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Feminizing Constitutionalism and Constitutionalizing Feminism

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Abstract:
This article seeks to analyze the praxis between constitutionalism and feminism. It analyzes the extent to which constitutionalism had been feminized, the new questions raised by feminism perspective in the constitutionalism studies and to what extent this has resulted in the process of constitutionalization of feminism whereby feminist demands and ideals have become part and parcel of constitutions.

1. Introduction

Constitutionalism, both as 'theory and practice' has been most generally defined as the 'idea that the exercise of arbitrary power of the state needs to be restrained' (Dhingra 2014: 135). This 'definition however cannot exhaust the meaning of constitutionalism and can be more fittingly described as liberal constitutionalism' (ibid).

Constitutionalism was tantamount to judicial review, for many years (Kahana and Stephenson 2012:240). As per, the conventional wisdom the chief purpose of constitution is to restrain majorities and legislatures. Courts were assigned the responsibility for this purpose(ibid).Tsvi Kahana and Rachel Stephenson point out that mainstream constitutionalism has been gradually but certainly shifting the focus away from the courts (ibid). Several scholars across the globe have now been advocating replacing judiciary supremacy based constitutionalism with what can be called as 'democratic constitutionalism' (ibid). This is in contrast to both American style judicial supremacy and the British model of parliamentary sovereignty (ibid). Democratic constitutionalism favours a 'supreme and entrenched' constitution but leaves the last word in the hands of chosen law makers (ibid). Kahana and Stephenson argue that democratic constitutionalism provides significant 'opportunities for the direct participation of women' in deliberations on constitutional issues (ibid.) The idea of democratic constitutionalism means opening up the constitutional dialogue to representatives but also to the represented.

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2. Feminizing Constitutionalism

Daphne Barak-Erez defines feminism 'as offering a new interpretative practice on human knowledge, including in the legal sphere' (Barak-Erez 2012: 85). 'Equality with men' vs. 'difference with men' has been a long debate in feminist studies. Beverley Baines points out the defining feature of feminism is 'identifying and condemning behaviour that harms women', rather than commitment to sex equality (Baines 2012: 465).

Irving argues that women share the historical and enduring experience of subjugation (Irving 2008: 36). Therefore, feminist constitutionalism is concerned with the 'reality that law, specifically constitutional law is a practical instrument for either perpetuating or challenging this subordination' (ibid). She argues that constitutions are historically 'gendered' and their provisions have differential impact on women, even when they appear gender neutral (ibid: i). Irving moves beyond a meek focus on equality rights and scrutinizes 'constitutional language, interpretation, structures and distribution of power, rules of citizenship, processes of representation, and the constitutional recognition of international and customary law' (ibid). She examines how constitutional provisions can advance or hinder gender equity and agency (ibid: 1). Despite the fact that understanding the subordination of women, requires 'a deep analysis of history and socio-cultural influences' and cannot said to simply lie in constitutional opportunities (ibid: 135). Nonetheless, the provisions of the constitution can play a substantive role in 'either reinforcing the historical-socio-cultural inhibitors or assisting in mitigating them' (ibid).

Irving points out that feminist constitutionalism should avoid a stark choice between structural bias theory and liberalism (ibid: 34). The uncomplicated objective of formal equality under the law has long been challenged and most liberal feminists admit that

'substantive measures based on differential treatment are needed to accommodate the reality that equal treatment often produces inequalities among the differentially situated' (ibid).

Mackinnon argues that feminist constitutionalism would be motivated by different principles (ibid: x). Male supremacy would be dealt 'strategically, but squarely' (ibid). It would entail 'substantive equality of women both as an underlying theme in the document and as an underlying reality in the social order, in active engagement with society recognized as unequal based on sex and gender, necessarily in interaction with all salient' (ibid). Though remaining sensitive to context, the project of feminist constitutionalism cannot be diverted by 'essentialist questions' such as sameness versus difference debate among the feminists or 'cultural relativist' questions as to whether cultural specific practices based on women subordination should be respected (ibid). It would reject the supposition that 'a private sphere defined around home and family is a place of sex equality' and therefore immune from public rules (ibid). Respect and dignity for women would be bestowed by suitable means across the social order that would be enforced in each setting (ibid). The issues where 'no effective freedom to dissent or power to affect the shape of options or outcomes exists' such as 'the form of government or sexual access, forms of force from socialization to physical aggression would not be rationalized as consensual' (ibid). Collective power of some social groups over others would be confronted which is generally rationalized as divergent 'moral values or normative choices' (ibid).

Beverley Baines and Ruth-Rubio-Marian argue that a 'feminist constitutional agenda' should deal with the position of women with regard to '(1) constitutional agency, (2) constitutional rights, (3) constitutionally structured diversity, (4) constitutional equality, with special attention to (5) reproductive rights and sexual autonomy, (6) women's rights within the family, (7) women's socioeconomic development and democratic rights' (Baines and Marin 2004: 4).

Kathleen Sullivan raises the question: 'What choices would a hypothetical set of feminist drafters face if they were to constitutionalize women's equality from scratch?' (Sullivan 2002: 747) Sullivan replies that they would have to select:

(1)between a general provision favoring equality or a specific provision facing sex equality,(2) between limiting classifications based on sex or protecting the class of women,(3) between reaching only state discrimination or reaching private discrimination as well,(4) between protecting women from discrimination or also guaranteeing affirmative rights to the material preconditions for equality, (5) between setting forth only judicially enforceable or also broadly aspirational equality norms (ibid).

Irving points out that Sullivan's paradigm of a feminist constitution is a bill of rights, rather than a full constitution (Irving 2008: 29). Irving argues that a rights-centred paradigm does not addresses the structurally prior questions regarding the constitutional design of institutions in which the judges are appointed and work, the mechanism by which the laws they review are made, the process of implementation, and the process through which the lawmakers are chosen (ibid).

Irving argues that to concentrate on provisions for rights and statements of equality is to focus on future judicial review and bypasses questions about the ways in which constitutional interpretation may be constrained, including by the constitution itself (ibid).

2.1. 'Center and Periphery in Constitutional Law' (Baines, Barak-Erez and Kahana 2012: 2)

Feminism appeals to constitutional discourse to attend to concerns that are vital in determining the lives of women (ibid). The issues such as reproductive rights, social rights, the regulation of group rights of minorities should be addressed not as 'side' issues but as rather as principal issues worthy of consideration along with the 'big questions' of national security and separation of laws (ibid). The scope of thinking on national security requires to be extended to comprise not only borders and armed forces but also 'security at home and in the streets' (ibid). The notion of security needs to be extended from the one that requires protection guns, bombs and missiles to the one that necessitates protection also from 'physical abuse, knives, sexual offences, and emotional, medical and nutritional want' (ibid).

2.2. 'Revisiting Constitutional Assumptions and Categories' (IBID)

The project of feminist constitutionalism necessitates being critical of the underlying assumptions the scholars of constitutional law (ibid). One of these is the conventional division between public and private realms which is central to liberal constitutionalism (ibid). Another such assumption is the hierarchy of rights with primacy, being given to first generation rights such as 'liberty' and 'speech' (ibid: 3).

2.3. Constitutional Language

Irving argues that while framing, interpreting or reading a constitution the power of the language, either legally or symbolically should not be underestimated (Irving 20008: 63). Therefore, a 'gender audit' of the constitution must entail an 'examination of the language on its face, in its use, as a form of representation and in its hermeneutics' (ibid: 64). We should not discard doubt in the face of assertion that masculine language is inclusive (ibid).

2.4. Public-Private Dichotomy

The doctrine of "separate spheres" has legitimated the control of elite men and exclusion of women from public spheres (Vickers 2012: 2). This doctrine was embedded in constitutions of older-liberal federations that protected families from the regulation of state and therefore allowed the men to have complete control over family issues (ibid). Since the constitutions of these federations were hard to amend, the 'repressive gender regimes' were changed only after centuries of feminist activism (ibid). For example, it was only in the late twentieth century that violence against women became illegal in all states of the United Sates of America (ibid). The remnants of such doctrines lead to continuation of political marginalization of women which can be remedied only through restricting

of 'restrictive constitutions' as happened in Switzerland, where feminist activists were successful in bringing about a central level equal rights amendment (ERA) (ibid).

Feminists are dedicated to democratic dialogue and deliberative democracy and seek to dislodge the public/private split, and to 'craft a more inclusive democratic dialogue embracing and modifying the Habermasian notion of the public sphere as an emancipatory space from which discrimination and disadvantage can be challenged'(Narain 2012: 388). Jugen 'Habermas's idealized notion of the public sphere' believes that this 'rational deliberation would be based on reason and would bring about transformation and the end of dominance' (ibid). It supposes that those involved in dialogue would take part as equal and their particular interests and identities would be submerged during their deliberations (ibid). It also rests on the assumption that everyone has free access to this public sphere (ibid). This notion of public sphere regards public sphere as 'culture-free and neutral' and devoid of hierarchies and power relations (ibid). Feminist scholars interrogate this notion of dialogic public sphere as 'liberating' and argue that it may turn on the contrary to be 'subjugating' (ibid). Nancy Fraser emphasizes the significance of using this Habermasian idea of 'democratic dialogue' and 'emancipatory public sphere' as a 'conceptual resource' vital to feminist enquiry (ibid). Narain points out that Fraser's conceptualization of public sphere as constituted by many 'publics' better 'reflects the reality of diverse societies where the discursive relations between differentially empowered groups may take the form not only of exclusion but also of contestation'(ibid). Fraser questions the 'exclusion of private issues' from public discussion (ibid). She further points out that tagging certain issues as 'private' prevent public scrutiny and debate on these issues (ibid).

Seyla Benhabib's idea of deliberative democracy can be seen as a adaptation of both the Rawlsian conceptualization of the public sphere and the Habermasian conceptualization of dialogic engagement (ibid). She challenges the public/private split and acknowledges the power relations innate in public deliberations (ibid: 38). She gives a call for reconstituting of the 'liberal' public sphere paying attention to non-state dimensions (ibid). She argues for a deliberative democracy that takes into account more than the 'official public sphere of state bureaucracies and institutions', paying attention to the 'social movements, civil, cultural, religious, artistic, and political associations of the "unofficial" public sphere as well' (ibid: 389).

3. Constitutionalizing Feminism

Many of the issues in the past were regarded as 'private' or 'personal' and hence, non-political. Feminist theorists and activists have challenged the public-private distinction and made many women's issues as political issues. The next stage is to make women's issues 'constitutional'. Irving argues that the borderline between politics and constitutionalism is thin and changing (Irving 2008: 218). Several issues that were once 'allocated to the realm of the political have in recent times been given constitutional expression' (ibid). Many of these issues have been of particular concern to women (ibid).

For instance, Article 27 of the Rwandan Constitution 2010, states 'Both parents shall have the right and responsibility to bring up their children' (http://aceproject.org/ero-en/regions/africa/RW/rwanda-constitution-2010/view). Moreover, 'The State shall put in place appropriate legislation and institutions for the protection of the family in particular mother and child in order to ensure that the family flourishes (ibid).

Article 46 of the Colombian Constitution states that 'the state, the society, and the family will all participate in protecting and assisting senior citizens and will promote their integration into active and community life. The state will guarantee them services of social security and food subsidies in cases of indigence.'

(http://confinder.richmond.edu/admin/docs/colombia_const2.pdf)

The Colombian constitution similarly addresses the protection of children, adolescents and women. Thus, all the issues of the family which were considered to belong to the private realm and hence-non-political have not only being brought in the political domain but more recently into the constitutional domain as well.

There are only a few constitutions which written before World War II and include an explicit mention of gender equality (Irving 2008: 173). Some of these were Austria's 1934 Constitution, German Constitution of 1919 and 1936 Constitution of Soviet Union (ibid). Article 16(2) of Austria's 1934 Constitution declared that '[w]omen have the same rights and obligations as men, except when the law decrees otherwise' (ibid). The Weimar Constitution of Germany stated: 'All Germans are equal in front of the law. In principle, men and women have the same rights and obligations' (ibid). Article 122 of the 1936 Constitution of the Soviet Union declared:

Women in the U.S.S.R are accorded equal rights with men in all spheres of economic, state, cultural, social and political life. The possibility of exercising these rights to women is ensured to women by granting them an equal right with men to work, payment for work, rest and leisure, social insurance and education, and by state protection of the interests of mother and child, prematernity and maternity leave with full pay, and the provision of a wide network of maternity home, nurseries and kindergartens (ibid).

More than half of the world's constitutions have been framed since the 1970s. The end of cold war saw the materialization of many new constitutions, others have followed regime changes (for e.g., in Afghanistan and Iraq (ibid:1). Since 1970s, 'many of the western countries have undergone constitutional reform through incorporation of bill of rights, devolution of governance and the creation of new constitutional courts'. In this new epoch of fresh beginning one of the most remarkable things to note is the degree to which gender awareness has been reflected in the provisions of new constitutions (ibid: 2).

Irving points out that in recent times, there are many examples of women coming together to consider the constitution-making process in their country (ibid: 16). Women met and exchanged ideas preceding the adoption of the Canada's Charter of Rights and Freedoms (ibid). Women actively participated in the framing of South-Africa's post-apartheid Constitution in the mid-1990s and the new Colombian Constitution in 1991 (ibid: 16-17). They also actively participated in a significant number of African countries, including, Rwanda (ibid: 17). In 2004, a National Woman Outreach on Constitutional Reform in Nigeria (part of a national review of the 1999 Constitution) came up with 'a set of proposals and recommendations that would make the constitution more women-friendly' (ibid).

These incorporated constitutional provisions for the 'social security of women', provision for affirmative action , the justiciability of the existing socio-economic rights, freedom of religion, judicial process should be affordable and accessible to the average Nigerian and the language of the constitution supposed to be easy and translated into local languages (ibid).

When the Iraq Constitution was written in 2005, 'the constitutional recognition of women' and 'provisions for gender equality' and 'protection from gender discrimination' were forcefully debated (ibid). Women's organizations, both domestic and international were involved in campaigning and lobbying both prior to and during the drafting of the Constitution (ibid). One of the prominent organizations, Women for Women International met in Jordon in June 2005 and its report on the meeting was titles, 'Our Constitution, Our Future: Enshrining Women's Rights in the Iraqi Constitution', listed ten recommendations for constitutional provisions (ibid). These were:

a strong and visionary preamble(some participants recommended that the preamble should affirm the country's adherence to international conventions such as CEDAW); the principle of supremacy of the Constitution; constitutional recognition of a single citizenship along with "a statement that all citizens are entitled to rights, benefits and responsibilities of citizenship"; a comprehensive bill of rights, including formal and substantive equality provisions; federalism; an independent Supreme Constitutional Court; recognition of Islam as the official religion and religious freedom; the establishment of a gender equality commission; gender quotas for women in the national legislature; and the creation of a dedicated position at all levels of government to advise on and to monitor gender equality and women's access to services (ibid: 18).

Many of these provisions got reflected in the 2005 Iraqi Constitution (ibid).

The significance of feminist perspective on constitutionalism lies in extending the frontiers of constitutionalism. It provides opportunity to address hitherto unaddressed issues. It also provides opportunity to questions the assumptions that are taken for granted. The constitutions framed in 18th and 19th century does not contain explicit reference to gender equality. Women were not represented in the framing of these constitutions. The representation of women in framing of the new constitutions has made explicit reference to gender equality indispensable. The demands raised by the feminist movement are gradually being constitutionalized.

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