

The Gender of Constitutional Jurisprudence

Edited by

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Introduction

Toward a Feminist Constitutional Agenda

Beverley Baines and Ruth Rubio-Marín

Women around the world increasingly resort to constitutional litigation to resolve controversies involving gender issues. This litigation has involved claims for political participation, freedom from discrimination and violence, sexual and reproductive rights, employment and civic rights, matrimonial and familial autonomy, as well as other social and economic rights. For the most part, constitutional law scholars have analyzed this jurisprudence doctrinally, confining their research mainly to individual flashpoint issues such as abortion or affirmative action. Such studies are usually framed by national boundaries; and, when comparative, their reach is often limited to a small number of countries sharing the same legal tradition. This explains the need for a feminist analysis of constitutional jurisprudence in which gender becomes the focal point and for a broader comparative constitutional law approach that encompasses both of the world's major legal traditions. Those are the focal points of this book.

Not long ago a feminist constitutional law scholar asked: “Can constitutions be for women too?”¹ Cognizant of the dangers of overgeneralizing about women's experiences and concerns, she was cautious about responding affirmatively. Nevertheless, her message was clear. Although women may be un-, or under-, represented among the ranks of those who draft domestic constitutions, we are not entirely without constitutional agency. Whether constitutional language adverts or not to women, we still advance claims for constitutional rights. And, despite legal theory's conventional assumptions about defining constitutionalism as “the relationship among a constitution's authority, its identity, and possible methodologies of interpretation,”²

¹ Donna Greschner, “Can Constitutions Be for Women Too?,” in Dawn Currie and B. MacLean, eds., *The Administration of Justice* (Saskatoon: University of Saskatchewan Social Research Unit, 1986) 20.

² Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 1.

feminist theorists have not hesitated to conceptualize it more contextually, as illustrated by the feminist philosopher who concluded “the constitution we have depends upon the constitution we make and do and are.”³ Thus women activists, lawyers, judges, and scholars appear to agree that what is at stake no longer is whether constitutions can be for women but, rather, when and how to ensure that they recognize and promote women’s rights.

The “when” question is easy to answer. Now. It is timely to assert, litigate, protect, and promote the constitutional rights of women because of the confluence of two twentieth-century developments. One is scholarly and the other juridical. In the first place, feminist scholarship has begun to embrace the study of legal phenomena. Of course, analyzing law from the perspective of gender is by no means new. In the eighteenth century, Mary Wollstonecraft issued her *Vindication of the Rights of Women*, a publication that clearly entailed commentary on legal rules that impacted on women’s lives.⁴ By the closing decades of the twentieth century, a number of scholars from various countries had published treatises on feminist legal theory, including therein works by the Norwegian scholar Tove Stang Dahl, British scholars such as Katherine O’Donovan and Carol Smart, the American scholar Catharine MacKinnon, and the Australian scholar Carole Pateman.⁵ Moreover, some contemporary feminist legal scholarship is comparatively but not consistently constitutionally oriented.⁶ The burgeoning literature on comparative constitutional law covers a wide range of topics, such as constitutionalism, rights, judicial review, federalism, governance, and economic development, while being virtually devoid of research that pertains to women’s rights. In other words, there is a huge gap – a gender gap – in contemporary comparative constitutional analysis.⁷ The same cannot be said

³ Hanna Fenichel Pitkin, “The Idea of a Constitution” (1987) 37 *J. Legal Educ.* 167 at 168, continuing: “Except insofar as we *do*, what we think we *have* is powerless and will soon disappear. Except insofar as, in doing, we respect what we *are* – both our actuality and the genuine potential within us – our doing will be a disaster” (emphasis in original).

⁴ Mary Wollstonecraft, *A Vindication of the Rights of Women, with Strictures on Political and Moral Subjects* (London: John Johnson, 1794).

⁵ Tove Stang Dahl, *Women’s Law: An Introduction to Feminist Jurisprudence* (Oslo: Norwegian University Press, 1987); Katherine O’Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985); Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987); Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

⁶ Susan Bazilli, ed., *Putting Women on the Agenda* (Johannesburg: Ravan Press, 1991); Fiona Beveridge, Sue Nott and Kylie Stephen, eds., *Making Women Count: Integrating Gender into Law and Policy-making* (Aldershot: Ashgate Publishing Ltd., 2000).

⁷ A striking exception is the recent publication of Fiona Beveridge, Sue Nott and Kylie Stephen, eds., *Making Women Count: Integrating Gender into Law and Policy-making* (Aldershot: Ashgate Publishing Ltd., 2000).

of comparative law scholarship in general.⁸ Nor does it extend to the study of historically disadvantaged groups other than women. Recently, for instance, comparative constitutional law scholars not only examined contemporary ethnic group conflicts⁹ but also studied the legal claims of religious communities.¹⁰

In the second place, and coincidentally with this spate of feminist legal theorizing, have appeared constitutional doctrines that impact or have the potential to impact on women's issues. The same was not true for women who entered the twentieth century. The constitutional rights of women received little or no juridical recognition until well into the twentieth century. Moreover, this holds true irrespective of whether a country is relatively new to the world's stage or whether its roots go back for centuries. It should come as no surprise, therefore, that much still remains to be done in the twenty-first century to promote the process of "constituting" (or recognizing, sustaining and promoting) women's rights.

This brings us to the "how" question, which is more a challenge than a question. Writ large, the immediate question is how to use constitution making processes and, more than anything, the existing constitutional judicial processes to achieve gender equality for women. The challenge is complex because feminists and judges emphasize different material facts, rely on different terminology, reason quite distinctively, and do not necessarily share the same goals when they examine the issue of gender equality. Most feminists believe gender equality will not be achieved until the subordination of women is overcome. In contrast, some jurists deny that women's subordination is real,¹¹ whereas others question the value of relying on constitutional strategies for redress.¹² To give yet a further example, although legal reasoning

⁸ See, for all, V. Jackson and M. Tushnet, *Comparative Constitutional Law*, University Casebook Series (New York, New York Foundation Press, 1999); and N. Dorsen, M. Rosenfeld, A. Sajó and S. Baer, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: Thomson/West, 2003).

⁹ E.g., Yash Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge: Cambridge University Press, 2000).

¹⁰ Peter W. Edge and Graham Harvey, eds., *Law and Religion in Contemporary Society: Communities, Individualism, and the State* (Burlington, VI: Ashgate Publishing Co., 2000).

¹¹ E.g., *Gould v. Yukon Order of Pioneers* (1991), 14 C.H.R.R. D/176 (Wachowich J.) at D/190, discussing why the sex equality provision in the Canadian Constitution might not be "available to combat allegedly discriminatory behaviour against all women. In my view women, as a group, are not what is commonly understood to be a 'minority' in Canadian society. The intervener stated that a recent Yukon census showed that 53.1 percent of the population was male, while 46.9 percent was female. Whether this constitutes a minority that can be discriminated against is in doubt."

¹² E.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster Inc., 1990) 330: "I had taken the position that, except for this rational basis test, the equal protection clause [in the American Constitution] should be restricted to race and ethnicity. . . . There is unlikely to be much work for the equal protection clause to do with respect to governmental distinctions between the sexes because legislators are hardly

is invariably deductive, feminists are as likely, if not more likely, to reason inductively. Under these circumstances, common sense suggests developing the relationship between feminist theorizing and constitutional reasoning in several stages, rather than thrusting them together and holding our breath as we wait to see if the marriage will endure.

More specifically, we advocate developing a feminist constitutional agenda, which like any good ordering device should admit of some degree of flexibility. At a minimum, however, this feminist constitutional agenda should address the position of women with respect to: (i) constitutional agency; (ii) constitutional rights; (iii) constitutionally structured diversity; (iv) constitutional equality; and give special attention to (v) women's reproductive rights and sexual autonomy; (vi) women's rights within the family; (vii) women's socioeconomic development and democratic rights.

This listing is lengthy. However, it would be even longer were it to contain all the context- and fact-driven issues that could constitute an agenda structured solely along feminist lines. Indeed, its length offers no consolation to women who are lesbian, bisexual, or transgendered, women with disabilities, and/or elder women who do not see their rights reflected on it. They will assume their claims lie buried within the listed categories. Moreover, this listing is also vulnerable to the criticism that some issues might overlap more than one theme. These shortcomings notwithstanding, the virtue of making our proposed feminist constitutional agenda as extensive as it is, lies in the fact that it is significantly more detailed than most of the agendas that are designed from a purportedly "gender neutral" constitutional law perspective. Such scholarship tends to address issues as if they pertain either to federalism and separation of powers, or to constitutional rights. Typically, the latter research will be further bifurcated into studies focusing on one of two main strategies for dealing with rights conflicts. The more popular strategy is autonomy, which encompasses claims that range from privacy claims to the collective claim of self-determination.¹³ Thus, when perceived in terms of self-determination, autonomy is the rallying cry of many indigenous, racial, ethnic, and linguistic groups. On occasion, most of these rights-seeking groups also turn to the other major strategy for managing rights conflicts, which is equality. Although these three major constitutional law categories – federalism, autonomy, and equality – might capture women's claims, they also might distort and/or impoverish them, viz. should claims of democratic underrepresentation be subsumed under autonomy or equality, or are they *sui generis*? Also, with only three categories at their disposal,

likely to impose invidious discriminations upon a group that comprises a slight majority of the electorate."

¹³ Yash Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge: Cambridge University Press, 2000) at 1: "One of the most sought after, and resisted, devices for conflict management is autonomy."

scholars might be tempted to portray the relationships among them as adversarial, viz. treating pornography as a contest between the pornographers' autonomy and the equality rights of women and girls, which would neglect entirely the entitlement of the latter to self-determination or autonomy.

Thus, we propose to design a feminist constitutional agenda as a middle course between the extensive and reality-driven delineation of issues that feminist scholars advance and the more rigidly bounded, often threefold, doctrinal categorization found in constitutional law scholarship. The main purpose of this introduction is to raise some of the major questions that should be addressed under each of the headings described in the hope that, when approaching the different national experiences that are described in this book, the reader will be able to identify the span of possible answers and assess their practical impact. The reader will realize that the themes are in fact drawn from the national chapters that follow. Not every theme is found in every chapter, and some chapters may contain other themes that have not been explicitly added to this agenda. Knowing that some themes overlap, and that some themes should be but are not self-evident in our listing, we invite feminist constitutional law scholars to continue what we have begun by de- and reconstructing our agenda themes as part of our larger project of encouraging judicial recognition of the constitutional structures and rights necessary to overcome the subordination of women. Our primary goal is, in short, to identify, sustain and promote the constitutional norms and strategies that will achieve gender equality for women. To this end, we invite feminist, legal, and other interested scholars to think about constitutions in a gendered way.

The contributors to this volume have done precisely that. This book is designed to explore these themes as they are manifested in the constitutions and constitutional jurisprudence issued by the national courts in twelve countries: Australia, Canada, Colombia, Costa Rica, France, Germany, India, Israel, South Africa, Spain, Turkey, and the United States. These countries span several continents, cover diverse legal traditions and collectively represent constitutional regimes that were adopted over a period of almost three centuries. Although the overall scope of this coverage matters, there was no magic in the number of countries chosen. Rather inclusion was based on balancing a number of structural features, including representation of the major legal traditions (civil law and common law), governance structures (monarchy and republic), legislative regimes (parliamentary and presidential), adjudicative mechanisms (constitutional courts and general courts), and jurisdictional structures (federal unions and unitary states). Other factors that distinguish these countries include their racial, religious, linguistic, and cultural demographics. As well, these particular countries derive their constitutional rights from a wide range of sources including entrenched bills of rights, unwritten principles, ordinary statutes, and international human rights treaties. Arguably the more extensive the structural, social, and legal

diversity of these countries, the more compelling the similarities, if any, that crystallize from analyzing their jurisprudence.

Even though each national contribution should be perceived as part of the larger enterprise of conceptualizing the themes on a feminist constitutional agenda, each also stands alone as a chapter describing that country's constitutional jurisprudence as it pertains to women. Crucial to the selection process was, therefore, the willingness of country contributors to examine the role of women as constitutional agents, analyzing their engagement in constitutional litigation and adjudication, as well as in constitution making and amending processes. We also encouraged contributors to highlight the most progressive element(s) of the constitutions and of the constitutional jurisprudence that national courts have adjudicated on behalf of women's claims in the hope of encouraging strategic extrapolation.

More specifically, we asked them to discuss who makes constitutional claims, what kinds of rights inform these claims, how these claims have evolved over time, what kinds of arguments work in defense of these claims, and how these claims relate to the larger social, economic and political issues that contemporary countries are facing. We urged them to provide a comprehensive reference to the most important case law and relevant constitutional provisions, as well as a brief bibliography that could serve as a guide for further research. The contributors, all of whom are academics and/or advocates on behalf of women's rights, remained true to their training as lawyers, responding both critically and constructively. Their chapters illuminate their constructive critiques partly by addressing selected common themes and partly by developing the most original themes that each national experience offers in terms of constitutional gender jurisprudence.

Three caveats should be borne in mind. First, our feminist constitutional agenda is just that, an agenda and not a recipe. We propose themes to open this field for further examination and not to foreclose alternative approaches. While trying to identify some of the factors that are to be taken into account in a gender-sensitive constitutional analysis and inviting the contributors to reflect upon them in the context of their national experiences, aware of the richness and intricacies of each constitutional system, we have purposefully avoided drawing direct causal-effect conclusions that might have been rightfully criticized as oversimplifications. Second, although we asked the country contributors to emphasize constitutional doctrine and jurisprudence, we do not intend to suggest that constitutional progress is synonymous with social progress. In some instances, law may be more often an aspiration than a set of binding norms; judiciary systems may be more or less reliable when it comes to applying doctrine; and in some countries the doctrines relevant to women's rights are too new and/or fragmentary to be coherently systematized. Third, even as a study of this kind invites extrapolation from one country to another, we recognize the need for carefully keeping in mind the deep differences that exist between and among countries not only culturally

but also in terms of their legal traditions. Legal traditions vary according to the significance they attach to constitutional law, to competing sources of law including religious authorities, indigenous traditions, and international law, as well as to judicial review.

WOMEN AND CONSTITUTIONAL AGENCY

For centuries, states openly barred women from participating in civic life, whether as voters or legislators, lawyers or jurists. Men also monopolized constitutional activities. Not surprisingly, women's initial forays into the realm of constitution-making focused primarily on voting, although their strategies differed. On the one hand, white women in two Australian colonies were not only the first to receive the franchise, but also in 1901 they became the first women to vote on a constitution. On the other hand, following decades of lobbying, in 1920 Americans became the first to secure a constitutional amendment guaranteeing women the right to vote. Although these initial strategies were important, however, it is curious that they did not lead to any further formal constitutional changes for women in either country.

The embrace of formal equality and the explicit commitment to sex equality only became a general trend in postwar constitutionalism. Women's role in promoting those provisions is unclear. Given pervasive underrepresentation in legislative and constituent assemblies, it would not be surprising to find that their activities were limited. However, during the 1980s and 1990s, women began to engage actively in processes of general constitutional renewal. For instance, not only did Canadian women lobby to strengthen the sex equality guarantees newly entrenched in the Charter of Rights and Freedoms (1982), but also women in Colombia successfully advocated for gender equality and gender-related provisions in their new Constitution (1991), and South African women actively participated in the process of drafting their new Constitution (1996). Finally, by procuring an amendment (1999) that requires gender parity in selected electoral contests, French feminists may have portended a new era, one in which women could seek specific gender-related constitutional amendments as needed rather than only during times of general constitutional change.

The foregoing suggests women who are active in feminist movements have begun to identify constitutions and constitutional change as relevant to our lives. With more comparative analysis, we may better understand when to initiate constitutional change on behalf of women, whether to intervene in changes already underway, what strategies are appropriate to each context, and how best to connect the international with the national fora, how to engage other women in these processes, and what results are most likely to undermine the prevailing patterns of political, social, and economic subordination of women. Thus, politically speaking, there is much to learn from the

roles women have already played in the constitution making and amending processes and initiatives.

The process of litigation offers women ways of developing and changing the meaning of constitutional norms. The country chapters in this volume exemplify this process at work, tantalizing us with questions of measurement (how active have women been in litigating?) and quality (what claims do women litigate and with what consequences?). More specifically with respect to the level of women's litigious activity, what institutional mechanisms are most likely to overcome conventional barriers to accessibility by helping women as a group to avail themselves of constitutional tools? The possibilities include the design of standing rules and class action rules, as well as the provision of funding for litigation, of officials who institute actions such as *ombudpersons*, or of organizations that specifically protect women's rights in constitutional litigation such as the Women's Legal Education and Action Fund (LEAF) in Canada or the more controversial Commission for Gender Equality in South Africa.

Understanding women's constitutional agency requires an understanding of the types of claims that women bring, and the constitutional strategies on which they rely. There is no question that, although the strongest emphasis has been on equality provisions, gender-related litigation has proceeded under most of the other rights-based provisions as well as under some federalism provisions. In this context, it is worth considering whether specific groups of women are more litigious than others and if so, how this impacts on the way in which doctrine is shaped. It also is interesting to observe to what extent men's agency has had an impact on women's. Moreover, gender-related doctrine may be affected in cases in which women are defendants or not even parties, as for example in most sexual assault prosecutions. Finally, any assessment of the quality of women's constitutional litigious agency would not be complete without an assessment of the difference, if any, that is made by having women on the final appellate courts that decide constitutional matters.

In sum, women's constitutional agency involves lobbying, legislating, litigating, and adjudicating. Although all of these roles are open to women, as the different chapters show, our entry is not commensurate with our numbers, suggesting invisible but real public constraints, perhaps not unlike the proverbial glass ceiling in the private workplace. Nor should women mistake bestowals of nice-sounding principles for the efforts of agency. As the Turkish experience shows, men can use women's equality for their own purpose. In other words, progress and agency need not go hand-in-hand.

WOMEN AND CONSTITUTIONAL RIGHTS

Constitutional rights provide women and other rights seekers with the tools to challenge state activity in the courts. They offer more protection than

statutory and other nonconstitutional rights which may not constrain legislation. Also controversies involving statutory and other nonconstitutional rights are not necessarily resolved by courts; often they are designed to be heard at least initially, if not finally, by administrative tribunals or government officials.

Nevertheless, arguably there is one important respect in which statutory and other nonconstitutional rights might be perceived as offering better protection to rights seekers, especially rights seekers who are unaccustomed to the methodology of legal reasoning. Put simply, while constitutional provisions tend to have a greater visibility and seem to permeate more easily the general legal culture than statutory rights do, statutory rights are often detailed, making their meanings more transparent and accessible to rights seekers. In contrast, constitutional rights are usually expressed in terms of abstract generalities so that their meanings are dependent on the interpretations judges have ascribed to them. Thus, understanding constitutional rights involves understanding the claims litigants have raised and judges have adjudicated. In fact, this may make less relevant the varying degrees in which rights can be constitutionally framed, which, as the national cases addressed here show, range from extremely detailed formulations to very limited or even nonexistent.

In any event, the country chapters reveal that women's constitutional rights claims have encompassed a wide array of grounds. Some of these grounds have been unique to women from individual countries. For instance, women have constitutionally reacted against the desecration of sacred land in Australia, police failure to warn about a serial rapist in Canada, forcing contraceptives on female prisoners as a condition of conjugal visits in Colombia, gendered prayer rights in Israel, the restitution of conjugal rights in India, the order of family names in Germany, or male preference rules in the inheritance of nobility titles in Spain. But many other grounds have been raised more generally. For example, women have often used constitutional instruments to fight against pregnancy and employment discrimination, domestic violence, political underrepresentation, sexual harassment, military service discrimination, sex crimes and/or their accompanying procedures, or unfair marriage, divorce, and succession rules.

Given their breadth, it is striking that few if any of these grounds are expressly prohibited in contemporary constitutions. This lacuna forces women to figure out constitutional strategies to react against the liabilities involved, ground by ground, and country by country. Having to contend on a case-by-case basis for subsuming specific prohibitions within the more abstractly worded provisions found in most constitutions is resource intensive and energy depleting. Moreover, many women simply cannot afford to undertake such an approach. Thus, the insights of comparative analysis suggest feminist and other legal scholars should reassess the current practice of refracting constitutional rights through a myriad of grounds. The flexibility of expressing

constitutional rights abstractly may or may not assist women. One of the dangers in silence is that it forces women to rely on the more generic equality provision, but doing so forces women to phrase their claims always in comparative terms. Because the parameters for the comparison are provided by men's experience, presumably, this strategy has inherent limitations.

However, constitutional rights are no panacea. Constitutional rights espouse, and are expected to espouse, the fundamental values of a nation and this has both good and bad consequences for women because courts are prepared not only to uphold but also to limit women's claims in the name of these fundamental values. For instance, as we will see, this has worked to women's disadvantage when restrictive abortion laws were challenged in countries where the courts responded by upholding restrictions, or even by strengthening them, in the name of the foetus and the value of life. In other words, the antithetical consequences that ensue when constitutional rights also serve as constitutional limits should be factored into any consideration of the feasibility of adopting more explicit or grounded expressions of women's constitutional rights. Also, freedom of speech has traditionally been asserted against attempts to limit the harm women suffer because of pornography.

No analysis of women's constitutional rights would be complete without referring to the sphere of application of constitutional rights. Some countries, virtually all of the common law countries analyzed here, restrict the application of women's challenges to state (or public) activity, whereas others, mostly of the civil law tradition, allow women to rely on constitutional rights to challenge injustice and discrimination in the private sector, including the family, schools, workplace, or the media. This distinction between countries that require state action and those recognizing the "horizontal" effect or *Drittwirkung* of constitutional rights is especially relevant to women. It evokes the public/private controversy that fuels much of feminist theory. Often the most serious forms of discrimination are those that women encounter in the private sphere. Nevertheless, those countries that strictly adhere to the constitutional state action doctrine often have general antidiscrimination legislation addressing systematically the various forms of discrimination that women encounter in civil society so that, in practical terms, the difference might not be so dramatic.

Finally, some consideration should be granted to constitutional hermeneutics as well. Have different methods of constitutional interpretation a gender impact? Time may make a difference here. Presumably, if the constitution is an old document written at a time when women's subordinate status was accepted as the natural order of things, and if the courts prefer an originalist or textual approach rather than a "living tree" or teleological approach, this may have a negative impact on women's constitutional position. Also, the different relevance constitutions attach to international human rights instruments and supranational law can have a clear impact on women's