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Gender and global justice: Lu's justice and reconciliation in world politics

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ABSTRACT

Catherine Lu's important book argues that global justice must be conceived in structural terms, paving special attention to the way this approach applies to colonialism and its legacies. Lu shows how our states system perpetuates colonial injustice, and how deconstructing or disaggregating nation states reveal the ways that colonial legacies continue to permeate contemporary problems of justice. In this essay, I apply these arguments to key issues and institutions of global gender justice, that is, issues of 'equality and autonomy for people of all sex groups and gender identities,' focusing especially on problems of women's rights and problems with global dimensions, which can be thought of as a subcategory of gender justice (Htun and Weldon 2018). Drawing on recent feminist analyses of the International Criminal Court (ICC) and the Convention on the Elimination of Discrimination Against Women (CEDAW), I show how Lu's approach illuminates our thinking about the justice of these institutions. Considering the problem of missing and murdered indigenous women (violence against Native American and Indigenous women more generally) further highlights the limitations of these institutions and the strength of the structural approach to global justice. Conversely, I also use these examples to assess the adequacy of Lu's approach for guiding action, especially for those grappling with questions of institutional design and policy development. In each case, understanding gender justice initiatives as attempts to address structural injustice helps to understand the advantages and limits of various strategies of institutional design and reform.

ARTICLE HISTORY

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Catherine Lu's important book argues that global justice must be conceived in structural terms, paying special attention to the way this approach applies to colonialism and its legacies.¹ Lu shows how our states system perpetuates colonial injustice, and how deconstructing or disaggregating nation states reveal the ways that colonial legacies continue to permeate contemporary problems of justice. In this essay, I apply these arguments to key issues and institutions of global gender justice, that is, issues of 'equality and autonomy for people of all sex groups and gender identities,' focusing especially on problems of women's rights and problems with global dimensions, which can be thought of as a subcategory of

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¹Lu also addresses many other issues and questions, including issues of reconciliation, and issues other than gender, but I focus my attention here just on this theme of structural injustice and its relation to gender for reasons of space.

32 😉 S. L. WELDON

gender justice (Htun and Weldon, 2018). Drawing on recent feminist analyses of the International Criminal Court (ICC) and the Convention on the Elimination of Discrimination Against Women (CEDAW), I show how Lu's approach illuminates our thinking about the justice of these institutions. Considering the problem of missing and murdered indigenous women (MMIW; violence against Native American and Indigenous women more generally) further highlights the limitations of these institutions and the strength of the structural approach to global justice. Conversely, I also use these examples to assess the adequacy of Lu's approach for guiding action, especially for those grappling with questions of institutional design and policy development. To foreshadow what I say, in each case, understanding gender justice initiatives as attempts to address structural injustice helps to understand the advantages and limits of various strategies of institutional design and reform.

Structural approaches to global justice

Structural analyses of world politics have a long provenance (Waltz 1979, 2010; Galtung 1971). The sense in which Lu is using 'structure' here, however, is slightly different from these earlier works, drawing as she does on Young's (1990) approach to analysing questions of justice. Lu's approach goes beyond a focus on economic conditions, or even on material conditions more generally, to incorporate ideational phenomena (such as norms, or identities) as elements of structure. As she defines them,

Structural injustices broadly refer to institutions, norms, practices, and material conditions that play a causal or conditioning role in producing objectionable conduct or outcomes. The structures in question encompass institutionalized, formal, or informal rules or norms, practices, or conditions.

Young's approach to social structures, on which Lu draws, defines social structures quite broadly. For Young (1990), social structures must be analysed at a macro-level, where institutional rules and standard operating procedures combine with the 'mobilization of resources' as well as 'physical structures such as buildings and roads.' These patterns constitute the 'background conditions for individual actions by presenting actors with options; they provide "channels" that both enable action and constrain it' (18). The concept of structural injustice requires us to go beyond the analysis of particular acts or interactions between agents to examine 'the social structures and processes that condition their interaction, embodied in "institutions, discourses, and practices" (Young 1990). How do these structures and processes channel actors into particular patterns of interaction, and close off others? The strength of this approach is the way it requires us to step back, take a broader view, and consider the ways diverse sets of rules and procedures structure the action-situation. The can reveal the way that some questions and issues are completely off the table. We may not even have the language for raising some important issues of justice because of the way institutional procedures are organized.

Taking a step back from our current international order reveals that the development of our current system of states, our system of international law, and the UN system more generally in some ways embeds injustices of the colonial system in our institutions, even the newest of these. Understanding the complicated relationship between gender and imperial legacies helps us better to understand contemporary conflicts over gender justice. To mention just one aspect of this relationship, the improvement of women's condition was so often used as a pretext and justification for colonialism, that contemporary feminists must distinguish themselves from this earlier colonial stance while also combating contemporary masculinist efforts to dismiss all feminism as Western interference (see, for example, Jayawardena 1986; McClintock 2013; Narayan 2013; Bannerji 2000). As a result of this history, some important issues of gender justice are not well served by the states system. Understanding the way in which colonialism is embedded in international institutions helps to see why global gender justice is fruitfully understood as a problem of structural injustice. But thinking this way might seem to draw attention away from, or downplay, immediate actions that can be taken to improve the lives of the oppressed and marginalized. I conclude by reflecting on this seeming dilemma, and trying to point a way out of it.

Global gender justice and the International Criminal Court

Lu's approach is especially helpful in understanding the limits of the ICC. The ICC is a court of last resort, aiming to complement, rather than replace, national courts in efforts to ensure that individuals who commit the 'gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression' are tried for their crimes. The ICC came into being in 2002 through the Rome statute, a statute that has been praised both for its gender sensitivity and for its ability to hold individuals, rather than just states, to account (Chappell 2016).

The gender provisions of the Rome statute did not emerge organically from good intentions: Feminist activists at the Rome Conference (specifically, members of the Women's Caucus for Gender Justice) called on states to transform the core institutions of international justice (Chappell 2016, 25–26). Though not all of their demands were taken up, some were encoded in the final version of the Rome Statute. This resulted in a strong gender justice mandate, a court that aspired to end impunity for atrocities including gender-based violence, to ensure gender representation in deliberations, and to produce restorative justice including reparations.

In spite of this promise, the Court has been disappointing from a feminist standpoint. In its first decade, the Court failed to secure a single conviction for sexual or gender-based crimes. This is largely because longstanding gender legacies, external to the court itself, but part of the legal environment in which the court is embedded, still influence the operation of the ICC, accounting for the gap between formal rules and implementation (Chappell 2016). This network of informal rules, and the courts' imbrication in this broader, gender-biased context, obstructs the realization of the promise of the ICC. This problem operates at both the macro-level and micro-level: The Court is embedded in a broader international system that is male-biased, and it is also gender-biased at the micro-level through gender legacies and the individual actors who reproduce them.

This analysis of the ICC demonstrates the promise of Lu's structural approach to gender justice in two ways. First, while the feminist institutionalist approach highlights the *analytic* importance of understanding informal institutions, the concept of structural injustice highlights the *normative* significance of these phenomena. Informal

34 😉 S. L. WELDON

institutions or norms are a major obstacle to delivering on the promise of the ICC (Chappell 2016). As Lu notes: 'The structures in question encompass institutionalized, formal, or informal rules or norms, practices, or conditions.' These structural conditions are problems of justice because they embed unjust principles (for example, that violations of women's bodies are not sufficiently important to constitute a 'gravest crime of concern to humanity') in our legal system, and they combine with these other laws and practices to perpetuate male dominance and impunity for sexual violence.

A focus on structural injustice brings into sharp relief the limited nature of the ICC as a solution to problems of gender inequality. On the positive side, the Court breaks away from the state-to-state approach in focusing on individual culpability for these crimes, so is not bedevilled by some of the problems of the states system that Lu identifies in her book. In addition, as a new institution, it could be said that the Court begins the process of institutional change for which Lu calls. But as I read Lu, she would argue that in its focus on individual victims on a case-by-case basis, and on settling of accounts, the ICC is a limited institution for achieving gender justice because it does not offer a way to transform the background conditions that lead to the systematic abuse of some groups of people. It is individualistic rather than structural in focus.

If this is right, then just fixing the informal institutions that bog the ICC down in dealing with sexual violence will not be adequate, on its own, as a broader strategy for gender justice (and perhaps was never intended as such). In some way, this structural critique is reminiscent of Canadian feminist and anti-violence activist Lee Lakeman's point, that we don't want to be 'servicing ever increasing numbers of victims,' – rather, we want the violence to stop (cited in Weldon 2011). If this is what Lu is saying, it makes a great deal of sense. But it also raises a question to which I will return later in this essay, which is: what does a better approach to international criminal justice look like? The ICC represents a watershed for women in some way, and we can only dream of its implementation. But it is also true that the ICC, even if it is fully implemented, will not change the background conditions that produce gender violence in the first place. Thinking more broadly about social transformation highlights the fact that the ICC can only ever be part of a solution. But what does that broader solution look like, and how do we balance the 'necessity of engaging with the law' in all its male-biased forms with a programme for broader structural transformation (Smart 2013)?

Convention on the Elimination of Discrimination Against Women (CEDAW)

Let me turn now to another major focus of global feminist advocates, the Convention on the Elimination of Discrimination Against Women, or CEDAW. CEDAW is a broad measure, one that calls on governments to transform their societies with respect to sex equality, and one in which state governments commit to mutually holding each other to account to do better. CEDAW was adopted in 1979 and is often described as an international bill of rights for women (UN Women 2017; Baldez, 2014). There is no other measure that is so comprehensive in addressing the many areas of women's rights – from violence against women (VAWA),² to work and family law – and it is the only place that women's reproductive rights are affirmed (UN Women 2017). CEDAW

²VAW was not included in the original text of CEDAW (see Htun and Weldon, 2018).

requires states to incorporate the principle of sex equality into their legal system by reforming existing laws to eliminate formal discrimination and to create new laws that prohibit discrimination. It requires the creation of institutions to promote effective implementation of these laws, and it covers all acts of discrimination by people, organizations or enterprises. Countries that have ratified or acceded to the Convention must submit regular national reports describing measures they have taken to comply with their treaty obligations.

CEDAW has driven change in both law and women's status (Gray, Kittilson, and Sandholtz, 2006; Baldez 2014; Simmons 2009; Htun and Weldon, 2018). Indeed, as Cope and Creamer (2016) note: 'Of the human rights instruments evaluated quantitatively, research suggests that the CEDAW has perhaps the most impressive achievement record' (9). These effects are conditional on women's organizing: Where domestic activists insist on implementation of the law, it has prompted significant legal changes (Cope and Creamer 2016; Simmons 2009; Htun and Weldon, 2018). And the mere process of signing the Convention can spark domestic organizing (Simmons 2009). The CEDAW process produces improvements over time, through an iterative process (Baldez 2014; Htun and Weldon, 2018). Conversely, where citizens are unable to hold governments to account, governments may cynically sign on to these treaties to burnish their democratic credentials without any intention of making good on their promises. In Jordan, for example, laws advancing women's rights coincided with democratic crackdowns, and were widely seen and bitterly dismissed as useless 'Ink on Paper' by feminist groups (Forester 2017).

Ironically, the very breadth of scope which is a hallmark of CEDAWs success is also a source of weakness. The US has not ratified CEDAW because of concerns about reproductive rights, and the same is true for Nigeria (Baldez 2014; O'Brien 2010). Other countries have signed while registering reservations to issues of family law, a practice that many activists feels undermines the bill itself (Montforte 2017).

The CEDAW process may seem to do more to remedy structural injustice than the ICC: Every government is held to account; the remit of CEDAW is broad, seeking to alter the male-biased or male-dominated nature of society more generally. Especially with the adoption of the Optional Protocol in 1999, which allows individuals to hold their governments to account, this institution empowers individuals to demand that governments be held accountable for living up to their human rights commitments.³

But this institution is grafted onto a legal system in which colonial legacies continue, undermining the legitimacy of the CEDAW project. As noted, colonial powers historically used the status of women as a pretext for colonial domination of so-called backward or insufficiently advanced societies. Today, this makes it difficult for northern states to criticize southern states (Jayawardena 1986; Narayan 2013). Where domestic women's groups demand the application of the Convention, these objections are harder to maintain, but in states like Jordan or China where women are unable to organize freely, CEDAW does not bring the same advances. Moreover these governments may be lauded for measures to advance the status of women, while cracking down on the very processes that would bring real change, namely, women's ability to organize and call the

³The Optional Protocol was adopted by the United Nations General Assembly on 6 October 1999, and in force from 22 December 2000. As of October 2016, the Protocol has 80 signatories and 108 parties.

36 👄 S. L. WELDON

government to account (Forester 2017). In these contexts, CEDAW does not improve women's ability to determine the conditions of their lives.

The issue of reservations to CEDAW further reveals the value of the structural approach. Legal scholars have argued that reservations undermine CEDAW, pointing to the many seeming conflicts between universal human rights and Islamic law. However, if we think of this not as a conflict between the universal and the particular (or between Islam and Western enlightenment), we can see that it is possible for states to comply with CEDAW within the framework of Islamic law (Montforte 2017). Foregrounding colonial history draws our attention to the historical relations of domination that viewed the Islamic religion as completely 'other' (Narayan 1997). Rather than drawing a 'bright line' between Islam and women's rights, we should bring these countries into the CEDAW process, supporting efforts on the part of women in these countries – such as Islamic feminists – to offer their own versions of what it means to comply with CEDAW. As Monteforte argues:

Islamic law...is a complex rule system with various principles of interpretation and as such, it is itself open to interpretation and reinterpretation...by claiming, or at times suggesting, that the reservations are incompatible with the object and purpose of the Convention, the [CEDAW] Committee is saying that Shari'a is *a priori* fundamentally incompatible with the human rights of women; again, the objective is always to withdraw the reservation, because if it has a purpose, it is to inflect 'equality' and therefore cannot stand. The pronouncement has thus already been made...

If the CEDAW Committee made the opposite assumption – that Islam and women's human rights could be made compatible – reservations referring to Islamic law would be read differently. The onus would be on the signatory state to find a version of Islamic law that allowed for the guarantee of women's fundamental human rights and freedoms. Indeed, if a state's reservation is accepted in good faith, and not with suspicions based on its 'Islamic' or religious character, then that is precisely what such a reservation commits the reserving states to do (Montforte 2017). A colonial stance, however, contributes to this complete 'othering' of the Islamic religion (Montforte 2017; Narayan 1997). Reforming these religions from within is often the most promising way forward, politically, but equating gender equality with secularism closes off this path (Htun and Weldon, 2018). Recognizing how the interpretation of CEDAW commitments becomes entangled in the colonial legacies of the states' system helps us understand obstacles to achieving global justice.

A focus on transformative change that looks at both formal law and informal processes, then, draws our attention to the way the states system enables some cultural and gender groups to dominate others. A structural justice approach helps us to understand the power of CEDAW but also its limits. The main condition needed to combat domination – self-determination and participation in processes of social transformation – are blocked to some degree and in some places by structural conditions that are legacies of colonialism and broader problems of democracy.

Missing and murdered indigenous women (MMIW)

Last, I turn to the problem of violence against indigenous, First Nations women as a problem of global gender justice. The past decade has brought unprecedented attention

to the sexual and gendered violence that such women endure: New research and advocacy reports have documented and demanded action on such violence (Deer 2015; Amnesty International 2008, 2014; UN Women 2015 Box 5.4). Justice is often inaccessible to indigenous women suffering violence, both in the US and Canada. In both contexts, formal institutions driving gender equality policy are shaped by informal cultural norms rooted in colonial histories. These informal norms impede the realization of gender justice for indigenous women.

In the USA, the VAWA (1994) has been the primary policy addressing violence against women. It aims to create safer homes and streets for women by reforming legal processes and enforcement and by funding research, shelters and crisis centres, and public awareness campaigns. While comprehensive in other respects, VAWA fails to protect women on Indian Land. Native American Women suffer gendered violence (rape, intimate violence, stalking) at a higher rate than any other group of women in the USA. For example, nearly a third of Native American women are raped, a much higher rate than their non-Native counterparts. While most sexual assault in the USA is intraracial (victims and perpetrators are of the same race), this is not true for Native American women who are mostly assaulted by non-native men.

Native American women are often unable to take legal action against their non-Native perpetrators because of the complicated way that legal systems combine (Amnesty International 2008; 2012; Deer 2015). Jurisdictional issues mean that Native American women have little recourse if they are sexually assaulted by non-Native men, in spite of legal reforms to improve government responsiveness to violence against women (Amnesty International 2008; Duthu 2008). Even though Native reservations are seen as sovereign nations with their own police departments and courts in charge of prosecuting crimes on tribal land, Indian police in most places do not have the legal authority to arrest non-Native people on Indian Land, and Tribal Courts do not have the authority to prosecute them (Horwitz 2014). As a consequence, women assaulted by non-Native men who call the Tribal Police are told that the police (and the Tribal Courts) can do nothing about men who are 'not enrolled' as Native Americans. If they then turn to State authorities, they are told that these police do not have jurisdiction on Indian Land. And federal authorities who may have jurisdiction are remote, under-resourced and generally ill-equipped and unresponsive. These are not unusual or exceptional situations: Official statistics indicate that 'Native American and Alaska Native women are more than two-and -a-half times more likely to be raped or sexually assaulted than women in the USA in general and that 86% of the reported crimes are committed by non-Native men.'4 Despite several attempts at reform – such as allocating jurisdiction to tribal courts to enforce protection orders and earmarked funding for tailored service provision problems persist (Deer 2015).

Canada faces a comparable crisis: Aboriginal women in Canada are three times as likely as non-aboriginal women to be victims of violence (Brennan 2011), and the violence to

⁴Note that this is not a case of 'protecting brown women from brown men,' in Spivak's pithy terms. This is about protecting women on Indian Land from perpetrators of violence, the vast majority of whom are non-Indigenous.

38 👄 S. L. WELDON

which they are subject is likely to be more severe (Amnesty International 2014; O'Donnell and Wallace, 2011).⁵ The Native Women's Association of Canada has identified more than 500 missing or murdered aboriginal women just from the last two decades.

These abuses are insufficiently addressed by both the federal government and First Nations communities. The issue of 'missing and murdered aboriginal women' was a focus of the 2015 election campaign, which led to the formation of a government commission on MMIW, a commission which has been bogged down in controversy. As in the US, First Nations women in Canada fall into a jurisprudential vacuum. For example, the area of matrimonial property is surprisingly reminiscent of the situation in the USA discussed above. Indeed, Razack (2001) has identified such women as falling into 'zones of violence.' There is a 'jurisdictional gap' with respect to women's matrimonial property rights on reserve:

The Supreme Court of Canada confirmed in 1986 that courts cannot apply provincial or territorial laws dealing with the division of family assets in a manner that would alter the interests of First Nations in their reserve land because reserve lands fall under federal responsibility.⁶

Although women are not formally barred from holding property, the combination of tradition and formal policy structures access for women to matrimonial property on reserve in ways that make it difficult for women to assert their rights to live and own property on reserve in the event of a conflict with their spouse.

Unlike the US, Canada has a constitutional basis for Aboriginal self-governance and rights guarantees. Despite differences in official policy, in both cases informal practices and policies rooted in colonial history impede formal legal reform. Tribal or Band authorities continue to have limited sovereignty due to the persistence of colonial understandings that depreciate the status of Indian nations and that undergird unfounded perceptions of incompetence of Indian justice systems. These longstanding, unresolved tensions have pronounced impacts on women's safety.

Deer (2015) emphasizes the centrality of colonialism to rape, and rape to colonialism. She shows how colonial legacies form the background conditions that obstruct current efforts to address rape. Here again, colonial legacies and other structural injustices lie at the heart of contemporary questions of global justice, and that we cannot abstract away from these conditions and still craft legitimate solutions to pressing problems. In order to address violence against women, we have to remedy the colonial status of these communities. Deer argues that addressing rape is a necessary part of addressing the colonial status of these communities, that this status cannot be improved unless rape is addressed. Lu's approach helps us see that this is not just a problem of the Federal government, or state government, or tribal government, or even the Assembly of First Nations, or of the Native Women's Association of Canada. It is a problem at all levels, and every level of government must make stopping the rape of First Nations women a priority.

⁵An earlier report found that Status Indian (Indigenous) women between the ages of 25 and 44 were five times more likely than all other women of the same age to die as the result of violence (Indian and Northern Affairs Canada 1996; Amnesty International 2004.)

⁶See Derrickson v. Derrickson [1986] 1 S.C.R. 285 which held that provincial matrimonial property laws cannot take effect on reserves because reserve lands fall under the exclusive jurisdiction of the federal government under section 91(24) of the Constitution.

Concluding reflections

I have argued that Lu's idea of structural injustice helps us to understand the limits of contemporary efforts to advance gender justice: The ICC is limited because it is focused on getting remedies for individual victims rather than transforming the structural context. CEDAW is limited because it is embedded in broader structures tied to colonialism and cannot challenge autocratic, anti-democratic systems. It focusses on outcomes rather than on empowerment of women. The problem of MMIW, and the maze of injustice that prevents us from addressing it, is at least partially due to the same colonial legacies lurking in the background. Nations as defined in informal norms and as imagined communities, colonial and racist in their many incarnations and sexist in the ways they define the roles of different women and men, are a core dimension of gender. These analyses illustrate how and why colonial concepts of gender, race and nation undergird problems of global gender justice. Constellations of institutions, both formal and informal, at multiple levels, combine to advantage some groups and ways of life and to devalue and oppress others, creating core challenges of global justice.

The less satisfactory part of this approach is how well it informs the proscriptive element of allocating political responsibility for these injustices. Where does this analysis leave us in terms of our orientation to action? Lu appropriately points our attention to the need to reform the background institutions that privilege some groups and disempower others on the global scene. It remains unclear, however, who should do this, and *how* they should do it. In a global system where structural reform feels very far away, the emphasis on the structural elements that subvert well-intentioned efforts at institutional reform can be disempowering, especially if it is not coupled with strong guidance as to what to do next. In the contemporary context of a global women's movement in retreat, a transnational network afraid to call an international meeting in case the fragile and partial progress that has been made could be rolled back, it is not clear that the best way to focus our analytic attention is on the colonial roots of the states system that is the basis for CEDAW. CEDAW has been very important in advancing women's status and empowerment in many countries, and advocates for gender justice ought to take care not to throw the baby out with the bathwater. The ICC offers a similar 'glass-half-full' dilemma.

A commitment to structural injustice, however, does not require that all actions are taken at a structural level. Rather, it helps to temper our expectations for smaller scale reforms, and to point to the importance of transforming structural relations among groups as a pathway to justice. We can challenge institutionalized relations of domination not only directly through processes of institutional reform or large-scale efforts at transformation, but also by promoting self-determination for oppressed and marginalized groups. In addition to considering specific remedies for victims or legal changes proscribed from above, we should think about how to build on the powers of the powerless to better their own situation (Carroll, 1972). In other words, the focus on the responsibility of victims themselves to define and remedy justice, which Lu also emphasizes, can seem like 'pull yourself up by your bootstraps' advice or victimblaming, but it is very important in terms of locating political responsibility for change. To the extent that Lu's analysis points to background conditions such as unequal resources, institutional rules, and other conditions that prevent the victimized from being able to speak and organize, working against those rules helps to denaturalize the extant global order and create more potential for change. For example, AWID (2013) has documented declining funding for women's organizing to advance women's rights. Such organizing has been a major catalyst for progress, so this is a problem. Moreover, feminist movements in places like Jordan or China need more than funds for organizing. They need freedom. This should be the focus of efforts to promote gender justice – empowering women within countries and across national borders in the feminist collaboratives that have powered the advances of the past three or four decades. As we face retrenchment now, we need to renew our support for these efforts by women to organize on their own behalf.

Relatedly, identifying the colonial roots of the states system or of CEDAW may not demand that we throw out CEDAW or even the state's system, but rather, that we devise new ways to counter colonial influences that are perverting our current efforts to pursue justice. To return to the example of CEDAW reservations related to Sharia, placing the conflict in the context of an historical connection between women's status and colonialism suggests that the assumption that Sharia and CEDAW are incompatible may be contributing to the problem. Making different assumptions could produce a different political reality. Supporting efforts by Islamic feminists to articulate a model for gender-equal Sharia is a practical implication of the type of analysis Lu advocates. Similarly, efforts to address violence against indigenous women can start from efforts to attack racist and colonial attitudes towards these communities while simultaneously supporting the efforts of indigenous feminists to make rape a priority for their own communities as they highlight its intimate connection to liberation and decolonization. Highlighting the implications of the structural approach for action will ensure that Lu's approach brings us closer to the ideal of global justice she articulates.

Disclosure statement

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