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Kenya at 50: unrealized rights of minorities and indigenous peoples

By Korir Sing'Oei Abraham





Two young Turkana herders near the village of Kache Imeri in Turkana District, northern Kenya.
Frederic Courbet / Panos.

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Minority Rights Group International

Minority Rights Group International (MRG) is a nongovernmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations, which represent minority and indigenous peoples.

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Abbreviations

| | | | |
|-----------------|---|--------------|--|
| ACHPR | African Commission on Human and Peoples' Rights | IHRDA | Institute for Human Rights and Development in Africa |
| ACRWC | African Committee of Experts on the Rights and Welfare of the Child | ILO | International Labour Organization |
| CBS | Central Bureau of Statistics | JSC | Judicial Service Commission |
| CEMIRIDE | Centre for Minority Rights and Development | KANU | Kenya Africa National Union |
| CIC | Constitutional Implementation Commission | NCIA | National Cohesion and Integration Act |
| CIPEV | Commission of Inquiry into Post-Electoral Violence | NCIC | National Cohesion and Integration Commission |
| EOC | Equal Opportunities Commission | NGO | non-governmental organization |
| FGD | focus group discussions | NLC | National Land Commission |
| ICC | International Criminal Court | OSI | Open Society Justice Initiative |
| IDPs | internally displaced persons | TJRC | Truth, Justice and Reconciliation Commission |
| | | UN | United Nations |

Executive summary

To mark Kenya's 50th anniversary of self-rule, this report reviews the current status of minority and indigenous groups in Kenya. Focusing on Kenya's 2010 Constitution, this report pays particular attention to how legal and policy changes over the last five years have responded to the social, economic and political challenges confronting minorities.

Kenya's new Constitution is a progressive document that aims to address the failed legal and moral systems created by earlier colonial and postcolonial regimes. The country's previous constitutional order alienated most citizens from the state, but minority and indigenous communities have borne the brunt of this exclusion. Further, this system reproduced and strengthened differences between Kenya's diverse groups – mainly ethnic and religious – rather than building a pluralistic society that tolerates all shades of diversity based on equality before the law.

The present state of minority and indigenous groups within Kenya's dynamic context has been shaped by conflicting forces of regression and progress responding to the 2007 post-electoral violence, the new Constitution and the forthcoming 2012 elections. This report demonstrates both the opportunities to be seized and constraints to be overcome by minority groups if they are to realize the dream of inclusion.

Although Kenya's new Constitution contains numerous positive provisions for minorities and other

vulnerable groups generally, this report shows that the prevailing experience of minorities in Kenya is increased vulnerability. This means that although policy recognition of minorities is an important gain, legislative and administrative implementation remains a challenge. There is a danger that constitutional recognition may not translate into positive developments for minority groups in reality. The report describes the ongoing challenges facing minority and indigenous groups: lack of political participation, discrimination and weak protection of their right to development.

Responding to the deep-seated disempowerment of minorities on the one hand and the opportunities presented by the new constitutional framework on the other, the report recommends that principles of multiculturalism should be established in every sector of society, including in education. It urges the Kenyan government to facilitate the political participation of minorities and put a stop to targeted police harassment of minority groups in the country.

Directed at non-governmental organizations (NGOs), policy actors and the media, the report warns that failure to ensure inclusion of minorities and address the anxieties of majorities, particularly in the context of county governments in the run-up to the 2012 elections and beyond, will lead to untold conflict, driving the reform agenda several years back.

Kenya



Introduction

Kenya will celebrate its golden anniversary of self-rule in 2012. Over this 50-year period, the country's population has grown five-fold; from a mere 8 million people in 1964, to 40 million in 2009. Out of the 43 ethnic groups listed in Kenya's 2009 National Housing and Population Census Report,¹ five communities – Kikuyu, Luhya, Kalenjin, Luo and Kamba – account for over 50 per cent of the population; 18 other ethnic groups listed in the report have populations of less than 100,000 people. This report reviews the present status of minority communities in Kenya, paying particular attention to the manner in which legal and policy changes over the last five years have taken account of the social, economic and political challenges confronting minorities. Focusing on the new Constitution, this report analyses the various provisions that relate most directly to the particular concerns of minority groups in Kenya and beyond, while exploring the opportunities and challenges that activists, donors and the Kenyan state must navigate to ensure that the promise of social justice for the most disadvantaged communities in Kenya is realized.

This report is in four sections. The first discusses the emerging constitutional, policy and practical understanding of the beneficiaries of minority rights protection in Kenya. This section also analyses the historical and current drivers for the continued exclusion of minorities in the country. The second section describes the situation of three minority groups to show the common challenges confronting many minorities in the country: lack of political participation, discrimination and weak protection of their right to development. The third section focuses on the struggle by a number of minority groups for inclusion, particularly through the constitutional review process. This section examines the provisions of the new Constitution and their implications for minorities in the country, and assesses developments since the new Constitution was adopted. The fourth section of the report analyses some efforts by other African countries to enhance the inclusion of marginalized groups.

This provides activists with crucial ideas on how to secure minority and indigenous rights in the context of the constitutional implementation process in Kenya.

This report argues that it is essential to raise minority groups' awareness of the provisions of the Constitution and the implications of these provisions for their lives. Among other key recommendations, this report urges the Kenyan state, development partners and civil society to roll out a comprehensive civil education programme to benefit marginalized communities. This civic education should also target public servants, particularly the police, who are instructed by the Constitution to address the needs of vulnerable groups. The report also urges parliament to legislate to give effect to the constitutional provision on affirmative action for marginalized groups and clarify the land provisions of the new Constitution. The Kenyan government should also develop a strategy to include minority members at all levels of governance and map minorities at the county level. It should also ensure that constitutional and legislative safeguards for the protection and promotion of minority rights within counties are adopted and implemented before the 2012 elections.

Methodology

This report was written during a three-month period, from August to October 2011, and is based largely on the author's personal interaction with the evolving context of minority rights protection both in Kenya and internationally over the last ten years. This report also draws on secondary literature, as well as key informant interviews and meetings attended by the author. A short questionnaire was also developed and sent to select respondents, whose qualitative response informed the author's understanding of community perceptions of constitutional, legal or political changes over the last couple of years. Focus group discussions with Ogiek in Nakuru, Nubians in Nairobi, Turkana in Kitale and Samburu in Nanyuki, Kenya were held in the month of October.

Minority identity in Kenya

Minority groups in Kenya

In order to understand how Kenya's complex multi-ethnic mosaic was created, it is necessary to appreciate that most of Africa's states, Kenya included, were constructed by the forces of colonialism.² Despite the fact that in the colonial scheme, few of the colonizers 'spheres of influence' were designed to be states³, the Organization of African Unity resolved to retain colonial borders after independence.⁴ As a consequence, most African states, Kenya included, are made up of many ethnic communities that are not well integrated to their countries' national life.

While the Central Bureau of Statistics (CBS) in Kenya provided data disaggregated by communities in its 2009 Census report, it failed to provide statistics on minority ethnicities, particularly hunter-gatherers.⁵ Instead, the CBS chose to subsume groups such as Sengwer, Ogiek and Endorois in a larger identity group, the Kalenjin. Even when the CBS statistics provided numbers of a minority group, members of that group have discounted the accuracy of the count.⁶

The limitations of official ethnic statistics notwithstanding, based on the latest data from CBS, Kenya is composed of more than 43 ethnic groups whose populations range from 6 million to a few thousands. This level of ethnic diversity, where no group makes up more than one half of the total population, means that the

Table 1: Communities with a population exceeding 1 million

| Community | Population size |
|--------------|-----------------|
| Kikuyu | 6,622,576 |
| Luhya | 5,338,666 |
| Kalenjin | 4,967,328 |
| Luo | 4,044,440 |
| Kamba | 3,893,157 |
| Kenya Somali | 2,385,572 |
| Kisii | 2,205,669 |
| Mijikenda | 1,960,574 |
| Meru | 1,658,108 |

SOURCE: CENTRAL BUREAU OF STATISTICS (CBS), KENYA 2009 POPULATION AND HOUSING CENSUS, [HTTP://WWW.PLANNING.GO.KE/INDEX.PHP?OPTION=COM_DOCMAN&TASK=CAT_VIEW&GID=64&ITEMID=69&LIMITSTART=15](http://www.planning.go.ke/index.php?option=com_docman&task=cat_view&gid=64&itemid=69&limitstart=15)

Table 2: Communities with a population below 1 million

| Community | Population size |
|---|-----------------|
| Turkana | 988,592 |
| Maasai | 841,622 |
| Teso | 338,833 |
| Embu | 324,092 |
| Taita | 273,519 |
| Kuria | 260,401 |
| Samburu | 237,179 |
| Tharaka | 175,905 |
| Mbeere | 168,155 |
| Borana | 161,399 |
| Basuba | 139,271 |
| Swahili | 110,614 |
| Communities with a population below 100,000 | |
| Gabbara | 89,515 |
| Orma | 66,275 |
| Rendile | 60,437 |
| Kenyan Asians | 46,782 |
| Kenyan Arabs | 40,760 |
| Ilchamus | 27,288 |
| Sakuye | 26,784 |
| Burji | 23,735 |
| Gosha | 21,864 |
| Taveta | 20,828 |
| Walwana | 16,803 |
| Nubi | 15,463 |
| Dasenach | 12,530 |
| Waata | 6,900 |
| Leysan | 5,900 |
| Njemps | 5,228 |
| Kenyan Europeans | 5,166 |
| Isaak | 3,160 |
| Kenyan Americans | 2,422 |
| Konso | 1,758 |

status of 'a minority' in the country becomes contingent upon communities' differential access to the state during and after colonial rule. In a previous report, Minority Rights Group International (MRG) noted that in Kenya there is a direct correlation between political power and the economic well-being of a community and, by extension, individuals within that community:

*'Political power in Kenya has been used to acquire economic power, thereby placing an additional premium on the necessity of acquiring political power. This has been taken to absurd levels, where particular leaders have used their political positions to illegally acquire wealth and, upon being called to account, have said that their ethnic groups are being persecuted politically. However, even when a particular community is in power, the 'eating' is only done by that community's elite. It does not always translate into a tangible benefit for the ordinary people in that community.'*⁷

Released in 2005, this report captured the situation of hunter-gatherer and pastoralist communities who have traditionally self-identified either as minorities or indigenous peoples or both.⁸ However, discussion on the meaning of 'minorities' and content of minority rights, has evolved rapidly, particularly since 2007.

Over the last decade, the work of minority rights activists in Kenya has focused on mobilizing the voices of ethnic and cultural groups⁹ 'who think of themselves as possessing a distinct cultural identity ... and who evidence a desire to transmit this to succeeding generations [and] ... are defined by their real not imagined differences to the majority'.¹⁰ This more classical definition of minorities, however, was inexorably altered by the unprecedented post-election violence between December 2007 and February 2008, which was sparked by a contested presidential election result but quickly took on an ethnic dimension; and further by the new Constitution adopted in August 2010.¹¹

The post-election violence revealed that the situation of minorities in Kenya should be assessed not merely from a national context but, more importantly, from the sub-national, provincial, district and constituency levels. The lesson of this conflict, and of previous ethnic conflict over elections in the 1990s, is that while Kikuyu, Luo or Luhya may constitute relatively dominant groups at the national level, they can be in a non-dominant position at sub-national levels.¹² Similarly, while the Maasai, Somali, Giriama or Endorois may be minorities from a national-level perspective, they exert dominance in their constituencies in the North Eastern, Coast or Rift Valley provinces respectively. A more nuanced understanding of minorities is required in the post-2007 Kenyan context:

*'The situation is very complicated – because Kenya is a very unequal society ... the "dominant" groups include many who are poor and neglected ... [W]ithin many areas – including in the new counties – there will be people who are minorities, even if they are members of groups that are dominant elsewhere in the country.'*¹³

While the grievances and anger against some of the dominant groups are perceived and identified in the context of national-level political and economic debate, any prejudice, exclusion and violence is exercised at a much more local level.

Responding at least partially to this reality, the 2010 Constitution seeks to address both the historical situations that created minorities as well as emerging social developments that have the potential to create new minorities. The Constitution accords protection to 'minorities', 'marginalized communities' and 'marginalized groups', and often uses these terms interchangeably. Article 260 of the Constitution, when describing marginalized communities and marginalized groups, does not define the term 'minority', perhaps because of the lack of an internationally accepted definition of the latter term.¹⁴ In seeking to identify these disadvantaged groups, the Constitution relies on objective rather than subjective criteria, in a manner quite consistent with international standards.¹⁵

The Constitution defines a *marginalized community* as: a community which, by reason of its size or otherwise, has been unable to participate in public life in Kenya; an indigenous community that has retained and maintained a traditional livelihood based on a hunter or gatherer economy; nomadic or sedentary pastoralists; and groups which are geographically isolated. While some groups, such as Nubians, meet only one criterion of a marginalized community, others, such as the Ogiek, could fit into more than one.

A *marginalized group*, in contrast, is defined so as to capture a very broad class of socially excluded persons: 'Who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)', including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, language or birth.

By providing for present and future protection of groups suffering unfair disadvantages in law or in practice, the Constitution demonstrates an important understanding of the dynamic nature of the forces of exclusion in the country. However, the expanded definition of marginalized groups implies that many may seek protection as marginalized groups making the definition either redundant or ineffectual for protecting 'real' minorities in the Kenyan context.

Historical development of minority rights in Kenya

The Constitution which Kenya inherited from the British in 1964 – under the country's first president, Mzee Jomo Kenyatta – was based on compromises between the colonial interests of the settler minority and an attempt to balance the disparate ethnic aspirations and fears of Kenya's indigenous communities. The Constitution aimed to safeguard white minority interests, particularly property and citizenship rights,¹⁶ and adopted two mechanisms to secure the accommodation and autonomy of African minority communities in Kenya. It established regional governments, which were vested with authority to manage the affairs of the communities living in those regions, while ensuring that regional concerns were well articulated within the supra-state level.¹⁷ The Constitution also established what was at that time, in the early 1960s, a robust bill of rights fashioned after the European Convention on Human Rights.

These constitutional arrangements collapsed soon after independence. Regional assemblies were dismantled, the two-chambered legislature (Senate and parliament) abolished and the power of these bodies combined under an imperial presidency. Under this constitutional aberration, the presidency was used as an instrument of crude accumulation of state largesse, but also – and most crucially for minorities – land.¹⁸

It was hoped that the rise to power of Daniel Moi – who succeeded President Kenyatta in 1978 and was himself from a minority group background – would pave the way for more inclusive and responsive policies.¹⁹ But this was not to be. After the failed coup in 1982, Moi commenced a 'pogrom' that fixed ethnicity, and impunity, as the cornerstone for governance.

The multi-party period in early 1990s heralded the return of political pluralism but most minority groups were mobilized under the Kenya Africa National Union (KANU) party.²⁰ During this period, a number of groups were displaced from ancestrally occupied land, in the name of either development or of the resettlement of landless people.²¹

Although President Mwai Kibaki was first elected on a platform of reform in 2002, his political and economic agenda has continued on the same trajectory as the previous Kenyan governments with respect to the treatment of minority rights and grievances. What has changed by and large is the strategy: the Kibaki state appears to seek some form of engagement with minorities, but with little if any intention of pursuing a major change in policy. For instance, prior to the 2007 elections, Kibaki hosted delegations from the Nubian community and

promised to grant them unfettered nationality as well as land rights over areas they occupied in Kibera, a slum district of Nairobi.²² Similarly, Kibaki established a task force to study and report to him on Muslim historical grievances in Kenya,²³ and yet consistently sanctioned the rendition of Muslims for trial within more repressive states in neighbouring countries without due process.²⁴ In both cases, Kibaki has demonstrated less than unequivocal commitment to following through on his promises. Kibaki's government has pursued macro-level economic growth at the expense of minorities.²⁵ Rather than ethnic conflicts over natural resources and political competition being the main cause of displacement and impoverishment, national development is now the primary threat to the survival of some minorities.²⁶ To his credit though, Kibaki presided over the adoption of the new Constitution, the broad provisions of which contain important safeguards for the protection of minority rights in the new Kenya, as we shall discuss in more detail later in this report.

Recent developments

The exercise of presidential power alone, however, is not responsible for the current status of minority rights protection. Kenya is a member of the United Nations (UN), the African Union and other sub-regional arrangements and therefore the international community is involved in the country's internal affairs to some extent. Until the height of the post-election violence in 2007–8, the influence of these external actors in Kenya's internal affairs was less than clear. Following the escalation of violence, at the request of the international community and under Kofi Annan's mediation, Kenya's warring political parties signed a power-sharing arrangement and a National Accord. The accord's four-point agenda provided a road map for necessary short- and longer-term changes to prevent future violence. These proposed changes aimed not only to deal with immediate humanitarian issues, but also to address impunity²⁷ and promote broader institutional change, including land reform and the adoption of a new Constitution.²⁸

The National Accord and the enactment of Annan's four-point agenda is already having tremendous impact on inter-ethnic relations in a number of ways. First, minorities stand to benefit a great deal – subject to effective and inclusive implementation – from the provisions of the new Constitution. Second, two institutional responses emerged to address ethnic conflict and discrimination that present immense potential to minorities. The first of these is the Truth, Justice and Reconciliation Commission (TJRC), which has been designed as a 'forum for non-retributive truth telling that

charts a new moral vision and seeks to create a value-based society for all Kenyans'.²⁹ Additionally, the TJRC is expected to assess 'perceived economic marginalization of communities and make recommendations on how to address their marginalization'. The second institutional response is the National Cohesion and Integration Act (NCIA) of 2008. This milestone legislation, apart from criminalizing hate speech, seeks to address the problem of ethnic discrimination within the public sector.³⁰ More importantly, the NCIA established the National Cohesion and Integration Commission to implement the Act (NCIC).

Already, various grievances by minority groups have featured prominently in the public hearings and regional visits of the TJRC. Relatives of the victims of the Wagalla massacre in the late 1980s provided extensive testimony on the state-sponsored killings of members of the Somali Degodia clan by security officials. A special session to hear testimonies of women widowed as a result of the Wagalla massacre 27 years ago was held in camera due to allegations of sexual violence. Most of the TJRC's 30,000 statements, collected from victims across the country, deal with land grievances, one of the most common challenges facing indigenous groups in the country.³¹ In order to ensure that concerns of minorities are fully incorporated in its final report, the TJRC has commissioned the Centre for Minority Rights and Development (CEMIRIDE) to draft an issue paper and propose recommendations to address perceived marginalization of communities.³² Equally, the NCIC has emphasized the need for inclusion in public sector appointments. Its ethnic audit, released in April 2011, revealed that members of the Kikuyu, Kalenjin, Luhya, Kamba and Luo communities occupy 70 per cent of all jobs in the civil service.³³ The NCIC is currently involved in formulating a policy on national cohesion which will have significant impact on how dominant and non-dominant groups relate, focusing on the need for tolerance education.³⁴

The celebrated decision in the Endorois case best exemplifies the impact of Kenya's participation in regional and international human rights institutions.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya³⁵

Facts of the case

F1. In 1973 the Government of Kenya in exercise of its statutory authority over land, reserved Endorois land (then Trust Land) as a wildlife sanctuary first called

Lake Harrington and later Lake Bogoria Game Reserve, controlled by the Baringo and Koibatek local authorities and managed by the Kenya Wildlife Services. The government proceeded to forcibly evict over 400 families from Lake Bogoria without any consultation or compensation.

F2. The failure to compensate the community with adequate grazing land to sustain their livestock, or to subsequently involve the Endorois in the management and benefit-sharing of the reserve, forced the Endorois into abject poverty from which they have never recovered.

F3. In 1997 the Endorois, as beneficial owners of Trust Land, sought constitutional interpretation regarding their rights within the Lake Bogoria reserve. They specifically urged the Court to abolish the Trust on the grounds that the Baringo and Koibatek councils had violated their duty towards the community by failing to apply resources accrued from the reserve towards improving the social and economic welfare of the community. The Constitutional Court failed to assess the duty of a local authority towards the community (as envisaged in Articles 114–19 of the former Constitution) but instead found that the establishment of the reserve had nationalized the resource, placing it outside the direct control or enjoyment of the community.

F4. The appeal filed by the community was not heard for over three years, and in 2003 the Endorois, through CEMIRIDE and MRG, approached the African Commission seeking remedies of restitution of its land and compensation for material and spiritual losses among others on the basis of the African Charter on Human and Peoples' Rights.

F5. On 2 February 2010, the African Commission found in favour of the Endorois community.

Ruling

R1. On indigenous identity: In response to the government of Kenya's objection that the inclusion of the Endorois in 'modern society' had affected their cultural distinctiveness for the purposes of special protection as an indigenous group, the Commission established that actual aboriginality or distinctiveness were not a requirement for indigenous status in Africa. Proof regarding unambiguous dependence on a specific territory and the experience of marginalization and discrimination was sufficient.

Citing *Saramaka v. Suriname* (Inter-American Court of Human Rights), the Commission concluded that the mere fact that some members of Endorois no longer identified with the cultural traditions of the community did not deprive their community of juridical personality.

R2. On the right to property: The Commission found that neither paper title nor uninterrupted occupation were necessary to prove ownership for indigenous communities. It determined that ‘possession’ of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property. The Commission further added that, while traditional possession entitled indigenous people to demand official recognition and registration of property title, members of indigenous communities who had unwillingly left their traditional lands, or lost possession thereof, maintained property rights thereto, even though they lack legal title, unless the lands had been lawfully transferred to third parties in good faith. Moreover, the Commission stressed that members of indigenous communities who had unwillingly lost possession of their lands, when those lands had been lawfully transferred to innocent third parties, remained entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The government was urged to consult Endorois in clarifying the nature and content of tenure rights over Lake Bogoria. The Commission concluded that Trust Land regime had ‘proved inadequate to protect the rights of communities ...’

Legal recommendations

- R1. Recognize rights of ownership to the Endorois and reconstitute Endorois ancestral land.
- R2. Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- R3. Pay adequate compensation to the community for all the loss suffered.
- R4. Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- R5. Grant registration to the Endorois Welfare Committee.
- R6. Engage in dialogue with the Complainants for the effective implementation of these recommendations.

Status of the decision: Not implemented.

While the Kenyan state often does not comply with the recommendations and decisions of human rights treaty bodies, the Universal Periodic Review process within the framework of the UN Human Rights Council yielded a commitment on the part of Kenya to ‘implement the recommendations and decisions from its own judicial institutions as well as the African Commission on Human and Peoples’ Rights (ACHPR), particularly those relating to the rights of indigenous peoples.’ This open-ended commitment provides an opportunity to kick start negotiations with the state on ways to execute the recommendations of the ACHPR in the Endorois communication as well as the Ilchamus decision, which is discussed in the following section of this report.

Human rights concerns of minorities

MRG's 2005 report on Kenya exposed the country's existing complex ethnic and regional inequalities, and the resulting impact on the social and economic rights of minorities. Failure to address these equity concerns threatened the stability of the state:³⁷

'The common denominator among Kenya's excluded communities is poor access to resources and opportunities, insecurity of tenure and alienation from the state administration. Their weak voice in governance restricts their ability to address most of these issues and increases their vulnerability in the face of environmental, economic and political problems ... [they] suffer from low levels of income; and poor health and nutrition, literacy and educational performance, and physical infrastructure.'

Despite some progress made in addressing these challenges, especially at the policy level, many minorities feel that their situation is worse today than it was in 2005. Central to this perception is the increased ethnicization of Kenyan politics, which has deepened the sense of exclusion among minority groups. During interviews conducted for this report, Sahra Ali, a woman from the Isahakia community in Narok contended that 'minorities are being marginalized further ... Big tribes are merging to build political coalitions for political reasons.' She further pointed out that issues affecting minority groups, such as drought, are not receiving media attention in contrast to, for instance, the International Criminal Court's (ICC) activities in Kenya, which dominate media space.³⁸ Sheikh Ramadhan, from the Nubian community, held the view that

*'the situation of the Nubians is worse today than before ... from Kibigori to Kibera, land grabbing of what would be Nubian community land is on the rise ... What is the use of the new Constitution providing for community land when all lands occupied by Nubians have been grabbed?'*³⁹

In contrast, Patita Tingoi, a young Maasai woman leader saw the long-term potential of the new

Constitution, while acknowledging that it might take a while before some groups (minority women included) began to reap the benefits: 'much as the gains will not be immediate, it is most certainly comforting to know that for those who might wish to benefit in certain ways, they have the constitutional backing to do so'.⁴⁰

Many minorities, interviewed separately and in groups, reported that formal courts across the country have been used either to silence or deliberately harass them. Equally, some minority members accused the police of enforcing the rights of wealthy and influential individuals over those of communities, particularly in property disputes cases. In Samburu for instance, charges of trespass against pastoral groups have increased whenever the community seeks access to grazing grounds, even in what they consider to be community lands.⁴¹ A similar trend has been witnessed in Kedong ranch in Naivasha, in the Rift Valley, where over 50 cases of trespass have been filed against Maasai herdsmen.⁴² Trespass charges have also been initiated in the Kenyan Coast province against communities who occupy government land, which is the predominant land tenure in the region.⁴³ The police often mete out communal punishment against minority groups, including the use of rape in the case of Samburu women in Pois Robo, and the confiscation of livestock.⁴⁴

In general, some of the shared problems faced by minorities and marginalized communities that emerged from focus group discussions (FGDs)⁴⁵ include:

- The lack of effective representation in parliament and participation in local decision-making;
- The dispossession of their ancestral land and resource rights in addition to distortion of their livelihoods to make way for the establishment of national parks, game reserves, forest areas and economic activities;
- Poverty, inequality, and limited access to social services as a result of historical marginalization.

Some of these issues are further discussed in the next section of the report.

Public decision-making deficit: the Ilchamus example

While minorities in Kenya are increasingly recognized by the state from an identity perspective, this recognition has yet to translate into real respect. This treatment is clear from the limited level of participation of minorities in actual decision-making in relation to matters that affect them. Traditional governance structures have been systematically undermined over the years,⁴⁶ leaving minorities to contend with dominant groups within formal decision-making bodies where they have limited or no representation. Without the opportunity to ‘influence the formulation and implementation of public policy, and to be represented by people belonging to the same social, cultural and economic context as themselves’⁴⁷ minorities have become increasingly alienated and socially vulnerable within the state.

Most minorities and marginalized communities in Kenya – by virtue of their numbers – are unable to succeed in having a member of their own community win an elective office in Kenya’s majoritarian system of democracy. This difficulty is further compounded by deliberate attempts by the state to divide minorities between different administrative or electoral units, rendering them numerically inferior in whichever unit where they are present. Such has been the fate of Ogiek, who are spread over five constituencies, drastically reducing their chances of winning in an electoral contest in any of these areas.⁴⁸ The Endorois are similarly divided into two local authorities – Baringo and Koibatek – where, despite having a number of councillors from the community, they are unable to influence political decisions in either county council because they are too few.⁴⁹ Sengwer are equally disadvantaged by skewed administrative borders; the group bestraddle the Marakwet, Pokot and Trans-Nzoia counties, rendering them totally unrepresented in each.

Minorities’ lack of participation translates into weak voice in public decision-making, thereby contributing to an increased sense of exclusion. In most cases, political representation in Kenya is also linked to access to resources given that political units, notably constituencies, have become direct recipients of annual grants from central government to cater for local development.⁵⁰ Many members of the Sengwer community link their 2009 evictions from Kobolet forest and the eventual burning down of their homes and farmlands to the lack of political participation. Moses Laima, a Sengwer elder put it poignantly: ‘We have no defender in parliament, nor within district administrations. Our eviction matters not to any political actor. We are like a house without walls.’⁵¹

The relationship between access to public services and proximity to government exerts pressure on minority groups to discard or hide their identity and take on the more dominant identity. A Nubian woman asserted that: ‘I’d pretend to be a Kikuyu when seeking services from government offices ... Once, I spoke loudly in Kikuyu language to attract the attention of a government official in Kibera, but was let down by my *buibui* [black gown worn by Muslim women].’⁵²

Participation is so important for minority groups that some communities have moved beyond appealing to the state to include them in decision-making processes and have instead sought the assistance of courts. The best demonstration of this trend is the struggle by the Ilchamus community.

Ilchamus community v. Electoral Commission of Kenya and Attorney General of Kenya⁵³

Facts of the case

- F1. In 2004, an application was brought before the High Court of Kenya by the Ilchamus people against the government of Kenya alleging violations of their rights to political representation, to choose a candidate of their choice, freedom of conscience and freedom of expression.
- F2. The Ilchamus (also known as the Njemps) – a small group with a distinct history and language, numbering 25,000–30,000 persons and living around the shores of Lake Baringo – were considered to be part of the Baringo Central Constituency, one of the 200 political units in the country. They argued that they were indigenous people and that a member of their community had never and could never represent them (for the next 40 years) in parliament because the current demarcation of constituency boundaries, especially in Baringo Central Constituency, made them a perpetual minority. Consequently, the Ilchamus contended that this demarcation violated their fundamental rights to political representation, to choose a candidate of their choice, freedom of conscience and freedom of expression.
- F3. They further contended that the Baringo Central Constituency should be divided into two separate constituencies, taking into account the appropriate demographic and numerical considerations and all powers set out in section 42 of the Constitution of Kenya, so as to prevent the continuing electoral, political, social and economic marginalization of the Ilchamus.

F4. The Ilchamus contended that they fall within the purview of section 33 of the Constitution, in that they constitute special interests and consequently one of their members should be nominated as a way of implementing the constitutional machinery for the representation and protection of indigenous minorities. They advocated for the need to have their voice in parliament so as to protect their interests, to safeguard their own cultural values, traditions, social patterns and territorial identity.

F5. The government of Kenya argued that the application was frivolous, vexatious, an abuse of court process and lacked merit in law and fact, in that the Ilchamus were not an indigenous people but a Maasai clan. The government further argued that the Ilchamus did not constitute a special interest group envisaged in section 33 of the Constitution and therefore were not entitled to representation. They further argued that the current delimitation of the Baringo Central Constituency took into account their special interests.

Ruling

R1. The Ilchamus people are a unique, cohesive, homogeneous and culturally distinct minority having all the attributes of the internationally recognized indigenous peoples. The Ilchamus community constituted a special interest group as contemplated by the mandatory purposes of section 33 of the Kenya Constitution.

R2. The term 'minorities' under modern and forward-looking jurisprudence should include non-citizens.

R3. The Ilchamus people have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves.

R4. The Electoral Commission of Kenya had a duty to protect minority interests – the principle of one man one vote notwithstanding. The Electoral Commission of Kenya was not supposed to submerge minority groups when drawing boundaries. Again gerrymandering in the drawing of constituency lines so as to dilute the voting power of a minority or other group is not permissible.

R5. For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Participation is

the lifeblood of democracy and clear constitutional recognition of a minority is essential so they can participate in the state's political process and influence state policies.

R6. The Ilchamus' right to exist, be treated without discrimination, the preservation of their cultural identity, freedom of conscience, freedom of association and their participation in public life had been violated.

R7. The Electoral Commission of Kenya was directed to take into account all the requirements set out in section 42 of the Constitution of Kenya at its next boundary review and, in particular, to ensure adequate representation of sparsely populated rural areas, and to take account of population trend, and community of interest, including that of minorities, especially the Ilchamus of Baringo Central Constituency.

Status of the decision: Not implemented.

While the new Constitution could address the problem of political participation, the lack of political will to implement provisions relating to minorities is causing considerable frustration among minorities. At one focus group, it was observed that:

*'The 10th parliament has ... not put in place any legislative measures to redress the blatant exclusion of minorities in political institutions and the government has neither taken any affirmative programmes to facilitate enjoyment of our gains in the new Constitution.'*⁵⁴

The government's failure to implement positive legal provisions or favourable judicial decisions such as the *Endorois* and *Ilchamus* cases, has pushed minorities further to the margins of society. Without experiencing the fruits of their legitimate struggles, it is not unreasonable that minorities to increasingly resort to 'self-help' including violence due to frustration with the government.

Social exclusion: the Nubian example

The exclusion faced by ethnic, linguistic and religious minorities in Kenya is both overt and covert. While law and policy are beginning to respond to the challenges

facing minorities, social discrimination and discrimination in state practice remain endemic. Nothing exemplifies this discrimination more clearly than the situation of the Nubian community.

Seven years before Kenya experienced its worst politically instigated violence in December 2007, the winds of mass violence had already rocked the Kibera slums near downtown Nairobi. In this expansive human settlement known internationally for its poor sanitation and cramped living quarters, Nubians, now sixth-generation descendants of former soldiers in the British-led Kenya African Rifles – eke out an existence. But in December 2001, ten Nubian landlords were summarily executed by their Luo and Luhya tenants when the former demanded payment of outstanding rent. These killings set off a three-day conflict which pitted Nubians against Luos and Luyhas, and left hundreds of people critically injured and many properties, particularly those belonging to Nubians, burnt to the ground. Thousands of people were displaced, and for months sought refuge in mosques until they were absorbed into Kibera's massive informal settlement.⁵⁵

In the immediate aftermath of the 2001 conflicts, it emerged that the denial of rights to property – whose secondary right includes the ability to levy rent from a tenant – and displacements were not new phenomena but a periodic reality experienced by Nubians. At least eight previous demolitions of Nubian homes by the state spanning a 40-year period, starting in 1947 during the construction of a railway line all the way up to 1984, had taken place. In each of these waves of demolitions and forced evictions, the Nubians were never consulted prior to their evictions and were forcibly displaced without compensation or alternative settlements, and never benefited from the estates build on their land.⁵⁶

While in Kenya unresolved land claims are a ready trigger of conflict, Nubians' claims over Kibera are very specific. In the first instance, the Nubians – originally from the Nuba mountains in central Sudan – have occupied Kibera for well over a hundred years – longer than most Kenyan communities have inhabited their present secure holdings. Indeed, the colonial government had acknowledged by 1934, that one of the reasons why 4,197 hectares of urban land in the precincts of Nairobi was designated as 'Crown lands', the precursor of the current 'government lands', was to 'provide a home for Sudanese ex-Askaries (Nubian former soldiers)'.⁵⁷ It was clear, even to the colonial regime at a period prior to international human rights law becoming ubiquitous, that equity demanded that Nubians in Kibera either be granted full property rights or relocated to land of equal value.

Underlying the insecurity of Nubian land tenure in Kibera has been the question of their unclear citizenship

status in Kenya. Although Kenya's independence Constitution recognized land rights irrespective of nationality, the practice was that land settled by known African communities of indigenous extraction would devolve to that community. African communities which occupied government land such as forests or 'unalienated land' (land which had not been leased or allocated), such as the Nubians, Ogiek, Sengwer and communities in the Kenyan Coast, faced the unique problem that their occupation of these lands was unlawful. Since independence, the Kenyan government has either hived off forests or used portions of government land to settle landless Kenyans. To use government land to recompense a non-native community such as the Nubians is seen as politically unpopular and no Kenyan government has been willing to find a resolution to the long-standing Nubian land question. Therefore the Nubian community resorted to litigation.

In 2003, the Nubians went to the High Courts in Nairobi to seek entitlement to Kenyan citizenship. Although this litigation effort did not yield a positive outcome, largely because of the highly inefficient and corrupt judicial system, it exposed the Kenyan government's discriminatory policy towards the Nubians. Through papers filed in Court, it became clear that the Kenyan state viewed the Nubians as foreigners from Sudan who must renounce their putative citizenship before being granted Kenyan citizenship. Moreover, the Kenyan state believed that Nubians should only be entitled to citizenship by registration, an inferior type of citizenship that could be withdrawn on the whim and caprice of the Minister in Charge of Nationality Issues.

Frustrated by their failure in the Kenyan courts, Nubians shifted the focus of their struggle from the domestic level in Kenya to the regional level. Thus in 2006, with the support of CEMIRIDE, Open Society Justice Initiative (OSI) and the Institute for Human Rights and Development in Africa (IHRDA), Nubians sued the Kenyan state at the ACHPR for violation of various rights protected by the African Charter on Human and Peoples' Rights, the African Union's principal human rights treaty. These rights included the right to property, freedom of movement, freedom from discrimination, and various social and economic rights.

Simultaneously with the action at the African Commission, the Nubians also presented the African Committee of Experts on the Rights and Welfare of the Child (ACRWC) (the body that monitors African Charter on the Rights and Welfare of the Child, which Kenya ratified on 25 July 2000) with a complaint on behalf of Nubian children. While the African Commission, which declared the Nubian complaint admissible in 2009, has yet to make a decision in relation to the Nubian case, the ACRWC found Kenya in violation of the rights of Nubian

children to non-discrimination, nationality and protection against statelessness in a decision issued on 25 March 2011.⁵⁸

Following the adoption of the new Constitution, a number of formal challenges to Nubian citizenship have been eliminated.⁵⁹ However, social discrimination is still pervasive.

Denial of community-determined development: proposed Lamu Port

Kenya's ambition is to become a newly industrialized, 'middle-income country ... by the year 2030'⁶⁰. To achieve this goal, the Kenyan state has designated series of flagship programmes (known as *Vision 2030*), a number of them for areas occupied by minority and marginalized groups. These mega-projects, while having the potential to engender growth, can have harmful impacts on the livelihoods and cultures of indigenous groups, threatening not only their identities but also their very survival. The Kenyan state's approach to development, during the colonial and postcolonial period,⁶¹ is to pursue quick economic gains for the majority, at the expense of prior consultation and participation of communities. This approach has exacerbated inequalities between and within communities, displaced communities from land traditionally held by them, and often intensified the poverty and vulnerability of certain communities.

Lamu is the largest town on Lamu Island, which is in turn part of the Lamu archipelago. Lamu old town became a UNESCO World Heritage Site in 2001. It is one of the oldest and best-preserved continuously occupied settlements among the Swahili towns on the East African coast, with origins dating back to the twelfth century AD. This area is home to several minority and indigenous groups – including the Bajuni, Boni, Sanye and Swahili – and will soon see the development of a US \$20 billion port project called the Lamu Port–Southern Sudan–Ethiopia Transport (Lapsset), one of the flagship projects of *Vision 2030*. When complete, the project will comprise a port, an international airport and a refinery at Lamu, and a labyrinth of roads, railways and pipelines covering Kenya, Ethiopia and South Sudan.⁶²

Far from promoting the culture of the people of the Lamu region, the government will in fact destroy local culture as a result of the development and the influx of skilled workers with their own cultures from neighbouring cities. Many Lamu believe that 'up-country' people will come to Lamu, dominating all aspects of Lamu's institutions, causing them to become an oppressed minority. The Lamu Tour Guide Association Chairman does not welcome the upcoming modern port:

*'We have preserved a special identity and the cultural heritage unique to this island because we only accept local people in our organization. Everything on the island is done on a small-scale basis. From tourism, fishing to ship building, all the livelihoods that sustain the island are localized much in the same way when the island was first settled on around 1160 AD. Only 5 per cent of the population have sufficient skills to seek employment at the proposed Port.'*⁶³

In the past, local fishermen have hailed the Manda Creek, next to Lamu town, as a shrimp sanctuary vital to local subsistence fishermen. But now, construction of the port in this area would undoubtedly have a negative impact on their livelihood.⁶⁴ Moreover, in order to begin the port construction, pristine mangrove forests in the Manda Bay area, from Mkanda Channel to Dodori Creek, would require extensive felling. Mangrove forests are the first line of defence against the rise in sea level associated with global warming, and destruction of these forests would endanger this fragile eco-system and reduce its capacity to mitigate the effects of climate change.⁶⁵ Ironically, the government has for years denied the local communities rights to harvest the mangrove forests precisely on the ground that this would threaten the coastal eco-system.⁶⁶

Sanye, Boni and Bajuni watch these developments with consternation. Years of state neglect is now giving way to massive grabbing of their forest, fishing and farming lands in order to drive forward national and regional developmental plans. While the proposed projects may bring economic benefits for Kenya 'in socio-cultural terms, they will spell the doom of the Lamu indigenous people's distinct culture and creed. They will also adversely affect the environment in Lamu.'⁶⁷

Minorities and change: the new Constitution

Minority communities' engagement in the struggle for a new constitution

Minorities engaged quite robustly with the constitutional review process from 2000 on. Their engagement focused on educating their communities on the review process, collecting community views and submitting memoranda to various institutions created to lead in Constitution making. There were common aspirations across many minority groups: juridical recognition of their identity, access to ancestral land and to participation in public life. Ogiek, for instance, made a passionate plea to the committee of experts on the constitutional review process in 2009, justifying their request for land rights in the Mau forest:

'If a land restitution programme were run on the basis of aboriginal title, Ogiek would be entitled to claim much of Kenya and the Mau Forest ... Given present realities, such a course of action is not realistic ... Ogiek request for recognition and land should not be viewed in terms of restitution of traditional lands or compensation for past injustices, but rather as an attempt to effect a more equitable present ... Ogiek calls for greater access to land are neither unrealistic nor unreasonable since they are bound up in present socio-economic concerns and needs. The issue here is not whether the Ogiek wish to re-tribalise the country but rather that they see themselves as entitled to have access to land to make a living, that is to lead a

*decent life, be socially integrated and participate in the development of the common good.'*⁶⁸

In 2002, another hunter-gatherer community, the Sengwer, went beyond the Ogiek and sought restitution of their ancestral land, including land annexed during the colonial period. Relying heavily on International Labour Organization (ILO) Convention 169,⁶⁹ the Sengwer submitted that:

*'When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be compensated under appropriate guarantees.'*⁷⁰

The overall views of minorities submitted by the Pastoralists and Hunter Gatherers Network on land were emphatic that: 'All government land and Trust Land shall be surrendered to the local community in which it is situated and the community shall devise appropriate land tenure system. No such community land shall be sold or mortgaged.'⁷¹

The views of minorities on the Constitution and the extent to which these views were incorporated by various organs of the review process are summarized in Table 3.

Table 3: Minority views during the Constitution Review Process

| Minority group | Minority demands | Bomas draft 2004 | Referendum draft 2005 | New Constitution 2010 |
|--|--|--|-----------------------|---|
| Ogiek Peoples' Development Program on Behalf of the Ogiek ⁱ | The recognition of the Ogiek people as a distinct ethnic community incorporated in the Kenyan laws | No explicit mention of ethnic groups but ethnic diversity recognized | Silent | Article 206 defines minorities and marginalized groups to include hunter gatherer communities |

Table 3: Minority views during the Constitution Review Process (*continued*)

| Minority group | Minority demands | Bomas draft 2004 | Referendum draft 2005 | New Constitution 2010 |
|--|---|---|---|--|
| | The recognition and restitution of Ogiek ancestral lands in Kenya within the larger Mau forest complex as contained in the Bomas draft, chapters 7 and 8 | Land restitution contemplated but no institutional framework established for this except through the Land Commission's pursuance of its mandate to address 'historical injustices' | Silent | Land Commission established in Article 67 with mandate including investigation of land-related historical dispossessions |
| | Inclusion of Ogiek people in governance and in government institutions through affirmative action | The Bomas draft provided for representation of marginalized groups in both the Senate and the House of Representatives ⁱⁱ and specifically required that parliament should be inclusive of all communities in Kenya including marginalized groups ⁱⁱⁱ | Silent | Article 100 imposes an obligation on parliament to enact a law to facilitate political representation of marginalized groups |
| | The implementation of a devolved government | The Bomas draft provided four levels of devolution – national, regional, district and village | Provided for two levels of devolution –national and district | Chapter 11 provides for devolution of power at two levels – national and county |
| Sengwer Indigenous Peoples' Program on behalf of the Sengwer | Sengwer to be recognized as a separate and distinct ethnic group in Kenya, including in the census | Article 307 of the draft identified the beneficiaries of minority rights protection ^{iv} | Ethnic diversity recognized but none explicitly mentioned | Ethnic diversity recognized but no community is explicitly mentioned |
| CEMIRIDE on behalf of pastoralists and hunter gatherers ^v | There shall be a Constitutional Commission to address historical injustices | Similar provisions in favour of minorities and marginalized groups were made in the Bomas draft with regard to devolution, ^{vi} public financing, ^{vii} taxation ^{viii} representation in the public service, ^{ix} and within Constitutional Commissions ^x | Article 85 established a Land Commission with power to investigate land injustices, both present and historical, and "ensure appropriate redress" | Article 67 sets up a Land Commission that will make recommendations for the resolution of historical land injustices. Presumably, other historical injustice questions are being addressed by statutory bodies such as the TJRC and NCIC |
| | This Constitution shall obligate the state to recognize the rights of indigenous peoples as stipulated by various international instruments and standards | Participation of minorities integrated in various provisions | Silent | Various provisions recognize right to culture, land, political participation and non-discrimination of minorities and indigenous groups |

Table 3: Minority views during the Constitution Review Process (*continued*)

| Minority group | Minority demands | Bomas draft 2004 | Referendum draft 2005 | New Constitution 2010 |
|----------------|---|--|--|---|
| | Alternative Dispute Resolution (traditional methods of conflict resolution shall be strengthened in the Constitution and shall run alongside conventional system) | Article 85(2) (l) encouraged the application of traditionally accepted systems of dispute resolution in land disputes by the Land Commission; Article 184(3) (c) established Traditional Courts as courts subordinate to the High Court | Article 85(2) (l) encourage the application of traditionally accepted systems of dispute resolution in land disputes by the Land Commission. | Article 67 (2) (f) encourages the application of traditional dispute resolution mechanisms in land conflicts; enjoins courts to apply traditional dispute resolution mechanisms that are consistent with the constitution in Article 159(2) (c) |
| | The Office of Ombudsman for Minorities shall be constitutionally provisioned to deal with administrative disputes | Article 298(1) (d) established the Commission on Human Rights and Administrative Justice. One member of the Commission shall be a Minority Rights Commissioner, who shall have special responsibility for the rights of ethnic and religious minorities and marginalized communities | Silent | Establishes the Commission on Human Rights and Administrative Justice as one of the Human Rights and Equality Commissions envisioned under Article 59, but does not designate a specific Minority Rights Commissioner |

NOTES FOR TABLE 3:

i OGIEK VIEWS TO THE COMMITTEE OF EXPERTS (2009) AT [HTTP://WWW.FORESTGUARDIAN.NET/NEWS/NEWS-00-09-1.HTM](http://www.forestguardian.net/news/news-00-09-1.htm)>

ii KENYA CONSTITUTION (2010), ARTICLES 101, 114(6), 122(1)(C) AND 123(1)(C).

iii *IBID.*, ARTICLE 124(A).

iv ARTICLE 307, WHICH IS THE INTERPRETIVE PROVISION OF THE BOMAS DRAFT, DEFINED 'MARGINALIZED COMMUNITY' AND 'MARGINALIZED GROUP' IN THE SAME TERMS AS ARTICLE 206 OF THE CONSTITUTION ADOPTED IN AUGUST 2010.

v MEMORANDUM TO THE CONSTITUTION OF KENYA REVIEW COMMISSION BY THE PASTORALISTS AND HUNTER GATHERERS ETHNIC MINORITIES NETWORK, JULY 2002,

[HTTP://WWW.OGIEK.ORG/SITEMAP/CASE-MEMORANDUM.HTM](http://www.ogiek.org/sitemap/case-memorandum.htm)

vi BOMAS DRAFT, 2004, ARTICLES 206(1)(E), 219(C) AND 234.

vii *IBID.*, ARTICLES 236, 250(2), 259(5)(B) AND 259(6)(H).

viii *IBID.*, ARTICLE 240(G).

ix *IBID.*, ARTICLE 263(1)(K).

x *IBID.*, ARTICLE 298(1).

In the numerous Kenyan Constitutions, minority rights have been protected to varying degrees, as highlighted in Table 4.

Table 4: Minority rights in Kenyan Constitutions

| Issue of concern to minorities | Independence Constitution, 1963 | 1967–2009 Constitution | New Constitution |
|--------------------------------|---|---|--|
| Non-discrimination | Discrimination on ethnic, racial or national grounds prohibited | Discrimination on ethnic, racial, national or gender grounds prohibited | The prohibited classes in relation to discrimination are expanded to include marital status, health status, disability, dress, culture, etc. (Article 27(4)) |
| Recognition of identity | Silent | Silent | Recognition of collective rights, right to culture and diversity signals strong appreciation of identity Definitions of marginalized communities and marginalized groups in Article 260 identify groups that could benefit from affirmative action under Article 56 |

Table 4: Minority rights in Kenyan Constitutions (*continued*)

| Issue of concern to minorities | Independence Constitution, 1963 | 1967–2009 Constitution | New Constitution |
|---|--|--|--|
| Land rights | Silent save for protection of property rights and the creation of the Trust Land regime | Silent except for protection of property rights in section 75 and the Trust Land system in sections 114–117 | Land tenure clearly defined, including creation of community land in Article 63 and non-protection of unlawfully acquired property in Article 43 |
| Political participation | Regional assemblies which enabled minorities to participate in political processes; quota system for special interest groups | 12 Reserved Seats for special interest groups provided for in section 33(1) | New Constitution emphasizes participation of all citizens in public processes. Article 100 requires parliament to legislate to facilitate participation of minorities in the senate and national assembly. Article 177 also requires that minorities be represented in county assemblies |
| Revenue allocation | Executive authority with parliamentary sanction. No specific allocation for minorities | Parliamentary approval for public expenditure required but no specific public funds earmarked for marginalized groups' development | Article 204 earmarks 0.5% of annual state revenue for the development of marginalized areas in addition to 15% of national revenue being allocated for direct transfers to county governments |
| Affirmative action to address historical wrongs | Silent | Silent | Affirmative action for minorities (Article 56), persons with disabilities (54(2)), youth (Article 55) entrenched in the Constitution. |
| Gender issues | Silent | Silent | State mandated to ensure through legislation that no elective and appointive body has more than 67% of one gender (Article. 27(8)). No specific safeguards for women from minority groups in this gender quota |

SOURCE: CREATED BY THE AUTHOR BASED ON COMPARISONS OF THE VARIOUS DRAFT CONSTITUTIONAL TEXTS/SUBMISSIONS.

Kenya's constitutional protections for minorities

Kenya's 2010 Constitution protects the rights of minorities in three ways. First, it makes substantive provision to address specific concerns of these communities. Second, it mainstreams concerns of minorities into institutions of government including political parties. Last, it creates institutions and mechanisms that, if effectively implemented, could empower minorities and other groups.

Specific safeguards

Kenya's 2010 Constitution provides a rich and complex array of civil and political rights, social-economic rights and group rights. Kenya's bill of rights is greatly inspired by the 1996 South African Constitution, as evidenced by the emphasis on rights as vehicles for the preservation of individual and communal dignity, the promotion of social justice and the realization of human potential,⁷² and it curtails attempts to limit rights, often used by African governments in the name of public order. Through Article 24, the 2010 Constitution explains that constitutionally protected human rights can be circumscribed only by a specific law, and that such limitation will be permissible

only if it is 'reasonable and justifiable in an open and democratic society based on human dignity'. Courts are therefore required not to take statutes that seek to limit rights as definitive, but to comprehensively scrutinize the extent to which these limitations are permissible against the rigorous test established by Article 24.

Another notable innovation in the bill of rights relates to the fact that it is binding not just upon state organs but also on private persons.⁷³ This will put increased pressure on non-state actors to take positive action not to violate the constitutionally protected rights of communities and individuals.

Article 22, the enforcement of the bill of rights, accords every individual the right to institute court proceedings. Article 22(2)(b) goes further to allow a person to institute proceedings either as a member of or in the interest of a group or class of persons, while Article 22(2)(c) allows for proceedings by persons acting in the public interest. This is particularly important for the enforcement of indigenous rights, given their collective nature. Collective rights proved arduous to enforce under the previous constitutional order, under which most cases were interpreted as recognizing claims by individuals. This experience can be attested to by communities such as the Endorois.⁷⁴ This position is further enforced by Article 22(3), which calls for the formalities associated with court proceedings to be minimized and, where necessary, for informal documentation be accepted. Article 22 states that no fee should be charged for commencing such proceedings and the court should not to be unreasonably restricted by procedural technicalities.

Non-discrimination

Article 27(4) prohibits discrimination on the basis of ethnic or social origin, religion, conscience, belief, culture, dress or language. Article 27(6) further calls on the state to undertake, 'legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination'. This article prohibits both direct and indirect discrimination. Direct discrimination consists of measures adopted by a state that intentionally disadvantage an individual or group on the basis of a prohibited ground, such as race or nationality. Indirect discrimination occurs when a seemingly neutral provision or practice disproportionately impacts a particular group, without objective and reasonable justification.⁷⁵ This means that, in assessing the existence or otherwise of discriminatory treatment, courts will not only look at conduct or policy that differentiates groups and result in disadvantage. It will also explore conduct and policy which may not appear discriminatory on paper but which, when applied, create disproportionate disadvantage for some

groups more than others. Article 27 prohibits discrimination perpetrated by individuals and corporations, as well as the government. This is particularly important given that most violations of the rights of minority groups are perpetrated by corporate actors.

Even though the 2010 Kenyan Constitution prohibits discrimination, it also recognizes the existence of past discrimination. To address this, the Constitution recognizes the need for affirmative action programmes and policies in order to redress any past disadvantages caused by state policy or practice, an experience which many minorities have gone through.⁷⁶

Courts have already spoken on the provisions of Article 27 of the Constitution. In August 2011, six women's rights organizations filed a case challenging the decision of the Judicial Service Commission (JSC) to recommend to the president the appointment of five judges to the Supreme Court. The women's rights organizations argued that the JSC violated the provisions of Article 27 of the Constitution, which require that not more than two-thirds of the members of elective or appointive bodies should be of the same gender. The High Court dismissed the case, saying that:

*'the distinction has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or obstructing this access to benefits or advantage which are available to others is an essential and important criteria [sic] to determine the violation.'*⁷⁷

However, the Court ruled that 'Article 27(8) does not create any duty or a right which can be directed definitively against the 2nd Respondent (government) to perform its functions in a particular manner'.⁷⁸ The Court's ruling suggests, quite erroneously, that in the absence of enabling legislation, Article 27(8) is aspirational at best.

Earlier in 2011, the High Court in Mombasa issued orders to restrain the Immigration Ministry from enforcing an administrative circular requiring people of Arab and Asian identity to produce documentary proof of ancestry beyond those required of other Kenyans, and to be subjected to a verification process known as 'vetting' before being granted identity cards or passports. The Court ruled the circular a nullity for 'singling out Kenyan Arabs and Asians as communities members of which must supply parents' and grandparents' birth certificates before being issued with national identity cards'.⁷⁹

Economic, social and cultural rights

The majority of marginalized communities lack access to basic amenities such as water, food and shelter. Areas

occupied by marginalized groups such as Pokot or Turkana, who suffer from perpetual famine and poverty,⁸⁰ received constitutional concern through Article 43, which catalogues the economic and social rights guaranteed under the Constitution to include the right to health, adequate housing, clean and safe water, social security and education. While the social and economic rights provided in Article 43 are to be realized progressively, the state is precluded from merely relying on the commonly used justification that it has insufficient resources to meet the specific obligation. The new Constitution shifts the burden of proof onto the state to provide evidence of inadequate resources. Courts are empowered to scrutinize state priorities in resource allocation to ensure that the state is not merely evading its obligation to satisfy social and economic rights protected under the Constitution. In particular, the Constitution requires courts to scrutinize the government's resource allocation priorities to ensure their responsiveness to 'the vulnerability of particular groups and individuals'.⁸¹

Courts are already testing the constitutional content of Article 43. A community of over 1,000 residents in Garissa province filed a suit to seek to prevent the government from evicting petitioners from a piece of land they had been occupying for several years, or to provide the petitioners with emergency alternative housing, food, clean and safe drinking water, sanitary facilities and health care services. On 28 February 2011, the Court granted all the above orders, pending the hearing of the application *inter partes*.⁸²

In May 2011, a community in Moroto Mombasa challenged their eviction from public land, which they alleged had been irregularly sold to a private party, named Jama Abdi Noor. Over 276 families sought Court protection of their houses from demolition based on the constitutional protection of housing rights in Article 43. But the Court declined to grant their request, arguing that Article 21(2) meant that the right to housing in Article 43 'was an aspirational right, which the state is to endeavour to render progressively'.⁸³

In contrast, High Court judge Justice Daniel Musinga issued orders to stop the Staff Retirement Pension Fund of the Kenya Railway Cooperation from evicting and demolishing the houses occupied by the petitioners, who had lived as tenants of Muthurwa Estate, a slum in Eastleigh area of Nairobi since 1979. The judge also ordered the Railway Pension Fund to stop disconnecting the water supply from these houses in order to force tenants to leave and make way for the development of a modern housing estate. The residents of Muthurwa argued that this action would violate their social and economic rights to housing and water provided by Article 43 of the Constitution. While seeking to balance the property rights

of the Railway Pension Fund with the right to housing of a vulnerable group, the Court observed that it appreciated:

'The 1st respondent's good intentions of developing modern residential and commercial properties on the suit land ... and [recognized] that the said developments cannot be undertaken while the tenants of Muthurwa Estate remain in occupation of the dilapidated houses.'

However, the Court noted that it could not 'overlook the fundamental rights of the tenants' to accessible and adequate housing as required under Article 43(b) of the Constitution and urged the state to address the 'problem of informal settlements in urban areas ... and the issue of forced evictions [through developing] clear policy and legal guidelines relating thereto'.⁸⁴

Affirmative action for marginalized communities

The Constitution also elaborates certain rights to be applied to certain vulnerable groups, including youth, persons with disability and the aged. In this respect, Article 56 of the Constitution calls for the application of affirmative action programmes in favour of minorities and marginalized groups. Such programmes should be designed to ensure: their participation in governance; access to educational and economic activities; access to employment; development of their cultural values, languages and practices; and access to water, health services and infrastructure. Affirmative action is defined in Article 260 of the Constitution as: 'any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom'. While the aim of affirmative action is to enhance the participation of marginalized groups in decision-making, the gap between policy and practice is still wide, given the present reality of life for many minority groups in the country.

Mainstreaming of concerns of minorities

Land and environment

In a departure from previous Constitutions, the 2010 Constitution anchors land relations in Kenya on principles set out in the National Land Policy.⁸⁵ These principles include the need for secure land rights and encourage communities to deploy 'recognized local initiatives' to resolve land disputes. These principles are consistent with the informal approach to disputes of indigenous groups, such as pastoralists, which were previously subordinated by the constitutional and legal regime in Kenya. However,

the 2010 Constitution is also clear that local initiatives for dispute resolution must comply with the Constitution, so that if such approaches promote discrimination, including in gender relations, they will be found to be incompatible with the Constitution. These principles further embody sensitivity to the gendered nature of land relations by calling for the 'elimination of gender discrimination in law, custom and practices related to land'.⁸⁶

While the previous Constitution did not create a distinction based on citizenship with regard to property rights, the 2010 Constitution limits non-citizens' right to land to leaseholds whose terms shall not exceed a period of 99 years.⁸⁷ Designed to facilitate greater access to land by Kenyan citizens, this provision, while welcome to many minorities, is defeated by the provision of Article 62(1)(c), which defines such land not as community land, but as public land held by the county government in trust for the residents of the county.⁸⁸

Articles 62, 63 and 64 of the 2010 Constitution create three land tenure categories: public land, community land and private land. Public land, held by the government in trust for the people of Kenya and residents of the specific county respectively, shall be administered by the National Land Commission created under Article 67. It is noteworthy that the scope of public land has now been expanded to include not only 'unalienated' government land but also game reserves and land surrendered to the government by way of reversion.⁸⁹ This may present specific challenges for minorities, particularly those living on the Kenyan Coast, where most land is presently managed as government land. Undue expansion of public land to include 'game reserves' and land transferred to the Republic by way of reversion or surrender in Article 62(1)(c) of the Constitution may also prove problematic. This is a major issue of contention in most areas inhabited by minorities – particularly for the Maasai in Laikipia and in Northern Kenya – which has often led to tribal/ethnic conflicts. It has also led to serious tensions between conservation efforts and the rights of communities living within these regions, and impeded the development of pastoralists' enterprises.

The 2010 Constitution also creates community tenure, defined to include land 'lawfully held as trust land by *county governments*' and ancestral lands traditionally occupied by hunter-gatherer communities. While creating community land aims to address the problems created by both the previous Trust Land Act and Group Ranch laws (especially among pastoralists), minorities must be vigilant to ensure that the enabling law, to be enacted by parliament, does not take away from the gains intended by the Constitution.

The establishment of the National Land Commission (NLC), proposed by Article 67 is a positive step that will

ensure policy and legislative development in the land sector. Further, the fact that the same Commission is vested with power to investigate historical and present land injustices provides a great opportunity for minorities such as Ogiek and Nubians, to bring their issues for resolution through the Land Commission.

Devolved government and enhanced public support for marginalized groups

The transfer of decision-making to authorities at sub-national level is one of the important devices for increasing the participation of minorities in governance.⁹⁰ Recognizing that the over-concentration of power at the centre has been blamed for some of the conflicts witnessed in Kenya, including the PEV,⁹¹ Article 174 of the Constitution is clear that the objectives of devolution include fostering national unity by recognizing diversity, and recognizing the right of communities to manage their own affairs and to further their development.

Each of the 47 counties established by the Constitution⁹² shall have legislative and executive organs, the county assembly and county executive respectively. Each county assembly will have representatives from 'marginalized groups, including persons with disabilities and the youth',⁹³ elected through proportional representation. Parliament is mandated to legislate so that membership of both county assembly and county executive reflects the 'cultural diversity of a county' and so that minorities within counties are protected.⁹⁴

By virtue of Article 203(2) of the Constitution, counties will be beneficiaries of an annual unconditional grant of at least 15 per cent of national revenue to enable them to provide services to citizens at the county level. A Revenue Allocation Commission has been established to regularly formulate policy and operational means for equitable sharing of revenue raised by the national government.⁹⁴

Article 62(2) of the Constitution provides that county governments shall hold certain categories of public land in trust for the people resident in the county. This means that the survival and integrity of the county structure is critical for the security of land relations in a given county. Yet without their main revenue source, game reserves, the security of these structures, particularly those in pastoralists' areas, is now in doubt.⁹⁶ As a trade-off, Article 204(2) of the Constitution earmarks 0.5 per cent of national revenue on an annual basis (for an initial 20-year period) for the Equalization Fund, which shall be used to 'provide basic services including water, roads, health facilities and electricity to marginalized areas'.

The analysis provided above is indicative of the complexity of the devolution scheme presented in the new Constitution, and therefore requires the sustained focus of

minority advocacy groups. The 47 counties vary in terms of ethnic diversity, counties in central, western, north-eastern and Nyanza regions are more ethnically homogeneous than those in Nairobi, Rift Valley and the Coast. Academics Professor Yash Ghai and Jill Cottrell caution that self-governance as an objective of devolution will only be realized in heterogeneous counties if:

*'there are political or semi-administrative units below the county government ... There is real danger that most new activities would take place at the county capital – so many communities would be denied both representation and participation – unless very deliberate efforts are made.'*⁹⁷

Minorities have cautiously welcomed the devolution of power to counties, but are uncertain about how they will be able to participate in the new units. A professional from one minority group doubted that devolution will lead to increased participation: 'I am an internally displaced member of the Sabaot community in Kinyoro without any realistic chances of ascending to real leadership position in West Pokot, Bungoma or Trans-Nzoia Counties ... How is the Constitution going to right the lost opportunities ...?'⁹⁸ Counties such as Isiolo and Garissa are already witnessing increased incidence of ethnic violence. At the centre of these conflicts is the fear of marginalization:

*'The expansionism into Isiolo by some communities and their attempt to seize political control within the county to the disadvantage of the indigenous Borana, the manipulation of the border between Isiolo and Meru counties and government intention to transform Isiolo into a resort city are in combination stirring the most intense competition over natural resources and political power.'*⁹⁹

Despite these misgivings, local consensus-building processes are taking place within multi-ethnic counties. For instance, there is an ongoing dialogue between the Kuria and Luo in Migori county to secure pre-election agreements on how to share political positions at the county assembly. The idea behind the consensus-building process is that while Luos are dominant in Migori and can secure most positions at the county level, the stability of the county depends also on the extent of inclusion of the Kuria minority.¹⁰⁰ The emerging practice demonstrates a bottom-up appreciation for inclusive democracy and equitable resource-sharing.

Current status of constitutional implementation in relation to minority rights

Developments since the adoption of the new Constitution in 2010 point to limited change in the way the Kenyan state and non-state actors approach the question of minorities. During this period, evictions from land have continued to plague many minority groups, in absolute disregard of the new Constitution.¹⁰¹ The government has pursued the justifiable resettlement of internally displaced persons (IDPs), in some cases without regard to the fact that some minorities too, such as Maasai, Samburu and Ogiek, have also been rendered landless by state-induced processes.¹⁰² Courts have continued to mete out hostile and contradictory determinations on questions of concern to minorities, while the state has failed to internalize the findings of human rights treaty bodies, unrepentant of the reality of Article 2(6) of the new Constitution, which automatically domesticates international treaties ratified by Kenya.¹⁰³

The media discourse on the inclusion of marginalized groups has focused solely on gender concerns, while failing to highlight the need to also ensure the participation of ethnic minorities. Additionally, the media has failed to expose the hierarchies within the women's rights movement itself, even though rural women, most of whom are from minority groups, never benefit from gender quotas targeting women generally. Even when the media has covered issues affecting minority communities, it has failed to interrogate the possibility that minority rights discourse may be co-opted to serve the interests of dominant political actors. Laws adopted or being considered for adoption by the National Assembly have betrayed a total lack of commitment to ensuring that minorities are a functional part of the new Kenya. The exception to this development relates to the draft laws designed to implement provisions of the new decentralization arrangements, which have demonstrated an increased responsiveness to minority concerns.¹⁰⁵

Even though lessons learned in the two decade long process leading to a new constitutional dispensation emphasize the importance of collaboration between the state and civil society, relations between civil society and the Kenyan government remain precarious at best and tense at worst. Constitutional implementation is made more difficult given that it is happening within the context of the struggle to break the back of impunity through the ICC process, as well as preparatory campaigns for 2012 elections. While the situation of mainstream human rights NGOs remains precarious, organizations

working on minority rights issues are in an even more difficult position. This presents unique challenges in the context of monitoring and engagement with a fairly rapid and complex legislative process moving towards implementation of core provisions of the new Constitution.

On a positive note, parliament enacted the Environment and Land Court Bill in August 2011, to implement aspects of land reform envisaged by the new Constitution and the Land Policy. This law seeks to establish a superior court that will hear and determine disputes relating to the environment and the use and occupation of land. The law opens the door to using traditional dispute resolution mechanisms when it comes to land, and repeals the ineffective Land Disputes Tribunal Act.

Most minority groups view the recognition of minority rights in the Constitution and appreciation for cultural diversity positively.¹⁰⁶ However, the constitutional provisions of relevance to minorities such as devolution, representation and the land chapter remain least understood:

*'The new Constitution has provision for everyone, but the pastoralist communities don't understand it. There are also a lot of political changes in terms of representation. We need massive civic education so that pastoralist communities can be empowered to make the best of this Constitution. Otherwise the pastoralist communities could end up fighting over who gets the seats.'*¹⁰⁷

Constitutionalizing minority rights in Africa

Affirmative action, whether through special quotas in political organs of the state or the establishment of funding mechanisms, is becoming a common feature for addressing historical inequity directed at ethnic minorities and women in a number of African countries. In Uganda for instance, Article 32 of the 1995 Ugandan Constitution enjoins the state ‘to take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom for purposes of redressing imbalances that exist against them’. In this regard the Constitution mandates parliament to enact appropriate laws, including laws to establish an Equal Opportunities Commission (EOC) for the purpose of giving full effect to Article 32(1). Article 36 guarantees the right of ethnic minorities to fully participate in the development process as well as in decision-making that affects their welfare. While affirmative action measures focused on women have often been implemented, those measures directed towards minority groups have not received enthusiastic follow-through. In Uganda’s case, the EOC envisioned in the Constitution was only established in 2007, over ten years after the adoption the Constitution,¹⁰⁸ and its impact on improving the situation of minorities has been negligible at best.

Similarly, the Burundian Constitution provides in Articles 143, 164 and 180 respectively for proportionate ethnic representation in public enterprises, the National Assembly and the Senate.¹⁰⁹ The explicit mention of Twa, an indigenous forest community, as beneficiaries of this ethnic quota constitutes the highest level of identification. In the case of Burundi, this constitutional intent has been embodied in the Electoral Code thus:

‘Each list must take into account the ethnic diversity and gender participation ... Any time, in case the composition of a municipal council would not reflect ethnic diversity, the National Independent Electoral Commission, may order cooptation in the Council of persons coming from a sub-represented ethnic group on condition that the persons so co-opted do not

constitute more than a fifth of the members of council.’¹¹⁰

Institutional arrangements specifically targeting minority groups have been set up in a number of states. In South Africa for instance, the Constitution established the Commission for the Promotion and Protection of the Rights of Cultural, Linguistic and Religious Communities, tasked with upholding respect for rules, principles, traditions, languages and mores of society, in accordance with the Cultural Charter for Africa.¹¹¹ This body has been starved of funding, however, to the extent that the Commission has been unable to meet its basic overhead costs, let alone discharge its mandate.¹¹² Similarly, South Africa’s land redistribution programme was ushered in by the post-apartheid Constitution (1996), section 25(7) of which contains language that has been used by indigenous groups to reclaim lost territories:

‘a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of parliament, either to restitution of that property or equitable redress’.

The 1994 Restitution of Land Rights Act created a Land Claims Court and a Commission on Restitution of Land Rights. While these institutions have made remarkable efforts in discharging their roles, it has been argued that they have largely ‘failed to redress the moral harm done to victims of apartheid forced removals’.¹¹³

The cautionary tale for minorities in Kenya is that these affirmative action measures and institutions established across a number of African states have not lifted vulnerable groups from their destitution, nor protected their lands and resources from wanton spoliation without compensation. Constant engagement with new institutional opportunities is the surer way of consolidating any normative gains, whether in Kenya or elsewhere in the continent.

Conclusion

Since 2007, it is generally acknowledged that Kenya is a highly divided country. In this context, the place of minority rights protection becomes even more paramount for national stability. This report has shown that Kenya's new Constitution contains numerous positive provisions for minorities and other vulnerable groups generally: it recognizes the legal validity of treaty law in Kenya's legal corpus; incorporates a rich array of both civil and political rights and social and economic rights of huge benefit to minority groups; and mandates judicial authority in the country to deploy alternative dispute resolutions, including cultural mechanisms that are not reprehensible to the new Constitution's spirit to resolve disputes. The new Constitution further establishes important institutions whose operations will have important bearings on the overall well-being of minority groupings.

The success of mainstreaming concerns of minorities in relation to land and human rights, as well as enhanced allocation of public sector funding to meet social-economic challenges of communities has been articulated in the report. Civil society gains in this regard were largely brought about by visible and active campaigns waged through the media and in the streets during the last ten years. Despite these positive developments, the report has outlined that the prevailing experience of minorities is increased vulnerability. This means that, although recognition of minorities in terms of policy is an important gain, it needs to be translated into substantive

legislative and administrative language as well as operational guidelines for state officials. To do this calls for more dogged and consistent technical engagement with the process in a way that organized groups working on indigenous and minority rights have not demonstrated over the same period. The obvious demands for capacity will be crucial. The danger therefore is that, as in Uganda, where constitutional recognition has not translated into empirical positive interventions in favour of minorities, the situation of minorities in Kenya will not undergo positive qualitative transformation.

This report also shows that civil society action alone is not enough to ensure increased inclusion of minorities in Kenya's public life. The state needs to deliberately overcome its attitude towards minorities, which regards the latter as only seeking to veto national processes, especially in the context of development. It should wholeheartedly embrace international standards relative to minorities, most of which are now part of Kenyan law by virtue of Article 2(6) of the Constitution. It should also do more to create programmes that redress minority disadvantage, in order to bring a permanent end to minorities being dominated. Given the complex concentration of minorities within Kenya's new counties, it is imperative that cultural dialogues take place to address the fears of both majorities and minorities as an integral part of nation building. Such a dialogue should push state departments to initiate laws and policies that recognize historical disadvantages and that enable both majority and minority communities to perceive each other as partners in society. Kenya's emergent institutional arrangements including the Constitutional Implementation Commission (CIC), TJRC and NCIC are well placed to ensure that the progressive provisions in the new Constitution advance the protection of minorities for national stability.

Recommendations

1. The Kenyan state, development partners and civil society must urgently roll out a comprehensive civic education programme to benefit all communities, including those in the margins of society. This civic education must also target public servants, particularly the police, who are instructed by the Constitution to address the needs of vulnerable groups.
2. Parliament and the CIC must urgently initiate legislation to give immediate effect to the constitutional provisions on affirmative action for marginalized groups and their representation in political organs of the state, and fast track the enactment of a law to establish the NLC. In doing so, parliament and the CIC should ensure adequate consultation with members of marginalized groups.
3. The Kenyan government must ensure that deeper decentralization of development funding does not exacerbate the exclusion of marginalized groups. The state, development partners and civil society should work together to formulate a national strategy to include marginalized groups at all levels of governance. In this regard also, the state is urged to map minorities at the county level and ensure sufficient safeguards before the 2012 elections.
4. Independent commissions, notably the Truth, Justice and Reconciliation Commission, CIC, National Cohesion and Integration Commission, Kenya National Commission on Human Rights, the Revenue Allocation Commission, etc. must develop clear policies to engage with the particular challenges of marginalized groups.
5. Donors are urged to prioritize support designed to enhance the capacity of marginalized groups' civil society to mount successful public interest litigation to maximize the expanded potential of courts to mediate group and individual rights.
6. The Kenyan government must develop adequate capacity to enforce judicial decisions of international or regional human rights treaty bodies. In particular, the Kenyan government should prioritize the full implementation of the Endorois decision by the African Commission.
7. The Kenyan state should formulate a framework for engaging with the recommendations of UN mechanisms including the Universal Periodic Review process, and recommendations of special mechanisms.
8. The Kenyan state, donors and civil society are urged to prioritize the clarification of the land provisions in the new Constitution and the National Land Policy relating particularly to the transition of Trust Land to Community Land and the role of county governments in land management. In this regard, the Kenyan state should prioritize the establishment of the National Land Commission set up by Article 67 of the Constitution, and ensure that this Commission includes members of minority groups.
9. The Kenyan government is urged to re-align its Vision 2030 to incorporate specific safeguards for minority groups. Development-induced displacement is emerging as the most significant threat to the survival and cultural integrity of minority communities across the country.
10. The Kenyan government must ensure that women, youth and persons with disabilities from minority groups benefit from the emerging political and economic spaces created by the new Constitution.
11. The Kenyan state and independent commissions should urgently develop mechanisms to ensure that non-state actors participate in governance and that such participation is effective and inclusive of minorities.

Notes

- 1 Kenya 2009 Population and Housing Census Results, 31 August 2010, http://www.planning.go.ke/index.php?option=com_docman&task=doc_view&gid=30&tmpl=component&format=raw&Itemid=69
- 2 Postcolonial self-determination has been limited. Eritrea and more recently Southern Sudan are the only new states to have been created during the decolonization era. All other attempts at secession in Africa have not been recognized (e.g. Katanga (Congo), British Somaliland (Somalia), Northern Frontier Districts (Kenya), Caprivi (Botswana) and Mayotte (Comoros)). The two-decade long conflict in Somalia and the recent changes in Maghreb Africa could dramatically alter this picture.
- 3 See Robert, J. and Roseberg, C., 'Why Africa's weak states persist: the empirical and juridical statehood', *World Politics*, vol. 35, no. 1, 1982, pp. 1–24.
- 4 The principles of *uti possidetis* required states to assume the inheritance of their colonial borders unless the colonial power(s) or another decision maker, such as the United Nations, had determined otherwise. See Article 4 (b) of the African Union's Constitutive Act and Article 3(3) of the Charter of the Organization of African Unity.
- 5 This is despite the Concluding Recommendations of the Committee on the International Covenant on Economic, Social and Cultural Rights in 2008 that Kenya should provide data on ethnicity with specific reference to Nubians and Ogiek. Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, November 2008, para. 35, http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.KEN.CO.1_EN.pdf
- 6 Nubians state that the CBS data is inaccurate as only Nubians in Kibera were informed about the community's census code. Nubian focus group discussion, Kibera, 7 October 2011. For the significance of data disaggregation to the Nubian community, see Balaton-Chrimes, S., 'Counting as citizens: the case of the Nubians in the 2009 Kenyan Census', *Ethnopolitics*, vol. 10, no. 2, 2011, pp. 205–18.
- 7 Odhiambo Makoloo M., *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, London, MRG, 2005, p. 23.
- 8 One of the criteria for minority or indigenous status is self-identification. See, African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations and Communities*, Copenhagen, Eks/Skolens Trykker, 2005, p. 89.
- 9 Makoloo, *op. cit.*
- 10 Thornberry, P., *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1991, p. 13.
- 11 Matheson, I., *Kenya Six Months On: A New Beginning or Business as Usual?* London, MRG, 28 August 2008.
- 12 The Commission of Inquiry into Post Electoral Violence (CIPEV) revealed that 1,300 people were killed, an estimated 300,000 others displaced, and more than 900 women were raped. Most of the deaths, rapes and displacement took place in the Rift Valley. The communities most affected were Kikuyu, Luo and Kalenjin. See, Republic of Kenya, *Report of the Commission of Inquiry into Post Electoral Violence*, 2008, <http://www.dialoguekenya.org/docs/PEVReport1.pdf>
- 13 Ghai, Y. and Cottrell J., *Kenya's Constitution: An Instrument for Change*, Nairobi, Katiba Institute, 2011, p. 40.
- 14 Shaw, M.N., 'The definition of minorities in international law', in Dinstein, Y. and Tabory, M. (eds) *The Protection of Minorities and Human Rights*, Netherlands, Martinus Nijhoff, 1992, p. 1. Shaw opines:

'While a precise definition may serve to minimize controversy by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants, on the other hand, controversy may not be easily avoided in view of the range and extent of the diverse groups that exist across the globe distinguished by factors that are often confused, complicated and contradictory. It thus makes it virtually impossible to list all the minorities that exist.'
- 15 'The existence of a ... minority in a given state party does not depend upon a decision by the state party, but requires to be established by objective criteria.' Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 38, 1994, <http://www1.umn.edu/humanrts/gencomm/hrcom23.htm>
- 16 See generally, Korir Sing'Oei, A., 'Impact of statelessness on human rights in Kenya', in Blitz, B. and Lynch, M. (eds), *Statelessness and the Benefits of Citizenship: A Comparative Study*, Geneva, Geneva Academy of International Humanitarian Law and Human Rights and International Observatory on Statelessness, 2009, pp. 38–50.
- 17 Kenya Constitution, 1963, part VI.
- 18 Through two schemes, the Million Acres Scheme and settlement trust fund mechanisms, land was acquired in the Rift Valley to the prejudice of minorities. See Leo, C., 'Who benefitted from the Million Acre Scheme? Toward a class analysis of Kenya's transition to independence', *Canadian Journal of African Studies*, vol. 15, no. 2, 1981, pp. 201–222.
- 19 Moi's Tugen community, at the time was deemed a minority within the larger Kalenjin. This was before Moi abolished all sub identities and subsumed them within the larger rubric of Kalenjin for political reasons
- 20 Because minorities, particularly pastoralists, live in geographically isolated enclaves of northern Kenya, with limited or no infrastructure, KANU, which had been in power from independence till 2002, was the only political party with the monetary and propaganda capability to mobilize communities in these regions. The nascent opposition, fragmented by internal schisms, was portrayed as an urban force funded and sustained by foreign powers with no interest in the development of rural communities.
- 21 Ogiek bore the brunt of the Moi government's policy and forest land was often annexed for the benefit of politically favoured individuals. See Government of Kenya, *Report of the Presidential Commission into the Irregular/Illegal Allocation of Public Land* (Ndungu Report), Nairobi, Government Printer, 2004.
- 22 CNN, 'Kenya's ostracized Nubians', 28 September 2010, <http://articles.cnn.com/2010-09-28/world/kenya.nubians>

- _1_kenyan-citizens-king-s-african-rifles-east-africa?_s=PM:WORLD
- 23 The Presidential Action Committee to Address Specific Concerns of the Muslim Community in Regard to Alleged Harassment and/or Discrimination in the Application/ Enforcement of the law. This committee's report, submitted in July 2009, has never been made public. See, Office of Public Communication, 'No one will be discriminated – president assures Muslim community', 22 July, 2009, <http://www.communication.go.ke/news.asp?id=253>
 - 24 Alamin Kimathi, a human rights activist, became the latest victim when he was extradited to Uganda without due process. See, Rice, X., 'Kenyan activist becomes a victim of rendition', *Time*, 10 March 2011, <http://www.time.com/time/world/article/0,8599,2057966,00.html>
 - 25 Designed to revive the economy of the state plundered during the Kenyatta and Moi years, Kibaki launched ambitious economic policy programs upon his election to power in 2003, the Economic Recovery Strategy for Wealth and Employment Creation. Upon his contested re-election in 2008, Kibaki initiated a new and long term development policy, *Vision 2030*.
 - 26 McVeigh, T., 'Biofuels land grab in Kenya's Tana Delta fuels talk of war', *The Guardian*, 2 July 2011, at <http://www.guardian.co.uk/world/2011/jul/02/biofuels-land-grab-kenya-delta>
 - 27 The mechanism designed to address impunity was the establishment of the CIPEV, an independent quasi-judicial body, to investigate the causes of the violence and prescribe solutions for securing justice for the victims of the violence. The recommendations of this body have led to the referral of the Kenyan case to the International Criminal Court (ICC), where six senior officials of the Kenyan government are likely to stand trial as persons 'bearing the greatest responsibility' for the violence. See, e.g., Korir Sing'Oei, A., 'The ICC as arbiter in Kenya's post-electoral violence', *Minnesota Journal of International Law*, vol. 9, 2010, <http://minnjl.org/pdf/Singoei.pdf>
 - 28 The full set of the text of the National Accord and related documents is available at <http://www.dialoguekenya.org/>
 - 29 Republic of Kenya, Truth, Justice and Reconciliation Act, 2008, section 6 (p).
 - 30 Republic of Kenya, National Cohesions and Integration Act, section 11.
 - 31 Musau, N., 'Land main source of complaints, says TJRC', *Nairobi Star*, 27 June 2011, <http://allafrica.com/stories/201106272231.html>
 - 32 Interview with Yobo Rutin, CEMIRIDE Director, 1 October 2011, Nairobi.
 - 33 Leftie, P., 'Shock of Kenya ruled by ethnicity', *The East African*, 6 April 2011, <http://www.theeastafrican.co.ke/news/-/2558/1140072/-/o3wqvztz/-/index.html>
 - 34 Interview with Munini Mutuku, Senior Program Officer, NCIC, Nairobi, August 15, 2011.
 - 35 Summary of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission Communication 276/2003.
 - 36 Human Rights Council, Report of the Working Group on the Universal Periodic Review, 50th Session, 17 June 2010, para. 101.114, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement>
 - 37 Makoloo, *op. cit.*, pp. 24–8.
 - 38 Interview with Sahra Ali, Nairobi, 12 October 2011.
 - 39 Kibera focus group discussion (FGD).
 - 40 Interview with Patita Tingoi, Programme Officer Fahamu (Networks for Social Justice), Nairobi, 20 October 2011.
 - 41 Samburu FGD in Nanyuki, 11 August 2011.
 - 42 Interview with Andrew Korinko, Olkaria community leader in Naivasha.
 - 43 Interview with Charo Wa Yaa, Mombasa, 20 August 2011.
 - 44 Samburu FGD.
 - 45 FGDs were held in Kibera (Nubians), Tindiret Forest (Ogiek) and Kitale (Turkana) on 13, 14 and 15 October 2011.
 - 46 Korir Sing'Oei, A., 'Customary law and conflict resolution among Kenya's pastoralist communities', *Indigenous Affairs*, no. 1–2, 2010, http://www.iwgia.org/iwgia_files_publications.../0470_IA_1_2_2010.pdf
 - 47 Ghai, Y., *Public Participation and Minorities*, London, MRG, 2003, p. 5.
 - 48 Interview with Peter Cheruiyot, Program Officer, OPDP (Ogiek Peoples' Development Program), Nakuru, 20 July 2011.
 - 49 Interview with Richard Yegon, Endorois Elders Council and former local councillor, Nakuru, 28 July 2011.
 - 50 Republic of Kenya, Kenya Constituency Development Funds Act, 2005.
 - 51 Interview with Moses Laima, Kitale, 13 October 2011.
 - 52 Anonymous Nubian woman, interviewed on 12 October 2011, Kibera.
 - 53 Summary of *Joseph Lemaiguran and Others on behalf of the Ilchamus community v. Electoral Commission of Kenya and Attorney General of Kenya* (judgment of 18 December 2006), Nairobi High Court Miscellaneous Civil Application no. 305, 2004.
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- '[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'*
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Kenya at 50: unrealized rights of minorities and indigenous peoples

To mark Kenya's 50th anniversary of self-rule, this report reviews the current status of minority and indigenous groups in Kenya. Focusing on Kenya's 2010 Constitution, this report pays particular attention to how legal and policy changes over the last five years have addressed the social, economic and political challenges confronting minorities.

The present state of minority and indigenous groups within Kenya's dynamic context has been shaped by conflicting forces of regression and progress responding to the 2007 post-electoral violence, the new Constitution and the forthcoming 2012 elections. This report demonstrates both the opportunities to be seized and constraints to be overcome by minority groups if they are to realize the dream of inclusion.

Although Kenya's new Constitution contains numerous positive provisions for minorities and other vulnerable

groups generally, this report shows that the prevailing experience of minorities in Kenya is increased vulnerability.

There is a danger that constitutional recognition may not translate into positive developments for minority groups in reality. This report describes the ongoing challenges facing minority and indigenous groups: lack of political participation, discrimination and weak protection of their right to development.

Directed at non-governmental organizations, policy actors and the media, this report warns that failure to ensure inclusion of minorities and address the anxieties of majorities, particularly in the context of county governments in the run-up to the 2012 elections and beyond, will lead to untold conflict, driving the reform agenda several years back.