Gendered Constitutionalism in Postcolonial Africa: Towards a Decolonial Gendered Citizenship

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Abstract: This paper makes the case for a theorising of gendered constitutionalism in postcolonial Africa on its own terms, rather than as an appendage or often afterthought to hegemonic and universalising impulses of Western liberal thought. More specifically, the first task is to interrogate the existing body of literature of feminist constitutionalism to examine the extent to which it *speaks for* the pursuit of gender equality through constitutions in Africa that produces an *awkward incongruence* with that of Western feminist liberal thought. The second task is to explore an alternative framework within feminist constitutionalism that speaks more closely to ordinary women's experiences to the pursuit of rights and justice through constitutions in Africa. I find great persuasion in Annette Joseph-Gabriel's concept of *decolonial citizenship* as a promising avenue towards a decolonial gendered citizenship within gendered constitutionalism in Africa. I do this through three lines of enquiry: the concept of gender in Africa, the postcolonial, and decolonial. The choice of the term 'gendered' as opposed to 'feminist' constitutionalism is deliberate, and both ontological and epistemic to demonstrate the colonial imposition of gendered binaries. I set out the postcolonial context, so often associated or even conflated with the Third World or Global South although the terms are not mutually exclusive in terms of neat definitions, neither do they necessarily mean the same thing. The postcolonial sets the stage for a discussion on the *coloniality* of constitutionalism in Africa. Coloniality is distinct from colonialism in and of itself and is concerned with the colonial and continuing imposition of Western liberal constitutional thought on Africa, including through the global governance feminist movement. Liberal rights constitutional frameworks sit awkwardly with African societies with plural normative orders in a way that means ordinary African womenfolk may not access constitutional rights. Constitutional agency is key.

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A. Introduction

In this paper I address three questions on gendered constitutionalism in postcolonial Africa: first is, to what extent is the existing framework and literature on feminist constitutionalism

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for gender equality in the African context? Second is, what alternative framework would best suit the pursuit of gender equality through constitutions in postcolonial Africa? More specifically, the second question is pursued through the lens of a decolonial citizenship. How would a discourse on a decolonial gendered citizenship be epistemically reformulated beyond the euro-centric and universalising formulations of feminist constitutionalism? What potential is there to explore in epistemic reformulations for marginalised groups and minorities? The main argument that I pursue is that liberal rights-based frameworks are not in and of themselves adequate to address gender inequalities in postcolonial contexts such as Africa, particularly through constitutional frameworks that could never truly be free from Western hegemonic influences, and global neoliberal impulses that all pose themselves as global and universal.

Feminist constitutionalism concerns the pursuit of gender equality through constitutions, and has increasingly attracted scholarly attention in recent years as a vehicle for pursuing gender equality through constitutions. Feminist constitutionalism has been conceptualised in diverse ways. Some scholars see it as a question of constitutionalising women's equality rights.[1] This perspective is concerned with equality language and the different forms of equality such as formal or substantive equality, gender neutral or gender specific language, whether to constitutionalise or leave room for legislation of equality, among other things. Some focus on gendered citizenship.[2] Others see it as a question of constitutional drafting and design,[3] concerned primarily with questions of constitutional architecture and structures such as federalism,[4] and gender quotas to address the underrepresentation of women in state legislatures.[5] Other forms of gendered constitutionalism centre around the controversies of reproductive rights, specifically the right to abortion.[6]

A different approach to gendered constitutionalism is to focus on the idea of the whole constitution beyond specific architectural and design issues. There are those that focus on specific questions of constitutional law such as constitutional agency and citizenship,[7] those

1 *Kathleen Sullivan*, Constitutionalizing Women's Equality, California Law Review 90 (2002), p. 735.

2 *Helen Irving*, Citizenship and Nationality, in: Helen Irving (ed.), Constitutions and Gender, United Kingdom 2017, p. 387.

3 *Helen Irving*, Drafting, Design and Gender, in: Tom Ginsburg / Rosalind Dixon (eds.), Comparative Constitutional Law, United Kingdom 2011, p. 19.

4 *Judith Resnik*, Categorical Federalism: Jurisdiction, Gender, and the Globe, Yale Law Review 111 (2001–02), p. 619; *Helen Irving*, Gender and the Constitution: Equity and Agency in Comparative Constitutional Design, Cambridge 2008.

5 *Drude Dahlerup / Lenita Freidenvall*, Gender Quotas in Politics – A Constitutional Challenge', in: Susan Williams (ed.), Constituting Equality: Gender Equality and Comparative Constitutional Law, Cambridge 2009; *Susan Williams*, Equality, Representation, and Challenge to Hierarchy: Justifying Electoral Quotas for Women, in: Susan Williams (ed.), Constituting Equality: Gender Equality and Comparative Constitutional Law, Cambridge 2009.

6 *Rosalind Dixon / Jade Bond*, Constitutions and Reproductive Rights: Convergence and Nonconvergence, in: Helen Irving (ed.), Constitutions and Gender, United Kingdom 2017, p. 438.

7 *Irving*, note 4.

that survey a range of different constitutional questions or different approaches in different jurisdictions into a feminist constitutional agenda,[8] and those that conceptualise normative frameworks for feminist constitutional deliberation and focus, such as Paula Monopoli's comparison between presidential and parliamentary systems of governance, and the extent to which they obscure access to leadership for women,[9] or Vicki Jackson's application of 'the woman question' to constitutionalism.[10]

Third world postcolonial narratives are often included in global edited collections on feminist constitutionalism, sometimes with awkward resonance with the theorisation of the collections. I make the case for the centring of these narratives as organising thoughts in the theorisation of gendered constitutionalism in postcolonial Africa. It is imperative that gendered constitutionalism in the African postcolony is theorised from its own lens and on its own right. I attempt to do this through the exposition and application of the concept of decolonial citizenship. The goal of this study is the formulation of a decolonial gendered citizenship in the African postcolony on what it means for women to belong. I make the case that this goal may or may not be adequately represented in the current theorising of feminist constitutionalism.

I attempt to centre postcololonial narratives of feminist constitutionalism from Africa using three lines of enquiries. First is the question of gender in Africa and the need to shift terms from feminist constitutionalism. Second and third are the concepts of the postcolonial, and decolonial – what do these actually mean for gendered constitutionalism in Africa? I expound on these below as I launch my argument for a decolonial gendered citizenship in Africa. In the final sections, I apply this notion of a gendered decolonial citizenship in three practical areas of feminist constitutionalism contestations: gender equality in the personal sphere (beyond the nation state), women's rights as human rights and constitutional affirmative action/gender quotas as tokenist gestures of inclusion of women in constitutions. These three priority areas are chosen based on some of the priority areas of the Southern African Gender and Development Protocol.[11]

Before moving on to these lines of enquiry I need to address the pertinent question: why is this research necessary? African scholars have observed that 'constitutional provi-

8 *Alexandra Dobrowolsky / Vivien Hart*, Women Making Constitutions: New Politics and Comparative Perspectives, United Kingdom 2003; *Beverly Baines / Ruth Rubio-Marin*, The Gender of Constitutional Jurisprudence, Cambridge 2005.

9 *Paula A. Monopolis*, Gender and Constitutional Design, Yale Law Journal 115 (2005), p. 2643.

10 *Vicki Jackson*, Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, Interpretation, in: Susan Williams (ed.), Constituting Equality: Gender Equality and Comparative Constitutional Law, Cambridge 2009.

11 See: Southern African Development Community, Revised SADC Protocol on Gender and Development, https://www.sadc.int/document/revised-sadc-protocol-gender-and-development-english (last accessed on 13 March 2023).

sions in many parts of Africa are still essentially *masculinist*.'[12] They all fairly agree that in formulating African constitutions, women face the greatest plight on their sexual orientation where politicians and cultural institutions actively suppress dissent on acceptable sexual behaviour,[13] ethnicity,[14] indigenous citizenship,[15] religious freedoms,[16] and are socially and economically underprivileged.[17] Many women highly risk their citizenship in marriages, most of which are patriarchal,[18] patrilocal,[19] or patriligious.[20] Women in many African countries often lose both their indigenous state citizenship and marital state citizenship upon marriage.[21] But most pertinent is that the substance of women's lives is concentrated in the personal sphere, which is often outside the reach of constitutional law. The point has since been made that women's lives in postcolonial contexts are governed by a myriad of relationships in the personal sphere, to which the state does not always reach.[22] These personal relationships are not devoid of normative content that runs alongside state law, a phenomenon that has generally come to be known as legal pluralism.[23] These personal laws have also been identified as sites of women's oppression in postcolonial contexts. Of what use is it to prescribe transplanted rights provisions into constitution review projects

12 *Doreen Lwanga,* Book Review, J. Oloka-Onyango's Constitutionalism In Africa: Creating Opportunities, Facing Challenges (2001), Chicago-Kent Journal of International and Comparative Law 3 (2003) https://scholarship.kentlaw.iit.edu/ckjicl/vol3/iss1/3 (last accessed on 12 March 2023), p. 3.

13 *Ali A. Mazrui*, Constitutional Change and Cultural Engineering: Africa's Search for New Directions, in: Joseph Oloka-Onyango (ed.), Constitutionalism in Africa: Creating Opportunities, Facing Challenges, Kampala 2001, p. 18.

14 *Bibiane Gahamanyi-Mbaye*, Culture, Ethnicity and Citizenship: Reflections on Senegal and Rwanda, in: Joseph Oloka-Onyango (ed.), Constitutionalism In Africa: Creating Opportunities, Facing Challenges, Kampala 2001, p. 66.

15 *Tajudeen Abdul Raheem,* Panafricanism and Constitutionalism, in: Joseph Oloka-Onyango (ed.), Constitutionalism in Africa: Creating Opportunities, Facing Challenges, Kampala 2001.

16 *Ola Abou Zeid*, Equality, Discrimination and Constitutionalism in Muslim Africa, in: Joseph Oloka-Onyango (ed.), Constitutionalism In Africa: Creating Opportunities, Facing Challenges, Kampala 2001, p. 173.

17 *Sylvia Tamale*, Gender and Affirmative Action in Post-1995 Uganda: A New Dispensation, or Business as Usual?, in: Joseph Oloka-Onyango (ed.), Constitutionalism In Africa: Creating Opportunities, Facing Challenges, Kampala 2001, p. 211.

18 Meaning the man controls or dominates the marriage, see *Abdul Raheem*, note 15.

19 Meaning the couple sets up their matrimonial home in the husband's home or community, see *Charmaine Pereira*, Culture, Gender and Constitutional Restructuring in Nigeria, in: Joseph Oloka-Onyango (ed.), Constitutionalism In Africa: Creating Opportunities, Facing Challenges, Kampala 2001, p. 146.

20 Meaning religious and controlled or dominated by men, see *Abou Zeid*, note 16.

21 *Pereira*, note 19, p. 146.

22 *Joseph Oloka-Onyango / Sylvia Tamale*, "The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism, Human Rights Quarterly 17 (1995), p. 702.

23 *Sally Engle Merry*, Legal Pluralism, Law and Society Review 22 (1988), pp. 869-896.

in Africa if there are competing discriminatory personal norms that are unlikely to be challenged successfully in court?

It would surely make sense to take these personal norms and institutions into account when formulating women-specific provisions, or gender-neutral constitutional guarantees such as equality and freedom from discrimination. I argue that the question we ought to address ourselves is: where do women in postcolonial Africa exercise their constitutional agency? In which spaces and in what ways is their constitutional agency *constrained?*

B. The Question of Gender in Africa

Gender is broadly defined beyond its original conception in feminist constitutionalism of a gendered binary. This positioning of gender is based on two reasons. One is aligned with Carol Smart's charge that law is sexist as it operates on a male/female binary axis, male as it advances masculine interests), and gendered as it employs the technology of law and other fields to promote the gendered binary.[24] Secondly, the question of gender in this paper is both epistemic and ontological. *How do I come to know what I know about the self as a metaphysical being?* What does this question have to do with gendered constitutionalism in postcolonial contexts? How do we make sense of Western discourse on gender and law? To what extent would these analyses be unique or different from existing studies in feminist constitutionalism? Are constitutions capable of securing gender justice in outside the constrictions of binaries? How do we address oppression in multiple gendered norms and relations, both in the public and private spheres? To what extent are legal interventions,in this case throughconstitutions, useful?

I do not wish to give hard and fast answers. Rather, my analysis revolves around two lines of analysis. The first category of analysis is the inherent gendered binary Western self imposedon the colonised indigenous at the colonial encounter, and continues to be perpetuated in an ever pervasive coloniality of being. The second category of analysis will centre around postcolonial narratives on the double oppression and the place of the colonially invented postcolonial woman as a legal subject.

The first important observation in answering these questions is the violent imposition of gendered binaries in the colonial encounter, so fundamentally different from the African indigenous conception of the self. Perhaps the most enduring evidence is that many African languages such as the Bantu languages simply do not have gendered pronouns of 'he' and 'she'. Pronouns are simply neutral. This colonial imposition of Western gendered norms and racialised legal subjects was reflected at the core of colonial governance and law, and has persisted to date.

I find Oyéronké Oyéwumi's analysis of the invention of woman in postcolonial Nigeria instructive. Oyéronké Oyéwumi asks, how do we make an African sense of Western colonial discourses of gender? Oyéronké Oyéwumi discusses the invention of woman (and

24 *Carol Smart*, The Woman of Legal Discourse, Social and Legal Studies 1 (1992), pp. 29-44.

man) and the categorisation of white settlers and the African indigenous along racialised and gendered lines. The white man is lord over the white woman, followed by the African man, with the African woman at the very bottom. The African woman is subordinated further in a double oppression formed by a patriarchal coalition of the colonial state and African male elders.

C. Postcolonial and Decolonial Questions on Constitutionalism in Africa

The 'postcolonial' has sometimes be conflated with the Third World and the Global South. This is understandably so as 'the Global South is considered as the heir to the notion of the 'Third World', which emerged in the early 1950s as the confident self-description of the newly independent and non-aligned states in the South.'[25] The 'Third World' has had complex histories and contested meanings that may or may not fully convey the postcolonial, and came to be associated most recently with developing countries as opposed to first (capitalist) and second (communist) countries until the Cold War in the early 1990s.[26]

Postcolonial theorists challenge the provincial and Eurocentric nature of knowledge,[27] most recently also associated with theorists on the South.[28] I find comradeship in some of these multiple and contested meanings within geopolitical,[29] ontological and epistemic,[30] as well as economic (deliberately impoverished nations),[31] perspectives. In relation to constitutionalism specifically, Upendra Baxi speaks of postcolonialism as 'a troubled continent of contested conceptions; the challenge and complexity stand aggravated when the unfamiliar

25 *Philipp Dann / Michael Riegner,/ Maxim Bönnemann*, The Global South and Comparative Constitutional Law, Oxford, 2020, p. 5.

26 *Dann et al*, note 25, pp. 5-6.

27 Some good examples are *Walter Mignolo*, Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-coloniality, Cultural Studies 21 (2007); *Dipesh Chakrabarty*, Provincializing Europe: Postcolonial Thought and Historical Difference, Princeton 2009; *Anibal Quijano*, Coloniality of Power and Eurocentrism in Latin America. International Sociology 15 (2000); *Chandra Mohanty*, Under Western Eyes: Feminist Scholarship and Colonial Discourses, Boundary 2 (1984).

28 *Jean Comaroff / John L Comaroff*, Theory from the South, or, How Euro-America is Evolving toward Africa, Anthropological Forum 22 (2012); *Julian Go*, Globalizing Sociology, Turning South: Perspectival Realism and the Southern Standpoint, Sociologica 2 (2016).

29 *Sebastian Haug / Jacqueline Braveboy-Wagner / Günther Maihod*, The 'Global South' in the Study of World Politics: Examining a Mega Category, Third World Quarterly 42 (2021); *BS Chimni / Siddharth Mallavarapu*, International Relations: Perspectives for the Global South, London 2012; *Amitav Acharya / Barry Buzan*, The Making of Global International Relations: Origins and Evolution of IR at its Centenary, Cambridge 2019; *Siba Grovogui*, A Revolution Nevertheless: Global South in International Relations, The Global South 5 (2011), p. 175.

30 *Daniel B Maldonado*, Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia, Cambridge 2013; Comaroff / Comaroff, note 28.

31 *Walter Rodney*, How Europe Underdeveloped Africa, London 1972.

guest – the discourse of constitutionalism and human rights – makes appearance at the dining table.'[32]

Constitutionalism has been defined in different ways. I find the definition by Anthonia Kalu[33] specifically for the postcolonial African context useful, as they see consitutionalism as 'a carefully crafted relationship between recognisable national ideas and the day-to-day practice of citizenship,'[34] and warns against 'neo-colonial constitutionalism in Africa by continual use of "Western classrooms" models introduced in the colonial era.'[35]

I see two imperialist 'Western classroom' models imposed on African constitutionalism – one is the imposed independence constitutions upon immediately postcolonial African states, in what Upendra Baxi refers to as "postcolonial legality,"[36] and "state formative practices".[37] This is not simply to suggest that 'constitutional forms and ideals constitute a legacy of colonialism. The reality is otherwise. Colonialism and constitutionalism were always strangers. And the very act of enunciating a constitution marks a historic rupture.'[38] Rather, it is to say that

> *'colonial legal cultures did affect forms of constitutions: the civil law and the common law traditions render legible the texts structuring the apparatuses of governance […] Perhaps more decisive to the constitutionalism formation were the contexts of the Cold War, which generated the antithetic discourse between the liberal bourgeois and revolutionary socialist constitutionalism. The differences proved vital for Third World practices of constitution making […] Both socialist and capitalist forms of imperial hegemony affected the text and context of constitutionalism in decolonized societies.'*[39]

Two colonial constitutional foundational principles addressed in this paper are, first 'Man-as-Citizen' that is White, Male, Christian and subsequently rational (as in not female, or indigenous or racialised, formerly referred to as savage in colonial legal texts).[40] Sec-

32 *Upendra Baxi*, Postcolonial Legality, in: Henry Schwartz / Sangeeta Ray (eds.) A Companion to Postcolonial Studies, Oxford 2000, p. 540.

33 *Anthonia Kalu*, Language and Politics: Towards a New Lexicon of African Constitutionalism, in: Joseph Oloka-Onyango (ed.), Constitutionalism In Africa: Creating Opportunities, Facing Challenges, Kampala 2001.

34 *Doreen Lwanga*, note 12.

35 Ibid.

36 *Baxi*, note 32.

37 *Upendra Baxi*, Constitutionalism as a Site of State Formative Practices, Cardozo Law Review 21 (1999), p. 1183.

38 Baxi, note 32, p. 541.

39 Baxi, note 32, pp. 541-542.

40 *Sylvia Wynter*, Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation - An Argument, The New Centennial Review 3 (2003), p. 257. See other references to 'the savage' in Peter Fitzpatrick, The Mythology of Modern Law, London and New York 1992.

ond is the coloniality/modernity complex in which there is no other political organising imaginable other than the nation state, superimposing nation states on the plurality of indigenous citizenships.[41] Both of these foundational principles of Man-as-Citizen and the modernity/coloniality complex have the wholesale effect of producing various colonialities in postcolonial legalities, including coloniality of power,[42] coloniality of being and coloniality of gender.[43] Upendra Baxi writes that

> *'[T]he history of evolution of modern constitutionalism is a narrative of growth of asymmetries in domination and resistance. Principles of constitutionalism were perfected in Europe at the very historic moment when colonialism flourished. In retrospect, the narrative of constitutional development in decolonized societies provides a massive indictment of accomplishments of liberal thought.'*

The second imperialist "Western classroom model is still ongoing in the context of constitutional review/amendment processes following constitutional upheavals such as conflict and *coup de tats*. Katrin Seidel refers to these as 'rule of law translation projects' where Western dominated international agencies and experts translate liberal rule of law and rights provisions into these revised constitutions.[44] The question is the extent to which such rule of law and rights provisions actually serve the interests of the African local ordinary masses. Such rule of law translation projects have been charged with *femocracy* where elite women dominate international and domestic negotiations on women's rights, constitution review and governance but whose interests are aligned with patriarchal oligarchies.[45] Governments may also adopt such rule of law provisions with no intentions of bettering the lives of their citizenry,and sometimes actually suppress their citizens' rights, as unwritten norms dominate instead. Okoth Ogendo referred to this phenomenon as 'constitutions without constitutionalism'.[46]

41 *Mignolo*, note 27.

42 *Quijano*, note 27.

43 *Wynter*, note 40.

44 *Katrin Seidel*, The Promotion of Rule of Law in Translation: Technologies of Normative Knowledge Transfer in South Sudan's Constitution Making, in: Tobias Berger / Alejandro Esguerra (eds.), World Politics in Translation, London 2019.

45 *Amina Mama*, Feminism or Femocracy? State Feminism and Democratisation in Nigeria, Africa Development 20 (1995), p. 38.

46 *HWO Okoth-Ogendo*, Constitutions without Constitutionalism, in: Issa Shivji (ed.), State and Constitutionalism: An African Debate on Democracy, Harare 1991.

D. Decolonial Gendered Citizenship in Postcolonial Africa

Decolonial citizenship is borrowed and expanded from Annette K. Joseph-Gabriel's work around black women's liberation work in the French empire,[47] Sylvia Wynter's work around the overrepresentation of 'Man-as-Citizen' in the western bourgeois conception of what it means to be human,[48] and Walter Mignolo's coloniality/modernity complex.[49]

Decolonial citizenship contests the colonial foundations of citizenship that were used to disavow non-European epistemologies of what it means to belong. This was accompanied by a conflation of national identity with racial characteristics, which are then used to design a hierarchical model to determine who is a good citizen, and who would count as part of the undesirables.[50] The Declaration of the Rights of Man and of the Citizen as a direct product of the French Revolution passed by the National Assembly in 1798 is the founding text for human rights and citizenship, but is premised on the invention of Man, and the fusion of Man and Citizen.[51] Annette Joseph-Gabriel relies on Sylvia Wynter's caution on the Euro-centric and Western-bourgeois 'invention of Man'[52], who is conflated with and overrepresented in discourses of what it means to be human, to belong.[53] Sylvia Wynter writes that

> *Man is a deliberate Western bourgeois creation, a definition of the human that is limited and exclusionary along the lines of class, gender, ethnicity, race, nationality, and sexuality. More specifically, Man is European, heterosexual, white, and male, initially understood to be Christian but later, in the Enlightenment period, redefined as rational. The construction of Man is deeply entangled with the history of colonial conquest, because Man came to be defined in opposition to the colonised "Other", the nonwhite, non-Christian, and, later, supposedly irrational savages.*[54]

Basing their argument on Quijano's 'coloniality of power',[55] and Walter Mignolo's coloniality/modernity complex,[56] Sylvia Wynter argues that the overrepresentation of 'Man-

47 *Annette K Gabriel-Joseph*, Reimagining Liberation: How Black Women Transformed Citizenship in the French Empire, Chicago and Springfield 2019.

48 *Wynter*, note 40.

49 *Mignolo*, note 27.

50 *Gabriel-Joseph*, note 47, p. 10.

51 ibid, p. 9.

52 *Donald F. Bouchard (ed.) / Michel Foucault,* Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault, New York 1981; *Colin Gordon (ed) / Michel Foucault,* Power/Knowledge: Selected Interviews and Other Writings, New York 1980.

53 *Wynter*, note 40.

54 *Gabriel-Joseph*, note 47, p. 10.

55 *Quijano*, note 27.

56 *Mignolo*, note 27.

as-Citizen' contributes to the coloniality of being, power, truth and freedom[57] – Man-as-Citizen actively contributes to the 'Othering' that legitimises colonial and antihuman processes such as 'African enslavement, Latin American colonial conquests, and Asian subjugation'.[58]

Walter Mignolo writes that coloniality and the resultant privileging of Eurocentric thought on what it means to belong means that citizenship is understood to be the only mode of collective identity and belonging.[59] Citizenship is not universal, and is antithetical to the fact that 'what is universal is the human drive to build communities grounded on memories and experiences that constitute the house, the dwelling place of different people'.[60] The Eurocentric mode of citizenship pretending to be universal was imposed on non-European civilisations as a colonial act, so much so that over time these non-European civilisations 'became painfully aware of the ways in which modern political forms, such as nation states and citizenship, were connected to a prior history of colonialism rooted in race.'[61]

Thus, 'those who have been excluded from citizenship (and there are always old or new categories that are) are represented, and so to speak, "produced," by all sorts of disciplinary or institutional mechanisms as imperfect human beings, as "abnormals" or monsters on the margins of humanity.'[62] The fusion of Man and Citizen becomes the basis of the othering of those that are excluded from the category of Citizen.[63]

Decolonial citizenship is thus not concerned with the tokenist inclusion of few marginalised groups,[64] but rather an epistemic reformulation of the 'colonial foundations of citizenship and the elements of coloniality that shape this notion of belonging […], the disavowal of non-European epistemologies, the conflation of racial and national identity, and the hierarchical model of belonging based on state's demarcation of good citizens and the undesirables.[65] The second element of *decolonial citizenship* is that it seeks to 'untether citizenship from the narrow confines of the nation-state as the only political community imaginable towards an of plural ford advocates a shift toward plural forms of belonging.'[66]

Coloniality of euro-centric political organising imposed violence on the various ethnic communities that had their own elaborate governance structures subsumed and artificially imposed 54 African nation-states.

57 *Wynter*, note 40, p. 260.
58 Ibid, p. 263.
59 *Mignolo*, note 27, p. 315.
60 Ibid, p. 315.
61 Ibid, p. 177.
62 *Étienne Balibar,* Citizenship, Cambridge 2016, p. 16.
63 *Gabriel-Joseph*, note 47, p. 12.
64 Ibid, p. 11.
65 Ibid, p. 17.
66 Ibid, pp. 17-18.

In this study I explore ways in which gendered constitutionalism in postcolonial Africa could navigate the coloniality of constitutional arrangements and euro-centric discourses on equality and affirmative action that are deeply embedded in the problematic hegemonic construction of 'Man-as-Citizen'. How would such a discourse on women's sense of belonging in the African postcolony be epistemically reformulated beyond the euro-centric simplistic formulation of feminist constitutionalism? What potential is there to explore in such epistemic reformulations of 'Man-as-Citizen' and hegemonic debates on constitutionalism and political organising for marginalised groups (women, sexual minorities, ethnic minorities, the poor urban class, among others)?

I see potential in Helen Irving's conception of gender and constitutions not just as a question of citizenship and belonging, but also citizenship as *agency,* and the extent to which we all have *equity* in exercising that agency.[67] As far as women's citizenship is concerned, Helen Irving argues that we must ask ourselves whether women have a sense of belonging to the constitutional community. To determine the answer to this question, Helen Irving proposes three further set of questions: whether women are included in the constitution , whether women feel that they can make claims in the courts for violations of these constitutional guarantees, and whether the courts will take their claims seriously. Helen Irving proposes that this set of questions is an exercise in determining women's constitutional agency. In the rest of the paper, I apply these three questions in a gendered constitutionalism both within and beyond the nation state, to the question of women's rights as human rights, and affirmative action.

I find Helen Irving's argument for a focus on women's sense of belonging to the constitutional community and constitutional agency persuasive but its greatest limitation is its focus on constitutional text for women specific provisions and gender-neutral constitutional guarantees. A second limitation is that the constitutional community is confined to state institutions, to the exclusion of social institutions such as religious and customary ones. This critique validates Walter Mignolo's coloniality/modernity/ complex that privileges the nation-state as the only imaginable political organizing,[68] and goes to the core of the inability of Western liberal democracy and governance to conceptualise itself beyond the nation state.

I. Constitutional Agency and Legal Pluralism

Moving on from the critique of feminist constitutionalism's focus on the nation state and its privileging of constitutional text and constitutional or state institutions, I make the case that a gendered constitutionalism in the Global South would pay greater attention to the ways that constitutional law relates with personal spaces. The aim would be to assess whether

67 *Irving*, note 4.

68 *Mignolo*, note 27.

they are excluded from constitutional scrutiny and regulation against anti-discrimination and left to their own devices or are regulated to ensure equality and discrimination.

Many immediately independent African constitutions either expressly exempted personal laws from the constitutional requirement of equality and non-discrimination, or failed to address discriminatory personal laws entirely. Most formerly British independence constitutions had, (and some still do,[69] have these exemption clauses.[70] For instance, the 1963 Independence Constitution of Kenya had this exemption clause:

> *(1) (...) no law shall make any provision that is discriminatory either of itself or in its effect. (4) Subsection (1) of this section shall not apply (...) (b) with respect to adoption, marriage, divorce, burial, devolution, of property on death or other matters of personal law; or (c) for the application in the case of members of a particular race ---.,'. or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons…*[71]

There is a historical reason for these post-independence pluralism clauses, which vary across specific English speaking African countries.[72] In the case of Kenya for instance, the Sultan of Zanzibar demanded that his subjects on the East African 10-mile coastal strip be allowed by British colonial authorities to practice Islam, and that Islamic *Kadhi's* courts.[73] The 10-mile coastal strip was merged with the rest of mainland Kenya on this condition, thereby necessitating the wording of the pluralism clause.[74] The pluralism clause was subsequently framed much more broadly in the independence to cover all personal systems and law, and entrenched in the fundamental rights chapter of the constitution.[75]

Pluralism clauses in postcolonial contexts seriously undermine Helen Irving's second premise on constitutional agency: women's ability to take claims to court, and whether such claims will be taken seriously. A gendered constitutionalism in postcolonial contexts would need to pay closer attention to constitutional reforms and the extent to which such pluralism clauses are addressed. Attention to this context would have a direct effect on whether the substance of women's lives in personal sphere are also under the scrutiny of constitutions' equality and antidiscrimination clauses. It should concern gendered constitutionalism great-

69 These are Botswana, Zambia, Zimbabwe and Lesotho.

70 *Celestine Nyamu-Musembi*, Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol, in: Anne Hellum / Henrietta Sinding Aasen (eds.), Women's Human Rights: CEDAW in International, Regional and National Law, New York 2013, p. 197.

71 The Kenya Independence Order in Council 1963, s. 26.

72 *Nyamu-Musembi*, note 70, pp. 198-199.

73 *Yash Ghai*, Independence and Safeguards in Kenya, East African Law Journal 3 (1967), pp. 177-217; *Yash Ghai / Patrick McAuslan*, Public Law and Political Change in Kenya: A Study of the Legal Framework from Colonial Times to the Present, Nairobi 1970.

74 *Ghai*, note 73, *Ghai / McAuslan*, note 73.

75 *Nyamu-Musembi*, note 70, p. 199.

ly if such pluralism clauses persist, and personal spheres and laws are left unchecked as far as the right to equality and antidiscrimination is concerned.

Recent constitution reforms in Africa have replaced postcolonial independence constitutions, and also repealed exemption clauses.[76] Aili Mari Tripp writes that 'virtually all African countries have either rewritten their constitutions or made major reforms since 1990,'[77] except five of them: Liberia, Botswana, Guinea Bissau, Mauritius and São Tomé Principe.[78] Some of these reforms involve ensuring that constitutional and statutory law prevails over customary law, especially where there is conflict between customary practice and women's rights.[79] Another major reform involves a specific mention of equality between men and women.[80] In this way, recent constitutional reforms in English speaking postcolonial countries in East and Southern Africa have seen to it that personal law exemption clauses have been removed from the constitutions of Uganda, Ghana, Malawi and Kenya.[81] Unfortunately, these exemption clauses still persist in the constitutions of Botswana, Zambia, Zimbabwe, and Lesotho.[82]

Some historical cases in Africa prove the importance for gendered constitutionalism in postcolonial contexts to pay attention to the constitutional treatment of the personal sphere, namely *Venia Magaya v Nakayi Magaya*,[83] and *Virginia Edith Wambui Otieno-Odek v Joash Ougo & Omolo Siranga.*[84] Courts always took a hand-off approach where they claimed their hands were tied by personal law's exemption clauses.[85] This hands-off approach from the courts had the effect of denying women access to constitutional remedies for negative discrimination in personal laws.[86]

Venia Magaya concerned an inheritance dispute where a father had died intestate, leaving behind four children and two wives. Although the eldest female daughter had been granted heirship to her father's estate by a community court, this decision was overturned in

76 Ibid, pp. 201-204.

77 *Aili Mari Tripp*, Women's Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia, Politics and Gender 12 (2016), p. 81.

78 *Tripp*, note 77.

79 *Nyamu Musembi,* note 70, pp. 201-204.

80 *Tripp*, note 77, p. 85.

81 *Nyamu Musembi*, note 70, pp. 199-200.

82 *Nyamu Musembi,* note 70, p. 200.

83 *Venia Magaya v Nakayi Magaya*, SC 210/98, Supreme Court of Zimbabwe, May 1999. See also *AT Dodo*, Venia Magaya's Sacrifice: A Case of Custom Gone Awry, in: Kaori Izumi (ed.), Reclaiming Our Lives: HIV and AIDS, Women's Land and Property Rights, and Livelihoods in Southern and East Africa, Cape Town 2006.

84 Civil Appeal No. 31 (4) of 1987, Court of Appeal in Nairobi, http://kenyalaw.org/caselaw/cases/view/7898/ (last accessed on 25 February 2023).

85 *Celestine Nyamu-Musembi*, Sitting on her Husband's Back with her Hands in his Pockets: Commentary on Judicial Decision-making on Marital Property Cases in Kenya, in: A Bainham (ed.), The International Survey of Family Law, Bristol 2002, pp. 229-242.

86 *Nyamu-Musembi*, note 70.

the Court of Appeal. The Supreme Court confirmed the decision of the Court of Appeal and granted heirship to the second son - with the effect that Venia was kicked out of the municipal house that was the centre of the dispute. The reasoning of both the Court of Appeal and Supreme Court was that customary law reserved inheritance for male survivors. The courts addressed the issue whether this customary law was discriminatory and unconstitutional, but held that their hands were 'tied' by section 26 of the Constitution that exempted the nondiscrimination clause from matters of 'adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.'[87]

Virginia Edith Wambui Otieno-Odek concerned a burial dispute where a widow wanted to bury her deceased husband, SM Otieno, at their matrimonial and urban home in Nairobi. SM Otieno's clan however claimed to have a customary right to bury him at his rural homeland in Siaya. The Court of Appeal ordered that the deceased be buried at his ancestral home in Siaya in accordance with Luo customary law.[88] Just like in *Venia Magaya* in Zimbabwe, the Constitution of Kenya at the time exempted the equality and nondiscrimination from application to matters of personal law in marriage, divorce, adoption, inheritance, burial, and devolution of property.[89]

Both cases prove how a lack of constitutional agency has had devastating consequences for women's lives in deeply personal ways, and also in ways that have altered the course of their socio-economic wellbeing, such as in the case of Venia Magaya who was disinherited from her father's municipal home.

A focus on women's constitutional agency might also mean that personal laws and culture may sometimes work in litigants' favour. Thus, a true constitutional agency must mean that women are able to choose where they want to take their claims: to the state courts, or in their personal alternative dispute resolution systems. The Constitution of Kenyagot this balance well regarding Muslim women. During the constitutional review process leading to the revised 2010 Constitution, Muslim women's representative groups 'believed that the preservation of Kadhi's courts was potentially a mechanism for empowering them (…), the substantive needs of Muslim women entailed a fight for rights on their own terms without the overriding precepts embedded in a country and legal system that were largely non-Muslim.'[90]

87 Constitution of Zimbabwe of 1980, s. 26.

88 See a further exposition of the case in *Ambreena Manji*, Of the Laws of Kenya and Burials and all that, Law and Literature 14 (2002); *Ambreena Manji*, Rereading Burying SM as a Social Reproduction Text, African Studies (2022), https://doi.org/10.1080/00020184.2022.2080430 (last accessed on 25 February 2023); *ES Atieno Odhiambo / DW Cohen,* Burying SM: The Politics of Knowledge and the Sociology of Power in Africa, Suffolk 2006.

89 Constitution of the Republic of Kenya of 1964, s. 82.

90 *Athena Mutua*, Gender Equality and Women's Solidarity Across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process, William and Mary Journal of Women and Law 13 (2006), p. 91.

There is research that shows evidence of Muslim women being historically able to obtain positive results on their personal claims in Kadhi's courts, and that they perceived Kadhi's courts as women's courts.[91] Conversely, Muslim men also begrudgingly saw Kadhi's courts as women's courts, particularly in marital disputes.[92] Susan Hirsch's 25 months' research on Kadhi's courts at the Coast of Kenya found that women brought most of the claims – 108 out of 129, 93% of which were related to maintenance and dissolution of marriage.[93] Susan Hirsch writes further that 'women won 42.5% of their cases, settled 39.8% and lost only 1.9%, with 14.8% unresolved.'[94] It is not surprising that Muslim women would prefer the preservation of Kadhi's courts in the Constitution as a potential empowering mechanism.

An exercise of constitutional agency has great implications on the extent to which personal alternative forms of dispute resolution are recognised, embedded in the constitutional architecture and integrated with the courts system. It is a question of how the state courts and personal dispute resolution mechanisms 'speak to each other', so to speak. It's not only important that they are recognised, but also that decisions from these traditional mechanisms are capable of enforcement, or judicial scrutiny towards equality and nondiscrimination.

Some recently reformed constitutions have gone some way in achieving all three: recognition, enforcement, and scrutiny. On recognition, the Kenyan Constitution for instance provides that 'in exercising judicial authority, the courts and tribunals shall be guided by the following principles… alternative forms of dispute resolution including reconciliation, mediation, arbitration and tradition dispute resolution mechanisms shall be promoted…'.

My favourite case so far on the constitutional recognition of traditional dispute mechanisms is known simply as *The Blood Money Case*[95] decided in the High Court of Kenya. This was a criminal law case that involved two persons accused of murder alleged to have been committed in January 2016. Whilst the case was being prosecuted in the High Court from February 2016, clan members of the deceased and accused families asked the court to terminate the criminal proceedings so that the matter could be solved amicably out of court. In July 2017, the prosecutor confirmed to the court that the kin of both two accused persons and the deceased had reached an agreement for payment of blood money in the form of cows and bulls to the deceased's family according to customs of the Kamba ethnic community. In upholding the traditional dispute settlement, the judge stated: 'I am also not

91 *Susan Hirsch*, Pronouncing and Preserving: Gender and the Discourses of Disputing in an African Islamic Court, The Australian Journal of Anthropology 12 (2001), pp. 136-137.

92 Ibid.

93 Ibid, pp. 125-127.

94 Ibid, p. 127.

95 *Republic v Musili Ivia & Another*, Criminal Case No. 2 of 2016, High Court of Kenya in Garissa, http://kenyalaw.org/caselaw/cases/view/143113/ (last accessed on 26 February 2023).

aware of any written law or International Convention that prohibits the amicable settlement proposed. The victim is already dead, and close relatives agree to the settlement. I have not been told that there is any objection from the community or the public.'[96]

It is very commendable that the deceased were able to obtain some tangible compensation for the murder of their relative, which never happens in criminal law that is focused on punishment rather than restitution or even reconciliation. It is likely that some of these relatives may have lost a breadwinner, and compensation would be of direct benefit to the victims than punishment of the offenders. This directly addresses the colonial foundations of criminal law.

There is obviously a huge risk as the normative content of such personal laws may be in direct conflict with constitutional values. The key is that the woman can exercise their agency on where they want to take their claim and leverage on the outcomes. It is in recognising that legal strategies come with a risk,[97] whether in state or personal spheres. It should be up to the woman to weigh up that risk in exercising their constitutional agency, not simply to be left with nowhere to turn for legal or quasi-legal recourse as happened to Venia Magaya in Zimbabwe, and Wambui Otieno in Kenya.

II. From Tokenist Inclusion to Full Inclusion: Man-as-Citizen to Woman-as-Citizen

1. Women's Rights as Human Rights

A gendered constitutionalism in postcolonial Africa will be incomplete if it is devoid of an analytical link with international human or women-specific rights as far as these are transplanted directly into African constitutions. The first question here is whether constitutionalising and legislating women's rights - a particularly popular Western feminist intervention and sometimes accompanied by punitive measures - is always the best approach to some of these enduring cultural practices. This question must always be considered very carefully in postcolonial contexts with pluralist normative orderings. Second is the question of the right to culture within constitutions and harmful cultural practices.

The practise of constitutionalising gender-specific or women-specific rights may be a counter to Man-as-citizen ideology of constitutions. This follows a similar approach in the 'women's rights as human rights' movement in international law. The ideal of gender equality is based on international human rights but developed partly in response to the limitations of the human rights regime's applicability to women's lives.[98]

Feminist international lawyers identified the limitations of international law for women and attributed the cause to the fact that men were the primary creators of the human rights regime, hence reflecting men's historical control over most social institutions, and male

96 Ibid.

97 *Carol Smart*, Feminism and the Power of Law, London and New York 2002.

98 *Mutua*, note 90, p. 38.

perspectives.[99] These feminist international lawyers saw that 'the absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has […] legitimated the unequal position of women around the world rather than challenged it'.[100] The limitations of the human rights regimes to their applicability to women's rights brought about slogans such as 'women's rights are human rights',[101] and 'the personal is political' in discourses around the 1993 Vienna Convention on Human Rights.[102] Thus, international law feminists call for a reflection on what it means to bring feminist approaches to international law, and also what it means to bring "the international" into feminist discourses.[103]

The shift to the gender equality regime first appeared in the Convention on the Elimination of Discrimination Against Women (CEDAW).[104] It was recognised for the first time that inequality and disadvantage stem from within social orderings, and provided mechanisms that addressed the substance of women's lives.[105] State parties are required to include the principle of equality between men and women in national constitutions and legislation, and to abolish any laws and policies that discriminate against women. State parties are required to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of cultural prejudices and practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.[106] State parties are also required to carry out family education to recognise maternity as a social function that requires 'the common responsibility of men and women in the upbringing and development of their children'.[107] Through CEDAW is justified a focus on the equality of *outcomes* of specific government decisions, policies and programs on women's lives, not just equality of opportunity, what has come to be known as substantive equality.[108]

Constitutionalising and legislating equality and women's rights follow CEDAW's legislative approach. However, just constitutionalising international women's rights does not address the extent to which rights-based provisions are actually applicable women's daily lived realities governed by pluralist normative orderings.[109] CEDAW's approach through

99 *Hillary* .

100 *Hillary* , p. 1.

101 *Charlotte*

102 note 22.

103 *Doris* .

104 Convention on the Elimination of Discrimination Against Women (CEDAW) 1979, https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf, (last accessed on 16 September 2020).

105 CEDAW, article 5(a).

106 Ibid.

107 CEDAW, article 5(b).

108 *Oloka-Onyango / Tamale*, note 22.

109 *Merry*, note 23.

its committee has been criticised for its dogmatic approach that does not go beyond constitutional and legislative frameworks to address discrimination in these multiple and personal normative orderings.[110] African feminists have questioned the applicability of human rights to African women,[111] in which culture is viewed in almost always negative terms as the site of women's oppression, . [112] The traditional approach in international human rights law has been to view culture and rights as opposites,[113] that is, 'African women would have to first strip themselves of culture before enjoying their rights.'[114] Sylvia Tamale writes:

> *When a husband batters his wife, two dynamics are at play. The first dynamic corresponds to the political character of the seemingly personal act sanctioned by the forces of patriarchy and domination. Furthermore, there is a manifest distinction between the personal in Western and nonwestern societies. In the African context, this distinction emanates from the largely communitarian and extended-family complex of relations. This is a phenomenon very distinct from the spatially atomized individual existence that is more typical of Western societies. In short, the province of the personal in Africa is legion (...).*[115]

The Optional Protocol on the Rights of African Women has been commended for its its context-specific and sensitive approach to cultural practices such as polygamy, wife/widow inheritance and female genital cutting.[116] Instead of outlawing polygamy as recommended by the CEDAW Committee for instance, the Optional Protocol provides that monogamy is *the preferred form of marriage,* towards gradual rather than eradication that may cause upheaval and more harm to all involved. Female genital cutting is however regarded as mutilation with zero tolerance due its medically evidenced harmful effects on women.

Some recent cases on the right to culture and harmful cultural practices drive the approach of the Optional Protocol home. *Tatu Kamau v Attorney General & 2 others*[117] was a constitutional petition in Kenya on the right to practise one's culture. Dr. Tatu Kamau,

110 *Nyamu-Musembi*, note 70.

111 Ibid.

112 Ibid.

113 *Mahmoud Mamdani*, Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture, Cape Town 2000, pp. 1-13; *Abdullahi Ahmed An-Na'im*, Cultural Transformation and Human Rights in Africa, London 2002.

114 *Sylvia Tamale*, The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa, Feminist Legal Studies 16 (2008), p. 55.

115 *Oloka Onyango / Tamale*, note 22, p. 702.

116 *Fareda Banda*, Blazing a Trail: The African Protocol on Women's Rights Comes into Force, Journal of African Law 50 (2006), pp. 72-84.

117 *Tatu Kamau v Attorney General and two others*, *Equality Now and 9 others* (*Interested Parties), Katiba Institute and another (Amicus* Curiae) [2021] KEHC 450 (KLR), http://kenyalaw.org/caselaw/cases/view/209223/ (last accessed on 27 February 2023).

a medical doctor, challenged the criminal prohibition of female genital cutting.[118] Dr. Tatu Kamau argued that the prohibition limited 'women's choice and right to uphold and respect their culture; ethnic identity; religion; beliefs; and, by discriminating between men and women (…) an imperialist imposition from another culture that holds a different set of beliefs or norms.'[119] The High Court dismissed the petition, citing that 'from the medical evidence… we are left in no doubt about the negative short term and long term effects of FGM/C on women's health […] We are not persuaded that one can choose to undergo a harmful practice… limiting this right is reasonable in an open and democratic society based on the dignity of women.'[120]

The Constitutional Court of Uganda dealt with the cultural practice of bride price in *Mifumi (U) Ltd & 12 Others v Attorney General*.[121] Some thirteen petitioners challenged the practice of payment of bride price as a precondition for marriage, and refund of bride price as a precondition of dissolution of marriage. The petitioners argued that these practicesoffend the requirement for the free consent of parties to a marriage, and '…leads men to treat their women as mere possessions from whom maximum obedience is extracted, thus perpetuating conditions of inequality between men and women […] in so far as portrays the woman as an article in a market for sale amounts to degrading treatment.' The Constitutional Court did not agree with the petitioners that the cultural practice violates constitutional values of equality, nondiscrimination and dignity, save for when one is forced to enter into a customary marriage and a bride price arrangement. The Court did agree with the petitioners however that the demand for refund of bride prince on the dissolution of marriage undermines the equality and dignity of a woman in marriage and fails to honour the unique contributions and value of a wife in a marriage.

The High Court of Kenya also recognised and upheld the cultural practice of *woman-to-woman marriages* where older women, often wealthy and cannot have children of their own, marry younger women for purposes of childbearing and companionship. In *Monica Katam v Jackson Chepkwony & Another,*[122] the High Court of Kenya upheld the inheritance rights of the younger widow in a *woman-to-woman marriage* where the older and wealthier woman in the marriage had died without a will.

As the cases suggest that constitutionalising the right to culture comes with potentially huge risks. Malawi's revised constitution of 1994 for instance has removed the personal

118 Specifically see: Prohibition of Female Genital Mutilation Act (No. 32 of 2011), http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.+32+of+2011 (last accessed on 27 February 2023).

119 *Tatu Kamau v Attorney General*, note 94.

120 Ibid.

121 *Mifumi (U) Ltd and 12 Others v Attorney General, Kenneth Kakuru* (Constitutional Petition 12 of 2007) [2010] UGSC 2, https://ulii.org/ug/judgment/supreme-court-uganda/2010/2 (last accessed on 27 February 2023).

122 *Monica Jesang Katam v Jackson and Selina Jemaiyo Tirop*, Succession Cause No. 212 of 2010, http://kenyalaw.org/caselaw/cases/view/75868 (last accessed on 27 February 2023).

laws exemption clause but included an unqualified right to practice one's own culture, which can potentially be a site of oppression.[123] A second risk with the right to culture has been the powerful argument of cultural relativism often advanced by governments and politicians to suppress women's rights in the name of culture but is actually a 'hook on which patriarchy can further its local hegemony.'[124] This goes back to the question of the inherent risks of legal strategies – the emerging case law I have discussed on the cultural practices of female genital cutting, bride price and *woman-to-woman marriages* suggests that courts are aware of and are balancing these risks in a manner that empowers women with constitutional agency to pursue their claims in the courts, rather than disempowering them.

2. The Coloniality of Gender Quotas

Gender quotas still operates on a Man-as-Citizen praxis, so that man is still the norm and form of political organising. Women's inclusion into politics and decision making is based on a history of tokenist inclusion, under the term *gender mainstreaming.*

Gender mainstreaming as an ideal emerged earlier in the discussions at the 1985 Third World Conference of the United Nations Decade for Women, and then again in the 1995 Fourth World Conference on Women: Action for Equality, Development and Peace, and from 4th to 15th September 1995 at Beijing. The Beijing Declaration and Platform for Action was a result of the 1995 Fourth World Conference.[125] In that Platform for Action, 'women in power and decision making' was identified as one of the strategic objectives and actions. Under Strategic Objective G1, Governments agreed to

> *"commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, inter alia, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary, through positive action, in all governmental and public administration positions."*[126]

In their paper on the global impact of quotas, Aili Mari Tripp and Alice Kang write that 'many governments and political leaders, for their own reasons, responded positively to the

123 *Lea Mwambene*, Reconciling African Customary Law with Women's Rights in Malawi: The Proposed Marriage, Divorce and Family Relations Bill: Notes and Comments, Malawi Law Journal 1 (2007).

124 *Oloka Onyango / Tamale*, note 22, pp. 702-703. See also *Fareda Banda*, Global Standards: Local Values, International Journal of Law, Policy and the Family 17 (2003).

125 Beijing Declaration and Platform for Action, the Fourth World Conference on Women, 15 September 1995, https://beijing20.unwomen.org/~/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf#page=125, (last accessed on 15 September 2020).

126 Ibid

1995 Platform of Action that emerged out of the UN Beijing Conference…,'[127] and that 'pressures from international bodies were mediated by pressures from regional women's rights networks and intergovernmental bodies.'[128] For Africa specifically,

> *National women's movements, through their regional networks, encouraged the Southern African Development Community (SADC) to employ measures to raise the representation of women in their respective countries (Tripp, 2005). In November 1997, SADC Heads of Government adopted the Declaration on Gender and Development, in which they committed themselves to achieving 30% representation of women in decision-making posts by 2005. In 2005, they set a 50% goal for 2015. These regional pressures, in part, help explain why southern African countries have higher rates of representation than those found elsewhere in Africa.*[129]

As a result of the Beijing Declaration and Platform for Action, the Southern African Development Community (SADC) enacted the *SADC Protocol on Gender and Development 2008.*[130] The 2008 SADC Protocol requires that 'States Parties shall endeavor (sic) that, by 2015, at least fifty percent of decision-making positions in the public and private sectors are held by women including the use of affirmative action measures.[131] On affirmative action the SADC Protocol requires State Parties to 'put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation'.

The SADC carries out longitudinal studies aimed at monitoring and evaluating the performance of their fifteen member states towards 30% women's representation in governance by 2005, and 50-50% gender parity in governance by 2015, and towards constitutional and legal rights, among other indicators.

By 2015, this gender parity had not been achieved, with the 2018 SADC Barometer reporting an average of 25% women's representation in Parliament, Cabinet and local government, and predicting *at best* an average of 36% women's representation in Parliament, and 29% women's representation in local government by 2020.[132] Detailed analysis of the 2018 barometer shows some indication of hope, although still far from achieving parity. South

127 *Aili Mari Tripp / Alice Kang*, The Global Impact of Gender Quotas, Comparative Political Studies 41 (2008), p. 341.

128 Ibid.

129 Ibid.

130 See: SADC Protocol on Gender and Development 2008, https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf (last accessed on 3 October 2020) article 12.

131 Ibid.

132 See: Gender Links, Barometer 2018 Gender and Governance, https://genderlinks.org.za/what-we-do/sadc-gender-protocol/sadc-protocol-barometer/sadc-gender-protocol-barometer-2018/barometer-2018-gender-and-governance/ (last accessed on 10 March 2023).

Africa achieved 50% women's representation in Cabinet, and over 40% women's representation in Parliament and local government,[133] followed closely by Mozambique, Tanzania, Zimbabwe, Namibia and Angola with over 30% in women's representation in Parliament (with Mozambique at 40%), Angola and Seychelles with over 30% women's representation in Cabinet, and Namibia and Lesotho with 40% and over in women's representation in local government (Lesotho having the highest overall in all fifteen member states).[134] The 2022 SADC Gender Barometer also shows some high figures of 40% and above in some chambers of Parliament in South Africa (46.7% in the Lower House), Zimbabwe (44.2% in the Upper House), Namibia (44.2% in the Lower House), Mozambique(42.2%), and Kingdom of Eswatini (40% in the Upper House).[135]

In the rest of Africa outside the SADC, Rwanda seems to be the only success story that has achieved gender parity.Rwanda constitutionalised gender quotas in 2003 at 30% for women in Parliament, complemented by voluntary party lists.[136] Women parliamentarians in Rwanda made up the highest number of women legislators worldwide, at 50% in 2003,[137] 56% in 2008, and 64% in 2013.[138] Uganda constitutionalised 30% reserved seats for women in Parliament in 1995,[139] as it's a reserved quota its achievement is meant to be predetermined.[140]

The type of quota matters.Whilst the outcome of reserved party quotas (in Tanzania, Rwanda and Uganda) is predetermined, compulsory quotas 'often result in noncompliance because they are imposed on parties that may not be interested in advancing women's political representation.'[141] This might partly explain the disastrous failure of the compulsory two-thirds gender quota in Kenya, despite judicial pronouncements for its enforcement.[142] Voluntary party quotas are of course dependent on the extent to which political parties are

133 Ibid.

134 Ibid.

135 See: Southern African Development Community, Gender and Development Monitor 2022, https://www.sadc.int/sites/default/files/2023-02/ENGLISH-SADC_Gender_Monitor_on_Women_in_Politics_%26_Decision-making_2022-FINAL.pdf (last accessed on 3 March 2023).

136 *Gretchen Bauer / Jenny E. Burnett*, Gender Quotas, Democracy and Women's Representation in Africa: Some Insights from Democratic Botswana and Autocratic Rwanda, Women's Studies International Forum 41 (2013), p. 105.

137 *Tripp / Kang*, note 127, p. 338.

138 UN Women, Revisiting Rwanda five years after record breaking parliamentary elections, https://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament *(*last accessed on 10 April 2021). See also: *Bauer / Burnett,* note 136, p.103.

139 *Sylvia* .

140 *Tripp / Kang*, note 127, p. 340.

141 Ibid, pp.339-340.

142 *Martha Gayoye*, The Role of the Courts in Constitution Making: The Two-Thirds Gender Quota in Kenya, Warwick 2023, https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.833892 (forthcoming).

committed to gender equality or want to use quotas as evidence of their support towards women's representation.[143]

Although Tripp and Kang attribute higher women's representation globally from 2000 onwards to gender quotas, they do acknowledge that other factors play a role, most prominent being that gender quotas work hand in hand with institutional factors such as electoral systems with proportional representation as opposed to majoritarian systems.[144] Some countries may actually adopt gender quotas and other constitutional equality provisions for reasons other than a commitment to gender parity, namely that

> *'Political leaders may pursue quotas because they want to appear "modern" and in tandem with changing international norms, because they do not want to appear regressive while neighboring (sic) countries make gains in female political representation, or because they want to play the gender card to drive a rift between themselves and their political opponents, especially in countries with strong or growing Islamicist movements. Others may use quotas to curry favor (sic) with female parliamentarians as another patronage group and obtain political support through them.'*[145]

Aili Mari Tripp examines some three Arab/Islamic autocracies that take such a stance in the Middle East and the Maghreb, including Morocco, Tunisia and Algeria.[146] Amina Mama had arrived at a similar observation with post-independence African countries that adopt women-friendly policies with no intention or commitment to gender parity:

> *During the postcolonial period, it has increasingly become incumbent upon independent states to display a commitment to improving the status and participation of women. A cynic might be forgiven for suggesting that with independence, African governments have found it expedient to exploit the gender question so as to receive economic aid in an international climate that has become increasingly sympathetic towards women's demands for greater equality.*[147]

Tripp's and Kang's study however found that despite ulterior motives of governments' adoption of women's rights, particularly those with predominantly Islamic populations, '…when quotas and religion are factored into existing models, Islam no longer appears to act as a constraint on women's representation. Numerous predominantly Muslim countries, such as Tunisia, Senegal, and Indonesia, have adopted quotas, raising rates of female repre-

143 *Tripp / Kang*, note 127, p. 340.

144 Ibid, pp. 357-358.

145 Ibid, pp. 340-341.

146 *Aili Mari Tripp,* Seeking Legitimacy: Why Arab Autocracies Adopt Women's Rights, Cambridge 2019.

147 *Mama*, note 45.

sentation in these countries.'[148] Tripp and Kang also attribute improvements to women's representations on gender quotas despite other barriers such as religiosity and negative attitudes towards women's leadership, and economic barriers.[149]

Despite this positive celebration of gender quotas, *masculinist meritocracy,* coupled with social privilege and notions of African communitarianism are still huge barriers, which has meant that affirmative action measures have not necessarily translated into women's empowerment.[150]

Perhaps we could heed Amina Mama's exhortation to examine the extent to which women's representation and gender politics brings about the liberation of women from all forms of oppression for *ordinary* women– which should be the goal of feminist as a popular struggle for women's emancipation.[151] Amina Mama does not define what she means by 'ordinary' woman, but seriously casts doubt on their emancipation and representation by gender politics that she terms as 'femocracy' – 'a feminine autocracy running in parallel to the patriarchal oligarchy upon which it relies for its authority, and which it supports completely.'[152]

Amina Mama asks us to ask the following questions of femocracy: 'Given that women have succeeded in establishing femocracies in several African countries, it is incumbent upon us to ask the question: can a femocracy result in changes in gender relations, or improve the prospects of ordinary women? Can femocracy be democratised? More generally, can state structures act as vehicles for ordinary women's struggles, or do they only serve the femocracy?'[153] Speaking of Nigeria's gender politics in its period of military rule, Mama writes:

> *'We can conclude from this evidence that femocracy has affected the gender politics of the nation, but not in the way that one might have hoped. It cannot be said to have enhanced gender equality or to have in any way challenged conservative attitudes to women. Instead 8 years of femocracy has generated promises to appoint token women, and made the parading of expensively attired wives into a political tradition. Absent from the political discourse is any discussion of more fundamental change. In the event of a transition to civilian rule, Nigerian women are therefore faced with the prospect of becoming media adjuncts to their spouses political campaigns, rather than making a more successful entry into politics.'*[154]

148 *Tripp / Kang*, note 127, p. 358.
149 Ibid, pp. 356-357.
150 *Tamale*, note 17, p. 211.
151 *Mama*, note 45, p. 41.
152 Ibid.
153 Ibid, pp. 41-42.
154 Ibid, p. 56.

Mama concludes that 'femocracy is not a viable political phenomenon, and that it does not lead to any sustainable change in women's political status, or to any enduring improvement in the lives of ordinary women. Nor can it be successfully transformed to create a democratic space for women.'[155]

The power of femocracy in the disenfranchisement of *ordinary* women should not be underestimated. In the 21st century, femocracy forms a powerful alliance with the imperialist 'rule of law translation' project in which women are not passive, but active participants in the translation and constitutionalising of international women's rights provisions – however, it is not all women. Elite women loyal to patriarchal oligarchies lead these constitution review processes alongside international actors, a space that an ordinary woman would never dream of due to their socio-economic and educational barriers. The *bread-and-butter* interests of ordinary women clash sharply with those of elite women who may indeed be interested in political participation – alas, their bread and butter are secure.

The tensions between elite women and ordinary women, also referred to sometimes as *grassroots* women's groups – apolitical self-help welfare groups[156] - was evident in Kenya's decade-long constitutional review process that gave rise to the Constitution of 2010, for instance. Although the review process was said to have been truly representative and democratic where the Constitution Review Commission of 2001-2004 collected views from all sections of the society,[157] tensions between the interests of grassroots women and elite women were rife.[158] Athena Mutua described these tensions between elite and grassroots women in the National Constitution Conference of 2004:

> *'…the charge that urban elite women inappropriately were seeking to represent poor rural women was explosive and seemed to give the delegates pause, especially district delegates. Although these district delegates appeared unlikely to classify themselves as poor rural women, their suspicion among the delegates, that of elite urban women, among other things, caused significant tensions campaign, and other women's groups observing the process…a diversity of women spoke about the urban/rural divide as well as other issues and sources of division among women.'*[159]

155 Ibid, p. 57.

156 *Kivutha Kibwana*, Women Politics and Gender Politicking: Question from Kenya, in: Joseph Oloka-Onyango (ed.), Constitutionalism In Africa: Creating Opportunities, Facing Challenges, Kampala 2001, p. 194; *Maria Nzomo*, The Impact of the Women's Decade on Policies, Programs and Empowerment of Women in Kenya, African Issues 17 (1989), pp. 15-16; *Maria Nzomo*, Kenya: The Women's Movement and Democratic Change, in: Leonardo A. Villalon / Phillip A. Huxtable (eds.) The African State at a Critical Juncture: Between Disintegration and Reconfiguration, Colorado 1998, pp. 170-173.

157 *Wanjiku Murabi Kabira*, Time for Harvest: Women and Constitution Making in Kenya, Nairobi 2012.

158 *Mutua,* note 90.

159 *Mutua*, note 90, p. 115.

More enduring is the question of the extent to which ordinary women's interests are represented in elective and governance bodies once elite women do join the table. The risk is always that gender quotas and constitutional gender politics may become tokenist inclusion in that they allow the tokenist inclusion of only a few elite woman loyal and implicated in patriarchal oligarchies that don't actually bring about the transformation of gender relations or the *true* representation of the interests of the masses.

It would become necessary that partakers of constitutional gender politics reflect on its consequences, for any hope of meaningful gender equality to be realised. Janet Halley, Prabha Kotiswaran, Prabha Kotiswaran, Rachel Rebouché and Hila Shamir urge us to practise what Max Weber refers to as the paradoxical ethics of an 'ethics of conviction', and an 'ethics of responsibility': '[…] the former is the will to do what is right […] to preserve the purity of one's intention no matter the damage they occasion – while to inhabit the latter "you must answer for the […] consequences of your actions.'[160] Elite women and international agencies involved in constitutional governance feminism that translate rights provisions into African constitutions ought to examine the consequences of such rule of law translation projects – whose interests does their constitutional politics serve?

E. Conclusion

I began with an exposition of the meaning and context of the postcolonial, and its relationship with the Global South and third world. All three terms have interconnected and contested historical, geopolitical and contested meanings, which have a direct implication for their theorising and knowledge production on constitutionalism in Africa.

Particularly in relation to a gendered constitutionalism in postcolonial Africa, I have framed the question as the extent to which there can be a distinct theorising away from existing literature on global feminist constitutionalism. I have located the answer to be both ontological and epistemic – around the coloniality of gender, coloniality of being, coloniality of power and coloniality of constitutionalism in Africa. All these colonialities operate on a gendered binary and Man-as-Citizen axis where Man (White, male and rational, initially Christian) is the desirable Subject of Constitutional law. Any inclusion of other categories can only be tokenist inclusion at best. Secondly, the reach of constitutional law is confined within the boundaries of the nation state as the only possible form of political organising.

My two-pronged argument has been that constitution making processes in Africa and the constitutionalising of women's rights bears colonial foundations of state formative practices post-independence, which continues to be perpetuated in rule of law translation post-1990s constitution review projects. The same colonial project that superimposed constitutions on post-independence states have taken on a new shape and form as donors and Western dominated international agencies busy with translating the rule of law into African

160 *Janet Halley*, *Prabha Kotiswaran, Halley, Janet, Prabha Kotiswaran, Rachel Rebouché* and *Hila Shamir*, Governance Feminism: An Introduction, Minneapolis 2018, p. XV.

constitutions, particularly for states undergoing post-conflict or post-authoritarian reconstruction and constitution (re)making. Both imperialist state formative practices reinforce the Man-as-Citizen and coloniality/modernity complex where the personal sphere (beyond the nation state) is left untouched or unregulated, but crucially where the daily lived realities of the ordinary African woman are concentrated. African governments adopt gender friendly provisions not because they are committed to gender equality but to appease the the international community (not to be seen as regressive) and international donor agencies.

Women involved in constitution making in post 1990s Africa are implicated in these two imperialist processes-elite women practicing what Amina Mama refers to as femocracy. Their involvement in international negotiations and rule of law translation constitution review/making projects is aligned with international interests and domestic patriarchal oligarchies that disenfranchises ordinary/grassroots women. Grassroots/ordinary women are concerned not merely with having a seat at the table (governance) but crucially bread and butter issues. Additionally, their daily lived realities are likely to be concentrated in the private sphere of daily struggle, removed from the opportunities that their elite counterparts have within the State, either due to their comparative educational advantage and their patriarchal and international alliances. The constitutionalising of women's rights, equality provisions and affirmative action measures such as gender quotas are often tokenist in that they do not lead to transformation of gender relations or to an improvement of their socio-economic status. Rather, this tokenist inclusion of elite women serves their political interests and those of their patriarchal oligarchies and imperialist international alliances. Meanwhile, the struggle for gender equality and true transformation of ordinary women's lives continues – nothing has changed yet again.

I have made use of Helen Irving's constitutional agency test in examining the extent to which women feel a sense of belonging to the constitutional community, which involves asking three questions: whether the constitution includes women in constitutions, whether women can make judicial claims to those provisions, and whether courts will take them seriously.[161] I have applied this constitutional agency test to the African context by arguing that first, women's constitutional provisions are useless if they do not also address the personal sphere that is the lived realities of women's lives. Secondly, claims should also be capable of being made beyond the judicial apparatus of the nation-state, and women should be able to make choices and weigh the risks that come with engaging with either formal courts or traditional dispute mechanism. Lastly, we really need to take an 'ethics of responsibility' for both the intended and unintended consequences of engaging with

161 *Irving*, note 5.

constitutions: for whom governance feminism is for – whose interests does it serve? If the ordinary woman cannot lay claim to any stakes, then it cannot be said to be feminism at all.