

SYMPOSIUM: GENDERED CONSTITUTIONALISM IN THE GLOBAL SOUTH

Gendered Constitutionalism in the Global South

By *Martha Gayoye**

A. Introduction

This symposium concerns the pursuit of gender equality through constitutions in Global South, third world postcolonial contexts. The central questions addressed in this symposium are: how do we make sense of existing western discourse on feminist constitutionalism for third world postcolonial contexts in the Global South? Can gendered constitutionalism in the Global South be theorised quite distinctly from existing studies of feminist comparative constitutionalism? What would such a theorisation look like?

The Global South, third world and the postcolonial are all contested epistemic terrains that we do not want to conflate into one as simply the Global South. All three terms have complex histories with contested geopolitical,¹ ontological and epistemic,² as well as economic (in terms of the deliberate impoverishment of third world nations)³ meanings that we find useful in our various analyses on theorising gendered constitutionalism. All the contributors have taken considerable care and attention on what these terms mean for their analyses. We invite you to reflect on these contested pluralities and terrains with us. After all, the contributors in this issue have been personally impacted by some of the more practical consequences of being part of the third world, or postcolonial, or Global South – whatever these contested terms might mean – so vividly demonstrated by the ongoing

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- 1 *Sebastian Haug / Jacqueline Braveboy-Wagner / Günther Maihold*, 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.
- 2 *Daniel B Maldonado*, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, Cambridge 2013; *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).
- 3 *Walter Rodney*, *How Europe Underdeveloped Africa*, London 1972.

covid-19 pandemic, and the seemingly perpetual global economic crises, such as the Sri Lankan crisis. We have lost some contributors along the way that simply could not balance this *precarity of existence* with the ongoing rigorous demands of academic publishing on this occasion. Two of our contributors have reflected on their personal experiences in contributing to this symposium whilst navigating this *precarity of existence* in relation to the Sri Lankan crisis.

Western conception of feminist constitutionalism is generally concerned with frameworks of constitutionalising women's equality rights.⁴ 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.⁵ Another aspect of feminist constitutionalism is constitutional drafting and design,⁶ concerned primarily with questions of constitutional architecture and structures such as federalism,⁷ and gender quotas to address the underrepresentation of women in state legislatures.⁸ Other forms of feminist constitutionalism centre around the controversies of reproductive rights, specifically the right to abortion. These are just but to name a few.

All these models of gendered constitutionalism have a comparative element that is fraught with the difficulties inherent in 'comparing the incomparable'. There are epistemological questions surrounding Eurocentric notions of concepts such as feminism and gender (we prefer the more inclusive term 'gendered constitutionalism' beyond the Western gendered binary subject) 'equality, citizenship and governance. The Global South has also increasingly been invoked as its own epistemic site or framework of comparative constitutional law.⁹ The question of gender is still undertheorised, and there is hardly even a separate field of Global South constitutionalism. We make the case for theorising gendered constitutionalism in third world postcolonial contexts *in their own right*. There are

- 4 Kathleen M Sullivan, Constitutionalizing Women's Equality, *California Law Review* 90 (2002), p. 735.
- 5 Helen Irving, Citizenship and Nationality, in: Helen Irving (ed.), *Constitutions and Gender*, Massachusetts 2017.
- 6 Paula A Monopoli, Gender and Constitutional Design, *Yale Law Journal* 115 (2005), p. 2643.
- 7 Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, *Yale Law Review* 111 (2002), p. 619.
- 8 Drude Dahlrup / Lenita Freidenvall, Lenita, Gender Quotas in Politics – A Constitutional Challenge, in: Susan Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge 2009.
- 9 See Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, Cambridge 2013; Roberto Gargarella, Constitutionalism of the Global South, *International Journal of Constitutional Law* 15 (2017), pp. 571-573; Sujith Xavier, False Universalism of Global Governance Theories: Global Constitutionalism, *Global Administrative Law, International Criminal Institutions and the Global South* (2015); Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020.

questions around the treatment of legal pluralism in postcolonial constitutions, indigenous women, clash between (mainstream) feminism and sexual minorities, clash between elite and grassroots women's concerns, gender and the environment, among other things. Other considerations to think about are a gendered citizenship in the Global South, a gendered constitutionalism beyond the nation state, just to name a few.

The symposium covers Africa and South Asia. There is a general contribution on postcolonial Africa, and two specific contributions on Kenya in East Africa and Tunisia in North Africa. Two contributions focus on Sri Lanka and India in South Asia. Anna and Dinesha write on insights from Sri Lanka on *asking the woman question of constitutions*. Tanja writes on *feminist constitutionalism activism in India*. Alma writes on *gender equality in Tunisian constitutionalism*. Emmah writes on *Kenya's national security infrastructure in the Constitution*. Finally, I write on *gendered constitutionalism in postcolonial Africa*. This introductory chapter introduces and sets out the context of each of the papers in the forthcoming sections.

B. Asking the Woman Question of Constitutions: Insights from Sri Lanka.

In this first contribution, Anna and Dinesha propose three lines of inquiry: 'asking the woman question',¹⁰ gendered analysis, and the Global South. They ask us to imagine what would happen if we were to 'ask the woman question' of constitutions in the Global South.

The authors focus their critique on four limitations of constitutional gender analysis. The authors first argue that constitutional gender analysis suffers from focusing too much on constitutional text and institutions, which assumes that the solution to women's oppression is to add more text, usually transplanted from other contexts. The second critique against constitutional gender analysis is a generalised approach to gender and constitutions that may have little to *awkward resonance* in all contexts that is 'based on assumptions about equality and constitutions that do not hold true in all contexts.'¹¹ The critique is that there is a fixed meaning of gender equality, a legal centrism that overly privileges state law over nonstate forms of law. A third critique of constitutional gender analysis is its prescriptive toolkit of constitutional provisions, such as gender quotas and women-specific rights provisions. Finally, incomplete explanations are offered for the failure of these prescriptive constitutional toolkits, which is blamed on culture, lack of political will and economic conditions.

Going back to the critique on overreliance on constitutional text and institutions, Anna and Dinesha ask us to move beyond constitutional institutions and pay attention also to societal institutions, what they term as *proximate institutions*. They define proximate

10 For a detailed understanding on asking the woman question, see *Katharine T Bartlett*, *Feminist Legal Methods*, Harvard Law Review 103 (1990), p. 837-849.

11 *Dziedzic / Samararatne*, *Asking the Woman Question of Constitutions: Insights from Sri Lanka*, p. #.

institutions as those ‘proximate or close to the constitution’,¹² that may not be regulated by the constitution but nonetheless have a role in constitutional governance, whether state or non-state. Anna and Dinesha class these proximate institutions into three broad categories. First are *customary or religious institutions* that may be recognised in constitutional text or take the place of state institutions to regulate personal affairs. Second are those that are crucial for the functioning of the state, such as *political parties, social movements, trade unions*, knowledge institutions that disseminate knowledge on democratic constitutionalism such as *universities and the press*, and *legal professions* that are crucial for the functioning of the judiciary. Third are those that are excluded from other institutions of the government but may well replace them, such as the *military*. Anna and Dinesha urge us to also think about quasi-judicial institutions and jurisprudence as part of proximate institutions.

The greatest task in ‘asking the woman question’ of constitutions in the Global South is to demonstrate how these proximate institutions can be incorporated into constitutional gender analysis. Incorporating these proximate institutions is important as they may act as barriers to constitutional guarantees and gender justice, or they may override constitutional values. Anna and Dinesha focus particularly on four of these societal institutions, *the family, institutions relating to labour, religious institutions, and the military* as sites of women’s oppression and therefore perhaps also potential sites for women’s emancipation. Attention to these four proximate institutions would mean a focus on the value systems that are in direct competition with constitutionalism.

Attention to proximate institutions and their value systems would therefore mean addressing legal barriers to the enjoyment of equality that may arise primarily in customary (personal) laws. These value systems are shaped by complex histories and contemporary problems of colonialism and nationalism.

Other than missing crucial sites of women’s oppression in proximate institutions and laws, another glaring limitation is that judicial review of legislation is limited to the drafting stage, not after the laws have been passed and come into force. What this means is that it is not possible to use the constitutional tool of judicial review to invalidate written and personal laws that contradict fundamental rights in the Constitution. Institutions relating to labour and the market are also ‘exempt from interference in the liberal constitutional model’, with exploitative working conditions that are a serious impediment to the enjoyment of the constitutional guarantees of equality.

Military control of public life and militarisation mobilise patriarchal notions and ethnonationalism that undermines gender equality, transparency, and accountability in governance. The militarisation of governance and popular culture has been galvanised into presidential soft power and shrouded in constitutional silence that often results in violence. Anna’s and Dinesha’s discussion of militancy and militarisation of governance as a proximate institution in the first contribution has a strong link to Emmah’s discussion on gender, security and constitutionalism.

12 *Dziedzic / Samararatne*, note 11, p. #.

In sum, the authors see a potential in paying attention to proximate institutions for context-specific constitutional gender analysis that does not see *context* as a barrier but an *enabler* to gender justice and equality. This conclusion has a strong resonance with a *decolonial gendered citizenship* in my paper that locates and sees potential in personal laws and traditional dispute resolution systems as part of constitutional frameworks rather than beyond constitutional frameworks.

C. Feminist Constitutional Activism in India

Tanja's paper concerns feminist engagements with the Constitution to advance women's rights in India, what she refers to as feminist constitutional activism. Tanja gives a historical overview of this feminist constitutional activism spanning over a century, involving constitution making and constitutional adjudication. Tanja focuses particularly on the conflict between religion and women's rights, which is a central feature of gendered constitutionalism in the Global South.

In assessing the effectiveness of the century-long feminist constitutional activism in India, Tanja relies on Helen Irving's concept of constitutional agency, which is 'the ways in which women have assessed their country's Constitution, both during its formation and its operation, specifically from the perspective of women's interests.'¹³

Tanja begins with the social reform movement of the 19th century and feminist activism of the 20th century, which both preceded the making of the Indian Constitution. Social reform was largely initiated by men, and closely linked to the British colonial civilising mission to abolish gendered and oppressive or primitive practices. Social reform was achieved through legislation such as the Widow Remarriage Act 1856, Age of Consent Act 1891, and the Child Marriage Restraint Act 1929. Social reform was however paternalistic and protectionist, geared towards the education and modernisation of women rather than gender equality.

Social reform was followed by feminist political activism in early 20th century that agitated for formal equality between men and women. This activism achieved the right to vote for women, agitated for a better legal position of women in the family, and led to women's political participation in the Indian nationalist movement and anti-colonial struggle.

Feminist political activism of the early 20th century was followed by feminist constitution making in mid-20th century. This was achieved through participation in the Constituency Assembly of 1936 to 1949. The greatest misgiving of this strategy of feminist constitution making was the failure to fully curtail religious freedom against gender discrimination in the 1947 Constitution. Other weaknesses of the 1947 Constitution were the

13 Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge 2008, p. 246.

use of masculine terms, formal equality rather than substantive equality, and the failure to address intersectional discrimination.

Feminist activism of the late 1970s and early 1980s focused on demands for substantive equality and targeted patriarchal and misogynistic state institutions. The Mathura Case of 1978 in which the courts acquitted two policemen accused of raping a minor in a police station was the focal point of nationwide protests, leading to rape law reform.

From the 1990s feminist constitutional activism emerged around the formation of women's legal organisations made up of women lawyers. These organisations filled a legal void within the women's movement to focus on law reform, individual legal representation, feminist legal scholarship, strategic public interest litigation, and consciousness raising. These organisations began to focus on intersectional discrimination and the reform of religious personal laws, particularly on the rights legal representation of ethnic minority women in the courts. A case that highlighted intersectional discrimination is was the Shah Bano Case.

Tanja concludes her paper by reflecting on the limits and pitfalls of feminist constitutional activism as a law reform strategy. First, law reform and judicial victories in strategic litigation do not necessarily lead to change of attitude in law enforcement institutions such as the police. Lack of access to law for underprivileged communities leads to lack of awareness on their rights. There is lack of application of judicial precedent by lower courts due to gaps in law reporting. Tanja reflects that for law reform to be successful it must be accompanied by grassroots implementation through mobilisation, rights education and empowerment, gender sensitisation programmes for state institutions, and dissemination of court judgments, just to name a few. Tanja also reflects on the importance of litigation in the lower courts alongside strategic public interest litigation in the higher courts, what she terms as 'everyday litigation'.

D. How Southern is Tunisia? Gender Equality in Tunisian Constitutionalism

Writing on gender equality in Tunisian constitutionalism, Alma writes that there need not be a distinct voice for Global South constitutionalism but rather a multiplicity of perspectives. For Tunisia, an additional perspective on constitutionalism would be anchored on its colonial past and Islamic constitutionalism. Both factors have had a tremendous effect on gendered constitutionalism in Tunisia.

Specifically, colonial conquest had a direct correlation to a plurilegal system brought about by the religious affiliations of colonial authorities and indigenous rulers, namely the Beys monarchy's Islam, and the Ottoman Empire's capitulation to the West. French colonial rule between 1881 and 1956 brought about Christian and Jewish religious affiliations. These religious and personal norms regulated and cemented a heteronormative division of gender roles and patriarchal hierarchy in which women's daily lived realities are concentrated in the private sphere and domesticity, whilst those of men dominate the public sphere.

Islamic constitutionalism is a central feature in Maghreb states (the five countries in North Africa, namely Algeria, Tunisia, Mauritania, Morocco, and Libya), including Tunisia, quite distinctly from the rest of Africa where Islam was often relegated as a personal law in the colonial process, and sometimes wholly excluded from constitutional governance. As early as 1857, the Bey monarchy enacted some basic rights for their subjects, including some consideration of the legal situation of women and access to education but never equality with men. Personal matters in inheritance, family and property relations were governed by religious courts and had a profound impact on gender relations based on a patriarchal hierarchy, which the French colonial power left untouched and unchanged.

Alma's historical account of state feminism in a Muslim context shows that women were not passive subjects in the dual Arab/Islamic identity and modernised state building. Like most other postcolonial contexts, feminists acquiesced to and were loyal to politicians who used them to galvanise their own power. In that sense, this was not an autonomous social movement to consolidate collective demands for gender equality and social change. Political participation of women was confined to laws on personal status, not in the development of the new state and new constitutional order, even though women participated actively in the struggle for independence. Legal improvement on personal status were codified in the Personal Status Code, independent of constitutional guarantees under the 1959 Constitution, the result of the decolonisation process.

After independence, only one women's movement was allowed (Union National des Femmes Tunisiennes, UNFT), until much later. The Tahar Haddad Cultural Circle formed in 1974 was comprised of bourgeoisie women who formed the Association Tunisienne des Femmes Démocrates (Association of Tunisian Democratic Women), and the Association of Tunisian Women for Research and Development in 1989. These new feminist movements addressed gender relations directly and demanded formal law reform towards gender equality. This was later followed by Islamic feminist movements in the 1990s, focused on the complementarity of the sexes rather than equality, and did not address the compatibility of Islam with universal women's rights.

The constitutional transition of 2011 to 2014 coincided with the Arab Spring in which citizens revolted against authoritarian regimes, resulting to the 2014 transition constitution. The feminist international community had a profound impact, particularly through influencing the transplantation of international provisions such as the Convention on the Elimination of Discrimination Against Women (CEDAW). Women formed part of the constituent assembly of the constitution making process. This led to a constitutional anchoring of specific women's rights and affirmative action in the transition 2014 Constitution.

The final 2022 Constitution took over most of the provisions of the transition 2014 Constitution. Islam is still a central feature – what Alma terms an obsession with an “Arab-Islamic identity”.

In conclusion, gender equality in Tunisian constitutionalism is a complex hybridity of a colonial past leading to a legal pluralism postcolonial legality, an Arab-Islamic identity,

state feminism and feminist movements, international law, and the influence of the international community.

E. Possibilities of New Approaches to Gender, Security and Constitutionalism: A Living Gender Probe into Kenya's National Security Architecture in the Constitution

Focusing on the Constitution of Kenya 2010, Emmah critiques feminist constitutionalism as 'procedural utterances of equality without a comprehensive interdiction of the underlying masculine structure'.¹⁴ Emmah is sceptical of rights-based approaches inherent in feminist constitutionalism that do not interrogate the masculine structure of constitutions. Emmah urges us to focus on questions of *ontology*, *content* and *locus* of constitutions when thinking about a gendered constitutionalism for the Global South.

In terms of ontology, Emmah employs the feminist strategy of 'asking the woman question' that seeks to 'identify the gender implications of rules and practices which might otherwise appear neutral or objective'.¹⁵ Emmah sees potential in the 'asking the woman question' strategy that would unify multiple feminist approaches in gendered constitutionalism, and provide an avenue for a gender analysis that operates beyond the male/female, masculine/feminine binary approach.

The question of locus would employ a socio-legal methodology that provides a link between constitutionalism and security studies. Emmah sees potential in this socio legal link with security studies that will involve a multidisciplinary research inquiry. This will include and centre gender analysis with its multiple intersections (of class, race, and sexuality) and expressions.

The question of content would examine how gender is expressed in the overall security architecture of the Constitution. Emmah's concern is that gender considerations are either completely excluded from the constitutional security architecture, or they are dealt with on a separate basis outside the constitutional framework. Emmah discusses the examples of the United Nations Women, Peace, and Security (WPS) Agenda and its various Resolutions that have been crystallised into National Peace Agreements (NAPs) that are often discussed and improved outside the framework of the constitutional security architecture of the constitution of the police and the military, for instance.

14 See *Emma Khisa Senge Wabuke*, Possibilities of New Approaches to Gender, Security and Constitutionalism, p. # (Abstract).

15 *Charlotte Skeet*, Gender And "Modern" Constitutionalism: The Treaty Establishing A Constitution For Europe, *Northern Ireland Legal Quarterly* 58 (2005), p. 433.

F. Gendered Constitutionalism in Postcolonial Africa: Towards a Decolonial Gendered Citizenship

In my own contribution to this symposium, I borrow the concept of decolonial citizenship from Annette Joseph-Gabriel that deconstructs the ‘Man-as-Citizen’ model that is so inherent in liberal constitutionalism, alongside a coloniality/modernity complex that privileges the nation-state as the only imaginable form of political organising. A gendered decolonial citizenship would therefore address the tokenist inclusion of women into constitutional frameworks that are inherently masculine in structure and intent through rights-based women-specific provisions and affirmative action measures. Secondly, a decolonial gendered citizenship would address the status of the postcolonial woman in Africa as a legal subject beyond the nation-state. I propose that this twin-decolonial approach would necessitate a re-conceptualisation of women’s constitutional agency in Global South constitutions.

Adopting the term ‘constitutional agency’ from Helen Irving, I make the case that it is not enough to include women-specific rights-based provisions and affirmative action measures if we don’t ask ourselves, where do women in postcolonial Africa exercise their constitutional agency? Constitutional agency requires us to ask three further questions: to what extent do constitutions address women’s interests and concerns? Would women be able to lay claims in court based on those interests, and would the courts take them seriously? The danger with the last two questions of course is that the term ‘courts’ might risk being narrowly defined to mean the judiciary as an organ of the state, excluding indigenous forms of dispute resolution mechanisms as legitimate.

In re-formulating women’s constitutional agency in postcolonial constitutions, I rely on the notion of legal pluralism denoting a postcolonial legality of multiple legal systems operating alongside each other.¹⁶ I make the case that women in postcolonial Africa exercise their constitutional agency not just through and within constitutional text and institutions, but their daily lived realities are concentrated outside the purview of the nation state in the private sphere. In this private sphere, women’s daily lives are governed by personal laws laden with value systems that may be in direct competition with rights-based constitutional text and may not necessarily be regulated by the constitution.

I discuss constitutional claw-back exemption clauses that characterised so many post-colonial independence constitutions where the fundamental guarantees of equality and nondiscrimination are not applicable to often discriminatory personal laws.. Surely constitutional agency would require that we pay attention to these exemption clauses. Paying attention to constitutional agency in the private sphere might mean that women are able to take claims both to formal courts and indigenous dispute resolution mechanisms, and that both are integrated into the constitutional framework to safeguard equality and nondiscrimination.

16 *Sally Engle Merry, Legal Pluralism, Law and Society Review* 22 (1988), p. 869.

Constitutional agency might also address the need to go beyond constitutional text and tokenist inclusion of women in male-centred and masculine constitutional structures. It will mean confronting the structural, political, social and material conditions of women's lives that cause that marginalisation and exclusion from participation in the constitutional framework in the first place. These could be through access to education and socio-economic policies that address the material conditions of ordinary women. Constitutional agency might mean ensuring that the interests of ordinary women are centred in constitution making discourse to displace those of elite women loyal to local patriarchal oligarchies and hegemonic international interests.

G. Distinct or Additional Voices?

Some various interwoven themes flow through all the contributions in this symposium, which I will set out below in order to formulate a manifesto for continuing the discourse on a gendered constitutionalism in the Global South.

First is legal pluralism and the need to go beyond constitutional text and institutions and pay attention to constitutional gender equality and justice beyond the nation state. My paper on *gendered constitutionalism in postcolonial Africa* is theorised around a decolonial gendered citizenship. Decolonial gendered citizenship contests the colonial foundations of constitutions that are inherently embedded with a 'Man-as-Citizen' model in which the white (and probably Christian) middle class man is the ideal citizen, and a coloniality/modernity complex that is incapable of conceiving political organising beyond the nation-state, thus excluding other forms of communitarian identities beyond the nation state, such as indigenous dispute resolution mechanisms. The key task of gendered constitutionalism is to locate the substance of women's daily lived realities beyond constitutional institutions and text that are so deeply invested within the nation-state – in what ways does this act as a barrier to women's inclusion in constitutions? What potential is there in indigenous forms of political organising in a widely conceived gendered constitutionalism beyond the nation state? The first contribution on *Asking the woman question of constitutions: Insights from Sri Lanka* focuses on proximate institutions, which are not part of or regulated by constitutions but are closely related to or proximate to the constitution. Key ones are family, religious or customary institutions which are laden with value systems that are in direct competition to the constitution.

The second theme is constitutional agency, which is not a distinctly Southern approach but is deeply linked with the first theme on legal pluralism. Where do women in the Global South exercise their constitutional agency? Tanja and I both rely on Helen Irving's concept of constitutional agency, which is useful to gauge the extent to which women's interests are reflected in the constitution, and whether women can successfully lay claims to those interests in court (broadly defined to include indigenous dispute resolution mechanisms). What is distinctly and particularly developed in both papers beyond Helen Irving is constitutional agency beyond the formal structures of the nation-state. For me, this would be the exercise

of women's constitutional agency in indigenous dispute resolution mechanisms. For Tanja, women's constitutional agency is also implicated in grassroots mobilisations.

The third theme is the masculine structure of constitutions. The critique of the 'Man-as-Citizen' model of constitutions is apt in demonstrating the inherent masculine and male structure of constitutions, perhaps not surprising given Carol Smart's similar charge of law being male, sexist and gendered.¹⁷ 'Asking the woman question'¹⁸ is a useful strategy to centre women's experiences and narratives in law, in this case constitutions. This strategy is employed both in the case of the constitution of Sri Lanka in relation to proximate institutions discussed by Anna and Dinesha, and Emma's contribution focused on Kenya's gendered and masculine national security architecture in the constitution.

Nationalism and nation-building is a fourth theme that arises particularly in relation to the contribution on gendered constitutionalism in Tunisia – 'the so-called women's question' recurs again and again as a strategy for identity, power and state-building'¹⁹ albeit in a patriarchal hierarchy in Islamic state building. Alma considers this question of gender and nation building as state feminism in a Muslim context – 'the so-called women's question in a postcolonial context shows the duality of a rootedness in the supposedly authentic Islamic culture and a modernization of the new states in the postcolonial period.'²⁰ Social feminist movements are very much part and parcel of constitution making and nation building, if only part of the proximate institutions considered by Anna and Dinesha. Gender, nationalism and citizenship in third world postcolonial contexts are complex subjects on their own but are otherwise an important factor in determining the extent to which women have constitutional agency.

Islamic constitutionalism is another theme that is central to Alma's contribution on Tunisian constitutionalism. Islamic constitutionalism is a central feature of constitutionalism in Maghreb and Middle East states, over and above being a personal moral code. This has an impact on gender relations, as discriminatory personal norms are sanctioned by the constitution. This operates quite distinctly from the way Islam may be treated in legal pluralism as a personal law that is excluded or ignored from constitutional regulation, thereby *passively* sanctioning discrimination. Islamic constitutionalism is embedded as part of the constitutional framework. In sum, the way religion (including Islam) is treated by constitutions requires careful examination in each context to determine its effect on gender relations.

The final theme is the extent to which gendered constitutionalism is an effective law reform strategy. Tanja and I address this question directly in our contributions on gendered constitutionalism in postcolonial Africa, and feminist constitutional activism in India. I rely

17 Carol Smart, *The Woman of Legal Discourse*, *Social and Legal Studies* 1 (1992), p. 30.

18 Katharine T Bartlett, note 5.

19 Alma Laiadhi, *How Southern is Tunisia: Gender Equality in Tunisian Constitutionalism*, p. #.

20 *Ibid.*, p. #.

on Amina Mama's notion of 'femocracy'²¹ to address the tokenist inclusion of women in constitutional provisions and affirmative action measures whose benefits do not trickle down to ordinary women but rather serve the interests of elite women loyal to international networks and local patriarchal hegemonies. Femocracy cannot be said to be feminism at all if it does not serve the interests of the ordinary African woman. Tanja reflects on the limitations of strategic litigation in changing attitudes of law enforcement agents such as the police, and communities' lack of awareness of rights, judgments or laws, and lack of implementation of judicial precedents in lower courts. Tanja advises that law reform strategies can only be effective if accompanied by grassroots mechanisms such as mobilisation, rights education and empowerment, gender sensitisation programmes for state institutions and the dissemination of court judgments.

There is unity of purpose in feminist constitutionalism and gendered constitutionalism in the Global South – the pursuit of gender equality through constitutions, and more broadly using law reform strategies. The question of the extent to which law reform strategies are effective for such a goal will continue to be a pertinent question for both. The question of constitutional agency has emerged to be of interest to both feminist constitutionalism and a gendered constitutionalism in the Global South. Both grapple with the masculine structure of constitutions, and its inherent *masculinist meritocracy*. A sceptical reader may in the first instance intimate that Global South gendered constitutionalism may indeed be saying the same thing and have nothing new to offer.

All contributors to this symposium speak with one clear voice that Global South gendered constitutionalism has additional, and sometimes distinct voices to add to the discourse on the pursuit of gender equality through constitutions to address phenomena that are unique to them. Some of these are the coloniality of constitutionalism, legal pluralism as a direct and enduring result of colonial histories, nationalism and nation building in postcolonial contexts, citizenship and belonging beyond the nation-state, quasi-judicial traditional dispute mechanisms, and Islamic constitutionalism, just to name a few. There are some themes that we wish we would have the space and time to delve into further. The subject of feminist nationalism deserves a much closer inspection than what we have accorded in this symposium. A contribution on the inherent gendered binary subject of constitutional texts was originally and always intended to be part of this symposium but dropped in its entirety in the end. We do not wish to close the subject, rather we invite others to think alongside us, and we hope that we have set out a manifesto to continue this discourse.



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