

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

INTERNATIONAL CONSTITUTION-MAKING AS A TECHNIQUE OF GENDER ORDERING: CONSIDERING THE ROLE OF THE FAMILY IN GLOBAL ECONOMIC RELATIONS

*Michele Krech**

[H]ow could women’s subjection be reconciled with the egalitarian promise that was foundational to modern constitutionalism? The institution of the marital family, based on the marital contract and central to the household-based political order, holds the answer.¹

A feminist utopian economy would possess . . . a fundamentally different definition of “family.”²

In “Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance,” Anna Saunders highlights that the study and practice of constitutionalism exhibit a reluctance to consider the relationship between national constitutions and international economic relations. She argues that the prevailing epistemic boundaries of constitutionalism—understood as a self-contained project, separate from projects of global economic ordering—have largely insulated it from critiques raised by scholars concerned with the material and distributive implications of reshaping the global legal order through the making and revising of constitutions. This essay takes up Saunders’s call to de-insulate constitution-making as a technique of international law from such critique by pointing to the family as an institution that is central both to constitutional ordering and to economic ordering, and thus can help overcome the epistemic boundary between the two. To this end, the essay brings together various strands of critical thought that identify one particular family structure—the nuclear family—as an exploitative institution that has (re)produced structural inequality both within and between states. Described as the “original sin” of modern constitutionalism³ and as an essential “instrument of colonization,”⁴ the nuclear family model represents an apt entry point to reconceiving constitution-making as Saunders suggests—in a way “that both acknowledges the discipline’s past collaboration with forms of dispossession and exploitation, and that actively reconsiders its future boundaries.”⁵

* *Harry A. Bigelow Fellow & Lecturer in Law, University of Chicago Law School, Chicago, Illinois, United States.*

¹ RUTH RUBIO-MARÍN, [GLOBAL GENDER CONSTITUTIONALISM AND WOMEN’S CITIZENSHIP: A STRUGGLE FOR TRANSFORMATIVE INCLUSION](#) 30 (2022).

² Sheila Bapat, [How to Create a Feminist Utopia: Redefine the Family!](#), NEW REPUBLIC (Oct. 8, 2015).

³ Ruth Rubio-Marín, [Gendered Nationalism and Constitutionalism](#), 18 INT’L J. CONST. L. 441, 446 (2020).

⁴ Gillian Hewitson, [Economics and the Family: A Postcolonial Perspective](#), 37 CUMB. J. ECON. 91, 93 (2013).

⁵ Anna Saunders, [Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance](#), 117 AJIL 251, 306 (2023).

The Family as a Foundational Feature of Constitutional Gender Ordering

The family is foundational to constitutional ordering. Indeed, most constitutions recognize the family as the fundamental unit of society and the necessary basis of social order, which the state is bound to protect.⁶ While the understanding of family may vary between countries, modern constitutionalism, with its Western European origins, is premised on the nuclear family model—a family unit composed of a man and woman, married, and living together with their biological children, all in a single household dwelling. This definition has been subject to various challenges and revisions over time and place (e.g., to include interracial and same-sex marriage, adopted and surrogate children, etc.), but continues to be constitutionally recognized, in its basic nuclear structure, as the foundational unit of society.⁷

This foundation has serious material and distributive implications. As Ruth Rubio-Marín has shown, “modern constitutionalism was superimposed on an extractive reproductive and heteronormative family structure with racist undertones, which was naturalized and even romanticized.”⁸ Extractive because it facilitated the distinction between productive (paid) work and reproductive (unpaid) work; heteronormative, because it strictly organized this work along binary gender lines; and racist, because the idealized male-breadwinner/female-homemaker model was unachievable for many, particularly poor and racialized minorities. In other words, the nuclear family model has facilitated the unequal distribution of resources along gender, race, and class lines. In this way, it has arguably been the primary mechanism for constitutionally establishing the gender order of a state.⁹

As international institutions play a greater role in constitution-making processes around the world,¹⁰ thus facilitating constitutional borrowing, the promotion and protection of a particular family structure can be seen as part of international constitution-making. It is largely an unspoken part, however. The field tends not to question how family structures—nuclear or otherwise—relate to gendered economic relations on a global scale. This is one way the field of international constitution-making remains ignorant to its complicity in (re)producing inequality while purporting to do the opposite.

The Selective Technicity of Gender-Responsive Constitution-Making

Even as gender has become a point of focus in the field of international constitution-making, relevant foundational institutions like the family have not been given much consideration. The international organizations involved in so-called “gender responsive” constitution-making¹¹ therefore exhibit the same sort of “selective technicity” that Saunders observes more generally. That is, they seek to facilitate certain forms of political contestation about certain issues, while “largely avoiding the deeply political questions of legal structures governing the distribution of wealth and the creation of private right.”¹²

More specifically, engagement with gender in the field of constitution-making is largely limited to ensuring formal participation by women and sexual and gender minorities in local consultative processes. According to the Guidance Note of the Secretary-General on UN Constitutional Assistance, such participatory processes are the

⁶ *Constitute*; see also RUBIO-MARÍN, *supra* note 1, at 280.

⁷ RUBIO-MARÍN, *supra* note 1, at 329.

⁸ *Id.* at 79.

⁹ *Id.* at 26–80.

¹⁰ Saunders, *supra* note 5; Christina Murray & Cindy Wittke, *International Institutions, Constitution-Making and Gender*, in *CONSTITUTIONS AND GENDER* (Helen Irving ed., 2017).

¹¹ UN Women, *Global Gender Equality Constitutional Database*.

¹² Saunders, *supra* note 5, at 271.

“main goal” of UN constitutional assistance, which is to be offered in the form of “technical advice.”¹³ While the Guidance Note also stipulates that constitutions should embed the principles of equality and non-discrimination and should be “gender sensitive and inclusive” in their language, institutions, and processes, there is no engagement with what this might require in substance.¹⁴ Reflecting this ostensibly “neutral” or “apolitical” approach, most international constitutional assistance fails to engage with underlying gendered power relations, let alone with the ways constitutions entrench such structural inequalities.¹⁵ A similar avoidance is found in scholarship, where, despite nascent attention to the dilemmas of international assistance in constitution-making processes, “their implications for the international assistance given in relation to gender issues have not been properly explored.”¹⁶

A preliminary step toward such an exploration flows from Saunders’s observation that constitutionalism purports to address marginalization by offering a range of design options for domestic governance that claim to disperse political power along axes of exclusion.¹⁷ Notably, however, within any one of these systems, the family generally remains the unquestioned foundational social unit. Indeed, challenging the traditional family is often received as a “challenge to the very structure of the foundational constitutional order.”¹⁸ This should make us particularly curious about the significance of the family as a means of explaining constitution-making’s “relationship to material interests and structural exploitation.”¹⁹ The reluctance of the field of international constitution-making to consider this particular relationship is arguably one way “particular projects of constitution-making have facilitated the continuation of colonial dispossession or the incorporation of societies into particular forms of global economic relation.”²⁰ The remainder of this essay explores this proposition, using the example of the nuclear family (as one of many family structures that could be explored in this way).

Connecting Nuclear Family-Based Critiques of Constitutional Law and International Law

To uncover how the nuclear family, as a foundational feature of constitutionalism, is connected to global economic relations, it is helpful to identify and bring together two separate realms of feminist critique: one relevant to constitutional law and another relevant to international law. This approach mirrors Saunders’s move of bringing together constitutional and international legal scholarship more generally (although the critiques I survey are not found squarely within either of these disciplines). It also responds to the critique that the field of Global Constitutionalism has been neglected by most critical international law and constitutional law scholars because of the field’s disciplinary hybridity: “It is neither fully a discipline of comparative constitutionalism nor is it fully a discipline of international law.”²¹ The study and practice of constitution-making demands critical insights, if not from, then relevant to, both realms.

Importantly, these insights arise from an understanding of legal orders, both domestic and international, as products of history. While Saunders focuses on the legacies of the disciplinary conversation that emerged leading

¹³ [Guidance Note of the Secretary-General on United National Constitutional Assistance](#) (Sept. 2020).

¹⁴ *Id.*

¹⁵ [Murray & Wittke](#), *supra* note 10, at 115, 124.

¹⁶ *Id.* at 108.

¹⁷ [Saunders](#), *supra* note 5, at 261.

¹⁸ [RUBIO-MARIN](#), *supra* note 1, at 79.

¹⁹ [Saunders](#), *supra* note 5, at 307.

²⁰ *Id.* at 303.

²¹ Vidya Kumar, [Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South](#), *VÖLKERRECHTSBLOG* (July 27, 2017).

up to and following World War II, she also points to the need to expose how constitution-making projects might be “linked to the continuation of forms of dispossession and violence that these processes seek to prevent.”²² I take up this invitation by connecting critiques of constitutional law and international law that focus specifically on the nuclear family—a legal and ideological construct—in historical processes of oppression. While I cannot do justice to the nuances of either multifaceted line of critique here, a brief discussion of each will show that the nuclear family specifically, and the family more generally, should be an object of interest to the field of international constitution-making.

The few scholars who apply a feminist lens to global/comparative constitutionalism emphasize that constitutionalism was not only “gendered from its inception”²³ but remains so largely due to the public/private divide—gendered separate spheres—which the nuclear family does much to uphold.²⁴ Accordingly, expressions of a “gender transformative agenda” in contemporary constitutionalism often focus on discarding the hetero- and cis-normative procreative family as the foundational unit of society.²⁵ Such expressions draw from Black and Queer feminist thought that has long highlighted how the nuclear family underlies national systems of social and political organization characterized by gender, race, and class hierarchies.²⁶ Feminist constitutionalist critiques of the nuclear family have also drawn on the utopian narratives of feminist science fiction, wherein “non-nuclear familial ties and kinship [are] the basis for community” and the “home and mothering are public, shared experiences and in some instances forms of governance.”²⁷ Notably, however, the foregoing critiques are largely confined to considering the role of the nuclear family in ordering relations with the state, rather than internationally or globally.

The connection between the nuclear family and international legal ordering is instead taken up by scholars concerned with the legacies of colonization. Post-colonial international law scholars certainly share this concern, and other international legal scholars have critiqued the nuclear family from the perspective of queer theory²⁸ and feminist theory,²⁹ but the connection between the nuclear family and global economic inequality is identified more clearly in work from other disciplines of the social sciences and humanities. These show that the nuclear family served as the basis for the construction of the gender- and race-based classification schemes that were essential to colonization;³⁰ as a standard of civilization used to justify the marginalization or destruction of other formations of community, care, and security;³¹ and as a means of distinguishing economically productive citizens from those who did not contribute to European economic and ideological interests, with devastating

²² [Saunders](#), *supra* note 5, at 273, 301.

²³ Bev Baines, [Foreword](#), in [RUBIO-MARÍN](#), *supra* note 1, at xiv.

²⁴ See [RUBIO-MARÍN](#), *supra* note 1.

²⁵ *Id.* at 334.

²⁶ See, e.g., Patricia Hill Collins, [It’s All in the Family: Intersections of Gender, Race, and Nation](#), 13 *HYPATIA* 62 (1998); VALERIE LEHR, [QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY](#) (1999).

²⁷ Ruth Houghton & Aoife O’Donoghue, [“Ourworld”: A Feminist Approach to Global Constitutionalism](#), 9 *GLOB. CONST.* 38, 74 (2019).

²⁸ See, e.g., Damian A. Gonzalez-Salzberg, [Queering Reparations Under International Law: Damages, Suffering, and \(Heteronormative\) Kinship](#), in [QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS](#) (Dianne Otto ed., 2018).

²⁹ See, e.g., Hilary Charlesworth, [The Public/Private Distinction and the Right to Development in International Law](#), in [HUMAN RIGHTS](#) (Robert McCorquodale ed., 2003).

³⁰ OYÈRÓNKÉ OYÈWÚMÍ, [THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES](#) (1997); María Lugones, [Heterosexualism and the Colonial/Modern Gender System](#), 22 *HYPATIA* 186 (2007); ANNA LAURA STOLER, [RACE AND THE EDUCATION OF DESIRE: FOUCAULT’S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS](#) (1995); [Hewitson](#), *supra* note 4.

³¹ [Lugones](#), *supra* note 30; SALLY L. KITSCH, [THE SPECTER OF SEX: GENDERED FOUNDATIONS OF RACIAL FORMATION IN THE UNITED STATES](#) (2009).

consequences for Indigenous populations.³² They also highlight the contemporary relevance of the Eurocentric nuclear family model, which still today is used to “reinforce [W]estern authority while also protecting systems of domination that can be legitimated through the nuclear family’s modelling of sexed and gendered hierarchies as natural.”³³ The ongoing promotion of the nuclear family model is therefore said to contribute to “profound historical erasure of colonial conquest and its enduring social effects.”³⁴ The erasure of the effects of colonialism on the global legal order, in particular, has been described as typical of global constitutionalism.³⁵ Taking the nuclear family model—or any family structure—not as a natural given but as a choice with material consequences on a global scale is therefore a way to see the role and impact of international constitution-making more clearly.

Considering the Role of the Constitutionalized Nuclear Family in Global Economic Relations

Scholars and practitioners of international constitution-making interested in the material and distributive implications of the field should therefore think about the family, and the nuclear family model in particular. The ways this model is implicated in global economic relations are numerous and complex, but a good starting point is to bring to light the connection between the nuclear family and global capitalist exploitation.³⁶ For example, the nuclear family naturalizes unpaid labor in the form of caregiving, classifying it as a lifestyle choice for which little support can be expected.³⁷ It also helps naturalize intergenerational wealth or intergenerational poverty as “a private matter rather than a social crisis that requires political and economic redress.”³⁸ Such naturalization processes have material consequences not only within states but across them, as seen in global care chains, whereby poor women from poor countries leave their families (while a poorer woman fills their familial roles) in order to fill the care deficit for families in richer countries.³⁹ This is one way women, particularly women from the Global South, are mobilized within and across states “in order to consolidate patriarchal and colonizing processes” through “state discourses of the ordinary nuclear family.”⁴⁰ Since the nuclear family is “sutured” to capitalism and colonialism,⁴¹ so too is the theory and practice of modern constitutionalism. To ignore this is to engage in the selective technicity Saunders warns against.

According to Saunders, the practices espoused by many scholars and practitioners of international constitution-making “have often been consonant with, rather than perceived as a site of resistance to, the strategies for development-through-investment and protections for international property that have been promoted through other aspects of the international institutional and legal architecture.”⁴² The promotion of the nuclear family is arguably

³² [Hewitson](#), *supra* note 4, at 93.

³³ Haley McEwen, *Nuclear Power: The Family in Decolonial Perspective and “Pro-Family” Politics in Africa*, 34 DEV. S. AFR. 738, 742 (2017).

³⁴ *Id.* at 747.

³⁵ [Kumar](#), *supra* note 21.

³⁶ See, e.g., Kathi Weeks, *Abolition of the Family: The Most Infamous Feminist Proposal*, 24 FEMINIST THEORY 433 (2023); SOPHIE LEWIS, [FULL SURROGACY NOW: FEMINISM AGAINST FAMILY](#) (2019); FRIEDRICH ENGELS, [THE ORIGIN ON THE FAMILY, PRIVATE PROPERTY AND THE STATE](#) (1884).

³⁷ [Weeks](#), *supra* note 36, at 441.

³⁸ *Id.* at 439.

³⁹ Arlie Russell Hochschild, *Global Care Chains and Emotional Surplus Value*, in [ON THE EDGE: LIVING WITH GLOBAL CAPITALISM](#) (Will Hutton & Anthony Giddens eds., 2000).

⁴⁰ M. Jacqui Alexander & Chandra Talpade Mohanty, *Introduction: Genealogies, Legacies, Movements*, in [FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES](#) (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1996).

⁴¹ [McEwen](#), *supra* note 33, at 747.

⁴² [Saunders](#), *supra* note 5, at 265.

one of these practices; it is touted as “the key to unlocking neoliberal promises of prosperity”⁴³ and as a guardian of the sanctity of private property.⁴⁴ The privileging of the nuclear family, or the reluctance to engage with questions of family structure, might therefore be considered part of the prevailing tradition of constitutionalism that, according to Saunders, “remains allied with liberal forms of economic development and of property.”⁴⁵

If those engaged in the enterprise of constitution-making wish to examine the connection between their enterprise and the patterning of global economic relations, they should consider the institutions central to both. The family—in nuclear and other forms—is one such institution, and can be seen as a key example of how the intersection of global economic relations with aspects of constitutions “might foreclose the choice of political and legal system, the collective ownership of social resources, or the post-colonial repossession of ways of living in community.”⁴⁶ In other words, leaving unquestioned the relationship between the family and the global economic order limits the ability of constitution-making to contribute to transformative change, including in the name of gender equality.

The limitations of constitutionalist vocabularies and the circumscription of the constitutionalist ideal are, as Saunders says, particularly pressing as we face the rapidly unfolding crises of global inequality and climate change. It is therefore worth considering whether the institution of the family should be reconceived or replaced with new forms of relationships between human and non-human beings of all kinds. Bringing this substantive question to the fore can help inform a “thicker conception of constitutionalism that eschews an emphasis on stability and order in favor of social transformation.”⁴⁷ More immediately, whether or not abolishing the family is actually possible or desirable, understanding this institution as an important link between (gender-responsive) constitution-making and the (gendered) global economic order can open our minds to new ways of transforming both.

⁴³ [McEwen](#), *supra* note 33, at 745.

⁴⁴ Brigitte Berger, [The Civilization-Building Role of the Nuclear Family in Historical Perspective](#), 15 INT’L J. WORLD PEACE 21, 24 (1998).

⁴⁵ [Saunders](#), *supra* note 5, at 308.

⁴⁶ *Id.* at 303.

⁴⁷ *Id.* at 306.