ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Towards a Feminist Legal History of the Public/Private Dichotomy: Rewriting Constitutionalism

LUCÍA GIUDICE GRAÑA

Adjunct Professor of Philosophy of Law, University of the Republic (Uruguay)

✉ **lucia.giudice@fder.edu.uy** **https://orcid.org/0000-0002-2570-9556**

ABSTRACT

This article examines the foundational myths of constitutionalism by deconstructing the public/private dichotomy, a central but underexplored element in dominant constitutional legal culture. Drawing on feminist legal theory and historiography, the article argues that traditional constitutional narratives have marginalised women and reinforced hierarchical structures by relegating them to the private sphere. It contends that feminist constitutionalism must go beyond adding rights or redefining existing principles; it must prioritise reconstructing constitutional history to reveal the gendered processes that shaped the dichotomy and its implications. This approach challenges the presumed neutrality of constitutional frameworks and seeks to dismantle the epistemological biases underpinning their formation. The article concludes that a feminist reimagining of constitutionalism requires a radical critique of foundational concepts and the development of alternative narratives that address structural inequalities.

Keywords: feminist constitutionalism**,** public/private dichotomy**,** legal histor**y,** gender and law**,** legal culture

This article is part of the project titled "*Ecological Justice and New Vulnerabilities: Global Legal Challenges*", funded by the State Research Agency of Spain (*Agencia Estatal de Investigación, AEI*) under project reference 2024/00209/001. Additionally, this article reflects on discussions held during "*Tertulias: Constitucionalismos Feministas*", organised by Mariela Puga and Javier Truchero, in collaboration with the Chair of Constitutional Law at the Faculty of Social Sciences, University of Córdoba, Red ALAS (Latin American Network of Legal Scholars), and ICON.S Argentina. I would like to express my gratitude to the organisers and all participants for fostering a friendly dialogue and inspiring critical reflection on these important issues. I also thank the anonymous reviewers for their valuable suggestions regarding this article.

ATHENA
Volume 4.2/2024, pp. 28-57
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

"Artista: ¿divaga Ud. en una pintura ambigua que es solo un mediocre esteticismo? Aplique a sus obras REMOVEDOR abundante y concienzudamente hasta llegar al fondo limpio de sus telas, más aún, hasta lo más hondo de sus conceptos de Arte y sentirá Ud. que sus obras y sus conceptos se clarifican y engrandecen."[1]

J. Torres García

1. Introduction

Revisiting the compatibility between feminism and constitutionalism may seem unnecessary in a time and context where this reconciliation is frequently affirmed not only as possible but also as desirable. Nevertheless, this article argues that rather than simply debating their compatibility, unveiling the artificial nature of the public/private dichotomy, challenging it, and redefining it within constitutional discourse is crucial. This effort, however, finds its greatest strength in the need to retell legal history, reconsider traditional narratives, and show how these have shaped the hierarchies and exclusions typical of contemporary constitutionalism.

Analysing the construction of the public-private dichotomy reveals the biases underlying constitutional principles. In this context, feminist historiography plays a crucial role by challenging the narratives that have shaped constitutionalism and contributed to existing legal and social structures. Simply adding rights to constitutional texts or reforming the institutions that hold power is not enough. While these actions are necessary, they have proven insufficient for addressing the root causes of gender inequalities. This article argues that one reason for this inadequacy is the

[1] "Artist: Do you find yourself wandering in an ambiguous painting that amounts to mere mediocre aestheticism? Apply paint remover to your works abundantly and thoroughly until you reach the clean surface of your canvases, or better yet, delve into the very depths of your concepts of Art. You will feel that your works and concepts become clearer and more elevated" (*translated by the author*).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

historical narrative that legitimises traditional constitutionalism and many of its newer variants.

Although often portrayed as a neutral and linear discipline, legal history significantly shapes our understanding of the legal system and the principles it upholds. The narratives we create about law are not neutral; they configure the hierarchies that reinforce inequalities and define the pathways for dismantling them. In this context, the dominant constitutionalist narrative, shaped by a prevailing historiographical perspective, has established the public-private dichotomy as an organising principle of law and social life. This mechanism has served to legitimise the marginalisation of women, confining them to the private sphere or, more recently, overburdening them with responsibilities spanning both the private and public domains.

Confronted with this reality, it becomes imperative to hierarchise a legal history that challenges traditional narratives and encourages a re-evaluation of how legal structures perpetuate gender inequalities. When we encounter narratives that claim to be neutral, we often uncover the underlying issues that women wrestle with in their efforts to ensure that constitutionalism genuinely meets their needs.

This article is organised into six sections. The first section examines the challenges presented by the grammatical core of the term "constitutionalism" and the various meanings it has taken on in different contexts. The second section analyses the artificial nature of the public-private dichotomy, one of the foundational pillars of the dominant constitutional legal culture. In the third section, I expose the legal consequences of the Public/Private dichotomy; the fourth section is dedicated to exploring the contributions of feminist theory and "feminist constitutionalism" to understanding this dichotomy as a historically constructed concept. In the fifth section, I argue for the necessity of a feminist legal history that deconstructs traditional narratives and rewrites them from alternative perspectives. Finally, the sixth section provides some thoughts on the topics discussed.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

2. On the Conceptual Limits of "Constitutionalism"

In canonical literature, the term "constitutionalism" is frequently employed without a clear definition or explicit agreement on its meaning. It is used indiscriminately to denote phenomena that may be related but are not necessarily interconnected. Thus, the term refers to a political ideal, a legal ideology, a historical process, an object of study, or the discourses that justify different normative constitutional models. This indiscriminate use mistakenly assumes that we all share a common understanding of what "constitutionalism" entails. However, given its proliferation across theoretical and practical legal disciplines, it becomes essential to ask what does "constitutionalism" indeed mean? What ideas, interests, and exclusions underpin its usage?

The term "constitutionalism" has undergone various transformations over time; however, it remains characterised by vagueness and an open texture, as noted by Carlos Santiago Nino (1992, 2). Juan Carlos Bayón further observes that both "constitutionalism" and the "constitutional state" can have multiple interpretations, ranging from simple to more complex and demanding conceptual meanings (2010, 407). These differing interpretations, rather than enriching the concept, may lead to confusion, significantly when qualifiers such as "liberal", "social", or "feminist" do not effectively challenge its epistemological foundations.

Beyond the inherent difficulties of its conceptualisation, constitutionalism cannot be disentangled from the historical and political context of its emergence. Rooted in the liberal revolutions of the 18th century, its development has shaped law and politics by justifying and regulating power through the Constitution as the supreme norm. Over time, this notion has evolved to include social rights and has given rise to multiple variants, such as the neo-constitutionalism of recent decades. Nevertheless, its epistemological foundations remain primarily intact: a normative model that

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

prioritises individuality, rationality, personal autonomy, and property as the central axes of legal subjectivity.

Given the multiple issues evoked by the grammatical core of "constitutionalism", it may be more appropriate to abandon any attempt at exact disambiguation and instead recognise that we are ultimately dealing with a predominant "constitutional legal culture" capable of articulating and encompassing the diverse notions and dimensions invoked by this category. Regarding the legal dimension of the phenomenon, the notion of legal culture emphasises the practices of legal operators in identifying the law (Tarello, 2002). Legal texts play a central role, particularly the interpretive — and discursive — activity of doctrine or dogmatics, jurisprudence, and other legal operators. Tarello (2018) states that legal culture refers to the "set of attitudes, ways of expression, and modes of reasoning specific to legal operators".

In a similar yet broader sense, Luigi Ferrajoli argues that legal culture can be understood as the sum of different sets of knowledge and approaches: first, the legal theories developed by jurists and philosophers of law within a specific historical context; second, the ideologies, models of justice, and legal thinking characteristic of professional legal operators (legislators, judges, or administrators); and third, the common sense regarding law and legal institutions as it manifests in a given society. Furthermore, there is a reciprocal interaction between positive law and legal culture. Law can be conceived as a linguistic framework that is simultaneously the object and product of legal culture: a system of normative signs and associated meanings constructed and applied in legal practice by jurists, operators, and users. All these actors contribute to the production and interpretation of law in diverse ways and at different ways and levels (Ferrajoli, 2010, 15).

As Carmen López Medina notes, this approach to the legal phenomenon highlights the political choices that guide interpretation and application and the specific historical context in which the conceptual representations of those manipulating the discourse of legal sources are formed. These representations influence the body of interpretations provided by legal operators insofar as

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

they generate consensus on the correct application of normative texts (López Medina, 2014, 233). In this context, the history of law plays a central role in shaping constitutional legal culture, given that it forms part of legal education and the narrative employed by legal doctrine and jurisprudence to justify their positions.

Therefore, rather than advancing a specific descriptive or normative proposal about constitutionalism, the chore lies in dismantling its foundational myths and interrogating its conditions of possibility. Once we acknowledge the existence of a dominant constitutional legal culture, this requires delving into the historical narratives that have shaped its conception and normative grammar. Faced with a narrative that has systematically excluded women, the challenge is not merely to add new categories but to recount history anew, revealing how constitutionalism is not a neutral paradigm, but a historical construction deeply intertwined with gender hierarchies.

Classical constitutionalism -understood as a specific legal culture- is grounded in a modern rationality that consolidates a male legal subject, abstract and devoid of relational ties. As Ruth Rubio-Marín points out, the liberal historiography of constitutionalism constructed the myth of the independent and self-sufficient political being, shaping the individual as self-sovereign. This construction systematically excluded women, regarded as "creatures of emotion rather than reason" (Rubio-Marín, 2014, 7), and confined their citizenship to specific roles that reinforced their subordination to male power.

The concept of citizenship, traditionally anchored in property and contracts, assumes an abstract and universal subject — "neither noble nor commoner, neither peasant nor merchant, neither rich nor poor" (Pisarello, 2013). This notion often obscures the structural inequalities beneath a façade of neutrality. However, as Geneviève Fraisse points out, women's citizenship has not been developed abstractly. Instead, it is based on specific determinations that fragment and exclude women from achieving true

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

political equality. Fraisse notes that those who oppose gender equality are adept at manipulating distinctions among various categories, thus complicating the relationship between civil and political rights, economic status, ontology, eroticism, and legality (Fraisse, 2003, 12).

Even with the advancements in social rights in the 20th century, new forms of exclusion persisted. The link between "property/freedom" and citizenship broadened to include wage labour. However, it continued to marginalise women's contributions in reproductive and caregiving roles, which were relegated to an invisible private sphere. While the economic sphere gained greater significance as a "public" domain, women remained confined to roles that did not align with this categorisation (Ruth Rubio-Marín, 2014, 7).

In fact, the idea of property is epistemologically crucial to how we contemporarily understand rights. Jennifer Nedelsky's thesis is particularly illuminating in this regard. Framing her analysis of constitutionalism in the United States, the author explains that during the constitutional consolidation of the American Revolution, the Federalists and Madison addressed the tension between democratic demands and the protection of private property by constraining democracy's egalitarian impulses and reinforcing individual rights against the perceived tyranny of the majority. Nedelsky argues that understanding individual rights as constraints on government authority arises from the necessity to protect property, a perspective grounded in a patrimonial-individualist framework. As she suggests, this approach serves as a paradigm for understanding how constitutionalism generally conceives rights — as boundaries that prioritise individual liberties while constraining collective governance (Nedelsky, 2022). The resulting consequence is a conception of individual rights, understood primarily as boundaries, disregarding context, emotions, and any other aspects beyond defence against unwanted interferences — mirroring how the private sphere is conceived within traditional constitutionalism.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

3. The Public/Private Dichotomy: From Artificial Construct to Conceptual Corset

The separation between public and private spheres has been one of the foundational pillars of the liberal tradition from which modern constitutionalism derives. This construct not only structured social life but also became a central category in constitutionalist narratives and other areas of law, shaping our understanding of institutions and legal relationships.

Political theory has primarily focused on two main traditions: classical and liberal. The classical tradition distinguishes between oikos, which refers to the domestic sphere of production and reproduction typically associated with women, children, and enslaved individuals, and polis, which represents the space for deliberation and decision-making occupied by citizens.

In the liberal tradition, the distinction is made between the State, viewed as a space of public authority, and civil society, understood as a space of private, voluntary relationships. As Carole Pateman explains, the separation between paternal power and political power marks the starting point for how we currently understand the division between the public and private spheres.

The conventional interpretation of John Locke's social contract theory emphasises the creation and separation of civil or political society from the private familial realm. The political society is characterised by "the universal bonds of the contract among formally free and equal individuals". In contrast, the private sphere is comprised of "an order of natural bonds of subordination" (Pateman, 2019).

Although commonly portrayed in legal and political discussions as a natural distinction, the separation between public and private spheres is an artificial mechanism with specific purposes. This situation is not unique; many of the categories used in the prevailing legal narrative are neither neutral nor natural, even though they are often presented and accepted as such.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

Even in contexts where legal dogmatics are less central than in Civil Law traditions, Duncan Kennedy points out that the prevailing liberal legal discourse often obscures the ideological foundations of legal doctrines. This discourse also tends to overlook how these doctrines can perpetuate social and economic inequalities and the contradictions inherent in the "fields of knowledge" they create (Kennedy, 2010, p. 13). Additionally, Martha Chamallas notes that "legal subjects tend to be described using neutral categories, unmodified by any particular perspective or methodological orientation" (Chamallas, 1999, 10).

The field of constitutional law exemplifies the importance of critically analysing legal frameworks. As Christian Courtis explains, any set of legal texts is influenced by specific political, social, or economic perspectives. Legal dogmatics often attempt to characterise these influences by "modelling" different legal systems, such as "liberal constitutionalism versus social constitutionalism, or authoritarian criminal law versus liberal criminal law" (Courtis, 2006, 355).

In this context, the public-private dichotomy serves descriptive but, above all, normative functions. Although its roots trace back to Roman law and medieval commentaries, its modern form began developing between the 16th and 17th centuries as a mechanism to limit power — a fundamental element in the evolution of modern constitutionalism. However, as Klare warns, the peculiarity of legal discourse is that it tends to "restrict political imagination and induce the belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate". The law operates as a legitimising ideology by "making the historically contingent appear necessary" (Klare, 1982, 1358).

In contemporary Western political and legal literature, this dichotomy is often accepted as inherent, as if it had always existed. However, despite seeming like an abstraction detached from reality, the distinction between public and private has tangible consequences. Created at a time when the concept of the State was central to political theory, it persists in a world where

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

politics transcends the State, encompassing international organisations, corporations, and individuals (Mancilla, 2017).

While some more recent versions of constitutionalism have softened this sharp separation, none have entirely abandoned it. As Silvina Álvarez Medina states,

> the categories of public and private have guided the course of political philosophy in matters related to the most personal and intimate aspects of life and have often been used by legal theory with a certain dogmatism as a sort of corset, to classify actions whose characterisation cannot easily be subsumed into one category or the other in an exclusive manner.

Conversely, "some actions traverse both spheres, blurring the boundaries and demanding a reinterpretation of the categories under analysis" (Álvarez Medina, 2021b, 38).

Feminist critiques developed from the 1960s onward focused on challenging this dichotomy within the liberal tradition, emphasising the need to include domestic life within the definition of the private. As Pateman notes, this new way of understanding the public/private dichotomy became central to the feminist movement's concerns. In the 1980s, Jean Bethke Elshtain analysed the dense network of meanings associated with these categories and argued that they operate as

> twin force fields to create a moral environment for individuals, singly and in groups; to dictate norms of appropriate or worthy action; to establish barriers to action, particularly in areas such as the taking of human life, regulation of sexual relations, promulgation of family duties and obligations, and the arena of political responsibility (Elshtain, 1981, 5).

Thus, paradoxically, the space historically presented as one where individuals can fully exercise their autonomy is, in fact, shaped by the very

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

dichotomy that modernity sought to establish in order to eliminate unwanted interferences.

4. The Legal Consequences of the Public/Private Dichotomy

Although the rhetoric of the public/private dichotomy is ever-present in constitutional doctrine, it lacks significant analytical content. Its consequences, however, vary considerably depending on gender, disproportionately affecting women. In this regard, feminist theory has made key contributions by exposing these differential consequences. As MacKinnon emphasises, constitutional law impacts women's lives by creating and maintaining a legal distinction between these two spheres (2012).

Indeed, constitutional law and human rights have predominantly focused on the political-public sphere, sidelining private actions. In this context, the private sphere is often described as a domain of complete autonomy, free from institutional constraints and associated with authenticity—a space of freedom from public authority. However, as Álvarez Medina (2021a, 64) argues, this standard of minimal intervention, inherited from classical private law, has not prevented significant regulation of private life, particularly in intimate areas such as marriage, sexuality, reproduction, and family. These regulations have historically aligned with religious and patriarchal norms, imposing rigid roles on women as mothers, caregivers, and providers of emotional well-being.

From the prohibition of divorce to laws requiring wives' obedience to their husbands, the law has carefully shaped the private sphere. Even today, power dynamics within households often remain invisible in legal discourse, perpetuating structural inequalities that particularly affect women.

Despite the discourse emphasising the protection of the private sphere from state intervention, regulating this domain has undergone profound transformations. This is particularly evident in family law, where conflicts increasingly require external intervention. This phenomenon underscores the

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

need to redefine the role of law in private and family life and reconsider the very notion of autonomy.

Recognising the effects that the space defined as private has on women leads us to investigate the foundations underlying the legal regulation of this sphere. Critical and feminist legal theories offer key tools to uncover the moral and political assumptions embedded in legal frameworks. Furthermore, these theories shed light on areas where legal regulations reveal their biases and significant omissions (Lacey, 2004, 29).

In this vein, Álvarez Medina points out that the original liberal conception of private life was constructed on a public sphere that positioned men as protagonists of a rational and emotionless domain. This conceptual dichotomy simultaneously relegated women to the private sphere, configuring it as a particularly precarious space for their autonomy. In this context, the lack of state intervention in relationships such as marriage and family perpetuates unequal power dynamics, turning the private sphere into a space of subordination. As MacKinnon observes, "epistemically and daily, the private transcends the private" (1995, 340).

Thus, the liberal tradition, by separating reason from passion, constructed opposing categories representing divergent modes of existence: the public and the private. At the same time, the public sphere was consolidated as the domain of rationality and political society, emotions, passions, and feelings were confined to the private sphere (Álvarez Medina, 2021b, 18). This binary scheme not only reproduced and reinforced gender hierarchies but, by completely ignoring contextual relationships, legitimised a normative structure that limits women's conditions to exercise their autonomy fully while privileging, at their expense, the exercise of men's autonomy.

5. Towards a Historical Understanding of an Artificial Dichotomy

Modern constitutionalism has shaped legal practices that often depict masculinity as the normative standard for what is considered human and

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

public. In contrast, femininity is relegated to the private and singular sphere in narrative contexts. This entrenched perspective overlooks the reality that women, despite being traditionally associated with the "private" realm, have consistently made their mark in the so-called "public sphere." However, as Yanira Zúñiga Añazco explains, women's struggles to recognise their rights have often been marginalised, leaving their advocates as spectral figures in dominant discourses (2022a).

Within the described context of the proliferation of the term "constitutionalism," feminist theorists have shed light on underexplored issues. As a complex movement, feminist constitutionalism seeks to develop from multiple perspectives, including historical, theoretical-epistemological, methodological, and legal-discursive frameworks (Peter da Silva, 2021, 154). While other approaches to constitutionalism have attempted similar endeavours, these efforts have not achieved comparable visibility in canonical literature.

As Mariela Puga points out, the concept of "feminist constitutionalism" is complex and challenging to define. It grapples with finding its role within established and emerging constitutionalism forms. At times, it encounters a fundamental dilemma: it can either conform to the existing narratives of dominant constitutional frameworks and their shortcomings or challenge and disrupt them. This tension is a fundamental aspect of the constitutional changes we witness today (Puga, 2023b).

The languages developed to interpret and apply constitutional texts have been predominantly androcentric, limiting their ability to reflect on the effects of these interpretations. As Sánchez Muñoz (2019) warns, the "original wound" of constituent processes occurs not only in the act of creating constitutions but also in the scarring of the discourses woven around them.

Feminist constitutionalism, as Puga suggests, seeks not merely to expand rights but also to "destabilise constitutional common sense", critically examining the foundations upon which the existing constitutional order is built (Puga, 2023b). This approach invites a rethinking of constitutional

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

categories and principles, questioning their implicit meanings. In terms of Baines, Barak-Erez y Kahana, "it is timely for constitutionalists – scholars, jurists, lawyers – to attend to the contributions that feminism offers to the traditional domains of constitutionalism" (Baines et al., 2012, 2).

Many feminist authors have shown that merely adding rights to constitutions is not enough. On one hand, the language of rights can be paradoxical. On the other hand, enabling women's participation in drafting processes is neither sufficient (Pou Giménez, Rubio-Marín, and Undurraga Valdés, 2024; Jaramillo Sierra, 2024; Álvarez Medina, 2024). While it is inevitable that rights have helped mitigate certain forms of historical subordination and inequality faced by women, as Wendy Brown points out, rights often function more as a mitigation than a resolution of the systems that reproduce these inequalities. Moreover, there is an inherent paradox: rights specifically designed for women tend to reinforce the identity categories that perpetuate their subordination, while rights framed as neutral and universal often overlook and sometimes exacerbate the structural conditions that disadvantage them. Within this framework, rights not only reflect the tensions between regulation and equality but also the power dynamics that disproportionately benefit those who already possess social and political resources (Brown, 2000).

Furthermore, even in contexts where women manage to become involved in constitutional process-making, the dynamics highlighted by Rubio-Marín and Helen Irving persist: Formal constitution-making remains largely dependent on traditional forms of political representation. As a result, given the ongoing underrepresentation of women in political institutions and senior roles within the legal profession, these processes continue to be dominated by male politicians and legal experts. The enduring glorification of the "founding fathers" as the architects of constitutions further marginalizes the recognition of women's contributions (2019).

This analysis underscores how traditional power structures constrain the transformative potential of women's participation in these processes.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

Consequently, the objective is not merely to revisit and reinterpret what constitutional law has established but to adopt a fundamentally different standpoint — one that embraces a new epistemological and methodological perspective on legal culture.

The value of these approaches becomes evident when analysing feminist critiques of conjectural historical narratives that underpin the foundations of constitutionalist discourse. As Puga highlights in her analysis of Roberto Gargarella's work, even hypothetical narratives that imagine an egalitarian conversation between men and women — such as the one presented in *The Law as a Conversation Among Equals* — reproduce a "blindness" to the dynamics of gender subordination. In chapter 2 of his book, Gargarella describes an imaginary conversation among immigrant settlers on a ship, where men and women discuss the rules for the new world. They listen to one another without prejudice and with mutual respect. According to Puga: "The conversation unfolds as if the women were not, at that moment, busy preparing food, cleaning, or caring for children and the elderly, allowing the men to converse in peace" (Puga, 2023a, 239).

Although Puga is fully aware that this scenario is hypothetical, the author seeks to demonstrate how such narratives erase the sexual hierarchies that have historically shaped political relations. Even as a regulative ideal, the hypothesis, Puga argues, challenges our imagination by assuming that women would participate on equal terms in everyday spaces. This blind spot not only limits our capacity to envision egalitarian relationships but also reinforces cultural preconceptions that shape positions taken in contemporary debates (Puga, 2023a, 240).

To delve deeper into this issue, Pateman's warning proves useful: contemporary contract theorists tend to subsume women under the seemingly neutral category of "individual", thus following the example of classical authors, who argued that natural capacities and attributes are sexually differentiated (Pateman, 2019). Adopting a feminist approach entails a profound re-examination of these narratives and the foundational

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

assumptions that have shaped constitutional law. This process not only aims to expand the possibilities of constitutionalism but also to challenge the boundaries of what has traditionally been understood as such.

Ultimately, feminist constitutionalism involves a fundamental questioning of the historical and normative foundations that have shaped constitutional law. Beyond expanding rights or reinterpreting traditional principles, this approach calls for a rethinking of the very structures of modern constitutionalism. Recognising historical exclusions and androcentric biases is not enough; it is essential to subject the core categories of constitutionalism to thorough scrutiny from a framework that not only incorporates women's experiences but also transforms power dynamics. Understanding its tenets requires acknowledging dominant narratives, especially historiography.

6. Rewriting History: A New Narrative on the Two Spheres

Feminism has focused much of its efforts on formulating non-androcentric epistemologies, moving away from the normative figure of a specific masculinity. In this context, early critiques of the two-sphere theory emphasised the importance of recognising the multiple and concurrent discourses surrounding the public/private dichotomy in each historical moment. However, while feminist contributions from disciplines such as social sciences and philosophy have enriched the legal field, feminist historiography has had a limited impact on the domain of law (Costa and Lerussi, 2022, 114).

By adopting the notion of legal culture to explore additional layers of the legal phenomenon, we can acknowledge that legal history, far from being an intellectual fetish, constitutes a fundamental component of legal practice. The way law is historicized — if it is historicized at all — significantly influences our approach to it. According to Vita and Cacciavillani, the dominant narrative of legal history taught in law schools is not only uncritical but also riddled with biases — of gender, race, and class, among others. This narrative

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

often portrays actors such as women, racialized individuals, sexual minorities, workers, or migrants as lacking agency, disregarding their knowledge as legally relevant. Consequently, it reinforces the presence of a single narrative in which these groups neither participate in the production of law nor understand what it means (Vita and Cacciavillani, 2023).

From a broader perspective, law has not been the subject of any canonical work within historiography, nor is the legal dimension particularly considered by the leading figures in this field. Nevertheless, legal historiography has gradually established itself as a distinct field, gaining significant momentum since the 1960s with the emergence of what is known as Critical Legal Historiography (Costa and Lerussi, 2022, 119).

Legal historiography must go beyond merely uncovering missing stories; it must critique the fallacies of the singular narrative that dominates the teaching of law and expose how this narrative reinforces biases related to gender, race, and class. As Vita and Cacciavillani (2023) argue, history provides a necessary corrective that challenges the traditions and habits in which law students are socialized, functioning as an antidote to the indoctrination of legal doctrine. From this perspective, it is essential to question the assumption that the core categories of law are neutral or universal, as they are deeply shaped by the values, expectations, and prejudices of their creators.

Incorporating the perspective of gender into legal history requires more than simply adding women to existing narratives. It demands a radical transformation: constructing new timelines and narratives that not only make women's historical contributions visible but also challenge the seemingly neutral categories of law. This approach is particularly transformative when applied to areas that, at first glance, appear untouched by gender, as it dismantles the underlying assumptions sustaining the dominant legal order.

In this way, the introduction of gender broadens the field of study and opens new possibilities for rethinking the fundamental structures of law and

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

its historical narratives[2]. This critical exercise allows us to imagine alternative present and futures where the central categories of constitutionalism—and law in general—are no longer seen as immutable but rather as the product of specific historical decisions that can be questioned and reimagined (Vita and Cacciavillani, 2023; Sandberg, 2021).

6.1. Telling the Story Anew

Traditional constitutionalism has systematically relegated the private sphere to the margins of theoretical and normative concerns. This dynamic solidified a hierarchical structure that prioritises the public sphere while relegating the private to a subsidiary, supportive role. Within this framework, intimate life and women's contributions were rendered invisible, limiting their autonomy and reinforcing unequal power relations (Álvarez Medina, 2021b, 27).

The second half of the 18th century was a significant historical period for developing what is now referred to as "constitutionalism" in its various dimensions. This interest arose not only from the active drafting of new constitutions but also from rapid advancements in their formulation and legitimacy. While men positioned themselves as the protagonists of liberal revolutions, women's inequality remained a stark reality — an issue that constitutionalism legitimised with minimal effort to address within its dominant narrative (Garay Montañez, 2012, 203).

Moreover, the modern identity of men and women, as conceived by the liberal revolutionary program transplanted to the American independence movements, was based on the notion of formal equality yet limited by the concept of the "individual". This, in turn, stemmed from the distinction between reason and emotion, which, as Álvarez Medina explains, "is entirely aligned with the public-private distinction" (Álvarez Medina, 2021b, 27).

[2] At this point, it is important to give special recognition to Ruth Rubio Marín's work, *Global Gender Constitutionalism and Women's Citizenship*, along with the historical framework she presents within it. As Beverly Baines notes in the book's foreword, the work addresses the "her-story" of constitutionalism (Rubio-Marin, 2022).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20397

The analysis of the dichotomy between the public and private spheres reveals the latter's subsidiary nature about the former. Despite its relevance to individuals' development and personal growth, the private sphere — and precisely intimacy — has been displaced in favour of the public sphere's supremacy. This subordination is not accidental; it reflects a dominant approach in philosophical-political theory and constitutional jurisprudence, prioritising the public-political sphere as the central focus of concern.

Within this framework, the private sphere and its activities were valued solely for their capacity to support and sustain the public sphere, thereby consolidating their instrumental character. This structure not only excluded women from public spaces but also limited their autonomy within the private sphere. In fact, in an inversely proportional relationship, the autonomy of men in the private sphere expanded precisely at the expense of women's autonomy, solidifying unequal power dynamics within the household and intimate relationships. It is also crucial to recognise that the empowerment of men in the public sphere was and remains possible only through the marginalisation of women from this domain and their fulfilment of roles explicitly imposed by theorists such as Rousseau on the ideal companions of the model citizen.

In traditional historical narratives, the private or intimate sphere has been conceived as a subsidiary and less significant space compared to public life. This dynamic systematically excluded it not only from normative frameworks and institutional design but also from the theoretical elaborations underpinning these systems. Consequently, the marginalisation of the private sphere from central concerns reinforced a hierarchical structure that shaped conceptions of social and political order, granting prominence to the public sphere as the only fully recognised space.

For a long time, the private sphere — and, by extension, women's actions — was not considered a subject of scientific, historical, or academic interest. Moreover, women did not speak for themselves; they were conceived and interpreted through external perspectives, viewed through the lens of writings

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https://doi.org/10.6092/issn.2724-6299/20397

by others — representatives of patriarchal power and order — thereby establishing knowledge that was "foreign" to them.

As Elshtain observed, the public sphere was routinely defined in terms of the political domain, while the private sphere was framed in terms of the family or home. She argued that a recurring problem for women was not only their exclusion from political participation but also the terms under which this exclusion occurred. Throughout the Western tradition, this problem, framed as political, has been part of an elaborate defence against the influence of the private, the allure of the familial, and the evocations of feminine power (Hawkesworth, 2019, 91).

Faced with this, it is crucial to challenge the prevailing historical narrative that creates the classic and artificial constitutionalism dichotomy, differentiating between the public and private spheres. In this regard, feminist activists and scholars have engaged with the public/private dichotomy in diverse ways to highlight the social significance of different spaces, each with its own rationalities and normative frameworks.

The historiography that recounts the formation of these spaces exhibits biases that significantly influence how constitutionalism justifies its principles, relying on historical events deemed supposedly determinative of its emergence. In this context, the critique posed by feminist historiography is essential, as it challenges the narratives that have underpinned the constitutionalism sustaining current structures.

6.2. Challenging the Dominant Narrative of the Public/Private Dichotomy

Building on the previous discussion, it is crucial to delve deeper into the historical narrative that sustains the artificial constitutional dichotomy between the public and the private. Feminist activists and scholars have taken up this dichotomy to uncover how these spheres have been socially and historically constructed, each governed by distinct rationalities and normative frameworks. By doing so, they challenge the hierarchical ordering that has

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https://doi.org/10.6092/issn.2724-6299/20397

historically subordinated the private sphere to the public, revealing its implications for gendered power dynamics and constitutional thought.

Historiography recounting the formation of these spaces reveals biases that significantly shape how constitutionalism justifies its principles, often relying on historical events deemed supposedly pivotal to its emergence. In this context, the critique offered by feminist historiography is fundamental, as it challenges the narratives that have underpinned constitutionalism and supported existing structures.

Traditional constitutionalism, both in the design of constitutions and in the narratives developed about them, suffers from the same flaw that Moreno identifies in hegemonic historical discourse. This flaw goes beyond the systematic erasure or omission of pages that might document women's participation in events now attributed solely to men. The portrayal of the "virile archetype" (Moreno, 1987) as the protagonist of history has also permitted dominant constitutional analysis to remain, until now, narrowly centred on men who fit the prototype of the "founding fathers."

This perspective has led to the elevation of certain events or phenomena as significant — those in which men predominantly participated as exclusive protagonists, particularly in matters related to the public sphere. Consequently, everything that women have done exclusively or predominantly throughout history has been undervalued and ignored: reproduction, domestic production of goods essential for daily survival, and, in general, everything considered specific to the private sphere of men (Moreno, 1987, 39). Thus, in constitutional design, not only were women's interests and issues overlooked, but also the historically conflictual relationships between genders, the sexual division of labour, and, more broadly, the subordination that the private sphere has historically imposed on women.

Consider how historiography depicts women's existence following the liberal revolutions. This representation remains highly uncertain due to the lack of foundational texts and historical certainties. In the context of the brief

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history of the Republic compared to the extensive history of the monarchy, the construction of sexual, civil, political, economic, and social ties — erotic and legal — follows a particular thought process, logic, or even deliberate intent. This logic has been obscured through various mechanisms: the absence of a foundational text on sexual relations during democratic times, subtle shifts between civil law and citizenship, and especially the apparent self-evidence of a separation between private and public life. Only a genealogy of this historical period will reveal the structure we must conceive regarding the relationship between family and the city, the articulation of the two forms of governance, and the domestic and political realms (Fraisse, 2003, 13).

Nineteenth-century constitutions "enshrined a gendered order in society" by omitting women from their texts. This omission was no mere oversight. This gendered order, intrinsic to constitutionalism, rested on two pillars: the separation of social functions by sex and the subordination of women to men. Classical constitutionalism did not ignore this order; instead, it constitutionally codified it and served as a vital tool for its perpetuation. This is the "destabilizing" narrative of feminism, which forces constitutionalism out of its comfort zone (Puga, 2023b).

Feminism has urged constitutional law scholars and practitioners to critically examine the underlying assumptions of their theories. One such assumption is the rigid separation between the two worlds — public and private — inherent in liberal constitutionalism, or the distinction between productive and reproductive labour characteristic of gender studies. Efforts to advance these discussions are evident in the National Constituent Assembly of Colombia's 1991 Constitution (Buchely Ibarra, 2014) and, more recently, in the Chilean case (Zúñiga Añazco, 2022b).

At this point, the necessity of telling a different story becomes crucial. As historian Mary Nash suggests, based on the contemporary feminist affirmation that "the personal is political" and that gender is a social category, the history of women evolves from an initial focus on justifying its own legitimacy toward approaches that challenge traditional historical theses and

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propose new conceptual frameworks, methodologies, and research sources. By attempting to situate women within the complexity of their historical contexts, new historiography not only seeks to reconstruct women's history and expand our understanding of the many dimensions of their protagonism in historical processes but also endeavours to understand the significance of gender groups in historical contexts (Nash, 1985, 101-102).

The invisibility of women in the history of certain key events that shaped the understanding of dichotomies like public/private does not arise from malicious conspiracies by male historians but rather from an entrenched androcentric conception of history that has privileged a masculine perspective within a patriarchal value system (Nash, 1984).

The core of this discussion seems to lie in a more fundamental unit of historical analysis: the concept of the individual, which underpins this dichotomy and inherently conflicts with a feminist proposal. While the notion of "the individual" has ambiguous meanings, Scott argues that Enlightenment philosophers and revolutionary politicians used it to refer to an abstract prototype of the human being. This served as a foundation for asserting the existence of natural and universal rights (to liberty, property, happiness), which granted men a shared claim to the political rights of citizens. Thus, revolutionary philosophers established abstract individualism as the rhetorical basis for their republic, even though, historically, republics were not founded on such inclusive notions (Scott, 2012, 23).

Through this abstraction, the concept of fundamental human equality — a set of universal characteristics — emerged, paving the way for equality in political, social, and even economic realms. However, precisely because the abstract concept of the individual was singular and defined by a specific set of attributes, it could also be used to exclude those deemed not to possess the requisite traits (Scott, 2012, 23).

When abstract individualism referred to a prototypical individual, it generalized all humans while invoking individuality as uniqueness. Yet, a contrasting relationship of difference was required to conceive an individual's

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uniqueness. The most common way to address individuality and difference was through the lens of gender. Under this approach, the broad spectrum of differences between "self" and "other" was reduced to the question of sexual difference; masculinity was equated with individuality, while femininity was associated with otherness in a rigid, hierarchical, and immutable opposition. Consequently, the political individual was considered both universal and male. In contrast, women were not regarded as individuals — first, because they were not identical to the human prototype, and second, because they were the "other" that confirmed men's individuality (Scott, 2012, 25).

7. Some Final Thoughts

Feminist contributions to legal scholarship have brought about a paradigm shift, enabling a radically different perspective on entrenched truths. These insights reveal that the constitutional ideology built around the private sphere sustains a conception of the individual rooted in classical liberalism, which disregards the relational aspects of identity. Based on a network of normative principles grounded in self-preference and independence as self-sufficiency, such an ideology appears incapable of redistributing social power (Zúñiga Añazco, n.d., 55) or recognising the value of that which does not conform to the male archetype that has dominated history.

In this sense, feminist theories, particularly since the second half of the 20th century, have challenged the traditional understanding of the public and private spheres. They have exposed the fiction underlying the notion that the domestic sphere is free from state intervention and the supposed neutrality of the state regarding this domain. The private sphere has been subject to legal regulation and control over family and reproduction, historically wielded to reinforce patriarchal structures (Sánchez Muñoz et al., 2001, 95). Through a feminist lens, the private space emerges as a domain constructed in opposition to the public, defined by its exclusion from institutional and legal authority

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https://doi.org/10.6092/issn.2724-6299/20397

and its characterisation as detached from state interference (Álvarez Medina, 2020, 3).

Despite longstanding elaborations, feminist constitutionalism remains a work in progress. Recognising this is not a sign of theoretical immaturity but rather a testament to the rigorous efforts of feminist scholars to sustain a proposal without resorting to the easy solutions offered by the dogmas of traditional legal-historical narratives. This underscores the importance of advancing feminist constitutional history as a core dimension of feminist constitutionalism. Beyond addressing conceptual tensions, feminist constitutionalism must prioritise the reconstruction of a feminist constitutional history that reveals the construction of the public/private dichotomy — a dichotomy central to contemporary constitutionalism itself. By highlighting the historical processes that shaped this divide, feminist constitutionalism gains the tools to dismantle entrenched narratives and reimagine constitutional frameworks.

At this juncture, we must ask: What are the limits of reconceptualising fundamental theoretical categories that "constitutionalism" can withstand before it pushes us outside its grammatical core? Alternatively, should we consider abandoning the invocation of a concept that provokes such tensions and instead advocate for a transition toward a new form of social organisation and institutional legitimacy — one that incorporates elements of constitutionalism without being entirely subsumed by it?

Without disregarding the risks of pursuing the latter option, feminism has always been a dissident, counter-hegemonic movement. In the words of Yanira Zúñiga, women have organised protests, broken paradigms, challenged beliefs, and imagined utopias. They have strategically chosen which battles to fight, when, and how. "Feminism has been an uncomfortable idea, an insolent genre, a curious gaze, a disruptive word, a divergent thought, an irreverent alliance" (2022a, 9). Feminist constitutionalism must follow this same path.

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Thus, we must certainly examine the Constitution's "engine room" but with an eye toward far more ambitious reforms, reclaiming the true meaning of utopia. Perhaps we need to dismantle the machine, scrutinize each of its components, and question — even its power source — if necessary. Perhaps the time has come to insist on our own metaphors and trust their illuminating potential.

I draw here on the powerful words of writer Cristina Morales, who reflects on creative labour as an act of constructive destruction:

> If I am to write to build, how can I erect any building on the reader's ground without first tearing down the one already in ruins? Writing to please — is it not piling more rubble onto the ruins, or perhaps clearing and rearranging them, pretending to build when there is no building but only an orderly heap of trash? (2020, p. 65).

Similarly, feminist constitutionalism cannot limit itself to "rearranging the rubble"; its purpose must be bolder — not reorganising the existing constitutional edifice but also imagining and constructing an entirely new architecture.

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