The Gender of Constitutional Jurisprudence

Edited by

BEVERLEY BAINES and RUTH RUBIO-MARIN

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BEVERLEY BAINES
Queen's University
RUTH RUBIO-MARIN
Universidad de Sevilla

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The Gender of Constitutional Jurisprudence

To explain how constitutions shape and are shaped by women's lives, the contributors to this volume examine constitutional cases pertaining to women in twelve countries. Analyzing jurisprudence about reproductive, sexual, familial, socioeconomic, and democratic rights, they focus constructively on women's claims to equality, asking who makes these claims, what constitutional rights inform them, how they have evolved, what arguments work in defending them, and how they relate to other national issues. Their findings reveal significant similarities in outcomes and in reasoning about women's constitutional rights in these twelve countries, challenging the tradition of distinguishing constitutional jurisprudence depending on whether the country has a written or unwritten constitution, subscribes to civil or common law, is a federal or unitary state, limits constitutional adjudication to the public rather than also including the private domain, accords international norms binding or subject to incorporation force, or relies on a specialized or general court to adjudicate constitutional matters.

Beverley Baines is Associate Professor in the Faculty of Law at Queen's University, Kingston, Ontario, Canada, where she originated the Law Gender Equality and Feminist Jurisprudence courses. Her research interests include issues in constitutional law, feminist legal theory, antidiscrimination law, multiculturalism, and equality rights. She has contributed chapters to *Conversation among Friends – Entre Amies: Women and Constitutional Reform*, *Changing Patterns: Women in Canada*, and *Women and the Constitution*, and she has written articles for major Canadian and international journals.

Ruth Rubio-Marin is Associate Professor of Constitutional Law at the University of Seville, Spain. She is author *of Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* and of articles on language rights, nationality, immigration, and gender in law. She has taught at several North American academic institutions, including Princeton University and Columbia Law School, and is currently a member of the Hauser Global Law School Program at New York University.

List of Contributors

Beverley Baines, B.A. (McGill), LL.B. (Queen's), is Associate Professor in the Faculty of Law at Queen's University, Kingston, Ontario, Canada, where she originated the Women and the Law (now Law Gender Equality) and Feminist Jurisprudence courses. Currently she teaches Public Law, Constitutional Law, and Equality Rights under the Charter in the Faculty of Law, as well as Law and Public Policy in the School of Public Policy. She is cross-appointed to the Department of Women's Studies where she was Coordinator, 1991–3. Her research interests include issues in constitutional law, feminist legal theory, antidiscrimination law, multiculturalism, and equality rights. She has published articles in Canadian and international journals, as well as contributing chapters on women and constitutional law to *Conversations among Friends – Entre Amies: Women and Constitutional Reform*, *Changing Patterns: Women in Canada*, and *Women and the Constitution*.

Hilal Elver is Distinguished Visiting Professor at the UCSB Global and International Studies Program. She was adjunct Professor of Comparative Law at Rutgers University School of Law, Newark, NJ. She earned her bachelor degree in Law and her Ph.D. in Law from the University of Ankara, School of Law in Turkey, where she taught Roman Law, Comparative Law, International Environmental Law, and Legal Status of Women until 1993. In the 1990s, the Turkish government appointed her as the Legal Advisor to the Ministry of Environment, then as the Legal Advisor and the General Director of Women's Status under the auspices of the Prime Ministry. In 1994–6, she taught environmental diplomacy as the UNEP Chair at the Mediterranean Academy of Diplomatic Studies in Malta. She was a Fulbright Scholar at the University of Michigan School of Law in 1993 and Visiting Fellow at the Center of International Studies at Princeton University in 1997. She has published several articles on environmental law and women's issues in Turkey. Recently, she published a book entitled *Peaceful Uses of International Rivers: The Case of Euphrates and Tigris Rivers* (Transnational Publishers).

Alda Facio is a jurist, writer, and international expert on gender and women's human rights. She has been a visiting professor on women's human rights in several universities in Spain and Latin America. In 1997, she co-founded the Women's Caucus for Gender Justice in the International Criminal Court and became its first director. In 1996, she received the first Women's Human Rights Award from Women, Law and Development International. Since 1990, she has been the Director of the Women, Justice, and Gender Program at the Latin American United Nations Institute for Crime Prevention (ILANUD). She designed a methodology for analyzing the law and legal traditions from a gender-sensitive perspective, which is in its fifth edition. She also has been a judge in the District Court of Guadalupe in Costa Rica, the Founder and General Director of the Costa Rican National Dance Company, a professor of Roman Law at the Law Faculty of the University of Costa Rica, and for six years she was the Costa Rican Alternate Delegate to the United Nations Offices in Geneva.

Ran Hirschl is an assistant professor of political science at the University of Toronto. His primary areas of interest are comparative public law, constitutional rights, and judicial politics. He holds bachelor's, master's, and LL.B. degrees from Tel-Aviv University, as well as a master of arts, master of philosophy, and a Ph.D. from Yale University. He has published extensively on comparative constitutional law and politics in journals such as *Law & Social Inquiry*, *Comparative Politics*, *Human Rights Quarterly*, *American Journal of Comparative Law*, *University of Richmond Law Review*, *Stanford Journal of International Law*, and *Canadian Journal of Law and Jurisprudence*, as well as in several acclaimed edited volumes. He is the author of *Towards Juristocracy: A Comparative Inquiry into the Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2003).

Saras Jagwanth is a senior lecturer in the Department of Public Law at the University of Cape Town, where she teaches Constitutional and Administrative Law. She has a special interest in equality law. She has published in this area and is the coeditor of a volume on *Women and the Law* (HSRC Press).

Rodrigo Jiménez Sandoval is a Costa Rican lawyer and consultant specializing in the rights of people with disabilities and women's rights. He studied Law at the University of Costa Rica and since 1984 has been Professor of the International Law course at the Autonomous Central American University (UACA). He also has a degree in Education, and a Master's in Business. For more than ten years he has worked as legal advisor for many Costa Rican NGOs, including the Helen Keller Association, the Down Syndrome Association, and the Costa Rican Association of Handicapped People. He has also been a board member of the National Rehabilitation Council and of the National Rehabilitation Patronate. For eight years he served as an international consultant for the Inter-American Institute of Human Rights

(IIHR). He has also worked for the United Nations Development Program (UNDP), the World Bank, and the Fundación Arias para la Paz y el Progreso Humano. Since 1995, he has been Sub-Director of the Women, Justice, and Gender Program of ILANUD. He has written various books and many magazine articles on persons with disabilities and women's rights.

Isabel Karpin, B.A./LL.B. (Sydney), LLM. (Harvard), JS.D. (Columbia), is a senior lecturer at the University of Sydney, Faculty of Law. She specializes in the areas of feminist legal theory, constitutional law, law and culture, and health law. Her doctoral work at Columbia University, entitled *Embodying Justice: Legal Responses to the Transgressive Body*, examined the regulation of marginalized bodies, with a particular focus on the pregnant woman. With Professor Martha Fineman of Cornell Law School she coedited *Mothers in Law*, as well as publishing several book chapters and articles in both international and Australian journals. She is currently involved in two major research projects in the areas of new media and regulation of emergent genetic technologies.

Eric Millard is Professor of Legal Theory and Public Law at the University of Paris-Sud. His interests include legal epistemology, theory of the state, human rights, social politics, and gender and law. He is the author of *Famille et droit public* (Librairie générale de droit et jurisprudence, Paris, 1995) and coauthor of several books, including *La Parité, enjeux et mise en oeuvre* (Presses universitaires du Mirail, 1998). He has written articles dealing with family law, constitutional law, social law, and legal theory. A graduate of Toulouse University, he holds a Ph.D. in public law from Lyon University (1994). He has been a professor at the Universities of Saint-Etienne, Toulouse, and Perpignan and a member of the Institut Universitaire de France. He gave lectures or courses at the Universities of Helsinki, Oslo, Copenhagen, Tallinn, Bologna, Casablanca, Baltimore, Montréal, and Queen's, as well as at many French universities.

Martha I. Morgan is the Robert S. Vance Professor of Law at the University of Alabama School of Law, teaching courses in constitutional law, civil rights legislation, comparative constitutional law, and gender and sexuality law. She received a B.S. from the University of Alabama and a J.D. from the George Washington University National Law Center. She has carried out research on women and constitution-making in Colombia and Nicaragua, as well as examining other law reform efforts by women in Costa Rica, Guatemala, and Nicaragua. Recently, her research has focused on the emerging gender jurisprudence in Latin America and on the domestic incorporation of gender rights contained in international human rights law. She serves as a consultant to the Women, Justice, and Gender Program of the United Nations Latin American Institute for the Prevention of Crime and Treatment of Delinquency in San José, Costa Rica, and to the Tigray Women's Law

Project of the Mekelle University Faculty of Law in Mekelle, Ethiopia. She also serves on the boards of directors of the Equal Justice Initiative of Alabama and the American Civil Liberties Union of Alabama.

Christina Murray is Professor of Constitutional and Human Rights Law at the University of Cape Town and Deputy Dean of the Law Faculty. Between 1994 and 1996, she served on a panel of seven experts advising the South African Constitutional Assembly in drafting the "final" Constitution. She has taught and written on the law of contract, human rights law (and particularly issues relating to gender equality and African customary law), international law, and constitutional law. She is the director of the Law, Race, and Gender Research Unit at the University of Cape Town. The Unit is concerned with judges' education on matters relating to race, gender, and cultural diversity.

Martha C. Nussbaum is Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago, appointed in the Philosophy Department, Law School, and Divinity School. She is an Associate in the Classics Department, a member of the Board of the Human Rights Program, and an Affiliate of the Committee on Southern Asian Studies. She is the founder and Coordinator of the new Center for Comparative Constitutionalism. Her most recent books are *Upheavals of Thought: The Intelligence of Emotions* (2001) and *Women and Human Development: The Capabilities Approach* (2000).

Karen O'Connell is a human rights lawyer with degrees in law and humanities from the University of Sydney. She is a doctoral candidate at Columbia University School of Law and currently holds an Audrey Harrison Commemorative Fellowship from the Australian Federation of University Women. Her research interests include feminist theory, technology, and human rights.

Ruth Rubio-Marin is Associate Professor of Constitutional Law at the University of Seville, Spain. She is author of *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press, 2000) and coauthor of *Mujer e Igualdad: la norma y su aplicación* (*Women and Equality: The Norm and Its Application*) (Instituto Andaluz de la Mujer, 1999) and of several articles on language rights, nationality, immigration, and gender in the law. She has taught at different North American academic institutions, including Princeton University and Columbia Law School, and she is currently part of the Hauser Global Law School Program at New York University.

Blanca Rodríguez Ruiz is a lecturer in constitutional law at the University of Seville, Spain. She received her Ph.D. in law from the European University Institute (Florence, Italy) and enjoyed a long postdoctoral research stay in Frankfurt am Main (Germany). Her work takes a discourse-theoretical approach to constitutional rights and gender equality issues. Her publications

include "Discourse Theory and the Addressees of Basic Rights," in *Rechtstheorie*, vol. 32 (2001), pp. 87–133; "Familia e igualdad entre los sexos en el Estado Constitucional: una mirada crítica al Estado alemán," *Revista de la Facultad de Derecho de la Universidad de Granada*, vol. 4 (2001), pp. 311–40; "The Right to Privacy: A Discourse-Theoretical Approach," *Ratio Juris*, vol. 11 (1998), pp. 155–67; and *Privacy in Telecommunications: A European and an American Approach* (The Hague: Kluwer Law International, 1997). She recently visited at the Gender Institute in the London School of Economics.

Ute Sacksofsky is a Full Professor of Public Law and Comparative Public Law at the University Frankfurt a.M., Germany, since 1999, serving also as codirector of the Cornelia-Goethe-Center for Gender Studies. She served as law clerk to Justice Böckenförde at the Federal Constitutional Court (*Bundesverfassungsgericht*) from 1991 to 1995, having received her doctorate in law from the University of Freiburg in 1990, her Master of Public Administration from Harvard University in 1986, and her law degree from the University of Freiburg in 1983. Awarded various prizes and scholarships, she has been a legal expert in various hearings before Parliament and she has written extensively on gender and law (especially with respect to the constitutional guarantee of equality).

Ayelet Shachar is an assistant professor of law at the Faculty of Law University of Toronto. She has written extensively on group rights, gender equality, citizenship theory, and immigration law. She is the author of the award-winning book *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001). Her recent publications appear in the *Cardozo Law Review*, *Georgetown Immigration Law Journal*, *Harvard Civil Rights–Civil Liberties Law Review*, *Journal of Political Philosophy*, *NOMOS*, and *Political Theory*, as well as several acclaimed edited volumes. Professor Shachar holds bachelor's degrees in law and political science and master's and doctoral degrees in law from Yale University. She served as law clerk to Deputy Chief Justice Aharon Barak of the Supreme Court of Israel. She is a past member of the Institute for Advanced Study at Princeton, and a current Fellow of the Institute for Women's Studies and Gender Studies at the University of Toronto.

Reva B. Siegel is Nicholas deB. Katzenbach Professor of Law at the Yale Law School. A graduate of the Yale Law School, Professor Siegel began her teaching career at the University of California at Berkeley and has been a member of the Yale faculty since 1994. She teaches constitutional law, anti-discrimination law, and legal history. Professor Siegel draws on legal history to explore contemporary questions of civil rights, and she has written on topics including the regulation of abortion, domestic labor, domestic violence, sexual harassment, and a variety of questions concerning the law of race

discrimination. Much of this work situates law in a sociohistorical account of status inequality – demonstrating how the understandings and practices that sustain social stratification vary by group and evolve as contested over time. Professor Siegel is now working on a series of projects concerning popular constitutionalism and legislative enforcement of constitutional rights that challenge the new federalism restrictions the Court is imposing on Congress's power to enact civil rights legislation.

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Like most of its kind, this project is the result of many joint efforts. It initially was conceived in a series of informal meetings held between the coeditors during Ruth Rubio-Marin's research stay at Queen's University in Kingston, Ontario. That stay was made possible by a Fellowship from the Canadian Embassy in Madrid, Spain. The idea was to hold a small conference and a series of workshops and internal sessions to discuss the themes and the structure that a gender focused book on comparative constitutional jurisprudence ought to have. This gathering took place in June 2000, and for their funding contribution we thank the Law Foundation of Ontario, the Office of Research Services at Queen's University, the Department of Constitutional Law in the University of Seville, and, above all, the Spanish Ministry for Social Affairs and the Foundation "El Monte." Finally, for their contributions in bringing the volume to fruition, we are pleased to recognize the insightful comments of Cambridge University Press's readers, the editorial support of Lewis Bateman at the Press, and Nigel McCready and Sharron Sluiter for their technical assistance at Queen's.

Beverley Baines, Kingston, Ontario
Ruth Rubio-Marin, Sevilla
October 2003

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Contents

Introduction

Toward a Feminist Constitutional Agenda

Beverley Baines and Ruth Rubio-Marin

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 conflicts[9] 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