

## Book Review: Interrogating Constitutional Jurisprudence from a Gendered Point of View: Asking Too Much, or Not Enough?

Niccolai, Silvia

Postprint / Postprint

Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

[www.peerproject.eu](http://www.peerproject.eu)

### Empfohlene Zitierung / Suggested Citation:

Niccolai, S. (2006). Book Review: Interrogating Constitutional Jurisprudence from a Gendered Point of View: Asking Too Much, or Not Enough? *European Journal of Women's Studies*, 13(2), 169-172. <https://doi.org/10.1177/135050680601300208>

### Nutzungsbedingungen:

Dieser Text wird unter dem "PEER Licence Agreement zur Verfügung" gestellt. Nähere Auskünfte zum PEER-Projekt finden Sie hier: <http://www.peerproject.eu> Gewährt wird ein nicht exklusives, nicht übertragbares, persönliches und beschränktes Recht auf Nutzung dieses Dokuments. Dieses Dokument ist ausschließlich für den persönlichen, nicht-kommerziellen Gebrauch bestimmt. Auf sämtlichen Kopien dieses Dokuments müssen alle Urheberrechtshinweise und sonstigen Hinweise auf gesetzlichen Schutz beibehalten werden. Sie dürfen dieses Dokument nicht in irgendeiner Weise abändern, noch dürfen Sie dieses Dokument für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, aufführen, vertreiben oder anderweitig nutzen.

Mit der Verwendung dieses Dokuments erkennen Sie die Nutzungsbedingungen an.

### Terms of use:

This document is made available under the "PEER Licence Agreement". For more information regarding the PEER-project see: <http://www.peerproject.eu> This document is solely intended for your personal, non-commercial use. All of the copies of this documents must retain all copyright information and other information regarding legal protection. You are not allowed to alter this document in any way, to copy it for public or commercial purposes, to exhibit the document in public, to perform, distribute or otherwise use the document in public.

By using this particular document, you accept the above-stated conditions of use.

traversable' (p. 114) – finds itself realized in this study. The main chapters are accompanied with thorough notes, and an extensive Bibliography and well-managed index make this a valuable research resource. Using the diverse manifestations of *écriture féminine* as an analytical vehicle, the authors are able to suggest productive ways of travelling through and alongside Cixous's work. In so doing, they do not balk at exposing what some have seen as inconsistencies in Cixous's exposition of *écriture féminine*. Appropriately, though, they allow Cixous to speak for herself: her project is to give the apple trees of gender a thorough shaking 'inside out, upside down' (p. 30).

Perhaps if Adam had mustered a smile rather than a frown at Eve's joyful apple-gobbling, the flowering of oppositional 'masculine' and 'feminine' economies would have been nipped in the bud.

Mary Bryden  
Cardiff University

#### INTERROGATING CONSTITUTIONAL JURISPRUDENCE FROM A GENDERED POINT OF VIEW: ASKING TOO MUCH, OR NOT ENOUGH?

Beverly Baines and Ruth Rubio-Marin, eds  
*The Gender of Constitutional Jurisprudence*

Cambridge: Cambridge University Press, 2005, xiii + 342 pp., ISBN 0-521-53027-X (hbk), 0-521-82336-6 (pbk)

*The Gender of Constitutional Jurisprudence* is a wide-ranging and very interesting survey of constitutional principles on gender and their enforcement by the constitutional courts in 12 countries (Australia, Canada, Colombia, Costa Rica, France, Germany, India, Israel, South Africa, Spain, Turkey and the USA). The authors are all scholars highly qualified in themes related to gender. Each of the 12 chapters gives a quick but comprehensive account of the recent constitutional history of the country examined, then focuses on constitutional provisions about gender and on a review of gender-related case law. Each chapter also offers a brief bibliography. Technical aspects (e.g. the rules of constitutional proceedings) are plainly explained, and thus the reading of the book, even if obviously easier for experts in law, can be enjoyed by a larger public.

As the editors underline in their Introduction, the case law reported makes up a possible 'feminist constitutional agenda', and brings together a large number of themes. Most of them (from employment discrimination to political underrepresentation) are common to the different countries; some (e.g. the rights to land sacred to aboriginal women in Australia) are more specific to a single country.

Even if aware of the 'discursive power' of constitutions and of constitutional jurisprudence, even if conscious that (as Isabel Karpin and Karen O'Connell write in their profound essay on Australia) 'The Constitution – any Constitution – is limited by the forms of power in which it is embedded' (p. 46), and that, on the other hand, 'the interests of women are not unitary but diverse', the writings collected in this book share on the whole the idea that constitutional provisions and constitutional claims are useful tools in order to improve the condition of women as a group, especially when fully implemented by the courts (where even more women judges should sit), and provided that the mere 'formal equality' gives way to 'substantive equality'.

Whereas formal equality (equality before the law) neutralizes differences

between men and women and between women, substantive equality is expected to be able to express, promote and protect differences between groups of individuals. Allowing reasonable and proportionate differences in treatment to persons who find themselves in different *de facto* situations, substantive equality is the principle that should grant positive or corrective measures specifically applicable to women (or to groups of women, as women in minorities, poor, lesbian, elderly women); it is the interpretative path to name male privileges and to uncover the inequalities embedded both in gender-neutral laws and in paternalistic benefits; and the judiciary instrument that makes it possible to overcome oppression and subordination of women by recognizing for them, in the various contexts of life (family, labour, decision-making processes, etc.), special and articulated rights.

In the work of recognizing and implementing substantive equality, the courts appear at times disappointing, at times progressive: the final comment that Blanca Rodríguez Ruiz and Ute Sacksofsky make about the German Federal Constitutional Court, 'quite helpful' but still having 'a long way to go', epitomizes the opinion expressed in the book as a whole towards the outcomes of constitutional jurisprudence.

The rich and varied case law reported (the very treasure which makes this book simply precious) is nevertheless challenging. It questions some of the premises of the analysis if not the possibility (or the opportunity) itself of selecting a portion of constitutional jurisprudence as the one which – as the editors say – 'pertains to women'. The case law seems moreover to suggest that equality (even if substantive) is always a very ambiguous, paradoxical way to make differences speak.

Let us think of the delicate theme of abortion. It is of course a matter of 'women's reproductive rights', but the choice of addressing the courts is rarely made by women. Constitutional proceedings on abortion arise from male claims (as in the case of the Canadian doctor prosecuted for performing abortion, reported by Beverley Baines) or from public initiatives (as that of the Government of Bavaria in Germany). In effect, the complex balance of interests which the courts in such cases realize goes to show that at stake are not the rights of women, but the building of a 'secular moral', the drawing of boundaries (and linkages) between State and Religion, the effort of the court to demonstrate that a 'public conscience' does exist, aware of the needs of all the possible actors, unborn life included, and that it is legitimate to answer the 'ultimate questions' such as the beginning of life – the kind of questions that our culture likes to consider are involved in abortion. Whether or not successful in terms of achieving legality of abortion, the great narratives built up by the courts show that these kinds of claims are an important area, and perhaps the more sensitive one, where constitutional democracy constructs itself as a pluralistic arena. Far from outlining a field merely pertaining to women, and thus separate from the rest of the ('neutral?') constitutional agenda, litigations on abortion prove that issues embodied in women are the cross-roads, the decisive points in the making of the symbolic, discursive and normative construction of contemporary democracies. Another example could be given: quotas and women's representative rights. How much are they an opportunity offered to women, and not an opportunity for the suffering value of democracy to renovate itself and appear useful and good?

Following the balance of interests made up by the courts, we discover that issues 'pertaining to women' are always situated at the heart of the most important institutions of western or westernized societies. When the courts discuss if maternal leave should or should not be extended to fathers, their reasoning, which tries to balance the interests of the child, the paternal role, the

problems of married or unmarried couples and so on, ends by putting the institution of the Family at the centre. Sometimes against the interests of women, maybe, but always demonstrating that a fact is at work: the world is made up of different people, who find themselves always in different relations (with regard to this in Italian feminist thought, see Giardini, 2004). As women, as feminists, we will always risk feeling defeated by the law, if we don't allow ourselves to perceive, recognize and say that, in its own way, the law always reveals the dynamic strength of sexed relations. We will always feel displeased, if not defeated, if we don't stop waiting for the law to make 'justice' for women, without becoming aware that women are already inside the law, at the centre of its (at times, inconsistent) complex movements.

At times, we ourselves, as feminist lobbyists, law experts and scholars, do not facilitate the interaction between differences and the law. If we keep on entering claims to equality in the discourse of law, we should not be surprised when the law replies paradoxically, or does not reply at all.

Let us think of the headscarf issue in Turkey (another question, where, as Hilal Elver precisely observes, not only is a religious claim of women at stake, but a whole idea of the public and private spheres). Some women affirm that the prohibition of headscarves, e.g. in the universities, means that women and men are treated unequally before the law, because, as Elver explains, 'men who share the same belief with women . . . are admitted to universities . . . since they have no specific religious dress code' (p. 295). The courts (the Turkish court and the European Court of Human Rights) reply: sorry, you're wrong, it's just the wearing of headscarves that creates 'unequal treatment between male and female believers', so this form of dress must be prohibited in the name of equality (pp. 294, 296). Tricky, of course, but these are the outcomes of equality – and of substantive equality, also.

In this regard, we turn to the field of labour. The fight which in the 1990s took place between the German courts and the European Court of Justice about quotas (masterly reported by Rodríguez Ruiz and Sacksofsky) can be regarded as an exemplary one. According to the European judges, quotas are inconsistent with principles of equal treatment and non-discrimination when they give women absolute priority over male candidates with equal qualifications. In this fight, the national level speaks the language of a traditional constitutionalism innervated with (progressive or stereotyped?) values, and the supranational actor speaks the language of the uniformity of rules in the European context, which does not tolerate too many special rights for women, given that they are a cost in terms of market competition and free circulation of workers. The European Court of Justice, which upholds a strict 'non-discrimination' principle to be applied across the 25 countries of the European Union (not infrequently using this principle as a weapon against protectionist legislation for women), reminds us that the claims of substantive equality (special treatments granted out of protection of special needs of special social groups, as women) are not a way to escape formal equality.

In legal reasoning, every special treatment must first of all be proportional to its own end: a special treatment can never offer a disadvantaged group opportunities that would entail the discrimination of another group. Second, every special treatment must be justified on the basis of 'concrete' grounds: a 'positive measure' such as quotas finds its grounds in the 'under-representation of women in the field of Labour'. The grounds, which justify the positive measure, must continue to exist. Otherwise, the special treatment becomes discriminatory. That is to say: inconsistent with formal equality.

Thus, where would a battle for substantive equality bring us? There are two

possibilities. The first would be that women and groups of women remain for ever so problematic, so needy, as to merit eternally some kind of special treatment. The second, that women and groups of women at last overcome their problems and become, finally, equal. Are these the images of women we dream of?

A puzzling dilemma, perhaps recognized by those women who choose not to argue their claims from the perspective of equality and non-discrimination, but who defend their interests with arguments strictly related to the concrete features of single cases (as the child interest in a Spanish litigation case about child support, reported by Ruth Rubio-Marin). Were these women (and their lawyers, whose sex it would be interesting to know, and not only that of the judges!) wrong, or were they aware that equality is not the best way to express the centrality and full legitimacy of women's claims in the juridical discourse? In fact, they won, and their victory (Rubio-Marin notes) was perceived as a victory for women.

Thanks to the editors and authors for a book that helps to pose questions around the relevant theme of a feminist constitutional interpretation.

## REFERENCE

Giardini, Federica (2004) *Relazioni*. Rome: Luca Sossella.

Silvia Niccolai  
*The University of Cagliari, Italy*

## CONTROVERSIAL, DISTASTEFUL OR NECESSARY? LET'S TALK ABOUT RAPE

Merril D. Smith, ed.  
*Encyclopedia of Rape*  
 Westport, CT: Greenwood Press, 2004, 301 pp., ISBN 0-3133-2687-8

Can a four-lettered word really merit an entire encyclopaedia? When that word is rape the answer has to be yes. If you take an interest in history, law, literature, cultural studies, criminology, in fact any facet of life connected to gendered relations, this book will prove a valuable addition to your bookshelves. To some extent it is not a conventional encyclopaedia: there are no tables, graphs, charts or illustrations. It is, however, a very readable series of cross-referenced articles that collectively provide insight into the issue of rape from a range of perspectives. The editor, Merrill D. Smith, clearly states that the book takes a US focus to the subject matter and this focus is generally adhered to throughout, although there are some entries of historical and cultural relevance that go beyond these limits.

Aimed at the general reader, the *Encyclopedia of Rape* is a compendium of easily accessible information on all aspects of rape. It is written in a jargon-free, straightforward style and features 186 entries written by 79 scholars covering concepts and key individuals, emphasizing the historical and practical, rather than the deeply theoretical. A chronology of rape history precedes the general entries and spans events from the pre-Christian Babylonian code of Hammurabi, which legislated on the guilt or innocence of rape victims determined by their marital status, to the trial of Marc Dutroux in Belgium in 2004. It also provides alphabetical and topical lists of entries, which help to save time for the browser who is unsure of