Possibilities of New Approaches to Gender, Security and Constitutionalism: A Living Gender Probe into Kenyan National Security Architecture in the Constitution

By *Emmah Khisa Senge Wabuke**

Abstract: This paper situates itself within existing feminist constitutionalism analyses by noting that constitutions and constitutional processes are gendered and that constitutional norms may have different consequences for different genders. However, it attempts to extend these existing theories to interrogate how, if at all, feminist constitutional approaches may make credible interventions into the national security architecture given in the constitution. To this end, this paper proposes 'living gender' as a model of analysis. This model requires a deliberate inclusion of gender in the architectural design of constitutional institutions, which in this case, is the Kenyan National Security Framework. As with most feminist approaches, living gender is sceptical of rights-based clauses on equality and non-discrimination that do not interrogate the underlying masculine structures of constitutions. In this paper, I propose a three-pronged approach, including, ontological, locus and content concerns. To test this model, this paper uses the national security architecture in the Constitution of Kenya, 2010 as a case study.

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A. Introduction

In assessing the Kenyan national security architecture and its constitutional context, this paper sets the following question: How can a post-colonial post-conflict state achieve meaningful gender equality within its national security architecture? As an initial premise, this paper asserts that, one, apparent gender-neutral Constitutions often have disparate outcomes for different genders.[1] Connected to this, this paper asserts that inclusion of gender within the larger constitution-making agenda in new age Constitutions is not, at face value, a controversial nor radical suggestion. In fact, Constitutions promulgated in the past

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* PhD Candidate – University of Cambridge (Centre for Gender Studies); Gates Cambridge Scholar, eksw2@cam.ac.uk.

1 *Charlotte Skeet,* Gender And "Modern" Constitutionalism: The Treaty Establishing A Constitution For Europe, Northern Ireland Legal Quarterly 58 (2005), p. 144.

three decades by varied countries across the globe, including, in Chile, Kenya and Rwanda, have included rights-conferring gender-specific clauses.[2]

However, most of these clauses are often set out as the only measurement of the impact of the Constitution on gender. Put differently, gender constitutionalism in modern-day Constitutions chiefly (and sometimes solely) employ a rights-based approach by calling for gender equality and non-discrimination, especially in situations of political representation, without interrogating other key architectural areas of the Constitution.[3] Left untouched, these constitutional institutions remain masculine, and are therefore, unable to deliver on the promised equality.

To effectively respond to the main argument, this paper shall be contextualised within the Kenyan constitutional journey and architecture. While Kenya is not a post-conflict state, its current Constitution was, nonetheless, borne from a situation of political violence following disputed elections in 2007.[4] The Constitution, which was promulgated on 27 August 2010, isolates Chapter 14 to deal with 'national security' and includes, among others, provisions on principles of national security, national security organs and the establishment of the National Security Council.[5] From this, Parliament has enacted several laws and policies, including, Security Laws (Amendment) Act, and Prevention of Terrorism Act. [6]

In this paper, I shall argue that, Chapter 14, and its subsequent laws, has failed to adopt a gendered security approach in the content and interpretation despite the overarching equality-conferring provisions given in Article 27 of the said Constitution. In situating itself within this gap, this paper attempts to first, demonstrate the pitfalls of a rights-based approach in constitution-making and design in Kenya; lack of a gendered security approach within the existing constitutional framework in Kenya; and the negative implications that flow thereon.

Based on existing conceptual frameworks in feminist constitutional analyses and feminist security studies, this article develops an analytical model that responds to the specific limitations in the Kenyan context. This model, which I term 'living gender' has three concerns: ontological (What is gender?); locus (Where is gender in national security architecture in the Constitution?); and content (What issues comprise gendered approaches to security?'). This theoretical framing is important in that it will help us not only question the continued masculinization of national security in law and practice despite the fact that gender implications of security are gaining legal and policy traction, but also question the underlying colonial currents existent in the Kenyan context.

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2   *Dina Francesca Haynes, Fionnuala Ní Aoláin, and Naomi Cahn*, Gendering Constitutional Design in Post-Conflict Societies, William and Mary Journal of Women and the Law (2011), p. 509.

3   *Kathleen M. Sullivan*, Constitutionalizing Women's Equality, California Law Review 90 (2002) 747.

4   *Yash Pal Ghai / Jill Cottrell Ghai*, Kenya's Constitution: An Instrument for Change, Nairobi 2021, p. 148.

5   *Constitution of Kenya* 2010, Article 238.

6   Prevention of Terrorism Act No. 30 of 2012, Laws of Kenya.

Part B of this article explores common theoretical frameworks on gender and constitutionalism, including, distinctions between 'old' and 'new' constitutionalism; equality provisions in constitutional architecture and design, including, pitfalls of formal and substantive equality; and possibilities of extending these forms to include equity and agency. I shall also highlight inadequacies of a rights-conferring approach in feminist constitutionalism.

In Part C, I shall explore constitutional lacunas in existing feminist constitutionalism approaches, that is, an appraisal of how (if at all) security is gendered in transformative constitutions. This shall include enunciating theories surrounding feminist security studies, including, standpoint feminism, liberal feminism, and poststructuralist feminism and how these theories translate into methods.

Part D argues that the analytical model 'living gender' provides an opportunity to address the gendered approach to the security architecture provided for in the constitution. This model attempts to offer a theoretical pathway by highlighting a three-part process with the following concerns: ontological, locus and content. In channelling this pathway, I attempt to reimagine and redefine necessary security institutions by providing guidelines for feminist constitutional analyses and emphasizing the utility of methods and disciplines beyond normative and legal approaches.

In Part E, I shall specifically appraise the Kenyan security architecture in the 2010 Constitution and interrogate the applicability of living gender within this context. This inquiry will encompass constitutional design (that is, specific chapters on national security in the Constitution); and constitutional practice, dealing with selected caselaw touching on national security in the country.

B. Gender and Constitutionalism: Some Theoretical Frameworks

While different strands of understanding the intersection between gender and constitutionalism exist, the underlying common thread is that Constitutions are inherently gendered and bear different impacts on different genders.[7] This differentiation is found in many foundational norms of modern-day constitutions, including, in designing access to political power by different genders; rights-conferring provisions; citizenship rights and duties; and the masculine natures of different forms of government, which bear an impact on women's ability to be included in the political process.[8]

In addition, feminist interventions in Constitutional Law include critiquing the meaning and application of constitutionalism. Some scholars have deconstructed constitutionalism into 'old' and 'new' constitutionalism in which the former assumes constitution-making as creating a final and perpetual product, that is, representation of 'conclusion of negotia-

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7 See, for example, *Beverley Baines / Ruth Rubio-Marin* (eds.), The Gender of Constitutional Jurisprudence, Cambridge 2005, p. 10; *Wanjiku Kabira,* Time for Harvest: Women and Constitution Making in Kenya, Nairobi 2012.

8 *Helen Irving*, Gender and the Constitution: Equity And Agency In Comparative Constitutional Design, Cambridge 2008, p. 31.

tions'[9] while 'new constitutionalism' views the Constitution as flexible and responsive to the societal changes.[10] This theory encompasses transformative constitutionalism, defined by Karl Klare as follows:

By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.'[11]

Development of transformative constitutions has formed the basis of both constitutional architecture and judicial interpretation of many post-conflict post-colonial states by comprising express provisions that aim to transform rather than preserve the constitutional order, including, articles on equality; and socio-economic rights.[12]Judicial actors have also characterised 'transformative constitutionalism' as defining features in these states, and have embraced different tools to enhance this feature, such as use of Kenya's hyper-amendment history to prevent an unlawful change of Constitutional architecture.[13]

Feminist critiques of constitutionalism include women's experiences of epistemic violence, that is the inability of oppressed persons (in this case, women) to articulate their issues in their voices, which results in historical erasure of their realities.[14] This historical exclusion is found in both new and old forms of constitutionalism through selected provisions, including, citizenship rights (including, who is eligible to pass citizenship and/or

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9 *Iving*, note 8, p. 25

10 *Reva B. Siegel,* Text in Contest: Gender and the Constitution from a Social Movement Perspective*, University of Pennsylvania Law Review 150 (2001), p. 314.

11 *, Karl Klare,* Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights, (1998) p. 150.

12 *Berihun Adugna Gebeye,* Transformative Constitutionalism and the Basic Structure Doctrine: A New Account from Kenya*, http://www.iconnectblog.com/2021/05/transformative-constitutionalism-and-the-basic-structure-doctrine-a-new-account-from-kenya/ (last accessed 10 February 2022).

13 *David Ndii and Others v Attorney General and Others (2021) eKLR where the Court noted at para 473:*

   To be sure, there is no clause in the Constitution that explicitly makes any article in the Constitution un-amendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited. The structure and history of this Constitution makes it plain that it was the desire of Kenyans to barricade it against destruction by political and other elites. As has been said before, the Kenyan Constitution was one in which Kenyans bequeathed themselves in spite of, and, at times, against the Political and other elites

14 *Gayatri Spivak,* Can the Subaltern Speak? In: Cary Nelson / Lawrence Grossberg (eds.), Marxism and the Interpretation of Culture, Urbana 1998, p. 271.

enjoy citizenship rights) which may result in what Alan Cairns terms as 'constitutional stigmatisation'.[15]

Whatever the case, some scholars have argued that this historical exclusion provides an opportunity for feminist drafters to engage in a back-to-basics exercise in constitution making. Kathrine Sullivan, for example, provides a helpful guide on major takeaways from a feminist-guided constitutional process.[16] These include making deliberate choices between general provisions on equality versus specific articles on sex equality; and drawing distinctions between sex and women.[17] Other important choices relate to the public/private divide, and particularly, whether the constitution should prohibit both state and private discriminations and the import of such a provision; and provision for either enforceable norms or aspirational statements or both.[18]

Constitutions, styled as transformative have embodied most if not all of these guidelines. In Kenya, the inaugural Chief Justice of the 2010 Constitution, Willy Mutunga has noted that 'Our progressive and transformative Constitution, if implemented, would put Kenya in a social democratic trajectory, under a human rights state, signaling equitable distribution of resources, sustainable development and prosperity; and that to implement our Constitution our jurisprudence must reflect social justice'.[19]

This position has been variously affirmed by Kenyan jurists, including, in *John Kabui Mwai v Attorney General*[20] where the Court found, in part:

> *'The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio - economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio - economic deprivation to one based on equal and equitable distribution of resources.'[21]*

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15 *Alan Cairns,* Constitutional Stigmatisation in**:** Patrick J. Hanafin / Melissa S. Williams Identity, Rights and Constitutional Transformation, London 1991, p. 13.

16 *Sullivan*, note 3, p. 747.

17 Ibid.

18 Ibid.

19 *Willy Mutunga,* Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution - Lameck Goma Annual Lecture, Lusaka 2017, p.19. <gphand-lahdpffmccakmbngmbjnjiiahp/http://saipar.org/wp-content/uploads/2017/09/Paper-by-Mutung a.pdf> (accessed 20 February 2022).

20 *John Kabui Mwai v Attorney General* Petition No. 15 of 2011 [2011] eKLR; See also, *Mwenda* Martin, The Context of Transformative Constitutionalism in Kenya, <https://ssrn.com/abstract=26 24928;> (accessed 20 February 2022).

21 Ibid.

Similarly, South African Judge, Justice Langa expressed that, 'the ultimate goal of social transformation is to reach a level of substantive equality, where everyone is able to lead a life consistent with human dignity'.[22]

C. Constitutionalism Lacunas: Theorising Gender and the Security Sector

As the foregoing paragraphs have evidenced, analysis of gendered constitutionalism has focused on agitating for inclusion of rights-conferring provisions. There are important and necessary reasons for this. For one, a rights framework (in general) provides a possible pathway to enforcement. Put differently, rights-conferring provisions provide written reference points to the beneficiaries and enforcers of equality measures in the specific jurisdiction. In that way, these references enable legal actors to implore for judicial intervention in situations where the written provisions remain unfulfilled or where specific actions by the state or other actors directly contravene the express wording of these clauses in the Constitution.

Additionally, rights-based approach to gendered constitutionalism, when well-written, can override the inadequacies of formal equality. Whereas formal equality provisions in the Constitution may enunciate a general prohibition on discrimination based on a person's sex or gender,[23] substantive equality extends this inquiry by looking at the results of any action to find out whether or not they are equal.[24] Therefore, in addition to a prohibitory clause on sex or gender discrimination, substantive equality provisions may also promote 'positive discrimination' in an effort to enhance equal results/outcome of governmental or private action.[25] The equality provision in the Kenyan Constitution, for example, first lists women as a disadvantaged group[26] and further provides that, 'To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.'[27]

However, a singular use of a gendered rights-based approach has several drawbacks. One, a rights-based approach centralises legal rights as the most important (and sometimes, the only) catalyst to gendered social change.[28] Transformative gendered constitutionalism requires other forms of change alongside rights-based approaches, such as,political science,

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22 *Langa* Transformative constitutionalism' Stellenbosch 2006, <http://law.sun.ac.za/portal/page/port al/law/index.english/news/2006/Pius%20Langa°/o20Speech.pdf> (accessed 23 February 2022).

23 *Catharine Mackinnon,* Sex Equality, Minnesota 2017 p. 5.

24 Ibid.

25 *Irving*, note 8, p. 3.

26 Constitution of Kenya, note 3, Art 27

27 Ibid.

28 *Irving,* note 8, p. 4.

history and literature which may provide case examples of gender and its inclusion in constitutional systems.[29]

A second drawback to this approach is that this gendered rights-based approach fails to interrogate the constitutional architecture and design.[30] Instead, it almost unilaterally focuses on Bill of Rights 'with limitations of government rather than a full constitution.'[31]

Other alternative approaches have, therefore, been suggested. Irving, for example, suggests 'three dimensional textual, structural and applied perspective, within an interest and rights based framework'[32] which questions not only the words in the constitution but also its structure and its application in practice. Another helpful framework is 'feminist constitutional agenda' which calls for a comprehensive feminist analysis to address constitutional rights, constitutional agency, constitutionally structured diversity, and constitutional equality.'[33]

While making several references to rights, these frameworks are helpful to this paper in that they go beyond a rights assessment to other aspects of constitutional design, including, selection of structure of government, representation in political processes, and gender sensitization of relevant judicial actors.[34] However, there is scant literature on gendered constitutionalism and national security architecture. It is this lacuna which this paper seeks to respond to.

Although legal theory provides little guidance on how to effectively design a feminist constitutional analysis, feminist perspectives on national security have received significant ventilation in international politics and relations. As noted by Carol Cohn there is an 'old story about war where war is considered to be a quintessentially masculine realm where men do the fighting and the dying' while women are at worst, absent or at best, peripheral addendums to the story.[35] This story is flawed in that it fails to appreciate the diverse masculinised experiences of both war and women, which results in diverse experiences for women, including as victims, direct perpetrators, supporters and more controversially, as victim-perpetrators.[36]

Notwithstanding this, gender as a term in discussion of women in war and national security remains a notoriously difficult term to define due to the variety of ways it is

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29 Ibid.

30 *Irving,* note 8, p. 25.

31 *Irving*, note 8, p. 27.

32 Ibid.

33 *Beverley Baines and Ruth Rubio-Marin,* The Gender of Constitutional Jurisprudence, Cambridge 2004, p. 6.

34 See, for example, *Paula A. Monopoli*, Gender and Constitutional Design, Yale Law Journal 115 (2006), p. 2643; *Arend Lijphart*, Constitutional Design for Divided Societies, Journal of Democracy 15 (2004), 96.

35 *Carol Cohn,* Women and Wars, Cambridge 2013, p. 2.

36 *Joshua Goldstein,* War and Gender: How Gender Shapes the War System and Vice Versa, Cambridge 2001, p. 6.

deployed, either as a pseudonym for 'women's issues'[37] or as a cultural/social issue independent of 'sex' which is a biological issue. A helpful beginning of analysing gender in security and conflict is found in Cynthia Enloe's seminal work, *Bananas, Beaches and Bases*.[38] Here, Enloe attempts to locate where women are in war/security studies taking up the argument that the 'personal is political is international', that is, power relations in the political realm bear an impact on the personal lives of women.[39] This impact ranges from division of labour, home entertainment and sexual relations.

In respect of division of labour, Enloe, for example, argues that men's participation in security (political) is dependent on women staying at home (private).[40] Shepherd (2012) employs this 'personal is political' argument in respect of home entertainment where she demonstrates how leisure at home (that is, watching television shows) may help generate ideas around gender and violence which, when transplanted into the political realm bear significant consequences to understanding gender and violence.[41]

In 'Sex Among Allies',[42] Katherine Moon (1997) attempts to analyse how sexual activities between Korean prostitutes and American soldiers, which are private relations, influenced the military policies between the two countries in the 1970s. To prevent American withdrawal of troops from the region, Korean authorities engaged in a sweeping clean-up campaign to create a 'welcoming' environment for American soldiers, who were widely viewed as important customers for sex work in Korea. This initiative included registering prostitutes, enforcing STD examinations and requiring prostitutes to carry venereal disease cards. These prostitutes were transformed from 'Western whores' into 'personal ambassadors' as an attempt to maintain diplomatic and military relations between the two countries.[43]

Feminist frameworks of gender, war and security are often grouped into liberal feminism, standpoint feminism, and post-structuralist feminism. Liberal feminists, in general, view power as a resource that should be redistributed equally between men and women who are viewed as perfectly equal.[44] This view is extended to all spheres of social life, including, war. From this perspective, exclusion of women from participating in war is

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37 *Cohn,* note 35, p. 3.

38 *Cynthia Enloe,* Bananas, Beaches and Bases: Making Feminist Sense of International Politics, California 2014.

39 *Laura Mcleod,* Personal-Political Imaginations: Feminism, Gender and Security in Serbia, 2015, <https://www.e-ir.info/2015/07/17/personal-political-imaginations-feminism-gender-and-security-in-serbia/> (accessed: 25 January 2022).

40 *Enloe,* note 38, p. 8

41 *Laura Shepherd,* Gender, Violence and Popular Culture: Telling Stories, Oxon: 2012.

42 *Katherine Moon,* Sex Among Allies Military Prostitution in U.S – Korea Relations New York: 1997, p. 75.

43 *Moon*, note 42, p.76

44 *Judith Loeber,* Gender Inequality: Feminist Theories and Politics, Oxford 2010, p. 23.

discriminatory as women are capable and equal to men.[45] However, as in other spheres, liberal feminists' analysis of war faces two significant critiques. For one, liberal feminists are faulted for being blind to women's different attributes from men.[46] In addition, liberal feminists are criticised for not taking into account structural inequalities between the genders, and are faulted for incorporating an 'Add Women and Stir' approach to war and security studies.[47]

On the other hand, standpoint feminist theorists argue that gender should be a central category of analysis in war and security studies. Put simply, feminist standpoint theorists argue that women may provide important reflections on social phenomena due to their unique social location as a socially disadvantaged group. These theorists believe that observing the world, or a gendered social phenomenon through the eyes of the woman, provides 'an epistemic advantage regarding politically contested topics related to the women's subordination, relative to the perspectives of the groups that dominate them'.[48]

In developing feminist perspectives on security, standpoint theorists agitate for the centrality of gender as a category of analysis. This approach provides several important insights into conventional security studies. Tickner notes that in centralising gender in security studies, standpoint feminist theorists enable a bottom-up approach to understanding war and security by analysing their impact at the micro-level and in so doing, help 'tell us something new about the causes of war that is missing from both conventional and critical perspectives'.[49]

A feminist standpoint theory will also enable one to question the marginalisation and/or misrepresentation of women's voices in security discourse among policymakers. In analysing the security discourse during the bombing of Indochina during the Vietnam War, Jennifer Milliken and David Sylvan noted how policymakers portrayed South Vietnam as weak and feminised while North Vietnamese were described as 'brutal fanatics'.[50] This gendered language had a direct impact on the crafting of the bombing policy in the region. Gender-differentiated discourse is also visible during military training exercises where 'the Enemy', that is, the military's opponents, whoever they may be, is denigrated using effeminized language.[51]

This strand of feminist theory has been criticised for relying on the notion of 'authentic' female experiences and for adopting a strict male-female dualism in armed conflict. The

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45 *Goldstein,* note, 36, p.38.

46 Ibid.

47 *Francine D'Amico,* Feminist Perspectives on Women Warriors, Peace Review 1996, p. 380.

48 Ibid.

49 *J. Ann Tickner,* Gendering World Politics: Issues and Approaches in the Post-Cold War Era, New York 2001, p. 48.

50 *Jennifer Milliken / David Sylvan,* Soft Bodies, Hard Targets and Chic Theories: US Bombing Policy in Indochina, Millenium Journal of International Studies 25, p. 54.

51 *Cohn,* note 35.

reality, however is that women are sometimes complicit in construction of gendered war identities.[52] The male-female dualism is also fallacious when looking at women's roles in armed conflict which range from victims to perpetrators to victim-perpetrators.

Taking into account the shortcomings of standpoint feminism, some theorists instead favour post-structuralist feminism. At its core, poststructuralist feminism views gender in war as 'fluid, contextual and arbitrary' and is outwardly suspicious of any unique male or female experiences during insecurity and armed conflict.[53] Instead, these feminist theorists view the categories of 'man' and 'woman' as unstable and reject essentialising and gendering experiences.

Poststructuralist feminists view masculinity and femininity as ever-changing concepts during armed conflict, as in, World War One, where male artillery crew fought in drag costumes.[54] In discouraging essentialised gender concepts, poststructuralist feminists note that even what is understood as feminine roles in war is always a moving target based on the different capacities an individual woman may occupy during the conflict.

A fictional example on the fluidity of gender roles in conflict is given in 'The Shadow King'[55] where Hirut, a female soldier and protector of 'Emperor' Haile Selassie during the 1930s Italian Invasion of Ethiopia was still expected to fulfil her gendered roles after removing her military fatigue, including as a mistress to an officer in the Emperor's Army and nurse to wounded soldiers. In different parts of the novel, Hirut seesaws between 'Kebur Zebegna, a member of the emperor's elite army',[56] an officer's unwilling mistress and a nurse to wounded male soldiers where she 'applied crushed leaves and honey to almost every kind of wound…and packed open sores with turmeric and ash and held trembling hands until the pain has subsided'[57]

While this feminist perspective has been praised for favouring 'otherness' as a liberalised understanding of gender, it has nonetheless been criticised for undermining collective action through its embrace of the fluidity of identity, including, gender identity.

Although the larger part of this section has sought to differentiate the schools of feminist thought, it is important to acknowledge that significant points of convergence exist. These include a general acceptance that gender matters in violence, and continued existence of subordination of the 'other', in favour of a masculinised class.

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52 *Jean Bethke Elshtain,* Women and War, Chicago, 1987, p. 169.
53 *Spike Peterson and Anne Sisson Runyan*, Global Gender Issues: Dilemmas in World Politics, Colorado 1993, p. 22-25.
54 *Goldstein,* note, 36, p. 50.
55 *Maaza Mengiste,* The Shadow King, New York City 2020, p. 238.
56 *Mengiste,* note 55, p.169.
57 Ibid.

D. Living Gender as An Analytical Model on Gender, Security and Constitutionalism

This section introduces living gender as a possible analytical framework in interpreting convergences between national security, gender and constitutionalism. I must note at the outset that living gender is not a rejection of existing feminist constitutionalism analyses, most of which are enunciated in Parts B and C of this article.

Instead, this framework attempts to extend the said existing approaches to gender, security and constitutionalism through rearranging the intersections into three main concerns: ontology (who is gender); locus (where is gender in constitutionalism and security studies); and content of gender within the larger constitutional framework on the country's security sector.

I. Ontology Concern or Who Is Gender?

Gender as ontology is a broad inquiry into 'what type of thing genders are, how they are created and maintained, and what it is to be gendered'.[58] It also questions the 'natural' nature of gender and what role politics play in constructing and/or maintaining "sex" and "gender" categories.[59] There are many ways to examine gender from its ontological perspective but for purposes of this model, we select 'the woman question' as the best pathway. This is because of the question's theoretical origin in public law, and specifically in the Women's Suffrage Movement in the United States of America where this debate was referred as such because the campaign raised inquiries on women's place in the political organisation of the state, including their incomplete recognition of citizens and their unsettled in the country's constitutional order.[60] This methodology has also received scholarly attention by feminists away from legal spaces.[61]

In sum, the woman question seeks to 'identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.'[62] Cochav Elkayam-Levy designed a three-stage analysis of the woman question as follows. In its first stage, the 'woman question' takes a descriptive form, which identifies and describes the impugned legal norm in order to 'fully comprehend the scope of international over-sight, covering relevant international instruments, declarations, resolutions, reports, and individual communications.'. The second stage involves an impact assessment where the identified norm is

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58 *Labont Center For Ontology / Department Of Philosophy And Educational Science, University Of Turin*, Ontology of Gender (1999) <https://labont.it/areas/ontology-of-gender/> (accessed 20 March 2022).

59 Ibid.

60 *Skeet,* note 1, p. 435.

61 *Carol Gould / Marx Wartofsky,* The Woman Question: Philosophy of Liberation and the Liberation of Philosophy, in: Woman And Philosophy: Toward A Theory Of Liberation, New York City 1976, p. 5.

62 *Skeet,* note 1, p. 433.

measured against its impact on the lived realities of women while the third stage, 'transformative reconstruction' seeks to transform rather than simply modify the existing context.[63] This reconstruction goes beyond questioning norms analysis to incorporate appraisal of social structures and institutions and their impact on invisibilising women or gendered issues within the structures.[64]

The woman question provides a helpful guide to the living gender methodology in several respects. One, this question provides a unifying thread among multiple feminist approaches. As noted in Part D, feminist security studies comprises many disparate understandings of feminism and gender. The woman question will enable policymakers to be guided by multiple strands rather than being confined to select only one.[65]

Second, the woman question creates an enabling environment to extend the question beyond women's lived realities to experiences by other genders. The woman question provides an avenue to interpret gender as a spectrum and how other genders are mis/unrepresented within the larger context of constitutionalism and security studies. beyond the binary experience.[66] The woman question enables an interjection of a queer theory analysis into a rather binary assessment of how gender (which is often read as synonymous to women) is conceptualised not only in constitutionalism but also in security studies.[67]

Even where it is limited to persons who identify as women, the woman question provides an opportunity for an intersectional analysis on the impact of different women within the larger sphere of constitutionalism and security studies. This method strives for a greater understanding of the consequences that specific norms or practices have on women or persons who identify themselves as women, and further, how different identities may intersect in different women which increases their vulnerabilities.

This method is uniquely positioned to question on these intersectionalities, especially when coupled with the use of feminist narratives. Narratives, as modes of analysis or style of writing 'offers a toolbox to formulate, compare and challenge different interpretations of events and actions'.[68] Narrative theory ensure personalised bottom-up epistemological approaches by reclaiming 'the importance of everyday life to understanding global processes...presenting alternative voices (and consequently unheard stories) of peoples, places, and events that are central to the unfolding of international affairs'.[69]

63 *Skeet,* note 1, p. 438.

64 Ibid.

65 Ibid.

66 See, for example*, Jamie J. Hagen*, Queering women, peace and security, 92 International Affairs, p. 313 – 332.

67 Ibid.

68 Wibben, Annick T.R. 2011. Feminist Security Studies: A Narrative Approach. London & New York: Routledge --2016a. Researching War: Feminist Methods, Ethics & Politics. London & New York: Routledge

69 Moulin, Carolina (2016). Narrative. In: Mhurchú, Aoileann Ní and Shindo, Reiko (Eds.) Critical Imaginations in International Relations (pp. 136-152). New York: Routledge

Both the woman question and feminist narratives ensure that focalization[70] (that is, the relation between who perceives and what is perceived) is made from the specific woman's perspective, in all her/their intersecting identities, including, race, ethnicity, nationality, disability or sexuality. Feminist narratives, as part of the woman question method, call for us to measure the silences of the respective laws or policies that is, 'investigating, identifying, and measuring…the deviation'[71] as 'it reveals how the substance of law may silently and without justification submerge the perspectives of women'.[72]

In combining the woman question and feminist narratives, living gender enables us to question the spectrum of women and gender and how persons within this spectrum experience security structures given within the constitutional framework.

II. Locus Concern or Where is Gender in Constitutionalism and Security Studies?

This concern attempts to locate the position of gender within the larger disciplines of constitutionalism and security studies. The living gender model proposes that these outwardly-disparate disciplines find a meeting point through an interdisciplinary socio-legal approach.

Socio-legal scholarship merges two broad concepts: law and society, which makes it hard to know how to define it, be it as a 'discipline in its own right or as a research approach or as an orientation or way of understanding the world or as a political commitment'.[73] Whatever the case, socio-legal studies call for a methodological approach which embodies a multidisciplinary research inquiry, by combining different methods and theories.[74]

As Levin notes, socio-legal studies recognises that law is not an autonomous discipline but is deeply anchored in society.[75] Therefore, this methodology seeks to investigate 'how law both reflects and impacts culture, and how inequalities are reinforced through differential access to, and competence with, legal procedures and institutions'.[76] Put simply, then, socio-legal researchers situate law in society rather than law and society and understand law as cultural, ideological, societal and political.

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70 *Akanksha Mehta / Annick T.R. Wibben,* Feminist Narrative Approaches to Security Microsoft Word - Accepted Version - Mehta and Wibben - Feminist Narrative Approaches to Security - Edited Version 2 6080 words.docx (gold.ac.uk)

71 *Gayatri C. Spivak*, Can the subaltern speak?, in: Cary Nelson / Lawrence Grossberg (eds.), Marxism and the Interpretation of Culture, Urbana 1988, p. 287

72 *Mehta / Wibben*, note 70, p. 9.

73 *Naomi Creutzfeldt / Marc Mason / Kirsten McConnachie* (eds.), Routledge Handbook of Socio-Legal Theory and Methods*,* New York 2020, p. 10

74 Ibid.

75 FJ Levine, Goose Bumps and "The Search for Signs of Intelligent Life" in Sociolegal Studies: After Twenty-Five Years, Law & Society Review 24 (1990), pp. 7–33.

76 Ibid.

To effectively do so, socio-legal studies must be understood from the point of sociological realism, that is, that it is important to examine how social relations affects the law and its converse, how the law affects social ordering.[77] This examination includes how the law is socially embodied, how it was historically constructed and how it is presently applied.[78]

Feminist studies and socio-legal scholarship share a closeness in that both are concerned with how law and society affect each other. Broadly speaking, both of these research areas view law as, depending on the context, either as a dependent variable affected by social process or as the independent variable influencing the society.[79] Although feminist socio-legal studies has been employed in varied contexts, the connecting concern in all these situations is the inquiry of how the gendered 'socio' affects the 'legal'.[80]

Feminist socio-legal scholarship follows two main tangents. One, this scholarship critiques gender-blind and gender-neutral laws which are not alive to the gendered ordering in the society, and hence, construct legal policies that disadvantage the societally-constructed inferior gender.[81] The second strand critiques gender misrepresentations in the law, that is, laws constructed on mistaken beliefs on how gender operates in society.[82]

To avoid these missteps, the living gender model adopts a conscious feminist approach to socio-legal methodology which deliberately includes and centralise gender analysis with its multiple intersectionalities and expressions. The utility of feminist socio-legal methodology in this model cannot be gainsaid. For one, socio-legal methodology enables an important investigation on how social ordering may be consolidated into the law. Tied to this is the fact that the socio-legal approach is the best tool to identify potential guidelines for developing responsive laws that augur well with the targeted communities and in that way rely on the law's rule-making and enforcement character to ensure continued practice.

III. Content Concern or What Gender Issues are Found in Security and Constitutionalism Analyses?

Living gender is also concerned with a content-based analysis of feminist constitutionalism and security studies. In other words, living gender looks into how gender is expressed within the overall security architecture in the Constitution. Gender within security architecture has either been excluded in the overall architecture or considered separately from the mainstream format. A good example of a separatist approach is the failure of constitutional frameworks to integrate the Women, Peace and Security Agenda (WPS).

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77 *John Clarke*, The Contested Social in Dermot Feenan, Exploring the 'Socio' of Socio-Legal Studies, New York 2013, p. 33.

78 *Clarke*, note 77, p.38.

79 Ibid.

80 *Rosemary Hunter*, The Gendered 'Socio' of Socio-Legal Studies, in: Dermot Feenan (ed.), Exploring the 'Socio' of Socio-Legal Studies, New York 2013, p. 206.

81 *Hunter*, note 80, p. 205.

82 Ibid.

The WPS Agenda is essentially a series of United Nations Resolutions that seek to respond to a global 'understanding of the impact of armed conflict on women and girls, and developing effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security'.[83]

Since 2000, the UN has supplemented the Resolution 1325 with eight other Resolutions, which collectively form the Women, Peace and Security Agenda.[84] As Karen Barnes notes, read together, these Resolutions reveal three common themes, now known as the WPS Pillars.[85] These pillars are protection of women, prevention of conflict and participation of women in peace processes.[86]

Resolutions 1820 (2008), 1888 (2009), 1960 (2010), and 2106 (2013) are mostly concerned with the first pillar, that is, 'protection from and ending impunity for sexual and gender-based violence in armed conflict'.[87]By labelling sexual violence as war crimes, these Resolutions view sexual violence in armed conflict as a deliberate weapon of war.[88]

Subsequent Resolutions largely focus on the third pillar, 'participation of women in peace processes' by calling for women's participation and leadership in all aspects of conflict prevention, relief and recovery, including prevention of violent extremism.[89]The WPS Agenda sets out states' obligations in respect of women and armed conflict, including, 'undertaking comprehensive reforms…with a view to bringing perpetrators of sexual violence in conflicts to justice'.[90]

In an effort to satisfy their obligations under the WPS Agenda, many states have developed National Action Plans (NAPs). NAPs are considered an important tool for implementing the WPS Agenda as they act as the bridge between domestic affairs and international obligations for respective states by providing specific tangible actions whose impacts may be adequately monitored and evaluated.[91]

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83 *UN Security Council*, S/RES/1325, (2000).

84 *Carol Cohn et al,* Women, Peace and Security Resolution 1325, International Feminist Journal of Politics (2004) p. 133.

85 *Karen Barnes,* Turning Policies into Action? The European Union and the Implementation of UN-SCR 1325, in: Karen Barnes / Funmi Olonisakin (eds.) Women, Peace and Security: Translating Policy into Practice, Oxford 2011.

86 *Paul Kirby and Laura Shepherd,* The futures past of the Women, Peace and Security agenda, International Affairs 92 (2016), p. 379.

87 *Susan Hutchinson,* Leading the Operationalisation of WPS, Women and National Security (2018) p. 124-143.

88 *Christine Chinkin*, Rape and Sexual Abuse of Women in International Law, European Journal of International Law (1994) p. 326-341.

89 *UN Security Council,* S/RES/2242, 2015.

90 UN Security Council, note 93.

91 *Zsuzsanna Lippai and Angelic Young* , Creating National Action Plans: A Guide to Implementing Resolution 1325, (2017) Inclusive Security. <https://www.inclusivesecurity.org/wp-content/uploads/2018/09/InclusiveSecurity_NAP-Guide_ME_2017.pdf> (Accessed: 23 January 2022).

Additionally, as noted by Miki Jacevic, creation of NAPs itself is a beneficial process to the WPS Agenda as it mandates an unusual set of government actors to work together (including officials involved with security and gender, for example).[92] Further, she notes that the NAPs development process enables accessible participation by the citizenry, and in that way, reinforcing public trust and confidence in its government.[93]

PeaceWomen notes that well-constructed NAPs should reflect the holistic intention of WPS, be measurable (including a dedicated budget); have a participatory, transparent process of drafting, implementation and monitoring involving civil society and women's organizations and focus on the prevention of conflict, extending to the regulation of the arms trade and disarmament to remedy violations of women's human rights in conflict.[94]As of November 2019, WILPF analysis shows that 82 UN Member states have NAPs.[95]Regional Action Plans developed by African Union, European and the Asia-Pacific Regional Symposium supplement these NAPs.[96]

Although the WPS Agenda, and corresponding NAPs, generally comprise assertions of equality, non-discrimination and women's right to political participation, their implementation has received little legal attention. Instead, focus has focused on stakeholder and institutional mapping or design of constitutive documents.[97] This paucity in legal interventions has denied an opportunity to interrogate how gendered constitutionalism may help alleviate some of the inherent problems with these policies, as espoused below.

The living gender model helps point out the inconsistencies of women-themed policies. Even in women-themed policies, as Women Peace and Security Agenda, recognition of women as important players in countering violent extremism is provided but devoid of the intersectionalities and nuances that make up women. Therefore, while the Agenda may provide for methods to prevent women's participation in terrorist activities, it fails to recognise the multiple vulnerabilities that some women face, by virtue of their ethnic community, class or education level, and instead strives for the unhelpful liberal feminist 'Add Women and Stir' approach.

Additionally, this separation may have an unintended exclusionary effect, where the Agenda is viewed as women's issues and therefore, fails to receive the necessary attention

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92 *Miki Jacevic,* What makes for an effective WPS national action plan?, (2019) < https://www.aspist rategist.org.au/what-makes-for-an-effective-wps-national-action-plan/> (accessed 24 March 2022).

93 Ibid.

94 *PeaceWomen of Women's International League for Peace and Freedom*, Women, Peace and Security National Action Plan Development Toolkit, (2013) <https://www.peacewomen.org/assets/file/ national_action_plan_development_toolkit.pdf> (Accessed on 23 January 2020), p. 8.

95 PeaceWomen of Women's International League for Peace and Freedom (note 104), p. 9.

96 *African Union Peace and Security Council (AU PSC),* Briefing Note: Mitigating Vulnerabilities of Women and Children in Conflict, (2010); *European Union (EU) Parliament,* Implementation of EU Policies Following the UN Security Council Resolution 1325, (2010).

97 Shepherd, Laura 2020 "Gender and countering violent extremism in Women, Peace and Security national action plans" *European Journal of Politics and Gender*, *3*(3), 311-330.

from stakeholders, including. limited economic resources. Indeed, WILPF notes that only 35 percent of existing NAPs include a dedicated budget for implementation.[98]

IV. Living Gender: Some Additional Points

At its core, living gender calls for the inclusion and assessment of gender in all aspects of the Constitution, including, both its rights-content provisions and its architecture and design. It requires an audit to ensure that all genders are equitably represented and are able to exercise their agency without undue pitfalls. In that way, living gender is in line with Irving's observation that 'both equity and agency are central to the membership of the constitutional community that is, the body of persons who come under, and enjoy the protection and opportunities offered by, a constitution'.[99]

This application of living gender across the constitution goes beyond the traditional liberal understanding of gender mainstreaming. Though defined in different ways, gender mainstreaming, by and large, is recognised as 'the process of assessing the implications for women and men of any planned action in all areas and at all levels'[100] and further to ensure that both men's and women's concerns and experiences are inserted within the design and implementation of policies'.[101]

However, feminist scholars have rightly criticised the concept of gender mainstreaming due to its continued application of sameness approach to gender equality.[102] Implementation of gender mainstreaming does not substantively engage with gendered power relations, their intersections with other classes of discrimination (such as, race, disability or nationality), or the need for the broad conceptualisation of gender.[103]

While drawing inspiration from the ideal of gender mainstreaming, living gender extends this idea in definitive ways. Living gender, for one, extends the meaning of 'gender' beyond women to include all other genders and their inclusion in the constitutional architecture of a country. While gender mainstreaming deals with policies that solely focus on

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98 *PeaceWomen of Women's International League for Peace and Freedom* < http://1325naps.peacew omen.org/> (accessed 24

99 *Irving*, note 8, p. 3

100 UN, ECOSOC, 'Agreed Conclusions', 1997/2 (New York: UN ECOSOC).

101 Council of Europe. 1998, *Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming,* Adopted by the Committee of Ministers on October 7, 1998, at the 643rd Meeting of the Ministers' Deputies.

102 Daly, Mary. 2005. "Gender Mainstreaming in Theory and Practice." Social Politics: International Studies in Gender, State, and Society 12 (3): 433–50; Lombardo, Emanuela, and Petra Meier. 2006. "Gender Mainstreaming in the EU: Incorporating a Feminist Reading?" European Journal of Women's Studies13 (2):151–66

103 *Gulay Caglar*, 'Gender Knowledge and Economic Knowledge in the World Bank and UNDP: Multiple Meanings of Gender Budgeting' in Christoph Scherrer and Brigitte Young, Gender Knowledge and Knowledge Networks in International Political Economy, Baden-Baden 2010, p. 55–57.

women, living gender further includes how hegemonic masculinity recalibrates societal un-acceptance of other masculinities, and how other genders, beyond the binary, interact with socio-political and legal institutions.

Following Prugl's distinction between 'rules of identity' and 'rules of entitlement', living gender rejects identity-based rules due to their production of performances of gender, sex and desire, and hierarchical constructions of femininity and masculinity'[104] and instead embraces entitlement-based approaches where public participation and equitable represen-tation is read into the entirety of the Constitution.

E. Living Gender in Practice: Constitutionalism and National Security Structure in Kenya

Legal reform, and more specifically, constitutional design is considered an important tool in cultivating sustainable change in a post-conflict state.[105] Since 1990, a significant concern with regard to legal reform, generally, and transformative constitutionalism specifically, is the extent to which women are present, and how their issues are represented throughout the making and implementation process.[106]

While most African countries have engaged in constitutional reform, integration of women's rights as part of the constitutional order is most visible in countries that have adopted new constitutions as part of transitional justice.[107] Reasons for this may include increased democratisation trends that provided an avenue to ventilate women's rights as part of the overall goal of limiting executive power and protecting individual rights.[108] In addition, inclusion of women's movements into the constitutional drafting process precipi-tated sustained debate on what to include and how to integrate women's rights into the new Constitution.[109] However, despite their inclusion into the process, women's movements limited their interventions to rights-conferring provisions.

The clamour for constitutional change in Kenya received national attention after the repeal of Section 2A of the Constitution in 1991 which effectively brought an end of de jure Kenyan state.[110] The Constitution of Kenya Review Commission (CKRC), was established in 1997 and entrenched into the Constitution in 2000 by Parliament to be the driver of

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104 *Elisabeth Prug, / Audrey Lustgarten*, Mainstreaming Gender in International Organizations, in; Jane S. Jaquette / Gale Summerfield (eds.), Women and Gender Equity in Development Theory and Practice: Institutions, Resources, and Mobilization, Durham 2006, pp. 53–70.

105 *Haynes / Aoláin / Cahn*, note 2, p. 3.

106 Ibid.

107 *Aili Mari Tripp,* Women's Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia, Politics & Gender 12 (2016), p. 80.

108 Ibid.

109 Ibid.

110 *Stephen Ndegwa / Patrick Mwangi / Susan Kasera / Henry Owuor / Iris Karanja*, History of Constitution Making in Kenya, Nairobi 2012.

constitutional reform through provision of civic education, collation of public views and preparation of a draft constitution.[111] Women's involvement in this process was visible and active, as noted by the first head of the Constitution of Kenya Review Commission (CKRC), Yash Ghai (2005), who characterised the women's movements as 'the group which came out best from the process… who were able to present a united and coordinated position.'[112]

Although Moi dissolved this commission as one of his final acts as president,[113] the new coalition government, NARC, renewed the constitutional reform process in 2003 by convening the National Constitutional Conference at Bomas of Kenya which resulted in the Bomas Draft constitution.[114] Political opposition to the Constitution resulted in the development of an alternative political elite-led Constitution, named the Wako Draft. The Wako Draft was, however, defeated at a referendum process.[115]

Constitutional reform was reignited following post-election violence in 2008. Constitutional reform was integrated as part of the national reconciliation agreement signed by President Kibaki and Prime Minister Raila Odinga.[116] To actualise this, Parliament passed the Constitution of Kenya Review Act 2008 which established the Committee of Experts (CoE) as the main technical constitutional review organ to drive the process.[117] On 4th August 2010, Kenya held a Constitutional Referendum where the new constitution was overwhelmingly endorsed and was promulgated on 28 August 2010.[118]

In all drafts of the Constitution, women's involvement through its coalition was pronounced through regular consultation with political parties, civil society groups and the media. This sustained women's engagement resulted in their agendas being reduced into tangible provisions in the Constitution.[119] Although their concerns were broad, they were, however, ultimately galvanised around women's representation in political bodies and government entities and substantive equality provisions.[120]

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111 *Jacob Mwathi Mati*, Social Movements and Socio-Political Change in Africa: The Ufungamano Initiative and Kenyan Constitutional Reform Struggles (1999 – 2005), Voluntas 23 (2012), p. 68.

112 *Jill Cottrell / Yash Ghai*, Constitution Making and Democratization in Kenya, Democratization 14 (2007), p. 17.

113 *Ndegwa et al*., note 110.

114 Ibid.

115 *Bernard Namunane,* Kenya: Wako's And Bomas Drafts to Form Basis of Desired Changes, 13 August 2006 *https://allafrica.com/stories/200608140560.html (accessed 15 March 2022).*

116 *Atika School,* Constitutions and Constitution Making <'https://www.atikaschool.org/kcsehistorynotes/chapter-14-constitutions-and-constitution-making#:~:text=Constitution%20making%20process%20in%20Kenya%20in%20pre-colonial%2C%20colonial,and%20then%20handed%20down%20from%20generation%20to%20generation> (accessed 25 February 2022).

117 Ibid.

118 Ibid.

119 *Aili Mari Tripp,* (note 110), p. 88.

120 Ibid.

As articulated in preceding paragraphs, living gender goes beyond rights-conferring provisions to questions around equitable access and agency throughout the entire architecture of the Constitution. Living gender demands transformative action of dismantling of masculine structures rather than adding women into the already-skewed patriarchal system. By narrowing the issues to women's representation in elected bodies, women representatives missed an opportunity to mount an effective challenge to patriarchal systems of power by ensuring a reiteration of meaningful gender equality (read living gender) throughout the text of the Constitution. This exclusion has had negative impact on gender mainstreaming in other chapters of the Constitution beyond political representation and private relations (such as, inheritance).

I must note at the onset that I am cognizant of the expediency and efficacy reasons informing the decision to narrow down gender interventions to questions of political representation. I also note the unintended effects of this pragmatic (if unconscious) decision on the part of the stakeholders, especially when interrogating other architectural parts of the Constitution. I must also note that my intention is not to lay the blame on the women's coalition but on the entire process which failed to extend debates beyond political loyalties and ethnic identities to encompass other salient grounds, such as gender.

Regrettably, gender is not listed as one of the principles governing national security in Chapter 14 of the Constitution.[121] Contrast this with Article 60 on 'Land and Environment' which expressly provides that 'Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles…. elimination of gender discrimination in law, customs and practices related to land and property in land'.[122]

Failing to list gender as one of its main principles intimates the idea that 'gender' in national security is in fact an after-thought rather than a 'central category of analysis for understanding how unequal and gendered social structures negatively impact the security of individuals and groups'.[123] This has disparate outcomes in judicial intervention. While there have been several successful claims before the court in respect of gender discrimination

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121   Ibid, where it reads:

The national security of Kenya shall be promoted and guaranteed in accordance with the following principles–

(a) national security is subject to the authority of this Constitution and Parliament;

(b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

(c) in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and

(d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions. National security organs

122   *Constitution of Kenya,* (note 5), Article 60.

123   *Tickner,* (note 49), p. 50.

in land matters,[124] there have not been any cases dealing with how the masculine national security architecture perpetuates gendered experiences between women and men.

By failing to include a meaningful discussion of living gender in the constitution-making process, stakeholders inadvertently created a culture of constitutional implementation where questions of gender are seemingly limited to their representation without closely interrogating how other constitutional provisions have an impact on gender. Even where stakeholders have mounted successful claims against perceived unlawful amendment processes, as with the 2021 *Building Bridges Initiative Case*, rarely is the discussion of gender considered in the overall scheme of proposed presidential power.[125] Instead, gendered intervention is once more limited to the two-thirds gender principle.[126]

Even in constitutional petitions directly related to national security cases, gender is not considered an important point of determination. In *Coalition For Reform And Democracy (CORD) And The Kenya National Commission On Human Rights (KNCHR) versus The Republic Of Kenya And The Hon. Attorney General,*[127] the Court was asked to conduct a judicial inquiry on the constitutionality on the Prevention of Terrorism Act. The petitioners alleged that the impugned Act was a contravention of several rights, including, freedom of expression, freedom of the media, right to a fair trial, and right to privacy.[128] There was no mention of the gendered impact of this Act.

While the petitioners were successful in their claim, I further posit that a living gender model would have further bolstered the argument as it would question the composition of security actors' institutions and their (in)ability to respond to gendered experiences of women caught up in violent extremism. Living gender would enable stakeholders take note of the unequal outcomes of gender-neutral provisions on countering violent extremism. These outcomes are well-documented and include excessive penal repercussions for women terrorists due to gendered understandings of women engaged in violence; exclusion of women from effective counter-terrorism initiatives; and drawing linkages between increased gender based violence and state violence.[129]

Another missing piece in developing feminist constitutionalism in Kenya is the failure to include all genders in the process. Living gender model seeks to extend the woman question to address gender in all its forms and strands. Gender expressions beyond the

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124 See, for example, Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR; P N N v Z W N [2017] eKLR; In re Estate of CCBH (Deceased) [2017] eKLR

125 *David Ndii and Others v Attorney General and Others* (note 13).

126 Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR

127 Coalition For Reform And Democracy (CORD) And The Kenya National Commission On Human Rights (KNCHR) versus The Republic Of Kenya And The Hon. Attorney General [2015] eKLR

128 Ibid, para. 35.

129 *United Nations Office On Drugs And Crime*, Handbook On Gender Dimensions Of Criminal Justice Responses To Terrorism, Vienna 2019.

binary experience unique forms of discrimination in the context of state violence which is exacerbated by their invisibility from constitutional protections. Living gender analysis may be helpful, first, as it requires an inquiry beyond women to include other genders. In calling for a socio-legal scholarship, this model embraces other theories beyond constitutional law or feminism to include, in this case, queer theory analysis.

F. Living Gender, Constitutionalism and National Security: Some Concluding Remarks

Living gender is not an infallible concept. I am aware of the difficulty in its implementation in a fast-paced constitution making process, or in trying to reintegrate it in an already-installed constitutional order. In any event, there may well be other ways in which gender in constitutionalised national security may be conceived and implemented. Taking into account the lack of meaningful feminist constitutional analysis of national security architecture in Kenya, I verily believe that living gender provides an important starting point. What inroads can this model make for a constitution which has successfully resisted attempts to amend it thus far?

First, a living gender model can inject important unexplored questions before judicial tribunals, some of which are detailed below. This framework can enable stakeholders institute constitutional questions on the excesses of national security organs not only from a generic human rights perspective but also from a gendered perspective. This model will enable stakeholders to also argue on the importance of implementing gendered national security policies while simultaneously questioning the ineffectiveness of existing ones. This will hopefully catalyse injection of more resources and attention by executive decision-making machinery to the disparate effects of human insecurity on other genders.

Additionally, this model of analysis will enable constitutional inquiries to rise beyond rights-conferring provisions to other architectural spaces. Indeed, living gender can provide an important avenue for rights approach to extend beyond political representation to non-traditional spaces, such as national security, by providing important ontological, locus and content contexts that can then be instrumentalised to question the gender composition of constitutionally-listed national security organs.

Most importantly, I believe that the framework created here is also intended to identify other ways in which feminist constitutionalism can transform traditional understandings of constitutionalism by entering in male spaces and agitating for seismic gendered shifts.