

Kenya six months on: A new beginning or business as usual?

By Ishbel Matheson

Introduction

At the start of 2008, Kenya was in the grip of its worst crisis since independence. The violence following the December 2007 election was unprecedented. It continued for weeks and posed a real threat to the unity of the nation. The initial spark was the contested presidential result, where the incumbent Mwai Kibaki – candidate of the Party of National Unity (PNU) – claimed victory, and was swiftly sworn in, amid claims of widespread poll-rigging. But the unrest quickly took on an ethnic dimension.¹

The Kikuyus – the group which has dominated Kenya economically since independence in 1963 – bore the brunt of the violence. They were perceived to be the backers of Mwai Kibaki – a Kikuyu – and his Kikuyu-dominated PNU alliance.² The worst unrest was around the Northern Rift Valley town of Eldoret where Kalenjins mobilised against Kikuyu, driving them away and burning their property.³ But there was also serious violence in the Southern Rift, with Kalenjin attacks on Kisii communities over land ownership issues, and in Western Kenya, particularly in the town of Kisumu, where Luo supporters of the opposition Orange Democratic Movement (ODM) were shot by the Kenyan police.⁴ In the Rift Valley towns of Naivasha, Molo and Nakuru, the Mungiki, a Kikuyu outlawed militia, attacked ODM supporters.⁵ Families from the minority Ogiek hunter-gatherer community close to Nakuru had their houses burnt down and their property destroyed by Kikuyu villagers. By the time the power-sharing deal was struck on 28 February 2008, bringing together the ODM and the PNU,⁶ approximately 1,500 Kenyans⁷ had been killed, over 400,000 displaced⁸ and an unknown number of women had been raped.⁹

Six months on, the Grand Coalition has survived – despite initial scepticism over its prospects – and peace has returned to the Kenyan countryside. But it is a fragile peace and dependent on strong leadership with a will to reform. When the Grand Coalition was formed, its leaders vowed to tackle the deeply rooted problems that led to the violence in the first place. They promised a new inclusive approach to governing Kenya's multi-ethnic society – instead of the 'winner takes all' mentality of the past. But a

key test of the pledge is how the Coalition reaches out to the country's most marginalized and impoverished communities. The experience of Kenya's smaller minority and indigenous peoples (see page 3) shows that thus far, this promise has yet to be fulfilled.

Members of the Ogiek hunter-gatherer group caught up in the violence have yet to receive any government assistance, while internally displaced peoples (IDPs) from larger communities have received shelter, seeds and fertilizers, as well as the promise of compensation to rebuild houses. Moreover, despite the important reforms set in motion by the Kofi Annan-brokered deal, there has been no commitment to involve minority and indigenous peoples in these processes and it remains unclear how these communities will realise their right to participate in them.

Secondly, Kenya's new prime minister has pledged to tackle what he termed the 'scourge of ethnicity' in Kenya.¹⁰ His meaning however remains unclear and potentially poses difficulties for minorities. If it entails a more hostile approach to minorities' rights to express their separate culture and identity, then it will undercut the very point of the inclusive process that the reforms are supposed to achieve.

However, if the prime minister means to tackle the politicization of ethnicity which has disfigured Kenya's governance since independence, then the commitment is a welcome one. But here again there are doubts about the political will to follow through on this promise. Reconciliation efforts in the countryside have been largely NGO and church-led. The government's main priority seems to have been to disperse the large IDP camps, rather than heal ethnic divisions. Moreover, the ODM's calls for an amnesty for their supporters arrested during the election violence puts a question mark over the party's commitment to tackle the culture of impunity which surrounds ethnic violence in Kenya.

The first part of this paper will examine in greater detail how the government has dealt with the issue of ethnicity and fall-out from the violence six months ago. The second part of the paper will look at the prospects for reform through the lens of minority and indigenous rights.

1. Reconciliation and reconstruction

The backdrop to the 2007 poll

Kenya's ethnic diversity is a source of strength for the nation. Preservation of traditions and cultures can provide 'a sense of solidarity in the face of a relentlessly globalising marketplace.'¹¹ In calmer times, ethnic differences are a source of endless comment, humour and discussion among Kenyans of all ages and backgrounds. However, the deliberate mobilisation of ethnic identity to accomplish political ends has also been a feature of Kenyan life both before and after independence.¹² During the Kenyatta era (1963–1978) the first president was ultimately supported by an elite group of Kikuyus from the Kiambu district of Central Kenya.¹³ During the Moi era (1978–2002), the president's Kalenjin group – and in particular the Tugen sub-clan – benefited from the disbursement of patronage and resources.¹⁴ Kibaki's first term in government (2002–2007) was perceived to have favoured a circle of Kikuyu cronies, dubbed the "Mount Kenya mafia", whilst failing to deliver the benefits of economic growth to all sections of Kenya's population.¹⁵

Following the restoration of multi-party politics in 1991, political ethnicity¹⁶ has also been associated with election violence. In the run-up and aftermath of the 1992 election, it was estimated that 1,500 people died, and 300,000 were displaced over a two year period.¹⁷ The attacks took place in the Rift Valley, carried out by Kalenjin youths on farms belonging to Kikuyus, Luhyas and Luos.¹⁸ Before the 1997 elections, attacks were carried out by militia drawn from the indigenous coastal communities, targeted at members of the 'settler' Kamba, Kikuyu, Luo and Luhya communities.¹⁹ In both 1991 and 1997, officials from the then-ruling party KANU were heavily implicated in inciting the violence.²⁰

The unrest associated with the 2007 result was different from previous episodes: it erupted after – not before – polling day, and was initially a popular protest against the blatant rigging of the presidential election result.²¹ But it was the Kikuyu in the countryside – not the political elite – who bore the brunt of the backlash from opposition supporters. Historical grievances dating back to the Kenyatta era, about land allocation to the Kikuyu in the Rift Valley in the 1960s and 1970s,²² were re-ignited. Kikuyu farmers in the Rift Valley – especially around Eldoret – found themselves driven off their land by Kalenjin militia.²³ Elsewhere in the South Rift, dispute over land and access to jobs led to Kalenjin attacks on Kisii and Luo communities. According to the International Crisis Group, these were less organised and more opportunistic than the violence against the Kikuyus in the Northern Rift.²⁴

Although the election provided the spark, inflammatory anti-Kikuyu rhetoric by political leaders, elders and on vernacular radio prior to the election, prepared the ground.²⁵ Jane Wanjiku, a Kikuyu farmer, told MRG that

she had been warned by Kalenjin youths five days before the election. 'They would kill our young men and take us women and young girls as wives,' she said,²⁶ if ODM was not victorious. In the Rift Valley, many Kikuyus ended up in camps for internally displaced people. In Western Kenya – an opposition and Luo stronghold – Kikuyu fled the town. By late May, residents in the Lake Victoria town of Kisumu reported that, apart from civil service workers, many Kikuyus had not returned, with some selling their transport businesses to Luos.²⁷ In Nakuru and Naivasha, attacks were carried out by the Kikuyu Mungiki militia on non-Kikuyu including Luos, Luhyas, Kalenjin,²⁸ and minorities such as the Ogiek were also targeted (see page 9). Some of those who fled their homes ended up in IDP camps, but some migrant workers employed in the large flower farms – such as members of the minority Bunyala fisher folk community, originally from Lake Victoria – opted to return to their ancestral homeland.²⁹ This pattern was also repeated in Central Province, with Kikuyu IDPs turning up to claim possession of land which had belonged to their forebears.³⁰ The sudden movement put considerable strain on traditional arrangements for allocating land.³¹

Overall, the effect of the violence led to a 'balkanisation' of the country, according to Halakhe Waqo, a senior consultant working for ActionAid. 'Peoples travel around, but their attitudes are more entrenched than ever,' he says. 'If there is no long-term planning and response then the situation is likely to re-occur.'³²

Dealing with the IDP crisis

From the start, the new government appeared more intent on getting rid of large IDP camps in the centre and on the outskirts of major towns, than healing ethnic divisions. Operation *Rudi Nyumbani* was launched by the government in May 2008 to resettle IDPs back in their home areas.³³ By the end of July, the Red Cross estimated that 24,000 were still in IDP camps.³⁴ However this figure disguises the fact that many of the displaced moved out from the large IDP centres, and continue to live in tents in poorly equipped 'transit' camps close to their home village. Although the farmers work on their *shambas* (smallholdings) during the day, most have been unable to rebuild their houses due to lack of money. The government has given some assistance with seeds and fertilizers, and some IDPs spoke of being promised 10,000 KSh (Kenyan shillings) for the construction of houses.³⁵ The Kenyan National Commission on Human Rights (KNCHR) carried out an assessment of Operation *Rudi Nyumbani* in June 2008, which identified a number of problems.³⁶ It found that the IDPs were not adequately informed about the conditions and security situation prior to their return, and while most went home voluntarily, there had been cases of IDPs forced to return by provincial officials. The Commission recommended that the government bring the whole exercise into line with accepted international standards on resettlement, particularly by securing the free

and informed consent of the displaced prior to their return.³⁷ Halakhe Waqo of ActionAid says that the entire operation has been 'gross inadequacy of resources'.³⁸ The government promised to put 30 billion KSh (\$436 million) into resettling displaced families: in fact, it has only been able to raise a fraction of that sum.³⁹

Those resettled from the IDP camps did, however, have the benefit of some government assistance. Members of the Ogiek hunter-gatherer community who were caught up in the violence have not received any official help (see page 7) – despite recently raising the issue of compensation with the Prime Minister directly.⁴⁰ The Ogiek see the lack of help for their plight as further evidence of the discrimination faced by their small community – discrimination which has its roots in the State's refusal to recognise their existence as a distinct group. Similarly, there have been complaints that the 'political' IDPs have been getting preferential treatment from the government, because the majority comes from the powerful Kikuyu community. Wilson Kipkazi of the Endorois Welfare Council, which works on behalf of the small Endorois community in Lake Bogoria, says the Endorois have been hosting 500 IDPs from recent inter-ethnic clashes over grazing land, but has not, to date, received any official help.⁴¹ This sense of unfairness has contributed to the ongoing hostility towards Kikuyu victims of the violence.

The government's decision to speed up the resettlement process was seen as unhelpful by those engaged with reconciliation work on the ground. Whilst new police stations were being built to boost security, there were few peace initiatives underway.⁴² Ken Wafula of the Centre for Human Rights and Democracy (CHRD) says, 'Little has been done to reconcile and build trust among the communities involved.'⁴³ The government has taken a back seat in reconciliation efforts,⁴⁴ allowing international NGOs, national NGOs and community-based organizations to take the lead.⁴⁵ The churches have also been involved. The Roman Catholic Bishop of Eldoret, Cornelius Korir, has been heading efforts to build bridges between the communities in his area (see page 4).⁴⁶ But the efforts still do not match the scale of the needs. The Ogiek, for example, have tried to rebuild their relationship with their Kikuyu neighbours, but while one village has been responsive, another continued to refuse to allow access to Ogiek weeks after the violence had died away.⁴⁷ Six months on, some Kalenjin communities are reportedly still refusing to allow the return of their Kikuyu neighbours, and there are cases where Kikuyus returned to the IDPs camps after facing intimidation from Kalenjin communities.⁴⁸

The coalition government: a house divided

While the Kibaki-Odinga power-sharing arrangement has cooled the political temperature, the early manoeuvring for the next presidential election reinforced the impression that for the politicians in Nairobi it was back to business as usual.⁴⁹ The country was in the grip of an IDP crisis, and



An Endorois family in Lake Bogoria in the Rift Valley, displaced by clashes with a neighbouring pastoralist community over access to land. Unlike IDPs from the election violence (most of whom come from the bigger communities), the Endorois IDPs have received no official help. *Ishbel Matheson/MRG*

Kenya's minorities: a struggle for equality

As in many African states, there is no overall ethnic majority in Kenya. However, while all communities are in a numerical minority, some are bigger and more dominant than others. The two biggest groups are the Kikuyus and the Luhya, making up 21 per cent and 14 per cent of the population respectively, whilst the next biggest – the Luo and the Kalenjin – form 12 per cent and 11 per cent of the population.

The State officially recognises 42 ethnic groups, but in fact there are over 70 distinct communities in Kenya. For example, the existence of the Ogiek – possibly the country's largest hunter-gatherer community – is not acknowledged by the Kenyan State. In addition to ethnic diversity, Kenya also has several religious minorities, including Muslims, and linguistic minorities, such as the Yaaku.

Whilst diversity has been a source of strength for the Kenyan nation, it has also led to fierce competition for power and resources between the large groups, at the expense of the smaller, non-dominant minorities. A MRG report in 2005 noted that 'exclusion and rampant discrimination have characterized Kenya's political and economic system'.

Kenya's smaller minorities have tried to advance their struggle for equality through legal action and the constitutional review process, but thus far they remain some of the most marginalized and poorest communities in the country.

Sources: 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity', MRG, 2005; 'Kenya: Ethnic Groups', African Studies Centre, University of Pennsylvania, <http://www.africa.upenn.edu>

Healing ethnic divisions: the work of Bishop Cornelius Korir

In the peaceful gardens of the Cathedral of the Holy Heart in Eldoret, a meeting is underway under the watchful supervision of Bishop Cornelius Korir (pictured). 'This,' says the Bishop, 'is neutral ground.' On one side the Kikuyu farmers, on the other their Kalenjin neighbours. For the past few months, the Kikuyus have been living in an IDP camp in Eldoret, unable to return to their farms for fear of attack.

Now it is time to clear the air, and the Kalenjin elders bring up their grievances. Why is it the Kikuyu have given names to their farms in their own language? How is it that Kikuyus come to be farming in the area in the first place? The Kikuyus are given an opportunity to respond.



Land is always, says the Bishop, the main issue.

The Kalenjin – the biggest community in the area – see the Northern Rift Valley land as their ancestral property, and they resent the Kikuyu smallholders. But the question of land rights is a complex one. Many Kikuyu farmers bought their property from Kalenjins under a 'willing-buyer-willing-seller' arrangement, and are not there because of the controversial resettlement scheme pursued by the Kikuyu independence leader Jomo Kenyatta in the 1960s and 1970s. Others argue that the territory was originally occupied by the Maasai – so the Kalenjin themselves have no right to claim it as theirs.

It could take months before the difficulties between these divided communities are fully resolved. And this is just one village out of the many which were engulfed in violence. After the elders' meeting, the Bishop will convene one between women's leaders, then the youths and so on. 'It is a small way,' he says, 'But a sure way.'

At the height of the violence, the Bishop doubted whether the two communities could ever be reconciled. In reality, most have no choice. For the Kikuyus, farming is their livelihood so they must return to their land. But the Bishop says patience is the key. 'If they are forced back, an explosion can happen. This is a way to defuse tensions. Otherwise, it can erupt again.'

Source: MRG interview, Eldoret, May 2008

widespread food shortages were looming as a result of the election crisis,⁵⁰ but cabinet ministers, particularly on the PNU side, seemed more intent on staking out their claim to Kibaki's post in four years' time.⁵¹

The parliamentary arithmetic post-election is a source of tension. The General Election left the ODM with a slim parliamentary majority – and although the Grand Coalition parties govern together, by-elections are contested competitively. Deaths of MPs in the post-election violence and a plane crash,⁵² as well as disputed constituency results, have led to a number of fiercely fought by-elections. For example, the Kilgoris by-election in Trans Mara District in June 2008 was marked by a high degree of tension between the Maasai and the Kipsigis community, who had bought and settled Maasai land in the area.⁵³ There were threats from members of the Maasai community that the Kipsigis would be driven from their land if a Kipsigis MP was elected. Ultimately, many Kipsigis were deterred from voting.⁵⁴ BBC reporter Muliro Telewa, who covered the by-election, says although there was no incitement of ethnicity by the party leaderships, junior party officials egged on those feelings. He says, 'It is in their interest to push things along by working up people along ethnic lines... If I get the political outcome, why not?'⁵⁵

Serious divisions have also emerged over how to deal with the alleged perpetrators of the violence. The ODM's attempt to portray itself as the champion of the reform agenda, committed to strengthening the rule of law,⁵⁶ took a knock when it started to advocate for an amnesty for those held in connection with violence. The issue was sparked when ODM cabinet minister William Ruto⁵⁷ reportedly called for an 'unconditional' amnesty for ODM's supporters in detention.⁵⁸ This was vigorously opposed by the PNU – and in particular, the Kikuyu Justice minister, Martha Karua, who is seen to harbour presidential ambitions.⁵⁹ She argued that the law must take its course – a stance which played well with the PNU's Kikuyu supporters. Calls for an unconditional amnesty were also opposed by Western donors and the Kenyan National Commission on Human Rights, which pointed out that blanket amnesties for gross human rights abuses and crimes such as torture are a violation of international law.⁶⁰

Since then, the ODM has shifted its position, with the prime minister saying that he is only seeking those held on minor charges to be released, in the interests of reconciliation, and denying that what was sought was an 'amnesty'.⁶¹ But the episode has served to reinforce the reluctance of the political leadership to tackle the mobilisation of ethnic militia associated with Kenya's election violence.

CHRD's Ken Wafula says:

*'There were a lot of mass killings and destruction of property in 1991, and no-one was punished. In 1997, no-one was punished, so people believe these are things that you can do and get away with them.'*⁶²

But Kenya's experience – and MRG's study of ethnic conflicts elsewhere in the world – shows that if crimes go unpunished, then violence is likely to break out again.⁶³ The real test for the Coalition will come upon the completion of the Commission of Inquiry into Post Election violence, known as the Waki Commission. On previous occasions, investigations into the causes of ethnic clashes – most notably the 1999 Akiwumi Commission – have been suppressed by governments, and their findings ignored.⁶⁴ This time, the Waki Commission has been tasked with investigating the causes of the election violence, including the involvement of State agents, and to recommend measures to bring to justice those responsible.⁶⁵ The report is eagerly awaited given the allegations circulating about the role of politicians on both sides in inciting and fuelling the unrest.⁶⁶

The Commission's findings will also be important for victims of sexual violence. At the first public hearing of the Commission, its chairman made a strong commitment to seek justice for victims of rape, describing it as 'the silent crime in situations of conflict.'⁶⁷ In March 2008, an investigation carried out by the UN Population Fund, UNICEF and the Christian Children's Fund found that: 'Sexual violence has increased during the post-election crisis that began on 30 December. Evidence suggests that perpetrators are exploiting the conflict by committing sexual violence with impunity.'⁶⁸ At hearings in Kisumu in August 2008, aid workers testified that many of the victims of rape were elderly women – and accused the officers from Kenya's General Service Unit, police officers and youths of being responsible.⁶⁹

2. Kenya's minorities and indigenous communities: the imperative for reform

Successive Kenyan governments have failed to live up to their international legal obligations to protect the rights and fundamental freedoms of Kenya's ethnic, religious and linguistic minorities and indigenous peoples.

A study for MRG in 2005 found that budget allocations and historical development policies had discriminated against minorities and indigenous peoples.⁷⁰ Their social and economic development was not equal to that of the larger communities, and they find it difficult to participate in public life.⁷¹

Despite the clear obligation under the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM) to protect the existence of minorities and to encourage conditions for the promotion of their identity,⁷² several Kenyan minorities believe they are in danger of being wiped out, either through the destruction of their traditional livelihoods or through assimilation with larger communities.⁷³

In MRG's report *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*,⁷⁴ author Maurice Odhiambo Makoloo says the minorities and indigenous peoples have been

'immensely disadvantaged' by the politicization of ethnicity in Kenya because 'they cannot marshal sufficient numbers to bargain with other groups for political power.'⁷⁵

The Coalition's promise of a new inclusive approach presents minorities and indigenous peoples with an opportunity. Moreover, Antony Kuria of the KNHRC says the public mood may be now more receptive to minorities' claims for recognition: 'We are so many, so diverse we have to find a way of living together... The case of small groups will resonate now when almost every Kenyan knows the pain of the State unable to protect their rights.'⁷⁶

One of the Coalition's first steps did, indeed, appear to deliver on the promises of inclusion. When the government line-up was unveiled in April 2008, two new ministries were established: the Ministry for Development of Northern Kenya and Arid Lands, and the Ministry for Fisheries. These government departments seemingly offer assistance to marginalized communities in Northern and Western Kenya. The vast territory of Northern Kenya is the most under-developed part of the country, and pastoralist communities there have long considered poor access to resources and a weak voice in government as being causes for their plight.⁷⁷ Similarly, the fisher folk of Lake Victoria suffered from the general under-development of the area – in part because the successive presidencies of Kenyatta and Moi did not favour a region which was the heartland of the Luo opposition.⁷⁸

However, on closer scrutiny, it seems that the two ministries were created due to raw political calculations, rather than a genuine commitment to diversity. During the 2007 election, the 40 or so MPs from different pastoralist communities in the North and North-East were split evenly between PNU and its allies and the ODM.⁷⁹ It was, therefore, in the interests of both parties to keep voters in these constituencies on-side. The establishment of the Ministry for Fisheries was a result of Raila Odinga's newly elevated status as prime minister, and a signal of his intention to help his supporters by reviving the fishing industry – the lynchpin of the economy in Western Kenya.⁸⁰

The new ministries were initially given a cautious welcome by the communities, but subsequently there have been complaints about under-resourcing. The Executive Director of the Indigenous Fishers Network, Nyang'ori Ohenjo, was disappointed with the 650 million KSh (\$9.6 million) allocated to the new fisheries ministry, believing that the sum was not sufficient to make a difference to the dilapidated infrastructure.⁸¹ Similarly, the 2.7 billion KSh (\$40 million) allocated to the Ministry of Northern Kenya and Arid Lands, was denounced by some Kenyan Somali MPs as proof that the ministry had merely been created for 'political expediency'.⁸²

But Turkana activist Pius Ewoton, of the Arid Lands Integrated Programme, says it is probably just as well that large funds have not been allocated, given the confusion surrounding the ministry. He says that the geographical

scope of the new government department has not been defined. 'Which areas are arid and which are Northern Kenya?' he says. 'Where does Northern Kenya start?' He also worries about the lack of real commitment from the Kenyan political elite. At present, the Ministry has no legal standing and can be disposed of upon a presidential whim.⁸³

The importance of the North and North-Eastern vote was also underscored by the selection of the 12 nominated MPs to seats reserved under the Kenyan constitution for 'special interest' groups. Representatives from the pastoralist and/or muslim minority communities in the North and North-East were given half of the 12. Women, in particular, benefited with the PNU, KANU and ODM all nominating one female MP.⁸⁴ Although small, this represented a tripling of numbers. In the last parliament, only one muslim woman MP was nominated. The slow rate of advance, however, still cannot disguise the lamentable state of female representation in Kenya. Of the three East African countries, Kenya, Tanzania and Uganda, Kenya has 21 female MPs following the 2007 election, compared to 97 in Tanzania and 102 in Uganda. Efforts to secure better representation through reserved seats prior to the 2007 election were thwarted when MPs did not form the required quorum for a constitutional amendment.⁸⁵

For Kenya's smallest communities, their failure to secure a nominated seat in the 2008 parliament was a major disappointment.⁸⁶ It has been a long-standing grievance among these communities that the 210 constituency MPs in Kenya, are generally drawn from the dominant community in the constituency – making it extremely difficult for some of the smaller pastoralist and hunter-gatherer groups to be represented.⁸⁷

Parliamentary representation in Kenya is particularly important – not just because it gives communities access to political power. Since Kibaki's first term in office, substantial Constituency Development Funds (CDFs) are allocated to MPs. Small communities, like the Ogiek, have all too often found these swallowed up by the larger ethnic groups within the constituencies.⁸⁸

In the run-up to the 2007 vote, the Hunter-Gatherer Forum, which represents the Ogiek, the Yaaku, the Sengwer, the El Molo and the Awer, wrote letters to the officials at the main political parties, telling them of the need for nominated MPs.⁸⁹ The Ogiek, in particular, lobbied hard. When Raila Odinga came seeking their votes in the election campaign, they gave him their support and made him an elder.

Daniel Kobei of the Ogiek Peoples' Development Programme says:

'They should have nominated the Ogiek to parliament. They have not done anything. The real positions have gone to their own people.'

Ignoring the claims of the smaller minorities and indigenous communities to nominated seats also flew in the face of a 2006 ruling by the Kenya Constitutional Court in favour of the Ilchamus people. This small pastoralist community is located around Lake Baringo in the Rift Valley. They number 35,000–40,000, with 7,000 registered voters. Like the Ogiek, their separate identity is not officially recognized by the Kenyan State.

The Ilchamus had long complained that their interests were not being represented at a national level because they did not have an MP.⁹⁰ With the help of Ilchamus lawyer, Thomas Letangule, they took a case to the Kenyan Constitutional Court. In an important ruling, the three judges ruled that the Ilchamus qualified as 'special interest' group under the current constitution:

*'Although the Constitution does not define special interests contemplated by Section 33(i), they include those interests which have not been taken care of by the election process, and which are vital to the effectiveness of the democratic election in terms of adequate representation for all in a democracy.'*⁹¹

But in the Kenyan political system, constitutional court rulings are often only implemented following considerable lobbying at parliamentary level. Caught in a vicious circle, the Ilchamus who are campaigning for the right to have an MP find themselves without anyone to champion their cause within parliament.

Post-election, the Kenyan National Commission for Human Rights, along with Kenyan minority rights activists, have also lodged another case with the constitutional court to try to get it to define what 'special interest' means.⁹² However, it may take up to three years before there is a ruling in this case.

The Constitutional Review

In the meantime, the constitutional review process may offer another route through which the Ilchamus decision could be recognised. Under Kofi Annan's mediation, the two sides pledged to complete a constitutional review within a year. Many Kenyans believe that is an optimistic timetable. On the other hand, after nearly two decades of trying – and failing – to get a new constitution, there is also a feeling that the main sticking points are known, and what has to be crafted now is a way around them.⁹³ The question is whether there is the political will to do so.

Yash Pal Ghai was the Chairman of the Constitution of Kenya Review Commission which drew up a draft of the Constitution (popularly known the Bomas draft) after widespread public consultation including minority and indigenous communities. The Kibaki government put a much watered-down version to the electorate in 2005 – and had it rejected by the Kenyan public.

Professor Ghai is pessimistic for the prospects of success this time round:

*'There seems little will to pass the new constitution, at least on the part of the PNU ministers. Two Bills have been submitted to Parliament – one with procedures for replacing the constitution, including a referendum, and the other setting up the road map/procedure for the review of the Constitution, initially through a committee of experts. The general view is that this is more to satisfy the Panel of Eminent Persons [part of the AU supervisory process], and local pressure groups, but there is no serious intension to proceed with the bills.'*⁹⁴

Nevertheless, minority communities feel that there is much at stake, and are anxious that their voices be heard. Yobo Rutin, Director of the Centre for Minority Rights Development (CEMIRIDE), says, 'A narrow perspective is affecting the process... It is as if the Kenya process is between PNU and ODM, minorities are caught in between.'⁹⁵

One of the major issues will be majimboism, or regional autonomy. The debate over majimboism, which has dominated Kenyan politics since independence, is at one level, about the transfer of resources and power, to the regions. This is popular with Kenya's minorities who feel that their interests have been poorly protected by the current centralized and corrupt state structures. However, the concept of majimboism is also infused with ethnic chauvinism, with some communities seeing it as a chance to deprive Kikuyus and other 'settler' communities of land and access to employment. The issue was highly politicized in the 2007 election campaign, with the ODM supporting majimbosim but not elaborating on what it meant by the term, whilst the PNU argued that devolution would lead to ethnic cleansing, and possibly the break-up of the State.⁹⁶

For minorities and indigenous peoples, the danger is that the divisions between PNU and ODM over issues like majimboism, means that other important reforms are neglected. They want to see the progressive measures contained in the Bomas draft – but which were dropped from Kibaki's version put to the referendum – restored. These include affirmative action provisions 'designed to benefit minorities and marginalized groups',⁹⁷ parliamentary representation of minorities,⁹⁸ as well as the positive promotion of ethnicity 'to promote understanding, tolerance, and appreciation of diversity.'⁹⁹

Equally important is the question of participation. Even though the Committee of Experts tasked with drawing up the constitution is 'enjoined to consult the people widely and to be accountable to the people',¹⁰⁰ it is not clear what that will mean in practise. The tight timetable for the review limits the scope for the kind of wide-ranging consultation undertaken during the Bomas process. Wilson Kipkazi of the Endorois Welfare Council fears it will be



Millikah Kennedy and her three children lost their home and all their possessions in an attack carried out by Kikuyu neighbours in January 2008. She has received no official help, and is now living with her father-in-law. She cannot afford clothes for her new-born baby.
Ishbel Matheson/MRG

Ogiek: forgotten victims of ethnic violence

The Ogiek – Kenya's largest forest-dwelling hunter-gatherer community – were badly affected by the post election violence in 2007. On 29 January, 11 Ogiek houses in the hills above Nakuru in the Rift Valley were burnt to the ground. Retired security guard Livingstone Ngiria says he was attacked by a Kikuyu mob. They were accompanied by armed Kikuyu police officers, who were shooting to chase the Ogiek away.

The Ogiek believe they were targeted because they were ODM supporters, and because the Kikuyu were taking revenge for attacks being carried out on their kinsmen further north in Eldoret. When the Ogiek went to police headquarters in Nakuru to complain about the police action, they were told, 'Everyone is complaining about police harassment, what is so special about you?'

The Ogiek homeless were given shelter by their extended family members – Ogiek cultural traditions mean that they help each other out in times of hardship. But unlike Kenyans, who fled to IDP camps, they have not received any official help. One family lost their store of maize and beans, as well as household goods totalling an estimated \$5,000 – a good portion of their annual income.

Others incurred legal bills to get their sons out of jail following in the violence. In August 2008, all charges against three Ogiek youths were dropped – but not before legal fees totalling 70,000 Ksh (\$1,000) had been incurred. Hard-pressed families are now facing the additional prospect of selling their property to pay the bills.

Source: MRG interviews, May and August 2008

'people jostling for power in 2012' who will dictate the content of the draft:

*'We the marginalized indigenous/minority communities shall have no say in this very important process of constitution making... this will make the process a flawed one and unrepresentative of all the Kenyan stakeholders.'*¹⁰¹

Minority and indigenous representatives argue that it is essential, therefore, that at least one member of the Committee of Experts is from a minority/indigenous community, as well as an expert on minority rights. They will press their case through the newly formed Minority Reform Consortium. This group brings together around 50 minority and indigenous groups and the goal is to provide a platform for the smaller communities to get their voices heard during the important reform processes. However, inevitably, resources are an issue, as many of the groups live in marginalized areas and have little capacity to fund regular transport to Nairobi. It will be imperative, therefore, that the Kenyan government and donors support the new reform consortium, to enable them to realise their right to effective participation in the crafting of a modern, inclusive constitution.

The Truth, Justice and Reconciliation Commission and National Ethnic and Race Relations Commission

The Kenya Dialogue and Reconciliation process also initiated the establishment of two commissions – the Truth, Justice and Reconciliation Commission (TJRC) and the National Ethnic and Race Relations Commission.

The former has the mandate of establishing a comprehensive record of violation and abuses of human and economic rights. It has several positive provisions for minorities, including inquiring into 'the reality or otherwise of perceived economic marginalization of communities, and to make recommendations on how to address the marginalization.'¹⁰²

Some minorities and indigenous peoples have been disappointed that it only examines post-independence violations from December 1963 – the Maasai point out that they lost control of their lands under the colonial administration.¹⁰³ The terms of the Parliamentary Bill drawn up to establish the Commission have also been criticized by human rights groups – Amnesty International says that the amnesty provisions for gross human rights violations (except for war crimes, genocide and crimes against humanity) are a breach of international law.¹⁰⁴

But the Minority Reform Consortium broadly supports the TRJC, although stressing that it is vital that minorities' experience is reflected also in the composition of the Commission. Interim Director Nyang'ori Ohenjo says, 'We need first to have someone from the minority communities as one of the commissioners. It is not just a question of

being interviewed as part of the process. You have to have your voice heard from the inside.'¹⁰⁵

But it is the National Ethnic and Race Relations Commission which has run into the greatest difficulty. Under the terms of the bill published by the government, the former has a wide-ranging mandate to investigate complaints of ethnic or racial discrimination, as well as to 'promote tolerance, understanding and acceptance of diversity in all aspects of national life, and encourage full participation by all ethnic communities in the social, economic, cultural and political life of other communities.'¹⁰⁶ It must also make special provision to examine the experiences of 'vulnerable groups',¹⁰⁷ and provide opportunities for marginalized groups to relate their experiences.

However, the Bill divided MPs in parliament – highlighting the ambivalence surrounding the issue of ethnicity in Kenya – and they ultimately rejected it. Some MPs felt the powers to investigate would lead to witch-hunts among enemies of the government, whilst others supported it, saying that there should be greater efforts to punish ethnic and racial discrimination.¹⁰⁸ The Minorities Reform Consortium was concerned that the bill promoted a negative view of ethnicity,¹⁰⁹ while the Kenyan National Commission on Human Rights also weighed in against the bill, rejecting the necessity for a special commission. It said, 'The issues that the Bill proposes as the Commissions functions could be dealt with through other state organs, so long as there is a deliberate policy to rein in ethnicity.'¹¹⁰ The Bill has now been sent it back to the Ministry of Justice for reworking, but given the hostility to the proposals it seems unlikely that the Commission will ever be established.¹¹¹

The Land Policy

Since taking office, the ODM Minister for Lands, James Orengo, has pledged to reform Kenya's land laws – a promise which has gone down well with many ordinary Kenyans. Some of the deep social and economic inequalities experienced by Kenyans have their roots in inequitable land distribution – as does the violence experienced in the Rift Valley after the 2007 election. Land distribution was skewed in favour of the Kikuyus, both prior to independence and during Kenyatta's tenure.¹¹² This historic fact fuelled the 2007/2008 election violence against the Kikuyu in the Rift Valley. However, the land problems are also due to the clutter of poorly administered existing laws – a mix of British, Indian and customary rules – which have opened the door to land-grabbing by well-connected individuals, and made it extremely difficult for poorer Kenyans to obtain title to land.¹¹³

Kenya's indigenous peoples, in particular, have suffered from sharp violations of their land rights. In his 2007 report, the UN Special Rapporteur on Indigenous Issues, Rodolfo Stavenhagen, painted a bleak picture of the situation of Kenya's pastoralist, hunter-gatherer and forest

tribes. Excluded from economic and political power, these peoples have seen their land seized and resources plundered, making their way of life ever more untenable.¹¹⁴

The draft National Land Policy, drawn up after extensive public consultation, contains important provisions to help minorities and indigenous peoples. Indeed, it includes a special section on minorities, pastoralist groups and coastal peoples. Some of the policy's provisions include: the establishment of a legislative framework to secure the rights of minorities and indigenous peoples; to convert government-owned land on the Coast into community land; and crucially, to recognize pastoralism as a legitimate land use and production system.¹¹⁵

Perhaps predictably, the proposals are being met by fierce opposition. The Kenya Landowners Association – which represents the country's bigger landowners – says they encourage environmental degradation, are against free enterprise and will legitimize Zimbabwe-style land seizures.¹¹⁶ Catherine Gatundu of the NGO Kenya Land Alliance, which helped to craft the policy, is in no doubt that a tough battle lies ahead. 'They [the landowners] want their existing rights protected... It will be a war between those with money and the people.' She sees little interest in the PNU side for reform, believing that Kibaki's supporters have too much to lose, but is hopeful that the reformist pitch of the ODM might yet deliver change.¹¹⁷

The international response

With political impetus for reform likely to fade as the Coalition government becomes more established,¹¹⁸ the involvement of the international community could yet be decisive. In the reconciliation and dialogue package brokered by Kofi Annan, international involvement forms an integral part. The reform processes not only fall under African Union supervision, but there is also an international presence on key commissions. The Kriegler Commission tasked with investigating the electoral irregularities and Waki Commission have non-Kenyan members. The current plan is that the Committee drafting the country's constitution should also have a number of international experts on it.¹¹⁹ Potentially, this makes it harder for Kenyan politicians to ignore their recommendations, and it places the African Union Heads of State under an obligation to press for the full implementation of the recommendations of these Commissions.

The former British ambassador to Kenya, Sir Edward Clay, cautions that, 'without external stimulus and assistance, reform will be little and piecemeal.'¹²⁰ But the donors and the AU will also have to weigh the need to support the Coalition government, so that the country gets a chance to recover. It is a difficult balancing act, but not impossible. The unity of purpose shown by the US, UK, EU and African Union in the wake of Kibaki's controversial victory helped to deliver the power-sharing government. Through a combination of threats to investigate individuals

caught up in the violence, and cutting aid to Kenya, pressure was placed upon the main political players.¹²¹ It is vital that similar pressure is maintained if Kenya is to make the transition to a fully modern, functioning democracy. Without these reforms, the prospects for long-term stability for Kenya and all its peoples are bleak.

Ways forward

An impressive raft of reform processes have been set in motion following the 2007 crisis. But previous experience in Kenya shows that, without political will at the highest levels, little will be accomplished.

Minorities and indigenous communities have much to gain if the reform processes can take root. But given the highly-politicized environment, and with eyes already on the next election, they will have to lobby hard to get their concerns taken on board – this can be difficult for communities who are often geographically as well as economically marginalized. But if a new Kenya – where ethnic diversity is seen as a strength rather than a source of division – is to succeed, its leadership can no longer afford to flout the State's international legal obligations to protect and promote the rights of these vulnerable communities.

The EU, UK, US, international financial institutions and the African Union must keep up the pressure for the reforms to be kept on track. It would be a mistake to assume that the crisis in Kenya is over. Unless the international community continues to actively nurture the reform processes it insisted upon, then Kenya will become ever more divided on ethnic lines, raising the real fear of renewed, worsening conflict.

To the Government of Kenya

- Adhere to the 'Agreement on the principles of the partnership for Kenya', signed as part of the Kenyan Reconciliation and Dialogue process, which stated that the Coalition government would 'work in good faith as true partners, through constant consultation and willingness to compromise.'¹²²
- The new draft Constitution should be drawn up through a process which ensures the voices of minorities and indigenous peoples are heard and their issues incorporated through informed and effective participation.
- The draft constitution should ensure, in particular, that the existence of Kenya's minority and indigenous communities is recognized, that special measures should be taken to redress the inequalities experienced by marginalized communities, and parliamentary representation is guaranteed for Kenya's smallest minority and indigenous communities.

- A new land policy is introduced which recognizes collective land rights, and historic injustices relating to land and natural resources should be addressed.
- The government should appoint representatives of minorities and indigenous peoples to the Truth, Justice and Reconciliation Commission and the constitutional review committee. These appointments should be undertaken after consultation with minorities and indigenous peoples' representatives.
- There should be an independent review of the funding needs and remit of the Ministry for Northern Kenya and Arid Lands, and the Ministry of Fisheries. Recommendations should be acted upon.
- The Waki Commission's findings should be made public, and the Government act swiftly on its findings, including recommendations relating to the investigation and prosecution of individuals implicated in the violence.
- The government should fulfil its funding pledges for the internally displaced people. It should specifically channel funds into reconciliation efforts, ensuring all affected communities are reached.
- In the medium-term, the government should set up an independent commission to handle all IDP issues, including the establishment of a separate fund to assist IDPs from ethnic clashes elsewhere in Kenya.
- Amnesty provisions should be in line with international law, and should be undertaken as part of a wider truth, justice and reconciliation process.

To the major government donors and African Union:

- Continue to support the Coalition government's reform processes diplomatically and financially.
- Raise minority and indigenous rights issues with the Kenyan government, in order that minority and indigenous peoples should not be overlooked.
- Support the Minority Reform Consortium to allow minority and indigenous groups to effectively participate in the reform processes.

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