

## Gender and Constitutional Design: Democracy and the Challenge of Multiculturalism

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### Introduction: Gender and Constitutions

Constitutionalism is sweeping the world. Since 1990, at least 110 countries around the globe have been involved in writing new constitutions or major revisions of old ones.<sup>1</sup> In many of these countries, issues of gender equality have been a central concern in the constitutional process. Women have been active participants in these constitutional projects and they have worked for the inclusion of a broad range of constitutional provisions and mechanisms to promote gender equality.<sup>2</sup> One might expect that this phenomenon of world-wide constitution drafting would have generated a rich literature concerning gender equality issues in comparative constitutional law, but in fact it has not. As the editors of one of the very few books on the subject put it, “there is a huge gap – a gender gap – in contemporary comparative constitutional analysis.”<sup>3</sup>

The lack of attention to these issues became painfully clear to me in 2003, when I began to work with women’s groups from Burma and Liberia on constitutional reform addressing gender equality issues. For the past several years, I have been working with constitutional drafting teams in the Burmese democracy movement to write state and federal constitutions that will, hopefully one day soon, help to provide the legal frameworks for a free and democratic Burma. As part of this work, I have acted as an advisor to the Women’s League of Burma (WLB) -- an umbrella group for many of the women’s groups in the democracy movement – helping them to draft constitutional provisions, write position papers, and design advocacy campaigns in support of these provisions. The WLB and other groups like it around the world are participating in law reform and constitutional drafting projects. In this process they need assistance on specific issues: information about the range of possible constitutional mechanisms for promoting gender equality; data on the effectiveness of different mechanisms in different countries; and guidance about drafting legal language to implement these mechanisms. But in my efforts to research these issues, I ran into one dead-end after another.

The subject seems to have fallen into a gap between the two fields of comparative constitutional law and gender equality law. Three recent works begin the process of bridging this gap. Beverly Baines and Ruth Rubio-Marin’s book, *The Gender of Constitutional Jurisprudence*,<sup>4</sup> was the first book-length treatment of issues of gender in comparative constitutional law. The second book, by Helen Irving, is *Gender and the Constitution: Equity and*

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<sup>1</sup> See <http://confinder.richmond.edu/index.php>

<sup>2</sup> See *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* (Alexandra Dobrowolsky & Vivien Hart, eds.) (Palgrave 2003).

<sup>3</sup> Beverley Baines & Ruth Rubio-Marin, *Introduction: Toward a Feminist Constitutional Agenda in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 1, 2 (Beverly Baines & Ruth Rubio-Marin, eds.) (Cambridge University Press 2005).

<sup>4</sup> See *supra* n. 3.

*Agency in Comparative Constitutional Design*,<sup>5</sup> which added a design-based approach to the subject. The most recent book is *Constituting Equality: Comparative Constitutional Law and Gender Equality*,<sup>6</sup> which I edited. This book continues the design orientation and adds an interdisciplinary and global perspective.<sup>7</sup>

The range of constitutional issues with an impact on gender equality is much broader than might at first appear. The constitutional guarantee of equality rights, and rights provisions generally, are, of course, of great importance from the perspective of gender equality. But many other aspects of the constitution can also have important effects promoting or retarding the progress to greater equality for women. Structural issues – such as federalism v. unitary systems, presidential v. parliamentary systems, and the choice of an electoral system – have been the mainstay of the comparative constitutional literature. These structural aspects are generally seen as responses to issues of cultural/religious/ethnic division within a society or as mechanisms for regulating political life, but they can have profound, and often ignored, implications for gender equality. For example, the choice of a proportional representation (PR) electoral system as opposed to a first-past-the-post (FPP) system has a large impact on the level of women’s political representation. Women do much better in PR than in FPP systems.<sup>8</sup> The inclusion of a constitutional mandate for a PR electoral system is, therefore, an extremely useful mechanism for promoting women’s equality.

### **Multiculturalism and Feminism**<sup>9</sup>

In this paper, I want to briefly suggest the usefulness of a gender equality focus and a feminist perspective in dealing with one such issue of constitutional design: multicultural accommodations of minority ethnic or religious groups within a pluralist, democratic state. When one begins from the perspectives of women and a concern for gender equality, the problem raised is that accommodation of the minority culture by the larger society sometimes results in serious harm to vulnerable groups within the minority culture. This problem is well-recognized in the literature on multiculturalism and is often referred to as an issue of “internal minorities”<sup>10</sup> or as the “paradox of multiculturalism.”<sup>11</sup> In many controversies in liberal democracies over issues of accommodation, the vulnerable group that is hurt is often women.

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<sup>5</sup> HELEN IRVING, *GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN* (Cambridge University Press 2008)

<sup>6</sup> *CONSTITUTING EQUALITY: COMPARATIVE CONSTITUTIONAL LAW AND GENDER EQUALITY* (Susan H. Williams, ed.) (Cambridge University Press 2009).

<sup>7</sup> The first two pages of this paper are taken from my introduction to that book. See *Introduction: Comparative Constitutional Law, Gender Equality, and Constitutional Design* in *CONSTITUTING EQUALITY*, *supra* n. 6 at 1.

<sup>8</sup> See Drude Dahlerup & Lenita Freidenvall, *Gender Quotas in Politics – A Constitutional Challenge*, in *CONSTITUTING EQUALITY*, *supra* n. 6.

<sup>9</sup> The remainder of this paper is taken from a longer work considering this issue in more detail. See Susan H. Williams, *Democratic Theory, Feminist Theory, and Constitutionalism: Models of Equality and the Challenge of Multiculturalism* (unpublished manuscript on file with author.)

<sup>10</sup> See Leslie Green, *Internal Minorities and Their Rights* at 257 in *THE RIGHTS OF MINORITY CULTURES* (Will Kymlick, ed.) (Oxford University Press 1995); see generally *MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS, AND DIVERSITY* (Avigail Eisenberg & Jeff Spinner-Halevy, ed.) (Cambridge University Press 2005).

There is, however, an important part of this problem that has received insufficient attention. In order to highlight this aspect of the problem, I will draw on a constructivist conception of culture and a dialogic model of democracy, both of which have been adopted by a number of feminist theorists as the frameworks for addressing these issues. But I will suggest that there is an aspect of the democratic model that has been largely overlooked and that is central to an adequate response to the problem of vulnerable internal minorities. The missing element concerns the need to build in mechanisms for challenge and disruption within the democratic dialogue in order to avoid the reinscription of hierarchy. When the dialogic model, with this element of disruption, is applied to the deliberations *within* the minority community – and not just to discussions between minority and majority, as is usually the focus – then additional possibilities appear for dealing with the problem of vulnerable internal minorities. In particular, it is possible for the liberal state to link accommodation of minority cultures to the willingness of the minority community to allow for internal challenge and change.

### **The Problem of Internal Minorities**

This issue arises in a number of different forms and in a range of different contexts. The literature tends to focus on the particular context of states committed to a liberal, democratic form of government in which a number of different communities are seeking just conditions for co-existence. My comments will also be addressed to that context. The types of communities making accommodation claims within such states vary, of course, and that heterogeneity complicates the analysis. Moreover, the kind of accommodation requested by minority communities also covers a wide range, from claims for exemptions from laws that burden cultural practices to demands for group representation within government and many others.<sup>12</sup>

The literature has tended to resolve the problem of vulnerable internal minorities by going to one extreme or the other: some theorists would allow a minority group to restrict or discriminate against its own members with very few limits beyond a guarantee that those members have freedom to exit,<sup>13</sup> while other theorists would refuse to allow any discrimination or restriction that violates the liberal rules applicable within the majority culture.<sup>14</sup> Both of these responses are extremely problematic. The problem with relying upon exit as a basis for allowing mistreatment of internal minorities is twofold. First, in order to function as a justification here, exit cannot simply be a theoretical possibility; it must be a practical possibility. But economic, social and emotional realities often make exit a less than meaningful option for vulnerable people.<sup>15</sup> And, second, even if exit is truly possible, this approach forces a woman faced with such cultural practices to choose between her rights as a citizen and her

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<sup>11</sup> See AYELET SCHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 3 (Cambridge University Press 2001).

<sup>12</sup> For a useful list of the range of accommodation claims, see JACOB LEVY, *THE MULTICULTURALISM OF FEAR* 127 (Oxford University Press 2000)

<sup>13</sup> See Chandra Kukathas, *Are There any Cultural Rights?* In *THE RIGHTS OF MINORITY CULTURES*, *supra* n. 10 at 238, 247-48.

<sup>14</sup> See SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (Princeton University Press 1999)

<sup>15</sup> See SARAH SONG, *JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM* 161-62 (Cambridge University Press 2007); see generally Oonagh Reitman, *On Exit in MINORITIES WITHIN MINORITIES*, *supra* n. at 192-204.

culture.<sup>16</sup> The alternative approach, by insisting that no minority community can be accommodated in any practice that violates the liberal norms of the majority, leaves little room for the diversity that multiculturalism was intended to protect. In other words, this approach is really only possible for those who do not regard the inclusion of minority cultures as an important priority of justice.

### **Feminist Responses: Constructivism, Dialogic Democracy, and Multiculturalism**

A number of feminists have turned to a more complex understanding of culture and to dialogic models of democracy to provide a method for protecting vulnerable internal minorities while respecting the minority communities to which they belong. Rejecting a “billiard ball” model of culture, these theorists have insisted on a constructivist approach instead.<sup>17</sup> In this approach, “cultures are internally contested, negotiated and reimaged by members, who are sometimes motivated by their interactions with outsiders.”<sup>18</sup> Recognizing the internally contested nature of cultures suggests the need for sensitivity to the power dynamics within a culture and the ways in which the minority group’s interaction with the majority affects the status, power, and resources of subgroups within the minority community. As many theorists have recognized, certain forms of accommodation – such as group representation and the incorporation of traditional norms into the state legal system – can have a systematic effect of supporting traditional authority figures in the community, and their views of the culture, at the expense of the power and perspectives of more marginalized groups, often including women.<sup>19</sup> There is no neutral position for the state here: action and inaction both have consequences for the distribution of power and status inside the minority community.

Many of the feminist theorists struggling with the issues of vulnerable internal minorities also embrace a dialogic model of democracy as a useful tool. Anne Phillips, Seyla Benhabib, Iris Marion Young, Monique Deveaux, Sarah Song, and Judith Squires all support various forms of dialogic democracy as offering a mechanism for the majority and minority cultures to reach acceptable accommodations.<sup>20</sup> I agree that a dialogic model of democracy is a good starting place for thinking about issues of multiculturalism in liberal, democratic societies. The focus on equal respect and inclusion provides a foundation for both the accommodation claims made by minority communities and the possible grounds for limiting those claims. And I agree that a democratic dialogue between the many groups in a pluralist society is an important part of the process for resolving the difficult cases. The particular observation I want to offer here is that a dialogic, democratic approach to the problem of vulnerable internal minorities requires additional attention to the dynamics within the minority community, and

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<sup>16</sup> See SCHACHAR, *supra* n. 11.

<sup>17</sup> See Iris Marion Young, *Together in Difference: Transforming the Logic of Group Political Conflict in THE RIGHTS OF MINORITY CULTURES*, *supra* n. 10 at 157-161.

<sup>18</sup> SONG, *supra* n. 13 at 32.

<sup>19</sup> See Anne Phillips, *Multiculturalism Without Culture* 163, 169 (Princeton University Press 2007).

<sup>20</sup> See PHILLIPS, *supra* n. 17; SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 105-46 (Princeton University Press 2002); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (Oxford University Press 2000); MONIQUE DEVEAUX, *CULTURAL PLURALISM AND DILEMMAS OF JUSTICE* (Cornell University Press 2000); SONG, *supra* n.; Judith Squires, *Culture, Equality, and Diversity in MULTICULTURALISM RECONSIDERED* 120 (Paul Kelly, ed.) (Polity Press 2005).

not only to the dialogue between the community and the larger society. While all of the theorists I have mentioned recognize this issue, none of them has focused on it. Their focus is on the nature of the dialogue within the larger society.<sup>21</sup> The missing element, then, is some sustained attention to the nature of the dialogue within the minority community, the need for openness to challenge and change in that dialogue, and the role that might be played by accommodations in supporting and encouraging this sort of conversation.

### **The Need for Challenge: Democratic Theory and Models of Equality**

In this section, I will argue that the dialogic model of democracy requires attention to the role of disruption and challenge in preventing the reintroduction of domination. Such challenge is crucial and cannot simply be assumed – incentives and support for it must be built into the democratic structure. The conclusion I will draw is that one important aim of accommodation in multicultural societies should be to provide support for such challenge by vulnerable internal minorities within the community's dialogue.<sup>22</sup>

In a dialogic model of democracy, the purpose of democratic politics is to form a political community in which people can seek a way forward together.<sup>23</sup> Participants engage in a collective process of deliberation to seek this path. Their role is to bring their particular perspectives and expertise to this deliberation and to listen carefully to the contributions of the other deliberators so as to reach agreement on the best path forward. A number of feminist theorists, including Bonnie Honing, Jane Mansbridge, and Nancy Fraser, have recognized the dangers of a dialogic or deliberative model of democracy that does not reckon seriously enough with the ineradicability of power.<sup>24</sup> Difference is inevitable and there is a constant pressure for people with power to use that difference to generate or reinforce hierarchy. The risk of a

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<sup>21</sup> Monique Deveaux has given the most attention to this issue in her essay, *A deliberative approach to conflicts of culture in MINORITIES WITHIN MINORITIES*, *supra* n. at 340. In this chapter, she offers a clearer statement of her conviction that democratic processes must apply within the cultural minority community and not just between that community and the larger society. *Id.* at 343. She also offers some guidelines for the dialogue that are useful for internal as well as external purposes. *Id.* at 350-51 (non-domination, political equality, and revisability.) Nonetheless, the example she uses to illustrate the process is still an external conversation, rather than the ongoing, internal process of cultural construction, interpretation, and implementation. *Id.* at 356-61. In addition, she does not consider the accommodation itself as a mechanism for encouraging internal dialogue. This essay is intended to add those missing elements.

<sup>22</sup> The argument in the next three paragraphs is taken from Susan H. Williams, *Equality, Representation, and Challenge to Hierarchy: Justifying Electoral Quotas for Women in CONSTITUTING EQUALITY*, *supra* n. 6. In that chapter, I use the element of challenge to supplement the substantive model of equality and explain how this modified equality argument answers the most difficult objections to electoral gender quotas.

<sup>23</sup> In some versions, the goal of this deliberation is to seek the common good of the community. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 8 (1988). In other versions, the dialogic process itself is the goal, understood as “free and reasoned deliberation among individuals considered as moral and political equals.” Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 67, 68 (Seyla Benhabib, ed.) (Princeton University Press 1996). I intend my description of the category to cover both versions.

<sup>24</sup> See Bonnie Honing, *Difference, Dilemmas, and the Politics of Home in DEMOCRACY AND DIFFERENCE*, *supra* n. 20 at 257-77; Jane Mansbridge, *Using Power/Fighting Power: The Polity in DEMOCRACY AND DIFFERENCE*, *supra* n. 20 at 46-66; Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy in HABERMAS AND THE PUBLIC SPHERE* 123 (Craig Calhoun ed.) (MIT Press 1993).

deliberative model is that we will too quickly assume that our deliberative processes are free of coercion (when they are not) or that our dialogue has resulted in a good that is common (when it is not.) Our model of democracy must include strong and explicit attention to the processes through which our ideals fail or are subverted.

Think about an analogy to efforts to cure a particular endemic disease. The primary concern, of course, is to initiate the public health reforms needed to eliminate the disease, perhaps cleaning up water supplies or providing inoculations. But it is also essential to ensure that you have good mechanisms for detecting the reemergence of the disease. And it is necessary to be vigilant about the possibility that your public health efforts may themselves be generating problems, such as antibiotic resistance or damaging side effects. Moreover, these two projects may not necessarily overlap: the programs necessary to eliminate the disease may not by themselves provide you with adequate warning about the risks of reemergence or side effects. I want to suggest that dialogic democracy is like the goal in a disease eradication plan. It is a picture of the type of society we hope to create and a model of the legal and political institutions that might help to get us there. I am arguing that we need to add to this model a strong element analogous to the watchdog function in the disease detection program: a part of the model devoted to recognizing and calling attention to the reemergence of coercion or oppression.

The focus here is on the act of recognizing and resisting evil rather than on constructing something good, because evil will inevitably reemerge. Even our best plans for achieving democracy will fail in at least three ways. First, the means we choose will never be perfectly effective, leading to failures of implementation. Second, our understanding of our ideals will always be incomplete and imperfect, leading to failures of conception. And third, people with power will always try to cripple the reforms intended to challenge their power, or even to pervert the reforms into a mechanism for reinforcing their power. The insidiousness of power is such that we can never guarantee that our reform efforts will not become the vehicles for the very inequality and oppression they were designed to combat.

### **Challenge and the Problem of Vulnerable Internal Minorities**

The basic claim I wish to make is that deference and accommodation by the majority culture to the practices of a minority group is more warranted as the group demonstrates more willingness to carry on an internal dialogue in which such challenge is possible. And, it follows that constitutional provisions providing for the possibility of such accommodation should be designed and interpreted in ways that support this goal. Taking this approach is not the same as asking whether the cultural practices that are at issue in a particular accommodation claim are consistent with liberal individual rights. Here we are focused not on the particular practices at issue in the accommodation, but on the methods through which such practices are created, interpreted, and implemented. If those methods, and the background conditions under which they operate, allow for meaningful challenge, then the larger society should offer a greater degree of accommodation to the community's practices, even if those practices include some illiberal features.

I suggest that the larger society should approach issues of accommodation by thinking about three different mechanisms for encouraging and supporting internal challenge. First the larger society can increase the capacity for challenge by internal minorities by giving them recognition and social capital. Second, the larger society can increase the capacity of internal minorities by redistributing practical resources, such as economic power and education, to them. And third, the larger society can increase the opportunity for internal minorities to challenge hierarchy within their own communities by making accommodation conditional on the adoption of internal dialogic practices that provide opportunities for such challenge. In all three of these projects, the larger society must take care to recruit the support of traditional leaders as much as possible so as to avoid a backlash against internal minorities who are seen as collaborators with the larger society. In the larger paper of which this argument is a part, I offer concrete examples of such mechanisms and apply this approach to the issue of customary law in Liberia, a country in which I have acted as a constitutional advisor.

### **Conclusion**

For the purposes of this short paper, however, I simply wish to use this argument to illustrate the usefulness of paying attention to gender and to feminist theory in thinking about constitutional design. The attention to gender issues foregrounds aspects of a situation that might otherwise be overlooked (such as the problem of vulnerable internal minorities) and the attention to feminist theory provides alternatives to traditional approaches that open new possibilities (such as a focus on internal challenge as the basis for a new approach to accommodation.) Constitutions at all levels – from the details of particular provisions to the theoretical foundations of the document – can benefit from an analysis that asks about gender equality.