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GABEL ON REIFICATION IN LEGAL REASONING: MEETING THE FEMINIST DEMAND ON LEGAL REASONING

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Abstract: This paper adopted the textual analytical method to analyze Peter Gabel's notion of reification in law, showing how it helps in meeting feminist demand on legal reasoning. It explained that feminists expect legal reasoning to give effect to women's unique experiences which they argue are not captured in enacted legal rules owing to the patriarchal nature of law itself. Feminists' expect that legal reasoning, through practical reasoning (Katherine Bartlett), accommodates extralegal factors identified as public policy (Clare Dalton), which rejuvenate laid-down rules for justifying women's perspectives. Gabel charted an easy way for this feminist demand by identifying as political reasoning, Delton's public policy which merges with legal reasoning amounting to 'politico-legal reasoning'. His insistence that politico-legal reasoning is meaningless because both legal and political reasoning involve abstractions enabled him recognize Bartlett's practical reasoning and account for how it operates. Gabel argued politico-legal reasoning only makes meaning when abstractions correspond with the concrete social and economic world. The correspondence enables appreciation of changes in unique experiences of women occasioned by social, economic and political changes constantly witnessed in the society and also helps in periodical estimation of the extent legal reasoning gives effect to women's perspectives.

Key Words: Demand, Feminist, Implications, Legal Reasoning, Reification

Introduction

This paper is to adopt the textual analytical method in establishing how Peter Gabel's position on what he called, 'reification' in legal reasoning, can help in meeting the feminist demand on legal reasoning. Feminists argue that since the law is already structured in line with the patriarchal nature of the society, it is only through its dynamic aspect which in essence is legal reasoning, that it could give effect to issues not contemplated in the framing of laid-down rules. They go as far as arguing that in fact the peculiarities of women's experiences are difficult to be imbued in enacted legal rules such that they even fall outside what could be contemplated by the legislature. Hence, the demand on legal reasoning to fill the lacuna created by the legal rules not eliciting what they argue are the unique experiences of women.

Gabel, a Critical Legal Studies theorist presents arguments similar to those of the feminists concerning law and legal reasoning. However, in his own views could be seen a clearer articulation of the feminist demand on legal reasoning. This paper therefore proposes to articulate from his position, ways of meeting the feminist demand on legal reasoning. It is divided into four sections. Section one is the ongoing introductory part. In section two, Gabel's idea of reification in legal reasoning will be analyzed. Section three ex-rays the feminist demand on legal reasoning while section four articulates how the feminist demand could be met by relying on Gabel's position. What follows is the conclusion.

Gabel on Reification in Law: Meeting the Feminist Demand on Legal Reasoning

In offering a critique of high technicality in legal reasoning, Peter Gabel in his work entitled, "Research in Law and Sociology", observes that when a judge engages in legal reasoning he is thinking but his thinking is within a context because he is performing

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the judicial function. The judicial function, as Gabel makes us understand, manifests in the judges' act of deriving concepts from his apprehension of the social field. He points out that in such derivation the judge has the intention to adjudicate a dispute in such a way that the system will be restored to a normal and legitimated equilibration in the realm of thought, (Gabel, 1980). The judge according to Gabel unconsciously apprehends the events leading up to the dispute as a disequilibrated fact-situation. He maintains that in order to conceptualize the fact-situation legally, that is, with legal consciousness, the judge has to abstract concepts from the normal movement of facts. The abstracted concepts, as he says, are concretized by the judge after which, he would re-describe the facts with the aid of the abstractions. According to him, this is simply what the lawyer does in applying the law to the facts. Analyzing how judges abstract concepts, Gabel notes that people involved in a dispute are referred to as parties in dispute. The term 'party' says Gabel, stands for abstract universal that signifies that the social field comprises of legal parts that are identical to one another. He goes on to argue that this abstraction belies the actual nature and interaction of the individuals who are now referred to as parties. Thus he states:

> This process of reifying the rule turns the world as it is on its head, because it signifies that a norm of inter-subjective action is "caused "by an ideological appearance that has been drawn from it. The process of deducing outcome from the rule then becomes the process of signifying the causality of the law, of signifying that the social order is the consequence of a legal order that is imminent to it, (40).

Gabel means by reification the act of judges abstracting concepts and using such concepts in forming universal rules.

Gabel further notes that no matter the effectiveness of legal reification, the law itself must appear to spring from normative assumptions about, who the individuals it now designates as parties, are, real people. Such normative assumptions, he says, have to be located by making reference to human nature. He goes on to state that the concept of human nature is the outcome of political reasoning which also involves abstraction and reification. However he maintains that though legal reasoning and political reasoning involved reifying, political reasoning backs up legal reasoning. The backup Gabel notes owes to the fact that political reasoning articulates the relationship between a party as functioning-unit and a party as human being. Such articulation according to him, makes the duty corresponding to the party's function seem to be ultimately derived from the intentions of the party (43). Thus a party could then be said to have entered a contract of his or her own free will. Gabel argues that with the backing up of political reasoning, legal reasoning being the application of the law in resolving dispute reminds us that the system itself is the embodiment of our collective nature. However, he maintains that the nature of legal reasoning, what he refers to as politico-legal reasoning, cannot yield the desired result so long as it is based only on reified abstractions. His position is that before such reasoning can make sense, there must be a relative correspondence between the reified abstractions and the concrete socio-economic world from which they are abstracted.

We can illustrate Gabel's arguments above using contract law. Contract law is an aspect of private law that guides people in the various agreements they make in everyday life situations. Yet a whole lot of agreements that touch on the sinuses of our being are not enforceable through contract law. In the case of Balfour v. Balfour (1991)2 KB 571, for instance, the promise made by a husband to his wife during the intimate act of conjugal sex, was declared unenforceable by contract law. Let us also look at other forms of agreement like those between boyfriend/girlfriend; sugar-daddy/lover; sugar-mummy/lover; and non-statutory marriages. Any

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matter arising from these forms of arrangement subjected to the contract law of marriage which does not capture them. Unless judicial discretion is resorted to by the courts, one could not expect justice to be done such matters using the Marriage Act. In adjudicating on matters arising from such agreements, facts that may be considered through judicial discretion include:

(a) that the level of unemployment in the society today makes it difficult for some partners or lovers to formally establish their relationships through contract of marriage;

(b) that the level of poverty in the society today makes it necessary that some young men and women survive through sugar-mummy and sugar-daddy relationships; and,

(c) that in some societies like in African countries, non-statutory marriages are valued more than statutory marriages.

A consideration of these factors can enable the courts, while acknowledging that the relationship involved is not covered by law, not to deny *in toto*, the rights due a statutorily married couple, to the parties involved. Reference to these factors would depict relative correspondence between Marriage Act and the concrete socio-economic world from which the rules of the act are abstracted as Gabel notes.

Feminist Demand on Legal Reasoning

Feminists' objections to legal reasoning are best captured in the works of the feminists analyzed in this section. The feminist, Clare Dalton in her work, "An Essay in the Deconstruction of Contract Doctrines", challenges the claim that actual contractual relationships could be captured in the framing of contract law. She expresses dissatisfaction over what she calls 'doctrinal arguments' towards legal reasoning. Dalton comments, "By offering us the false hope of definitive resolution, they allow us to escape the pain, and promise of construal reassessment and accommodation", (Dalton 1985:1095). She seems to be expressing the same dismay expressed by Gabel, concerning reification in legal reasoning. She approaches the issue of doctrinal argument from the point of view of reasoning in contract law. Her focus is on cases involving the agreements of non-marital habitants. According to her, decisions on such cases make reference to the distinctions between private and public realms and between contracts implied-in-fact and contracts implied-in-law. She notes that in deciding on cases of cohabitations, judges find it difficult to bring contract doctrine as it is established by law to bear on the agreement. This she says is because the agreement of the partners in a cohabitation case cannot adequately be located either within the private realm or the public realm. Again she observes that the distinction between contracts implied -in-fact and contracts implied-in-law, is not of adequate help to the judge in deciding cases of cohabitation. This happens according to her because such distinction makes reference to the notion of intent and that judges usually conclude that the agreement in cohabitation does not manifest that the partners intended to use the court in settling issues arising from the relationship. Thus she states:

> The argument here is essentially that even if such agreement use language of promise, or commitment or reciprocal obligation, that language must be understood, in the intimate context in which it is employed, as not involving any understanding that the party might use a court to enforce a duty forsaken, or a promise broken, (1099).

Dalton's intention is that this agreement of the judges, which is in line with contract doctrine makes legal reasoning in terms of the law of contract wanting. According to her, the loophole exists because judges undermine the role of power in contract formation. She points out that the question of power, that is to say in a situation in which any of the parties is coerced into agreeing to enter the contract in intimate relationship like cohabitation, is very difficult to answer. According to Dalton, we cannot overlook the fact that even in intimate relationship such as

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cohabitation and marriages, issues of unequal bargaining power do arise. She maintains that considerations of power and fairness are more likely to receive explicit attention when a judge frankly invokes public policy instead of relying exclusively on contract doctrine. Thus she avers, "But only when judges move outside the framework of traditional contract doctrine will they be in a position to grapple with the full range of problems posed by those disputes", (1110). She sees traditional contract doctrine as a product of what Gabel refers to as reification. Hence she argues that reliance on such abstract construct overshadows reality and therefore cannot be a way of deciding on cases of intimate relationship of which cohabitation is a type. Even though Dalton argues from a purely feminist perspective, her argument, like those of others, point to the fact that in legal reasoning over-reliance on established general rules may only end up increasing a false picture of the actual world. Her words echo this fact as she claims:

> My story requires that we develop new understanding of our word makers as we create them and are in turn created by them. This kind of inquiry, exemplified for me by feminist theory, can help us see that the world we live in is certainly not the only possible world for us to live in. And in coming to that realization, we increase our efforts of building our world anew, (1114).

It should be noted from this Dalton's statement that women's potentials should not be limited by male-constructed categories. Feminist scholarship in law tends to be fuelled by an idea that things ought not to be as they currently are and that feminist's theoretical engagement can play a role in envisioning how they might be.

Katherine T. Bartlett, in her article, "Feminists Legal Methods", advocates for a consideration of feminist thinking about law in legal reasoning. She projects what she calls 'feminist practical reasoning', as a form of legal reasoning that can ratify masculine nature of legal reasoning. Defining the method, she states:

Feminist practical reasoning differs from other forms of legal reasoning, however in the strength of its commitment to the notion that there is not one, but many overlapping communities to which one might look for "reason", (Barttlet 1990:850).

Thus she sees feminist practical reasoning as being against the monolithic conception of community which has its root in Aristotle's view and which she sees as characterizing male accounts of practical reasoning. Bartlett in essence rejects the deductive model of legal reasoning. Her reason is that such model of reasoning uses the same legal construct in dealing with men and women, thereby neglecting the peculiarities of women. However, she points out that feminist practical reasoning like any other form of legal reasoning require the process of abstraction. She argues that feminist practical reasoning may make more facts relevant to the resolution of a legal case than would mere non-feminist analysis. Hence she avers, "Feminist rationality also strives to integrate emotive and intellectual elements and to open up the possibilities of new situations rather than limit them with prescribed categories of analysis", (851). Here, Bartlett is capitalizing on the feminist argument that women's attitude to situations is characterized with emotion while men's attitude is characterized by reference to the formal rules of logic. Consequently, she conceives feminist practical reasoning as that kind of reasoning that does not concedes the principles of formal logic. Bartlett finally notes that though feminist practical reasoning could apply to a wide range of legal problems, for example, problems of formalism and rule-scepticism, it has its clearest implications unrevealing insight about gender exclusion within existing legal rules and principles.

Joanne Conaghan in her article, "Truth, Justice and the Pursuit(s) of Feminism", argues for feminist thinking to be regarded as the best for legal reasoning. She highlights the normative prescriptive dimensions to legal reasoning. Conaghan points out that feminist

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theory precludes easy recourse to notions of objectivity or truth in legal reasoning. In her words, " Indeed a primary focus of feminist theory has been the problematization of objectivity both as a descriptive claim and as normative ideal...", (Conaghan 2000:377). Hence she maintains that the normative dimension of feminism should be based on the critique of legal arrangements by showing how law fails to live up to its own standards. In her view, the purpose of law is to maintain justice. She feels that the masculine nature of law, manifest in the fact that the legal terms judges act on, are constructed with the peculiarities of the male gender, is an obstacle to law achieving its purpose. Conaghan means by peculiarities of male gender, the predominant use of such terms as 'he', 'man', 'governor', in law to represent both the male and female genders.

The feminist legal theorist, Lucinda M. Finley, in her article, Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of legal Reasoning", advocates for the incorporation of feminist thinking in legal codes. She argues that legal reasoning is patriarchal. According to her, from the historical perspective, legal reasoning has been framed on the basis of life experiences typical to empowered white men. Her claim also has a normative component for she argues that in a sense, male-based perspectives, images and experience are often taken to be the norms in law. In her words:

> Privileged white men are the norm for equality law; they are the norm for assessing the reasonable person in tort law; the way men would react is the norm for self defence law; and the male worker is the prototype for labour law, (Finley 1989:887).

Consequently, she argues that addressing and comprehending of women by law, reflects mainly men's understanding of women and not women's own definitions. She cites examples of cases in which male's understanding of women is the only angle to legal decisions as the cases of pregnancy in relation to women's attitude to work, and cases of rape. In these cases, Finley argues that male judicial perspective prevails in the decision of cases. What she is saying could be illustrated with the case of rape in which a male's mere belief that a woman consented to sex exonerates him from rape. Here, one could see Finley's contention that the female perception which could find adequate articulation only in the feelings she has as a result of the act seems totally overlooked by the law. Finley argues that legal reasoning is based on abstraction and universalization from only one group experience and yet such abstraction and universalization are regarded as neutral. She however points out that the gender insensitive nature of law is enough to spur women to engage in legal theorizing and practices. Thus she avers:

> Since law inevitably will be one of the important discourses affecting the status of women, we must engage it. We must pursue trying to bring more women's experience, perspective, and voice into law in order to empower women and help legitimate these experiences, (889)

Observing that this task is difficult, she propose the gradual expansion of legal language through the equity side of law as a veritable means of making legal reasoning gender sensitive.

Another feminist, Nicola Lacey in her book, *Unspeakable Subject*, critiques conventional legal scholarship and labels as gender bias and also exposes the gender bias of legal reasoning. She argues that the masculinity of the central tenet of the rule of law doctrine, that law set up standards which are applied in a neutral manner to formally equal parties, (Lacey 1998:168-170). Her contention is that this tenet obscures those questions of inequality and power which may affect the capacity of those parties to engage effectively in legal reasoning. She proposes reconstruction of legal reasoning through the critiques of its process and its limitations. In her word, "What we need is not an abandonment of the legal and

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political project, but rather the development of more sophisticated understandings of legal practices their strengths as well as their evident and important limitations", (180). With this statement, Lacey urges those feminist who view law from the Marxists' cum anarchist position make a reorientation towards the feminist' project.

Ann c. Scales in her work, "The Emergence of Feminist Jurisprudence: An Essay", analyzes feminist jurisprudence and shows how it opposes abstractions in law. Her argument is that lawyers are trained to desire abstract, universal objective solutions to social ills in the form of legal rules or doctrines. She contends that it is impossible to see solutions to inequality through the lens of abstraction. Scale objects to the attitude of lawyer who the differences approach to determine cases involving male and female parties. According to her, this approach which makes reference to definitive list of differences in terms of gender puts women at a disadvantaged position in terms of legal reasoning. Hence, she argues:

> When we try to arrive at definitive list of difference, even in sophisticated ways, we only encourage the law's tendency to act upon a frozenslice of reality. In so doing, we participate in the underlying problem- the objectification of women… our aim must be to affirm differences as emergent and infinite. We must seek a legal system that works and at the same time, makes difference a cause for celebration, not classification, (Scales 1986:1373).

With this statement Scale advocates for a measure of pragmatism in legal reasoning. She equally describes as tyrannical, the claim to objectivity in legal reasoning, which hinges on the determination of relevant resemblances and difference among people or between different sexes.

Scale decries the inadequacy of what she terms 'incorporations view' in legal reasoning. This she says, involves the view that through abstractions in legal reasoning the law can settle all the competing considerations involving rules rights, relationships, and equity. She laments, "The injustice of sexism is not irrationality; it is domination. Law must focus on the later, and that focus cannot be achieved through a formal lens. Binding ourselves to rules would help us only if sexism were legal error", (1376). Therefore she advocates for a commitment to equality that requires the investigation of the genderization of the world. Her position is that males have different way of reasoning from that of females. According to her, male and female perceptions of value are not shared. She argues that while male reasoning and male perception of value is rights-based' female reasoning and female perception of value is care-based. Scales argue that these are totally different perspective that cannot be blended. She maintains that the female pattern of reasoning has been driven into oblivion because of male domination. Scale proposes a feminist method of adjudicative principles based on the relational model. Speaking about the model, she says, "The values of honesty and pragmatism require us to choose the relational model, because only it describes how we as language-users actually and responsibly perform according to truly meaningful criteria", (1380). The relational model of legal reasoning according to Scales, hinges on the view that law's duty is to enhance the rich direst of life.

Meeting the Feminist Demand on Legal Reasoning

Gabel's views on legal reasoning x- ray the position of various theorists like legal naturalists and feminist jurists, who argue that legal reasoning, cannot be free from political importations and considerations of the principles of natural justice. It is obvious from the position of the feminists analyzed above that feminists reject the fact of legal reasoning being mechanistic in the sense of judges making deductions from laid-down rules. Their view of the law as patriarchal in nature predisposes them to arguing that any reasoning anchored on laid-down rules is inadequate for the peculiar experiences of women. Such experiences,

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they argue, cannot be captured in the framing of judgment based on laid-down rules. It then means that only a measure like judicial legislation can enable legal reasoning give effect to the peculiar experiences of women.

The feminists quite agree with Gabel that abstraction or reification is inevitable in legal reasoning. They equally agree with him that legal reasoning needs to be reinvigorated for it to adequately matters that seek legal attention. The argument is that with abstraction, legal reasoning the limit of what could be adjudicated upon is already set. Thus, some issues are labeled non-justiciable. Feminists contend that unfortunately, most of the issues bordering on women's unique experiences, such as subjugation under male control, implied contract in sex-related relationships like male-female cohabitation, and the care inclined nature of women, will fall within the category of non-justiciability. The feminists articulated certain measures that can render legal reasoning amenable to the issues peculiar to women's experiences. Dalton advocates for consideration of public policy in legal reasoning, which, according to her, can effect to considerations of power and fairness. What she is saying is that abstraction in legal reasoning positions the male and female as possessing equal bargaining power in terms of being parties to a contract, such that each party is expected by law to carry out the specific performances required by contract law. Take for instance, the contract of marriage. One of the specific performances required is that the parties, now the husband and the wife, gratify each other through conjugal sex. Thus, denial of conjugal sex becomes a ground for dissolution of marriage. However, the abstract laid-down rules of the Marriage Act are framed such that factors like the male gender being a sole bread winner, being recognized by the society (either by religion or culture), are not contemplated in designating the husband and the wife as parties with equal status in terms of granting and receiving conjugal sex. Therefore, there is no way the judge, through reasoning from the abstract rules, can consider a situation whereby the husband, because of his economic position and the headship conferred on him by the society, which all elicit power over the wife, can demand for conjugal sex at the detriment of the wife's interests. Thus, even in some countries today, rape within marriage is something of a misnomer. Dalton thinks that the disparity in power status between the husband and the wife will only be given effect through legal reasoning if the judge stretches his reasoning to incorporate public policy. She uses public policy in its narrow sense of it being the principle that a person should not be allowed to do anything that would injure the public at large, (Garner, 2009). Dalton therefore, thinks that if a man, whose status in the marriage contract is already made more powerful than that of the woman, uses such power in any manner against the woman, he injures the society at large because he underrated the intimacy accorded the institution of marriage. That intimacy is difficult to comprehend in legal reasoning based solely on laid-down rules. Feminists also argue that such intimacy exists in the implied contract of cohabitation and that in such relationship, even the application of the abstracted legal rules become very difficult as the parties cannot effectively be categorized as husband and wife.

Lending credence to Dalton's solution to the feminists' identified problem of legal reasoning, Bartlett proposed feminist practical reasoning strives to integrate emotive and intellectual elements and to open up the possibilities of new situations rather than limit them with prescribed categories of analysis. Finley proposes the gradual expansion of legal language through the equity side of law as veritable means of making legal reasoning gender sensitive. The equity side of law embraces the idea of natural law and public policy. Lacey proposes reconstruction of legal reasoning through the critiques of its process and its limitations. Scales adumbrates what she terms the 'rational model', which, according to her ensures that law's duty of enhancing the rich desires of life is met.

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It is pertinent to note that all the measures articulated by the feminists considered above are captured in Gabel's position that no matter the effectiveness of legal reification, the law itself must appear to spring from normative assumptions about, who the individuals it designates as parties, are, real people. According to him, such normative assumptions have to be located by making reference to human nature which is the outcome of political reasoning. He means by 'political reasoning', the consideration of individuals as members of the society characterized with norms and values. It is in this sense Aristotle conceives man as a political animal, (Aristotle, 1979). His distinction between political reasoning and legal reasoning is quite interesting. Gabel admits that like legal reasoning, political reasoning also involves abstraction and reification. However, political reasoning aims at articulating human nature. It articulates the relationship between a party as functional unit and a party as human being. Legal reasoning in its own abstraction, articulates just a party as functional unit, a party as husband, wife, trader, civil servant, mother, father, child, adult, a legal person (cooperate personality). Articulating the relationship between a party as functional unit and a party as human being in plies that human nature is indispensible in accounting for the behavour or conduct of a party irrespective of the functional unit he or she operates in. Hence, Gabel's insistence that legal reasoning must be backed up by political reasoning to account for what he calls politico-legal reasoning.

In recent times, the idea of human nature has been articulated in the concept of human right. Thus, human right is described as inalienable rights ascribed to every human being just for the virtue of being human. It is however contested that this description fits in well with the liberal or abstract rights, (Akaruese, 2012:161). Gabel seems to have considered this argument for he also maintains that political reasoning backing up legal reasoning is not enough for achieving the goal of legal reasoning. In addition he maintains that politico-legal reasoning must ensure a relative correspondence between the reified abstractions and the concrete socio-economic world from which they are abstracted. In other words, Gabel advocates for a consideration not only of the liberal rights but also economic or concrete rights. A closer look at the feminists' demand on legal reasoning indicates that for them, reference to the status of the different genders with respect economic rights which they see as the major determinant of power relations, is key to dispensation of justice. Their solutions to their perceived problem of legal reasoning could not capture exactly, Gabel's proposal. Perhaps because, a times, feminists seem to be myopic to the fact that both genders find unification in human nature and that the socio-economic changes in society may affect male and female equally. In this present generation that distinction could hardly be made between males' and female's economic and political statatuses, Gabel's proposal becomes handy in giving effect not only to the feminists' demand on legal reasoning, to expectations of justice ascribed to law in general.

Conclusion

This paper in analyzing Gabel's notion of reification in law, maintains that he has an answer for the feminists demand on legal reasoning. Feminists expect legal reasoning to give effect to unique experiences which they argue are not captured in enacted legal rules owing to the patriarchal nature of law itself. It is also their position as the exposition of their views in this paper shows, that through legal reasoning, reference could be made to extralegal factors such as public policy, in order to adjudicate fairly on the issues of women's peculiar experiences. Their idea of public policy as expressed by Dalton, accords with Gabel's idea of political reasoning. Feminists argue that reference to public policy involve practical reasoning. However, they fail to explain precisely what practical reasoning entails. Gabel notes that political reasoning also involves abstractions such that what he termed politico-legal reasoning is not enough to enable reasoning give effect to concrete reality such as

manifest in economic and social changes constantly witnessed in the society. Thus, politico-legal reasoning can make sense, if it is a relative correspondence between the reified abstractions and the concrete socio-economic world from which they are abstracted. What the feminist argue in essence is that the peculiarities of women's experiences should be seen as streaming from women's nature and not in the legal abstraction of them as experiences had because women are wives or mothers. Thus, at most, what feminists canverse is politico-legal reasoning in the view of Gabel. However, what they actually need, which they are unable to explain clearly with the idea of practical reasoning is captured in Gabel's idea of politico-legal reasoning corresponding with the concrete socio-economic world. The demand for correspondence with the concrete socio-economic world enables us appreciate that those peculiarities of women's experiences may change due to socio-economic changes of the society. Thus, women may not always be subjugated under male control; they may not always be economically less privileged or politically marginalized. Gabel's position would also enable us appreciate the extent of the actualization of the feminists' demand on legal reasoning.

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