

# On Constitutionalism and Women's Citizenship

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**Abstract:** This article is an attempt to explain the forms in which constitutionalism has facilitated or hindered women's equal citizenship throughout history and with a particular emphasis on Western constitutionalism, especially the US and continental Europe, but also with an eye on new constitutionalism and its innovations. In so doing, the article takes into account not only women's access to the rights first conquered by men but also the extent to which the forms of participation traditionally assigned to women—neither in the state nor in the marketplace, but rather in the household and in the family—have become recognized as forms of citizenship contribution. In other words, it tells the story of the relevance of constitutionalism for women's citizenship as defined in male terms (that is to say, with a focus on equal rights and participation in the so-called public sphere), as well as for women's ability to redefine the very understanding of citizenship to include participation in social reproduction, in and through the so-called domestic sphere.

**Key words:** gender constitutionalism; women's citizenship; constitutional equality; gender roles disestablishment; gender equality backlash.

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## 1. Introduction

In 1872, Justice Bradley of the United States Supreme Court, in a case denying women the right to practice law, declared in an infamous concurring opinion that:

[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of

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womanhood. The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother.<sup>1</sup>

In 2003, Colombian Constitutional Court Justice Clara Inés Vargas Hernández, writing for the majority in a case which invalidated the restrictive terms of a newly established paternity leave, made reference to the ‘masculine revolution’ of the end of the millennium and to ‘a new generation of fathers who have discovered that they can get involved in their children’s upbringing, just as mothers do, without damage to their virility’, as well as to an ‘emerging model of ‘committed fatherhood’ characterised by the elements of responsibility, emotional nurturing, physical accessibility and material support’.<sup>2</sup> Although 131 years apart, both courts seem to be talking about familial gender roles which must be preserved or subverted, as a matter of constitutional law.

Many questions could certainly be raised in trying to account for the different viewpoints expressed in these decisions. Did the constitutions the justices were interpreting say anything about the family and care roles within it? Did they refer to sex equality and in what terms? Were these constitutions drafted by women or, at least, under the influence of women’s input or mobilization? How many if any were the women sitting on the benches deciding these cases? More importantly, how does the vision of men and women they describe refer to the prevalent understandings of women’s citizenship at the time when the opinions were written? One thing is certain: these decisions are not just talking about rights and duties of men and women; they are also defining men and women’s domains of participation. Whereas Bradley’s opinion refers to divine ordinance and a state of nature, which the constitution takes for granted, and normatively reduces women to the domestic sphere and the role of mother and wife, in its appeal to a new concept of fatherhood, the Colombian case refers to an egalitarian family structure which can no longer see women as relegated to the societal function of reproduction, a function in which men must equally participate.

This article is an attempt to explain, in very broad and hence necessarily impressionistic terms, the forms in which constitutionalism has facilitated or hindered women’s equal citizenship throughout history. While drawing from many experiences around the world, it places

<sup>1</sup> *Bradwell v Illinois*, 83 US 130, 141–42 [1873].

<sup>2</sup> Corte Constitucional [CC] [Constitutional Court], abril 1, 2003, Sentencia C-273-03, (Colom) para 5.

particular emphasis on Western constitutionalism, especially the US and continental Western Europe, mainly because of their leading role in the early history of written modern constitutionalism as well as my own situated academic background. In so doing, the article takes into account not only women's access to the rights first conquered by men but also the extent to which the forms of participation traditionally assigned to women—neither in the state nor in the marketplace, but rather in the household and in the family—have become recognised as forms of citizenship contribution. In other words, it tells the story of the relevance of constitutionalism for women's citizenship as defined in male terms (that is to say, with a focus on equal rights and participation in the so-called public sphere), as well as for women's ability to re-define the very understanding of citizenship to include participation in social reproduction, in and through the so-called domestic sphere.

To do this, the essay will begin with the birth of constitutionalism, which entrenched a two-track citizenship model for men and women on the basis of a theory of separate spheres. It will take us through the times and conquest of women's suffrage and its important but limited impact on women's constitutional equality, given that voting rights for women did not produce an overall subversion of the gender order as the old 'head and master' rules coexisted virtually everywhere with women's newly conquered political voice. We will then explore second-wave feminism and its much more meaningful though still limited impact on women's constitutional citizenship, with the ideal of a gender-neutral legal order becoming the new norm and replacing the *pater familias* regime which had conceived of women as legal minors. We will see how, under the doctrine of formal equality, and with an emphasis in the public sphere and in equal rights, discrimination on the grounds of sex consolidated as a constitutional wrong, helping women not only assert their equal legal status vis-à-vis their husbands but also join the marketplace on ever more equal terms with men. We will also see how, with very narrow exceptions, broadening the boundaries of contestation beyond market dynamics and the public sphere to include, as second wave feminists had wanted, housework, sexuality, and reproduction was something inclusive constitutionalism failed to achieve.

The essay will then bring us to contemporary times, carrying us through what I call 'women's participatory turn'. Beginning in the late 1980s and flourishing since mid-1990s, this participatory turn sees women's claims turning from equal rights to a broader claim of equal participation not only in the employment domain, but also in politics

and positions of authority and decision-making, calling on constitutional doctrines and norms of substantive equality and parity democracy to justify the adoption of quotas and other affirmative action measures serving this purpose. This participatory turn also refers to women ultimately joining constitution-making processes in significant ways and is connected to an expansion of the constitutional agenda which we approach next. Indeed, the essay discusses next what we could call the 'new millennium' gender constitutionalism, which is gradually acknowledging the centrality of social reproduction for all and of an egalitarian and democratic family structure, advancing a vision which disentangles the forms of contribution in the public and private spheres from normatively constructed gender roles of both men and women. Expressions of this contemporary transformative gender agenda include the affirmation of same-sex marriage, the fight against domestic and other forms of gender violence, the consolidation of women's reproductive freedom and the recognition of the need to enhance co-responsibility around human reproduction, as well as the acknowledgment of the socially constructed nature and fluidity of the concept of gender itself. Unfortunately, we cannot end our story without reference to the contemporary gender equality halt or backlash contesting some of the recent victories and seeking a reaffirmation of the traditional gender order built around old conceptions of the family.

It is important to notice that the timeframe followed in the essay pays attention to the moment when the different forms of contraction or expansion of women's citizenship through constitutionalism first came about in history. However, it by no means suggests an evolutionary path which must sequentially repeat itself in the advancement toward women's constitutional equality in every jurisdiction. It is thus best to think of these categories as forms of constitutionalism rather than stages and to consider them forms which can vary in time and sequence among national jurisdictions and which are not, for the most part, mutually exclusive, especially since the last three articulate different modalities of egalitarian constitutionalism. These forms are: (1) *exclusionary constitutionalism*, where constitutional law significantly fails to consider sex equality to be a constitutional concern and in fact contributes in sealing women off the political community and public sphere by supporting the doctrine of the separate spheres and women's relegation to the private sphere; (2) *inclusive constitutionalism*, which instead takes on board the goal of granting women rights equal to those it recognizes to men building on a constitutional notion of sex equality and a non-discrimination mandate interpreted as challenging

traditional gender stereotypes; (3) *participatory constitutionalism*, which, relying on substantive notions of equality and a revisited understanding of democracy, places the emphasis on the need to ensure women's equal participation in a broadly conceived thus far male-dominated public sphere; and (4) *transformative constitutionalism*, where constitutionalism supports the agenda of radically subverting the original gender order by adding to the incorporation of women in the public sphere the reinterpretation of the domestic sphere as also a socially relevant domain of participation and applying within it the constitutional ethos of democratic equality through the complete disestablishment of gender roles. As one can see, these four forms are defined on the basis of the role which constitutionalism has played with regard to women's citizenship and to the disestablishing of the separate spheres and gender order which modern constitutionalism helped establish since its foundation.

Before we start, a few additional caveats. Not only am I not suggesting that this is the evolutionary path which sequentially repeats itself in the advancement toward women's constitutional equality in every jurisdiction. I am also fully aware that in many jurisdictions (such as those with a stronger parliamentary tradition or weaker forms of judicial review) a similar evolution in women's citizenship took place mostly through legislative struggles and milestones, with written constitutions thus playing a minimal role. The question I seek to explore is thus more modest: to the extent that constitutions and constitutional litigation played a role in shaping the dynamics of inclusion or exclusion of women from constitutional membership, what was it and how was it achieved? Nor am I suggesting, of course, that this role has been unequivocally a positive or a linear one. But now I am getting ahead of myself. Let me start from the well-known beginning asking the reader for forgiveness for the many oversimplifications that I will incur as the price to summarize in one short piece of scholarship the (her)story of some of the main intersections between constitutionalism and women's citizenship across time and space.

## 2. *Exclusionary Gender Constitutionalism*

The French and American Revolutions signal the birth of modern rights-based enlightened constitutionalism. Whereas in 1776 the American Declaration of Independence provided that 'governments

are instituted among *men*, deriving their just powers from the consent of the governed', only a few years later, in 1789, the French Declaration of the Rights of *Man* and of the Citizen proclaimed the 'freedom and equality of *men* at birth'. Unfortunately, both Declarations actually meant what they said. Women of all ethnicities and races, more than half the population, were excluded from the body whose consent was required for the legitimation of government, just as were all but a small subset of men essentially white, propertied, and free.

This was not a minor omission. In fact, sex inequality was central to both the liberal and republican traditions of citizenship which modern constitutionalism inherited and was structurally built on. Both women's exclusion from the public sphere and the specific focus on the public sphere as a regulatory domain were foundational to the modern constitutional order. In the modern republican tradition, citizens were expected to contribute to the common good, but this meant different things for men and women. Men were expected to devote their energies to the business of soldiering and governing the city. Instead, women's civic role consisted in procreation and the instilment of love for, and guardianship of, republican virtues and morals in the private sphere, mainly as mothers.<sup>3</sup> Women did not fare much better under the liberal tradition.<sup>4</sup> In the bourgeois societies in which the liberal discourse of universal freedoms and rights flourished, subjects and rights-holders were only those endowed with property (including that of the self), those who could sustain themselves, those who, in other words, were subjected to no one. By definition, these could not be women, not even "free women" who were typically denied full property rights, depended on their husbands, and were said to be destined to taking care of others.

Now, how could women's exclusion be reconciled with the egalitarian promise which was foundational to modern constitutionalism? The answer lies in the marital family. Marriage as contract was the institution that, in modern times, would embody a woman's consent to her place in both society and the political community, and love was to facilitate it all. Thus, beginning with the early years of the Industrial Revolution and the decentering of production away from the household, the era of patriarchal 'political marriage' gradually gave way to a

<sup>3</sup> R Lister, *Citizenship: Feminist Perspectives* (2nd edn, New York University Press 2003) 71.

<sup>4</sup> R Lister and others, *Gendering Citizenship in Western Europe: New Challenges for Citizenship in a Cross-National Context* (The Policy Press 2007) 21.

system dubbed by Coontz as 'love-based marriage', the 'ideal of life-long monogamy and intimacy culminating with the male breadwinner/full-time housewife marriage model'.<sup>5</sup> The idea that love requires equality of rights as a baseline was, however, not internalised. In fact, as Carole Pateman reminded us in her pioneering work,<sup>6</sup> the contractual fiction of free and consent-based marriage allowed the notions of hierarchy and community which the modern project was supposed to replace to go largely unchallenged for women. A family exceptionalism, so to speak, was built into the constitutional project since its very inception, carving out what, in federal terms, could be visualised as a space of white male supremacy and governance in the home, where the law of nature (if not divine law!) still dictated the norms while the artefact of contract and consent legitimised the different degrees of expropriation of women's household labour and enforced sexual and reproductive work, whether as wives, domestics or slaves, in ways which would eventually sustain the new market economy.

Yet this is clearly not what many women at the time had wanted the revolutionary struggle to be, nor was this the desire of their daughters and granddaughters—women seizing gender silent constitutions to advance their rights, including suffrage, throughout the nineteenth century. The revolutions in the United States and France inspired calls to vindicate women's rights and reorganise marriage itself. In England, in 1792, Mary Wollstonecraft's *Vindication of the Rights of Women* would inspire the constitutional campaigns of women for decades to come. A year earlier, in France, in 1791, Olympe de Gouges wrote her *Declaration of the Rights of Women and the Female Citizen*, including a little-known reference to reproductive justice and a postscript, a 'Form for a Social Contract between Man and Woman', a veritable manifesto of equality in marriage.<sup>7</sup> Her manifesto called not only for universal suffrage but also for women's access to public office, equal property rights, and decision-making powers for husbands and wives. Many decades later, Cady Stanton would replicate the exercise by recasting the text of the American Declaration of Independence as a 'Declaration of Sentiments'. Adopted at the Seneca Falls Convention in 1848, it demanded the admission of women to all the rights and privileges which belonged to men as citizens.

<sup>5</sup> S Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin Books 2006) 145-46.

<sup>6</sup> C Pateman, *The Sexual Contract* (Stanford University Press 1988).

<sup>7</sup> Cited in H Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press 2008) 7.

Although it is the struggle for women's suffrage which has come to be known as the epitome of women's mobilisation during the nineteenth century, women were engaged in other constitutional causes as well. In the nineteenth-century United States, many, though by no means all, women were active abolitionists who analogised their experience of domestic servitude to the enforced servitude of slavery, drawing attention to the dual exploitation of slave women, who were sexually used by their masters and exploited for their labour. As Akhil Amar puts it, women were both 'in large part the agents and the subjects of the Thirteenth Amendment' ratified at the close of the Civil War in 1865, prohibiting slavery.<sup>8</sup> In 1873, the Women's Christian Temperance Union was established, seeking prohibition and politicising the family abandonment, domestic violence, and sexual abuse which women experienced and attributed to the consumption of alcohol. The movement ended up having an impact on the ratification of the Eighteenth Amendment in 1919 and its replacement by the Twenty-First Amendment in 1933. In Australia, too, women's involvement in the constitutional process during the 1890s was paramount, leading to the adoption of the country's Constitution in 1900, centred on securing women's franchise (which had in fact already become a reality in two colonies) and ensuring that the prohibition of the sale and trade of liquor remained within state jurisdiction.<sup>9</sup>

Early constitutional involvement to ensure women's equality was sought also through court litigation. Indeed, in the United States, the adoption of the Fourteenth Amendment in 1868, whose historical purpose was to force former slave states to recognise the legal citizenship of emancipated slaves, encouraged women to come forward and claim the privileges or immunities of citizenship. This is how Myra Bradwell in *Bradwell v Illinois*, came to claim the right to earn a livelihood by obtaining a license to practice as a lawyer, only to be told by the Court that the privileges referred to did not include her claim and to be sent home to do "a woman's work". Constitutional interpretation was also unsuccessfully put to the test that same year by Susan B. Anthony in her trial for the federal crime of voting without the right to vote, only to find that a systematic interpretation of the Constitution did not support her claim to be granted suffrage as a citizen privilege, because the Fifteenth Amendment, ratified in 1870 had not listed gender or sex

<sup>8</sup> See A Reed Amar, 'Women and the Constitution' (1995) 18(2) *Harvard Journal of Law and Public Policy* 465, 467.

<sup>9</sup> Irving (n 7) 76-78.



(only race, colour, or previous condition of servitude) among the prohibited grounds for denying the right to vote.<sup>10</sup> The following year, in *Minor v Happersett*,<sup>11</sup> the Supreme Court once again denied another woman the right to vote in state elections.

Soon enough, it became obvious that, to conquer women's suffrage, the only conducive way was to turn to law reform, constitutional or otherwise. In the United States, a campaign began for what was hoped would be the Sixteenth Amendment, recognising women's right to vote, a proposal which was first introduced in Congress in 1878, but only culminated 40 years later with the ratification of the Nineteenth Amendment in 1920. Notice that the achievement came after women had already gained suffrage on equal terms with men and at all levels of elections in many other parts of the world through non-constitutional means: Australia (1902), Finland (1905), Norway (1907), and Canada (1918). These were all countries without a constitutionally entrenched bill of rights, something which suggests that, where rights-based constitutionalism existed, it did not necessarily facilitate the affirmation of women's equality, given that this constitutionalism was assumed to be superimposed on an implicitly established male-dominated family order.

In fact, whether fought for through constitutional means or otherwise, normative motherhood—the idea of reducing women to the domestic sphere and to the roles of mother and wife—and the separate spheres ideology played a prominent role in the struggle for suffrage in various and sometimes contradictory ways even though this idea was never meant to apply to all women equally. Thus, while some feared that women's vote would disrupt family life, the argument that, as mothers and providers of care, women were unsuited for political concerns was sometimes turned on its head. For many suffragists, motherhood made for good and caring citizens, particularly suited to participate in local politics. Indeed, many women activists shared the view that men's and women's contributions to the nation were of a different kind and it was the confluence between egalitarians and 'maternalists' which contributed to the ultimate success of the cause.<sup>12</sup>

<sup>10</sup> Irving (n 7) 10–11.

<sup>11</sup> 88 US 162 (1874).

<sup>12</sup> K Cowman, 'Female Suffrage in Great Britain' in B Rodríguez Ruiz and R Rubio-Marin (eds), *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (Brill 2012) 275–76; E Boris, 'The Power of Motherhood: Black and White Activist Women Redefine the "Political"' (1989) 2(1) *Yale Journal of Law & Feminism* 25–49.

In all of this, women's challenge to speak with one voice in the struggle for suffrage was undeniable. Divisions along class, ethno-cultural, linguistic, and racial lines, as well as nationalist struggles, got in the way of women on both sides of the Atlantic. Yet women's disagreement also surrounded the possible effects which giving women the right to suffrage could have on the traditional family.<sup>13</sup> Conservative forces claimed that female suffrage was politically contentious, because it could distract women from their household chores, undermine family harmony, and generate social instability. Instead, women were to be represented by men as the heads of the family household. In Sweden, for instance, a parliamentary commission was formed and put in charge of investigating the potential consequences of female suffrage for birth rates and marriage. And, in the United Kingdom, Liberal Prime Minister William Gladstone, in his stubborn resistance to female suffrage, argued that women could be potentially corrupted by politics and thereby abandon the family.<sup>14</sup> Justified fear, and not just conservatism, drove women to oppose suffrage, mobilising through organisations like the National League for Opposing Women's Suffrage, founded in the United Kingdom in 1908.<sup>15</sup> After all, the separate spheres tradition held out the promise of economic subsistence and a defined social place as a wife, at least to women from 'all respectable classes' since women from lower social classes and racialized women could never afford to be "just wives".<sup>16</sup> Also, although economic opportunities for women had indeed improved by the end of the nineteenth century, they were still very limited.<sup>17</sup>

Given all this, it is not surprising that the conquest of female suffrage, even when it was constitutionalised, as in the United States, did not automatically lead to an overall reinterpretation of the

<sup>13</sup> R Rubio-Marín, 'The Achievement of Female Suffrage in Europe: On Women's Citizenship' (2014) 12(1) *International Journal of Constitutional Law* 15.

<sup>14</sup> *ibid.* 16.

<sup>15</sup> *ibid.*

<sup>16</sup> The separate spheres doctrine had both race and class-based undertones. It ignored the ways in which racial patriarchy—expressed through slavery, expropriation, and confinement of indigenous peoples, colonized populations, and otherwise marginalized racial minorities, created a public sphere as a "white male creation." See CW Mills, 'Intersecting Contracts' in C Pateman and CW Mills (eds) *Contract and Domination* (The Polity Press 2007) 187. It also implied the existence of a stable marital relationship and the possibility of surviving on the earnings of a single breadwinner, thus giving way to the advent of the family wage which many nevertheless failed to achieve. However elusive though, this culturally hegemonic model was exported abroad, forcing poor, single white women and nonwhite men and women to live under its shadow.

<sup>17</sup> Coontz (n 5) 182.

Constitution, the dismantlement of the male household headship, and the expansion of women's citizenship. In fact, we know that the attempt by American women to use the Nineteenth Amendment as a broader litigating tool to claim access to other domains of citizenship, including citizenship duties—such as jury service before state courts—systematically failed.<sup>18</sup> Nevertheless, what the newly conquered right to suffrage did in some European countries was open women's access to constitution-making for the very first time during the interwar period of the twentieth century. Where this happened, women used their newly gained powers to ensure an explicit sex equality provision and, tellingly, to include also the protection of motherhood and the family under the Constitution, as in the 1919 German Weimar Constitution.<sup>19</sup> Maternal protections were not just the product of women's wishes and participation. After all, women's numbers in constituent assemblies remained token at the time. They were also in line with the dominant philosophy of the nascent welfare state, which, since its inception at the turn of the century, had taken the form of what Orloff has called the 'two-channel welfare state' or 'patriarchal welfare state'.<sup>20</sup> Mirroring the family wage system, this system viewed women as primary caretakers, domestic workers, and, at best, secondary wage earners, thus recognising the need for the state to support families and mothers.

The coexistence of constitutional sex equality, motherhood, and family protections remained a feature of post-World War II European constitutionalism, a constitutionalism that became a reference for the rest of the world especially in the context of decolonisation. The post-war years coincided not only with the blooming of human rights

<sup>18</sup> See JK Brown, 'The Nineteenth Amendment and Women's Equality' (1993) 102(8) *Yale Law Journal* 2194.

<sup>19</sup> The forty-one women who had been elected thanks to the right to vote recognised just a year before participated in drafting the text of the 1919 Weimar Constitution. The Constitution granted men and women fundamentally the same rights and duties (under article 109), as well as women's equal access to the civil service (article 128). Yet the text also contained a clause reflecting the social centrality and political relevance of the family structure in general and of motherhood in particular. Thus, under a chapter devoted to Life in Community, article 119 entrusted both the state and the community with the protection of the welfare of families and mothers. That the generalised assumption about separate gender roles survived the constitutional recognition of equality explains why the sex equality provision was qualified with the caveat 'fundamentally' (men and women were said to have fundamentally the same rights and duties). This qualification was usually justified on the basis of men's distinctive military obligations.

<sup>20</sup> See A Shola Orloff, 'Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States' (1993) 58(3) *American Sociological Review* 323.

instruments (which incorporated an explicit ban of sex-based discrimination) but also with the heyday of the breadwinner family model in the context of a strong pronatalist movement in Western Europe.<sup>21</sup> Not everyone, however, had thought that this coexistence of sex equality and motherhood/family protections could be peaceful. To continue with our German example, Germany's 1949 Basic Law had first been drafted without a sex equality provision. Conservative forces had feared that a constitutional guarantee of equality for women could be deployed to harm women by depriving them of their special protections. In the end, it fell on one of the only four women selected to participate in the constituent assembly, Elisabeth Selbert, to travel the country to advocate in favour of including an equality provision.<sup>22</sup> Selbert eventually succeeded, and the Constitution acknowledged the equality of rights between men and women (article 3.2), including also a provision referring to the protection of the family and mothers (article 6 GG).

The underlying fear that women's proclaimed constitutional equality might threaten the established gender order and the system of protections for women as mothers and dependent spouses produced different outcomes in other contexts. Noticeably, in the United States, it contributed to the failure of the Equal Rights Amendment (ERA), an amendment which galvanised efforts of formidable women and would have recognised equality of rights between men and women, first proposed in 1922 by those who saw in it the natural sequence after suffrage.<sup>23</sup> The ERA, only adopted by Congress in 1972, failed to

<sup>21</sup> Coontz (n 5) 233. We should highlight that constitutions of socialist inspiration in Eastern Europe were also often explicit on the need to provide for social reproduction and protect motherhood beyond the family, which for the most part was considered a bourgeois institution linked to private property. The most influential work that touched on the issue of women's oppression influencing Eastern European policies was Engels's *On the Origin of Family, Private Property and the State* published in 1884 in which Engels claims that women's oppression has its roots in the emergence of the monogamous family, which in turn emerged because of the development of private property accumulated by men through a surplus of production. Hence the need to significantly move women's household tasks under the responsibility of the community. See F Engels, *On the Origin of Family, Private Property and the State* (Penguin Books 2010).

<sup>22</sup> S Baer, 'The Basic Law at 60—Equality and Difference: A Proposal for the Guest List to the Birthday Party' (2010) 11(1) *German Law Journal* 67 (Special Issue: S Baer and others (eds), 'The Basic Law at 60') 70 and 75. Tellingly, one of the arguments Selbert would often put forward in making her case was that the equal rights provision was perfectly consistent with the law's different treatment of men and women and that the 'husband's obligation to support [the family] was equivalent to the wife's obligation to educate the children and run the household'.

<sup>23</sup> See JC Suk, *We the Women: the Unstoppable Mothers of the Equal Rights Amendment* (Skyhork Publishing 2020).

secure necessary state ratifications, despite strenuous advocacy and a three-year extension. The lack of success was the result of conservatism appealing to fear and caution. Surely, there were those who, espousing conservative views, saw the amendment as a threat to the family structure (just as suffrage opponents had in the past). Their success, though, relied on appealing to those who instead feared the wiping out of special protections for women workers or dependent spouses in the context of a labour market in which women could not be expected to compete on equal terms.<sup>24</sup>

In this regard, one can only wonder whether the US Constitution's lack of European-style motherhood and family protection clauses made an Equal Rights provision to be perceived as much more threatening to the traditional family order and its system of protections for the legally enforced dependency of women than had the equality provisions of inter-war and post-war European constitutionalism. This may be especially so since, by the time the ERA was passed, the Right had begun to focus on the family as a realm for political mobilisation. This facilitated the drawing of links between the Amendment and the abortion and homosexuality debates in ways which ultimately blocked the ERA's adoption in those Southern and Western states whose votes were required for ratification.

In sum, although women joined the revolutionary struggles leading to the affirmation of nascent constitutional democracies and articulated many of their justice claims in constitutional terms (including by seeking to impact constitution-making processes and by relying on generically worded constitutional provisions to engage in litigation) for the longest time their efforts were unsuccessful under an exclusionary constitutionalism which naturalized the separate spheres tradition. Eventually, some nominal victories were won but even when this happened (as when the right to suffrage was conquered and inserted into the constitution or when the principle of sex equality was constitutionally incorporated) the still dominant gender order dictated the narrow interpretation of newly conquered rights. In some contexts, such interpretation was also facilitated by the fact that often, together with the right to equality, additional constitutional clauses were included which

<sup>24</sup> In her narrative, Phyllis Schlafly, the strongest anti-ERA advocate, uplifted the role of motherhood to that of "home executive," arguing that marriage and motherhood were the most reliable security the world could offer to women. Schlafly, as well as, more generally, the members of the STOP ERA movement, argued that ERA would invalidate state laws that made it the obligation of the husband to support his wife financially, wiping out the right of a wife to receive social security benefits based on her husband's earnings. See S Marshall, 'Ladies against Women: Mobilization Dilemmas of Anti-Feminist Movements' (1985) 32(4) *Social Problems* 357.

made reference to the protection of motherhood and of the family. It was also facilitated by the fact that these provisions could in turn be interpreted as establishing a domain of “family exceptionalism” in the constitutional egalitarian ethos allowing traditional conceptions of both to go for the most part unchallenged.

### 3. *Inclusive Gender Constitutionalism*

The passing of the ERA was one of the demands which, together with equal opportunity in jobs and education, free abortion on demand and free twenty-four-hour childcare centres, had animated the feminist movement of the late 1960s in the US.<sup>25</sup> Indeed, second wave feminism, in the US and elsewhere, had come to confront women’s normative motherhood much more directly than first wave feminism already had, challenging the dignitary and distributive wrongs which derived from the assumption that all women were dependent caregivers and from the social arrangements which produced caregiver dependency. In the US, although ERA ultimately failed to be ratified, in many ways the movement was extremely successful. Thus, besides enacting the ERA, Congress passed legislation to enforce the sex discrimination provisions of Title VII as seriously as its race discrimination provisions. Moreover, under the influence of the movement, the Supreme Court would soon develop a jurisprudence reflecting the central tenets of the ERA and construing the Fourteenth Amendment equal protection clause to prohibit legislation which discriminated against women. The reproductive justice claims animating the movement were, however and for the most part, less successful.

In constitutional terms, the new egalitarian logic allowed first and foremost to confront family exceptionalism and with it, the idea that the constitutional equality ethos was to be superimposed on a family order with its own internal logic which allowed for many distinctions to be drawn between husbands and wives and which the constitution was to respect. Instead, the dominant narrative became that, having joined men in the public domain of suffrage, it was now time for all women, and not only those compelled by economic necessity, to challenge discrimination based on their marital status and to join men fully in the domain of wage labour in the marketplace. This was, after all, a

<sup>25</sup> RB Siegel, ‘The Nineteenth Amendment and the Democratization of the Family’ (2020) 129 *The Yale Law Journal Forum* 474.

period when the contraceptive revolution of the 1960s gave women significant control over reproduction for the first time. It was also a period when the expanding economy required enough women to offer them a wage and more opportunities in the service sector. This, coupled with the inflation of the 1970s, made it harder for a man to be the sole breadwinner in the family.<sup>26</sup> The move made it necessary to free women from gender-based stereotypes about their natural abilities and capacities, the very stereotypes on which the separate spheres ideology had been established since the origins of constitutionalism. But, as many voices in the feminist movement had claimed all along, it also required addressing the social costs of human reproduction which had thus far been dumped exclusively on women. The latter would take much longer to materialize (and is in fact still work in progress) and has structurally encouraged the dumping of much of that work on poor, migrant, or racialized women both inside and outside the home.

In this context, the constitutional principle of sex equality came to be either implicitly or explicitly recognized in an increasing number of jurisdictions and was sometimes accompanied by broad legislative reforms seeking to produce a gender-neutral legal order, including by gradually repealing all remaining head and master laws that came to be seen as violating the principle of formal equality. Also, in those instances in which legislators dragged their feet, constitutional litigation became an option. Some women came forward to challenge protectionist norms which had so far limited their legal capacity and employment opportunities (including norms which limited their access to dangerous, physically strenuous, or male-dominated professions and which prohibited night shifts or established maximum hours),<sup>27</sup> as well as norms which limited their ability to generate benefits to support dependent husbands. But many of the claims were also articulated by women for whom the letting go of the protections they had once been granted came too late to hold any emancipatory promise (mandatory and voluntary 'marital leaves' which promised women to regain employment after the death of the husband would keep the Spanish Constitutional Court busy in its first years of existence).<sup>28</sup> Not

<sup>26</sup> Coontz (n 5) 242.

<sup>27</sup> See, for instance, BVerfGE 85, 191 (28 January 1992), in which the German Federal Constitutional Court found paternalistic the prohibition of women's night work and condemned it for perpetuating an image of women as indefensible creatures, an image that served women's subordination.

<sup>28</sup> See R Rubio-Marín, 'Women and the Cost of Transition to Democratic Constitutionalism in Spain' (2003) 18(1) *International Sociology* 245.

surprisingly, under the banner of sex neutrality and a doctrine of formal equality built around the sameness-difference dilemma, many of these struggles were also led by men seeking access to those benefits and/or protections which women had enjoyed as dependent caregivers (such as care-related tax exemptions or access to preferential treatment in orphanage or survivors' pensions) or to privileges which, at best, could be considered double edged (such as early retirement for women).<sup>29</sup> In response to the various claims under the new constitutional equality doctrine, courts would have to confront difficult dilemmas about how to manage the transition between different gender regimes without further overburdening women. Also, they could try to neutralise but could not entirely deny the relevance of all the differences between men and women. In fact, it was the narrower or broader interpretations of such differences and the consequences of those which were not strictly biologically determined which ended up shaping the different understandings of constitutional sex equality in the US and continental Europe, especially from the 1980s onwards.

In the United States, *Frontiero v Richardson*,<sup>30</sup> adopted in 1973 (a case dealing with a wage-earning wife in the job of lieutenant in the US Air Force who sought housing and medical insurance for her husband), was the first case in which the Court articulated the now orthodox view that laws based on sex stereotypes are constitutionally impermissible, denouncing the 'romantic paternalism' on which the history of separate spheres had been built. Henceforth, the constitutional sex equality doctrine would evolve, turning gender anti-stereotyping into the essence of the sex antidiscrimination principle. Whatever the statistical evidence could say about 'functional' enduring differences between the sexes (including, most tellingly, whether women continued to bear most of the childrearing responsibilities), any law which generalised on the basis of such evidence would be interpreted as 'normalising', sanctioning, or entrenching different sex roles,

<sup>29</sup> See JA Baer, 'Women's Rights and the Limits of Constitutional Doctrine' (1991) 44(4) *Western Political Quarterly* 821, 823, table 1, indicating that men brought eighteen of the twenty-six constitutional cases decided by the US Supreme Court between 1971 and 1984. See also B Baines, 'Using the Canadian Charter of Rights and Freedoms' in B Baines and R Rubio-Marín (eds), *Gender of Constitutional Jurisprudence* (CUP 2004) 52, arguing that, of all the sex discrimination cases decided during the first three years after the equality provision in the Canadian Charter (section 15) became effective, thirty-five were brought by or on behalf of men and only nine by or on behalf of women.

<sup>30</sup> 411 US 677 (1973).



and hence, as discriminatory. And although the Court did not rule out that differential treatment could be established as some form of compensation for past discrimination,<sup>31</sup> its anti-classification/symmetrical approach to the equal protection clause, replicating some of the central features of its racial anti-classification approach (such as the requirement of intent),<sup>32</sup> would make, in principle, affirmative or ameliorative action constitutionally suspicious under intermediate scrutiny review. As a result, especially since 1974 when, in *Geduldig v Aiello*,<sup>33</sup> the Supreme Court rejected the claim that pregnancy-based discrimination amounted to constitutional sex discrimination, this framing of the constitutional sex equality principle has limited the possibilities of relying on the Constitution to derive protections for pregnant women and working mothers, including the set of available legislative remedial options. These have had to be crafted in gender-neutral ways, mostly by assimilating reproduction-related employment hurdles to sickness, something which, many have argued, has contributed to rendering the social value of human reproduction invisible, leaving gendered patterns shaped around it basically unchanged.<sup>34</sup>

The New Right conservative agenda of the 1980s was also not conducive to the broader recognition of the need to socially distribute the costs of human reproduction which the feminist movement had claimed. True, *Roe v Wade*,<sup>35</sup> decided by the US Supreme Court in 1973, granted women and their doctors the right to abortion and the case embodies women's most successful attempt to insert some elements of the reproductive rights agenda into the gender-neutral constitutional framework of the time. In fact, it might have succeeded in offering a venue for articulating a significantly broader agenda of reproductive justice. But its grounding on privacy notions rather than equality values shut down this possibility. In 1980, the US Supreme Court decided *Harris v Mac Rae*,<sup>36</sup> a case validating the restriction of federal funds for abortion, de facto turning abortion into a privilege of the better off and leaving poor women's reproductive autonomy without constitutional shelter.

<sup>31</sup> See, for instance, *Schlesinger v Ballard*, 419 US 313 (1975) and *Califano v Webster*, 430 US 498 (1977).

<sup>32</sup> See RB Siegel, 'Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown' (2004) 117(5) *Harvard Law Review* 1470.

<sup>33</sup> 417 US 484 (1974).

<sup>34</sup> JC Suk, 'Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict' (2010) 110(1) *Columbia Law Review* 16, 55.

<sup>35</sup> 410 US 113 (1973).

<sup>36</sup> 448 US 297 (1980).

Given Western Europe's social welfarist and maternalist constitutional traditions, it was to be expected that its constitutional sex equality doctrine would take a somewhat different turn. Certainly, the 1970s and early 1980s signalled a moment of constitutional convergence with developments overseas. In Europe, for instance, the courts had, to a lesser or greater extent, during the 1950s and 1960s, embraced a sort of 'separate but equal worth doctrine' relying on women's greater devotion to housework which they simply assumed,<sup>37</sup> but they would eventually abandon it in the 1970s. At a legislative level, major family code reforms also took place in several countries to overcome the legal minor status of married women and to secure formal equality. Yet, under the influence of EU antidiscrimination legislation, and the growing influence of substantive equality notions and motherhood, pregnancy, and family protective constitutional provisions, an accommodationist constitutional doctrine soon developed, seeking to provide women with the actual means to combine pregnancy, motherhood, and family care with wage labour, at least to a certain extent.

Under what we could call Europe's *maternalist accommodationist* model, courts came to see pregnancy and motherhood protections not only as compatible with constitutional sex equality, but in fact as deriving from it, in the understanding that failing to accommodate 'women's gender-specific needs' and 'forms of employment' could amount to unacceptable indirect discrimination. And so, although protection for pregnant women and working mothers in continental Europe has come mostly through legislation (the tradition of maternity leave, for instance, has been widely consolidated since the foundation of the welfare state), where they exist, motherhood and family protection constitutional clauses (typically framed as directive principles and not as enforceable rights) have been read as supporting court interventions whenever the existing protections were deemed to be insufficient to accommodate women's specific needs in the labour market. Because the features of women's employment (e.g., part-time, sex-segregated, lower paid) were and continue to be in fact related to women's ongoing shouldering of a greater share of family responsibilities, it can be argued that this constitutional doctrine of sex equality accommodated gendered realities but at the expense of normalising women's 'double shift' and 'mommy tracks', thus accepting the ensuing dignity and

<sup>37</sup> See R Rubio-Marín, 'The (Dis)establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter' (2015) 13(4) *International Journal of Constitutional Law* 787, 792-796.

distributive harms entailed by the endorsement of normative motherhood and the normalization of gender segregated labour markets. Therefore, in essence, the European approach, although less assimilationist in nature and more committed to an anti-subordination logic which compels public powers to remove de facto obstacles women encounter in society,<sup>38</sup> has also had its shortcomings, especially since it too has failed to challenge traditional internal family arrangements and the impact which even gender-neutral norms have on perpetuating them.

Now, considering Europe's maternalist constitutional tradition, it is not surprising either that, when the abortion debate was taken to the courts in Europe, around the same time as in the United States,<sup>39</sup> where the courts did not simply defer to the legislature denying the foetus constitutional standing,<sup>40</sup> they ended up crafting a constitutional architecture that, in the name of the right to life of the unborn (or the constitutional value it embodies), in fact ended up limiting, rather than encouraging or backing legislative attempts to assert women's reproductive autonomy by turning pregnant women, constitutionally speaking, into motherhood duty bearers. At the same time—and here comes the other dimension of the European maternalist and welfarist tradition—some courts explicitly addressed this as a duty which arguably fell not only on women but also on the entire community. Under this construction, abortion came to be constitutionally tolerated, not as a right, but as a wrong to be accepted only in limited circumstances or, for lack of better alternatives (given the extremely limited efficiency of criminalization), to dissuade pregnant women, but it was publicly funded.<sup>41</sup> I am referring to the abortion constitutional architecture

<sup>38</sup> On the antistatist approach to the principle of equality, see OM Fiss, 'Groups and the Equal Protection Clause' (1976) 5(1) *Philosophy and Public Affairs* 107, 107-108, 157. For a rich account of the analytic framework of substantive equality, see S Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law*. See also CA MacKinnon's commentaries on Fredman, 'Substantive Equality Revisited: A Reply to Sandra Fredman' in *ibid* 739-46.

<sup>39</sup> Between 1974 and 1975 there were constitutional decisions on abortion in Austria, France, Italy, and Germany. See M Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study* (European University Institute 1990). Conseil Constitutionnel [CC] [Constitutional Court] decision No 74-54DC, 15 January 1975, J.O. 671 (Fr).

<sup>40</sup> In both Austria and France, the constitutional courts did not grant unborn human life any constitutional standing. See [1974] *Erklärungen des Verfassungsgerichtshofs* 221, decision of 11 October 1974.

<sup>41</sup> See R Rubio-Marín, 'Legal Transfer of Women and Fetuses: A Trip from German to Portuguese Abortion Constitutionalism', in G Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar Publishing 2013).

build around the landmark case of the German Federal Constitutional Court, adopted in 1975,<sup>42</sup> and to the decisive impact it would later have in shaping abortion constitutionalism in many other European countries, such as Spain, Portugal, and, later on, Hungary.<sup>43</sup>

To summarise, inclusive gender constitutionalism enabled the recognition of sex equality to be accepted as a constitutional imperative and to overcome the logic of family exceptionalism that had validated marital status-based differentiations and other deviations from the principle of gender neutrality which had sealed women's dependence on men. Foregrounding a notion of formal equality, this form of constitutionalism proved adequate to fight against gender stereotypes but much less so to accommodate women's motherhood and pregnancy related needs in general, and in the employment sector in particular. For this reason, an antistereotyping and a maternalist tradition of inclusive constitutionalism developed side by side, each with its potential and limitations, with family and motherhood clauses in some constitutions tilting the balance in favour of maternalist accommodationism rather than assimilationist workerism. With the male norm as a standard, once the head and master laws were discarded, inclusive constitutionalism in the 1970s, 1980s and early 1990s ended up prioritizing the domains thus far inhabited by men, like the marketplace, as relevant realms for constitutional equality struggles, thus foiling second-wave feminists' attempts to expand the boundaries of contestation beyond market dynamics and to include housework, sexuality, and reproduction within the realm of constitutional equality. Without the latter, however, equal participation in the public sphere would remain elusive even under gender neutral legal orders. This is why, at the turn of the century, women started placing emphasis precisely on equal participation both in the public and in the private sphere. After all, the two were deeply interrelated: without equal participation including equal representation in the public sphere it was difficult for women to broaden the agenda in ways which would allow to also address the injustices women experienced in the 'private domain'.

<sup>42</sup> See BVerfGE 39, 1 (25 February 1975). The architecture was refined though not fundamentally altered by BVerfGE 88, 203 (1993).

<sup>43</sup> See, for Spain, Spanish Constitutional Court's decision STC, 11 April 1985 (No 53/1985) (Spain); for Portugal, Tribunal Constitucional, 'Acórdão do Tribunal Constitucional No 25/84' in *Acórdãos do Tribunal Constitucional* (vol. 2, Coimbra Editora 1984) 7 ff.; 'Acórdão do Tribunal Constitucional No 85/85' in *Acórdãos do Tribunal Constitucional* (vol. 5, Coimbra Editora 1985) 245 ff.; for Hungary, see Alkotmánybíróság (AB) [Constitutional Court], 48/1998 (XI. 23.), *Magyar Közlöny* (MK) [Official Gazette of Hungary], 1998/105, 26 (Hung).

#### 4. *Participatory Gender Constitutionalism*

Women had good reasons for not confining themselves to the goal of equal entitlements nor to the aim of inhabiting the employment sector which inclusive constitutionalism facilitated. Women had good reasons to turn their gaze to the notion of participation in each and every site of decision-making and authority. In many ways, equal entitlements had not taken them very far. Notice that, even in those few countries where women had gained suffrage at the turn of the twentieth century, by the 1960s they had, at best, crossed the 20 percent threshold in parliamentary seats. Thus, by the 1980s, the women's movement, increasingly galvanised through international women's conferences, felt sufficiently empowered to begin reaching beyond legal rights to claim equality in decision-making power, something which gradually led to a 'participatory turn' in the gender equality narrative and movement which continues to this day. While still reclaiming the centrality of rights, this gender equality narrative began endorsing the need to go beyond equal rights to embrace substantive or de facto equality (measured in real opportunities and concrete results), as well as equal empowerment, with parity democracy or gender-balanced participation turning into new desired standards of political legitimacy. If the Convention on the Elimination of All Forms of Discrimination Against Women, ratified in 1979, embraced the legitimacy of temporary special measures to ensure women's equal opportunities, it was Beijing's Platform of Action emerging in 1995 from the Fourth World Conference on Women that, at a global level, best epitomised the participatory turn by including the strategic objectives of women's equal access to and full participation in power structures and decision-making positions.<sup>44</sup> This gender participatory turn is most paradigmatically expressed through the global—and still growing—spread of gender quotas (with seventy countries currently having a constitutional or legislative provision mandating that women constitute a certain percentage of candidates or seats). Women joining constitution-making processes in more significant numbers can be seen as an inherent part of it.

Of all the constitutions enacted after World War II, only a few of them (mostly in Asia, the first one being the 1947 Republic of China Constitution) contemplated gender quotas to enhance the political representation of women among other disadvantaged groups in an

<sup>44</sup> See Beijing Declaration and Platform for Action, 184 and 191a, and G1.

attempt to subvert the legacy of colonial stratification and subordination in the service of specific nation-building projects.<sup>45</sup> On the other hand, in Europe, the adoption and spread of legislative gender quotas initially took place in spite of, and not thanks to, constitutionalism. Only occasionally did the courts call on general notions of substantive equality (like in Spain) to back their adoption.<sup>46</sup> More frequently, constitutional reforms were required, either pre-emptively (i.e. to avoid likely constitutional hurdles, as in Portugal) or ex post (i.e. to overcome constitutional obstacles which had already been declared by the courts, as in France or Italy).<sup>47</sup> Constitutional debates on the matter are currently ongoing in Germany too since in July 2020, the Constitutional Court of Thuringia declared unconstitutional a parity law for local elections.<sup>48</sup> Among the many justifications of why legislative quotas were not legitimate short of constitutional reform we can find arguments around formal equality, political party autonomy, active and passive suffrage rights, as well as traditional and constitutionally embedded conceptions of representative democracy and citizenship. Needless to say, the formalistic and anti-stereotyping approach to constitutional gender equality in the US have failed to provide fertile ground for the spread of gender quotas in the context of growing suspicion against race-based affirmative action.<sup>49</sup>

Yet constitutionalism has been a facilitator, and not an obstacle, of quota adoption in other regions of the world, especially when the pertinent enabling constitutional clauses were introduced as part of broader democratising agendas, with women's movements taking an active role in their articulation. In India, the Seventy-Fourth Constitutional Amendment, enacted in 1992, added women quotas to the reserved seats for scheduled castes and tribes in local Panchayats

<sup>45</sup> See articles 64, 134, and 135 of the Chinese Constitution. See also R Rubio-Marín and Wen-Chen Ch, 'Sites of Constitutional Struggle for Women's Equality' in M Tushnet, T Fleiner, and C Saunders (eds), *Routledge Handbook of Comparative Constitutional Law* (Routledge 2015) 308.

<sup>46</sup> See STC, 29 January 2008 (No 12/2008) (Spain). See also B Rodríguez Ruiz and R Rubio-Marín, 'The Gender of Representation: On Democracy, Equality and Parity' (2008) 6(2) *International Journal of Constitutional Law* 287.

<sup>47</sup> See R Rubio-Marín, 'Women's Political Citizenship in New European Constitutionalism: Between Constitutional Amendment and Progressive Interpretation' in H Irving (ed) *Gender and Constitutions* (Edward Elgar Publishing 2017) 323-356.

<sup>48</sup> See ThürVerfGHG 2/20, July 30, 2019 (Thüringen) (Ger.). For a similar result achieved before the Brandenburg Constitutional Court, see VfGBbg 9/19, VfGBbg 55/19, 23 October 2020.

<sup>49</sup> See R Rubio-Marín, 'A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the US' (2012) 60(1) *American Journal of Comparative Law* 99, 118-124.

(which were contemplated already under its 1950 Constitution), demanding no less than one third of those seats to be allocated for women. In Latin America, where ten countries now include them, some constitutions were also among the first to adopt provisions to ensure the equality of women in public office and representative positions, as was the case of Colombia (1991, article 40) and Argentina (1994, article 37). And in Africa, where several quotas had already been introduced after independence in the form of reserved seats, many of the constitutions approved in the new century also contain quota provisions, such as the 2003 Rwandan Constitution, which reserves 30 percent of public office seats for women. Thus, in essence, we see turn-of-the-century constitutionalism accompanying and facilitating this worldwide phenomenon of gender quotas whether through reserved seats or enabling provisions and, in this way, assisting the process of affirmation of women's citizenship and a new understanding of democratic legitimacy striving for gender parity.

Women's involvement in constitution-making in more than token numbers and reflecting a broader trend of participatory constitutionalism since the 1990s represents another key milestone in the gradual process of affirmation of women's citizenship. Indeed, over the last decades, there has been a call for popular, civic, or democratic constitution-making processes, seeking to rescue constitutionalism from the domain of 'high politics' and to give ordinary citizens the opportunity to participate in the drafting of their constitution.<sup>50</sup> Women have been a part of this, and for the last two or three decades, there has been a growing presence of women in constitution-making bodies, though parity seems still a distant goal with the exception of Chile which is bound to be the first country in the world to have a perfectly paritary constituent assembly. Until the 1990s, women's representation in these bodies worldwide rarely went beyond 5 or 10 percent, whereas an analysis of twenty constitutional reform processes between 1990 and 2015 reveals that, on average, 19 percent of members of formal constitutional reform bodies were women.<sup>51</sup> This increase in women's presence reflects the natural rise of women in parliaments and in the legal profession but also women's growing mobilisation to demand

<sup>50</sup> See P Blokker, 'Constitutional Reform in Europe and Recourse to the People' in X Contiades and A Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2016) 40.

<sup>51</sup> See A Dobrowolsky and others, 'Introduction: Women, New Politics and Constitutional Change' in A Dobrowolsky and V Hart (eds), *Women Making Constitutions: New Politics and Comparative Perspectives* (Palgrave Macmillan 2004) 2.

their seat at the table, especially in post-conflict scenarios which often offer windows of opportunity. In some occasions, the increase of women in representative constituent bodies has in turn been facilitated by the prior adoption of electoral gender quotas. Examples include the case of Uganda during the process leading to the 1995 Constitution and the Bolivian constitution-making process that began in 2005, whereby constituents were elected through zippered party lists seeking parity. Some of the most recent participatory constitution-making experiments, such as those in Iceland and Ireland, have sought a more direct involvement of ordinary citizens in constitution-drafting bodies, and these experiences have led to women coming ever closer to true participatory parity.<sup>52</sup> But women joining constitution-making is also occurring through the court system, especially relevant for the purpose of constitutional interpretation of constitutional provisions which are necessarily broadly framed.<sup>53</sup> Indeed, since the turn of the century, gender-balanced participation (that is to say, not more than a 40–60 percent unbalance) is becoming a reality in a still small but growing number of constitutional courts (such as the current German and Canadian Constitutional Courts), and we tend to see a low but increasing number of countries with women in the role of Chief Justice for the first time in their courts' history<sup>54</sup> as well as the first self-identified lesbian justices.<sup>55</sup>

Although the slow but steady progress in women's inclusion in constitutional courts and constituent official bodies is to be celebrated, an overall assessment shows that, to this day, most of women's participation in constitution-making has been channelled through civil society

<sup>52</sup> See H Landemore, 'When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process' (2020) 18(1) *International Journal of Constitutional Law* 179; S Suteu, 'Women and Participatory Constitution-Making' in Irving (n 47) 28.

<sup>53</sup> See B Baines, 'Women Judges on Constitutional Courts: Why Not Nine Women?' in Irving (n 47) 299.

<sup>54</sup> This was the case of Justice McLachlin in Canada (2000–17); Lady Hale in the United Kingdom (2017–2020); Justice Susan Denham in Ireland (2011–2017) and Justice Gloria Stella Ortiz Delgado in Colombia since 2019.

<sup>55</sup> Justice Susanne Baer in Germany, Justice Virginia Bell of the High Court of Australia, and Maite Oronoz Rodríguez, president of the Supreme Court of Puerto Rico. There is a rich literature which discusses the difference that having women on the bench makes. Heather Elliot summarizes much of this early literature in 'The Difference Women Judges Make: Stare Decisis, Norms of Collegiality, and Feminine Jurisprudence—A Research Proposal' (2001) 16(1) *Wisconsin Women's Law Journal* 41. For more recent sources see also E Rackley, *Women, Judging and the Judiciary* (Routledge 2013).



initiatives.<sup>56</sup> Certainly, examples abound of organisations and platforms created by women's groups all over the world to participate in realising constitutional aspirations. One of the most well-known and pioneering experiences in this regard is that of South Africa, where a Women's National Coalition was created in 1992 by the women leaders of the liberation struggle, including a wide variety of organisations, to intervene in the male-dominated processes which were leading up to the writing of a constitution for a democratic South Africa. But even though South Africa is generally recognised as the first example of full constitution-making in which women's interests were asserted throughout, South African women had some partial precedents to follow.<sup>57</sup> From the early 1980s and throughout the 1990s, in Canada, the women's movement in general and the Aboriginal women's movement in particular were heavily involved in the constitutional struggles.<sup>58</sup> In 1986, in Nicaragua, hundreds of women took to the streets to protest against the sexist language of the first constitutional draft.<sup>59</sup> In Colombia, the women's movement formed a network around the constituent assembly (Red Nacional Mujer y Constituyente, or Women and Constituent Assembly National Network), which included 75 organisations around the country and garnered 15,000 signatures in support of its constitutional proposals.<sup>60</sup> The trend has continued in the new century all around the world. In 2011, a coalition of NGOs (calling itself the 'Feminist Spring for Democracy and Equality') was created in Morocco out of more than forty women's associations under the strong leadership of secularist groups, with the aim of constitutionalising equality between men and women.<sup>61</sup>

<sup>56</sup> R Rubio-Marín, 'Women and Participatory Constitutionalism' (2020) 18(1) *International Journal of Constitutional Law* 233; R Rubio-Marín and H Irving (eds), *Women as Constitution-Makers: Case Studies from the New Democratic Era* (Cambridge University Press 2019).

<sup>57</sup> C Albertyn, 'Women and Constitution-Making in South Africa' in Irving (n 47) 47.

<sup>58</sup> See KA Froc, 'Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment"' (2015) 19(2) *Review of Constitutional Studies* 237. See also A Dobrowolsky, *The Politics of Pragmatism: Women, Representation and Constitutionalism in Canada* (Oxford University Press 2000).

<sup>59</sup> MI Morgan, 'Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution' (1990) 70(1) *Boston University Law Review* 1, 52.

<sup>60</sup> See J Lemaitre, 'Feminist Legalism: Colombian Constitution-Making in the 1990s,' in Rubio-Marín and Irving (n 56) 234, 259-60; MI Morgan, 'Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution' in Baines and Rubio-Marín (n 29) 75-99.

<sup>61</sup> See S Borrillo, 'Women's Movements and the Recognition of Gender Equality in the Constitution-Making Process in Morocco and Tunisia (2011-2014)' in Rubio-Marín and Irving (n 56) 48.

As with the conquest of suffrage, an important factor in shaping women's influence in constituent processes all over the world has been the capacity of women's movements to overcome external and internal divides and, thus, to speak with a single voice, just like the relatively successful examples of South Africa, Colombia, Ecuador, or Bolivia show.<sup>62</sup> This has not required women to see themselves as an undifferentiated, unified, and essentialist collective. Instead, it has demanded a deliberate effort to leave aside old cleavages between historic feminists, modern feminists, organisations of mestizo, indigenous, or black women, institutionalised feminists, and different women's NGOs for the purpose of advancing a common agenda. Yet not everywhere has the inclusion of more women in constitution-making automatically translated into women's interests or feminist views being better represented (numerical and substantive representation never being in perfect correlation).<sup>63</sup> Nor has constitution-making necessarily proved to be a political project which could help women to overcome internal divisions. In some scenarios, the divides seem to have exacerbated instead. This has arguably been the case in constitution-making processes in which the different parties were centrally aligned around competing ethnic identities (which trumped gender identities) but also, more specifically, around competing visions of women's roles and gender relations. Thus, in the Arab world, several recent attempts at constitutional reform (such as those in Morocco, Tunisia, or Egypt)<sup>64</sup> have found society and women divided along a secularist/Islamist line, with the latter defending a Shari'a-inspired vision of gender relations shaped around the notion of complementarity rather than equality. Of course, none of this is to suggest a form of Islamic exceptionalism. The divisive influence of religious forces has also manifested itself in the Christian world. In Colombia, as in many other Catholic countries, the Catholic Church appeared as a formidable adversary to

<sup>62</sup> See S Rousseau, 'Indigenous and Feminist Movements at the Constituent Assembly in Bolivia: Locating the Representation of Indigenous Women' (2011) 46(2) *Latin America Research Review* 11-22.

<sup>63</sup> In this regard, Egypt offers an interesting example. In the process of drawing up the 2014 constitution, there were five women representing 10 percent of the constitutional committee. From a descriptive point of view, this was only marginally better than the 2012 drafting committee in which women had 7 percent of seats. However, from a substantive point of view, the difference was dramatic. Out of the five women chosen to be on the constitutional assembly, at least four had strong track records of championing women's rights. See M Tadros, 'Egypt's Tale of Two Constitutions' in Rubio-Marín and Irving (n 56) 331-332.

<sup>64</sup> See Borrillo (n 61) 55-67; Tadros (n 63) 342.

feminist demands, mobilising in similar ways to reject abortion rights or what feminist called 'the freedom to choose motherhood'.<sup>65</sup> The right to abortion has in fact been probably the one issue around which women's groups in countries of Catholic tradition have disagreed the most.

Although constitutional scholars sometimes speculate about the difference in contents which the involvement of women entails, relatively little has been advanced about the potentially intrinsic gains of women's constitutional mobilization in terms of consolidating the citizenship status of women, even in settings where the processes are not successful, either because they fail altogether or because women's claims are ultimately discarded. Yet there is evidence that the involvement of women can have such intrinsic gains as the strengthening of women's civil society tissue or opportunities for broadening the basis of women's movement. An example is Iraq, where the campaign to secure rights for women in the Constitution brought together party-affiliated and independent women activists of different ethnic and religious backgrounds, forging transnational links between activists inside and outside the country.<sup>66</sup> Engagement has also enabled the building of local, regional, and transnational alliances, sometimes facilitated by the ready access to resources—often through international aid—to the national media and to national and international networks. Finally, it has enabled women to contribute to the transformation of the agenda of what constitutionalism should be concerned with and to start challenging male-shaped understandings of citizenship which had so far been constitutionally enshrined. And this leads us to transformative gender constitutionalism.

<sup>65</sup> See Lemaitre (n 60) 39 and Morgan (n 60) 82.

<sup>66</sup> See N Efrati, 'Re-Living Yesterday's Battles: Women and Constitution-Making in Post-Saddam Iraq' in Rubio-Marín and Irving (n 56) 153 and 183-84.

The term "transformative constitutionalism" has long been used to describe the South African Constitution or at least some of its ambitions in terms of racial and social justice goals. See KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) South African Journal on Human Rights 146. Following the steps of South African constitutional jurisprudence, the Indian Supreme Court has adopted this transformative constitutionalism as "the ability of the Constitution to adapt and transform with the changing needs of the times," endorsing the need for the Constitution to be enforced through a "progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society" (*Navej Singh Johar v Union of India*, AIR 2018 SC 4321) and "to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens" (*Joseph Shine v Union of India*, AIR 2018 SC 4898). The use of the term here refers specifically to the gender axis of inequality underlying the constitutional order.

### 5. Transformative Gender Constitutionalism

If, in constitutional terms, the end of the century witnessed constitutionalism confronting and being part of the participatory shift in women's equality narrative, seeking women's increased presence in the public domain and in decision-making, it is in the twenty-first century that we see constitutionalism more and more confronted with an agenda which aims to fundamentally transform the contours of the traditional family and the gender roles allocated within it. It does so by fully applying the egalitarian and democratic constitutional ethos within it and by rendering social reproduction a matter of public concern and an occupation to be shared between the sexes. We cannot here, due to space constraints, fully cover all the contemporary manifestations of transformative constitutionalism.<sup>67</sup> But we must mention that among the first examples of transformative gender constitutionalism accompanying the participatory moment of the 1990s and the expanded agenda it brought about were the vindication of women's right to a life free of violence, including from private parties. This has increasingly been constitutionally anchored, sometimes including on sex equality rationales, much to the detriment of narrow state action doctrines limiting the scope of application of fundamental rights.<sup>68</sup>

<sup>67</sup> See J Nedelsky, 'The Gendered Division of Household Labor: An Issue of Constitutional Rights' in B Baines, D Barak-Erez, and T Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012) 15–47.

<sup>68</sup> See VK Vojdik, 'Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach' (2007) 31(2) *Fordham International Law Journal* 487. If the 1990s signal the moment when women across the world began demanding human rights instruments and constitutions to explicitly express their rightful claim to a life free of violence, such claims have only gained in poignancy in the last decades, as feminist movements across the world have been pushing to expand the concern surrounding gender violence beyond domestic and intimate partner violence—a move facilitated by the increasing involvement of women in constitution-making and constitutional litigation and adjudication. And if the first constitutions included demanding the state to undertake actions to combat violence against women in the family domain (see, e.g., article 60 of the 1992 Constitution of Paraguay), more recent ones are referring to further forms of violence, thus showing a more sophisticated understanding of gender violence and its manifold manifestations. Some of these provisions currently underscore the irrelevance of where the violence is perpetrated (in public or private spheres, or at the level of the general society) (see, e.g., article 52(a) of the 2013 Zimbabwean Constitution). Some better reflect intersectional concerns by making reference to the variety of vulnerable groups that are often subject to violence and by mentioning the condition of 'double vulnerability,' (see, e.g., article 66.3(b) of the 2008 Ecuadorian Constitution) while others refer to the need for special procedures and redress mechanisms for survivors (see, e.g., section 71 of the 2017 Thai Constitution), or else express the inadmissibility of religion and custom-based practices that amount to or allow for such violence (see, e.g., article 38 (3) of the 2015 Nepalese Constitution).

Another expression of transformative constitutionalism and of its fundamental challenge to the confinement of women to the domestic sphere and maternal role has been the gradual, though still imperfect (and certainly non-linear), affirmation of women's sexual and reproductive autonomy as constitutionally grounded. This affirmation has facilitated a departure from the original abortion constitutional architecture in favour of a greater recognition of women's reproductive autonomy in countries with a constitutional maternalist tradition. While still recognising the constitutional obligation to grant some protection to unborn human life, many such countries, including in Europe first and more recently in Latin America, have supported the expansion of the system of indications or even the adoption of a periodic model allowing women to decide in the early stages of pregnancy while assisting them with enabling measures and counselling.<sup>69</sup> In so doing, these systems are advancing the notion that women's reproductive roles can no longer be simply assumed or normalised. Instead, women must be freed from unwanted motherhood while being proactively protected in their reproductive and mothering capacities and desires including by being free from racial and ethnic discriminatory biopolitics. Autonomy- but also equality-based rationales have been called upon in various jurisdictions to trigger the change and address access obstacles with a disparate impact on poor, rural, or racialized women.<sup>70</sup> On top of this, over the last decades, constitutionalism has grown receptive to the fact that, if women's private and family lives are not to be an obstacle to their full participation in the public sphere, and if social reproduction is to be recognised both as a collective responsibility and as something intrinsically valuable, the degree to which men are both expected and allowed to contribute to it must also be addressed.<sup>71</sup> This agenda touches not only on the deconstruction of gender roles but also on that of the proper identification and prioritization of public goods or human capabilities as objects of constitutional protection, including, arguably, the right to care and be taken care of. It also defies old constructions of masculinity.

An essential chapter leading to this broad agenda for the transformation of gender roles and dynamics in the family towards a fully

<sup>69</sup> See RJ Cook, JN Erdman and BM Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014).

<sup>70</sup> See P Bergallo and AR Michel, 'Constitutional Developments in Latin American Abortion Law' (2016) 135(2) *International Journal of Gynecology and Obstetrics* 228–31.

<sup>71</sup> See Rubio-Marín (n 37) 1.

egalitarian ethos has been the challenge to the hegemony of the marital, reproductive, and heterosexual marriage which the gradual conquest of gay rights and same sex-marriage (in itself an incendiary constitutional battlefield) best epitomizes.<sup>72</sup> And, although the expansion of marital forms is guaranteeing gays and lesbians equal dignity and respect, as well as their equal right to develop fulfilling and non-stigmatised emotional, sexual, reproductive, and family lives—and this is to be celebrated for its intrinsic value—it is clear that the disestablishment of marital heteronormativity also strikes at the sexual contract as initially conceived and, hence, at the core of the gendered order of society, an order structured around marriage where men have always normatively been husbands and women wives.<sup>73</sup> Unsurprisingly, once more, constitutions around the world were initially seized more as a reactionary than as a transformative force. After all, whether explicitly recognised or implicitly assumed, heterosexual marital families were thought to be the foundational pillar of societies in modern constitutionalism. Certainly, in responding to the disputes brought before them, supreme and constitutional courts around the world varied and many deferred to the legislator. But in recent times, national courts have begun to affirm the recognition of same-sex marriage as constitutionally required, as was the case in South Africa (2005),<sup>74</sup> the United States (2015),<sup>75</sup> following the example of some state courts which preceded it,<sup>76</sup> and Colombia (2016).<sup>77</sup>

In general, the clearest textual expressions of a vision of citizenship which supplements the inclusive with the participatory and transformative dimensions of constitutional gender equality is to be found, once again, in those countries which have seen important

<sup>72</sup> See A Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Hart Publishing 2017) 1.

<sup>73</sup> See MA Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105(1) *Yale Law Journal* 9–13; and KM Franke, 'The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender' (1995) 144(1) *University of Pennsylvania Law Review* 1–99.

<sup>74</sup> See *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) (S. Afr.).

<sup>75</sup> *Obergefell v Hodges*, 576 US 644 (2015).

<sup>76</sup> In the United States, several state courts had defended the option of same-sex marriage as constitutionally required, including those in Massachusetts, *Goodridge v Department of Public Health*, 798 N.E.2d 941 (2003); Iowa, *Varnum v Brien*, 763 N.W.2d 862 (2009); Connecticut *Kerrigan v Commissioner of Public Health*, 289 Conn. 135 (2008); and California, *In re Marriage Cases*, 183 P.3d 384 (2008).

<sup>77</sup> Corte Constitucional [CC] [Constitutional Court], abril 28, 2016, Sentencia SU-214/2016, para 10.

constitutional moments (exemplified by the adoption of new constitutions or large-scale amendments to their existing ones) following the described participatory turn, especially when they resulted from processes shaped under the pressure of women's groups and the influence of evolving international and regional women's rights standards.

In terms of democratising the family and gender roles within it, Colombia's 1991 Constitution had already recognised that 'any form of violence in the family [is] to be considered harmful to its harmony and unity' (article 42.3), in a provision whose joint reading with those recognising the right to personal integrity (article 12) and to health and life (article 11) has allowed the Constitutional Court to decide cases on domestic violence. Ecuador's 2008 Constitution has gone further in recognising the 'home' as a domain of citizenship by including, among the list of citizen duties (article 83.16), the duty to 'help, feed, educate and raise one's children', acknowledging this duty to be 'a joint responsibility of mothers and fathers, in equal proportion'. It also stated (under article 333) that the 'unpaid work of self-sustenance and care-giving, carried out in the home' must be 'recognized as productive work' and supported by the state. And Nepal's 2015 Constitution provides an example of how all the guarantees necessary to ensure women's equal citizenship can be tied together in a single constitutional provision: article 38 broadly refers to the rights of women and sanctions the right to equal political participation in all state structures on the basis of proportional inclusion; affirmative action measures in education, health, employment, and social security; equality between the spouses in property and family matters; the prohibition of violence and oppression against women and the right to safe motherhood and reproductive health (which must be read against the background of the Constitutional Court's recognition of the right to state-funded abortion as integral to the right to equality and non-discrimination in the landmark case *Lakshmi Dhikta v Nepal*, decided in 2009, foregrounding the reproductive needs of poor women).<sup>78</sup>

Surely, the relevance of these provisions can be relativised in view of the fact that some of them (especially those requiring budgetary commitments) might not be directly enforceable but also because they arguably refer to countries where the gap between law on the books and law in action is wide and constitutions have often been said to have a

<sup>78</sup> *Laxmi v Office of the Prime Minister*, 2067, 52(9) NKP 1551 (2010). See also M Upreti, 'Toward Transformative Equality in Nepal: The Lakshmi Dhikta Decision' in Cook, Erdman, and Dickens (n 69) 279-303.

merely aspirational nature. But the truth is that one can also find at least some recent expressions of transformative gender constitutionalism in more consolidated constitutional democracies, including as pertains the need to better recognise the central importance of care and of its egalitarian distribution.

In the US, despite having failed to ratify it a generation ago, many are pushing for a federal Equal Rights Amendment to be inserted in the US Constitution. This renewed effort has been fuelled by women's continued disadvantages, the unfair treatment of mothers and pregnant women in the workplace, women's underrepresentation in decision-making and leadership positions, and the insufficient responses to violence against women. A brand-new ERA, it is argued, should provide the 'basis for a new infrastructure of social reproduction in our post-industrial societies' by enabling and compelling governmental action.<sup>79</sup> Other consolidated democracies have recently moved into action. This is the highly visible and celebrated case of Ireland's constitutional gender revolution. After two referenda, one in 2015 and another in 2018, the country has passed constitutional amendments to its old 1937 Constitution to recognise same-sex marriage and legalise abortion. Recently, fascinating debates also took place with regard to the destiny of article 41.2 of the Constitution, probably the best explicit expression of the dated breadwinner family model in the Western world.<sup>80</sup> While many have suggested that this provision endorsing gender stereotypes should be entirely removed, a citizens' Constitutional Convention, held in 2013, overwhelmingly supported to keep it so as to make visible the central importance of care for social reproduction, yet rendering it gender neutral and including forms of care beyond the home. It

<sup>79</sup> See JC Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home* (2017) 28(2) *Yale JL & Feminism* 381. Other critical voices, such as Siegel's, are urging us not to wait for the constitutional amendment to pass. Instead, on the occasion of the women's suffrage centennial, she endorses a reconstructed interpretation of Sections One and Five of the Fourteenth Amendment, inspired by the Nineteenth Amendment's underlying promise of an ever more democratic family, and suggests that matters of contraception, pregnancy, and violence against women should be constitutionally approached through tests that ultimately ask the question of whether the treatment at stake entrenches men's household headship foundational model or, instead, advances toward securing women's independent citizenship. See RB Siegel, 'The Pregnant Citizen, from Suffrage to the Present' in G Paras, 'Nineteenth Amendment Edition' (2020) 108 *The Georgetown Law Journal* 167.

<sup>80</sup> Article 41.2 of the Irish Constitution provides that the 'State recognizes that by her life within the home, woman gives the State a support without which the common good cannot be achieved . . . [and shall therefore] endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home'.



was decided that further review would take place to discuss this again.<sup>81</sup>

Maybe less visible to the public eye are the hermeneutic court-led changes supporting transformative constitutionalism in other parts of Europe in an attempt to go beyond the traditional accommodationist European model and to ensure both the possibility of work/family balance for all and the sharing of care responsibilities between men and women. We could, by way of example, mention jurisprudential changes in German and Italian constitutionalism.<sup>82</sup> In Germany, for years, the Federal Constitutional Court had called on state neutrality with respect to the internal organization of families (under the family provision of article 6.1 of the Basic Law whereby 'marriage and the family are under the special protection of the state') to sustain gender neutral legislation (including, for instance, in the realm of taxation), which in fact favoured the breadwinner family model. It now relies on the *constitutional duty* imposed on the legislator by article 3.2 of the Basic Law to enforce gender equality in social reality (a provision inserted by way of amendment in 1994) and to defend from constitutional challenges the parental leaves legislation schemes adopted to promote the equal sharing of family and care responsibilities between the spouses. In Italy, since the early 1990s, the Italian Constitutional Court's case law has supported the extension of legislative maternity leaves to fathers, albeit so far only in subsidiary terms (relying on a joint reading of the equality principle in article 3 of the Constitution and the recognition of spousal equality in marriage in article 29). The full equalization of paternity and maternity leaves (under a system of equal and non-transferable leaves) has not been a constitutional victory in Italy or elsewhere. The lumping together of the mother's biological needs with notions of normative motherhood feeding ideas about the 'special tie between mother and child'—ideas channelled through conceptions of the child's best interest—have so far prevailed. Yet litigation is coming to the fore and dissenting voices are backing the need for change.<sup>83</sup> Arguably, the change would require the prior re-evaluation of care and nurturing, from which traditional models of masculinity have deprived men and which have, at best, stopped being primarily conceptualised and treated, if not totally ignored, as burdens and employment-related impediments. It would, in other words, require

<sup>81</sup> See Suteu (n 52) 31.

<sup>82</sup> See Rubio-Marín (n 37) 807-815 (citing pertinent case law).

<sup>83</sup> See dissenting opinion by Judge Maria Luisa Balaguer Callejón in the Spanish Constitutional Court's decision STC, 29 October 2018 (No 117/2018) (Spain).

the 'emerging model' of 'committed fatherhood' characterised by the 'elements of responsibility, emotional nurturing, physical accessibility and material support' which we saw Justice Clara Inés Vargas Hernández allude to, to become the norm, rather than the exception.<sup>84</sup>

## 6. *Gender Equality Backlash: Back to the Traditional Family Order?*

If consolidated, this subversion of the gender order which was inherent to the state order built in and through modern constitutionalism through participatory and gender transformative constitutionalism would be quite revolutionary. The history of constitutionalism has witnessed other major disestablishment processes, including those challenging the power of the monarchy or the church, so the time might have come to fully address the remains of patriarchy. Maybe because of this, one should not expect this change to proceed without major resistance. And major resistance is indeed what we have been witnessing, especially over the last decade, coming from neoconservative reactions and religiously 'anti-gender movements'. The targets of anti-gender movements have included gender and sexually diverse persons' rights as well as reproductive rights (such as contraception, abortion, and reproductive technologies) but also sex and gender education in schools and gender studies as an academic discipline. More recently, and to a lesser extent, new conquered trans rights have also become the object of attack, even in the context of opposition against other agendas which are seen as deeply interconnected.<sup>85</sup>

These anti-gender equality movements are part of an increasingly global transnational phenomenon which has its roots in the late 1990s in a reaction from the Vatican, American conservative Christians, and other states of Christian and Muslim tradition to the International

<sup>84</sup> Corte Constitucional [CC] [Constitutional Court], abril 1, 2003, Sentencia C-273-03, (Colom) para 5.

<sup>85</sup> See D Paternotte and R Kuhar, 'The Anti-gender Movement in Comparative Perspective' in R Kuhar and D Paternotte (eds), *Anti-gender Campaigns in Europe: Mobilizing Against Equality* (Rowman and Littlefield International 2017) 256. In Poland, the Church claimed that gender-based protections, which were increasing in importance after the ratification of the Istanbul Convention, would have led to homosexuality and transsexuality. See A Krizsán and RM Popa, 'Contesting Gender Equality in Domestic-Violence Policy Debates: Comparing Three Countries in Central and Eastern Europe' in M Verloo (ed), *Varieties of Opposition to Gender Equality* (Routledge 2018) 98.

Conference on Population and Development (Cairo, 1994) and the Fourth World Conference on Women (Beijing, 1995), conferences which foregrounded sexuality and reproductive rights as well as gender as a relevant category of analysis to explain violence against women as a form of gender subordination. In essence, the reaction consisted in strongly vindicating the sexual binary and the complementarity of the sexes in the name of the natural law of creation and as the essence of the institutions of marriage and family around which a healthy and sustainable society would be articulated.<sup>86</sup> The penetration of this construct in civil society is, however, a more recent phenomenon.

It is in this last decade when the increasingly sophisticated organization of the movement is giving rise to a series of virulent battles, fuelled by an alliance between religious and far-right actors who, joining forces, see themselves as mobilising against what they contemptuously call 'gender ideology' and we could rather identify as the 'dis-establishment of the traditional gender order'. Interesting (but maybe not surprising given what is at stake) is the fact that the movement's tactics include three of constitutional dimension. These constitutional tactics are allowing the anti-gender equality movement to change its narratives to circumvent the traditional opposition between the religious and the secular, while taking advantage of democratic mechanisms and secular courts to frame its demands with reinforced legitimacy. Such constitutional tactics include more or less successful attempts at constitutional reforms to (re)entrench the traditional family order in the constitutions (*constitutional entrenchment*); constitutional litigation to invalidate or reduce previously granted rights in favour of women, and sexual and gender minorities (*constitutional erosion*); and *constitutional co-option*, which instead of seeking erosion through the abolition or reduction of the rights previously granted, seeks a *gestalt* change and co-opts the discourse of rights to preserve majority values from their perceived erosion. Since the last two rely on judicial activity they can certainly prosper with governments that, suspicious of what they denounce as "gender ideology", pack the court system in ways they deem fit to offer resistance.

Perhaps one of the earliest expressions of the strategy of constitutional erosion is found in the war against abortion rights in the United States. The fight is in fact much older because already in the years after

<sup>86</sup> See MA Case, 'After Gender the Destruction of Man—The Vatican's Nightmare Vision of the "Gender Agenda" for Law' (2011) 31(3) Pace Law Review 802.

*Roe v Wade*<sup>87</sup>, pro-life groups organised and in the 1970s and early 1980s concentrated their energies on the approval of a reform which would incorporate the life of the unborn child into the constitutional text, an initiative which was gradually abandoned in favour of a more incremental strategy of erosion through increased regulation.<sup>88</sup> This regulation, which, over time, has focused less and less on the protection of the foetus and more on the supposed protection of women against the ways in which they would be victims of their own decisions to have an abortion, has only accelerated since the 2010 elections which brought the Tea Party and other conservatives to power. Because ending abortion is a key priority for them, more restrictive laws were passed in 2011 than at any other time in US history.<sup>89</sup> If so far, the doctrinal core of *Roe v Wade* as nuanced by *Planned Parenthood v Casey*<sup>90</sup> has managed to survive, the recent swing of the Court to the right following the appointment of conservative justices in the Trump era only increases the hopes of pro-life advocates in spite of the pro-choice position of the Biden administration.<sup>91</sup>

Dynamics in Eastern Europe best allow us to exemplify the tactic of constitutional (re)-entrenchment through constitutional reforms seeking to reinforce the contours of the traditional family. Maybe the most widely shared expression of the fight against ‘gender ideology’ in the region so far has been the battle for the constitutional prohibition of same-sex marriage, although the falling from grace of the Istanbul

<sup>87</sup> 410 US 113 (1973).

<sup>88</sup> See C Franklin, ‘The Story of *Whole Woman’s Health v Hellerstedt* and What it Means to Protect Women’ in M Murray, K Shaw, and RB Siegel (eds), *Reproductive Rights and Justice Stories* (Foundation Press 2019) 223–225.

<sup>89</sup> These regulations include some that prohibit termination of pregnancy once a medically detectable foetal heartbeat occurs (usually as little as six weeks after conception), and many others that impose unwarranted and tremendous burdens seeking to drive away providers from the market. Behind such a legislative frenzy is often the influential pro-life group Americans United for Life (AUL), a group that has also supported the struggles against abortion in many other parts of the world, *ibid*.

<sup>90</sup> 505 US 833 (1992).

<sup>91</sup> On May 17, 2021, the Supreme Court agreed to hear a challenge to a Mississippi law that would ban most abortions after fifteen weeks of pregnancy—hence before viability—in a case that therefore poses a direct attack on the constitutional right to abortion. In the meantime, Texas has approved fetal heartbeat legislation de facto banning abortion after 6 weeks of pregnancy and the Supreme Court has declined to intervene to halt it. The United States is not the only country where what seemed to be settled doctrine is coming under challenge. In Germany, too, the debate around abortion has been reignited by criminal convictions of doctors under attack by Evangelical Christians. The first convicted doctor filed a constitutional complaint in February 2021 (BVerfG, 2 BvR 390/21), so we may have a new abortion decision in the foreseeable future.

Convention in a growing number of countries is also a good testimony.<sup>92</sup> To understand the roots of the phenomenon, it must be taken into account that in post-communist regimes the Church has been identified as one of the victims of the communist regime and that, in some of the region's countries, such as Poland or Croatia, the Church has traditionally been considered as the depository of national identity. For this reason, since the early 1990s, the Church has sought to restore its former role as a moral authority, either through civil society or directly through collaboration with the government, through 'a process of re-traditionalization of society'.<sup>93</sup> Furthermore, both in post-communist Europe and in Russia, it has been affirmed that gender ideologies represent a new form of totalitarianism equated with neo-Marxism, a form of imperialism of values promoted by international and regional organizations and academic elites, of an undemocratic nature, in a context which they describe as characterised by a growing Christianophobia.<sup>94</sup> In terms of constitutional dynamics, it is possible to distinguish countries, such as Hungary and Poland, where the ruling parties are part of the movement and take advantage of their parliamentary majorities (Hungary) or their increasingly sectarian courts (Poland) to advance this agenda, from others following a more bottom-up dynamic.

Entrenchment through constitutional reform has been particularly visible in Hungary where the rise to power of Viktor Orbán's populist movement in 2010 provoked the rejection of a liberal cultural agenda taken up by much of civil society, giving the right-wing government Fidesz-KDNO the two-thirds majority it needed to change the constitution. The new Hungarian Fundamental Law (2011) proclaims the protection of human life from the moment of conception (article II); defines marriage as 'the basis for the survival of the nation' and as a

<sup>92</sup> See Krizsán and Popa (n 85) 101-103, describing some of the common features of conservative opposition to gender violence legislation and actions, especially when framed in terms of gender equality. They include several claims of constitutional dimension, such as the alleged interference with family privacy, sex-based discrimination against men who are said to be victims of domestic violence just as often as women, the various due process rights of male defendants that might be undermined, and religious freedom.

<sup>93</sup> Kuhar and Paternotte (n 85) 266.

<sup>94</sup> By no means is the tactic of constitutional entrenchment to resist the challenge to the traditional family limited to the Christian world, however. In the Arab world it accounts for some of the dynamics that have unfolded over the last decade, when Islamist forces have been seeking the opportunity structures of democratisation and constitutional reform to try to reinforce the position of Shari'a law and the vision of complementarity between the sexes (and thus, traditional gender roles) that it is said to support. See, for Tunisia and Morocco, Borrillo (n 61) 31-80 and for Egypt, Tadros (n 63) 314-350.

conjugal union between a man and a woman (article L.1) and establishes that 'Hungary will encourage the commitment to have children' (article L.2). And when in 2012, based in part on the case law of the European Court of Human Rights, the Hungarian Constitutional Court struck down legislation supporting a narrow conception of the family (defined in essence as a heterosexual nuclear marital family),<sup>95</sup> the majority forces in power responded in 2013 with an additional constitutional amendment that strengthened the privileged position of heterosexual and procreative families, taking advantage of the occasion to limit the powers of review of the constitutional court itself.

Authoritarian governments of the region are not solely responsible for these processes. Conservative civil society forces, often fuelled by transnational references and support, have also been behind the multiple constitutional amendments aimed at resisting the constitutional dissolution of heterosexual marriage (in countries which, in addition to Hungary and Poland, include Bulgaria, Latvia, Moldova, Ukraine, Serbia, Montenegro, Croatia, Macedonia, Slovakia and Latvia), as well as behind several of the referendum campaigns which, with or without success, have accompanied such reform processes, including those in Croatia (2013), Slovakia (2014) and Romania (2018). These constitutional reforms are presented as (often pre-emptive) mechanisms of affirmation of the constitutional-national identity against the foreign influence of a Western Europe which, favouring homosexual marriage and oblivious to the natural mission of the gender binary, are dooming the traditional family and the human species.<sup>96</sup>

Finally, the strategy of constitutional co-option finds expression in multiple jurisdictions on both sides of the Atlantic. It uses victimization narratives which describe an 'oppressed majority' allegedly threatened by a totalitarian 'gender ideology' and combines the subversion of the constitutional logic of fundamental rights with the supra-ordination of religious freedom or freedom of conscience, to limit or even de facto empty the rights and freedoms granted to women and sexual and gender minorities by claiming protection for conscientious objection. Thus, if originally the accommodation of religious exemptions had been able to serve to protect religious minorities (in the observance of their practices, food or dress standards), now religious and

<sup>95</sup> See Alkotmánybíróság (AB) [Constitutional Court], 43/2012. (XII. 20.), Magyar Közlöny (MK) [Official Gazette of Hungary], 2012/82 (Hung).

<sup>96</sup> See M Mos, 'The Anticipatory Politics of Homophobia: Explaining Constitutional Bans on Same-Sex Marriage in Post-Communist Europe' (2020) 36(3) *East European Politics* 395, 397-398.

ideological exemptions are affirmed as a way of preserving majority religious values to the detriment of the constitutional equality of women and sexual minorities.<sup>97</sup> Conscientious objections in relation to the right to abortion are the subject of constitutional litigation in several countries in Europe, the United States, and Latin America, where they increasingly seek to exempt not only the doctors and nurses directly involved in the abortion medical procedures but also, on the basis of complicity, the personnel indirectly and remotely involved (such as nurses who provide after-care to patients or doctors who refer their patients for abortion).<sup>98</sup> Objections are also raised against the sale and coverage by insurers of abortion and contraceptive methods, including emergency contraception.<sup>99</sup> And they have also become a key mode of

<sup>97</sup> See D NeJaime and RB Siegel, 'Conscience Wars in the Americas' (2020) 5 *Latin American Law Review* 1-26.

<sup>98</sup> In Europe, various constitutional and supreme courts have been confronted with conscientious objections to abortion. See, for instance, *Greater Glasgow & Clyde Health Board v Doogan and Another* [2014] UKSC 68 [33], [37], addressing the objections of health care professionals and employees to laws that require them to offer post-procedure care to patients. See also Judgment of the Polish Constitutional Tribunal of 7 October 2015, Case No K 12/14, striking down a Law on Medical Professions that failed to include doctors' conscience-based exemptions for situations other than those of life-saving emergencies. Conscientious objections have also been raised in Latin America, sometimes with the explicit goal of limiting the scope of newly conquered rights in the abortion field. In 2017, Chile's congress legalised abortion and also authorised conscience exemptions for physicians who objected to performing the procedure. See Law No 21.030, 27 September 2017, *Diario Oficial [DO]* (Chile). But soon the Constitutional Tribunal, in response to a challenge posed by conservative politicians who had long opposed abortion, ruled that the law's limits on conscientious objection were unconstitutional and expanded exemptions from medical professionals performing the procedure to non-professionals who 'also object, in conscience, to the procedures in which they must intervene' as well as to institutions (Tribunal Constitucional [TC], Rol No 3729-(3751)-17 CPT-, 28 August 2017, 135). Defending this wide interpretation of conscientious objection see also, Tribunal Constitucional [TC], Rol No 5572-18, January 18, 2019. A similar strategy was tried in Colombia with less success. In 2006, the Constitutional Court struck down the total abortion ban and declared mandatory a set of exceptions to criminalisation (Corte Constitucional [CC] [Constitutional Court], 10 May 2006, Sentencia C-355 [Colom]). When confronted with the conscientious objection of doctors and judges interfering with access to abortion, the Colombian Constitutional Court imposed limits on conscientious objection with attention to the ways in which religious accommodation could impair the rights of groups historically subject to discrimination, expressing particular concern for fundamental constitutional rights 'developed out of struggles led by sectors of society that have historically been discriminated against and whose achievements have generally not been well received by a wide array of social sectors that, shielded by the exercise of conscientious objection, attempt to project their private convictions in the public sphere'. See Corte Constitucional [CC] [Constitutional Court], 28 May 2009, Sentencia T-388 [Colom]).

<sup>99</sup> See *Burwell, Secretary of Health and Human Services, et al. v Hobby Lobby Stores, Inc., et al.*, 134 S. Ct. 2751 (2014), upholding the claims of for-profit employers challenging a federal health insurance requirement that they cover contraception through

objection to LGBT rights, mainly in relation to same-sex marriage and antidiscrimination policies.<sup>100</sup> ‘Invoking freedom of conscience, religious pluralism, and non-discrimination’, rather than religious doctrine itself, ‘opponents of women’s reproductive rights and LGBT equality seek more persuasive justification for their positions and partly disable liberals from objecting.’<sup>101</sup> And although there may certainly be ways to address some conscientious objection claims while avoiding harm to third parties, the truth is that many courts are allowing too broad a reading of the right to conscientious objection in ways which practically empty out hard-won milestones in the process of disestablishment of traditional gender roles.

### 7. To Conclude

Modern constitutionalism was superimposed on an extractive reproductive family structure which was naturalised and even romanticised and which affected women and different sets of women’s citizenship in distinctive ways. This explains why all too often attempts to advance toward the affirmation of equal citizenship for women and a more egalitarian family were first resisted as challenges to the very structure of the constitutional order and not simply celebrated as natural steps in the gradual conquest of the constitutional promise of coexistence among naturally free human beings. Even the conquest of female suffrage was constitutionally resisted and, when accepted, only threw a wrinkle in the gender order, for it did not question the underlying marital contract. Everywhere, the effects of granting women’s political rights were mitigated by the gender bias in women’s social citizenship in patriarchal welfare regimes, as well as by women’s belated liberation from the head and master laws.

Yet, since the beginning of constitutionalism, women have engaged in various fights to turn their emancipatory claims into a constitutional reality, relying both on the constitutional interpretation of silent texts and on attempts to bring about constitutional norms. Throughout their various struggles, women have had to face the challenge of

health insurance benefits offered to employees and *Zubik v Burwell*, 136 S. Ct. 1557 (2016), withholding a pharmacist’s refusal to sell emergency contraception. See also the Spanish Constitutional Court’s decision STC, July 7, 2015 (No 52/2015) (Spain).

<sup>100</sup> See *Bull v Hall* [2013] UKSC 73 [34]; and *Masterpiece Cakeshop, Ltd., et al. v Colorado Civil Rights Commission et al.*, 138 S. Ct. 1719, 1732 (2018).

<sup>101</sup> NeJaime and Siegel (n 97) 11.



speaking with one voice, not only because of the difficulty of setting a priority order between the competing emancipatory causes of the time and the multiple and intersecting axes of oppression in their existence, but also because of the natural fear about the costs which the project of gender roles disestablishment could entail for women themselves and for some certainly more than for others. In crafting their constitutional demands, women have not respected the boundaries between the public as a domain of justice and the private as a domain of love following 'the dictates of nature'. Instead, they have identified coercion, abuse and exploitation whenever and wherever they encountered it in their own lives, including, and often starting with, the domestic sphere be it their own or that of others.

Originally built on the political exclusion of women, constitutionalism has only begun enabling and even facilitating women's citizenship in the last quarter of its existence by turning gradually receptive to women's claims for equal rights first and to equal participation later. Only in the current century, and thanks in part to women and gender dissidents joining the exercise of constitution-making, has it been possible to make significant progress in advancing the constitutional vision of a democratic and egalitarian family structure, both through the rejection of the heteronormative procreative family as the foundational cell of society and through the increasing, though still largely insufficient, valorisation of care, reproductive, and domestic work as a domain of citizenship. In the end, the constitutional challenge to gender roles and expectations has brought to the fore the social construction of gender itself and is now opening constitutionalism to the demands of justice of intersex and transgender citizens.

As with every major challenge to dominant norms justifying the legitimacy of power in the history of political thought, resistance to the disestablishment of patriarchy and its underlying gender order for the sake of a new conception of parity democracy seeking both "public" and "private" parity was to be expected. Thus, in recent years, we are indeed witnessing a slowing down and even some backlash, as well as a true wave of constitutional amendment initiatives (some pre-emptive, others reactive; some successful, others not so much) and other constitutional tactics seeking to restore the threatened traditional gender order. Yet women around the world have been fighting back and continue to do so. Their voices could be heard in the Women's March in Washington, DC in January 2017; in the Madrid feminist strike in March 2019; in many localities in Poland since October 2020 to protest against a Constitutional Court decision dramatically restricting

abortion rights or, more recently, in Turkey to protest against President Erdoğan's decision on April 19, 2021 to withdraw from the Istanbul Convention by an overnight decree which is arguably unconstitutional. In so doing, I claim, women are trying to both prevent the loss of historically gained territory but also to finish the job which their female ancestors began; namely, that of conquering citizenship as defined in men's terms but also of redefining it in their own terms, for as Amanda Gorman reminded us in her brilliant poem 'The Hill We Climb' in Biden's inauguration ceremony 'while democracy can be periodically delayed it can never be permanently defeated', and no country which calls itself a true democracy can do so without ensuring women their equal citizenship stature.