

## Taking diversity seriously: minorities and political participation in Kenya

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Poor inclusion of citizens in public affairs is a significant governance challenge facing Kenya. Many citizens – especially from minority groups<sup>1</sup> – view the state as accessible to only those with either economic might or strong ethnic affiliations with holders of political power. Exclusion of whole regions of the country from the benefits of state-sanctioned development and the specific targeting of entire communities for discrimination is not unusual phenomenon in Kenya.<sup>2</sup> For many, the greatest sense of belonging and security derives not from the state itself but through the mediation of ethnic networks to which they belong. Minorities and indigenous peoples in the country remain some of the groups that have suffered most from

this dynamic of exclusion. While political participation alone does not lead to inclusion, it is the necessary first step in the long process towards bringing in the voices of communities and improving their capabilities.

This briefing, developed on the basis of a literature review, focus group discussions and interviews with select representatives of marginalized groups in September and October 2012, explores normative and institutional mechanisms for enhancing minorities' political participation in the March 2013 elections. These elections are of great significance since the political institutions that will emerge, namely, the National Assembly, Senate and County Assemblies and Executives, will have the onerous



MINORITY WOMEN ARE DEMANDING A GREATER VOICE AHEAD OF MARCH ELECTIONS, THE FIRST SINCE 2007 WHEN ETHNIC VIOLENCE RESULTED IN THE DEATH OF 1,100 PEOPLE AND DISPLACED MANY OTHERS. ISHBEL MATHESON/IRMG.

task of translating the ambitious aspirations contained in Kenya's 2010 Constitution into reality. For minorities the stakes are particularly high, given that this Constitution for the first time grants juridical recognition to marginalized communities and groups; but realizing any gains from such recognition will be contingent upon the shape of the legislative and regulatory regimes that have yet to be formulated. It is intended, therefore, that this briefing will help minority communities lobby for inclusion of their concerns during the 2013 election process and the implementation of the new Constitution. It is also hoped that those from minority communities seeking elective positions at either the county or national levels will draw from this report insights for engaging with the emerging opportunity structures.

## Minorities and indigenous peoples in Kenya

Until the adoption of the new Constitution in 2010, state policy was ambivalent towards minorities.<sup>3</sup> The state pursued what appeared to be an 'ethnically blind' approach, justified on the basis of national unity, while successfully concealing the ethnic privileging of some sections of the society.<sup>4</sup> Jolted by the post-electoral violence in 2007/8, however, the Kenyan state, under the framework of the National Accord,<sup>5</sup> began to confront perceived ethnic bias.<sup>6</sup> Reflecting this development, the 2010 Constitution adopts broad terms such as 'marginalized community', 'marginalized group' or 'vulnerable group' to describe minorities. Thus under the Constitution, a 'marginalized community' must be outside the 'integrated social and economic life of Kenya as a whole'. This may be by choice, in order to preserve 'its unique culture and identity from assimilation', or by virtue of its mode of livelihood, namely 'hunter or gatherer' or pastoralist, or those who were formerly pastoralists and who are still isolated. It is not necessary to show any actual discrimination against such a group. The second phrase is 'marginalized group', which is 'a group of people 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)'. 'Group' is also not defined. It probably means women (discriminated against on gender grounds), people with a disability, and perhaps ethnic groups that have been discriminated against on the basis of 'race' or ethnicity. The word 'minorities' is also used but not defined. And the phrase 'special interest groups' is also applied, although incompletely defined.

Despite the potential ambiguities that could arise from the broad definitions used in the Constitution, this briefing defines minorities in Kenya<sup>7</sup> as groups that are: (a) numerically inferior to the rest of the population of a state; (b) in a non-dominant position; (c) reside in the state, being either nationals or a group with close long-standing

ties to the state; (d) possess ethnic, religious or linguistic characteristics that differ from those of the rest of the population, and (e) show, if only implicitly, a sense of solidarity directed towards preserving their distinctive collective identity.<sup>8</sup>

## Minorities' past experiences with political participation

As in many countries where majoritarian democracy is practised, larger groups in Kenya have historically enjoyed a distinct advantage in electoral politics as the main basis for establishing political units is population sizes. Consequently, minorities' political representation in Kenya varies widely, with some groups not having a single representative at any level of governance, while others have several. This divergence is based largely on skewed electoral boundary demarcations and the extent to which ethnic groups are concentrated within political units. Institutions with authority to create boundaries have often done so with the intention of ensuring that some communities become dispersed across various political units, thereby reducing the chances of such minorities of garnering the numbers of votes needed to secure victory in any of their constituencies or wards. Table 1 provides a clear illustration.

While spatial concentration of minorities is largely necessary to ensure increased representation, it is by no means the only factor. Bajuni of Lamu, an agro-fishing community, constitute a fairly significant population in the county but their poverty levels militate against their effective representation. According to Mwalimu Baadi of the Lamu Environmental Protection Action Committee (LEPAC), the fact that the Bajuni do not control resources – especially land and fishing grounds – means that, even when elected, such representatives serve the interests of the economically dominant groups in the county, that is, Arabs, Asians and Barawas.<sup>9</sup> This is because winning an electoral contest requires considerable financial resources and a candidate from the Bajuni community will invariably rely on the economically dominant mercantile groups for funding. The lack of campaign financing was highlighted by many minorities in focus group discussions and interviews.

Historically, areas inhabited by minorities, notably pastoralists, have experienced a high incidence of violent conflict.<sup>10</sup> While most of these conflicts are driven by competition over scarce natural resources,<sup>11</sup> elections provide an opportunity for political actors to reframe any unresolved questions in identity terms, in order to mobilize or consolidate their communities' or clans' votes. Characteristically, therefore, in the run-up to the 2013 elections, sporadic cases of cattle rustling, revenge killings and displacements have been reported in Baringo, Tana River, Mandera and Samburu.<sup>12</sup> While the impact of these

**Table 1:** Sample of the extent to which some minority communities have been represented politically at both parliamentary and civic levels

Minority community and population size (2009 national census)	Number of county wards (as per 2007 figures)	Number of constituencies (as per 2007 figures)	Comment
Turkana 988,592	79	3	Turkana are spatially concentrated in Turkana County, thereby increasing their chances of political representation at constituency and local ward level
Samburu 237,179	28	2	Samburu are spatially concentrated in Samburu County, thereby increasing chances of political representation at constituency and local ward level
Endorois of Baringo 10,132 (this figure is hotly disputed by the community)	57	3	Baringo is predominantly inhabited by Tugen. Endorois, Ilchamus and Pokot are minorities in the county. Of the 57 civic representatives, Endorois have only 9 councillors
Ilchamus of Baringo 27,288	57	3	The main wards occupied by Ilchamus are Salabani Makutani, Ng'ambo, Ilchamus and part of Marigat. Ilchamus have five elected councillors and no member of parliament
Sengwer in Marakwet 33,187	23	2	Sengwer in Marakwet have three elected councillors and one nominated councillor
Nubians in Nairobi 15,463	56	8	There are two elected councillors from the Nubian community
Ogiek in Nakuru 78,691	52	6	There are two elected councillors from the Ogiek community
Bajuni in Lamu 69,110	11	2	There are four elected councillors from the community, and two were nominated in the 2007 elections. None of the current MPs is Bajuni, although 99 per cent of Lamu East is inhabited by the community
Yaaku in Laikipia (based on self-identification and interview with Jennifer Koinante, Yiaku leader)	43	2	Yaaku have never had political representation even at the lowest level of participation
Elmoolo in Marsabit 2,844	27	3	Elmoolo have never had political representation at any political level

conflicts on electoral participation is not yet fully apparent, voter turn-out will no doubt be depressed, and women contestants, in particular, will be discouraged from participating.

As a pointer, in the context of ongoing voter registration, constituencies predominantly occupied by pastoralists have seen few people turning up for registration.<sup>13</sup> Such low turn-out for voter registration has at least two results. First, it undermines the minorities' ability to negotiate for a greater stake within mainstream political parties that are influenced by numerical considerations. Second, it may impact on the legitimacy of minority political candidates standing in the 2013 elections, since such candidates will be perceived as representing only a minority within a minority community.

## Constitutional, statutory and regulatory frameworks for political participation

Relevant to representation, various marginalized groups, or their members, are recognized in the Constitution in different ways. Some groups are given specific entitlements; other measures are largely directed at clarifying that these various groups are just as entitled as anyone else to rights and participation. To take the 2010 Constitution first: 'Every political party ... shall respect the right of all persons to participate in the political process, including minorities and marginalized groups' (Article 91); arguably this requires no particular positive action to be taken by political parties, just that they should not impede the fulfilment of these

rights. In fact this is a specific application, with regard to parties, of a duty that is a corollary of a general right, phrased without any mention of minorities and marginalized groups: 'Every adult citizen has the right, without unreasonable restrictions, to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office' (Article 38), and all rights are to be enjoyed without discrimination on grounds of 'race ... ethnic or social origin ... religion, conscience, belief, culture, dress, language or birth' (Article 27).

Such provisions of the Constitution lend themselves to ambiguity and multiple interpretations, and provide space for a state that lacks political will in this regard to ignore demands for minorities' inclusion. Voicing this fear, the chair of the Nubian Council of Elders argues: 'It is a Catch 22 situation for minorities especially the Nubians ... The Constitution did not go far enough. It was shy in coming up with the actual methodology for ensuring minority political participation.'<sup>14</sup>

## The electoral system

The Constitution prescribes the electoral system in detail; there is no room to adopt a proportional representation system overall, nor for a general system of ethnic quotas. In brief: the core of the electoral system, at national and county level, is based on single member electoral districts, elected on a first-past-the-post (FPTP) basis.<sup>15</sup> In the counties there will also be additional seats to ensure 'no more than two-thirds of either gender' in the County Assembly, through a party list system, allocated on a parallel basis (in proportion to the seats won by a party).

## Boundaries

Because of the FPTP system, a crucial factor in the chances of candidates from smaller groups in society being elected will be the new electoral district boundaries that will come into effect during the 2013 elections. These will affect the representation of groups in the following ways:

- If a group is split between districts when all or most of them could reasonably have been included in one district, the chances of the group affecting the outcome of any election are obviously reduced; for small groups it is better to be together.
- Even if it is not large enough to be able to elect 'its own person', if a group finds itself in a district with other groups with similar interests, it is more likely that whoever is elected will understand its problems and be able to represent it, even though they are from a different group.
- A group that is mostly in one district has a good chance of electing 'their own person' there, but will have no impact on elections anywhere else, whereas if it had been more evenly spread it could have affected the outcome in two districts.

The Constitution requires that boundaries be fixed taking into account various factors including 'community of interest, historical, economic and cultural ties' (Article 89(5)). But this is a secondary factor and only one among several, the primary factor being the size of constituencies: 'the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota'. In the past there were great discrepancies in size of constituencies. Now they are not to depart from a quota (equality) to a greater extent than 40 per cent for cities and sparsely populated areas, and 30 per cent for others.

Some countries clearly design constituencies to enhance the chances of communities being able to elect 'their own person'.

The process of designing constituencies and wards for the 2013 elections in Kenya was byzantine. The first phase was assigned to the Interim Independent Boundaries Review Commission (IIBRC), which held public consultation meetings and made proposals, but was unable to finish its work before its temporal mandate came to an end. A parliamentary committee reviewed its work. Then the Independent Electoral and Boundaries Commission (IEBC) under the new Constitution was required to decide on boundaries, using the IIBRC report as its starting point. It was required to apply the constitutional requirements, including that there must be 290 constituencies for the National Assembly and that, for the first elections, existing constituencies could not disappear.

## Minorities and the demarcation of electoral boundaries

At the various stages in this administrative process, the interests of minorities were frequently voiced. For example, initial public comments included: 'Requested the split of Isiolo South on the basis that the Boranas have been marginalized for a long time, though the population is not large enough',<sup>16</sup> and 'Proposal to create three constituencies because the people of Tharaka are highly marginalized and oppressed by their neighbours.'<sup>17</sup> The IEBC also took minority issues into consideration; for example, it told the High Court<sup>18</sup> that Lamu East constituency was given three rather than two County Assembly wards in order to cater for the Boni (Aweer) ethnic minority.

The final decisions of the IEBC were the subject of a large number of judicial review applications to the courts; they were consolidated into a single massive case.<sup>19</sup> The High Court said:

*202. We note that the community of interest as defined by the IEBC centred mainly on socio-economic factors and was narrow and restrictive. But a community may be defined by more than socio-economic factors. These factors may be consequences of shared history, values and traditions, culture, common*

*ethnic or tribal background or a variety of ties that create a community of voters with distinct interests.*

...

212. *We must emphasize and clarify that we do not endorse the exclusive affirmation of clan identity and clan-based political system, as it this can be an obstacle to the promotion of civic citizenship based on human rights and democratic principles. However, where the clan is shown to be a key factor in providing shared values of personal identity and security that are of high emotive value, then it is a relevant community of interest that should be taken into account in the delimitation of electoral boundaries and weighed against the constitutional values and principles.*

...

238. *... In our diversity, we recognize the need to fulfil our national anthem, regarding living in unity, reflecting homogeneity while equipping the disadvantaged minorities with opportunities to participate in our national development ...*

243. *We must caution that taking into account the rights of the minorities and marginalized does not mean that the IEBC is obliged to create sectorial, ethnic or clan enclaves. ... We must emphasize once again that delimitation of electoral boundaries is not the only means by which the problems of minorities and the marginalized will be solved.'*

The Court ordered a number of changes to the boundaries proposed by the IEBC, including:

- Moving four sub-locations from one constituency to another, in order to reunite the people with their fellow Giriama and Jibana.<sup>20</sup>
- A new ward created to provide for the 'corner tribes' among the Somalis: 'We find that the corner tribes, who form a distinct unit whose interests are peculiar and not taken care of by the larger tribes, have the right to be represented by people belonging to the same social cultural and economic context as themselves ... are recorded as being freed slaves of the major tribes and that these tribes look down upon them and do not see them as equals.'<sup>21</sup>
- Adjustment to ward boundaries to bring together the Ogiek community who occupy 'specific and contiguous areas' and because 'the IEBC failed to consider the rights of this minority and marginalized group'.
- Requiring the adjustment of Garissa County to reflect an agreement between communities, because: 'We are cognizant of the fact that clan interests form a strong community of interest in Garissa County.'<sup>22</sup>

In some instances they were unable to accommodate the interests of minorities. Rendille, they said, were too few to justify a ward of their own, being only 364.<sup>23</sup> This is odd

because the recent census gives Rendille a population of 60,437. And the Endorois community was said to be too scattered: 'After thoroughly and meticulously considering all the material placed before us, we are unable to place the applicants in any clear and specific electoral area within the Baringo South Constituency.' The irony for the Endorois is that their scattered situation is a consequence of the injustices they have suffered in terms of dispossession of their lands.<sup>24</sup>

## Devolution and minorities' representation

Kenya under the new Constitution has a system of devolved government (to come into effect following the 2013 elections), whose objects in Article 174, include: 'to protect and promote the interests and rights of minorities and marginalized communities'.

There is nothing to require any specific action to achieve this, but since Article 259 of the Constitution requires institutions to go beyond the letter of its provisions and look instead to give effect to the spirit of the document by paying due regard to the purpose of such an article, this must be borne in mind.

On the more negative side, from the perspective of minorities especially, county government is the lowest level of democratic government. The County Government Act creates a hierarchy of administrators, a bit like a lower-level version of Provincial Administration: sub-county administrator, ward administrator and village administrator,<sup>25</sup> and for urban areas there is also an administrative, not democratic system under the county government.<sup>26</sup> The village administrator must 'competitively appoint' three to five 'elders' to form the village council.<sup>27</sup> As these officials are not elected but appointed by national and county executives, this may raise challenges regarding accountability.

Then there are requirements in the new Constitution for more active measures:

*'The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups ... participate and are represented in governance and other spheres of life.'*  
*'Parliament shall enact legislation to promote the representation in Parliament of ... ethnic and other minorities; and marginalized communities.'*

Law, again passed by Parliament, must ensure community and cultural diversity in the county assemblies, and also protect minorities. Some of these requirements have deadlines, but these are not until after the first elections: three years after August 2010 for Article 197, and five years for Article 100.<sup>32</sup>

So what concrete guarantees are there for the representation of minorities and marginalized communities for the first elections?

## Women's representation

One marginalized group that is given specific attention in terms of electoral representation is women. Aside from mandating the state in Article 27(8) to 'take legislative and other measure to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender', the Constitution allocates women at least 47 seats in the National Assembly and 16 in the Senate.<sup>28</sup> Minorities see an opportunity for women from their communities to benefit from these women-only allocations of parliamentary seats: 'It would be important to have a Nubian woman to represent the women's constituency given that Nubians are the true natives of the county.'<sup>29</sup> This also provides an opportunity to address the multiple forms of discrimination minority women face, because of their gender and their ethnic identity. This hope appears less likely now after the decision of the Supreme Court determined that the gender equity rule in Article 27(8) could only be progressively realized and will not be applicable in the context of the 2013 elections.<sup>30</sup>

## Special interests

There is no 'quota' for marginalized communities or groups, but the Constitution does allocate 12 seats in the National Assembly to 'special interests'. These are specified to 'include' youth, persons with disabilities and workers; 'include' implies there are others. So does it include minorities?

The phrase was used in the previous Constitution, where it was not defined: 12 seats were for 'special interests', appointed by the President on the basis of nomination by parties. The High Court, in a case brought on behalf of a small minority, the Ilchamus,<sup>31</sup> held that they and other small marginalized communities constituted special interests under the Constitution. In the absence of any definition, it might be open to such communities to argue that they are still 'special interests' under the new Constitution.

The method of identification of these 12 is different from the old Constitution: they are to be taken from party lists, published in advance, and the numbers are to be taken from a party's list in proportion to the number of seats it wins in constituencies. The Elections Act, 2011, makes no attempt to indicate the make-up of the lists intended to provide the 12 'special interest candidates' for the National Assembly, presumably leaving it to the parties to comply with the Constitution. This is disappointing to say the least. Judicial interpretation of the notion of 'special interest' as used in the Constitution has recently yielded unfavourable results for minorities. The Court determined that:

*'The nature and extent of what constitutes special interests is defined by the party nominating the candidates ... [S]pecial interests ... must have a broad*

*and expanded meaning to cover interests identified by the political parties and not restricted to the categories of interest or groups identified by the Constitution.'*<sup>32</sup>

By adopting a broad view of Article 97(1)(c) of the Constitution, the ruling has made selection of minorities as parliamentarians through the nomination pathway more onerous, given that the law – rather than obliging political parties to give preference to candidates from these communities – only requires them to be considered, as against other interests which they may deem merit representation.

For the county assemblies, the Election Act says that a party list must 'prioritize a person with disability, the youth and any other candidate representing a marginalized group', but this is inconsistent with another provision of that act (s. 36(1)(f)), which says that each party must put forward a list including 'eight candidates, four of whom shall be persons with disability and four of whom shall be the youth' – which does not leave much room for other marginalized groups.

It is also worthy of note that there is a constitutional requirement that party lists at the national level reflect 'the regional and ethnic diversity of the people of Kenya' (Article 90). But in reality, whether members of small minorities are able to get elected, or how much influence small minorities have on who gets elected, and what they stand for, if anything,<sup>33</sup> will depend on the working of the political parties, and the FPTP system, which means factors like the constituency (national level) and ward (county level) boundaries.

In short, the current law guarantees nothing to minorities in the sense they are used in this briefing. However, minorities have expectations of being nominated. Abdul Faraj, chair of the Nubian Council of Elders, opines that: 'whereas 12 nominated MPs are not allocated solely for minorities but left open to special interest groups ... Nominating minorities to parliament would ensure equity ...'<sup>34</sup>

## Political parties

Political parties in Kenya have jealously guarded their gatekeeping role in the process of choosing candidates. In choosing such candidates, few incentives exist within parties to recognize the need for minority inclusion, given the FPTP type of electoral system. Although, the 2010 Constitution does provide for independent candidates, this provision is unlikely to redress the plight of the minorities.<sup>35</sup> Current indications suggest that party-sponsored candidates will remain dominant for the foreseeable future.

Under the Political Parties Act, a party may not be fully registered (and able to put forward candidates for election) unless it has the support of at least 1,000 people from each of at least 24 counties and these must 'reflect regional and ethnic diversity ... and representation of minorities and

marginalized groups'; likewise, the composition of a party's governing body must reflect diversity (section 7(2)). The former will be hard to regulate in great detail, but attempts to comply with it may bring in more minorities than have traditionally been involved in parties. The number of representatives of minorities included in party governing bodies is unlikely to be large enough to make any discernible difference.

The act provides for public funding of parties. That funding is to be used 'for purposes compatible with democracy including ... promoting the representation in Parliament and in the county assemblies of ... ethnic and other minorities and marginalized communities' (section 26). This imposes no specific obligation on parties: a party could ignore minorities in the way it spends this money and still satisfy the act. There is no incentive element in the allocation of funds: a party will not receive any more from the fund if it is successful in getting minority members elected, or even by virtue of selecting them as candidates.

Two final relevant constitutional provisions are that no one may form a political party on the basis of religion, language, race, ethnicity or region (Article 91), which means that it would not be possible to have a party for a 'tribe', or even for a grouping of minority ethnic/religious groups. Second, for the first time since 1964, it is possible for a person to stand as an independent candidate, and not for a political party.

## Expenses

Kenyan elections are very expensive for candidates; they spend a great deal of money, sometimes to bribe voters. Recent news reports have indicated that both the IEBC and the political parties have plans that will result in standing for election being very expensive. The IEBC plans to charge what has been described as a nomination fee of KShs1 million (or £7,524) to stand for the presidency, down to KShs250,000 for a seat in the National Assembly and KShs50,000 (£376) for election to a County Assembly.<sup>36</sup> Political parties require rather similar sums for their members to be nominated. These fees make it highly unlikely that any candidates from a small ethnic group will be able to stand. A petition is being presented to the IEBC against their fees and, if this is unsuccessful, it is possible they may be challenged in court as an unconstitutional fetter on the right to stand for election.

## Electoral districts and boundaries

The only hope, one might conclude, is that the ordinary electoral process will permit more participation of minorities as candidates, with some chance of success, than in the past.

As mentioned earlier, the Constitution provides for a devolved system of government, with certain powers allocated to 47 counties. They are to have elected

### Box 1: Minority women in parliament <sup>39</sup>

Sofia Abdi, a nominated member of parliament from the Orange Democratic Movement (ODM), contested elections in 1997 as a member of the Kenya African National Union (KANU) but was edged out after securing party nomination. Although her nomination was quashed on the basis that her Islamic faith did not permit women to lead, as well as the alleged cultural place of women within her Somali community, Sofia concluded that the annulment of her nomination was because she had not engaged sufficiently with her then political party structure at the highest level. Learning from this experience, Sofia joined ODM in 2007 and played a key role in the national party structure. Consequently, she was able to negotiate nomination to parliament, where she has played a crucial role in ensuring that gender concerns of marginalized groups – including female genital mutilation (FGM) – have received legislative sanction.

assemblies. An Act of Parliament is to provide for a number of 'members of marginalized groups' in each assembly, to 'include', again, persons with disability and youth. Probably a minority may, in appropriate circumstances, be considered a 'marginalized group', but, as mentioned earlier, the marginalization must have been by virtue of being discriminated against.

It is clear that the assumption is that the very fact of devolution will have the effect of bringing benefits to minorities and other communities. Article 174, quoted earlier, also speaks of devolution giving 'powers of self-governance to the people' and recognizing 'the right of communities to manage their own affairs and to further their development'.

## Strategies for ensuring public participation of minorities

Despite the open-ended language of the Constitution and the lack of regulatory clarity on how to ensure increased representation for minorities, communities are not discouraged. Many minorities are realistic that 'the major hurdle to success has therefore got to do with the ability of minorities to become candidates of major parties'.<sup>37</sup> The ethnic nature of Kenyan politics, according to Malashen Hamida of the Nubian Rights Forum, however, presents an important opportunity. This is because the five numerically dominant ethnic communities – Kikuyu, Luo, Luhya, Kalenjin and Kamba – view each other with great distrust, fear and suspicion. In this toxic context, it is possible for minorities to be trusted as non-threatening figures in the context of intense political competition:

*Nubians are not seen as a threat; in fact my Nubianness has been beneficial since I am considered to*

*be no threat to the dominant groups within the dominant ethnic groups in the party ... [I]t is easier to make friends ... The Constitution has helped ... [T]he constitutional requirement for respect of diversity is being seriously considered by parties – ethnic balance, religious balance, etc. ... in terms of discussions, there has to be gender balance ... even those working with presidential candidates must include women ... [T]his is a new consciousness. It is easier to penetrate the party structures through a gender and diversity enhancement lens ... I have been told not to perceive myself as a minority but asked to create my space, and if I am taken in, I can then champion rights of minorities. You can only push for minorities after you have created space. Minorities must learn to work for parties. They must engage and must participate. Then they can make demands based on the Constitution. The registrar of political parties is expected to ensure minorities' inclusion. But minorities must engage ...'*

Her views are given credence by the fact that subsequent to the post-electoral violence in 2007, disagreements between dominant communities witnessed the selection of representatives from marginalized communities to spearhead important national processes. For instance, Hon. Abdikadir Mohammed, an ethnic Somali, who was tasked with chairing the Parliamentary Departmental Committee on Administration of Justice and Legal Affairs, distinguished himself for his balanced approach to issues and thereafter was also tasked with the role of chairing the Parliamentary Constitution Implementation Oversight Committee. This scenario where minority aspirants become compromise candidates in the face of intense competition and suspicion between candidates from dominant groups has not been replicated in other instances, but has been evident in negotiating slots in various Constitutional Commissions.<sup>38</sup>

Malashen set out two important strategic considerations for candidates from minority communities:

- engage with political parties
- communicate global concerns before articulating a minority-specific agenda.

Using Sofia and Malashen's strategy for political participation requires a clear understanding of how political party nominations have been altered by under the new Constitution. Twelve people in the National Assembly, 20 in the Senate and an unknown number in the County Assembly will represent 'marginalized groups',<sup>40</sup> plus enough extras to ensure that not more than two-thirds of the members of the assembly are of the same gender. All these must be taken from party lists published in advance of the elections. The actual allocation of seats from the list will be based on how many seats overall in the particular house the party has won. The individuals must be taken in

the order in which they appeared in the published lists. This means that it is not enough for minorities to ensure that their names feature in the party lists for nomination to the National Assembly and Senate or County Assemblies. Attempts must be made to ensure that parties also rank minorities higher up in their lists to increase their chances of being nominated in the end. Further, the choice of a political party is equally crucial because parties' nominative potential is directly proportional to the numbers of elected members it garners.

To win, minorities cannot pursue the concerns of their communities alone, but must project their visions of social transformation that have impact on dominant groups as well: 'We cannot run with the intention of liberating minorities but as agents of liberating both dominant and non-dominant groups ...'<sup>41</sup>

The need for minorities to negotiate as a united front with various political parties in pursuit of either nominated or elected positions in parliament as well as at county level was also emphasized by various respondents. In order for this strategy to deliver for minorities, communities must become united around a set of policy goals around which they can negotiate with political parties and presidential aspirants: 'Communities must organize towards being swing vote group. If minority communities are well mobilized and know what is at stake, they could use their votes to determine the fate of many politicians at any levels.'<sup>42</sup> The establishment of the Kenya Minority Communities Council, hosted by the Endorois Welfare Council is precisely for this purpose, namely, to mobilize marginalized communities to negotiate with political parties and their aspirants as a united front and seek specific accommodations. Borrowing from their experience in 2004–5 during the constitutional review process, when minorities united and presented their case for recognition with a measure of success, over 15 members of parliament are seeking enhanced inclusion of minorities within political parties' formations.<sup>43</sup> In this context, it is clear that the importance of political negotiation skills among key leaders of the minorities' movement will be required.

A realistic assessment of opportunity structures for direct political representation for most minority groups reveals that minorities are more likely to get elected at the sub-national level than to the national parliament. Given that county governments – County Assembly and County Executive – have enhanced roles in governance and development, seeking effective representation at this level is bound to improve the social-economic situation of minorities. Civic education on the role of the County Assembly is however required.

## Trading votes for policies

Even if minorities may be able to get 'its own person' elected, this may be of limited value, given that policy change requires the support of certain threshold of



parliamentarians or County Assembly members to become effective. This has been the experience of many minorities who, although represented in the county councils, have witnessed the adoption of decisions having adverse impacts on their land and livelihoods made.<sup>44</sup> What minorities really need is a commitment by political parties, or a number of MPs/assembly members, to support them when decisions affecting them are under discussion. Ideally such a commitment would be made part of the party's platform. A community might be able to bargain on the lines of 'You can have our votes, but only if you promise to do x, y and z once you are elected.'

The success of this strategy, however, hinges on the extent to which political parties in Kenya take seriously their own commitments once they come to power. A brief assessment of political parties' strategic plans and party manifestos reveals limited commitment to a minorities-friendly agenda. In its Strategic Plan 2005–2010, dubbed 'Building a New Kenya', KANU identifies its 'multi-ethnic membership' as one of its strengths, but does not list as a weakness its poor track record on inclusion of national minorities. The Forum for the Restoration of Democracy (FORD), the second oldest party in Kenya, in its original aims and objectives, made a point of identifying minorities when talking about governance:

*'FORD-KENYA will cease to categorize communities unfairly and ethnically to the extent of institutionalizing poverty and stagnation among such communities and relegating them to perpetual soft handouts. Cases in point are the Turkana parts of Eastern, Coast and Nyanza provinces. FORD-KENYA's plan is for brave new initiatives to develop infrastructure and mobilize the communities in these affected areas for change, development and modernization. A modern airport and free trade zone amidst modern communication network linkages to countries of the Middle East, is for example, planned to happen in North Eastern Province.'*

Apart from these references, there is no detailed agenda for minorities and marginalized communities in FORD-Kenya's policy document. Its splinter sibling FORD-Asili came out with a manifesto in 2007 titled 'Haki na Ukweli' ('Justice and Truth'). In Article 9 of that document on 'Vulnerable and marginalized communities', the party declares:

*'Kenya has many communities and groups exposed to acute vulnerabilities. There are regions in the country that have, since independence, been so marginalized deliberately by governments that in the process, they became vulnerable to social depression in security, famine, diseases, ignorance and illiteracy. The small tribes/communities, pastoral communities, children and those with disabilities (e.g. albinos, cripples, mentally*

*challenged) and victims of chronic diseases like renal failures, HIV/AIDS are such communities that the society has deliberately marginalized and ignored. FORD ASILI believes that all the ethnic communities and social groups of whatever nature in Kenya are what makes it a state and must therefore work overdrive and overtime to integrate all, so as to create a harmonious state.'*

A significant drawback of the 2007 FORD-Asili manifesto is that it conflates issues to do with ethnic, linguistic and religious minorities and other socially excluded and marginalized classes and strata. However, the over-broad definition of marginalized groups in the 2010 Kenyan Constitution can be said to suffer from a similar conflation.

FORD-People, the third of the original FORD trilogy of parties, drew up two successive national strategic plans – one covering the years 2005–8 and the second dealing with 2006–11. In the first there is no mention of minorities. In the second, in contrast, FORD-People articulates as one of its missions 'Respect for minority rights' thus:

*'FORD-People is an open proponent of equality. Over time we have observed that the alienation of some segments of the population based on various reasons such as ethnicity, patriarchy and religion, amongst others, undermines equality. In seeking to ensure equality for all, FORD-People commits itself to the inclusion of all people in processes of development and will work towards the elimination of all forms of alienation and discrimination.'*

The National Rainbow Coalition's 'Draft Strategic Plan and Operational Plan 2004–8' made no reference to minorities. ODM's 'Prosperity with Equity and Accountability' brochure talks about 'change', the 'third liberation', 'a New Kenya' and 'Development for all Kenyans', but has no specific agenda on mainstreaming minorities in national life. Similarly, the Party of National Unity's (PNU) 2007 election platform, 'A Prosperous, Secure and Equitable Future for all Kenyans', articulates an agenda of great import to minorities proposing that the party would formulate 'a devolution strategy that ensures that each part of the country receives its equitable share of economic and social development opportunities so as to build a society that is cohesive, secure and tolerant; so that it will no longer matter which tribe you are from, which religion you belong to, or which region you come from'. This speaks directly and concretely to the demands of the various minority groups of Kenya.<sup>45</sup>

From this brief overview of various party documents, it would appear that Kenyan political parties are short on specifics regarding their policies towards the country's minorities.

During the heated 2007 civic, parliamentary and presidential campaigns, the three main electoral formations

– PNU, ODM and ODM-K were trying to outdo each other in their overtures to the minorities – whether ethnic, religious or otherwise. But this serves to underline and underscore the point that latching on to the minority agenda was primarily to win votes and secure state power.

## Conclusion

The above discussion has highlighted the opportunities and constraints with regard to ensuring increased political participation for minorities especially in the context of the elections of March 2013 in Kenya. Noting constitutional limitations on elevating the political positions of marginalized groups, the analysis has nevertheless demonstrated that, through concerted work by minorities to reshape political parties' mindsets and policies, marginalized groups' representation can be improved. Regulatory institutions such as the IEBC have an important role to play in ensuring that political parties nominate members of marginalized groups as well as by charging lower fees for contestants from these groups. It is clear that, although the Kenyan parliament has yet to legislate for the inclusion of minorities at the national and county assemblies in terms of Article 100 of the Constitution, these communities are not passively holding back. Their activity is especially evident in the manner in which networks are emerging to demand greater voice.

## Recommendations

Aside from direct political participation, minorities can secure increased participation by making full use of the possibilities available under the Constitution, and in the county government system, for popular participation in decision-making by legislative bodies – and in other ways,<sup>46</sup> including the use of petitions to authorities.<sup>47</sup> Minorities can also use complaints mechanisms, including the Human Rights Commission, the Gender and Equality Commission,<sup>548</sup> the Commission on Administrative Justice (Ombudsman) and the Independent Policing Oversight Authority to seek better policies.

There is a need for the executive arms of government to establish a department to provide space for participation of marginalized communities, and particularly women from these communities, given that the Constitution does not

establish any such institution. Lack of information continues to militate against effective participation of communities and the state is urged to ensure access to information in languages other than English and Swahili, including through funding regular radio programmes and other relevant media, to enable marginalized communities to receive pertinent information.

In addition, this report recommends:

### Relevant government departments should:

- Take measures to ensure the safety of voters at polling stations, particularly women, to enable more minorities to participate in the upcoming elections.

### The IEBC should:

- Reduce election charges for candidates from minority communities, especially women, to ensure increased participation in the electoral process.
- Work with communities and security organs of the state to mediate pre-election violence, thereby providing an environment more enabling for minorities to vote.
- Enhance voter registration in marginalized areas by adopting mobile registration units.
- In scrutinizing compliance with the Constitution, require all parties to provide an explanation of how they have ensured the inclusion of marginalized communities in their structures, including on lists of nominees and candidates in furtherance of the national values in Article 10 of the Constitution.

### Political parties should:

- Comply with the basic constitutional requirements for political parties by ensuring that its list for nominated members of parliament in Article 97 of the Constitution includes members of minority groups, especially women and persons with disabilities.
- Reduce the amount of fees required for persons from minority groups seeking candidature as parliamentarians or country representatives.

### Donors should:

- Support capacity enhancement of candidates representing minority groups in the same manner in which support has been extended to women candidates.

## Notes

1 Makoloo, M., *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, London, MRG, 2005.  
2 Ndzovu, H., *Muslim Relations in the Politics of Nationalism and Secession in Kenya*. PAS Working Papers 18. Evanston, IL: Northwestern University Press, 2010. Available at: <http://www.northwestern.edu/african-studies/docs/working-papers/Hassan-Muslims%20and%20Secessionism%20in%20Kenya-FINAL.pdf> (accessed 30 December 2012).

3 For more information about minorities and the 2010 Constitution see Sing'Oei, K., *Kenya at 50: Unrealized Rights of Minorities and Indigeneous Peoples*, London, Minority Rights Group, 2012.

4 See generally, Muhula, R., 'Horizontal inequalities and ethno-regional politics in Kenya', *Kenya Studies Review*, vol. 1, no. 1, December 2009.

- 5 Mediated by Kofi Annan, the Accord identified immediate interventions necessary to halt violent escalations, as well as more long-term programmes designed to address the root causes of the Kenyan conflict. See, Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project Reports at: <http://www.dialoguekenya.org/index.php/agreements.html> (accessed 1 January 2013).
- 6 See e.g. the Truth, Justice and Reconciliation Act, 2008 and the National Cohesion and Integration Act, 2008.
- 7 See generally, Deschênes, J., *Proposal Concerning the Definition of the Term 'Minority'*, UN doc. E/CN.4/Sub.2/1985/31, 14 May 1985.
- 8 Henrard, K., 'Devising an adequate system of minority protection', *Global Review of Ethnopolitics*, vol. 1, no. 1, September 2001, p. 45.
- 9 Malindi focus group discussion, 25 October 2012 and interview with Mwalimu Baadi.
- 10 Schilling, J., Opiyo, F.E.O. and Scheffran, J., *Raiding Pastoral Livelihoods: Motives and Effects of Violent Conflict in North-western Kenya, Pastoralism: Research, Policy and Practice* (online journal), vol. 2, 2012.
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- 12 'Bloodbath: 62 people killed in ethnic massacre', *East African Standard*, 23 August 2012, available at: <http://www.standardmedia.co.ke/?articleID=2000064607>.
- 13 '12.7m voters listed as deadline dawns', *Capital FM News*, 17 December 2012, available at: <http://www.capitalfm.co.ke/news/?p=45880> (accessed 30 December 2012).
- 14 Issa Abdulfaraj, in the Kibera focus group discussion, 10 October 2012.
- 15 This is the system used in the UK for most elections and in the US. The person who wins the highest number of votes in a constituency wins, even if they do not win an overall majority.
- 16 IIEC, *Preliminary Report on the First Review Relating to the Delimitation of Boundaries of Constituencies and Wards*, 9 January 2012, p. 65.
- 17 *Ibid.*, p. 72. See also brief summary of submissions by Ogiek, p. 122.
- 18 *Republic v Independent Election and Boundary Commission ex parte Kihusa and others* (Judicial Review Misc. App. 94 of 2012), 9 July 2012, para. 305, available at: [http://kenyalaw.org/CaseSearch/view\\_preview1.php?link=83393564387553403444866](http://kenyalaw.org/CaseSearch/view_preview1.php?link=83393564387553403444866) (accessed 30 December 2012).
- 19 *Ibid.*
- 20 *Ibid.*, para. 301.
- 21 *Ibid.*, para. 325. The corner tribes have been described in a UNDP report, *Dynamics and Trends of Conflict in Greater Mandera*, 2 May 2010.
- 22 *Ibid.*, para. 309; also para. 365: 'The inclusion of Melili Ward which is predominantly occupied by the Purko clan, in Narok North, was intended to give the Ildamat and Keekonyikie clan a fair chance of representation within Narok County by delimiting Narok East.'
- 23 *Ibid.*, para. 327.
- 24 See the Endorois case, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya* (Communication No. 276/2003). [http://www.worldcourts.com/achpr/eng/decisions/2009.11\\_CMRD\\_v\\_Kenya.htm](http://www.worldcourts.com/achpr/eng/decisions/2009.11_CMRD_v_Kenya.htm) (accessed 30 December 2012), discussed in Sing'Oei, *Kenya at 50*, *op. cit.*
- 25 County Government Act, ss. 50–52.
- 26 See Cities and Urban Areas Act, and Article 184 of the Constitution.
- 27 County Government Act, s. 53.
- 28 Constitution of Kenya, 2010, Articles 97(b) and 98(b).
- 21 Abdul Faraj, Kibera focus group discussion, 10 October 2012.
- 30 Supreme Court of Kenya, reference no. 2 OF 2012, In the Matter of the Principle of Gender Representation in the National Assembly and Senate (Opinion of the majority delivered on 11 December 2012).
- 31 See *Rangal Lemeiguran v Attorney General* [2006] EKLK, discussed in Sing'Oei, *Kenya at 50*, *op. cit.*, pp. 12–13.
- 32 Nairobi High Court Petition Nos 268 and 389 of 2012, *Commission on Implementation of the Constitution and Others v Attorney General and Others* at paragraphs 27 and 30.
- 33 This slightly cynical note reflects a widespread view that parties have very little by way of ideology or any real policy platform.
- 34 Abdul Faraj, Kibera focus group discussion, 10 October 2012.
- 35 The notion of an independent candidate is not known in the country and many minorities interviewed thought of independent candidates either as 'lone rangers' or as displaying an unwillingness to work with others in shaping policy. Independent candidates are also susceptible to attacks by all the other party candidates, with no one to stand up for them.
- 36 'IEBC reduces nomination fee for women', *Nairobi Star*, 20 August 2012. Available at: <http://www.the-star.co.ke/news/article-5513/iebc-reduces-nomination-fee-women> (accessed 30 December 2012).
- 37 Oloo, A., *Elections, Representation and the New Constitution*, Nairobi, Society for International Development, 2011, p. 7.
- 38 Minorities have been more successful in securing representation in key commissions, such as the Commission on Cohesion and Integration, the Commission on Revenue Allocation and the Human Rights Commission.
- 39 Interview with Sofia Abdi, nominated MP (ODM).
- 40 The Elections Act says eight and the County Government Act six; as a later piece of legislation, the latter prevails.
- 41 Peter Cheruiyot, Tinnet focus group discussion, 10 October 2012.
- 42 Adam Hussein, Kibera focus group discussion, 10 October 2012.
- 43 'Small communities push for stake in succession politics', *East African Standard*, 29 October 2010, available at: <http://m.standardmedia.co.ke/story.php?articleID=2000069476> (accessed 30 December 2012).
- 44 A resolution of the Baringo County Council endorsing the 'setting aside' of Lake Bogoria was taken, despite protests from assembly members representing the Endorois. Similarly, Lamu County Council adopted resolution in support of the construction of the Lamu Port, despite the potential impact of this project on Bajuni and other minorities represented within the council.
- 45 Party of National Unity (PNU) Manifesto, 2007, available at: <http://www.kenyavotes.org/parties> (accessed 30 December 2012).
- 46 Articles 10, 69, 118 and 196, County Government Act Part VIII, on Participation, and s. 97 'promotion of effective participation of marginalized and minority groups in public and political life'.
- 47 Article 37 of the Constitution and section 88 of the County Government Act.
- 48 The Commission is mandated to ensure compliance with all treaties and conventions ratified by Kenya in relation to 'minorities and marginalized persons' (Article 8(c) of the National Gender and Equality Commission Act, 2011).

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