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Book Review



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Abstract

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Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands by
Vijayashri Sripati¹
Frank J. Luce²

This book is a groundbreaking study of United Nations Constitutional Assistance (UNCA), that is, constitution making in nominally sovereign states, carried out under the auspices of the United Nations (UN) in the guise of technical assistance.³ The book is of interest to scholars in various fields, from those engaged directly in the emerging field of international constitutional law to those with a general interest in globalization, peace building, and the international institutions that give structure to international governance. The author, Vijayashri Sripati, takes a critical approach to the neo-liberal practice of imposing the rules of international trade and investment on nominally sovereign states that have been marginalized as debt-strapped, failed, or emerging. In the introduction, the author sets the stage for her argument by listing forty-three examples of sovereign states that have received UNCA since 1989.⁴ Sripati writes, “Indeed, this book explores how a particular constitutional model, though designed by and for powerful Western states, is produced in poor and politically weak states by the UN.”⁵

Sripati confesses to a lifelong passion for studying constitutions,⁶ and the overarching aim of the book is to describe and analyze the tension between the sovereign right of marginalized states to make their own constitution and the imposition through UNCA of the specific form of constitution that she names the “Western liberal constitution” model, or the “WL Constitution” with a capital “C.”⁷ Her argument is novel, but it is also an eye opener.

Sripati’s argument proceeds from a subaltern perspective that is often absent in mainstream legal scholarship, so it is useful to first acknowledge the academic tradition within which her work is situated. Sripati is a TWAIL scholar, that is, a scholar of “Third World Approaches to International Law.” For those not familiar with the impressive body of TWAIL scholarship, it is a “historically located intellectual and political movement” that provides a post-colonial perspective within the field of international law.⁸ Sripati’s book represents perhaps the first foray of TWAIL scholarship into the field of international constitutional law, and it admirably takes on the TWAIL task of interrogating international law norms and other related factors that contribute to an unjust world order.⁹

Sripati’s approach invites controversy by positioning UNCA within the historical sweep of colonialism’s “civilizing mission”¹⁰—a direction that TWAIL scholar Ralph Wilde pointed to in his seminal study of international territorial administration.¹¹ Whereas previous colonial policy

¹ (Oxford University Press, 2020).

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³ See Sripati, *supra* note 1 at 200, 235.

⁴ *Ibid* at 4-5.

⁵ *Ibid* at 8.

⁶ *Ibid* at xvi, 7.

⁷ *Ibid* at 4.

⁸ *Ibid* at 9, 70.

⁹ *Ibid* at 72.

¹⁰ *Ibid* at 9.

¹¹ *Ibid* at 7. See especially Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, 2008).

sought to impose Western values through religion and education,¹² UNCA policy today imposes Western values such as the rule of law, the protection of private property, and fundamental rights (including gender equity) through a WL Constitution.¹³ Sripati's book analyzes why and how this policy came about.

The book is in two parts. The first part, consisting of four chapters, deals with UNCA's historical antecedents in the internationalization of constitution making.¹⁴ This part will be of particular interest to anyone who is curious to know how and why the UN involved itself in the practice of constitution making in the first place. Sripati relies extensively on the use of storytelling, providing multiple examples of this UN practice. She begins with the initiative of the second UN Secretary-General Dag Hammarskjöld in the decolonization of the Belgian Congo, a turning point as Hammarskjöld sought to give material effect to the right of self-determination while still protecting Western economic interests.¹⁵ The second part, composed of the remaining six chapters, contains Sripati's "purposive analysis" of UNCA, employing an approach that she borrows from Wilde.¹⁶

The conceptual connection between Sripati's and Wilde's books is evident as Sripati expressly uses "Wilde's method"—the one that he employed in his analysis of international territorial administration (ITA).¹⁷ For Wilde, the modern "policy institutions" of ITA are on a continuum with the historical practices of "foreign territorial administration" (FTA), dating back to the colonial era.¹⁸ On this continuum, Wilde constructs a "family" of policy institutions (colonialism per se, protectorates, mandates, trusts, and occupations), of which each institution embraces a set of standard practices, which grow out of or are attributable to the institution's purpose.¹⁹ From this "family," Wilde proposes a "purposive analysis" as a framework of analysis, which Sripati then adopts as "Wilde's method"; in doing so, Sripati adds UNCA to this family of policy institutions.²⁰ As Wilde explains, a policy institution is not meant to create policy, its purpose is to implement policy.²¹ What his method seeks to analyze is "the purposes for which the practice is associated," or "the ends to which the practice is put."²² In response, Sripati's research question becomes: "How does the UN explain promoting the WL Constitution in sovereign states?"²³

In applying Wilde's method to her analysis of UNCA, Sripati takes us through the historical sweep of UNCA's evolution, from the UN's founding in 1945 through to 2019.²⁴ The story begins with reference to Libya and Eritrea in 1949 but is notionally interrupted in 1960 with the General Assembly's formal recognition of the right of colonized peoples to self-determination.²⁵ Ironically, it was in that same year that Hammarskjöld resuscitated the UNCA institution in the Belgian

¹² See Sripati, *supra* note 1 at 88-94.

¹³ *Ibid* at 5.

¹⁴ *Ibid* at 11.

¹⁵ *Ibid* at 55.

¹⁶ *Ibid* at 12.

¹⁷ See Wilde, *supra* note 11.

¹⁸ See Sripati, *supra* note 1 at 68-74.

¹⁹ *Ibid* at 74.

²⁰ *Ibid* at 74, 77.

²¹ *Ibid* at 69.

²² *Ibid*.

²³ *Ibid* at 4.

²⁴ *Ibid* at 75-76.

²⁵ *Ibid* at 15, 75.

Congo.²⁶ However, it was with the ending of the Cold War in 1989, Sripathi explains, that “a synthesis was sought...between neo-liberal ideas and poverty-reduction strategies.”²⁷ After that, the practice of UNCA mushroomed, and the WL Constitution took on its defining form in 1999 when the World Bank and the International Monetary Fund (IMF) launched their Conditionality/Poverty Reduction Strategy Papers (PRSPs).²⁸ According to Sripathi, the PRSPs marked a turning point in UNCA because they prescribed the “rule of law” as the path towards debt relief.²⁹ In the logic of the Western constitutional tradition, a country’s constitution is the starting point for the rule of law and is a legal instrument that gives structure to the territory’s administration.³⁰ In 2009, the UN effectively acknowledged UNCA as a policy institution when the UN’s “Rule of Law Assistance Unit” issued two “guidance notes” on UNCA and the rule of law, the latter of which subsumes the WL Constitution within the rule of law rubric.³¹

Sripathi launches her purposeful approach, as suggested by Wilde, within the historical framework that she has established for UNCA, asking herself what features lead her to include UNCA within Wilde’s family of policy institutions.³² UNCA’s procedural policies are relatively uncontroversial, at least from a purposive perspective, in calling for a “transparent, inclusive and participatory” process in constitution making.³³ However, the substantive features that UNCA promotes seem, at least potentially, to undermine or even subvert this democratic process. Sripathi argues that, under the guise of technical assistance, UNCA promotes four substantive features that together compose UNCA’s “civilized standard”: (1) the rule of law; (2) free markets; (3) good governance; and (4) modern social practices such as gender equality.³⁴ In other words, UNCA promotes the WL Constitution. Of course, it is the “free markets” feature that catches our attention, and here Sripathi turns to political economy for an answer, finding its origin in the PRSPs of 1999—the principles of which UNCA has caused to migrate from debtor states to the constitutions of all marginalized states in which UNCA has played a role.³⁵

The locus of UNCA activity is primarily the “third world” on which TWAIL scholarship is focused, as we see in chapter six where Sripathi tells the story of the multiple instances in which sovereign states have received the UN’s constitutional assistance since 1989, which cumulatively illustrate the institutional character of the UNCA experience.³⁶ Sripathi succeeds in highlighting the centrality of the constitution to the rule of law as a guarantee for the efficient operation of a globalized economic structure. In this sense, the constitution is the parent, she argues, of the child known as ITA.³⁷ In this approach, the constitution operates within the universal discourse of development, loosely defined by the UN as poverty reduction.³⁸ In order to access development assistance through the UN Development Programme, the offices of the World Bank, or the IMF, or to engage in international trade or attract foreign investment, a recipient country’s constitution

²⁶ *Ibid* at 25, 55.

²⁷ *Ibid* at 222.

²⁸ *Ibid* at 75-76.

²⁹ *Ibid* at 198.

³⁰ *Ibid* at 18-19.

³¹ *Ibid* at 222.

³² *Ibid* at 339-41.

³³ *Ibid* at 398, 411.

³⁴ *Ibid* at 422-23

³⁵ *Ibid* at 327-37, table 6.3.

³⁶ *Ibid* at 76; “United Nations Constitutional Assistance” in *ibid*, 225.

³⁷ *Ibid* at 76-77.

³⁸ *Ibid* at 6.

must provide for the appropriate protection of private property rights.³⁹ Hence the discourse of “civilizing mission” is replaced by that of international development.

Sripati is breaking new ground with her study of the UNCA, and it is surprising that other legal scholars have not previously addressed this significant development in international law and constitutional law, or as Sripati prefers, in international constitutional law. It seems that UNCA just fell through the cracks between the different fields, requiring an interdisciplinary approach such as the one she provides, which relies on political economy as well as socio-legal studies.⁴⁰

Moreover, the author’s passion for her topic sometimes makes for a lively read. Sripati prefers a constitutionalism that embodies a living document of great social and political import. For her, “This book is a karmic manifestation of my childhood passion for constitutions,”⁴¹ a passion acquired in the early decades of post-partition India when a secular constitution articulated through a democratic process offered the promise of state protection for both individual and communal rights. She demonstrates this passion for democratic constitution making through an enduring anecdote—the “Simon Go Back” incident from 1928. In 1928, Indian nationalists rejected a British attempt to impose a made-in-England constitution on India, urging Sir John Simon and his colleagues in the Simon Commission to go back home and leave Indians to fashion their own constitution.⁴²

Some readers may be confused by the author’s extensive reliance on abbreviations, with no fewer than forty-one acronyms and initialisms listed in an introductory reference.⁴³ This may appear excessively bureaucratic to some, but for me it captured the spirit of the UN documents under study, wherein such abbreviations are used as the order of the day. Sripati’s approach and argument are complex, but in recompense, she offers an extensive series of charts and diagrams.⁴⁴ Taken together, these provide a handy reference point whenever a sense of confusion may arise from a reading of the narrative text. For example, one chart lists the UN actors with their abbreviated titles,⁴⁵ while another illustrates how UNCA fits within Wilde’s family of FTA policy institutions.⁴⁶

The book is essential reading for scholars interested in the growing field of international constitutional law, and it proves a useful reference for anyone working in the field of international conflict resolution, international development, or any of the institutions of globalization. For anyone who has ever wondered how the UN bureaucracy functions, herein lies your answer, as Sripati has done a remarkable job of sifting through the rhetoric to provide a narrative for her argument. In short, she has met the TWAIL challenge of “revisit[ing], unpack[ing], question[ing] and reform[ing]” the aspects of UNCA that serve to reinforce the continuing exploitation of the poor by the rich.⁴⁷ We can now look forward to the publication of Sripati’s next book, in which she focuses on the role of the UN Security Council in this constitutional assistance process.⁴⁸

³⁹ “The Western Liberal Constitution’s Rise post 1989” in *ibid*, 183.

⁴⁰ *Ibid* at 5-6.

⁴¹ *Ibid* at xvi.

⁴² *Ibid* at 1.

⁴³ *Ibid* at xxvii-xxviii.

⁴⁴ *Ibid* at xi-xii.

⁴⁵ *Ibid* at 67.

⁴⁶ *Ibid* at 102.

⁴⁷ *Ibid* at 72.

⁴⁸ Personal communication from the author.