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978-0-521-76157-4 - Feminist Constitutionalism: Global perspectives

Edited by Beverley Baines, Daphne Barak-Erez and Tsvi Kahana

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FEMINIST CONSTITUTIONALISM

Constitutionalism affirms the idea that democracy may not lead to the violation of human rights or the oppression of minorities. This book aims to explore the relationship between constitutional law and feminism. The contributors offer a spectrum of approaches and the analysis is set across a wide range of topics, including both familiar ones like reproductive rights and marital status and emerging issues such as new approaches to household labor and participation of women in constitutional discussions online. The book is divided into six parts: I) feminism as a challenge to constitutional theory; II) feminism and judging; III) feminism, democracy, and political participation; IV) the constitutionalism of reproductive rights; V) women's rights, multiculturalism, and diversity; and VI) women between secularism and religion. As a collection, the book seeks to examine, challenge, and indeed redefine the very idea of constitutionalism from a feminist perspective.

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Feminist Constitutionalism

GLOBAL PERSPECTIVES

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Foreword

If feminism is what some of its purported academic adherents have made it over the last two decades or so, many of us have long been part of some other movement. The present volume goes far in reclaiming its promise as, in the words of Dean Daphne Barak-Erez, “a new interpretive perspective on human knowledge, including in the legal sphere,”¹ as well as a tool for intervening in legal practice.

Women have not, in general, written or agreed to constitutions. Powerful men have written them a long time ago as if women did not exist, after wars in the waging and peacemaking of which women often did not actively participate, by foreign experts who assumed that liberalism was enough for women, by the accretion of practices in which women have had more or less say. More recently, women have had some voice in constitutive processes, but nowhere near half of the clout. With exceptions, dominant men have largely interpreted constitutions, and have overwhelmingly confined debates they deem authoritative on them, to terms they set.

Constitutions are artifacts of a particular male legal intervention, defining nations and establishing states as they ground their governance. The idea is to write down the terms to which the men involved agree to hold one another. As such, they are the particular focus of certain legal actors, most specifically white upper-class liberal men in the Anglo-Saxon tradition, although others have taken them up. In these systems – not usually squarely criticized as colonialist since freedom fighters have embraced the form even as they have often altered the content – law is a real vehicle of social power. The constitution typically occupies the apex of its power pyramid, hence their intense interest in it and their lack of interest in questioning it *as* a form.

The skilled assistance of Lisa Cardyn with the footnotes is gratefully acknowledged. The support of The Diane Middlebrook and Carl Djerassi Visiting Professorship at the University of Cambridge Centre for Gender Studies provided time to write this Foreword. © Catharine A. MacKinnon 2011, 2012.

¹ Chapter 4, this volume.

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A feminist constitutionalism would be animated by alternate principles. It would face male supremacy strategically but squarely. It would require a substantive equality of women both as an overarching theme in the document and as an underlying reality in the social order, in active engagement with a society recognized as unequal based on sex and gender, necessarily in interaction with all salient inequalities. Remaining sensitive to context, it would not be sidetracked by essentialist questions as to whether women are the same as or different from men or cultural relativist questions as to whether each culture's particular form of female subordination should be respected simply because it is culturally specific. It would not assume that a private sphere defined around home and family or any other jurisdictional locality is a place of sex equality exempt from public rules. Respect and dignity for women would be accorded in appropriate ways across the social order that would be accepted and enforced in each setting, without favoritist exemption or other corruption or backing off on necessary changes. Whether the issue is the form of government or sexual access, forms of force – from socialization to threats to physical aggression – would not be rationalized as consensual where no effective freedom to dissent or power to affect the shape of options or outcomes exists. Collective power of some social groups over others would be challenged as what it is rather than rationalized as differing moral values or normative choices.² A feminist constitutionalism would ask whether the state and the law, its quintessential tool, are socially hegemonically male in ways that, at the least, call for investigation of the container as well as the content.

Should a feminist constitutionalism exist, or even a dialogue on constitutionalism that took feminist insights seriously, the present volume would certainly be part of it.³ As things are, a number of the chapters here productively examine conventional constitutional subjects.⁴ Taken as a whole, and particularly strongly in certain

² In terms of states, rather than constitutions, these four dimensions are discussed in detail in CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989), and applied to international law in Catharine A. MacKinnon, *Women's Status, Men's States*, in *ARE WOMEN HUMAN?* 1 (2006).

³ Useful forerunners include *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* (Baines and Rubio-Marín 2004), and *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW* (Williams 2009), as well as Kathleen M. Sullivan's insightful article, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735 (2002).

⁴ See especially Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights*, in *FEMINIST CONSTITUTIONALISM*, *supra* note 1, at 15; Tsvi Kahana & Rachel Stephenson, *The Promise of Democratic Constitutionalism: Women, Constitutional Dialogue, and the Internet*, in *id.* at 240 (arguing that legislative approaches are preferable for women to judicial ones). Further strong examples include the structural analysis of gender provided by Kerri A. Froc, *Will "Watertight Compartments" Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms*, in *id.* at 132; the examination of horizontal and vertical constitutions by Elizabeth Katz, *Women's Involvement in International Constitution-Making*, in *id.* at 204; and the inquiry into the use of the tutela by Carolina Vergel Tovar, *Between Constitutional Jurisdiction and Women's Rights Organizations: Women, War, and the Space of Justice in Colombia*, in *id.* at 223. Mary Ann Case innovatively combines an argument that gay marriage is supported by constitutional sex equality principles with a critique of marriage in *Feminist Fundamentalism and the Constitutionalization of Marriage*, in *id.* at 48.

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sections,⁵ these contributions go further to suggest that constitutionalism, although significant, as such may not be the most illuminating framework for interrogating the role of law in the lives of women, including their status and treatment under male-dominant institutions. Although the legal form “constitution” is inspired by liberalism and democracy, which are, for the most part, taken for granted in this volume, they are importantly interrogated by Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, who argue that constitutionalism’s inherited model of democracy rests on an ideology of social-sexual contract that structurally restricts women’s full citizenship.⁶

Throughout, by the scope of materials found necessary to engage, as well as the range of subjects taken up,⁷ these papers – although no one says so – find constitutionalism too narrow and formalistic a container for addressing the problems feminism identifies. Directives, criminal law, religious law, and customary law are easily as portentous, they notice *de facto*, often more potent. International law, it might be added, has proven more nimble and visionary.⁸ Social reality is authoritatively ordered, conflict acceptably resolved, the means of force legitimately monopolized by legal arrangements that – so far as women’s status is concerned including relationships with men, are far from confined to constitutions or even usually accountable to them. Custom, habit, norms, roles, and other dominant regularities powerfully constitute the law for women, that is, the real rules to which they are held. The chapters of this book accordingly range productively over multiple nonconstitutional systems with the constitutional ones, interrogating gendered rules, contextualized by gendered social realities, sometimes at an explicit interface with constitutions and sometimes not.⁹

If constitutionalism is too restrictive a cabin for the legal issues raised by taking the substance of sex inequality seriously, the chapters in this collection further indicate that feminism has become something to be done more than a flag to be flown. Fortunate, as feminism as a flag can become a way to confine work by gender, saluted so that it can be ignored, a means to cede the rest of the world to everyone who is not labeled, so they can continue doing what they imagine is everything else, unchallenged and unchanged. The evasion of feminist content is reminiscent of Tolstoy’s observation:

I know that most men – not only those considered clever, but even those who are very clever, and capable of understanding most difficult scientific, mathematical,

⁵ See, e.g., Chuma Himonga, *Constitutional Rights of Women under Customary Law in Southern Africa: Dominant Interventions and “Old Pathways,”* in *id.* at 317; Jewel Amoah, *Watch GRACE Grow: South African Customary Law and Constitutional Law in the Equality Garden,* in *id.* at 357.

⁶ Blanca Rodríguez-Ruiz & Ruth Rubio-Marín, *On Parity, Independence and Women’s Democracy,* in *id.* at 188.

⁷ Strangely, there is no sustained discussion of sexual abuse.

⁸ See MacKinnon, *Women’s Status, Men’s States,* *supra* note 2.

⁹ The refreshing analysis of abortion by Rachel Rebouché, *Challenges for Contemporary Reproductive Rights Advocacy: The South African Example,* in FEMINIST CONSTITUTIONALISM, *supra* note 1, at 298, strongly suggests that constitutionalism is the wrong question.

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or philosophic problems – can very seldom discern even the simplest and most obvious truth if it be such as to oblige them to admit the falsity of conclusions they have formed, perhaps with much difficulty – conclusions of which they are proud, which they have taught to others, and on which they have built their lives.¹⁰

That feminism as a philosophy as well as by its focal topics should have become a form of scholarly marginalization by gender is, of course, ironic. Its entire impetus has been to end the confinement of people and work to and by sex and gender, in the process transforming the legal project from one that promotes male dominance to one that promotes equality of the sexes, freeing women as well as legal scholarship. Yet in the legal academy, feminist analysis is not yet considered an expertise; it remains regarded as autobiographical and ideological: that stuff about women, a statement about the speaker rather than the spoken-about, a narrow solipsistic fixation rather than an approach to comprehending reality that increases accuracy by identifying a bias in prior approaches that makes them incapable of meeting even their own standards. Instead, it has become at best an academic niche to be occupied, if minimally; a little square of turf to be tilled by perhaps one person per faculty, likely a visitor; an eddy at the edge of the mainstream; a brand to be cultivated and competed over; a private faith like a religion, internally sustaining but unbecoming and unscholarly and stigmatic to expose or acknowledge, far less explicitly to pursue as the backbone or compass of an intellectual agenda.

Tokenism is the practical organizing principle of this ghettoizing reduction. One is a feminist legal scholar, not a legal scholar with particular information and focus and perspectives to offer. Meantime Marxists and conservatives and most of all liberal legal scholars of all stripes are simply legal scholars – defined by their subject matter or expertise or angle of vision, however male-valenced, however little relevance to women it has, their insights contended with for their content rather than as a this-kind-of-point from a scholar who is a one-note one-of-those. Confining feminism to a separate sphere, even if more room than it had before, becomes another way of maintaining male dominance as a discourse of power, as if it is neutral and tolerant.

Which is not to say there should be no feminist books. This book calmly challenges these limits, unsettles this complacency by exceeding its own envelope, putting more solid ground under women's feet as it expands law's horizons.

Catharine A. MacKinnon

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¹⁰ LEO TOLSTOY, *WHAT IS ART?* 124 (Aylmer Maude trans., 1899).

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