Introduction: A Public Law of Gender?

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1 Introduction

The formal recognition of gender, as a category of public law, has swept the world.[1] In a time of rapid legal change, in both new constitutions and old, the public law of gender – and the contested norm of gender equality – is being constituted, legislated and regulated. Of 194 written constitutions around the world, almost all guarantee equality in express terms; almost two-thirds entrench equality or nondiscrimination guarantees on the basis of sex, and almost one-third make express reference to gender.[2] Measures to ensure the equal participation of women and men in political and public decision making have been introduced in one hundred states and constitutionally entrenched in fifteen.[3] With

[1] With special thanks to Kim Rubenstein, Bev Baines, Kris Collins, Jayne Huckerby and Cora True Frost, as well as the other contributing authors of this volume, and participants at workshops at Duke Law School (May 2015) and Boston College Law School (June 2015). Thanks also go to the research assistance of Erica Coray and Daniel Strigle.

[2] Numerical study based on formal constitutional texts, using three data points: Constitute Project (2015), https://www.constituteproject.org/search?lang=en; UN Women, *Constitutional Database* (2013), http://constitutions.unwomen.org/; Oxford Constitutional Law, *Constitutions of the World* (2015), http://oxcon.ouplaw.com (all last accessed June 2015). We found, of 194 constitutions, 117 constitutions had an equality guarantee and a reference to 'sex', 29 had an equality guarantee and a constitutional reference to both 'sex' and 'gender', and 23 had an equality guarantee and a reference to 'gender'. In addition, many constitutions include a specific provision for nondiscrimination or equality or even 'proactive measures' in relation to gender, sex or women, in particular areas such as elections, work, maternity leave and nationality. For an illuminating coding of constitutions along 'gender neutral', 'difference egalitarian' and 'difference maternal' lines, see Priscilla Lambert and Druscilla L Scribner, 'A Politics of Difference Versus a Politics of Equality: Do Constitutions Matter?' (2009) 41 *Comparative Politics* 337 (systemically analysing the effect, especially of 'difference' constitutions, which carve out differential treatment for women for purported egalitarian or maternal purposes).

[3] Quota Project, *Global Database of Quotas for Women* (2015) www.quotaproject.org (last accessed June 2015); see further Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, 'On Parity, Interdependence, and Women's Democracy' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 188, 202.

five to ten constitutions due for design or redesign each year,[4] new statutes being introduced to respond to gender-based disadvantages and harms, and attention to gender in forums of representation a 'signifier of democratic credentials for countries transitioning from authoritarianism and/or conflict',[5] these extraordinary changes in the field of public law call for close analysis.

It is no coincidence that many of these changes to the public law of gender postdate the Convention on the Elimination of Discrimination Against Women (CEDAW), adopted by the United Nations General Assembly in 1979.[6] Half of the world's new constitutions have been drafted since 1974, with significant outside influence.[7] Initiatives for 'gender mainstreaming' and 'women's empowerment' have – at least formally – occupied international organisations since 1995[8] and influenced international sponsorship and advice on the public laws of individual states, particularly those in the Global South. While these gender-sensitive developments can be credited to the success of locally and globally networked women's movements (and also, especially more recently, gender recognition– or human

[4] Tom Ginsburg, 'Introduction', in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012) 1, 4 (noting that five to ten countries 'are engaged in major acts of constitutional design or redesign' in any given year).

[5] Rodríguez-Ruiz and Rubio-Marín, above n 3, 188, 203; see also Drude Dahlerup and Lenita Freidenvall, 'Gender Quotas in Politics: A Constitutional Challenge' in Susan Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009) 29.

[6] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 20378 (entered into force 3 September 1981) (CEDAW). Amongst the member states of the UN, 189 of 197 are parties to CEDAW. Another key moment, of course, is the period after World War II: see, e.g., the establishment of the Commission on the Status of Women within the United Nations, as well as, for example, the Preamble of the UN Charter (noting, as a fundamental goal, 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women', extended by the Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) (equality, without distinction on sex); see also Convention on the Political Rights of Women, opened for signature 20 December 1952, 193 UNTS 135 (entered into force 7 July 1954), which is the first international effort to recognise the equal status of women in exercising political rights.

[7] Helena Alviar García, 'Gender Structures and Constitutional Law' in Günter Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar, 2013) 81.

[8] UN Women, *Fourth Conference on Women* (1995) http://www.un.org/womenwatch/daw/beijing/index.html/ (Beijing Conference); see further Report of the Fourth World Conference on Women. Beijing, 4–15 September 1995, UN Doc. A/CONF.177/23/Add.1 (27 October 1995), and its follow-up, by the Commission on the Status of Women, UN Doc. E/CN.6/2015/3.

equality–based movements),[9] they are also the result of other transnational forces, including economic liberalisation, by which countries revise their systems of governance in order to secure foreign approval and capital and/or a higher ranking of development.[10] The entanglement of these processes complicates the global efforts of gender advocates and calls for scholarly investigation in multiple locales. Our study includes the perspectives of constitutional, administrative and international lawyers, as well as historians, ethnographers and political scientists, to analyse critically these apparent accomplishments.

Thus, with the worldwide sweep of these gender-equal or gender-cognisant public laws, one question recurs: has this widespread legal reform led to real change?[11] Women, in particular, continue to experience an array of gender-based disadvantage and harms: persistent and well-documented vulnerability to violence, including sexual violence, insecurity and poverty; circumscribed access to education, property and credit; workplace disadvantage and harassment; greater involvement in reproductive, household and care work, without material recognition; and a continued inability to access the political forums and public laws in which these problems have often been sidelined or misunderstood. While these problems may seem intractable for different reasons – culture, ideology, power, political economy – it is clear that law continues to constitute, or insulate, these various effects. Thus it is critical to understand and critique the operation of formal law as one aspect of the continuing gap between the advocacy of gender equality and its substantive achievement.

This volume brings international law together with domestic constitutional and statutory law to explore the dimensions of this gap and what is particular to the gender question. Three general explanations are common in each field. The first is the gap in *enforcement*: just as international

[9] See, e.g., Elizabeth Katz, 'Women's Involvement in International Constitution-Making' in Baines et al. (eds), above n 3, 204, 219.

[10] See, e.g., Kerry Rittich, 'The Properties of Gender Equality' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005) 87, 91–3; for a discussion of the links between the 'good governance' project and gender equality, see Sharon Bessell, 'Good Governance, Gender Equality and Women's Political Representation: Ideas as Points of Disjuncture', 273, in this volume; Kate Wilkinson, 'Is This the Future We Want: An Ecofeminist Comment on the UN Conference of Sustainable Development Outcome Document', 538, in this volume.

[11] For an attempt to illuminate this causal question comparatively, see Lambert and Scribner, above n 2 (building on earlier analysis by Eileen McDonagh, 'Political Citizenship and Democratization: The Gender Paradox' 96 (2002) *American Political Science Review* 535).

law exists famously without a centralised enforcement mechanism, so too does domestic constitutional law lack the guarantee of enforcement, even, it might be argued, in systems with judicial review.[12] The breach of a formal guarantee of gender equality, for example, may lack sanctions at both the international level (where, for example, the CEDAW Committee provides recommendations only)[13] and at the domestic, constitutional level, where constitutional courts may decline to enforce contentious constitutional provisions in order to avoid the deep political contestations that will result.[14] Of course, judicial enforcement is not the only function of formal law – it has expressive, coordinating and educative functions that all help to secure greater compliance. Moreover, the underenforcement of law by courts – where courts avoid direct enforcement with the expectation that other branches of government will tackle certain complex policy questions, such as those required to implement 'positive' obligations attached to rights to education or health care,[15] can apply with particular force to gender equality. The thesis of this book is that aspects of the 'gap' explained by nonenforcement and underenforcement can generate productive insights when fields of international and public law are brought together.[16]

The second explanation is a gap in *sincerity*. International treaties, especially the foundational human rights covenants of which CEDAW is part, have always attracted the criticism of being 'window-dressing', as states are free to ratify treaties without making any reforms in domestic

[12] Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law Review* 1791, 1822–40.

[13] See, e.g., Andrew Byrnes, 'The Committee on the Elimination of Discrimination Against Women' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional, and National Law* (Cambridge University Press, 2015) 25, 39–48 (noting the effectiveness of General Recommendations, as well as the very modest role of individual communications due to limited membership of the Optional Protocol). For recent analysis of the information-generating role of CEDAW, see Cosette Creamer and Beth A Simmons, 'Do Self-Reporting Regimes Matter? Evidence from the Convention on the Elimination of Discrimination Against Women' (draft paper, 2015, copy on file with author).

[14] Goldsmith and Levinson, above n 12, 1817 (describing comparable features of international and constitutional law, and using 'public law' as a common description of law for states).

[15] Lawrence Sager, *Justice in Plain Clothes: A Theory of American Constitutional Practice* (Yale University Press, 2004) (describing the phenomenon of underenforcement with respect to the U.S. Supreme Court).

[16] Compare, e.g., Kristin A. Collins, 'Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws', 73, with Vicki C. Jackson, 'Feminisms and Constitutions', 43, in this volume.

law.[17] A similar criticism has been made about the phenomenon of 'sham constitutions', whereby countries adopt constitutions while at the same time failing to uphold the rights that they purport to guarantee.[18] While the challenge of sincerity is related to the previously described problem of enforcement, it exists independently as a denial of the normative force of the law, which cannot be explained on formal institutional grounds. This 'performance gap' in the formal law has been observed to occur more for some legal protections than others: gender is one such area, as is substantive equality more generally.[19]

The third explanation for an observed gap in formal law and its effect on the ground is its *coverage*: both international law and constitutional law carve out a number of exceptions of application that can have a significant impact on gender. Most prominent in the gap in coverage is the public/private distinction, in which both international and public law are, in the main, concerned only with the regulation of the public sphere. This distinction is dealt with in more detail later in the section 'Defining Public Law', but it can be seen that, through reserving particular areas of law from constitutional reach, such as religious personal laws or customary law or private law more generally,[20] or through permitting far-reaching reservations in international human rights law that do the same,[21] the

[17] See, e.g., from this now voluminous literature, Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 *American Journal of Sociology* 25, 88; Oona Hathaway, 'Do Human Rights Make a Difference?' (2002) 111 *Yale Law Journal* 1373, 1373–1411. For early terminology of window-dressing, see Philip Alston, 'Reform of Treaty-Making Processes: Form over Substance?' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty?* (Australia National University, 1995) 1, 25.

[18] David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.

[19] Ibid (noting differences in respect paid to, for example, death penalty prohibitions and economic and social rights).

[20] See Vijaya Nagarajan and Archana Parashar, 'Gender Equality in International Law and Constitutions: Mediating Universal Norms and Local Differences', 170; Laura Grenfell, 'Customising Equality in Post-Conflict Constitutions', 147, in this volume.

[21] Michael L. Buenger, 'Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the CEDAW' (2014) 20 *Buffalo Human Rights Law Review* 67, 84–5 (documenting the raft of reservations to CEDAW made on religious and customary grounds); see also Byrnes, above n 13, 56–7; compare with Judith Resnik, 'Comparative (In) Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production' (2012) 10 *International Journal of Constitutional Law* 531, 545–50 (suggesting that countries' reservations, along with understandings and declarations, can help to sustain a productive form of pluralism). A full third of CEDAW members have recorded reservations to the instrument: see Resnik at 538.

application of public law has limited effect to challenge gendered disadvantage in the very spheres in which it is most heavily experienced and perpetuated. The question of coverage is also raised by the multiple layers of authority created by federalism and its special impact on issues of gender.[22]

These explanations apply to each field: indeed, hypotheses of gaps have been made since the earliest legal realist insight of the distinction between the law in the books and the law in action.[23] They also explain both more, and less, than the coexistence of formal equality and substantive inequality. This volume extends enforcement, sincerity and coverage rationales in public and international law to give greater attention to their application to gender.

2 Gender in Public Law: Defining the Terms

This book defines the public law of gender as an analytical category in which to study law's structuring of politics, governing and gender. This includes the role that gender plays in themes of representation and participation in both 'government' and 'governance'. The distinction between those terms is meant to highlight the different ways in which power has been expressed and continues to express itself from the local to the global. We ask how 'gender' has engaged with those structures and concepts, and how these structures and concepts depend on or enlist gendered roles. These enquiries engage public law in national, international and transnational perspectives and also the broad work of constitutional design and governance theory, including concerns coming under the headings of accountability, participation, transparency and rights. A focus on gender in the contested public sphere also invites a rethinking of judicial, legislative and executive processes under the traditional public law fields of constitutional and administrative law. Feminism – and feminisms – provide the theoretical tools for this analysis, from which to analyse the category

[22] See, e.g., Louise Chappell, Deborah Brennan and Kim Rubenstein, 'A Gender and Change Perspective on Intergovernmental Relations' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 228 (examining how federal–state relations have accommodated or obstructed the development of policy on violence against women and childcare); Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2006) 115 *Yale Law Journal* 1564, 1578 (analysing both local versus national, and domestic versus international, jurisdictional divides).

[23] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

of 'gender', as well as other legal categorisations, such as the guarantee of equality, and the public/private distinction, which are detailed in the following sections.

2.1 *Defining Gender*

Gender is not 'real or self-evident or in the nature of things';[24] nonetheless, it is a powerful construct, based on perceived differences between the sexes, that has served to organise social relations and roles in various ways throughout the world. The use of 'gender' as an analytical category, rather than as an essentialised identity or universal causal force, can help to uncover the pervasiveness of gender assumptions against various cultural backgrounds and histories.[25] In this vein, this book draws on the core assumption of feminism – that an inequality experienced along gender lines must be subject to challenge. Such an assumption holds value for women, men and transgender persons, and the book deals with all three gendered identities, with most chapters canvassing the particular impacts on women that are caused by gendered laws and/or stereotypes and assumptions. Nonetheless, we take issue with certain United Nations policies that have been observed to 'assume that "gender" is a synonym for women'.[26] One chapter interrogates the harm caused by formal rules

[24] See e.g., Joan Scott, 'Gender: A Useful Category for Historical Analysis' (1986) 91 *American Historical Review* 1053, 1067; note also the way gender is conceived by the CEDAW Committee as referring to 'socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favoring men and disadvantaging women': CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW (2010), UN Doc. CEDAW/C/2010/47/GC.2, para 5.

[25] Mary Hawkesworth, 'Sex, Gender, and Sexuality: From Naturalized Presumption to Analytical Categories' in Georgina Waylen et al. (eds), *Oxford Handbook of Gender and Politics*, 31 (Oxford University Press, 2013). For an important account of conservative opposition to the use of the gender category, see Sally Baden and Anne Marie Goetz, 'Who Needs [Sex] When You Can Have [Gender]: Conflicting Discourses on Gender at Beijing', 56 (1997) *Feminist Review* 3.

[26] See Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1, 14. Like Charlesworth, we recognise that this uncritical use of the gender category can miss the relational structure of gender-based harms and perpetuate stereotypes. It can also privilege heteronormativity; see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge Classics, 1990). For a thoroughgoing critique of the unity and exclusions of the category of 'woman' and its deployment in international human rights law, see Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98.

of gender discrimination on men as fathers;[27] others include perspectives that analyse gender-based harms on both women and on certain groups of men;[28] and another chapter examines more completely the harm of gender-based assumptions on gender-variant persons.[29]

Despite this range, the bulk of the chapters deal with women – which is a reflection of the disproportionate harm to women caused by gendered laws and assumptions, on a sheer numbers basis: yet we acknowledge the heterogeneity of women's interests and experiences. The chapters of this book therefore encompass the various experiences of women along different axes – such as race, class, age, disability, ethnicity, religion, sexual orientation, locality, geography and, critically, jurisdiction. Again, feminist theory provides important resources to understand the intersection of various inequalities and identity categories as well as gender.[30] This focus on intersectionality is most suited to the book's combined focus on the experience of women in both the Global South and North. For example, the following chapters are able to problematise the experience of a minority group, Muslim women in India, whose experience under the Indian Constitution is very different from that of Hindu women in India;[31] and of aboriginal, Muslim and Mormon women in Canada, whose experience of living in polygamous relationships may be very different from the expectations of other women and men in Canada, and of each other;[32] and of women's organisers in Colombia, whose gendered disadvantage cannot be divorced from their experience of extreme poverty and insecurity.[33] Gender may be a category that builds solidarity between women (and others), but it does not follow that the consequences of this category are the same across our sites of analysis.

[27] Collins, above n 16, 73.
[28] Susan Harris Rimmer, 'Gender, Governance and Defence of the Realm: Globalising Reforms in the Australian Defence Force', 413; Louise Chappell, 'Governing Victims' Rights Redress and Gender Justice at the International Criminal Court', 465, in this volume.
[29] See further Rohan Kapur and Kellin Kristofferson, 'A Gender Critique of Accountability in Global Administrative Governance', 514.
[30] For presentation of these ideas, see Jackson, above n 16; see, e.g., Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139, 159.
[31] Nagarajan and Parashar, above n 20, 170.
[32] Beverley Baines, 'Polygamy: Who Speaks for Women?', 219, in this volume.
[33] Julieta Lemaitre and Kristin Bergtora Sandvik, 'Structural Remedies and the One Million Pesos: On the Limits of Court-Ordered Social Change for Internally Displaced Women in Colombia', 99, in this volume.

2.2 *Defining Public Law*

Public law has a long history of supporting the 'legalised subordination' of women, as well as their invisibility.[34] Public law is primarily concerned with the relationship between individuals and the state, and between the state and other government actors.[35] This book explores both explicitly gendered public laws, such as equality guarantees (predominantly expressed in relation to sex or gender[36]), as well as facially neutral public laws, that may help to sustain many disparities between men and women. Public laws are not formally concerned with the choices made and the actions between individuals, which are, in the main, governed by private law such as contract, property and tort; nonetheless, they influence these choices in critical ways.[37] Moreover, a raft of antidiscrimination and accommodation statutes that reach into employment, for example, can be considered 'public law', due to the state's efforts to ensure that private relations are consistent with equality guarantees.[38] While these distinctions are made differently in civil and common law systems, this book adopts the category of 'public law' as a heuristic to interrogate the international, constitutional and statutory laws applicable to the state and government but does not assume that they are wholly separate from private application, particularly when those relations are enforced through laws of contract, property or tort. We acknowledge, therefore, that 'what is public in one society may well be private in another'.[39]

Indeed, the challenge to the distinction between public and private spheres, so long fostered by feminist activism, has become integrated into some versions of public law. Many modern constitutions now recognise

[34] Jill Elaine Hasday, 'Women's Exclusion from the Constitutional Canon' [2013] *University of Illinois Law Review* 1715, 1727.

[35] We leave aside the intermediate cases in which state actors are subject to contract, criminal or tort law, which are not relevant to the following chapters; they are, however, relevant to this sort of analysis.

[36] See text accompanying above n 2.

[37] Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497.

[38] Kirsty Gover, 'Gender and Racial Discrimination in the Formation of Groups: Tribal and Liberal Approaches to Membership in Settler Societies', 367; Dominique Allen, 'Rethinking the Australian Model of Promoting Gender Equality', 391, in this volume.

[39] Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 6 (citing comment by Hilary Charlesworth); see also the discussion in Rubenstein, 'In Her Own Voice: Oral (Legal) History's Insights on Gender and the Spheres of Public Law', 246, in this volume.

the 'horizontal effect' of public laws and require private individuals and groups to respect the constitutional rights and principles expressed in the public sphere.[40] While the 'state action' doctrine in the United States and Canada, for instance, reserves the application of the Constitution to cases involving state-individual interactions, there is nevertheless scope in those jurisdictions to develop the common law indirectly, in line with constitutional principles.[41] Elsewhere, private law is subject to the 'radiating effect' of the constitutional law, whereby courts are compelled to adhere to constitutional rights or values when applying private law.[42] The jurisprudence of the European Court of Human Rights, in recognising the positive obligations of states to secure protections as between private parties, has also challenged conventional expectations of the divide between public and private law.[43] As certain chapters suggest, the increasing recognition of positive obligations of gender equality, and other positive state duties, expands the reach of public law into private domains of subordination.[44]

Moreover, the very shift from government to governance that is evident in other chapters[45] signifies how various private, nonstate entities are now sourced to deliver services and perform other traditional state functions. Thus, at the same time as workplaces,[46] militaries[47] and other organisations must respect certain employment and criminal laws, the increasing number and range of public/private partnerships change the scope of public law. Accompanying this market-based challenge to the public/private distinction comes an assumption that the more 'family-like' an

[40] See, e.g., Dawn Oliver and Jorg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2009).

[41] Helen Herschkoff, '"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights' (2010) 62 *Stanford Law Review* 1521; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009) 198.

[42] See, e.g., Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter, 2014).

[43] Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 *European Law Journal* 771; Andrew Clapham, *Human Rights in the Private Sphere* (Oxford University Press, 1993); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

[44] E.g., Jackson, above n 16; Allen, above n 38; and see generally the exchange on recognising a constitutional role for religious and customary law in the chapters in Part II.

[45] E.g., Bessell, above n 10; see further Jody Freeman, 'The Private Role in Public Governance' (2000) 75 *NYU Law Review* 543.

[46] Allen, above n 38.

[47] Harris Rimmer, above n 28.