

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

*Kim Rubenstein and Katherine G Young (eds) (Cambridge University Press 2018) pp 628
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INTRODUCTION

This book is part of a series aimed at connecting international law with public law. The series discusses the important issues of health, environment, movement of people and security through the lens of connecting international law with public law. This final volume in the series concentrates on the gendered dimensions of international and public law from an interdisciplinary perspective, thereby acknowledging that law alone is too blunt a tool to address adequately the issues of gender that arise in the context of these legal spheres.

IMPORTANCE OF THE TOPIC

Young introduces this book by noting that 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.’¹ This is undoubtedly true. Indeed, as the recent Australian High Court challenges to safe access zones demonstrate, even in countries where there is no explicit constitutional right to gender equality, courts are being compelled to determine questions of significance for women under alternative frameworks. To elaborate on the point, safe access zone legislation in two Australian states (Victoria and Tasmania),² which prohibits anti-abortion protesting from occurring within 150 metres of a clinic that

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¹ Katharine Young, ‘Introduction: A Public Law of Gender’ in Kim Rubenstein and Katharine G Young (eds), *The Public Law of Gender: From the Local to the Global* (Cambridge University Press 2016) 1 (hereafter ‘Rubenstein and Young’).

² Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015 (Vic) section 5; Reproductive Health (Access to Terminations) Act 2013 (Tas) section 9.

provides abortion services, has been challenged as violating the freedom of political communication which is implied from the text of the Australian Constitution.³ Unlike most other liberal democracies, Australia does not have a Constitutional Bill of Rights; thus there is no right to free speech per se, but rather a more narrowly construed freedom of political communication.⁴ Further, the absence of a Bill of Rights also means that none of the constitutional rights that are traditionally invoked to protect women in other countries, such as a right to equality or a right to privacy, exist in Australia. As a consequence, it is not open to those supporting these laws to argue their validity on the basis of a constitutional right to health, privacy or equality.

Nevertheless, in an amicus brief submitted to the High Court by the Castan Centre for Human Rights Law, the authors note that the importance of the purpose of the Victorian safe access zone legislation is ‘demonstrated by its consistency with human rights norms enshrined in treaties ratified by Australia’.⁵ Such treaties include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). This is significant because it demonstrates the potential for international law to influence constitutional law in matters which have significant repercussions for women. For example, whilst there is no constitutional right to privacy in Australia, Australia has ratified the ICCPR therefore under international law Australia is bound by the right to privacy enshrined under article 17 of that treaty. Thus the argument that certain conduct of anti-abortion protestors outside of clinics (such as the recording of women entering the clinics) amounts to a violation of their right to privacy is relevant.

On the question of privacy, in her introduction to the book Young observes:

[B]oth 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

³ *Commonwealth of Australia Constitution Act 1900*.

⁴ For an overview of the jurisprudence relating to the implied freedom of political communication, see S Joseph and M Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co 2014).

⁵ T Penovic, R Sifris and C Henckels, *Submissions of the Castan Centre for Human Rights Law Seeking Leave to Appear as Amicus Curiae in the Case of Clubb v Edwards* [30].

both international and public law are, in the main, concerned only with the regulation of the public sphere.⁶

For example, the definition of torture enshrined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that torture constitutes severe pain or suffering 'inflicted by or at the instigation of or with the consent or acquiescence of a public official'. This focus on the role of the public official has traditionally meant that forms of violence against women perpetrated in the private realm, such as intimate partner violence or rape, were excluded from the international law understanding of torture. Nevertheless, the international legal community, including the Committee responsible for the interpretation of the Convention against Torture, has begun to adopt a 'due diligence' approach to the question of state responsibility. This means that increasingly it seems that the 'public official' requirement is met when a state fails to exercise 'due diligence' in relation to severe pain or suffering inflicted by private actors. For example, in relation to intimate partner violence former Special Rapporteur on Torture, Manfred Nowak, commented that 'States should be held accountable for complicity in violence against women, whenever they create and implement discriminatory laws that may trap women in abusive circumstances.'⁷ From a gendered perspective, this move towards including certain forms of 'private' violence within the international legal understanding of what conduct may constitute torture is a significant development as the impact of violence perpetrated in the private realm falls disproportionately on women.

These two examples demonstrate the importance of this book. The fact that the Australian High Court is currently determining the constitutional validity of laws aimed at protecting the privacy, dignity, health and well-being of women accessing abortion services illustrates the importance of analysing public law through a gendered lens. The fact that the international legal community is increasingly holding states responsible for violence perpetrated in the private realm (where a link can be established with the state) illustrates the momentum towards developing international law through a gendered lens.

⁶ Katharine Young, 'Introduction: A Public Law of Gender' in Rubenstein and Young (n 1) 5.

⁷ Manfred Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Doc A/HRC/7/3, 15 January 2008) 46.

KEY THEMES AND IDEAS

The book consists of six parts. Part I comprises three chapters focusing on constitutional design and gendered outcomes. These chapters emphasise the role that a rights-based approach may play in achieving gender equality and the importance of ensuring that law does not reinforce traditional gender stereotypes. Part II looks at constitutional design in a global setting and presents the ‘challenge of the local’. It comprises four chapters that present domestic challenges to addressing gender adequately within the local constitutional framework. Part III hones in on the crucial matter of women’s participation and looks at this issue through the specific lenses of polygamy and one woman’s role in the international system. Part IV then considers the related issue of representation and does so through four chapters, two of which focus on individual countries (New Zealand and Vietnam) and two of which focus on thematic issues. Closely connected to the question of representation, Part V is concerned with questions of equality and non-discrimination in the governance context, with two chapters analysing specific issues in the Australian context and one raising interesting comparisons with the way that law tackles racial discrimination. Finally, Part VI looks at global governance and the precepts of public law, discussing issues ranging from the influence of CEDAW, the approach of the International Criminal Court to gender justice, international organisations as employers, global administrative governance and ecofeminism.

When reading this book, I was struck by certain themes that cut across the different Parts. For example, a number of chapters in the book consider the role of international law and its connection to domestic law. Reflections on domestic law lead some of the chapters to ponder local challenges to a human rights-based approach; particularly the human right to equality. Discussion of the human right to equality or non-discrimination is itself a focal point of a number of chapters, with some chapters concentrating on issues concerning women’s representation and participation in the public realm as essential precursors to the achievement of equality.

The role of international law

As mentioned above, this book forms part of a series aimed at connecting international law with public law. So it is fitting that a number of chapters in the book focus on the role of international law. In fact in the book’s first chapter, Jackson discusses the inclusion of international human rights, such as the right to equality and economic, social and cultural rights within domestic Constitutions.⁸ Jackson

⁸ Vicki Jackson, ‘Feminisms and Constitutions’ in Rubenstein and Young (n 1) 43.

then expands on this theme in the final part of the book by looking more broadly at the influence of international law on domestic law.⁹ In addition to international law, the book also considers the influence of international institutions; and whilst Chappell reveals how international institutions may act as models for domestic purposes,¹⁰ Jefferson and Epichev point out that international institutions are not necessarily a positive example for domestic institutions.¹¹ Indeed the international realm in many instances reinforces the problems embedded in domestic systems. Thus Wilkinson, for example, points out the way in which international environmental law privileges the neoliberal political economy thereby devaluing women's work.¹²

This notion that international law may be both a positive and a negative influence on domestic law is important to bear in mind. Too often, proponents of international law, and international human rights in particular, are zealot-like in their attempts to encourage the incorporation of international law within the domestic legal sphere without engaging in an objective assessment of its merits. In many instances, international law has much room for improvement. For example, the public/private dichotomy that runs through international law (discussed above) is perhaps the most frequently cited example of the gendered nature of international law.¹³ That said, increasingly this dichotomy is being addressed and international law, particularly international human rights law, whilst not perfect in many respects represents an approach to governance which is aimed at securing women's rights and women's equality. Frequently, it is local social and cultural norms that pose the most serious challenge from a gendered perspective. Thus a number of chapters in this book consider local challenges to a human rights-based approach to equality.

⁹ Vicki Jackson, 'Feminisms, Pluralisms, and Transnationalism: On CEDAW and National Constitutions' in Rubenstein and Young (n 1) 437.

¹⁰ Louise Chappell, 'Governing Victims' Redress and Gender Justice at the International Criminal Court' in Rubenstein and Young (n 1) 465.

¹¹ Osmat Jefferson and Innokenti Epichev, 'International Organisations as Employers: Searching for Practices of Fair Treatment and Due Process Rights of Staff' in Rubenstein and Young (n 1) 489.

¹² Kate Wilkinson, 'Is This the Future We Want? An Ecofeminist Comment on the UN Conference on Sustainable Development Outcome Document' in Rubenstein and Young (n 1) 538.

¹³ See for example Rebecca Cook, 'State Responsibility for Violations of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 125; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 638–43.

Local challenges to a human rights-based approach to equality

A number of chapters consider the challenges of specific social and cultural norms to a human rights-based approach to equality. For example: Williams illuminates the conflict between customary law and gender equality in South Sudan in circumstances where both are constitutionally protected;¹⁴ Nagarajan and Parashar consider the pervasiveness of gender discrimination in India and Vanuatu, countries which have both ratified CEDAW;¹⁵ Kouvo and Levine reveal the enormity of problems concerning gender-based violence and inequality in Afghanistan, despite the fact that the 2004 Constitution enshrines gender equality and that the country has ratified CEDAW.¹⁶ Other chapters are broader in their focus. Wilson illustrates how CEDAW provides a focal point for what needs to be done locally to achieve women's equality.¹⁷ In their respective chapters, Grenfell, Bessell and Nguyen emphasise how the inclusion of women's rights in domestic Constitutions or the ratification of CEDAW does not in and of itself guarantee the protection of these right in reality or the adequate representation of women in positions of power.¹⁸ Indeed, social and cultural constraints are frequently more powerful than law on the books.

This broader focus is important. It is not only countries in the global South where women's rights are often more theoretical than practical; violence against women, in particular intimate partner violence, remains a serious issue around the world. According to the Australian Bureau of Statistics, one in three women has experienced physical and/or sexual violence perpetrated by someone known to them.¹⁹ On average in Australia, one woman a week is murdered by her current or former partner.²⁰ Thus the failure of countries to protect adequately women's basic human rights, such as the right to life, is pervasive throughout the world, including

¹⁴ Susan Williams, 'Customary Law, Constitutional Law, and Women's Equality' in Kim Rubenstein and Young (n 1) 123.

¹⁵ Vijaya Nagarajan and Archana Parashar, 'Gender Equality in International Law and Constitutions: Mediating Universal Norms and Local Differences' in Rubenstein and Young (n 1) 170.

¹⁶ Sari Kouvo and Corey Levine, 'Law as a Placeholder for Change? Women's Rights and Realities in Afghanistan' in Rubenstein and Young (n 1) 195.

¹⁷ Margaret Wilson, 'Women in Government/Governance in New Zealand' A Case Study of Engagement over Forty Years' in Rubenstein and Young (n 1) 296.

¹⁸ Laura Grenfell, 'Customising Equality in Post-Conflict Constitutions' in Rubenstein and Young (n 1) 147.

¹⁹ Australian Bureau of Statistics, *Personal Safety, Australia* (2013).

²⁰ W Bryant and S Bricknall, '*Homicide in Australia 2012-2014: National Homicide Monitoring Program report*' (Australian Institute of Criminology, 2017) <<https://bit.ly/2ozctxh>> accessed 15 November 2018.

in wealthy Western liberal democracies. As such, Rimmer's focus on gender-based abuse in the Australian military reminds us of the reality that cultural norms in countries like Australia, particularly in sub-cultures like the military which have a history of hyper masculinity, perpetuate the acceptance of certain forms of gender specific harm.²¹ Further, the pervasiveness of violence against women is a reflection of the inferior role that women continue to occupy in society and the insidious effects of gender-based discrimination; so the focus on the right to equality in many of the book's chapters is commendable.

The right to equality/non-discrimination

Starting from the reasonable assumption that gender equality does not exist, Allen imagines a legislative regime that imposes a positive duty to promote gender equality and Collins, by focusing on the specific context of nationality laws, highlights the importance of ensuring that law does not reinforce traditional gender stereotype.²² Gover, Kapur and Kristofferson bring a different perspective to bear on this issue of equality and discrimination. Gover discusses the difference in application of anti-discrimination laws to race and gender whilst Kapur and Kristofferson consider how traditional notions of equality fail to capture adequately the oppression endured by gender-variant persons.²³

The failure of both international and domestic laws to tackle discrimination perpetrated against transgender and gender non-binary people strikes me as particularly important. Whilst women still have a long way to go in achieving full substantive equality, the enormity of the conscious and unconscious discrimination suffered by transgender and gender non-binary persons is extremely troubling. For example, despite some movement in the international realm to condemn 'unnecessary surgery and treatment on intersex children without their consent'²⁴

²¹ Susan Rimmer, 'Gender, Governance and the Defence of the Realm: Globalising Reforms in the Australian Defence Force' in Rubenstein and Young (n 1) 413.

²² Dominique Allen, 'Rethinking the Australian Model of Promoting Gender Equality' 391; Kristin Collins, 'Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws' in Rubenstein and Young (n 1) 73.

²³ Kirsty Gover, 'Gender and Racial Discrimination in the Formation of Groups: Tribal and Liberal Approaches to Membership in Settler Societies' 367; Rohan Kapur and Kellin Kristofferson, 'A Gender Critique of Accountability in Global Administrative Governance' in Rubenstein and Young (n 1) 514.

²⁴ United Nations, 'Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People' (September 2015) <https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF> accessed 15 November 2018.

and despite a 2013 Australian Senate inquiry condemning non-therapeutic sterilisation of intersex babies,²⁵ in Australia there has been no legislative reform in this arena. Thus whilst the fight for women's equality must continue, those fighting for the right to equality for all must also fight in support of equality for those identifying as transgender or gender non-binary.

Representation/Participation

An essential precondition for the attainment of equality is representation and participation. After all, it is those with a seat at the table whose interests are promoted and protected by the decisions made at that table. A number of chapters in this book discuss women's representation and participation in different contexts. For example, Lemaitre and Sandvik focus on the power of grassroots movements, Williams discusses gender quotas in the South Sudanese legislature and Wilson analyses the engagement of women in New Zealand with the political process.²⁶ Rubenstein's chapter is particularly interesting in that it highlights the need to hear the experiences of women who have participated in decision-making at the highest levels and illuminates the way that what and whose history is recorded and reported reinforces existing power structures.²⁷

The question of power and power relations is key in any discussion of gender inequality. The fact that all societies continue to be structured so as to privilege men over women means that these power dynamics infect all parts of the state. This goes some way to explaining why, as Bessell discusses, even with various initiatives in place for women's political representation (such as targets and quotas) women remain under-represented in legislatures around the world.²⁸ Further, it is not sufficient for women to be represented, women's full participation requires

²⁵ Senate Standing Committees on Community Affairs, *Involuntary or Coerced Sterilisation of Intersex People in Australia* (Second Report of Senate Inquiry, 25 October 2013) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index> accessed 15 November 2018.

²⁶ Julieta Lemaitre and Kristin Sandvik, 'Structural Remedies and the One Million Pesos: On the Limits of Court-Ordered Social Change for Internally Displaced Women in Colombia' 99; Susan Williams, 'Customary Law, Constitutional Law, and Women's Equality' 123; Margaret Wilson, 'Women in Government/Governance in New Zealand: A Case Study of Engagement over Forty Years' in Rubenstein and Young (n 1) 296.

²⁷ Kim Rubenstein, 'In Her Own Voice: Oral (Legal) History's Insights on Gender and the Spheres of Public Law' in Rubenstein and Young (n 1) 246.

²⁸ Sharon Bessell, 'Good Governance, Gender Equality and Women's Political Representation: Ideas as Points of Disjuncture' in Rubenstein and Young (n 1) 273.

that a feminist perspective is incorporated into policies and process. Thus, for example, Wisor reflects on the feminisation of poverty and suggests how new measures of poverty may be developed through participatory processes that reflect on the values which do and should inform our conception of poverty.²⁹ Finally, Baines' somewhat controversial chapter on polygamy in Canada illuminates how sometimes, in the absence of participation of the women most affected, laws aimed at protecting particular groups of women may in reality operate to their detriment.³⁰ Baines invokes the criminalisation of polygamy to illustrate this point. The discussion makes me think about the also controversial topic of compensated surrogacy, in where the criminalisation of compensation leads to a situation in which doctors, lawyers and clinics are paid to provide a fertility service but the surrogate is expected to provide her reproductive labour 'altruistically' thereby reinforcing conceptions of women's work as unpaid work. Thus in this scenario too, the law operates to the detriment of the women it is supposed to protect (i.e. the surrogates).³¹

CONCLUSION

It has been almost forty years since CEDAW came into force; yet discrimination against women remains endemic globally, as do other human rights violations that disproportionately affect women. Nevertheless, over the years there have been some significant improvements at both the local and global level. For example, increasing numbers of countries have legalised abortion and the various human rights treaty bodies have recognised restrictions on abortion as a human rights concern. As this book illustrates, when viewing both the public law of many countries and international law through a gendered lens, there has been some progress with much remaining room for improvement.

Alongside the continued fight for women's equality, the next frontier is the fight for equal treatment of transgender, intersex and other gender non-binary people. Surgery on intersex babies to conform genitalia to a gender selected by doctors or parents remains one example of problematic conduct that is passively accepted on a widespread scale. Increasingly, there is a progressive realisation

²⁹ Scott Wisor, 'Gender, Justice and Statistics: The Case of Poverty Measurement' in Rubenstein and Young (n 1) 344.

³⁰ Beverley Baines, 'Polygamy: Who Speaks for Women?' in Rubenstein and Young (n 1) 219.

³¹ For a discussion of whether Australia should legalise compensated surrogacy, see R Sifris, K Ludlow and A Sifris (eds) 'Special Issue: Commercial Surrogacy — What Role for Law?' (2015) *Journal of Law and Medicine* 23.

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around the world not only that all people should be treated equally, but that it is folly to insist on categorising people in a way that lacks nuance and is unreflective of the lived experience of many individuals. It is to be hoped that there will be a volume 2 of this book which expands on the chapter dealing with gender diversity and focuses on the need for, and consequences of, broader conceptions of gender.