Getting to the centre of power

By Arthur Okwemba

As had been expected, debate on devolution of powers has been steamy, especially when it touched on how much power the president and the proposed prime minister should wield.

What is even more interesting is the unease that engulfed the floor whenever it was proposed that the principle of affirmative action in regard to gender should be embraced right from the top.

Women who contributed to the debate called for sharing of executive powers among men and women. They suggested that if a man is the boss, then the deputy should automatically be a woman and vice versa.

They want the positions of the prime minister and the deputies, and other executive positions, to alternate between men and women.

And as the power devolves down to the provincial, district and ultimately village levels, a similar pattern should be reflected.

“This is extremely important,” says Prof Ruth Othia from the University of Nairobi, who is a member of the Bomas team. “We are ensuring that people have a say in the management and equitable use of resources trickling down to the grassroots level as a consequence of power devolution.”

Addressing a lunch meeting of women caucuses last Thursday, a commissioner with the Constitution Review team, Mr Mutia Kango, advised them to ensure they benefited from the devolution of power.

“Centralisation of power and resources affects the development of certain areas and women are the first victims of such a government. Their men run to Nairobi, leaving them with the burden of caring for the family,” he said.

“And through the devolution of power and resources to the districts, more violent cases will take place at district levels that will help curb male migration. However, women must have a say on how these resources are shared out.”

To register gains in the devolution and sharing of executive powers, gender experts at the Bomas meeting want women to ensure the principle of ensuring that one gender’s representation is not below one-third is applied to the chapter on devolution of Executive powers and other important sectors.

It should apply to sectors and committees dealing with education and social welfare, among other important issues.

Unlike in the past few days when delegates clapped whenever speakers expressed support for affirmative action, these suggestions elicited few, if any, claps. Some of the men could be heard grumbling and murmuring in dissatisfied tones about the proposal.

Issues of culture and patriarchy seem to be creeping in. One man who preferred to remain anonymous said: “Some of the positions women want are inconsistent with some of our cultures. And it may be difficult to bargain on those.”

Prof Maria Nzomo, a women’s rights activist and lecturer at the University of Nairobi, says: “Men are not sure when it comes to sharing of executive powers. And my fear is that this may bring problems when we come to the technical committee stages.”

Seeking an amicable consensus

Isn’t the idea of Kadhis’ Courts more of a human rights issue than a religious one? asks Juliana Omale

Exactly what is it about the Kadhis’ Courts that elicits so much emotion? This week, as the Judiciary comes up for discussion at the Constitution conference, the issue of Kadhis’ Courts, is likely to steal the thunder.

On the one hand are the Muslims, and especially women, who have pointed out consistently that the Kadhis’ Court is the basis of human and women’s rights issues in regard to marriage, divorce and inheritance. They have pointed out that no other statute on earth gives more rights to women than the pronouncements of the Koran. On the other hand, the opposing camps argue that the Constitution should not uphold the rights of only one religious group.

At the centre of the controversy is Section 31 (4), better known amongst the delegates as the “Exemption Clause” which states that:

“The provisions of this chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance.”

As argued by NGO sector delegate Sophia Abdi Noor personal law pertaining to Islam – with a history over 1,000 years old - is at the heart of an affirmative action policy for women and minorities as is respect for humanity and wise decision-making. Muslim women are all too aware that these laws intimately define their way of life since most women’s rights violations occur within the family in the area of marriage, divorce and inheritance. At the same time, Muslim women have upheld that religious legislation is more freeing than restricting.

Under the current Constitution, although the Kadhi’s Court is functional, women have always felt that religious legislation is more freeing than restricting. Under the current Constitution, although the Kadhi’s Court is functional, women have always felt that religious legislation is more freeing than restricting.

For instance, according to Hubbie Hussein, a district delegate from Ijara in North Eastern Province, the Kadhi’s Court there handles over 3,000 cases every month compared to the 600 handled by the magistrate’s court.

The women have argued that the Koran is a way of life and that interpreting its precepts and context calls for individuals who are schooled in both Islamic law and secular law. This is not always the case, especially where Kadhis are handpicked against the will of communities they serve.

At the close of last week, the Constitution Review Commission chairman, Prof Yash Pal Ghai, was well aware of existing tensions and suspicions that could explode onto the floor at the plenary sittings. However, he maintained an optimistic view that this would not degenerate into a religious stalemate and that an amicable consensus would be reached.

Even as he called for tolerance and the recognition of diversity, Prof Ghai admitted that in responding to the variety of Kenyan identities it would be prudent for delegates to look deeply into the language of the constitution in.

Safeguarding women’s gains under the draft constitution

continued on page 3

continued on page 3
Net gains: So far so good

Since the National Constitutional Conference began, women have continuously recorded gain. But they have also faced obstacles. Nominated MP, Prof Ruth Oniang'o, spoke with Arthur Okwemba on the gains so far.

What achievements have women made since the conference began?

To begin with, the fact that many women are attending this conference is a major achievement. The method used to select delegates was the first step of affirmative action.

Unlike the making of the constitution at Lancaster House, when only one woman participated, we are well represented in this second constitution making.

There is an encouraging development that most women who came to this conference without a proper grasp of the provisions in the draft constitution are now knowledgeable. I am impressed that many of them are bright and they have realised they also have the power to negotiate. Some are increasingly learning the skills of lobbying and we hope the gains they are making here will be multiplied among the rural women and men who are representing here.

Another achievement is the effort by those chairing the sessions to give more women a chance to contribute to the debate. And as we do so men are realising our agenda is also good for them and their families. That is why we get overwhelming support for affirmative action.

One of the critical chapters in the draft constitution calls for devolution of power. How will this benefit women?

Devolution of power is the decentralisation of governance and resources, and in the process it has to ensure equity. Since we are talking of one-third women representation in a devolved power structure, the beneficiaries would be women.

Attempts will be made to ensure women are represented in decision-making organs at all levels, from the village to the district, and ultimately at national level. This will help them to prepare to fight for posts such as those in the National Council or the National Assembly. In essence a devolved power structure will help groom women for leadership roles.

Also, as the resources move to the district level in such a structure, and principles of good governance and equity are upheld, women will benefit both directly and indirectly.

Men, who go to work in towns and never remit money to support their families, are likely to remain in their districts as resources and development projects move there. And in this era of HIV/Aids, this may help to keep partners together and minimise the possibilities of extra-marital affairs.

The Bill of Rights, which would enhance women’s welfare greatly, can work effectively in a devolved power structure.

How about the idea of a two-chamber House? Is it good or bad for women?

Most likely, it will increase women’s representation. Given the provisions stating the number of women to be elected to the two houses. It is going to be the avenue to bring in by women from marginalised and minority groups into Parliament.

What do we want to make sure the one-third slots for women in both houses as provided for in the draft constitution is entrenched in the final document?

But we would prefer the use of both the Mixed Member Proportional Representation and the creation of constituencies for women, if we have to make enough gains in this representation.

The challenge now is to come up with a method of ensuring those women elected will deliver and offer quality leadership.

What difficulties have you encountered that might threaten your cause?

Many men are misunderstanding the Mixed Member Proportional Representation concept. My fear is that some delegates are thinking the formula is being used to sneak women into political representation on a silver platter.

We want to justify our presence in any position and prove to everybody that we deserved to be elected. The Mixed Member Proportional Representation concept needs to be explained and made clear for all to understand.

What strategies will you employ to achieve your objectives at this conference?

What we want is to solidify and safeguard the gains we have made so far. Our approach will be give-and-take. We will negotiate and lobby our male counterparts to understand and support our positions.

Lancaster: Where the rain started beating us

Martin Adhola looks at the original Constitution written at Lancaster to find out why gender issues were not taken into consideration.

Veteran politician Martin Shikuku uses glowing words to describe the independence Constitution that he and a number of other politicians helped to write at Lancaster House.

In fact, he is confident that had it been respected and implemented to the letter, the country would not be rewriting the Constitution. Because, according to Mr Shikuku, it addressed issues Kenyans wanted dealt with.

The concept of devolution of power, which is a hot button at Lancaster, was never given a chance to be used. The assemblies were seen as a threat to politicians and they were denied financial funding, which paralysed them.

He says that immediately the country got independence, opposition leaders were bought to defect and the spirit of multi-partyism was eroded with most of the leaders seeking to entrench themselves and consolidate their power.

“In 1964 the constitution was already being abused. To consolidate power, they (those in the ruling party) were already buying leaders from the opposition to consolidate power. History has it that I resisted and I was the last man to defect to the government side,” he says.

That is the genesis of the rot that brought the amendments to the Constitution that saw many principles of democracy tossed out and authoritarian rule take root.

The politician, who has a second chance to write the country’s constitution, says the draft should borrow from the Lancaster document.

He says that although the current Constitution has been amended about 40 times, it was once a masterpiece that could have led the country to prosperity. “People are talking about the decentralisation of power. Then we had mechanisms in the bicameral houses that existed. With their abolition at the pleasure of the president, he amassed huge amounts of wealth that saw him become the symbol of power”.

Shikuku wants the conference to put in place strict measures to make it hard for any individual or government to amend the Constitution at will.

He wants a law that requires that two-thirds of Kenyans endorse any amendment and that a referendum be held to decide whether the amendment is necessary.
Nairobi
Jane Ngugi, 22, Eastlands, Nairobi
“It is almost too good to be true to hear that there is a possibility for constituents to evaluate their MP. Constituents only means something during campaigns and elections, but now they can be heard even after members have been elected. We can now expect work to be done, as the honourable members watch their backs.”

Susan Nkirote, 21, sales person, Hurugilham
“I guess the most sensible way of evaluating legislators is by looking at the promises they made during their campaigns and how they have kept them. If a Member of Parliament has not helped end the challenges in lives of his constituents by ensuring essential services like roads, water and healthcare are available, then I think he or she should be recalled.”

Mitch Odero, media specialist, Westlands, Nairobi
“When legislators say they will shoot down decisions made at the conference, they are proving that they need to be checked. Occasional progress reports on MPs are important in evaluating their work. In many cases, those who are elected to Parliament ride on the euphoria and influence of money and other motivations rather than qualification. Checking their moral standing and performance will help keep them on their toes, and those found wanting should be replaced. Five years is a long time to have a non-performing MP.”

From the floor

By Martin Adhola
As debate entered Chapter Eight of the draft constitution last week, dealing with Executive powers and creation of a prime minister’s office, most contributors agreed that there was a need to reduce the president’s powers.

As the women contributors gave their reasons for supporting the proposal, they also called for inclusion of a clause on affirmative action to ensure equitable representation of men and women in the top echelons of power.

Ms Joyce Umbima, representing non-governmental organisations, said over centralisation of power had resulted in the economic decay that had led to the current poverty and corruption in the country.

“As a country, we have been abused because power has only been vested in one person, who has been firing people at will. To cure this mischief power must be devolved,” she said.

She called for establishment of the office of a prime minister to oversee the day-to-day running of the government.

She also supported the idea of ministers being chosen outside Parliament, saying this would enhance professionalism in delivery of services.

Another delegate, Ms Rita Katamu, supported decentralisation of power, saying previous presidents had used the powers bestowed on them to please and entertain their close friends. As a result, women, who were most affected by poverty, suffered at the hands of corrupt individuals who sought protection from the president.

She said should the prime minister be a man, the deputy should be a man, in the spirit of affirmative action.

Ms Fatima Ali, a delegate from Mandera, said creation of an office of the prime minister would help to remove power from the centre.

Women from North Eastern Province had suffered because the past presidents had used their enormous powers to unleash untold suffering on them, she said.

“Devolution of power will end the culture of political sycophancy and people will look forward to getting development from the government not on the basis of friendship but as a right.”

Getting to the centre of power

continued from page 1

Another female delegate is afraid that although men agree that women need deliberate measures to uplift their status, they are reluctant to let go of power.

“They are telling us that the affirmative action they have so far agreed to has limits of where it should apply.”

The writing is clear. If women’s rights activists found the endorsement of the affirmative action principle a walkover, this time they will have to put up a real fight to get a share of executive powers, at least going by the mood in the conference hall.

That articles 148 to 183 under the chapter on the Executive in the draft constitution make no mention of gender makes the task of those making this proposal daunting.

Yet it is important that once affirmative action is enshrined in the constitution, it should be applied at all levels.

Gender experts argue that women can only be effective if they are integrated in the country’s decision-making processes and organs at all levels.

“In political spheres, if women are not uplifted and given a chance to hold positions of importance as relates to decision-making processes, then they may not realise substantial gains,” says Dr Crispin Odhiambo, a political scientist and lecturer at the University of Nairobi.

And in one of her powerful and moving speeches to women when she visited Kenya recently, Ms Thelzhwe Mutiu, the deputy secretary-general of South Africa’s African National Congress (ANC), said:

“It is just not enough to celebrate that so many women are represented in Parliament, but having a good number of them in the Cabinet and other decision-making positions that can directly make their lives and those of their families better.”

QUOTE N’ UNQUOTE

“I sense a naked hostility to affirmative action from a section of the male politicians. Many of them have no problems with extending the principle to indigenous minorities and persons with disability but refuse to apply the same goodwill to women. For their convenience they categorise the gender debate as an elitist and abstract argument that has no place amongst our people. This is the height of hypocrisy and imincerity.”

Mary Okumu, gender activist, Observer.

Seeking consensus

continued from page 1

relation to gender, religion, work and other issues dear to Kenyans.

In the words of NGO delegate Joyce Umbima, the debate on the Kadhis’ Courts will benefit greatly if it will be grounded on how to professionalise the staff and appoint competent individuals who are well-versed in both Koranic and secular law. She argued that women must remain vigilant because this is where their most fundamental rights are handled.

“There should be no conflict between the National Council and the National Assembly. The second chamber should ideally be a residual part of the Kenyan nation, coalescing all the 42 communities of the Kenyan nation and its minority groups. If the Maasai’s and the Kisi’s are fighting, for instance, the council could be summoned to arbitrate. This chamber should be seen as a House of nationalities so that no community feels marginalised. Such a move will also counter the negative effects of ethnicity. It should include members of all the 42 communities and minority groups such as the Kenyan Europeans, Arabs, Jews and Asians.”

Dr Willy Mutunga, Executive Director, Kenya Human Rights Commission.

Safeguarding women’s gains under the draft constitution
By Koki Mulli

What is MMP(R)?

MMP(R) is a mixture of two electoral systems.

1. The first electoral system is what we have currently in Kenya; the constituency system, known as First Past The Post (FPTP) where many candidates compete at constituency level and the one with the highest number of votes amongst the candidates wins the election.

2. The second is the one proposed for the upcoming elections, and is the Proportional Representation (PR) electoral system.

The draft Constitution proposes the above two electoral systems, which are together known as MMP(R) electoral system, that is to say, our current system and the PR system.

Since we know our current electoral system, (which has given us 210 MPs and the 12 nominated MPs in our Parliament) let us try to address the second electoral system as proposed: The Proportional Representation (PR).

Is PR a nomination or an election system?

Do we have ballot papers and how many?

PR is an election system.

This means that a list of political parties is presented on a ballot paper during an election.

For example, if we adopt PR, we may have to have, either one ballot paper, containing a list of all the candidates from one political party and a ballot paper containing names of civic candidates. Meaning that instead of our usual three ballot papers, we shall now have four as follows:

- Political Parties’ list – PR system – one ballot paper
- Parliamentary election – Current system – one ballot paper
- Civic election – Current system – one ballot paper
- Civic election – Current system – one ballot paper

Note: If we have the list of political parties (PR) included in one of our existing ballot papers, say for example, on the presidential election ballot paper, or on our Parliamentary, or on our Civic election ballot paper. However, to minimise confusion, it may be advisable to introduce a fourth ballot paper as mentioned above.

Voters then vote for or choose one political party of their preference (just as they choose one candidate on the ballot during our elections), meaning that you have given that political party the mandate to choose an appropriate PR representative to represent your special interests in Parliament.

The election through political parties’ list is conducted through a secret ballot just as in our current system.

How do we “operationalise” the PR electoral system?

PR is absolutely necessary to separately enact Rules and Regulations governing the PR elections contained in the electoral act, for example providing for the procedures and limitations and how to administer and “operationalise” the system.

The Rules and Regulations must also for example provide that before the general election is held (say three months before or after the dissolution of Parliament), political parties on the PR list must publicise the names of the candidates for the PR seats.

The Rules and Regulations must also clearly state for example that, since PR is meant to address imbalances in representation by ensuring fair representation, all PR seats irrespective of political parties must be occupied by minority or marginalized groups, women, people with special needs, the youth or other categories of people whose interests are not adequately represented in Parliament.

In our case, it may be necessary to require that political parties, which have put forward a list of its candidates for PR, also provide a list of its prospective candidates for PR, then only those identified must actually contest for the PR seats that the political party concerned has won.

The Election Legislation must clearly state the process of identification of candidates by political parties and ensure that those political parties, which do not follow this process, will be fairly represented. Since a political party has put forward a list of its candidates for PR, then only those identified must actually contest for the PR seats that the political party concerned has won.

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PR unlike the quarter system ensures equal opportunities for all people with special needs, the youth, marginalized groups/communities, women, or other members of the society whose voices are not heard and do not seem to matter.

This means PR positions are not used to reward loyalty or dished out to campaign contributors who have failed to secure a seat in Parliament through our current system but that PR positions automatically correct existing social imbalances. For example, by ensuring fair representation for people who are not ordinarily fairly or equally represented – e.g. women who despite their numbers are still in the minority in terms of representation, people who suffer physical, visual, hearing and other challenges or people from marginalized communities and regions, the youth, etc.

What is the difference between PR and quarter systems, for example, the special seats reserved for women in the case of Uganda?

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PR is a permanent electoral system where there are reserved PR seats that the political party concerned has won in an election. This means that when political parties go through their nominations for the FPTP (our current system) candidates, they must also go through strict nomination processes for PR candidates. These processes will also be regulated and applied will help us to eradicate such practices as those that are seen to be systems.

Therefore, the PR system ensures two things. First: that such nominations are dispensed on a temporary basis and second that just like constituency candidates PR candidates are known before hand, they campaign on their own party list and are just fair representation on the creation of national parties, which cut across ethnic divides, etc. Indeed, all Kenyans taking part in the general elections will elect a PR candidate, just as they elect the president in our current system. This means PR candidates are nationalistic politicians with national mandate. These are some of the benefits of PR systems.

PR electoral system is a permanent electoral system and it is not changed after the imbalances have been corrected and most importantly, it ensures fair and equitable representation for all Kenyans permanently.

Kenyans have shown that they want to write this Constitution for posterity. A nation that protects its minorities, guarantees posterity for its future generations. Therefore, seats must be assured to all who pursue political fairness must provide opportunities for those occupying them to effectively participate in charting and improving the lives of those they represent. Therefore, quarter systems like in the Ugandan case, which may reserve seats but assign no powers, or responsibilities, are not very useful in effectively eradicating social injustices and ensuring fair representation.

Women in Kenya do not just want to go to Parliament or to occupy other elective and or appointive positions BUT those positions they occupy must be positions of responsibility so that women can actually participate in making decisions. For example, by ensuring fair representation for people who are not ordinarily fairly or equally represented – e.g. women who despite their numbers are still in the minority in terms of representation, people who suffer physical, visual, hearing and other challenges or people from marginalized communities and regions, the youth, etc.

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