained the wealth of the overdeveloped states by plundering and immiserating the underdeveloped (the former colonies and mandates).⁸ Engaging this larger system directly helps to explain the decisions made by UNCA and allows us both to appreciate the motives behind them and to understand why UNCA will refuse alternative policy proposals.

The idea of exporting the WLC seems at face value benign, especially to Western eyes, as did the civilizing mission of earlier times. However, ‘UNCA’s revival is the story of internationalizing the Third World’s constitution-making to advance the interests ... of powerful Western states’ (at 55). To support this claim, Sripathi analyses the commonalities in the making and content of various internationalized constitutions. She starts with the Permanent Mandates Commission as ‘a precursor to UNCA’, which focused on ‘market-oriented legal standard-setting’ (at 113). These standards would gradually evolve into a common understanding of development as ‘market-oriented poverty reduction’, which UNCA retains.

The standards are imposed on underdeveloped states, by the BWI, as loan conditionalities. These conditions generally require macro-economic restructuring and promotion of a particular vision of the rule of law. The underdeveloped states nominally agree to these conditions; in reality, this consent is coerced by the threat of bankruptcy. From 1989 to 1999, this process was carried out through structural adjustment policies (SAPs) and ‘subsumed ... under the “rule of law” strand of benevolent intervention’

⁶ See, e.g., Marks, ‘Human Rights and the Bottom Billion’, 1 *European Human Rights Law Review* (2009) 37; J. Linarelli, M. Salomon and M. Sonorajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2017); J. Hickel, *The Divide: Global Inequality from Conquest to Free Markets* (2018); Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, 15 *European Journal of International Law (EJIL)* (2004) 1.

⁷ A. Anghie, *Sovereignty and the Making of International Law* (2005); S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

⁸ Anghie, *supra* note 7; Pahuja, *supra* note 7; Beckett, *supra* note 1.

(at 197). In 1999, with the advent of poverty reduction strategy plans (PRSPs), ‘the Constitution was ... made a strategy for development (understood as market-oriented poverty reduction), and promoted through IMF-supported lending’ (at 203).

UNCA’s roots in the mandate system are important: ‘Since the colonial powers considered the Mandate territories’ resources as the international community’s property, they set the terms for exploiting those resources’ (at 114). Further, ‘UNCA continues to act as international trusteeship in sovereign states’ (at 370). Thus, Sripati sets out ‘to consider how the UN officially, in its own words, explains displacing local actors from and/or tutoring them in the conduct of, what it admits is inherently a “sovereign process”, and in the creation of what it admits is inherently, a sovereign document’ (at 340). She shows that, for the UN, ‘UNCA substitutes for the default method when the operation of the default method would produce a constitution that falls short of certain standards for “process” and “content”’ (at 343–344).

Thus, ‘what all the projects have in common on a purposive or policy level is derived from the way in which they operate on a practical level: displacing local actors ... either partially or in full’.⁹ To justify this, ‘local actors were portrayed as lacking ability, being divided, and or being otherwise unwilling, to fulfil preferred standards’ (at 363). The natives had to be civilized: ‘The message here for local actors is unless they draft content that meets the BWIs’ conditionalities: privatization, liberalization, fiscal decentralization, and other standards non-financial for example, gender equality, it will “speak out” to expose their bad practices. And step in to contain them. Thus, UNCA acts “reactively” when it deems local actors unwilling or incapable of conforming to preferred standards’ (at 361).

This is one way in which the de facto appropriation of sovereignty and agency are disguised. Local actors are tutored to favour, or at least to enshrine, international best practices; they have a script to follow, and the less they deviate from it the less UNCA has to be involved. By the time the constitution is being drafted, this tutoring is a familiar process, continuing the BWI’s earlier economic reforms: ‘[A] debtor state’s PRSP is the first milestone in its constitution-making process’ (at 217). Thus, ‘debtor states are forced to accept the BWIs’ pre-determined macro-economic framework – whose implementation requires the Constitution. ... UNCA is a UN Family enterprise; the UN Secretariat, the BWIs, the UNDP, other UN agencies, and the Security Council all offer it’ (at 208, 335, emphasis in the original).

3 The WLC

Sripati offers a brief history of liberalism’s imperial heritage, which presents it as paradoxical – as liberalism expanded in the metropolises, so colonialism intensified in the peripheries (at 84). This process makes more sense if it is embedded in a longer constitutional history. Mark Neocleous’ history of PIL as ‘primitive accumulation’ is also a constitutional (law) history that could have helped situate Sripati’s analysis.¹⁰

⁹ Wilde, *supra* note 2, at 233.

¹⁰ Neocleous, ‘International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization’, 23 *EJIL* (2012) 941.

Colonial practices were developed at home, and the logics of enclosure, waste and improvement were practised at home before being exported to the colonies. The subjects of what are now known as developed states were proletarianized before they were allowed to become citizens. Explicit Marxism is notably absent in Sripati's analysis, but Neocleous' history allows us to understand how the profits of colonialism enabled an easing of oppression at home. It was by sharing the plunder of colonialism that the colonial states were able to liberalize at home. There was no paradox but, rather, a causal relation. Sripati, however, does emphasize that, in the colonial period, '[d]evelopment meant: developing the Third World for the West's benefit' (at 98). This, she implies and others argue explicitly, remains the case today. UNCA is a form of imperial governance, ordering the world in the interests of the overdeveloped states.

To examine this practice, Sripati uses 'Constitution' with a capital C to refer to the WLC 'package' – that is, the standard internationalized constitution imposed by the UN and the BWIs. This neo-liberal package contains deregulation, privatization and good governance (including natural resources exploitation), with a gesture towards civilized standards usually in the form of women's or minorities' rights. The WLC is founded on private property and free-market economics. It enshrines an independent central bank, an independent judiciary and an anti-corruption commission. These prepare the states to receive foreign direct investment and develop their dependency on it.

Sripati shows how the 'UNCA replicates the same constitutional model everywhere' (at 335). Each intervention from the UNCA 'family' follows the same pattern and evolves towards the same constitution. This manifests 'a new universal understanding that market forces are essential for sustainable development' (quoting the UN Secretariat) (at 378). In reality, these forces 'create within poor Third World States, a constitutional environment that best suits powerful Western states' (at 209). This is trusteeship, or even colonialism, *redux*.

4 Justifications and Disguises

This brings us to the awkward nexus between consent and indebtedness. States, in fact, consented to these constitutions and to internationalized constitution-making or internationalized constitutional reform. However, they did so under the threat of bankruptcy. This coerced consent serves to justify and legitimate UNCA intervention. Although formal trusteeship was a non-consensual arrangement, 'there can be trusteeship where there is consent, provided it [consent] is contrived' (at 412). There remains a structure of domination within which consent is manufactured; the formerly imposed tutelage relationship is reproduced under the veneer of consent.

UNCA intervention is also justified by its neutral, technocratic character. It is simply aiding states to realize best practices and to draft civilized constitutions. The invariable outcome is the imposition of neo-liberal economic diktats within the constitutions of states. This becomes binding law of the highest level: '[T]he IMF had by 1983, intervened in forty-seven debtor states to impose its SAPs. In this way, Middle Eastern and

African LDCs who were sucked into the vortex of debt during 1972–1982, consented in 1983, to implement the BWIs' SAPs: to secure debt-relief' (at 195). As a result of this veneer of neutrality and consent, the expansion of internationalized constitution-making has also been hidden from independent scrutiny: 'The UN and the BWIs first universalized the Constitution, and then co-conceptualized it as a Rule of Law (ROL) or development (understood as market-oriented poverty reduction) strategy' (at 12). No one examined it as a constitutionalizing process because no one thought of it as a constitutionalizing process!

5 The Stakes

There are two things at stake in Sripati's analysis:

- the dignity of underdeveloped states and the denial of their right to self-determination; and
- the economic consequences of UNCA intervention.

Sripati focuses mainly on the first issue, though she does allude on occasion to the exploitative nature of a system set up to benefit overdeveloped states and transnational capital. Her focus is on the ongoing trusteeship relations as such; their effects are of secondary concern. Yet her analysis is driven by a current of TWAIL that is very much interested in the effects of international law. Her analysis adds another important institution to Chimni's map of the imperial global state in the making.¹¹ It complements and expands Pahuja's work on the rule of law as a specific development ideology – for what embodies the rule of law more than the constitution?¹² And it both draws on and extends Anghie's analysis of the 'economization' of sovereignty.¹³

Sripati introduces an almost entirely new field of study and makes good on her claim that UNCA is an institution within the family of trusteeship institutions. This entails the idea that UNCA has normative force and that its principles are implemented consistently over time and place (with place, of course, restricted to the underdeveloped states). Moreover, UNCA operates in a system that grants it coercive force as well – it wields the power to bankrupt states or banish them from the global economy. Finally, as an ostensibly benign and technocratic institution, whose interventions have been consented to, UNCA also has moral force. This combination of forces (normative, coercive and moral) reproduces the trusteeship model. A singular normative vision – the WLC – is imposed coercively by people who believe they have the moral authority to do so. This constitution eviscerates states' economic sovereignty, leaving them open to the depredations of the global market and the interests of transnational capitalist class. As John Linarelli, Margot Salomon and Muthucumaraswamy Sonorajah have

¹¹ Chimni, *supra* note 6.

¹² Chalmers and Pahuja, 'Economic Development and the Rule of Law', in J. Meierhenrich and M. Loughlin (eds), *The Cambridge Companion to the Rule of Law* (2021) 377.

¹³ Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', 32 *New York University Journal of International Law and Politics* (1999) 243.

emphasized, this coerced ‘openness’ to the free market devastates states and immiserates their populations.¹⁴

As Ntina Tzouvala has demonstrated, the standard of civilization as an argumentative pattern has never been removed from international law, only hidden from sight.¹⁵ Sripati has shown that even one of its most intrusive measures – trusteeship – has been hiding in plain sight all along. Sripati’s book stands at an interesting cross-section between PIL, constitutional law and political economy, drawing insights from, and offering fresh provocations to, each field. I hope it draws interest from all of those fields. But, in PIL, I fear it will not persuade those not already drawn to TWAIL, as it does tend to assert, rather than fully argue, its central assumption – namely, that the system is rigged by the West against the rest. At the same time, perhaps this is not the task of this book given that others have done that work already.¹⁶ Sripati engages a common TWAIL concern – neo-colonial governance – from a new angle, showing it to be more widespread and intrusive than we might have realized. Sripati’s unique contribution is to offer a wealth of knowledge, evidence and analysis to future researchers inside and outside the TWAIL tradition.

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Describing two International Centre for Settlement of Investment Disputes (ICSID) tribunal decisions, Nicolás Perrone observes that ‘they silenced the environment and social context’ of the host country (at 129). The tribunals took the disputes out of their local context and, instead, adjudicated them in a global context, against standards defined globally and with reference to precedents developed by previous tribunals. For Perrone, this is investment treaty arbitration working how it was intended to work. Intended, that is, by a group of transnational norm entrepreneurs in the 1950s and 1960s.

The argument at the centre of this fascinating book is that investment law still embodies the ‘legal imagination’ of those norm entrepreneurs from the 1950s. Legal imagination, a concept drawn from philosopher Charles Taylor, is a ‘specific way of thinking about foreign investor rights and investment relations’ (at 4). While it emerges from these norm entrepreneurs’ theories as well as their practical activities,

¹⁴ Linarelli, Salomon and Sonorajah, *supra* note 6.

¹⁵ N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020).

¹⁶ Chinni, *supra* note 6, offers an accessible introduction to this critique.