ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Rethinking (Eco)Feminist Constitutionalism

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ABSTRACT

This article focuses on the developments of liberal constitutionalism *vis a vis* the challenges posed by feminist and ecofeminist constitutionalism. First, it explores the insufficiencies of contemporary constitutionalism for fully incorporating the gender perspective. Second, it proposes two key notions for capturing the feminist proposal towards a new reading of the constitution: the relational perspective and the vulnerable self. Along with the relational approach and the review of autonomy in the light of vulnerability, the article proposes a constitutional reflection on the axiological basis of the constitution.

Keywords: feminist constitutionalism, ecofeminism, relational approach, autonomy, vulnerability

This article has been written as part of the "*Ecological justice and new vulnerabilities: global legal challenges*" project, funded by the State Research Agency, Spain (Agencia Estatal de Investigación, AEI), project reference 2024/00209/001.
I thank the participants in the ICON's Argentina Congress, Santa Fe, August 2024, and the participants in the AIFP Congress, Valparaíso, October 2024, for discussion of a former version of this article. I also thank an anonymous reviewer for helpful suggestions on this article.

ATHENA
Volume 4.2/2024, pp. 1-27
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

"Feminism has become something to be done more than a flag to be flown"
C. MacKinnon

1. Feminist Constitutionalism

I would like to think about feminism as proposed by Catherine MacKinnon, "something to be done", to be built; the same for feminist constitutionalism. As we know, feminist constitutional thinking began a long time ago, and it has developed important and relevant proposals about representation, fundamental rights and women interests. As a whole, feminist constitutionalism has focused on interpreting the constitution - its dogmatic but also its pragmatic dispositions - according to the conceptual and normative vindications of feminist theory and feminist jurisprudence. Besides, so called legal feminism or feminist jurisprudence are here understood as the background theory - as well as feminist theory - which leads to feminist reflections about the constitutional legal framework; in other words, feminist constitutionalism is an elaboration of legal feminism into constitutional code. Extensive catalogues of political, sexual, reproductive, civil and social rights have been presented to think the constitution and its protections on the bases of feminist theory (Y. Gómez, 1994, 2006; Baines y Rubio Marín, 2005; Irving, 2008; Baines, Barak-Erez and Kahana, 2012; I. Gómez, 2017; Rubio Marín and Irving, 2019; Alvarez Medina, 2021; Rubio Marín, 2022; Rubio Marín and Salazar, 2024; Pou, Rubio Marín and Undurraga, 2024).

The history of feminist constitutionalism is usually traced back to XVIII century (Irving, 2008, 4-16; Rubio Marín, 2022, 26-57). However, from the perspective of feminist vindications, the liberal constitution still embraces important deficits; it was because of the non-written constitution and its principles on wider bases and implicit clauses, that permitted to accommodate legal feminist vindications to some point. The invisible constitution (Tribe, 2008; Dixon y Stone, 2018) has progressively and only lately incorporated

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

women's demands. Impossible not to have done it and have kept a coherent set of liberal foundational principles, individual autonomy, dignity, justice (Dixon y Stone, 2018, 14) and, of course, equality. According to Laurence Tribe (2018, 26) "constitutional silences" live in the constitution as much as words do: some absent issues yell its constitutional belonging; otherwise, constitutional text may appear old and lack legitimacy. Then, we can affirm feminist legal achievements match precisely the liberal constitutional horizons, and such constitutions can't avoid recognising women's interests and keep being liberal constitutions of our time.

A quick look over the tenacious work done over the time on the field of feminist constitutionalism,[1] permits to observe the persistence and sagacity of lawyers and jurists who knew the limits and hardness of legal reasoning. The name of Ruth Bader Ginsburg is an example of such careers, fighting case by case, sculping changes and opening new legal ways at the pace of constitutional equality (Gibson, 2018). The achievements of feminist constitutionalism have had diverse results, from progressive effectiveness of political representation to persistent resistance to the inclusion of special treatment in the realm of fundamental rights, as in the case of sexual and reproductive rights, or body, psychological and moral integrity against gender violence in the couple. About reproduction, reactionary uprisings in some European countries illustrate the phenomena, and generates fear and concern on abortion legislation national and internationally.[2] The backlash to abortion constitutional rights in the United States is a case in point, as stated in the

[1] See, for example, the recent volume on gender and the constitution in Latin America, edited by F. Pou Giménez, R. Rubio Marín and V. Undurraga (2024), which includes chapters analysing eleven countries of the region and reveals complicated, gradual and slow constitutional and legal itineraries for opening the way towards public recognition of the intense and turbulent private life of women; legal changes comprise the family, children, marriage, reproduction, household labour, violence, care and the balance of private and family life.

[2] At the G7 meeting that took place in Italy in June 2024, the president of the Italian Council of Ministers managed to exclude the right to abortion from the joint declaration, which had been included in the 2023 declaration; see https://elpais.com/internacional/2024-06-14/meloni-consigue-eliminar-el-derecho-al-aborto-de-la-declaracion-conjunta-del-g-7.html.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

Supreme Court decision, *Dobbs v. Jackson Women's Health Organization* (2022).

The persistent tension between constitutionalism and feminist vindication of women's interests, leads me to explore in this article the convenience of the present strategy of more or less successful constitutional annexations or amendments. I propose to widen the scope and to address a concomitant task aiming at the axiological basis of constitutionalism. Important Latin American voices have pointed out severe shortfalls regarding the present constitutional model. Isabel C. Jaramillo, for example, affirms that, besides the project of reform of the feminist agenda, we have to pose the question on the effectiveness of the strategies undergone by feminist constitutionalism and its utility for overcoming persistent material inequality (2024, 68-69). Present and abundant legal production - constitutional and legal, as well as the case law - reveals to be not fully satisfactory if we observe women's life in different spheres. See, for example, the case of the Spanish regulation on gender violence under Act 1/2004, an innovative and ground-breaking proposal which introduced a novel and decisive gender-specific criminal classification model in addressing the problem, which has received the endorsement of the constitutional jurisdiction.[3] Despite this initiative, the figures of gender violence against women in relationships with a partner or ex-partner continue to exhibit more and more victims in Spain,as existing records show.[4] Naturally, the causes of this scenario of violence against

[3] Decision 59/2008 of the Spanish Constitutional Court established the constitutional basis of Law 1/2004, ruled out discrimination based on sex and affirmed the peculiarity and distinctive character of the typified acts, that is, violence against women exercised by the partner or ex-partner. This ruling was followed by others handed down between 2008 and 2010 that responded to other aspects of the law called into question through numerous questions of unconstitutionality. The success of this jurisprudence, some authors have pointed out, is not without improvements. Bodelón and others have pointed out that the ruling could have gone further and configured the protected legal asset as "a legal asset that is unique and diverse from others that already exist." (2009, 250); see also, Salazar and Rubio Marín (2024, 82).

[4] See the reports of the state observatory of violence against women, of the Government of Spain,
https://violenciagenero.igualdad.gob.es/violenciaencifras/observatorio/informesanuales/.
See also,

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

women are multiple and the legal approach is only one variable among many to take into account; and yet, the stubborn sexist reality challenges legal systems as well.

In the same direction Francisca Pou examines the Mexican context and refers to the reforms undertaken in the constitutional field to facilitate constitutional litigation on gender matters; the author points out the insufficiencies of the current model and states that "Nevertheless, the overall impression remains that Mexico lives under a superficial layer of inflationary normativity that fails to penetrate 'deep structures'. The formal inventory of norms, and even Mexico's position in equality indexes, somehow masks the degree of gender subordination that still prevails" (Pou 2024, 174). On a similar path, Rubio Marín and Salazar point out the urgency of persisting in reforms, given the important "deficiencies of a social State that has not only lacked public resources but also a feminist perspective" (translated of the original version, 2024, 144). Notwithstanding the many reforms already done in the realm of women's rights, there is a gender gap persistent in society. I propose a reflection on the value and conceptual grid of liberal constitutionalism, the matrix of which has persisted almost the same over time. The women's rights milestones have permitted key progress in terms of recognition and visibility for women as citizens. However, a gap persists in the constitutional arena. A step forward in the way of feminist vindications has still to be done; this doesn't mean including more rights or more aspirations in the constitution.[5] Nor do I mean further constitutional reforms, in terms of more inclusive conditions or parity standards. Indeed, such steps have already been taken, in different ways, throughout the last two centuries.

https://observatorioviolencia.org/incremento-el-numero-de-victimas-de-violencia-de-genero/#:~:text=Hasta%20el%20momento%2C%20en%20lo%20que%20va%20del,el%20maltrato%20siguen%20aumentando%20con%20resultados%20sumamente%20preocupantes.

[5] On the other hand, the so-called "aspirational constitutionalism" often functions as a mirage of political and social inclusion that, however, is far from making changes in people's lives; As Loughlin states, after giving the constitutional results of South Africa and Ecuador as examples, "drafting ambitious principles is much easier than turning them into reality" (Loughlin 2022:171; see also, Baines and Rubio Marín, 2005,6).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

Rubio-Marín (2022) has proposed a periodization of gender constitutionalism which begins with exclusive constitutionalism and moves progressively towards inclusive, participative and, finally, transformative one. According to her, we find ourselves at the point in which constitutions transform themselves at the pace of gender issues (Rubio Marín, 2022, 211-214). [6] In my view, deep transformation should be the focus, i.e., allowing women to have a leading role and be authors of transformation; such a move forward into constitutional change implies a step beyond rights inclusion, even beyond participation as presence. It is necessary to explore the transformation of the foundations of constitutionalism, in order to allow a genuine and original constitutional reflexion. MacKinnon affirms that many scholars find "constitutionalism too narrow and formalistic a container for addressing the problems feminism identifies" (2012, xi). This is also the problem with legal systems, a set of norms designed for other sort of conflicts and other's interests, different, very different, from those identified by feminism as women's interests and conflicts in patriarchal societies. Consequently, it shouldn't be a surprise that liberal constitutionalism as we know it has reached the gender agenda only partially. Political parity, sexual and reproductive rights, protection against gender violence, all of them are translated into legal rules attached to classical liberal legal systems, and are interpreted and enforced only with the same value instruments of already existing liberalism, whose basal and fundamental value is individual autonomy - mainly a male conception of autonomy. The fundamental rights achievements have been and are crucial for women, and I have supported its inclusion in the constitutions in former writings (Alvarez Medina, 2021). However, the serious problems feminism has found for interpreting and applying such rights reveal that annexing rights to national constitutions is not enough for transforming them. The *legal corset*, and specifically the

[6] At this stage of feminist constitutional development, and in the current political scenario, it is necessary to be alert, as Rubio Marín suggests, in the face of the dangerous attacks that loom over feminist advances and achievements (2022, 315 ff.).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

constitutional corset, fits someone else's measurement, and it hasn't been made for women's size.

In the following paper, I propose to look at aspects that may seem secondary at first sight, not centrally related either to fundamental rights nor to constitutional design. I will focus on the theoretical bases that on my view should nourish constitutionalism, not only considering normative and institutional design, but also substantive legal interpretations. I will focus on two key notions for capturing the feminist proposal towards a new reading of the constitution: the *relational perspective* and *the vulnerable self*. I will present first the relational approach, as opposed to individualism alone, which manifests itself properly through a new interpretation of the notion of personal autonomy, and its conceptualization as relational autonomy I will propose to incorporate the notion of vulnerability, along with dependency and interdependency, as variables themselves of personal autonomy in its relational dimension. Both the relational approach and the vulnerable self are called to complement the feminist legal proposal, and respond to core critiques made to key concepts of traditional legal systems - concepts such as universal and neutral individualism, public-private distinction, autonomy as full cognitive capacity.

The liberal conception of personal autonomy has worked as a hegemonic constitutional concept. This has been the case not only because it remains a key concept of the liberal political theory, hegemonic as well, but also because the concept retains centrality and influence also in other theoretical realms, beyond political and legal theory. This conceptual power exercised by the liberal conception of autonomy has been questioned by feminist theory which has proposed a less idealized and more context-related conception, under the notion of relational autonomy (MacKenzie y Stoljar, 2000; Nedelsky, 2011; Alvarez Medina, 2018). In parallel, the notion of vulnerability has also gained theoretical space, as a necessary counterpoint or contrast to autonomy, a core human condition, which also allows the identification of situations of structural and group dependence and

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

interdependence (Fineman y Grear, 2013; Timmer, 2013; Kittay, 2020, 57-77). As long as the reference and recipient of constitutionalism continues to be the person conceived as an autonomous individual that is capable of rationally mediated decision-making, emotionally neutral and contextually indifferent, the constitutional subject will not properly capture the lives of women or their interests and conflicts. Unless the notion of full autonomy, intended as the capacity of an ideally rational and contextually free subject is overcome, democratic liberal constitutions could barely be reshaped (Rodríguez Ruiz y Rubio Marín, 2012).

In this article I will focus mainly in rethinking constitutionalism on the basis of women's important interests and the underlying values developed by the feminist theory. However, the reflection can be extended to other realms. Together with the feminist perspective, other approaches question the constitutional agenda as well, and in some cases overlap women interests. Such is the case with environmental issues, activated by the climate crisis and the urgency of ecologically friendly legal developments. Ecofeminism has opened the political and legal agenda to integrated perspectives on issues of vulnerability, dependence and interdependence concerning women from an ecological approach (Mies y Shiva, 1998; Mellor, 2000; Puleo, 2016; Herrero, 2015). The relational approach to law and rights connects to vulnerability and dependency, which also connect to care work and caring values. Relations, then, open the road to caring, which is a core relational set of actions, beyond the limits of individualism and comprises caring the earth, its ecological equilibrium. Although I will not explore this issue here, caring as a constitutional value poses the challenge of a new dimension for equality, as well as for some key constitutional concepts, such as the public-private spheres, privacy or family life. Besides, another crucial challenge comes from relations with nature and the productive spheres, new vulnerabilities pushing towards a new interdependent and ecosocially sensible approach. Ecofeminism has pointed out two very important issues which question the

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

basis of liberal theory[7]: first, that individualism and the autonomous, rational, independent agent as the very centre of our social, cultural, economic and political world, proves to be a mistaken approach, which distorts the facts of an interdependent life and nature; second, that the underestimation and consequent neglect of emotional human capacities and caring attitudes have turned out into a big distortion which twisted reality and deprived it from an integrated approach. Furthermore, patriarchy, the key concept of the feminist theory, connects feminism with ecologist claims (Mellor, 1997, 81), as long as it highlights male oppression and the disregard of important issues of interdependency, caring and the relational approach.

My proposal will be based on the rich feminist genealogy, particularly some feminist political and legal theorists, such as Martha Fineman (2010), Eva Feder Kittay (2020) and, significantly, Jennifer Nedelsky and her article "The Gendered Division of Household Labor" (2012). According to Nedelsky, rights help to structure relations and, in addition, the structure of relations influences the exercise of rights; consequently, patriarchal arrangements in private and family life, and the division of household, strongly conditions the exercise of women's rights (2012, 16). One important factor in the patriarchal structure of relations is the public-private divide; Rubio Marín affirms that the public-private divide sets the gender order of the constitution and pervades the structure in a way that limits the possibility of emancipation for women (2022, 14). In order to overcome the gender deficit of liberal constitutionalism, I propose to look into the value system underpinning the constitution or, to say it with Nedelsky, "to rethink our values" (2012, 19). I propose to explore the hypothesis according to which the *feminist deficits of constitutionalism come from the seamless attachment to that axiological framework of original liberal constitutionalism*. In order to counteract this deficit, feminist and ecofeminist axiological background offer important inputs. In the following pages, I will start by posing the focus

[7] See, for example, Mellor (1997:136,148,153); Herrero (2015); Puleo (2016, 29-128).

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https://doi.org/10.6092/issn.2724-6299/20473

on the relational approach as the adequate perspective to address legal systems and individual rights.

2. The Missing Dialogue Between Feminism and Liberal Constitutionalism

It's been affirmed that the fundamental purpose of feminist legal work in the constitutional field is to reverse the subordination of women through constitutional law.[8] This simple formulation, however, confronts us with several questions. First of all, the question of how to effectively combat the subordination of women, historical and structural inequality, patriarchy, the political silencing of women's voices, economic domination, physical and ideological oppression, and so many other manifestations of subordination. This is a very relevant question because it inevitably leads to the substantive reflection on what women - represented both in their shared structural position and in their unique group diversity - want to make or carry out in the framework of constitutional protection; in other words, it confronts us with the so-called "feminist constitutional agenda" (Baines and Rubio Marin, 2005, 4). The substantive question about the *agenda* focuses on which important interests of women should come to light, be named and collected normatively, to make visible and counteract the subordination exercised through legal silence, absence or substitution.

But the agenda, in turn, can be addressed in various ways and through various feminist *strategies*.[9] Then, a second question arises regarding how to approach such an agenda from the perspective of women's interests, which is the best legal reading of women's demands. Legal feminism has presented two well-known strategies: first, the solution that assimilates women's

[8] See, for example, Baines and Rubio Marin (2005,5).
[9] Baines and Rubio Marín refer to "constitutional strategies" in a different sense than the one I use here, to present the claims of women in the legal field, referring more specifically to the legal framework; see Baines and Rubio Marín (2005, 8).

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https://doi.org/10.6092/issn.2724-6299/20473

demands to liberal-masculine legal categories, that is, that translates feminist demands into traditional legal language; second, the solution that specifies new, ad-hoc categories that complement the already existing ones, or even subvert them, and add new concepts and institutions (see Sohrab, 1993; Costa, 2000). Thus, legal changes aimed at closing gender gaps or solving inequalities have alternated between these two strategies over time, depending on the circumstances and the different social and political scenarios. Progressively, and starting with the so-called second feminist wave, the specificity of the feminist demands made evident the need for new legal instruments. This latter path of vindication through women's specific claims continues nowadays, and it is laborious and difficult, longer and slower, which is why I have spoken elsewhere about the two speeds of feminist vindications - a fast one through assimilation and a slower one through specificity (Alvarez Medina, 2021, 88-91).

Thirdly, beyond agenda and strategy, we must address the more technical question about *implementation*, i.e. which normative, legal-constitutional instruments are more effective or convenient for realizing feminist demands: the reform of the constitutional text, legal regulation that incorporates constitutional values, mainly equality, or the judicial route, particularly constitutional jurisdiction, which offers judicial solutions based, again, on constitutional values, mainly equality, but not only equality. These three pathways - constitutional reform, legal regulation and judicial decisions - have been used to open paths in the field of legal claims with a constitutional basis. Some authors have focused more on constitutional reform,[10] others have worked on constitutional expansion through legislative and judicial means,[11] and in general the specification of women's rights has been deemed the appropriate route, without renouncing a universal model of constitutional liberal values.

[10] In Spain, see Yolanda Gómez (2006,10-11); Itziar Gómez (2017,166-168; 173-174, 183).
[11] Also in Spain, see Blanca Rodríguez Ruiz (2017, 37-61, 118-119, 201-217).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

The three issues mentioned above, *agenda*, *strategy* and *implementation*, are present in the efforts of feminist constitutionalism, through the various proposals of feminist scholars who have addressed the constitutional path towards women inclusion. Along questions of agenda, strategy, and implementation, feminist constitutionalism has made its way while remaining within the axiological pattern of Western constitutionalism. By affirming the values of the liberal constitution, not only has the liberal political ideology and its principles been adhered to, but a unique interpretation of such principles or values has also been followed vis-a-vis the constitutional history of the last two centuries.

I propose here to explore the hypothesis according to which the *feminist deficits of constitutionalism come from the seamless attachment to that axiological framework of original liberal constitutionalism*. Baines and Rubio Marín raise a question that remains relevant and crucial to addressing change. The authors pose the question of "how" to carry out constitutional change with a view to gender equality and how to do it taking into account that "feminists and judges emphasize different material facts, rely on different terminology, reason quite distinctively, and do not necessarily share the same goals when they examine the issue of gender equality" (2005, 3). The problem is still present despite some progress that, thanks to legal and constitutional reforms, have allowed timid changes and nuances in judicial reasoning. Feminist legal theory has posed important challenges for legal systems, such as the criticism of the public-private category, the conceptualization of the subject of rights as an autonomous individual alone, the neutrality and universality of legal norms as well as recipient subject, among others. Although feminist legal theory continues to question constitutional systems, the latter barely acknowledge or incorporate feminist criticism.

The explanation for such a dialogue between deaf that exists between liberal constitutionalism and feminist constitutionalism may be traced back to what Mariela Puga (2023) called "the disciplinary narrative." As the author explains, classical liberal constitutionalism clearly did not include women

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

either as authors or as recipients or as references of what the constitutions wanted to capture or convert into norms. However, there is a contemporary constitutional narrative that understands this is an anomaly of Cronus, nothing that cannot be saved with a bit of constitutional interpretation. In other words, women can be incorporated to the constitution, you just have to think about them as you think about men. Another narrative is possible. The exclusion of women is forged with key categories and concepts of the constitutional and legal design: the public-private divide, individual autonomy as an exclusively rational capacity, the separation and independence of the individual. The exclusion of women is also forged by the silences of the constitution: the absence of the intimate and private, the invisibility of the body and reproduction, the denial of ties, relationships, emotions and care, mandatory privacy in the family. When feminism brings these silences to light, what Puga calls "the destabilizing narrative" emerges, which points to liberal constitutionalism as a "construction intended to support an andro-centric state that disciplines society based on hierarchical sexual differentiation between men and women" (Puga, 2023).

At this point, it is worth asking to what extent the graft that united feminism to liberal constitutionalism has been successful. To answer this question, it is not enough to verify that the graft has been carried out, that rights for women have been added to many Western constitutions, that in a voluntaristic manner and after successive waves of vindications and theoretical production, liberal constitutionalism has annexed or incorporated appendices of the feminist claim. A successful graft, as botany teaches, is one that produces a united organism, which grows on the basis of a pre-existing one, but which is transformed by the incorporation of a new tissue; it stops being as before and becomes a new organism. A successful graft results in a new plant, its parts growing together, as a single organism with renewed characteristics.

Despite its indisputable liberal pedigree, constitutional changes made for incorporating women have required numerous and continuous battles of

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

vindication, recognition and implementation, waged by feminism. The changes have been achieved little by little; they are important and yet they highlight important deficits too. On the one hand, as already noted in the first section, the impact of legal progress on women's lives remains modest in some spheres, mainly private and family life, but in many cases it is clearly insufficient - either due to regulatory deficits or implementation, either due to deficits in social reception of the regulatory changes. On the other hand, in the legal context, progress shows time and again its constitutional precariousness - legislative setbacks, jurisprudential changes such as those already mentioned on abortion, etc. The advances of legal feminism remain in the whole of constitutionalism as more or less accepted, more or less compatible patches, but they encounter serious difficulties to transform mainstream constitutionalism, to transform the legal conventions in use, to reformulate its axiological pillars. In short, the graft does not prosper because a new constitutional body has not emerged. The advances in agenda, strategy and implementation are undermined as long as they fail to provoke significant changes in the axiological model which, in turn, is what nourishes and confers ultimate meaning to the legal categories.

My proposal in the following pages aims to review the pillars of liberal constitutional framework, starting from the fully autonomous individual. At reviewing the capacity for autonomy, other perspectives appear that add vulnerability, dependence and interdependence to the core conceptual pattern. These, in turn, also allow us to display the dimension of care, which has permeated much of the feminist singularity. Relational autonomy, vulnerability, interdependence and care are notions with a strong normative load, which, when transferred to the constitutional sphere, can facilitate a better integration of the feminist *agenda*, counteracting the condition of uncomfortable and poorly integrated appendix, as is very often the case with the fundamental rights of women. It is also necessary to rethink the *strategy*: while assimilation seems to have been surpassed, specification alone does not bring about the desired changes. *Implementation*, finally, must also be

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

accompanied by changes in both the configuration and use of legal concepts and institutions. The achievements of the agenda in recent decades have been enormous and invaluable: new rights, new protagonists who are subjects of rights and new ways of accessing equality. All of this, however, has been adhered to pre-existing legal systems, sometimes in a more or less forced manner, fitting the new categories into structures whose form often exhibit intrinsic deficiencies. In other words, the implementation of women's rights requires a renewed technique and legal argumentation. The bare application of pre-feminist or patriarchal legal structures will not help to achieve genuine change, nor will the invocation of what Pou has rightly called "magical formalism", the belief in the changes that the forms of law may do by themselves alone (Pou, 2014, 36).

In order to explain the type of transformation that feminist constitutionalism should aim for, I propose to explore an idea by Jennifer Nedelsky about what people's rights are for in legal systems. The author describes North American legal development through the conceptual and theoretical keys of individualism, which cast rights as limits (Nedelsky, 2011, 91-117). The need to protect property and provide it with security shaped legal categories that advanced protections and guarantees in the public and the private spheres with a patrimonial-individualist model; rights set limits on the interference of others. Nedelsky advocates overcoming the theoretical framework which characterizes constitutionalism in the USA, a model of political and legal development focused on the idea of the individual owner, and consequently confined in such a conceptual framework. The challenge is not only about enriching categories and concepts - which have naturally evolved and changed - but, says Nedelsky, about changing the "metaphorical structure" (2022:83), the lines of work, the legal language, dogmatics, the interpretive models. In contrast to the vision strongly anchored in the individual as a fully autonomous, fully capable, fully decision-making agent, the theory of relational autonomy has designed another way of understanding agency and the decision-making capacity that derives from it. Besides these

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

assumptions about relational autonomy, vulnerability as a human feature adds for the comprehension of people and subjects of rights in another version, a more fragile and exposed version. Hand in hand with situations of vulnerability, dependency and care issues emerge. In what follows I will briefly present these notions, impregnated with a strong evaluative charge, and explore the contribution they can make to a renewed conception of feminist constitutionalism.

3. The Relational Approach: Autonomy and Vulnerability

Vulnerability has become a key concept for understanding private and family life, intimate relations and privacy, as well as public and institutional behaviour, concerning power relations and emotional aspects beyond strictly rational-cognitive capacities. Martha Fineman affirms vulnerability is both universal and particular: since all persons are vulnerable, the body has an intrinsic and constant potential to be harmed, but each individual is vulnerable in a different way, according to her body, psychic capacity and disposition, as well as context and relational conditions. Vulnerability is also complex, it has a social dimension, mainly relational, which comprises the institutional and economic environment (Fineman, 2010, 267-268). It is crucial, therefore, to acknowledge persons are not vulnerable in isolation, but they become vulnerable as part of an environment which constructs their comparative position as inferior, weak or dependant persons. Vulnerability has a structural meaning or matrix, better than exclusively individual; it originates in processes and interactions. María Ángeles Barrère warns about using categories of the vulnerable person or group without properly identifying the system of oppression, domination or inequality which lies beneath, i.e., power relations positioning people into a wither context (Barrère, 2016, 19, 29).

Besides the universal and the particular dimensions of vulnerability, there is also a group dimension, one related to membership or being part of a wider group of people, as developed in the decisions of the European Court of

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/20473

Human Rights (Peroni y Timmer, 2013; Timmer, 2013; La Barbera, 2019). Therefore, we have three aspects of vulnerability, as a *universal* or inherently human aspect, as a *particular* aspect linked to specific dependency situations, and as *group* condition, i.e. a condition related to social or cultural positions. Political philosophy hasn't gone deep enough into vulnerability as an unavoidable dimension of moral, social and political agency; on the contrary, it has inflated personal autonomy, as a full human capacity exclusively based on rationality, which not only pervaded political philosophy, but also became crucial for legal theory and the law.[12]

Liberal political philosophy has focused on personal autonomy as synonymous of independence. Such a characterization led to consider the autonomous individual as almost an isolated one, whose agency is not conceived primarily because of human relations with others but in opposition to them. This serious distortion contributed to the idea of autonomy as a capacity of the sole individual *against* others, not *with* them. Instead of highlighting the human necessity of coping with ties to others, habitat, emotions and other relational abilities, the liberal conception of autonomy as a full, absolute capacity, has intended that the autonomous person has to overcome them all. However, as Nedelsky has brilliantly noted, the core of autonomy is made of constructive, other-regarding relations (2022, 93), and legal attention should be posed on them.

We can now rethink constitutional design, taking into account universal, particular and group vulnerabilities. For the liberal classical model, the priority of the fully rational independent and autonomous individual is to undertake election and decision in a context free of obstacles or interferences by the state -government and the institutions.[13] However, if the individual is thought no longer as a fully autonomous person but as a vulnerable one, then

[12] Fineman (2004) has referred to this approach in his work on "the myth of autonomy" and its consequences for private and family life, in relation to childhood, dependency and the role of public institutions in the task of providing care. About the liberal conception of full autonomy, see Alvarez Medina, 2021:70-78.

[13] On personal autonomy as a fundamental value of liberal constitutionalism, see, for example, Nino (1992 162-168); Tribe (2008,190); Gargarella (2013, 5-6).

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autonomy will clearly appear as a necessarily gradual capacity, dependant on human fragility, plus eventual particular weaknesses - biographical, social, cultural -, and group membership disadvantages - colour, ethnic, religious, sexual or others.

According to Fineman, government, public institutions and the law should be aware of vulnerability as part of the capacity of autonomy (2010, 255-256). A state compromised of individuals seen not just as autonomous, independent people, but as fully capable of incurring in situations of universal, particular or group vulnerability, entails a compromise with material, rather than merely formal, equality. While the liberal state embraces non-interference as a fundamental guaranty for the protection of liberty and personal autonomy, the protection of the vulnerable subject goes further in the deployment of a system of guaranties. When guarantying personal autonomy alone, as Fineman affirms, the state gets less involved with institutional presence and action, than when assuming a compromise regarding unequal situations of vulnerability and, consequently, it is less prone to intervention (2010, 258). Equality is a central value of the liberal state too. However, according to Fineman, liberal states consider equality mainly as dependent on autonomy, i.e., they guaranty a formally equal exercise of autonomy (2010, 262). Changing the narrative from autonomy to vulnerability implies considering persons in a different way, and it entails another conception of the human condition more normatively, morally laden; a different light shines over political and legal theory. This change of perspective makes it possible to go forward into a conception that is no longer suspicious of the state as a negative interference or an obstacle for people's private life, but a conception of the state as a positive participant for options and the making of equality. In order to overcome the conflict between autonomy and equality, we should focus on the exercise of autonomy and have a look at the constituent elements of the capacity to choose, mainly options for action. The notion of autonomy that dominates in liberal constitutionalism is based on an exclusively procedural conception that relegates substantive aspects, even those linked to the options

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https://doi.org/10.6092/issn.2724-6299/20473

in relational contexts. Instead of that, a conception of personal autonomy that is more adjusted to the decision-making process should incorporate the relational dimension as well as contextual aspects that affect the construction of options.[14]

The incorporation of vulnerability as a constituent element of autonomy transforms the concept. Two main consequences of the recognition and incorporation of vulnerability can be outlined. First, vulnerability alerts about *human dependency* - ecological, social, cultural, etc.- and the need of strengthening relations for managing situations of need and fragility. Such a recognition puts into question independence as a condition for the deployment of autonomy, as stated by the liberal conception (Nedelsky, 2011, 27-29; Alvarez Medina, 2018). At this point relational autonomy and the centrality of vulnerability intersects with many of the claims posed by ecofeminists. According to María Mies and Vandana Shiva, biodiversity is a relational category, not likely to be reduced to individual or isolated parts (1998, 19-21), which means that no sustainable way of life may take place without a sort of equilibrium which takes parts into consideration and conceives them as interconnected by the web of relations (1998, 23). Second, vulnerability discloses an array of human capabilities: *emotional*, *imaginative*, *dialogic* (Mackenzie, 2022:69), and *body capacities*. The body may be the most evident sign of human vulnerability, neglected at length by rationality, which is in turn less evidently bounded to human fragility. For Nedelsky,

> When people experience sickness, injury, or fatigue as an interference with their capacity to live as they want to, the body becomes a threat to the constancy of reason and agency, which the tradition treats as the core of our humanness. The "otherness" of the body is both a cause of such experience and is reinforced by it (2011, 163).

[14] About relational autonomy and conceptions of personal autonomy, see Alvarez Medina and De Miguel Márquez (2025, forthcoming).

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All these aspects - body, affections, emotions, imagination, dialogue - are rescued and incorporated into the notion of relational autonomy, which proposes a capacity far closer to human abilities and cut off from the illusion of full autonomy - which is much more devoted to cognitive and volitive aspects of the isolated person. Also related to these physical and body aspects of the relational approach, ecofeminists have warned about the dangers carried out by the Enlightenment fiat on rationality alone and the contempt towards the body and the carnal (Mies y Shiva, 1998, 99). Furthermore, such a contempt goes hand in hand with the disassociation of humanity from nature as a whole, and the supremacy of the human being over the rest of natural life (Mies y Shiva, 1998, 157).

The changes proposed for the concept of autonomy impact also on the legal design of individual rights. According to Nedelsky, individual rights should be thought as an expression of the relational function they serve, and their contribution to recognition, depiction and establishment of personal relations (2011, 236-238). She proposes a conception of constitutional rights as core axes for the building of personal relationships (2011, 249),[15] and the deployment of civil, contract, commercial, labour, administrative law and all the legal regulations as part of the constitutional system of relational rights.[16] The relational perspective proposes a turning point for the constitutional basis of the legal system as a whole. Autonomy and vulnerability combine themselves into the relational conception of autonomy which takes into

[15] In the field of constitutional reflection, Aileen Kavanagh's (2024) proposal regarding what she calls collaborative constitutionalism, resorts to notions such as "constitutional relations", "constitutional government as a relational phenomenon" or "relational interaction between a multiplicity of actors". The author's purpose aims to move from an approach of confrontation to another that looks at relationships – "from rivals to relationships" -, and seems to announce a paradigm shift in the profound conception of legal dynamics, particularly constitutional ones (2024, 7-8). Although Kavanagh does not refer to Nedelsky's work, her proposal could be strongly enriched by Nedelsky's relational theory of law.

[16] Although the liberal theory on constitutional rights has posed the emphasis on a static vision of rights as trumps - on the celebrated formula proposed by Ronald Dworkin -, some legal theoretical areas, like the one contained in the literature on conflicts of rights, extensively recognises that rights have a strongly relational aspect. Conflicts uncovered the extreme consequences of the relational dimension, as they point out those situations in which the individual alone cannot be ultimately protected by the law, unless interdependency allows for better scenarios of entrenchment and adjustment.

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account the three dimensions of vulnerability exposed above, i.e., universal and particular - both concerning body and psyche -, as well as the position people occupy in the historical-socio-cultural structure as members of a disadvantaged group.[17]

Women often find themselves in a situation of vulnerability when patriarchal society, its gender structure, positions them in sexual, reproductive or other relationships in which their situation is potentially and comparatively less equipped to make decisions and carry out their choices. These are situations of vulnerability that occur, for example, when a woman is in a relationship with regular abuse, or in a sexual relationship with notorious power asymmetries - which may be reinforced, for example, by bodily superiority, physical strength, age difference, economic inequality, or others -, or in a reproductive process that exposes her to making decisions that compromise her body or the creation of bonds of motherhood and future care. These situations and processes take place within the framework of strong social and cultural pressures, mediated by prescriptive readings; such obligatory commands deal with gender stereotypes and roles, sometimes blocking access to relevant options, as in the case of women seeking for an abortion in contexts where it is not a legal and socially supported option, or is not accompanied by social and health support. In all these situations, women are in a vulnerable position.

To summarise, being able to recognize or identify vulnerability requires, in most cases, a contextual and relational reading, capable of linking the person with their environment, their sphere of interaction - sometimes their ecosystem -, their options. Vulnerability is then presented as an aspect of moral agency that complements the capacity for autonomy and qualifies it, modulates it, places it in relation to the emotional, interactional and social framework of the person. Autonomy is thus better shaped, more broadly, and

[17] A case in point is that of migrants, whose specific situation of vulnerability has been extensively developed by de case law of the European Court of Human Rights. For a classification of the different areas covered by the Court under group vulnerability label, see Timmer (2013, 151-161); La Barbera (2019, 241-244).

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reveals it does not pivot only on cognitive factors, rationality, calculation and weighing of preferences. Autonomy appears now in its contextual and relational dimension, and independence gives way to interaction, attention, dependence and care.

4. Conclusions. The Transformation of the Constitutional Axiological Pattern

In this article I have proposed a new reading of the constitution from the relational perspective, a new constitutional reading of the whole legal system. This reading implies a fundamental constitutional change, which should be oriented to overcoming the traditional liberal structure of rights as shields, intended mainly to protect individuality. As Nedelsky (2011; 2012) has proposed, such a structure results from the denial of important aspects of the relational and emotional dimensions of the self. Carrying out the relational approach and recognizing the complexity of agency beyond cognitive abilities requires thinking about people's interests as part of a network that connects various aspects of their lives. The relational conception is the opposite to the idea of public and private as separate spheres, the opposite to the conception of social, political or labour developments as something distant, separated from personal, emotional or family developments. The legal design of constitutional rights is unclear and insufficient as it responds to one-dimension protections only, instead of highlighting the complexity and connections between rights. Along with the relational approach and the review of autonomy in the light of vulnerability, the challenge of a new constitutional reflection on the values of relational autonomy, vulnerability and caring has been proposed here. The task is not minor, it should permeate the system in all its corners and take significant steps through regulatory changes. Some theoretical developments have been exposed here.

How to carry out a reflection of this depth is a question for the constitutional practice. The success of this task cannot be achieved without

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https://doi.org/10.6092/issn.2724-6299/20473

women and men sitting together to undertake the reflection. Nancy Fraser, by pointing to the bases of social construction, points out in her work ambitious goals, such as generating responsibility for care in men, a "utopian aspiration," she says, of […] "converting the current life model of women in the norm for everyone" (1994:611), which entails, in turn, disrupting the gender structure not only in the different social orders but also in its idiosyncrasy, and dealing with opportunism or evasion of responsibilities (1994:613). The task for feminist and ecofeminist constitutionalism is to think about the constitution and its objectives of equality and justice with renewed principles, fruit, in turn, of renewed ethical categories. I have stated here that transformative change involves incorporating values still absent in the constitution, fundamentally, the recognition of the relational approach and human vulnerability, added to the value of caring as part of a just social and political structure. For this, an audience will also be needed that is capable of recognizing women's constituent power. Ruth Houghton and Aoife O' Donoghue refer to the fundamental place that hearing plays in ensuring that women's opportunity to navigate new constitutional paths is contemplated and valued (2023:413-416). As the authors state in their excellent study on the manifestos, the allusion to "we" wants to awaken the audience and distance it from the context that subordinates or oppresses it (2023:419).

Feminist legal theory has been insistent in its criticism of the strongly patriarchal categories of liberal constitutionalism based on the public-private distinction, the fully autonomous universal subject and the neutrality of citizenship, as well as in its criticism of the supremacy of freedom understood as a decontextualized and formal value. These axes of criticism are precisely those that underpin the persistent feminist constitutional discomfort. The graft that united feminism to liberal constitutionalism hasn't been successful; the graft hasn't prospered because a new constitutional body hasn't emerged yet. To grow a new feminist constitution, more is needed; more than incorporating women as subjects of rights, more than recognizing the special rights of

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women. It is necessary to update the conceptual and axiological framework of the constitution.

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