GLOBAL GENDER CONSTITUTIONALISM AND WOMEN’S CITIZENSHIP

Have constitutions around the world – so far, mostly men’s creations – helped women and sexual minorities affirm their equal citizenship status or rather acted as stumbling blocks? By drawing examples of jurisdictions from all continents and engaging with a wide set of themes (including employment and marital status discrimination, abortion and reproductive rights, motherhood rights, political gender quotas, multicultural accommodations, violence against women, same-sex marriage, gender identity, and the distribution of care and domestic work), this book takes us through a journey from the inception of constitutionalism to the present day and from an exclusionary gender constitutionalism (which denied women equal citizenship) to an inclusive gender constitutionalism (which affirmed their equality measured against male standards that privileged the public realm), to a more recent, and still tentative, form of transformative gender constitutionalism that asserts the political relevance of the private domain and foregrounds the need to disestablish gender roles within it, and which has been facilitated by a participatory turn demanding that women join in constitution-making and that constitutionalism facilitates women’s access to decision-making.

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GLOBAL GENDER CONSTITUTIONALISM AND WOMEN’S CITIZENSHIP

A Struggle for Transformative Inclusion

RUTH RUBIO-MARIN

Universidad de Sevilla
I dedicate this book to Javier Pérez Royo and Reva Siegel for their lifelong teachings, inspiration, and support; to the many women constitution-makers around the world, silenced for centuries in official accounts of the history of constitutionalism; and to the younger generations of scholars, who should not feel that their passion for feminist engagements with constitutional law is marginal to the discipline.
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FOREWORD

The scholarly chasm between feminism and constitutionalism confronts constitutionalists who are also feminists. Ruth and I met over articulations of this chasm. On sharing, our relief was palpable. Given our own distinctive backgrounds (Spain and Canada), we set out to expand existing scholarship about gender analysis of constitutional law by remediating its virtual absence in comparative constitutionalism. Our strategy included an international conference in 2000 that led to the publication of a coedited book in 2005. The contributors to the book relied on our feminist constitutional agenda for their country-specific gender analyses of constitutional jurisprudence. Our theme of gender analysis of comparative constitutionalism reappeared with the publication in 2012 of Feminist Constitutionalism, a book that I coedited and to which Ruth contributed a chapter.

The widespread uptake of these works by feminist constitutionalists amazed me, but their comparative constitutional counterparts did not follow suit. Three Canadian colleagues provided a domestic exception in 2019. They invited Ruth and me to theorize feminist constitutionalism for a handbook on the Canadian constitution. We did not limit our theory to Canadian constitutionalism. Instead, we conceptualized constitutional legitimacy writ large, framing it as dependent on taking women (in their multiple identities including indigenous, immigrant, refugee, and trans women) seriously. Normatively, we argued, taking women seriously means advancing women’s equality rights. Assuming a sizable readership of domestic and other constitutionalists for this fifty-chapter handbook, did the inclusion of our chapter theorizing feminist constitutionalism have the potential to challenge them?

I’d like to think it did. But I have doubts. Feminists have advocated women’s equality as a constitutional right domestically and internationally for decades, if not centuries. Repetitive advocacy, while admirable, suggests the objective is, if not ephemeral or imaginary, unmet. For their part, what do constitutionalists say? Jumping the chasm, they report that women have equality; women do not need equality; women are the
second (or subordinate) sex; or women are the dominant sex. Or, returning to their own side of the chasm, they either excuse equality’s ineffectiveness because it is the most difficult right, the most elusive right, and the least precisely defined right; or, if equality rights are violated, they recite the refrain that no rights are absolute to justify the violation. Therefore, while Ruth and I framed feminist constitutionalism in a normative theory that is true to feminists, it may not resonate with or even reach constitutionalists.

In this new sole-authored book, Ruth has redefined the chasm challenge by moving away from the prevailing reactive narratives to a creative, globally detailed counternarrative. The book develops a creation story, a her-story of comparative constitutionalism that begins with the insight that constitutionalism everywhere was gendered from its inception. It may partially or even fully remain as such. Her objective is to advance possibilities for women’s betterment. Ruth draws on her phenomenal knowledge of many jurisdictions globally to illustrate specific possibilities for changes that are responsive to women’s needs, interests, issues, and rights. She also identifies changes (or failures to change) that hinder women’s lives and adeptly deploys comparison to point out the direction that their remediation might take.

Ruth’s original and distinctive theory advances feminist constitutionalism’s agenda and women’s equality rights by developing two new concepts: gender constitutionalism and periodization. Gender constitutionalism deposes constitutionalism’s most sacred artifact—the distinction between what falls under constitutionalism’s mandate and what does not, which is to say, the domain of constitutional law. Constitutionalists revere this distinction as the gender-neutral public/private divide; feminists critique it as gendered separate spheres. Ruth bridges it by rendering visible its gender performativity. More specifically, she genders the public/private divide by upending constitutionalism’s pretension of recognizing only the public side of the public/private divide. Inviting constitutionalists to explain what features constitutions (the public) use and how they use them to shape—facilitate and hinder—women’s marital and family lives (the private) frames the relations between constitutions and women as gender relations. The public sphere no longer consists of constitutions unmodified. In sum, constitutions are gender constitutions that rely on the public/private divide to entrench a foundational gender order that contemporary constitutionalism seeks to disestablish.

In other words, gender constitutionalism need not be static; it can be performative, an attribute Ruth sculpts as periodization. Performative
periodization realizes the capacity of gender constitutions to change. However, their changes are based not on the temporal stages through which constitutionalism might pass but rather on the forms it might take. Ruth conceptualizes four forms that give shape to periodization, starting with exclusionary gender constitutionalism, that manifested from the birth of written constitutionalism until post–World War II. Based on the role that constitutional law played or plays in women’s citizenship claims, the others are inclusive gender constitutionalism, participatory gender constitutionalism, and transformative gender constitutionalism. Each merits its own chapter rich with details that apply its features to multiple gender constitutions around the world over extended time periods. Reading these chapters is to be treasured for their insights into the myriad ways gender constitutions facilitate or hinder women’s equal citizenship claims.

I highlight some of the valuable insights I found in these chapters. First, its optimism: even before the chapters begin, the table of contents signals the potential for optimism through its conceptual overview of the evocative concepts of exclusionary, inclusive, participatory, and transformative periodization. Second, its realism: the themes of motherhood and abortion, caring, and violence are threaded throughout (Ruth prefers “woven” as a tapestry). Third, its relevance: the very apposite analysis of substantive equality that should prevail. Fourth, its diversity plus: the recognition of identities—multicultural, trans, etc.—pivotal to understanding and essaying resolutions of contemporary controversies. Fifth, its breadth: how generously, comprehensively, and knowledgeably Ruth shared her phenomenal understanding of the ways in which a very broad range of countries address, or not, key constitutional concerns that women contest. Sixth and never least, its goal: proffering resolutions where none seem available to advance women’s plights.

Ruth’s thesis is that gender transformative constitutionalism offers a new emancipatory vision, the disestablishment of patriarchal constitutionalism’s foundational gender order. This vision offers a counternarrative to all forms of human exploitation; it is radical and normatively compelling for feminists and constitutionalists alike. Both would make changes to achieve it, including reevaluating how they frame gender and the private sphere, respectively. If realized, however, they might bring some closure to the immeasurable space, the chasm, that separates them. Ruth has argued brilliantly and compellingly about the importance of trying.

Bev Baines
August 15, 2021
ACKNOWLEDGMENTS

Inevitably, a work that has taken years to produce can only be the result of a collective effort. My family has provided the emotional support system that has always kept me going. Throughout the years, the research assistance of Elena Brodeala, Stefano Osella, Lucrecia Rubio-Grundell, Alba Ruibal, Maria José Schmidt Kessen, and Fulvia Staiano has been of essence. Generous readers of the manuscript have provided precious feedback and reassured me in my interpretation of the various legal orders I address. They include Cristóbal Alvear, Beverley Baines, Stéphanie Hennette-Vauchez, Rory O’Connell, Cara Röhner, and Elettra Stradella. Luigi Celentano has been nothing less than an angel fallen from the sky, assisting me with language edition and the checking of sources. At Cambridge University Press, Finola O’Sullivan, executive publisher in law, deserves a big thank you for not losing trust in this project despite its many delays, as does Marianne Nield, who has supported it upon Finola’s retirement. To all of you, my most sincere gratitude.

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