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## Introduction: A Public Law of Gender?

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## Introduction: A Public Law of Gender?

Kim Rubenstein & Katharine Young\*

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### Introduction

The formal recognition of gender, as a category of public law, has swept the world. 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 guaranteed 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.<sup>1</sup> Measures to ensure the

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<sup>1</sup> 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.oup.com.proxy.bc.edu> (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).

equal participation of women and men in political and public decision making have been introduced in one hundred states and constitutionally entrenched in fifteen.<sup>2</sup>

With 5-10 constitutions due for design and redesign each year,<sup>3</sup> 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”,<sup>4</sup> 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 post-date the Convention on the Elimination of Discrimination against Women (‘CEDAW’), adopted by the United Nations General Assembly in 1979.<sup>5</sup> Half of the world’s new constitutions have been drafted since 1974, with significant outside influence.<sup>6</sup> Initiatives for ‘gender mainstreaming’ and ‘women’s empowerment’ have – at least formally – occupied international organizations since 1995,<sup>7</sup> 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 other gender-recognition or human equality-based movements),<sup>8</sup> they are also the result of other transnational forces, including economic liberalization, by which countries revise their systems of governance in order to secure foreign approval and capital and/or a higher ranking of development.<sup>9</sup>

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<sup>2</sup> Quota Project, *Global Database of Quotas for Women* (2015) [www.quotaproject.org](http://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.

<sup>3</sup> Russell on Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012).

<sup>4</sup> Blanca Rodríguez-Ruiz & Ruth Rubio-Martin, ‘On Parity, Interdependence, and Women’s Democracy’, in *Feminist Constitutionalism: Global Perspectives* 188, 203 (Beverley Baines et al. eds., 2012).

<sup>5</sup> Note the Convention on Political Rights of Women 1950. 189 of 197 member states of the UN are states parties to CEDAW. The US is signatory only.

<sup>6</sup> Helena Alviar García, ‘Gender Structures and Constitutional Law’, in Gunter Frankenberg, *Order from Transfer: Comparative Constitutional Design and Legal Culture* (2013), x.

<sup>7</sup> Beijing Conference

<sup>8</sup> See, eg, Elizabeth Katz, *Women’s Involvement in International Constitution-Making*, in *Feminist Constitutionalism: Global Perspectives* 204, 219 (Beverley Baines et al. eds., 2012).

<sup>9</sup> Kerry Rittich, ‘The Properties of Gender Equality’, in Philip Alston & Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 87, 91-3; see further Gráinne De Búrca, Claire Kilpatrick & Joanne Scott (eds), *Critical Legal Perspectives on Global Governance* (2014). For a

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-cognizant, public laws, one question recurs – has this widespread legal reform led to real change? Women, in particular, continue to experience an array of gender-based 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 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 justice or 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 a gap in *enforcement*: just as international law exists famously without a centralized enforcement mechanism, so too does domestic constitutional law lack the guarantee of enforcement, even, it might be argued, in systems with judicial review.<sup>10</sup> The breach of a formal guarantee of gender equality, for example, may lack sanctions at both the international level (where, for

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discussion of the links between the ‘good governance’ project and gender equality, see Sharon Bessell’s chapter, below; Kate Wilkinson.

<sup>10</sup> Jack Goldsmith & Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’, (2009) 122 Harvard Law Review 1791, 1822-1840.

example, the CEDAW Committee provides recommendations only)<sup>11</sup> 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.<sup>12</sup> 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,<sup>13</sup> 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.<sup>14</sup>

The second is a gap in *sincerity*. International treaties, especially the foundational human rights covenants, have always attracted the criticism of window dressing, as states are free to ratify treaties without making any reforms in domestic law.<sup>15</sup> A similar criticism has been made about the phenomenon of ‘sham constitutions’, whereby countries

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<sup>11</sup> See, e.g., Andrew Byrnes, ‘The Committee on the Elimination of Discrimination Against Women’ in Anne Hellum andHenriette 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).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> 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.

<sup>15</sup> Emilie M. Hafner - Burton and Kiyoteru Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, (2005) 110 *American Journal of Sociology*, pp. 1373-1411

regularly violate the very rights that their constitutions purport to guarantee.<sup>16</sup> 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.<sup>17</sup>

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 said to be 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,<sup>18</sup> or through permitting far-reaching reservations in international human rights law that do the same,<sup>19</sup> the 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.<sup>20</sup>

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

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<sup>16</sup> David S. Law and Mila Versteeg, *Sham Constitutions*, 101 *Cal. L. Rev.* 863 (2013).

<sup>17</sup> [Ibid](#) (noting differences in respect paid to, for example, death penalty prohibitions and economic and social rights).

<sup>18</sup> See chapters by Vijaya Nagarajan and Archana Pasharar, Greenfell.

<sup>19</sup> Document problem of reservations to CEDAW on religious and customary grounds.

<sup>20</sup> 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).

in action.<sup>21</sup> 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.

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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 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 headers 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 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';<sup>22</sup> nonetheless, it is a powerful construct, based on perceived differences between the sexes, that has served to

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<sup>21</sup> Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

<sup>22</sup> 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

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.<sup>23</sup> 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’.<sup>24</sup> One chapter interrogates the harm caused by formal rules of gender discrimination on men as fathers;<sup>25</sup> others include perspectives that analyse gender-based harms on both women and on certain groups of men;<sup>26</sup> and another chapter examines more completely the harm of gender-based assumptions on gender-variant persons.<sup>27</sup>

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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.

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> Collins, above [n 16](#), 73.

<sup>26</sup> 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.

<sup>27</sup> See further Rohan Kapur and Kellin Kristofferson, ‘A Gender Critique of Accountability in Global Administrative Governance’, 514.

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.<sup>28</sup> 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;<sup>29</sup> 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;<sup>30</sup> and of women’s organisers in Colombia, whose gendered disadvantage cannot be divorced from their experience of extreme poverty and insecurity.<sup>31</sup> 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.

## 2.2 Defining Public Law

Public law has a long history of supporting the ‘legalized subordination’ of women; as well as their invisibility. Public law is primarily concerned with the relationship between individuals and the state, and between the state and other government actors. This book

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<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> Beverley Baines, ‘Polygamy: Who Speaks for Women?’, 219, in this volume.

<sup>31</sup> 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.

explores both explicitly gendered public laws, such as equality guarantees (predominantly expressed in relation to sex or gender<sup>32</sup>), 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.<sup>33</sup> 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.<sup>34</sup> 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’.<sup>35</sup>

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 the ‘horizontal effect’ of public laws and require private individuals and groups to respect the constitutional rights and principles expressed in the public sphere.<sup>36</sup> While the ‘state action’ doctrine in the United States and Canada, for instance, reserves the application of the Constitution to cases involving state-

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<sup>32</sup> See text accompanying above [n 2](#).

<sup>33</sup> Frances E Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) **96** *Harvard Law Review* 1497.

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> See, e.g., Dawn Oliver and Jorg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2009).

individual interactions, there is nevertheless scope in those jurisdictions to develop the common law indirectly, in line with constitutional principles.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

Moreover, the very shift from government to governance that is evident in other chapters<sup>41</sup> 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,<sup>42</sup> militaries<sup>43</sup> 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 association or group, the

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<sup>37</sup> 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.

<sup>38</sup> See, e.g., Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter, 2014).

<sup>39</sup> 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).

<sup>40</sup> 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](#).

<sup>41</sup> E.g., Bessell, above [n 10](#); see further Jody Freeman, ‘The Private Role in Public Governance’ (2000) *75 NYU Law Review* 543.

<sup>42</sup> Allen, above [n 38](#).

<sup>43</sup> Harris Rimmer, above [n 28](#).

less likely public laws should be able to access it.<sup>44</sup> Yet this normative assumption, too, requires critical examination. How ‘family-like’ are indigenous communities in Western settler states,<sup>45</sup> polygamous unions in multicultural states<sup>46</sup> or traditional communities living under constitutionally prescribed customary law?<sup>47</sup> Attempts to prohibit gender discrimination in these communities are complicated by exceptions carved out for religious freedom, cultural rights or privacy in the previously described coverage terms.

The private sphere continues to be legally insulated in many parts of the world, and private subordination usually corresponds with subordination in the public sphere. As we shall see, public laws to end subordination may sometimes increase women’s experiences of subordination in the home and community.<sup>48</sup> Such dynamics are complicated by the public recognition of religious and customary laws, including trends in accommodation, access to courts, and the codification of custom.<sup>49</sup> While this is not true for all places, the traditional feminist contestations between sameness and difference, or essentialism and pluralism, have very different political valences in such places.<sup>50</sup>

### 2.3 From the Local to the Global

This insight complicates the local/global frame that this book incorporates. While transcending boundaries has been a central trope of feminist analysis,<sup>51</sup> the borders of states, and the sorting of regions (such as the Global North and the Global South, the core and the periphery, the developed and the developing world<sup>52</sup>), and the distinction

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<sup>44</sup> Gover, above [n 38](#); Olsen, above [n 37](#).

<sup>45</sup> Gover, above [n 38](#).

<sup>46</sup> Baines, above [n 32](#).

<sup>47</sup> Susan H Williams, ‘Customary Law, Constitutional Law and Women’s Equality’, 123, in this volume.

<sup>48</sup> Sari Kouvo and Corey Levine, ‘Law as a Placeholder for Change? Women’s Rights and Realities in Afghanistan’, 195, in this volume; see also Nicola Lacey, ‘Feminist Legal Theory and the Rights of Women’ in Karen Knop(ed), *Gender and Human Rights* (Oxford University Press, 2004) 13–55.

<sup>49</sup> Williams, above [n 51](#).

<sup>50</sup> Nagarajan and Parashar, above [n 20](#).

<sup>51</sup> Martha Albertson Fineman, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge, 2011).

between domestic and international laws, maintain a powerful hold as categories of study. This book invites attention to the public law recognition of gender across all of these sites. Of course, this goal must be reflective of how the uneven effect of historical processes and ideologies (such as colonialism, racism and industrialisation), different religious and cultural morality and sexuality codes, and current geopolitical and economic power, continue to perpetuate differences – of both degree and kind – in the experience of gender inequality in various parts of the world. This book therefore proceeds with attention to the local as well as the global – exposing diverse conceptions of gender equity, gender equality, parity and other gender-cognisant laws in different sites.

Attention to these processes requires an explicitly global/local perspective, which reviews the gender-related developments (and omissions) in subnational and transnational laws and their influence on domestic lawmaking and substantive laws. Certainly, the frame of human rights is one that is peculiarly suited to incorporating transnational, international and national laws and interactions.<sup>53</sup> Constitutions that incorporate international law directly also prompt an inclusive study.<sup>54</sup> The following chapters broaden the perspective of comparative constitutional law and human rights by highlighting what is captured by a gendered analysis when fields of international and public law are brought together. These include the usual areas in which a global perspective is taken, but that impact on gender

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<sup>52</sup> Eg Loveday Hodson, *Women's Rights and the Periphery: CEDAW's Optional Protocol*, 25 *Eur. J. Int'l L.* 561 (2014) 25 *European Journal of International Law* 561; D Bonilla Maldonado (ed), *Constitutionalism of the Global South* (Cambridge University Press, 2013)(presenting India, South Africa and Colombia as case studies that illustrate post-colonial constitutionalism, while not seeking to carve out a comprehensive and distinctive framework for a constitutionalist approach of the Global South); see also Penelope Andrews, *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights* (Ashgate, 2012) 19, 80 (rejecting a monolithic 'us' and a monolithic 'them' while suggesting that non-elite women from the Global South may have more in common with each other than with elites in the South and women in the North).

<sup>53</sup> E.g., Knop (ed), above [n 52](#); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006); Cook (ed), above [n 39](#).

<sup>54</sup> This interplay is illustrated well by Vicki Jackson's bookended chapters in this volume: compare Jackson, 'Feminisms and Constitutions', above [n 16](#), with Jackson, 'Feminisms, Pluralism and Transnationalism: On CEDAW and National Constitutions', 437, later in this volume. For example, Argentina's Constitution not only recognises the force of international law, but expressly names CEDAW, along with other human rights conventions, in its text: Article 75(22).

in sometimes unexpected ways (human rights, migration, international economic law and international criminal law), as well as other highly visible areas of globalised law and their less commented-upon impact on gender (post-conflict constitutions, environmental law, governance and development), to less visible areas of globalised law and their impact on gender (family law and polygamy, poverty measurement, employment law in international organisations and military law).

### 3 Intersecting Observations on Public Law

This book is situated in a number of intersecting literatures. While the study of the configuration of gender in public law – and the exclusion of women from the very origins of the state – has been a vigorous one in particular domestic contexts,<sup>55</sup> this book also stands on the shoulders of a number of recent works in comparative constitutional law that have drawn attention both to the distinctive treatments of gender in comparative constitutional jurisprudence<sup>56</sup> and the importance of gender categories in constitutional design.<sup>57</sup> These studies have challenged the gendered nature of constitutional principles, including the traditional sidelining of central issues of concern for women, such as reproductive rights, economic and social rights, the regulation of group rights of minorities as core principles and the traditional liberal distinction between public and private realms.<sup>58</sup>

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<sup>55</sup> See, e.g., Mary Wollstonecraft, *A Vindication of the Rights of Woman* (first published 1790, 1998 ed); Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); Carole Pateman, *The Sexual Contract* (Stanford University Press, 1988).

<sup>56</sup> Beverley Baines and Ruth Rubio-Marín (eds), *The Gender of Constitutional Jurisprudence* (Cambridge University Press, 2005); Baines et al. (eds), above [n 3](#).

<sup>57</sup> Williams (ed), above [n 5](#); Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008); Paula A Monopoli, 'Gender and Constitutional Design' (2006) **115** *Yale Law Journal* 2643; see also Linda C McClain and Joanna L Grossman (eds), *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge University Press, 2009).

<sup>58</sup> E.g., Baines and Rubio-Marín, above [n 60](#).

These works expand the accelerating field of comparative constitutional law,<sup>59</sup> and its attention to the migration of public law ideas across the world.<sup>3260</sup> Gender equality is one such idea, and has taken flight along with many of the same processes of borrowing and transplants that have been germane to other trends.<sup>61</sup> It is clear that networks of transnational women's and human rights activists have been important agents for these migrations,<sup>62</sup> in ways that may be quite distinct from the ensemble of constitutional ideas understood as 'generic' constitutional law.<sup>63</sup> As a historical matter, efforts to challenge the configuration of gender roles have often involved an appeal beyond the nation-state, with opponents coining their arguments in terms of the 'jurisdictional proprietary of leaving issues of gender to the nation-state'.<sup>64</sup> At this juncture, the insights learned from feminist approaches to international law help to clarify what is particularly untransplantable about such norms, as opposed to other human rights.

Indeed, recent empirical studies of state lawmaking suggest that the recognition of women's rights (post the initial stage by early adopters of women's suffrage) correlates less with domestic political conditions than with international 'contagion' effects.<sup>65</sup> Non-conformist states 'joined the bandwagon' against domestic violence, for example, 'despite dramatic differences in women's political power or access to economic resources

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<sup>59</sup> Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012), Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (2011); Sujit Choudry, *Constitutional Design in Divided Societies* (Oxford University Press, 2008),

<sup>60</sup> Sujit Choudry (ed), *The Migration of Constitutional Ideas* (2006); Frankenberg, above.

<sup>61</sup> Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2009). Vlad Perju, *Transplants*

<sup>62</sup> Catherine Eschle, *Making Feminist Sense of the Global Justice Movement* (Rowman and Littlefield Publishers, 2010); Sarah Henderson and Alana S. Jeydel, *Women and Politics in a Global World* (Oxford University Press, 2d ed, 2010); and Shirin M. Rai and Georgina Waylen, *Global Governance: Feminist Perspectives* (Palgrave Macmillan, 2008).

<sup>63</sup> David Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652; see also Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harvard Journal of International Law* 61.

<sup>64</sup> Resnik, above n 22, 1589 (citing Elizabeth Maddock Dillon, *The Gender of Freedom: Fictions of Liberalism and the Literary Public Sphere* (Stanford University Press, 2004), but also noting that no single level – 'the international, the transnational, the national, or the local – can be an ongoing source of any particular political stance': at 1670).

<sup>65</sup> Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

at the national level'.<sup>66</sup> Others inquire into how active women's movements during periods of transition have been 'unable to translate the importance of their activism ... into greater gains in the immediate post-transition period'.<sup>67</sup> These dynamics reveal stark questions about whether women's power and women's preferences have now surfaced in these places or have instead been coopted and sidelined by the global 'gender agenda'.

The question of origins has been posed explicitly by legal scholars critical of the rise of 'governance feminism'.<sup>68</sup> Tracking the apparent increase of influence by women's rights advocates within the international lawmaking field, these scholars have together explored the suggestion that 'feminism rules' and has become responsible as a 'wielder of power' in governance.<sup>69</sup> Under this lens, they describe a new feminist influence in lawmaking processes, such as the drafting of the *Statute of the International Criminal Court* (the *Rome Statute*) and its successful incorporation of rape as an international crime.<sup>70</sup> Yet while the accomplishments of governance feminism may be seen as a gain for women, the regime's focus on crime, punishment and victims also counts as a loss in terms of what forms of women's agency are excluded or denied. Indeed, these authors suggest that recent international successes for women have privileged only certain 'variants' of feminism – 'carceral' feminism (with an undue focus on criminalisation), radical feminism (with an undue focus on subordination) and liberal feminism (with Western imperial overtones and a blindness to power).<sup>71</sup>

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<sup>66</sup> Goodman and Jinks, above [n 69](#), 66–7 (reflecting on the convergence of women's rights).

<sup>67</sup> Georgina Waylen, 'Gendered Institutional Analysis: Understanding Democratic Transitions' in Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave Macmillan, 2011), 147, 154–6 (citing the Chilean case as an example of this phenomenon before applying it to eight other transitions).

<sup>68</sup> Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) *29 Harvard Journal of Gender and Law* 335.

<sup>69</sup> Janet Halley, 'Taking a Break from Feminism' in Knop (ed), above [n 52](#), [57](#), [65](#)

<sup>70</sup> Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', *30* (2008) *Michigan Journal of International Law* 1.

<sup>71</sup> Janet Halley et al., 'Introduction', in *Governance Feminism* (forthcoming) (copy on file with author).

Claims of ‘governance feminism’ have generated healthy reflection within feminist approaches to international law;<sup>72</sup> while welcome, however, some of the most pointed criticisms of those writing against ‘governance feminism’ (such as those relating to the excessive focus on criminalisation and undue spotlight given to sex trafficking in international law) have been too particular to describe the whole of international lawmaking, in which feminist power is in short supply.<sup>73</sup> Moreover, these and other criticisms of the missteps and unintended consequences of gender advocacy are, regrettably, not new.<sup>74</sup> Certainly, the goal of gender equality has been coopted by various other projects – nationalism,<sup>75</sup> socialism<sup>76</sup> and most pressing now, neoliberalism and securitisation.<sup>77</sup> The authors of this book give pause to any sense of feminist ‘triumph’ in international and public lawmaking. Yet our critical understandings of the attendant failures rest on different conclusions: the feminist, humanist or equality-based ideals pursued by such advocates should be open to self-reflection, not abandonment.<sup>78</sup>

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<sup>72</sup> E.g., Hilary Charlesworth, ‘Talking to Ourselves? Feminist Scholarship in International Law’ in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law* (Hart, 2011) 17.

<sup>73</sup> Otto, above [n 66](#).

<sup>74</sup> E.g., Ratna Kapur, ‘Travel Plans: Border Crossings and the Rights of Transnational Migrants’ (2005) **18** *Harvard Human Rights Journal* 107, 113 (describing one part of the anti–sex trafficking movement’s ‘targeting of migration from the south, promotion of a highly conservative moral agenda, and a denial to sex workers and other migrants of their right to work, family, and mobility’); Resnik, above [n 22](#), 1660–6 (noting the exportation of American antiprostitution policy).

<sup>75</sup> E.g., Crenshaw, above [n 30](#), 162, citing Kumari Jayawardena, *Feminism and Nationalism in the Third World* (Third World, 1986).

<sup>76</sup> Huong Nguyen, ‘Equality Without Freedom? Political Representation and Participation of Women in Vietnam’, 318, in this volume.

<sup>77</sup> Bessell, above [n 10](#), 273; see also Penny Griffin, ‘Gender, Governance and the Global Political Economy’ (2010) **64** *Australian Journal of International Affairs* 86.

<sup>78</sup> Examples include Nagarajan and Parashar’s exhortation for self-reflexivity, above [n 20](#), 171, 179; Jackson’s endorsement of feminist pluralism, above [n 58](#), 437; and the evaluative perspective taken by Kouvo and Levine, above [n 52](#), 216.

## Outline

We have divided the book into six parts, reflecting different aspects of the interaction between public law and gender, as well as different diagnoses and solutions to the problem of gender inequality. Thus we travel from issues of constitutional law and comparative constitutional design, to a study of participation and voice through law, and then to an interrogation of governance laws, including representation and gendered measures, and equality and non-discrimination. Finally, we turn to the public laws that operate at the level of global governance.

In order of appearance, these chapters encompass the constitutions and other public laws of the U.S., Colombia, South Sudan, India, Vanuatu, South Africa, Timor-Leste, Kosovo, Afghanistan, Canada, Malawi, New Zealand, Vietnam, and Australia. These chapters deliberately expand our analysis from the ‘usual suspects’ of comparative constitutional study.<sup>79</sup> The final part of the book deals more explicitly with various transnational and international sites of laws and lawmaking, such as in the CEDAW Committee, the International Criminal Court, the International Labour Organization, and the United Nations Conference on Sustainable Development. , It will be clear that global-local interactions pervade every aspect of this study.

### PART I CONSTITUTIONAL DESIGN AND GENDERED OUTCOMES

The application of feminist insight into constitutional design is complex: even with agreed-upon conceptions of gender equality, there is no, single right way to order and reorder constitutions to fulfill these conceptions. Adopting a perspective useful for different constitutional polities only complicates this further. The three chapters in this part interrogate how framework issues of constitutional design contribute to, and constrain, gendered outcomes. These framework issues include equality rights – equality

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<sup>79</sup> **Ran Hirschl**, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014)4 (noting overlooked regions, including Sub-Saharan Africa to Central and Southeast Asia).

before the law, non-discrimination on the basis of sex and gender, and more substantive ideas of gender equality. Moreover, a host of structural and institutional design features, that include gender ‘agnostic’ (facially neutral) and gender ‘cognizant’ prescriptions, can drive particular gender outcomes. These findings are elicited in ways that utilize the idea of a ‘gendered constitutional audit’,<sup>80</sup> to include analysis of how more general structural issues, such as access to court, or court-government relations, may configure particular gender outcomes.

In her opening chapter on ‘Feminisms and Constitutions’, Vicki Jackson draws on both new and traditional ideas of constitutional design to outline a range of features that constitutions might have, in order to reflect ‘feminist’ or ‘gender-equal’ aspirations and outcomes.<sup>81</sup> Rather than suggesting a single, right, feminist, answer, Jackson is sensitive to the plural, diverse and contingent effects of (varied) feminist thinking in (varied) constitutional contexts. Thus, she emphasizes certain *process* conditions for constitutional design or constitutional reform, including the relatively equal involvement of women and men, from different sectors of life, geography, occupation, ethnic or religious affiliation, and class; a process informed by a recognition of the need to address persistent “gendered disadvantages to both men and women, but on the whole more to women”.<sup>82</sup>

Such a process, Jackson suggests, might benefit from the consideration of a range of constitutional features and their impact on gender. Most obvious, she suggests, is the inclusion of rights – to equality, to non-discrimination, to affirmative measures and to economic and social rights such as health (including reproductive health), education and non-violence. Rights, she notes, do not only belong in the realm of what is prohibited on the part of government; they may also raise the question of what is permitted and what is required. The extension of positive duties on the part of the state – including into the

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<sup>80</sup> Irving, above [n 61](#), 13, 167 (making the historical note, too, that ‘gender auditing a constitution is hardly a new idea’).

<sup>81</sup> Jackson, above [n 16](#).

<sup>82</sup> [Ibid](#), 43.

private realm - is a fundamental question in contemporary constitutional theory and reflects particularly on gender outcomes. For example, how such positive duties are framed without perpetuations of stereotypes or the elicitation of backlash is a challenging issue, and one that is resolved very differently in various gender-equal constitutions.

A particularly striking suggestion made in this vein is Jackson's idea of a constitutional ban on patriarchy: a constitutional provision that would leave room for interpretive development, and extend current prohibitions on discrimination into other invidious private social practices of oppression and subordination, much like a ban on slavery in the U.S. Constitution, or untouchability in the Indian Constitution. This intriguing suggestion reflects Jackson's view of constitutions as laws made for the long term; as well as her nuanced view of constitutional language. Other points of focus include voting rights and their exercise, the representation of women in government, legislative voting and rules, as well as constitutional-structure questions relating to executive and legislative power, federalism, consociations, enforcement, forms of constitutional engagement with international law, and indeed the very rules of constitutional amendment, which each configure certain gender outcomes in identified – and under-identified – ways.

Each of these questions of constitutional-structure is worthy of a more focused study: and indeed, this is what Kristin Collins is able to do in her analysis of enforcement and underenforcement in the context of gender equality in U.S. nationality law.<sup>83</sup> This revealing chapter explores the continued gender asymmetries in federal citizenship statutes, which draw a distinction between the fathers and mothers of children born abroad whose parents are unmarried: while American mothers can secure citizenship for their children, American fathers are limited in their ability to do so. A practice now reversed by at least eight constitutional courts around the world (and by the prompting of some legislatures),<sup>84</sup> such laws reinforce gender-traditional parental roles while at the same time encumbering both caretaker fathers and their non-marital children.

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<sup>83</sup> [Collins, above n 16, 73.](#)

<sup>84</sup> *Ibid.*

That these facially discriminatory laws have continued shows how the apparently robust system of American gender equality laws may nevertheless run aground. Collins is able to reveal how this is done through the gender-neutral ‘plenary powers’ doctrine, which maintains that the ‘sovereign’ power to exclude aliens is one reserved for the political branches. This doctrine undergirds the practice of judicial deference in such contexts, creating political branch supremacy in a constitutional culture usually recognized in the world for its vigorous practice of judicial review.

Moreover, what makes Collins’ focus so illuminating is that she analyzes, not how this doctrine has constrained courts, but rather how it has shaped Congress’s response to the practice of gender discrimination in federal nationality statutes. Indeed, she shows how a practice of deference has both prompted legislative efforts for reform and has seriously undermined them. Judicial deference, undertaken against a background of strong judicial review, has created what Collins terms ‘a cycle of deferral’ of the issue: giving the court’s constitutional imprimatur to gender and illegitimacy-based discrimination in the field of nationality laws, and stalling reformist efforts in Congress. Such inter-branch effects are a reminder of how such institutional arrangements shape gender laws, even as they may play out differently in other constitutional systems.

An instructive mirror to Collins’ focus on the U.S. is Kristin Bergtora Sandvik and Julieta Lemaitre’s analysis of the constitutional backdrop of institutional questions in Colombia,<sup>85</sup> in particular the interactions established between the Colombian Constitutional Court and the internally displaced women’s league, the Liga de Mujeres Desplazadas. In the context of massive displacements of people from peasant farms into cities, including a disproportionate number of women, during Colombia’s protracted internal conflict, the Liga have mobilized to secure a baseline of security for such women, including through structural litigation in the Court.

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<sup>85</sup> [Lemaitre and Sandvik, above n 33, 99.](#)

This context has been supported by a number of design features of Colombia's 1991 Constitution: the newly created Constitutional Court itself and the availability of a *tutela* action with an expedited procedure for human rights complaints; later the declaration of an "unconstitutional state of affairs" which allowed for highly-interventionist court-ordered reforms, as well follow-up hearings and awards. These creative remedies extended to the gender-specific risks faced by internally displaced persons, such as sexual violence, enslavement for domestic services, and other special vulnerabilities.

Sandvik and Lemaitre recount how the Court's robust interventions in this field have been prompted and supported by NGOs, including the Liga. Itself recognized as a 'best practices' organization amongst international funders and observers, the Liga has pursued the court and the government for every possible material benefit for its members, including humanitarian aid and poverty alleviation. Nonetheless, in a country with one of the world's highest levels of inequality, and the ongoing aftershocks of conflict and violence, these public law remedies have proved unstable, corruptible and insufficient. Thus, although this chapter reveals the effectiveness of certain (gender-neutral) laws utilized by a mobilized grassroots organization and an innovative court, it concludes the limitations of constitutional design within an overarching setting of poverty and inequality.<sup>86</sup> These telling conclusions for public law introduce themes canvassed in the next part.

## **PART II CONSTITUTIONAL DESIGN IN A GLOBAL SETTING: THE CHALLENGE OF THE LOCAL**

While constitutional design appears to be a framework issue for the structuring of gender equality, it must contend with the challenge of gaining traction. These four chapters document the contending attempts of achieving both a universal and local reach by constitutional design, particular through the challenge of realizing gender equality in the context of customary laws and religious personal laws that may ascribe particularly rigid

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<sup>86</sup> Compare with, eg, Muna Ndulo, African Customary Law, Customs, and Women's Rights, 18 *Ind. J. Global Legal Stud.* 87, 92 (2011) (recommending a focus on reformist "courts and mass movements").

and/or subordinated gender roles. In such cases, local laws may appear impervious to global intervention: yet local customs, for example, have already been distorted and rigidified by international processes of colonialism, even in remote and rural areas.<sup>87</sup> Moreover, states that endeavor to accommodate legal pluralism are often the most heavily globalized, by the postcolonial or post-conflict interventions of other states and international organizations.<sup>88</sup> This is the case of South Sudan, Afghanistan, South Africa, Timor-Leste (East Timor), Kosovo, India and the Pacific state of Vanuatu, analyzed below.

Susan Williams first takes the reader to newly independent South Sudan, where she acted as a constitutional adviser for the Transitional Constitution of 2011.<sup>89</sup> In this context, the conflict between customary law and gender equality is patent; nonetheless, the Constitution formally marks out protection for both norms: the ‘equal protection of the law without discrimination as to ... sex’ is guaranteed, as is the equal dignity of women, their equal pay for equal work, and their right to participate fully in public life, including through gender quotas. At the same time, the Constitution requires culture to be protected, preserved and promoted, although only consistently with the dignity and status of women. Williams interrogates the extent of this protection in the context of the vast apparatus of traditional courts operating in the country, and the significant procedural and substantive effects of exclusion and discrimination against women in customary law systems.

To analyze this problem, Williams draws on feminist theorist Nancy Fraser and her framework of theorizing the distinct harms to gender justice raised by problems of

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<sup>87</sup> [Ibid](#); Karen Knop, Ralf Michaels and Annelise Riles, ‘From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style’ (2012) **64** *Stanford Law Review* 589, 618 (referring to the ‘aftershocks of a colonial legacy’). For extensive documentation of constitutional and statutory provisions protective of custom, see Katrina Cuskelly, ‘Customs and Constitutions: State Recognition of Customary Law Around the World’ (International Union for Conservation of Nature, 2011), <https://portals.iucn.org/library/efiles/documents/2011-101.pdf> (last visited 15 June 2015).

<sup>88</sup> For a study of the latter, see Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press, 2011).

<sup>89</sup> Williams, above [n 51](#).

recognition, redistribution and representation. Exploring these ‘various and cross-cutting forms of injustice at multiple levels’ through Fraser’s tight analytical edifice allows Williams to perceive the limits, but also the fruitful directions, of constitutional reform. In particular, she is able to show how giving priority to issues of representation – through gender quotas in the legislature, for example – need not (and should not) distract from attention to the cultural and material interventions that are required. Moreover, Williams extends Fraser’s analysis by focusing on the subnational sphere that is so influential for the lived experience of South Sudanese women.

This application reveals interesting reform proposals, in the form of constitutional mechanisms that will encourage adaptability and responsiveness in customary law; and that will strengthen women’s roles in those systems. For example, Williams proposes to end the practice of codifying customary law in South Sudan, and to alternatively encourage (and materially support) a form of common law decision making, through recording and disseminating customary judgments. One question that remains is how such a proposal can be sure to further, rather than obstruct, gender equality goals in light of certain conservative tendencies of common law reasoning;<sup>90</sup> Williams’ second proposal, for increasing women’s own influence in customary law systems, would seem to be a precondition (or even a substitute) of the first.

Laura Grenfell’s chapter identifies the same problematic: of the formal constitutional recognition of gender equality operating against the backdrop of significantly unequal customary law.<sup>91</sup> Taking post-conflict constitutions as her field of analysis, Grenfell outlines the drafting experience leading up to South Africa’s 1996 Constitution, Timor-Leste’s 2002 Constitution, Afghanistan’s 2004 Constitution, and Kosovo’s 2008 Constitution. The participation of women’s group has been uneven, despite the exhortation of the United Nations: the most recent process, in Kosovo, included few local women. In the other three contexts, women agitated strongly to require that customary

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<sup>90</sup> Compare with Tracy Robinson, ‘Gender, Nation and the Common Law Constitution’, (2008) 28 *Oxford Journal of Legal Studies* 735, 760.

<sup>91</sup> Grenfell, above n 20.

laws must operate in conformity with constitutional principles, and were partly successful.

Nonetheless, Grenfell suggests that the interaction between constitutional equality and customary laws remains unclear. South Africa's Constitution has proved the most robustly protective of gender equality, through Constitutional Court support for an evolving customary law, in which women can participate. Nonetheless, the recent support of the ANC given to traditional leaders suggests how precarious this settlement may be. In Timor-Leste, limited institutional support for gender equality is reflected in both the legislature and the courts, and gender-discriminating customary laws continue to operate. In Afghanistan, the situation is complicated by the constitutional recognition of both formal equality and the preeminence of Islamic law. Despite the highly divergent background systems of law operating in her chosen case studies, Grenfell combines these experiences to recommend a more explicit demarcation between gender equality and customary laws (and the priority of the former) in constitutional drafting. One may question the choice of such distinct comparators under the post-conflict theme; but it is clear that in such cases, certain traditional practices have been destabilized, and the moment of seeking equality based reforms for previously excluded groups may be a very narrow one.

Further attention is given to these different settings in the following two chapters, focusing on India and Vanuatu, on the one hand, and Afghanistan again, on the other. For Vijaya Nagarajan and Archana Parashar, in their chapter on constitutional equality in India and Vanuatu,<sup>92</sup> an explicit demarcation between constitutional and customary law will only get one so far. They contextualize each constitutional system, not by variables of political cultures or institutions or economies, but by their drafting origins and ideologies:<sup>93</sup> from India's postcolonial constitutional moment of 1950, equality has been

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<sup>92</sup> Nagarajan and Parashar, above [n 20](#), 179.

<sup>93</sup> For recent evidence that suggests constitutions reflect not merely processes of internal development, but 'legitimizing ideas dominant in the world system at the time of their creation', see Goodman and Jinks, above [n 69](#), [65](#), confirming a conclusion observed originally with respect to childhood and children's rights: John Boli-Bennett and John Meyer, 'The Ideology of Childhood and the State: Rules Distinguishing

given priority while nevertheless allowing for the accommodation of difference in religious personal laws. Vanuatu's Constitution of 1980, on the other hand, forged during a postmodern retreat from universals, sought to simultaneously support equality and custom in land ownership.

As Nagarajan and Parashar emphasize, these encounters with modernity have been further promoted by each state's membership to CEDAW (in India in 1993, in Vanuatu in 1995), and its attempt to set universal standards of equal rights for men and women. Nonetheless, in each system, the accommodation of difference portends unexamined disadvantages for particularly situated women. In India, minority women living under Muslim religious personal laws continue to experience lesser rights than Muslim men. In Vanuatu, women living under customary laws are excluded from making decisions about land, which particularly affects rural women.

These outcomes suggest, for Nagarajan and Parashar, a different tilt to the sameness-difference, and essentialism-pluralism debates in feminist theory: the acknowledgement that scholarly positions which may appear non-essentialist and non-imperial may actually ratify a great burden for particularly situated women. Their caution: that 'cultural specifics in domestic and local contexts could become proxy justifications for leaving the current practices un-examinable in the name of non-imposition of top down norms'<sup>94</sup> is a pressing challenge for scholars contributing to insights in the public law of gender.

For Sari Kouvo and Corey Levine, who explore women's rights and realities in Afghanistan, the message is a related one: an impressive 'success on paper',<sup>95</sup> with the Constitution of 2004 entrenching equality between women and men, including a quota on women in both houses of Parliament, legislation on the elimination of violence against women in 2009, (internationally funded) prosecutions, membership of CEDAW, and

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Children in National Constitutions' (1978) 43 *American Sociological Review* 797, 805; see also Nagarajan and Parashar, above [n 20](#), 194.

<sup>94</sup> Nagarajan and Parashar, above [n 20](#), 179.

<sup>95</sup> Kouvo and Levine, above [n 52](#), 196.

gender sensitivity in development policy; combined with some of the worst barometers for gender equality, female social inclusion, and levels of gender violence, in any part of the world.

The disconnect is not, of course, unusual in post-conflict states, where institutions may be weak and the rule of law may be fragile. Yet in such contexts, suggest Kouvo and Levine, equality-based laws and policies are nevertheless important: they operate as placeholders for the change that may come: ‘it would be worse for women’,<sup>96</sup> for example, if the Constitution contained no such provision for equality. Nonetheless, Kouvo uses interviews to assess the realities that dominate and frame women’s lives on the ground: these point to the private sphere (which are homologous, Kouvo contends, for the educated women of Kabul and Herat, just as for those living in rural communities). The public/private distinction, so relevant in feminist theory, continues to hold its grip on the ineffectiveness of public law to unsettle the inequalities experienced in the private sphere, which includes the home but also, to an important degree, the community in which women live. In this complicated setting, while respect in the private sphere may translate to the public sphere, the same may not be true in the reverse: successful interventions in the public sphere may attract private repercussions, and are not based on solidarity networks between women. This set of findings opens the book up to its the next focus, on participation.

### **PART III LOCALISING PARTICIPATION AND VOICE THROUGH LAW**

Participation, as an ideal of democratic theory, may have a protective function; yet it does not follow that all people should, therefore, participate; nor does it suggest the forms that participation should take.<sup>97</sup> This section examines the gendered dimensions of that prescription and its critique, across domestic and international settings. Some recent

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<sup>96</sup> Ibid.

<sup>97</sup> Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970); For the examination of participation in constitution-making, see Alexandra Dobrowolsky and Vivien Hart (eds), *Women Making Constitutions* (Palgrave Macmillan, 2004).

feminist analysis of participation and voice has explored aspects of non-participation and silences through the use of counter-factuals – such as what doctrine might look like today had excluded groups been allowed to participate.<sup>98</sup> Others look to aspects of narrative and storytelling to distill ideological biases or other blindspots.<sup>99</sup> This section combines two distinct approaches to participation, and voice, drawing on the judicial treatment of polygamy in Canada, in the chapter by Beverly Baines, and the unwritten memories of a leading woman international lawyer, in the chapter by Kim Rubenstein.

Beverly Baines tackles the complex issue of polygamy in her interrogation of the implications of gender equality norms, and its impact on notions of participation, agency and voice.<sup>100</sup> She draws from current Canadian constitutional jurisprudence on polygamy, where, as a result of a recent trial court opinion upholding the constitutionality of a law criminalizing polygamy on the grounds of harms to women, children, society and monogamous marriage,<sup>33101</sup> women living in polygamous relationships must face the stark (state-imposed) choice: to end their relationships or risk incarceration for up to five years.

Leaving aside the question as to why polygamy has been criminalised rather than regulated (especially given the rare instances of conviction and the sizeable practice of polygamy in certain communities), Baines contends that criminalisation gives Parliament a monopoly on the public vilification of polygamy, silencing its dissenters, particularly in immigrant Muslim and African as well as Mormon communities in Canada. Baines notes

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<sup>98</sup> Karen Knop, ‘The Tokyo Women’s Tribunal and the Turn to Fiction’ in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2011) 145 (describing the project for Japanese women with a counterfactual of international law, and noting the efforts to recast past jurisprudence in the Canadian feminist judgments project). This method of feminist criticism is also reflected in projects in Australia and the United Kingdom and more recently the United States.

<sup>99</sup> For seminal references, see Martha Minow, Michael Ryan, and Austin Sarat (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (University of Michigan Press, 1993); Peter Brooks (ed) *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996).

<sup>100</sup> Baines, above n 32.

<sup>101</sup> Reference re: Section 293 of the Criminal Code of Canada 2011 BCSC 1588 [Polygamy Reference].

the same strategy of silencing in the trial opinion itself. In critically assessing the evidentiary and legal arguments used in the case, she notes the devaluation – and often absence – of the voices of women living in polygamous relationships, including the particular experiences of aboriginal, Mormon, and Muslim women.

Baines aims to re-vision the lives of these women, crediting them with agency in contradistinction to a victimization narrative. In so doing, she outlines the benefits of a sex equality argument, rather than a Charter-based argument for religious freedom, on behalf of proponents of polygamy. Noting that gender equality is not an “infinitely elastic”<sup>102</sup> concept, she suggests however that the law – and indeed, feminism itself – may open up space for new – and presently silenced – discourses of separate-but-equal or mutual respect justifications for polygamous unions. While these legal arguments may not ultimately be successful ones, Baines suggests that the ability to express them at least disrupts the victimhood narrative in which such women are now locked. This challenging portrayal of gender equality in a stereotypical unequal space is a powerful reminder of the flexibilities required of feminism in public law.<sup>103</sup>

A very different perspective on voice is offered by the focus on the oral history of an elite female participant in international lawmaking, by Kim Rubenstein. In her chapter, Rubenstein draws from her scholarly investigation into ‘Trailblazing Women and the Law’, in particular the life of Erika Feller.<sup>104</sup> An Australian national who became the Deputy High Commissioner for Refugees within the United Nations High Commission for Refugees (UNHCR), one of the four top management posts of UNHCR, Erika Feller was one of the highest ranking women at UNHCR during her time and it was a position

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<sup>102</sup> Baines, above [n 32](#), 243.

<sup>103</sup> **Certainly, the comparative dimensions raised by polygamy in minority and majority cultural experiences are worthy of study; see, e.g., Celestine Nyamu Musembi, ‘Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol’ in Hellum and Sinding Aasen (eds), above [n 13](#), 183.**

<sup>104</sup> Rubenstein, above [n 39](#).

she held until her retirement in 2013. Through Feller's oral history, Rubenstein's chapter considers how gender permeated her life in the domestic and international public spheres.

By directly extracting six segments from this oral history, Rubenstein allows the reader to 'hear' the lived experience of Erika Feller as she herself has chosen to retell it. This subtle history opens up new insights into the experience of women who were active and involved in questions of human rights, participation, representation, lawmaking, leadership and democratisation in the public sphere, both locally and globally. In dealing with the particular experiences of a woman who successfully 'intruded' upon a domain traditionally reserved for men, Rubenstein examines the special individual commitments that assisted these early women professionals and leaves open the question as to whether these same commitments are those required for later efforts of inclusion.

In recognising the varieties of Erika Feller's experiences (which will read as deeply familiar to some, and distinctively unique to others), Rubenstein argues that by concentrating on one oral history we are reminded of the importance of including many more oral histories of women from different backgrounds and life experiences in institutional archives. This chapter therefore enables us to assess what may be identified as gaps in our knowledge of women's participation that have been absent from the institutionalised recordkeeping. Consequently, Rubenstein leaves us with the critical question of how the archives themselves are sites of power and governance.

#### **PART IV GOVERNANCE, REPRESENTATION AND GENDERED MEASURES**

The institutions and processes of public lawmaking are encompassed in the study of governance, which has become a ubiquitous framework for both prescription and critique. In the following two parts, the interactions between gender and governance are analyzed in relation to questions of representation, and questions of equality, respectively. First, a long-standing marker of political representation is the number of

women in government.<sup>105</sup> This quantitative measure has been applied to compare particular domestic and regional governments, and to instigate a notion of international best practice, with the idea that the involvement of women in representative roles will translate their political agendas into policies and laws. Three of the following chapters interrogate this marker – including its corollary, quotas – by critiquing notions of representation, participation, and indeed their very measurement. This latter critique is raised in the fourth chapter, in relation to the highly gendered stakes of poverty measurement.

Sharon Bessell’s analysis is sited at both global and local levels, and focuses on the role of ideas – world views, principled beliefs, and causal beliefs – that operate at these levels.<sup>106</sup> This position allows Bessell to interrogate the puzzle, as to why, with various initiatives for women’s political representation, including targets and quotas, women continue to occupy so few positions in legislatures around the world. At the global level, Bessell notes the conflation of parliamentary representation with the goal of ‘women’s empowerment’: a problematic assumption, tied to the ease of measurement and other factors. Moreover, Bessell describes the disjuncture between good governance and gender equality agendas: the first, primarily neoliberal in orientation, supports initiatives that are designed to promote the rule of law, accountability, rights and transparency without acknowledging their gendered dimensions; the second, seeking a more radical change, contends with less resources and influence.

Despite the global siting of such spaces, each has influence at the national level – in particular in the Global South, more dependent on meeting global governance priorities and measurements. Bessell’s interrogation of one such space – Malawi – shows how locally held ideas of women’s roles in society, in particular in reproductive and household domains, continue to be the strongest barriers to representation.

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<sup>105</sup> See, eg, Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions* (Palgrave Macmillan, 2011); Deborah Cass and Kim Rubenstein, *Representation/s of Women in the Australian Constitutional System*, (1995) 17 *Adel. L. Rev.* 3.

<sup>106</sup> Bessell, above [n 10](#).

Margaret Wilson's documentation of the engagement of New Zealand women with the political process in the period 1970-2008 elicits important dimensions of public law and gender equality.<sup>107</sup> She finds that electoral reform – in the form of mixed member proportional voting – has produced the greatest increase in the formal participation of women in the New Zealand parliament. These electoral reforms – paved against a backdrop of an unwritten constitution and a strong culture of political accountability – had been a significant part of the women's movement's agenda. While the same lack of constitutional formality perpetuates the lack of a positive legal right to equality, the routes of electoral laws and political party representation – in particular, through the New Zealand Labour Party – have not been unproductive for achieving certain reforms, in areas such as paid paternity leave and matrimonial property disputes.

Another aspect of Wilson's study is the focal point provided to women's groups by CEDAW, and the momentum that was created nationally for efforts first to ratify the treaty, and then to respond to its reporting requirements. This proved helpful against the backdrop of a collapse in cohesion in the women's movement with the advent of what Wilson identifies as cultural feminism, post-modernism and neo-liberalism. The continued rise of individualism, the market economy, and the decline of the state represent significant challenges.

Huong Nguyen examines gender equality in Vietnam, an ideal that has long been the official commitment of Vietnamese government.<sup>108</sup> The first Constitution of Vietnam in 1946 embraced the language of gender equality, well before world trends, as does the current 1992 Constitution. Vietnam ratified CEDAW in 1982. The executive issued National Strategies for the Advancement of Women in 1997, 2001 and 2011, setting ambitious goals toward greater gender equality. The National Assembly, the legislative body, enacted the Law on Gender Equality in 2006 and the Law against Domestic Violence in 2007.

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<sup>107</sup> Margaret Wilson, 'Women in Government/Governance in New Zealand: A Case Study of Engagement over Forty Years', 296, in this volume.

<sup>108</sup> Nguyen, above [n 80](#).

Yet Nguyen's is not a linear story of progress. The proportion of women in the legislature dropped from a third in 1975 to less than a fifth after 1987; a return to such numbers has still not been made. Feminism has been a pejorative label, associated with Western individualism or the bourgeoisie. Now, the old-fashioned terminology of women's emancipation has shifted, albeit incompletely, to a contemporary (UN sponsored) focus on gender mainstreaming, gender equality and women's rights. These official commitments, now with their different focus, continue to be stalled by cultural, ideological and cultural constraints.

Beside the problem of the patriarchal culture, Nguyen suggests that the transnational concept of gender equality as women's rights finds itself at odds with the existing political ideologies of cultural preservation and national independence projects; gender equality has to be advocated within the boundaries of collective goals of nation-building and socialism. She argues, in turn, that these obstructions are attributed to the structure of power that limits women's meaningful participation and representation in the socio-political life and in decision-making bodies where the meaning of gender equality and associated rights are defined. Although, in the short term, women's rights advocates must work within the boundaries of the current political system, Nguyen suggests gender advocates must work with the democracy movement to secure the preconditions of gender equality.

Scott Wisor turns his attention to the modes and techniques of measuring progress in securing human rights, with a particular focus on anti-poverty rights. The measurement of social progress is a central component of governance – it allows governments to evaluate how their programs and policies are working, and citizens to contest how they are governed.<sup>109</sup> Yet as Wisor demonstrates, poverty measurement as currently practiced is largely incapable of revealing gender disparities, despite the known fact that women experience far greater levels of poverty and disadvantage.

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<sup>109</sup> Scott Wisor, 'Gender, Justice and Statistics: The Case of Poverty Measurement', 344, in this volume.

Wisor suggests how new measures of poverty may be developed through participatory processes that reflect on the values that do and should inform our conception of poverty. Noting that procedures of deliberation are at risk of reinforcing gender hierarchies and exclusions, he draws on both participatory research and deliberative democratic theory to outline a number of exercises to include the voices of those who have been marginalised. The variety of techniques that Wisor proposes – including novel uses of weighted analyses, vetoes or formal dissents – suggests that robust processes of public reason can be critical for poor women and men in the measurement of poverty (a form of engagement that Wisor, in collaborative research, has also tested empirically).<sup>110</sup> Wisor also suggests substantive features of these poverty measures that would allow them to reveal gender disparities and concentrate on dimensions of life in which deprivations occur that are particularly important for women. This includes interrogating intrahousehold distributions of resources and burdens by focusing on the individual, collecting an expanded list of information, such as time-use and freedom-from-violence indicators, and being sensitive to biological or social difference. He concludes by refuting the view that quantitative measurement of rights is bad for justice.

## **PART V GOVERNANCE, EQUALITY AND NON-DISCRIMINATION**

The goals of equality, equal treatment, and non-discrimination are invariably complicated in practice. As public law and governance structures have sought to implement such goals, they are confounded by the varied background challenges of social norms, including with respect to race and gender.<sup>111</sup> These chapters, which share many of the normative concerns of the preceding parts of this book, especially [Part II](#), illuminate the

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<sup>110</sup> See Scott Wisor et al., *The Individual Deprivation Measure: A Gender-Sensitive Approach to Poverty Measurement*, <https://www.iwda.org.au/introducing-the-individual-deprivation-measure/> (last accessed 22 June 2015) (eighteen sites of analysis in six countries in Africa, Asia and the Pacific).

<sup>111</sup> See, e.g., Jens Dammann, ‘Place Aux Dames: The Ideological Divide Between US and European Gender Discrimination Laws’ (2012) 45 *Cornell International Law Journal* 25 (suggesting the prominence of social and class-based commitments that lead to different substantiations of antidiscrimination laws).

various modes of negotiating gender equality, this time in the highly diverse settings of indigenous laws in western settler states and in workplace laws and military settings in Australia.

Kirsty Gover's chapter addresses the "perforation" of anti-discrimination regimes, with respect to race and gender, and to certain associative exceptions, and the distinctive effect of such regimes on the constitution of indigenous communities in western settler states.<sup>112</sup> In Australia, Canada, and New Zealand, indigenous groups are subject to human rights and non-discrimination law, and their reliance on descent-based membership criteria is susceptible to challenge as a prohibited form of racial discrimination. In the public law of these liberal democracies, racial discrimination is subject to a much more comprehensive prohibition than gender discrimination.

Gover points out that while non-discrimination legislation contains numerous exceptions allowing named groups to discriminate in their membership criteria on the basis of gender, there are no exceptions that expressly permit groups to discriminate on the basis of race. Consequently, tribes do not benefit from express exceptions in non-discrimination legislation allowing certain "private" organizations to self-constitute in ways that would otherwise be unlawful. Yet, as Gover convincingly argues, in liberal settler democracies, the distinctive constitutional status of indigenous individuals and groups is legitimately premised on the legal concept of race. Gover turns to the reasoning deployed for two justified discriminations in Canadian and United Kingdom law – of permitting gender-based exclusions from a single-sex club, and of permitting religious-based exceptions for racial (descent-based) membership – to suggest that the justifications supporting the exception of families, households, subscription associations and religious organizations from non-discrimination law should also support exceptions for indigenous peoples as "racially constituted" groups.

Dominique Allen sets out to reassess the model of promoting gender equality in

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<sup>112</sup> [Gover, above n 38](#).

Australia, which she suggests is still partially locked in formal equality, anti-discrimination, and equality of opportunity frameworks.<sup>113</sup> She proposes instead two levels from which to think about promoting equality. The first is through anti-discrimination statutes that provide women who have experienced discrimination, whether in the workplace or elsewhere, with redress. The second level is through laws that are designed to promote equality such as a constitutional protection of equality, affirmative action measures and other proactive measures. The Australian Constitution contains no express guarantee of equality, and so Allen's analysis proceeds along statutory lines. Irrespective of what public law models are followed, however, she demonstrates how a formal model of equality can defeat substantive equality outcomes.

By examining the outcomes around Australia's sex discrimination laws, Allen is able to provide an overview critique of the problems of narrow enforcement, disincentives, and non-systemic redress. This leads her to propose reforms for improving anti-discrimination laws, by reforming the individual complaints model. At a different level of reform, however, Allen suggests a proactive approach to gender equality, which would abandon the remedial frame in order to broach a more positive duty to promote gender equality. This includes aspects of affirmative action (but not quotas), an equality impact assessment tool, and a legislated duty to fulfill positive gender equality, borrowed from United Kingdom public law.

Susan Harris Rimmer's chapter also proceeds along comparative and international lines with a critique of the current public laws engaging gender in the Australian military. She turns her attention to the 'hyper-masculinist' institution of the Australian Defence Force (ADF).<sup>114</sup> Acknowledging the special public law role of the military, Harris Rimmer examines the general requirement of equal treatment of men and women in the Australian context, apart from a limited exception for combat activities. Rather than focus on this exception (although noting its relationship to her focus on women's rights), Harris

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<sup>113</sup> Allen, above [n 38](#).

<sup>114</sup> Harris Rimmer, above [n 28](#).

Rimmer is concerned with the practices of gender-based abuse of both women and men that have occurred in the ADF, and the inadequate internal responses that have been followed. Pressure to address these incidents has arisen in Australia and in other western militaries.

With this concern in mind, Harris Rimmer suggests that Australia's Parliament should mandate that gender equality is fundamental to achieving the mission of the ADF as a foundational Australian public institution. Adopting an incremental, policy-making perspective, she proposes that international and comparative law can intersect with and influence military law and policy to improve gender equality within the ADF and improve the community impacts of ADF operations overseas. Her proposal is therefore based on particular international resolutions directed to gender equality, and to certain comparative examples from Germany and the United Kingdom. Harris Rimmer argues that if this legal intersection does not occur, the ADF will continue to respond to gender abuse in an ad hoc manner laboring under what she terms the 'rotten apple delusion' and 'wait out' reformist impulses. She concludes that the ADF should embrace parliamentary scrutiny and monitoring and should increase the number of women in its ranks.

## **PART VI GLOBAL GOVERNANCE AND THE PRECEPTS OF PUBLIC LAW**

This last section concludes the public and international law theme by bringing together four chapters highlighting the public law tensions for gender equality in the practice of global governance. These chapters examine where, how and/or why international institutions have evolved, if at all, to take gendered issues into account. They encompass the processes of the CEDAW Committee, the International Labour Organization, the International Criminal Court and the UN Conference on Sustainable Development. A more expansive assessment of global administrative law is made in dealing explicitly with the question of gender variance.

In a companion chapter to her first chapter in Part I (Feminisms and Constitutions), Jackson extends her analysis to the relationship between constitutions and international

and transnational sources of law.<sup>115</sup> In particular, Jackson argues for a posture of engagement between the two bodies of law, and analyses the potential of this approach for implementing CEDAW. As Jackson notes, there are reasonable but competing conceptions of how to advance gender equality through law, and recognition of this pluralism has implications, both for the practice of international organisations such as the CEDAW Committee, as well as the treatment of international law by domestic courts and other parts of government.

In testing this theory, Jackson puts CEDAW's monitoring activity under examination, including its approach to laws requiring gender neutrality in Finland, laws addressing sexual violence and prostitution in Iceland, and the Committee's preference for equality rather than equity measures in Mexico: for each, Jackson recommends a more open, and less uniform, position. In emphasizing the ideas of feminist pluralism, constitutional diversity, and epistemological humility, she concludes that a diversity of national practices aimed at increasing gender equality, rather than international uniformity, are more likely to advance women's equality.

Louise Chappell draws on a feminist variant of 'new institutionalism', which provides an important analytical lens for understanding gender justice across the formal and informal institutions of global governance.<sup>116</sup> In introducing this standpoint, Chappell focuses on the role of the Registry of the International Criminal Court ('the ICC'), the core governance organ of the ICC, in its first ten years of operation. In particular, Chappell analyses the Registry's efforts to advance gender justice especially through the protection of victims and witnesses of sexually based violence and its sensitivity to gender issues in the development of the ICC's outreach programs.

The formal recognition of gender justice within the Rome Statute for the ICC was the result of concerted feminist legal advocacy, and has helped to orient the Registry towards

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<sup>115</sup> Jackson, above n 58.

<sup>116</sup> Chappell, above n 28.

a gender-just, victim-centered, framework. Despite this achievement, however, Chappell argues that a set of compounding institutional problems frustrate this effort. These include limitations of the formal rules, scarce resources as well as the conflict between these new rules with older, and informal gender rules that interfere with efforts to address the claims of sexual violence victims, both male and female. Chappell concludes that the ongoing challenge for ICC insiders and those in civil society who are seeking more just gender outcomes is to find ways to circumvent ‘old’ gender norms and expectations so that ‘new’ gender justice rules can be instituted.

Turning to the administration of international organizations more generally, Osmat Jefferson and Innokenti Epichev set out to measure the accountability of international organizations (IOs) in the employment setting, with a particular focus on gender issues.<sup>117</sup> As they note, two tiers of safeguards protect individual employment: the internal and informal dispute resolution mechanisms, which are said to resolve 90% of individual disputes, and the quasi-judicial or formal one, in which the remaining 10% are processed and resolved by an administrative tribunal that is the ultimate court of appeal for employees of IOs after all internal means are exhausted.

In order to evaluate IO employer accountability in such general terms, Jefferson and Epichev examine common patterns of practices across diverse organizations through the lens of administrative tribunal judgments for complaints initiated by staff from these organizations between 2009 and 2012. In particular, they focus on the International Labour Organization Administrative Tribunal, which administers complaints from 59 IOs. They suggest that rules governing the mandate, composition and procedures of this tribunal are problematic from both an administrative law and human rights perspective; and note wide gaps in access to the tribunal and problems of due process and transparency. Disaggregating their analysis on the basis of both the nationality and gender of complainants, their data points to major lapses in accountability in the hiring and selection processes, pension compensation, medical leave, insurance, and (most

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<sup>117</sup> Osmat Jefferson and Innokenti Epichev, ‘International Organisations as Employers: Searching for Practices of Fair Treatment and Due Process Rights of Staff’, 489, in this volume.

overwhelmingly relevant, they find, for female complainants) unfair treatment and sexual harassment claims, in international organizations.

Rohan Kapur and Kellin Kristofferson extend the theme of administrative deficiencies by adopting the frame of global administrative law.<sup>118</sup> In this vein, they note that the emergence of transgovernmental systems of regulation may evade the control of national governments, domestic legal systems, or in the case of treaty-based regimes, the states parties to the treaty. One danger of this accountability deficit is that cultures of inequity, such as gender, become entrenched on a global scale.

Kapur and Kristofferson's chapter deals explicitly with one aspect of gender injustice and oppression: the experience of gender-variant persons. In this context, they investigate which mechanisms constrain or render accountable the activities of international regulatory bodies, focusing specifically on the gender inequities that may be rectified, avoided, or exacerbated by these mechanisms. In doing so, they draw on hard and soft models of accountability for international organisations. Taking an approach that they term as an 'explicit post-woman feminism', they highlight the experience of gender-variant persons as a compelling instance of gender oppression, and use this lens to identify instances where gender inequalities are supported or promulgated by economic and administrative processes, and by the cultural perceptions on which those processes are founded. This analysis is presented using four key administrative principles: visibility; opportunity to participate; active and passive oppression; and, interest recognition.

In the final chapter of this part, Kate Wilkinson utilizes the epistemological frame of 'ecofeminism' in order to evaluate the most recent developments in international environmental law.<sup>119</sup> In particular, Wilkinson examines how the Outcome Document

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<sup>118</sup> Kapur and Kristofferson, above [n 29](#).

<sup>119</sup> Wilkinson, above [n 10](#).

from the UN Conference on Sustainable Development, published in 2012, integrates concerns relating to ‘gender’. With this focus, Wilkinson examines the political participation and decision making by women’s and other groups at the UN Conference (such as the Women’s Major Group and Indigenous Peoples’ Major Group), who were permitted access to the preparatory process.

Despite this unprecedented access, and the numerous references to gender equality, women’s empowerment, and the “welfare of women” that have been included, Wilkinson deploys an ecofeminist critique to suggest that the ability of the Outcome Document to challenge current gendered (and ecosystem) inequalities has been limited. In particular, Wilkinson suggests that the presentation of a “green economy” has assimilated women and other marginalized groups into the dominant and andocentric project of “sustainable development”, and its current privileging of neoliberal political economy. For example, projects to “empower” women continue to devalue their work in the household, in the informal economy, and the “repetitive, local, necessary, communal and embedded [work] in the local ecosystem”.<sup>120</sup> It is a fitting conclusion to the book’s themes of how the public law of gender is constituted, coopted, and maintained across local and global sites of action.

## Conclusion

This is the concluding volume of a six part series<sup>121</sup> that has sought to broaden the scholarship on the ways public law and international law intersects. Its collective

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<sup>120</sup> [Ibid.](#), 556 fn 115, citing Mary Mellor, ‘Ecofeminist Political Economy’ (2006) 1 *International Journal of Green Economics* 139, 140.

<sup>121</sup> Hitoshi Nasu and Kim Rubenstein (eds), *Legal Perspectives on Security Institutions* (Cambridge University Press, 2015); Fiona Jenkins, Mark Andrew Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014); Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012); Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010); Jeremy Matam Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009).

message further emphasises that looking beyond the question of how international and public law overlap or beyond how international law is implemented domestically provides us with richer and more fluid frames to think through areas of profound significance. Concluding this series with the theme of gender has enabled us to not only consciously bring together public and international lawyers, political scientists, philosophers, psychologists, and specialists of gender studies, to consider and engage in each others' scholarship, but also to critically examine the contemporary construction and dissemination of this emerging public law field.

By utilizing a focus on gender in public law, we have identified an apparently extraordinary moment of national and transnational feminist influence in the public sphere; coming at the very moment of widespread diminishment of that sphere via contemporaneous constitutional and governance reforms.<sup>122</sup> For the reasons given in these chapters, the question remains as to whether the gender cognizant laws of non-discrimination, affirmative measures for legislative representation, and other equality-based initiatives, as well as more facially neutral liberal democratic and judicial reforms, will deliver the positive outcomes that gender advocates have so vigorously sought.

Certainly, the triad of reasons for the gaps identified between formal law's promises and its reality – which I have explained in terms of lapses in enforcement, sincerity and coverage – apply across local, national and transnational domains. Yet many of the chapters of this volume problematise each category. The chapters of [Parts I](#) and [VI](#) show how the structures of domestic and especially international law point to the challenge of enforcement: that, for example, it is a lack of enforcement that has allowed gender-discriminatory laws to continue in the United States or CEDAW recommendations to go unaddressed. Yet these chapters are not unified in their prescriptions for addressing this lapse of enforcement: while one describes how the very ambiguity of enforcement can

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<sup>122</sup> Frank Michelman, 'Constitutionalism, Privatisation and Globalisation: Whither the Constitution?' (2000) 21 *Cardozo Law Review* 1063; compare this trend with the recognition of the horizontal effect of public laws, text accompanying above [nn 39–43](#).

suppress challenges to gender inequality, another suggests that it may, contrariwise, sustain a more pluralist basis for such challenges over the long term.<sup>123</sup>

Amongst the other parts of the book, however, it is striking how lapses in enforcement are much less part of the problem, and how the challenges of coverage and sincerity become less easy to separate. For example, the chapters of [Part II](#), dealing with local custom, and [Parts IV](#) and [V](#), dealing with governance, inform our understanding of the problem of coverage, especially in the way that they point to the perpetuation of gendered roles within the private spheres that are left untouched by international or public laws (despite the private law-piercing aims of CEDAW, or of the horizontality of constitutional law, or of the ambitions of the ‘global governance’ programme<sup>124</sup>).

Yet here the lapses of coverage appear to blend with those of sincerity. Across both local and global sites of analysis, the documented endeavours for gender neutrality and gender equality in law seem to founder on an antipathy to the lived experience of gender disadvantage. While questioning the sincerity of lawmakers is too simplistic an overlay to the complex descriptions of law and gender within this volume – even as the gendered composition of those lawmakers is made clear, as is most highlighted in [Parts III](#) and [IV](#) – the question does provide a timely warning that calls for a feminist pluralism do not provide cover for further (antifeminist) insincerity.<sup>125</sup>

Thus, there is no single, neat message that concludes this volume. Nonetheless, we hope that it has opened up a research agenda that builds upon both the literatures of feminist constitutionalism and feminist approaches to international law and the common insights

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<sup>123</sup> Compare Collins, above [n 16](#), with Jackson, above [n 16](#).

<sup>124</sup> Representative here is, for example, Bessell, above [n 10](#).

<sup>125</sup> For the documentation of the compromises made by local and international organisations in approaching questions of gender, see Bina D’Costa, “‘You Cannot Hold Two Watermelons in One Hand’: Gender Justice and Anti-State Local Security Institutions in Pakistan and Afghanistan”, in Nasu and Rubenstein (eds), above [n 125](#), [47](#), [52](#) (noting that ‘many projects claiming to be gender sensitive are not only explicitly un-feminist but are gender biased. As such, while feminist projects are gender sensitive, not all gender projects are necessarily feminist’).

of each. We find several questions particularly suggestive in the current globalised setting. For example, we have not foregrounded economic and social rights, despite the attention of several chapters to the critically gendered nature of poverty<sup>126</sup> and the attempts made in international human rights law and in comparative constitutional law to address material deprivation in terms of rights.<sup>127</sup> This rapidly changing area of law, which allows for an implicit targeting of particularly disadvantaged groups (an implicitness which can be a key to the political success of public policy and public law), is critically important for addressing gender-relevant inequality.<sup>128</sup> Second, we have noted the role of religion in our book, analysing the gender-discriminatory aspects of religious rules in the same space as cultural or customary rules. Nonetheless, due to the hold of religious ideas in public spaces, a future study could attend to the challenge of minority and majority religions across public laws. What is it that connects the gender-based parental roles that have been used to court the Christian right in U.S. politics<sup>129</sup> and the intractability of modesty and chastity-requisite gender roles in Indian courts?<sup>130</sup>

A related example comes from the intersections of gender and security concerns. Indeed, while religion and security are connected (in the debates, for example, between fundamentalism and Islamism), it is worth setting out a clear study on these relations and how security-based interventions may further or diminish the cause of gender

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<sup>126</sup> See especially Lemaitre and Sandvik, above [n 33](#), 99; Wisor, above [n 114](#), 344.

<sup>127</sup> See generally Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012); compare findings of Lambert and Scribner, above [n 2](#), with Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' **62** (2014) *American Journal of Comparative Law* 1043. For qualitative, single-country analysis, see Beth Goldblatt and Kirsty McLean (eds), *Women's Social and Economic Rights: Developments in South Africa* (Springer, 2011).

<sup>128</sup> Young, above [n 131](#), 97 (noting Theda Skocpol's prescription for 'helping the poor by not talking about them': 'Targeting with Universalism: Politically Viable Policies to Combat Poverty in the United States' in Christopher Jencks and Paul E Peterson [eds], *The Urban Underclass* [Brookings Institution, 1991] 411).

<sup>129</sup> Collins, above [n 16](#).

<sup>130</sup> See, e.g., Daphne Barak-Erez and Jayna Kothari, 'When Sexual Harassment Law Goes East: Feminism, Legal Transplantation, and Social Change' (2011) **47** *Stanford Journal of International Law* 175, 190–1 (courts protecting only the 'pure' victim).

equality.<sup>131</sup> Finally, a rich set of questions arises from the chapter on gender-variance: with the growing appreciation of transgender rights, we must assess the benefits of a gender-specific approach, exemplified by CEDAW's focus on women,<sup>132</sup> and its solidarities and tensions with other humanist goals. For example, the burden of gender stereotypes extends beyond the male/female binary of men and women, to 'differently sexed' (intersex, transgender) people and people with a 'different sexuality' (gay, lesbian and bisexual people).<sup>133</sup> The different characterisations of this burden require examination both conceptually and comparatively.

We raise these questions as an invitation for further analysis, but note that many other causal, normative or conceptual questions in this field surface when one's frame is a globalised and comparative one. The public law of gender is rapidly evolving and, in drawing attention to local and global perspectives, we invite our readers to learn from both the successes and failures of the insistence on gender as a category of legal study.

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<sup>131</sup> E.g., D'Costa, above [n 129](#), 47; see also Otto, above [n 66](#), 100; Ní Aoláin et al., above [n 92](#), ch 3.

<sup>132</sup> Compare generally Hellum and Sinding Aasen (eds), above [n 13](#), with Rosenblum, above [n 26](#); see also DavidBrown, 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles' (2010) *31 Michigan Journal of International Law* 822

<sup>133</sup> Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' in Hellum and Sinding Aasen (eds), above [n 13](#), 95, 115; see also William Eskridge, 'Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive' (2010) *57 UCLA Law Review* 1333.

**THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL**

**Kim Rubenstein & Katharine G. Young, eds.**

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