



Introduction

The When, Why, What, and How of the Book and How the Personal Becomes Political

I.1 The When and Why of This Book

To some extent, this book owes its existence to the COVID-19 pandemic. It had been a few years since the contract to write it had been signed, and every year, with truly commendable patience, the publisher asked me the much-dreaded question: is it almost ready? The truth was that, as much as I wanted to, it had been extremely difficult for me to write a book, instead of articles or other pieces in shorter or collaborative formats. Writing a book requires constant dedication, committed and uninterrupted working time slots, and a degree of isolation that I have simply found difficult to combine with the rest of my academic obligations (classes, exam grading, thesis supervision, mentoring, conferences, preparation, direction, or coordination of research projects, reviews, travels abroad, etc.) and with the obligations of my role as first, a de facto, and then, a de jure single mother of two (food provision, calendar organization, homework, playdates, sports, doctors, housekeeping, holidays, etc.), despite the fact that I have always enjoyed a set of privileges (middle class, fairly white skin, and Spanish-European origin). Put together, this set of traits have no doubt allowed me to delegate part of that care work on other women who were economically more vulnerable – often, though not always, of immigrant origin. Without their assistance, not just this book but combining motherhood and an academic career would have simply been impossible. Add to this the more or less common, yet often painful, vicissitudes of life (moving between countries several times, sentimental turmoil, periods of illnesses, or loss of loved ones), and the bare truth is that, for a long time, I came to think that the time would never come for this book to see the light of day.

For this reason, when the COVID-19 pandemic broke into our lives and I saw how, suddenly, conferences, trips, and commitments of various kinds fell off the agenda and socialization routines were necessarily reduced, I glimpsed a unique occasion to, once again, pick up the book project from where I had left it off the last time I had managed to put aside sustained time to work on it (my university cannot really afford paid sabbaticals). This time I faced the endeavor with the renewed hope to see it through. And I have. As I write these words, I am fully aware that, for many of my colleagues – and not only for those whose health has been seriously compromised – the pandemic has not represented a window of opportunity in any sense of the word. I am thinking of colleagues with dependent children, whose schools were unable to continue teaching online, who have had to cope without the respite that school hours entail, and who, far from enjoying a context of peace and tranquility, have been confined to more or less narrow spaces (my house in Seville is large, bright, and has a lovely terrace). Moreover, to their roles as academics and caregivers, they have had to add that of school-teachers while also losing any possibility of outsourcing some of the care work to the paid employment sector. Certainly, they too are still privileged compared to women who, without the possibility of teleworking or the relative economic security of academic work, have had to expose their lives daily, assisting in essential tasks of care and provision of basic goods – tasks that are often little recognized and poorly paid; those who have completely lost their sources of employment or income – precarious jobs, work in the informal economy or in the care sector, in homes and countries that became impenetrable overnight; not to mention those who have not had a place to confine themselves and their families, or those who have lived confinement not as a forceful retreat but as a source of permanent anguish by sharing an intimate space with violent family members or loved ones whose most basic needs they could simply not provide for.¹

If I look back today, I realize that, throughout this time, several things helped me keep afloat the hope that this book would come to fruition, despite it living for the longest time only in my mind. First, the conviction that the book was needed and that the time was ripe for it. When

¹ For an overview of the impact of COVID-19 on women, see UN Women, *From Insight to Action: Gender Equality in the Wake of Covid-19* (United States: United Nations, 2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/gender-equality-in-the-wake-of-covid-19-en.pdf?la=en&vs=5142>.

nearly two decades ago, Bev Baines and I organized in Seville what must have been the first international workshop on gender and comparative constitutionalism ever – a workshop from which our edited volume, *The Gender of Constitutional Jurisprudence*, emerged in 2005,² we were not fully aware of the extent to which we were opening what has since become a vibrant research agenda. Of course, we were not starting from scratch, not even then. As Helen Irving recalls, “The modern understanding that constitutions are not neutral with respect to sex or gender” took root in the last decades of the twentieth century, but “it was poorly recognized,” and, with some few exceptions, “the history was little known outside feminist historians’ circles, and the insights it generated were neglected in the broader literature on constitution-making” and constitutionalism.³ Also, a burgeoning literature appeared, which began to apply a gender lens to a range of constitutions or at least attempted to describe the more or less limited role of women in their crafting. This practice has only grown ever since.⁴ Yet our interest was sparked by the intersection between comparative constitutional law and feminist legal theory, and we felt the need to call on the academic community to

² Beverley Baines and Ruth Rubio-Marín, *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge University Press, 2005). This was, I believe, the first book-length treatment of gender issues in comparative constitutional law. In its introduction, we set out a synoptic vision of the agenda to reflect on the interaction between constitutionalism and gender equality.

³ Helen Irving, ed., introduction to *Constitutions and Gender* (Cheltenham, UK: Edward Edgar, 2017), 2. She rightly cites Akhil Reed Amar, “Women and the Constitution,” *Harvard Journal of Law and Public Policy* 18, no. 2 (1995): 465–74 as one relevant exception.

⁴ See, for some examples, Lynn Smith and Eleanor Wachtel, *A Feminist Guide to the Canadian Constitution* (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1992); Sandra Liebenberg, ed., *The Constitution of South Africa from a Gender Perspective* (Cape Town: Community Law Centre, University of the Western Cape, 1995); Helen Irving, ed., *A Woman’s Constitution?: Gender and History in the Australian Commonwealth* (Sydney: Hale & Iremonger, 1996); Asunción Ventura Franch, *Las mujeres y la Constitución Española de 1978* (Madrid: Instituto de la Mujer, 1999); Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge: Cambridge University Press, 1999); Alexandra Dobrowolsky, *The Politics of Pragmatism: Women, Representation, and Constitutionalism in Canada* (Don Mills, ON: Oxford University Press, 2000); Miria Matembe, *Gender, Politics and Constitution Making in Uganda* (Kampala: Fountain Publishers, 2002); Sibyl A. Schwarzenbach and Patricia Smith, eds., *Women and the United States Constitution: History, Interpretation, and Practice* (New York: Columbia University Press, 2003); Blanca Rodríguez Ruiz, *Género y constitución: mujeres y varones en el orden constitucional español* (Lisbon: Juruá Editora, 2017); Marilisa D’Amico, *Una parità ambigua: costituzione e diritti delle donne* (Milan: Raffaello Cortina Editore, 2020).

critically engage in the analysis of central concepts of the discipline and some of the assumptions underlying mainstream constitutional theories; to identify emerging trends, but also remaining textual and doctrinal differences; to analyze opportunity structures; and, ultimately, to craft academic alliances and repositories of inspiration to advance in our shared endeavor: an analysis of how constitutional law could be turned into a tool of transformation in the struggle for women's justice. If the transnational women's movement, articulated around groundbreaking international conferences had – starting in the 1970s but especially since the mid-1990s – been able to organize itself to set feminist agendas in the field of human rights, offering a horizon of possibilities of a shared struggle for gender justice beyond national borders, wasn't it also reasonable to delve into how constitutions – those norms that sit in the apex of national legal orders but also in that space of confluence and exchange between national, regional, and international normative standards – were shaping the contours of emancipatory possibilities? Why not look abroad and not just above to gain a better grasp of the strengths and shortcomings of existing design and doctrinal alternatives, and their evolutions in time, drawing from the rich source of different national constitutional cultures? After all, didn't constitutionalism offer that meeting point between the vocationally universal and the contingent, historic, and culturally specific that would allow us to better understand the true dimensions of the challenge of building political communities able to overcome patriarchy-infused foundational gender legal orders?

Since then, it has been a true joy to watch this subfield of comparative constitutional law grow over the last two decades, going well beyond the focus on rights jurisprudence. Even if we limit ourselves to the literature published in English, this significant body of work began to foreground questions of constitutional design – see, for instance, Helen Irving's *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*⁵ – and also to expand, through collaborative

⁵ Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008). In her book, Irving adopts a three-dimensional approach: a textual, structural, and applied perspective, looking at what the words of the constitution say and mean, how the sections of the constitution are structured, and how the constitution's provisions work in practice, analyzing the relationship between gender equity and agency and constitutional opportunities structures. Other important work had preceded her in exploring key questions of institutional and procedural design in gender-responsive ways. See, for all, Kathleen Sullivan, "Constitutionalizing Women's Equality," *California Law Review* 90 (2002): 735;

efforts, the range of constitutional themes and constitutional country experiences beyond those that had so far dominated the agenda (often countries in the Global North as well as English-speaking jurisdictions). Among these contributions, we could mention Susan Williams's edited collection *Constituting Equality: Gender Equality and Comparative Constitutional Law*;⁶ Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana's *Feminist Constitutionalism: Global Perspectives*;⁷ Kim Rubenstein and Katharine G. Young's *The Public Law of Gender: From the Local to the Global*;⁸ and Helen Irving's *Constitutions and Gender*, the first handbook specifically devoted to the subject.⁹ At the same time, we have also seen the proliferation of books comparatively analyzing the experiences of women in constitution-making – for instance, the pioneer *Women Making Constitutions: New Politics and Comparative Perspectives*, edited by Alexandra Dobrowolsky and Vivien Hart¹⁰ – and a research agenda that has continued to expand with – I sincerely hope – our recent *Women as Constitution-Makers: Case Studies From the New Democratic Era*,¹¹ where Helen Irving and I made the purposeful attempt to capture recent efforts by women to influence the constitutions in their countries, with a particular emphasis on relatively underexplored experiences from Muslim countries. Interestingly, the flourishing of this academic literature – which must, of course, be enriched by the vast academic literature in languages other than English – has been accompanied by the growth of a set of feminist guides and toolkits that, nourished by academic findings, have increasingly been applied across

Paula Monopoli, "Gender and Constitutional Design," *Yale Law Journal* 115 (2006): 2643; Judith Resnik, "Categorical Federalism: Jurisdiction, Gender and the Globe," *Yale Law Journal* 11 (2002): 619.

⁶ Susan Williams, *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2009). The volume represents a comparative, design-oriented approach to gender equality in constitutional law with a global and interdisciplinary perspective that considers culture, politics, and theory along with law.

⁷ Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana, eds., *Feminist Constitutionalism: Global Perspectives* (Cambridge: Cambridge University Press, 2012).

⁸ Kim Rubenstein and Katharine G. Young, eds., *The Public Law of Gender: From the Local to the Global* (Cambridge: Cambridge University Press, 2016). This book draws meaningful connections between administrative, constitutional, and international public law in trying to account for a more wholesome description of the gender bias in public law.

⁹ Helen Irving, ed., *Constitutions and Gender* (Cheltenham, UK: Edward Elgar, 2017).

¹⁰ Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives* (Basingstoke: Palgrave Macmillan, 2004).

¹¹ Ruth Rubio-Marin and Helen Irving, eds., *Women as Constitution-Makers: Case Studies from the New Democratic Era* (Cambridge: Cambridge University Press, 2019).

the world by both national and international actors, who have joined in the task of “engendering” constitution-making processes and constitutional texts as a crucial element in the strengthening of the legitimacy of contemporary constitutional systems.¹² It is also worth mentioning the surveys, engines, online forums, and databases that have also appeared and now facilitate research and new quantitative approaches.¹³

With all this groundwork, I felt that the time was ripe to attempt a global analysis of constitutionalism through a gendered lens in the hope that it might provide a feminist perspective of constitutionalism both as a discipline and as it has evolved over time – a (her)story that, despite women’s different positionalities (albeit duly recognizing them), “we” could collectively own; a story that could bring to the surface recurrent tensions and dilemmas but also recover agendas and forms of contribution thus far neglected, challenging dominant conceptions in the field and allowing us to identify, whether in textual expressions or doctrinal constructions, key milestones and landmarks. I was also hoping that

¹² As Irving remarks (*Constitutions and Gender*, 4), these feminist guidelines for constitution-making and for “incorporating gender equality in constitutions under construction and for ‘assessing’ its recognition in existing constitutions” began to appear in the context of women’s increased role in new constitution-making in the 1980s and 1990s. See, for instance, Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1989); Lynne Smith and Eleanor Wachtel, *A Feminist Guide to the Canadian Constitution* (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1992). These guidelines have multiplied since the United Nations and the United Nations Development Program have embraced gender equality principles in their “Guidance Notes” on constitution-making. See Christina Murray and Cindy Wittke, “International institutions, constitution-making and gender,” in Irving, *Constitutions and Gender*, 107–32. On the creation of a “Constitution Assessment for Women’s Equality” toolkit by International IDEA and its Constitution-Building Program, see Melanie Allen, “A Practitioner’s Account: The Constitution Assessment for Women’s Equality,” in Irving, *Constitutions and Gender*, 195–220. In 2016, an “ABC for a Gender Sensitive Constitution” was drafted under the auspices of Euromed Feminist Initiative IFE-EFI, cofounded by the Swedish Government and the European Union.

¹³ For a comparative survey of constitutional gender equality rights and provisions that recognize women, see Kristin Van der Leest et al., “Engendering Constitutions: Gender Equality Provisions in Selected Constitutions – A Comparative Study Accompanied with Case Studies in Bosnia and Herzegovina, Kosovo, Montenegro and Serbia” (United Nations Development Fund for Women, 2007). UN Women has created a “Global Gender Equality Constitutional Database” with a repository of gender equality-related provisions in 195 constitutions from around the world (<https://constitutions.unwomen.org/en>), and *Constitute* (<https://www.constituteproject.org/?lang=en>) is a comparative database of the world’s constitutions, allowing to systematically compare constitutions across a broad set of topics, including “gender” and “women.”

these very milestones and landmarks would help expand the scope of what is considered canonical in the discipline while challenging some of the disciplinary and jurisdictional hegemonies that have, until now, characterized both constitutional and comparative constitutional law. Perhaps, as a result, I could try to periodize and typify the forms and stages of constitutionalism in ways that would relate to the central question of how effectively constitutional law has responded to women's evolving and diverse citizenship claims and gendered citizenship understandings, giving women's agencies and voices a predominant role throughout the process. Doing so, I thought, required connecting the study of the configuration of gender in constitutional law with the exclusion of women from the very origins of the state construct, as other authors, like Catharine MacKinnon and Carole Pateman, had already done.¹⁴ This would allow me to reclaim the intrinsic and systemic dimension of women's distinct and subordinate constitutional membership status as a starting point (the established gender order) from which to then address the ways in which the tools of constitutional law have acted both as mechanisms of resistance (especially in old constitutionalism) and subversion (especially in new constitutionalism) of the original gender order in a progressive, though by no means linear, fully shared, and contradiction-free process of "gender-order disestablishment."

This book is the outcome of this endeavor. Building on the proliferation of "micro" qualitative studies (focused on single national jurisdictions and duly allowing us to appreciate nuances, contexts, and cultural traits) and, more recently, quantitative studies (which, for the first time, offer us the possibility to observe wider and textual patterns – even though they are, nonetheless, sometimes lacking in context and hence difficult to interpret), my aim is to offer a diachronic "meso" level of analysis that would allow us to transcend the particular and to think through more regionally, but also more systemically, the concept of a "gender order," as opposed to separate but narrow themes, or, at least, allow us to connect the various particulars as pieces of a puzzle that, when put together, would provide a more general account. In this sense, this book aspires to be read and interpreted as a collective endeavor, even though, as it could not be otherwise, I take individual responsibility for the mistakes it may contain, or worse, for wrongs it may do.

¹⁴ See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989); Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1989).

Another of the driving forces behind this book's felt need is my commitment to a new generation of academics and the lingering traces of my intimate collection of small "academic traumas." To this day, I still vividly remember the reaction of one of the great professors and academic authorities in the first department that hired me, just after finishing my doctoral thesis in 1997 (a thesis that had focused on the constitutional status of migrants in various jurisdictions), when I informed him that my new research agenda would turn to gender and constitutional law. A liberal man at heart, "Of course, why not?" was his reaction, but only, if he could kindly suggest, as long as I did this "on the side," which is to say, as long as I did not make it the central object of my intellectual inquiry – or, in other words, as long as I was able to prove my credentials as a "true constitutional scholar" by sufficiently writing about the important constitutional matters (perhaps the principle of proportionality?). And, although I have indeed written about issues other than gender and constitutional law (while never really abandoning the underlying passion of uncovering the possibilities and limits of public law to subvert group domination), I must have failed to sufficiently prove my "mainstream constitutional scholar credentials." Otherwise, how could anyone explain this more recent experience? In this case, the remarks came from another well-established professor, chosen to preside the exam board for the open competition that the Spanish academic system foresees as the only method through which to consolidate the status of full professor. Commenting on my scientific work, an equally liberal and decent man (and just like the former, white, hetero, cis, and abled), this professor acknowledged that my work was no doubt of high quality and its international scope truly impressive but, drawing an analogy to the Argentine soccer player Leo Messi, whom he literally considered "the total soccer player" (in the sense, as he explained, that Messi handled *all* and not just *some* of the skills of soccer like no other), did I not feel the need to become more of a "total constitutionalist"? A remark, in short, that only makes sense if one interprets that the gender-focused, or more broadly speaking, the gender critical theoretical analysis of constitutional law does not require a "total" or at least comprehensive and sophisticated mastery of the history, key concepts, and central scholarly debates in constitutional law because it is something sectorial, confined, and, surely, of a minor order.

I'm aware that I'm not alone. In her foreword to *Feminist Constitutionalism*, Catharine MacKinnon accurately writes that "in the legal academy, feminist analysis is not yet considered an expertise; it

remains regarded as autobiographical and ideological: that stuff about women, the 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.”¹⁵ She wrote this statement only ten years ago, and I am acutely aware that this type of pressure has not disappeared. In fact, I often encounter scholars in the beginning of their academic careers who confess to me that they are confronted with the dilemma of “passion versus career”: dedicating themselves to what they are really passionate about (such as, for instance, the study of critical race, gender, and queer theory) compared to what is required of them to demonstrate their credentials of competence if they want to obtain a position and advance within this discipline that, like all disciplines, bears the traces of the historically privileged, who have so far defined its confines, central concepts, and priorities, undoubtedly in an exercise of epistemic supremacy.

In this context, this book, I hope, can be a modest contribution to the evidence of resilience and joins the existing scholarly work written in gender and comparative constitutional law with the intention of offering counternarratives. It celebrates the existence of this body of work from which I have learned immensely, as well as some other (still modest) signs of hope, including the fact that a serious publisher, like Cambridge University Press, has, in the English-speaking world, become a de facto “hub” of much (though certainly not all) of the significant work on feminist constitutionalism over the years. It also celebrates the fact that an international society of public law of recent creation and as vibrant as ICON·S has embraced the rule of parity in all its governance structure and makes a conscious effort to take into account various axes of diversity and existing patterns of discrimination when defining the contents

¹⁵ Catharine A. MacKinnon, foreword to *Feminist Constitutionalism: Global Perspectives*, eds. Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana (Cambridge: Cambridge University Press, 2012), xii.

and modus operandi of its increasingly successful yearly conferences; and the fact that more and more articles on gender and other critical approaches to public law have appeared in recent years in several international journals on constitutional law and constitutionalism – of which the *International Journal of Constitutional Law* deserves a special mention, since its editorial team recently took the bold step of explicitly inviting submissions by women and minorities.¹⁶ More importantly, this book tries to convey the message to a new generation of young and passionate scholars that they are not alone and that, to the extent we can (we must all pay our bills and it is easy to preach from the comfortable position of a tenured professor, which, however, I was not at the time I decided NOT to follow the advice I was given), we should all follow our passions (why choose to be an academic otherwise?) and reject the trap that passion-driven research cannot be analytically sophisticated or lead to serious scholarship. The possibility of a counternarrative is real, however imperfectly I might have achieved it here, and I hope it may invite the further proliferation of agendas and additional counterhistories, which, by focusing the gaze on other axes of exclusion that have marked the way in which constitutionalism has evolved and been narrated as a discipline, may help us to jointly build an account of the discipline that is closer to that ever-evasive goal that we call “scientific truth.”

For those tempted to follow this path, perhaps the only modest piece of advice I can offer is that it might be of essence to feel part of a community, a community of academics that in fact exists, even if it is often not there in a tangible and face-to-face way in many of our daily lives; even if we do not necessarily see it, when we attend our ordinary faculty meetings. It is with and through that community that I have found one is able to advance in the construction of disciplinary counternarratives, a task that, more than ever, seems critical as we watch the proliferation of organized movements seeking to delegitimize the scientific and academic entity of various strands of critical theory in academia in many countries. The sense of community, as I say, is key. At least for me, this has been the case. And, as I said before, in my eyes, this book certainly represents a collective achievement. The book synthesizes two decades of my own research, but anyone who knows me will know that

¹⁶ See Michaela Hailbronner, Marcela Prieto Rudolph, and Gráinne de Búrca, “Gender in Academic Publishing,” *International Journal of Constitutional Law* 17, no. 4 (2019): 1025–44.