

Engendering Constitutional Justice: Women's Rights and Substantive Equality in Contemporary Society

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ABSTRACT

In the past century, gender equality has been steadily enshrined as a core norm of constitutional democracies throughout the world. But the lived experience of millions of women remains, often dramatically, different from the rights given on paper. This paper explores the structural and jurisprudential gap between formal constitutional provisions and substantive gender justice, showing how patriarchal social orders, procedural barriers, and selective enforcement of rights continue to perpetuate inequality even when legal structures are ostensibly egalitarian. Using constitutional jurisprudence from India, South Africa, and some jurisdictions in Europe and the Americas, the article considers the doctrinal development of equality clauses, reproductive rights and antidiscrimination protections, while placing these issues within the broader feminist critique of liberal constitutionalism. The study further examines modern flashpoints – workplace sexual harassment, marital rape, property inheritance and digital violence – as test cases of how well constitutional architecture accommodates women's concerns. It contends that gender justice involves more than just formal inclusion in constitutional texts, but a transformational constitutionalism that actively dismantles hierarchies entrenched in both law and social practice. The article ends with a proposal for a framework of intersectional constitutionalism as a methodological and normative lens for judges, legislators and civil society groups committed to the advancement of women's rights in the twenty first century.

Keywords: gender justice, constitutional rights, women's rights, transformative constitutionalism, feminist jurisprudence, equality law

INTRODUCTION

The Constitution as Both Shield and Battleground. There is a particular kind of hope that attaches itself to constitutional texts. When a newly independent nation inscribes equality between men and women into its founding document, or when a constitutional court strikes down a law that discriminates on the basis of sex, the act carries a symbolic weight that far exceeds its immediate legal consequence. Constitutions name the world as it ought to be, even when they describe it as it is not. This tension between constitutional aspiration and social reality sits at the heart of the gender justice project. Formal equality the notion that people in like situations must be treated alike - has long been acknowledged by feminist legal scholars as necessary but not sufficient for women's liberation. It is necessary because arbitrary discrimination demeans and excludes. But it is insufficient because it takes existing social arrangements as its baseline, and those arrangements are themselves deeply gendered. A rule that treats a woman applying for a bank loan identically to a man assumes that she begins from the same position of economic and social power, an assumption that centuries of dispossession make untenable (MacKinnon, 1989 Nussbaum, 1999). Contemporary debates over gender justice are therefore not simply about whether constitutions contain equality clauses most do but about what those clauses are interpreted to require, and who bears the burden of advancing change. This article proceeds from the premise that constitutional rights for women are contested achievements rather than settled facts, and that the work of securing them is political, institutional, and cultural in equal measure. The sections that follow map the jurisprudential terrain of gender equality constitutionalism, examine contemporary pressure points where the gap between law and life is most visible, and argue for a theoretically rigorous and politically engaged understanding of transformative constitutionalism as the framework best suited to the current moment.

The paper draws on constitutional and statutory materials from India, South Africa, Germany, Canada, and the United States, not to construct a naive comparative ranking but to illuminate how different constitutional designs and political histories have shaped and sometimes constrained the pursuit of gender justice. The choice of jurisdictions reflects an attempt to include both the Global North and the Global South, recognising that the experience of patriarchy, though structurally common, takes locally specific forms.

CONSTITUTIONAL ARCHITECTURE

The Emergence of Equality Clauses

The inclusion of sex or gender as a prohibited ground of discrimination in constitutional texts is a twentieth century phenomenon, one whose spread accelerated after the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. Today, the overwhelming majority of the world's constitutions contain some form of antidiscrimination guarantee referencing sex, gender, or both. Yet the content and enforceability of these provisions vary enormously. For example, the Indian Constitution, in 1950, explicitly prohibited discrimination on the ground of sex under Article 15, but allowed the state to make “special provisions” for women under the same article. This was an early recognition that formal equality would not be enough. Article 39 further directs the state to ensure equal pay for equal work and to protect the health of workers. South Africa's post apartheid Constitution of 1996, widely regarded as among the most progressive in the world, goes further still Section 9 not only prohibits unfair discrimination but explicitly obligates the state to take legislative and other measures to promote equality, and explicitly lists sex, gender, pregnancy, and sexual orientation as protected grounds (Constitution of South Africa, 1996). These textual differences matter. Constitutions that merely prohibit discrimination place the burden on aggrieved individuals to challenge unequal treatment, while constitutions that impose positive obligations on the state create a different normative environment one in which inaction is itself a potential constitutional violation. The shift from negative to positive framing is not merely semantic it reflects a substantive theory of equality that acknowledges structural disadvantage (Fredman, 2008).

The Limits of Formal Equality

The formal equality model, often described as an 'anti classification' approach, treats any differentiation on the basis of sex as presumptively suspect. Its appeal lies in its apparent symmetry the same rules apply to men and women alike. Its limitation, as feminist jurisprudence has exhaustively demonstrated, is that it takes for granted a social world that is itself constituted by gendered hierarchies. The U.S. Supreme Court's sex discrimination jurisprudence illustrates both the power and the limits of the formal model. The Court's adoption in the 1970s of heightened scrutiny for sex-based classifications, championed by the advocate Ruth Bader Ginsburg, dismantled a thicket of laws that had openly subordinated women (*Frontiero v. Richardson*, 1973 *Reed v. Reed*, 1971). Yet the same formal equality framework proved deeply awkward when applied to pregnancy discrimination, revealing that a model designed to treat men and women alike struggles to address conditions that have no male equivalent. Congress eventually responded with the Pregnancy Discrimination Act of 1978, but the episode exposed a structural gap in the formal model's conceptual architecture (Williams, 1984). The substantive equality alternative, associated with scholars such as Sandra Fredman, Catharine MacKinnon, and Martha Nussbaum, reorients equality analysis away from sameness and difference toward the elimination of disadvantage, stigma, and subordination. On this view, a measure that treats pregnant women differently from non-pregnant workers may be

required by, rather than in tension with, equality norms, if the purpose is to remedy a structural disadvantage that women alone face

FEMINIST CRITIQUES OF LIBERAL CONSTITUTIONALISM

Feminist engagement with constitutional law has never been a single, unified project. Liberal feminists, radical feminists, socialist feminists, postcolonial feminists, and critical race feminists have all advanced distinct, sometimes competing, accounts of what constitutional equality requires and what it can deliver. Their disagreements are productive because they demand a confrontation with the assumptions that underlie dominant legal frameworks. Liberal feminism, broadly speaking, accepts the framework of rights while arguing for its consistent application to women. Its achievements formal legal equality, antidiscrimination statutes, equal pay legislation have been real and significant. But critics from within feminist theory have pointed out that the liberal framework tends to treat the individual as an atomistic rights bearer, abstracting away from the social relationships and structural conditions that shape women's lives (Olsen, 1983 Smart, 1989). Radical feminist jurisprudence, associated particularly with MacKinnon (1989), argues that liberal legal equality is not merely insufficient but actively ideological by treating as neutral a legal system that was built by and for men, formal equality naturalises and legitimises male dominance. This critique has found its most consequential application in the law of sexual harassment, which MacKinnon reconceptualised as sex discrimination rather than interpersonal misconduct reframing that fundamentally altered both legal doctrine and public understanding.

Postcolonial and third world feminist scholarship adds a further layer of complexity by questioning whether the constitutional rights frameworks developed in Western liberal democracies can be straightforwardly exported to, or applied in, societies marked by colonial legacies, caste hierarchies, religious pluralism, and deeply embedded customary practices. Scholars such as Ratna Kapur (2005) and Nivedita Menon (2004) have argued that the Indian constitutional project, for instance, has repeatedly subordinated women's rights to communal identity and national unity, particularly in matters of personal law governing marriage, divorce, and inheritance. These critiques do not add up to a rejection of constitutional rights as such, but they do counsel against a naive faith in formal legal mechanisms as sufficient vehicles of liberation. They suggest, instead, that constitutional rights are terrain on which power is contested, rather than solutions that arrive from above.

BRIDGING CONSTITUTIONAL PROMISE AND SOCIAL REALITY

Workplace Sexual Harassment and the Architecture of Accountability

Sexual harassment at the workplace remains among the most pervasive and under addressed manifestations of gender based inequality. Despite the existence of comprehensive legislation in many jurisdictions the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in India, Title VII jurisprudence in the United States, and the Equality Act 2010 in the United Kingdom implementation remains deeply uneven. The constitutional dimension of workplace harassment is not always immediately apparent, but it is real. Where states do not set up sufficient institutional mechanisms for redress, or where those mechanisms are co-opted by employer interests, they may be in breach of their positive obligations under constitutional equality guarantees. The Indian Supreme Court's seminal Vishaka judgment of 1997 made this link explicit, articulating a

constitutional obligation to prevent workplace sexual harassment that is directly derived from Articles 14, 15, 19, and 21 of the Constitution, where no legislation exists (*Vishaka v. State of Rajasthan*, 1997). The judgment, grounded in CEDAW as an interpretive tool, set guidelines that were eventually codified in the 2013 Act but the Act's patchy enforcement, particularly for informal sector workers who constitute the majority of women's employment in India, continues to raise questions about how far the constitutional promise has actually reached (Baxi, 2014).

Reproductive Rights and Bodily Autonomy

Few areas of constitutional law are as contested or as consequential for women's lives as reproductive rights. The question of whether women have a constitutional right to control their reproductive choices—including access to contraception, abortion, and reproductive healthcare—has been answered very differently across jurisdictions, and the answers have shifted over time in ways that underline the vulnerability of rights grounded in judicial interpretation rather than legislative entrenchment. The most dramatic recent example of this vulnerability is the U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). In ruling that there is no constitutional right to abortion and remanding the issue to state legislatures, the Court did not merely change a legal rule; it reshaped the constitutional landscape for millions of women, with immediate and disproportionate effects on low-income women and women of colour (*Dobbs v. Jackson Women's Health Organization*, 2022). The decision has led constitutional scholars to revisit the doctrinal foundations of reproductive rights, with many arguing for their explicit entrenchment at the federal level or, alternately, for their grounding in equal protection rather than substantive due process (Siegel, 2022). By contrast, constitutional frameworks that ground reproductive rights in equality rather than privacy have proved more robust. Germany's Constitutional Court, while permitting restrictions on abortion, has consistently held that the state must ensure women have access to counselling and social support, imposing positive obligations alongside the negative right not to be prosecuted. South Africa's Choice on Termination of Pregnancy Act, enacted under the equality-oriented Constitution, provides among the most permissive abortion regimes in the world, in deliberate recognition of the reproductive coercion that apartheid policies inflicted on Black women (Albertyn 2007).

Property, Inheritance, and Economic Rights

The relationship between property rights and women's empowerment is both empirical and normative. Empirically, women's access to land and property correlates strongly with improved outcomes in health, education, and freedom from domestic violence. Normatively, the exclusion of women from inheritance and property ownership is a direct manifestation of patriarchal control over female economic independence. In many jurisdictions, discriminatory inheritance practices persist through the mechanism of personal law or customary law, which constitutional frameworks have sometimes been reluctant to displace. In India, the Hindu Succession Act was amended in 2005 to grant daughters equal coparcenary rights in joint family property, a significant reform but implementation has been patchy, and the Supreme Court was still being called upon as late as 2020 to clarify whether the amendment applied to daughters born before 2005 (*Vineeta Sharma v. Rakesh Sharma*, 2020). In sub-Saharan Africa, customary land tenure systems in several countries continue to deny women heritable rights, with constitutional equality provisions often rendered toothless by 'repugnancy clauses' or judicial deference to tradition.

Digital Violence and the New Frontiers of Gendered Harm

The proliferation of digital technologies has created new and devastating forms of gendered harm non-consensual sharing of intimate images, online stalking, coordinated harassment campaigns, and deep fake pornography. These harms are disproportionately visited upon women, and they carry consequences psychological, professional, and social that are comparable in severity to more traditionally recognised forms of gender-based violence. Constitutional frameworks are still catching up with these realities. Free expression provisions have sometimes been invoked to resist the criminalisation of online harassment, raising difficult questions about how equality and speech rights should be balanced when the two come into conflict. Feminist scholars have argued persuasively that the chilling effect of online harassment on women's participation in public life journalism, politics, academia is itself a free expression concern, and that ignoring this effect in the name of speech protection reflects a gendered hierarchy of whose speech counts. Several jurisdictions have now enacted specific legislation addressing cyber harassment and image-based abuse, though the adequacy of these measures and the commitment to their enforcement remain contested.

Towards Transformative and Intersectional Constitutionalism

The concept of transformative constitutionalism, developed most fully in the South African context by scholars such as Karl Klare (1998) and Theunis Roux (2013), offers one of the most promising normative frameworks for thinking about how constitutional law can genuinely advance gender justice. Where liberal constitutionalism asks whether a particular rule discriminates, transformative constitutionalism asks whether the legal and social order, taken as a whole, is moving in the direction of substantive equality. Klare's original formulation identified transformative constitutionalism with a 'postliberal' understanding of law one that acknowledges the constitutive relationship between law and social power, takes seriously the aspirational dimension of constitutional rights, and accepts that judicial interpretation is a value laden rather than neutral exercise. Applied to gender, transformative constitutionalism would require courts not merely to strike down discriminatory laws but to interpret constitutional provisions in ways that actively enable women's full participation in social, economic, and political life.

Intersectionality, the concept introduced by legal scholar Kimberlé Crenshaw (1989, 1991) to describe the way in which multiple systems of oppression racism, sexism, class, caste, sexuality, disability interact and compound one another, is an indispensable complement to the transformative project. A constitutionalism that addresses gender in isolation from other axes of disadvantage will systematically fail the women who face the most acute forms of inequality. Dalit women in India, Black women in South Africa, Indigenous women in Canada and Australia, and women with disabilities across all jurisdictions experience gender-based disadvantage in forms that are qualitatively different from, and cannot be derived simply from, the separate experiences of gender and caste or gender and race. Constitutional courts have been slow to embrace intersectional analysis in any systematic way, and the reasons are instructive. Intersectionality complicates the neat categorical structure that equality law prefers it is harder to litigate, harder to remedy, and harder to accommodate within frameworks designed around single axis discrimination but the difficulty is not a reason for avoidance it is an argument for doctrinal innovation. The Canadian Supreme Court's approach in cases like *Janzen v. Platy Enterprises* (1989) and *Law v. Canada* (1999) has pointed in the right direction, though inconsistently, by asking about the effect of a challenged measure on actual social groups rather than on abstract, decontextualised individuals.

An intersectional constitutionalism would, in practice, require courts to attend to the specific circumstances of the claimants before them rather than averaging across a hypothetical 'woman' would require legislatures to assess the differential impacts of social policy on women in distinct social positions and would require civil society organisations and state institutions alike to collect and disaggregate data that makes intersecting disadvantages visible. These are institutional and political demands as much as jurisprudential ones, and they cannot be met by courts acting alone.

The Role of International Human Rights Law

International human rights law CEDAW, the Beijing Platform for Action, the Sustainable Development Goals, and the emerging consensus around a right to freedom from gender-based violence has provided crucial normative resources for domestic gender justice movements. The relationship between international norms and domestic constitutional law is complex and jurisdiction specific, but several patterns are discernible. In monist legal systems, or in those where constitutional provisions explicitly incorporate international law, CEDAW and related instruments can be directly invoked before courts. The Indian Supreme Court's use of CEDAW as an interpretive tool in *Vishaka*, despite India's dualist tradition, illustrates how creative judicial interpretation can bridge the gap. South Africa's Constitution explicitly requires courts to consider international law when interpreting the Bill of Rights, creating a structural opening for the incorporation of international gender norms. At the same time, the limits of international law as a mechanism for advancing domestic gender justice should not be understated. State reporting obligations under CEDAW are notoriously under enforced the Optional Protocol's individual communications mechanism, while valuable, reaches only a small fraction of those affected and the political will to implement Committee recommendations varies enormously. International norms are most effective when they are taken up by domestic movements, institutionalised in legislation and constitutional practice, and backed by independent monitoring mechanisms with real enforcement capacity.

Civil Society, Social Movements, and Constitutional Change

The history of gender justice in constitutional law is inseparable from the history of feminist social movements. Constitutional texts do not interpret themselves, and the progressive interpretation of equality clauses has almost invariably required sustained political pressure from organised women's movements, public interest litigants, and advocacy organisations willing to bring test cases, challenge legislative inaction, and hold courts and governments publicly accountable. The MeToo movement, which erupted globally after 2017, illustrates both the potential and the limits of social movement pressure in the constitutional domain. The movement shifted the terms of public discourse on sexual harassment and assault with remarkable speed, forcing legislative reforms in several jurisdictions and prompting institutional reviews across industries. Yet it also exposed the degree to which the existing legal infrastructure complaint mechanisms, evidentiary rules, statutes of limitations was poorly designed to address pervasive, normalised harassment, particularly when perpetrated by powerful individuals. Constitutional litigation and legislative reform in response to MeToo have produced some meaningful changes, but the movement's energy has also met significant institutional resistance, as well as backlash from those who characterise procedural reforms as threats to due process (Menkel Meadow, 2018). This dialectic between movement mobilisation and institutional consolidation is a recurring feature of the gender justice landscape. Rights won through social movements tend to be fragile when they rest solely on judicial interpretation they become more durable when entrenched in legislation, supported by enforcement institutions with independent resources, and embedded in a political culture that treats gender equality as a non-negotiable public value rather than a contested preference.

CONCLUSION

Gender justice, understood as the elimination of structural disadvantage based on gender and the equal realisation of all people's capabilities and freedoms, remains an unfinished constitutional project in every jurisdiction surveyed in this article. The achievements of formal legal equality the removal of overtly discriminatory rules, the opening of professions, the grant of voting rights and property rights represent genuine and hard-won gains. But they sit alongside persistent and well documented disparities in pay, representation, safety, and opportunity that formal equality frameworks have proved unable to address on their own. This article has argued for a move from formal to transformative and intersectional constitutionalism as the most intellectually honest and practically effective framework for the current moment. Such a constitutionalism takes seriously the aspirational dimension of constitutional texts, demands substantive rather than merely procedural equality, and insists that the experiences of the most marginalised women those at the intersection of gender with caste, race, poverty, disability, and sexuality must be the measure of constitutional progress rather than its exception.

Transformative constitutionalism is not a magic solution. It depends on courts that are willing to engage in purposive interpretation, legislatures that are responsive to equality demands, executive agencies that enforce rights with genuine commitment, and civil societies that maintain organised pressure for change. It requires, in other words, all the institutions of democratic governance to function reasonably well, and to be animated by a shared commitment to gender justice as a public value. That shared commitment cannot be assumed. It must be built, defended, and renewed in every generation. The constitution provides the vocabulary and the normative architecture for that work. The work itself belongs to all of us.

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