The Role of the Judiciary in Constitution Making: The Two-Thirds Gender Principle in Kenya

By:

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As I write this essay, I just had my doctoral viva a few days ago, that is the 5th of February 2021. In this post, I discuss my thesis when the title of "Dr" is still fresh. My PhD thesis entitled "The Role of the Judiciary in Constitution Making: The Two-Thirds Gender Principle in Keya", was examined by Prof Ambreena Manji of Cardiff Law School, and Dr. Sharifah Sekalala of Warwick Law School. My viva panel was therefore a powerhouse of legal feminists, but most importantly, both my supervisor (Prof. Ann Stewart of Warwick Law School) and I were keen on examiners who are conversant with the African context in relation to women's rights, which was the focus of my thesis.

Prof Manji's research focuses on land law and development particularly in the East African context, and (recently) the political economy of reproductive

labour. Her research examines the absence of gender consideration in land reform in East Africa, attempts to secure women's land rights in Tanzania and Uganda, and the failure of land relations in Africa through encouraging private tilting that leads to further inequalities in access to land. Dr. Sekalala's research is centered on global health law, including the intersections between international law, public policy and global health. Her research focuses on infectious and non-infectious diseases, and the impact of (international) law in addressing these diseases, but also in creating inequalities particularly in developing countries access to essential medicines and vaccines. Dr. Sekalala has been at the forefront in advocating for greater access to covid-19 vaccines for developing countries.

My PhD thesis is both empirical and interdisciplinary, as I employ theories and methodologies from law and political science. I discuss in detail courts, constitutionalism and gender in postcolonial contexts, specifically, the role that constitutionalism plays a perpetuating or addressing gender inequalities, what I refer to as "gendered constitutionalism". In this sense, I see a constitution as a double-edge sword. I see the role of courts and women's movements as crucial in such a gendered constitutionalism, and explore decolonised and subaltern perspectives of constitutionalism. The subaltern perspective I explore in my thesis is transformative constitutionalism. According to Upendra Baxi, Karl Klare among others, transformative constitutionalism means "legally-driven social change" from an undesirable past such as colonialism, apartheid and militarism. Debates on transformative constitutionalism centre on two polar assertions. First, that transformation can still be achieved through liberalism. Second, that a postliberal move away from western individualistic liberalism is a prerequisite to legally-driven egalitarianism. I reflect on this liberal-postliberal tension in postcolonial constitution such as that of Kenya.

My PhD thesis uncovers the two-thirds gender quota in Kenya's 2010 Constitution. I undertake a critical qualitative inquiry on the situatedness of the two-thirds gender principle in Kenya's 2010 Constitution, and the role of the courts and the women's movement in implementing it. I employ a constructivist grounded theory methodology involving a methodological triangulation of three research methods, focus groups (with women's rights advocates), and analysis of Government reports. All respondents were elites, accordingly, my thesis reflected on the opportunities, challenges and pitfalls of researching elites. I

carried out fieldwork in Kenya between October and December 2018.

The two-thirds gender quota is contained in the Kenyan Constitution principle that states that "not more than two-thirds of members of the members of elective and appointive bodies shall be of the same gender". In terms of its situatedness therefore, the two-thirds gender quota is an affirmative action principle based on liberal ideals of substantive equality. I had made the claim that Kenya's constitution is decolonial in that it seeks to move away from liberalism, and therefore that the two-thirds gender quota occupies this ambiguous position as a rights-based gender mainstreaming strategy, but also within a constitution that seeks to move away from liberalism through postcolonial normative values. However, my examiners invited me to revisit this position, and to respond to critique on the extent to which postcolonial constitutions can truly be decolonial if they are also based on liberalism, among other hegemonic influences.

Furthermore, I discuss how the women's movement in Kenya relied on a rights-based framework to work towards constitutionalising gender parity, and at the same time undertook relentless social action litigation to take claims of violation of teh two-thirds gender quota to court. Overall, my PhD thesis found that the woman's movement was crucial for the domestication of international gender mainstreaming targets in the constitution into Kenya, and the constitutionalising of the two-thirds gender principle. The women's movement was crucial in the efforts to implement it in Parliament where mechanisms to achieve it were lacking. Subsequently, the women's movement led the relentless litigation on the principle between 2011 and 2017 to obtain court orders seeking to force Parliament to enact legislation to implement the principle in Parliament, Cabinet and the Judiciary. There have been twelve cases so far on the two-thirds gender quota, all of which except one were filed by women's rights organisations. To date, the National Assembly falls short of the quota by 21.8%, while Cabinet falls short of the two-thirds gender target by 23.8%.

The question of the role of the courts in implementing the two-thirds gender principle was a much more complex one that required a wide-ranging analysis on the positioning of courts within debates on rule of law and constitutionalism in postcolonial contexts. The overall finding is that a gendered constitutionalism

(and indeed the implementation of all rights) requires a stable bureaucracy, in which respect for the Rule of Law is guaranteed.

My study of the implementation of the constitution of Kenya found that constitution making is marred by politics, in which the political elite-class has resisted juristocracy (that is, an expansion of judicial power), civic and women's rights activism in constitution drafting processes between 1997 and 2010 by dominating (and sometimes sabotaging) constitution review committees and processes. The two-thirds gender quota was one such constitutional provision that was watered down through politically-motivated interventions that eventually got rid of mechanisms for achieving the quota in Parliament, Cabinet and the Judiciary. The implementation of the 2010 Constitution has been marred with political elite-level pacts that have undermined long term democratic legitimacy for short term goals of political cohesion and peace, particularly in relation to elections.

The two-thirds gender quota is one such constitutional provision that has been sacrificed for short-term consolidation of male elite political interests, instead of tackling the structural constraints for women's effective political participation in campaign financing, political party nomination systems, intimidation and violence against women political aspirants, and stereotypes about women's role in society. Instead, the political-elite class has focused efforts on ignoring the quota, or getting rid of it from the constitution altogether. This has had huge implications on the extent to which the courts have played a role in efforts to realise the principle.

My thesis details the ways in which some judges have abdicated their responsibility to issue effective orders against the Government to implement the principle, and have in fact been complicit in some ways in assisting the Government to delay the implementation of the quota. The judiciary itself is also guilty of violating the quota, as the number of women judges in the Supreme Court does not meet the one-third threshold (which was justified in one of the cases filed against the Judicial Service Commission by the National Gender and Equality Commission). There has been a breed of few activist judges in the High Court that have issued court orders with ultimatums against Parliament to enact legislation to implement the quota or face dissolution - these orders have been blatantly defied, along with other numerous court

orders in other areas such as socio-economic rights. The breed of activist judges has also faced retaliatory repercussions from the political elite class.

In the end, I conclude that the courts cannot be solely replied upon to bring about legally-driven social change without civic pressure through sustained social action litigation, complemented by pre-litigation and post-litigation lobbying strategies to hold the Government accountable to implement court decisions. Thus, decolonised subaltern approaches to justice such as social action litigation and dialogic activism may have some value for women's movement in pursuing a gendered constitutionalism.

My future research plans include publishing this thesis into a book (I am yet to find a suitable publisher), and postdoctoral projects involving interrogating the role of women judges in Kenya (to expand later on to women judges in other African countries), the women's movement in Kenya (the extent to which there is a homogenous women's movement in Kenya), comparative studies between Kenya and South Africa in legally-driven social change, and family law reforms driven by gendered constitutionalism in African countries. I am a part-time teaching fellow at Warwick Law School, and an Early Career Fellow at Warwick's Institute of Advanced Study.

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