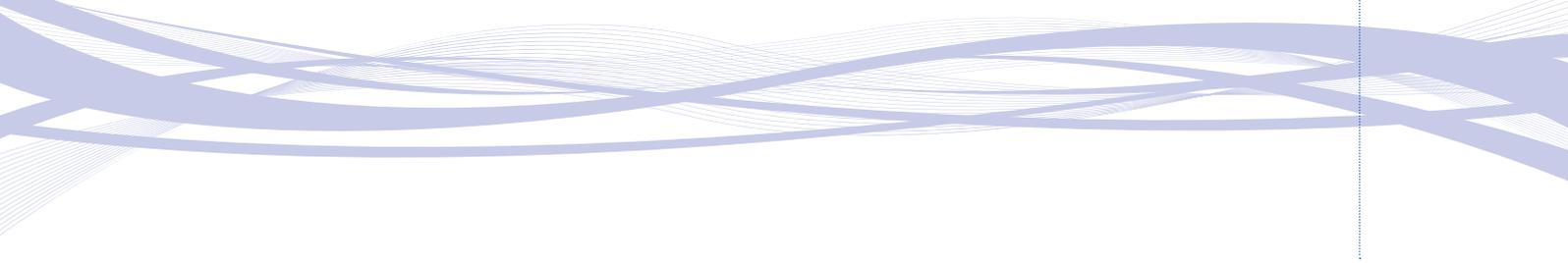


Elections, Representations and the New Constitution



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Adams Oloo



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Abstract

Elections are a very important aspect of democracy any constitution should ensure that the electoral system is not only representative, but also inclusive. The old constitution had a number of factors that inhibited fair and inclusive representation. First, its electoral system, the First Past the Post System, facilitated candidates with minority votes being declared winners. Second, it did not say how many constituencies there must be in the National Assembly leading to gerrymandering by ruling parties. Third, the old constitution did not have reserved seats for special groups such as women, the disabled and minorities. The new constitution has addressed some of these problems; however, we argue in this paper that more legislation on the electoral system is needed, if Kenya's electoral system is to be truly representative and inclusive. These include the adoption of a mixed electoral system and legislation on descriptive representation to ensure that all minorities have a voice in the representative bodies.

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The SID Constitution Working Paper Series

In 2010, on the cusp of Kenya's new constitutional dispensation, the Society for International Development (SID) embarked on a project called *'Thinking, Talking and Informing Kenya's Democratic Change Framework'*. Broadly stated, the objective of the project was both historical and contemporary: that is, to reflect on Kenyans struggles for a democratic order through a book project, and to examine the significance of a new constitutional order and its legal and policy imperatives, through a Working Paper Series.

Consequently, SID commissioned research on some of the chapters or aspects of the new constitution that require further policy and legislative intervention, culminating in ten Working Papers. These papers, mostly by Kenyan academics, are intended to help shape public discussions on the constitution and to build a stock of scholarly work on this subject.

These papers seek to contextualize some of the key changes brought about by the new constitutional order, if only to underscore the significance of the promulgation of the new constitution on August 27, 2010. The papers also seek to explore some policy, legislative and institutional reforms that may be necessary for Kenya's transition to a democratic order.

The Working Papers explore the extent to which the new constitution deconstructs the Kenyan post-colonial state: how it re-calibrates the balance of power amongst branches of government and reforms government's bureaucracy; redraws the nature of state-individual relations, state-economy relations, and state-society relations; and deconstructs the use of coercive arms of the government. Lastly, the papers examine some of the limitations of the new constitution and the challenges of constitutionalism.

In the first set of papers, **Dr Joshua Kivuva**, **Prof. Ben Sihanya** and **Dr. Obuya Bagaka**, separately examines how the new constitution has re-ordered nature of Kenya's post-colonial state, especially how it has deconstructed the logic of state power and rule, deconstructed the 'Imperial Presidency', and how it may re-constitute the notorious arm of post-independent Kenya's authoritarian rule: the provincial administration.

The next set of papers in this series, by **Dr. Othieno Nyanjom** and **Mr. Njeru Kirira**, separately looks at the administrative and fiscal consequences of Kenya's shift from a unitary-state to a quasi-federal state system. Whereas Dr. Nyanjom examines the anticipated administrative and development planning imperatives of devolving power; Mr. Kirira examines the anticipated revenue and expenditure concerns, which may arise in a state with two-tier levels of government. Both discussions take place within the context of a presidential system of government that the new constitution embraces.

The paper by **Dr. Musambayi Katumanga** examines the logic of security service provision in post-colonial Kenya. Dr. Katumanga argues that Kenya needs to shift the logic of security from regime-centred to citizen-centred security service provision. However, despite several attempts in the recent past, there are still several challenges and limitations which Kenya must redress. The new constitution offers some room for instituting a citizen-centric security reforms.

The paper by **Prof. Paul Syagga** examines the vexed question of public land and historical land injustices. It explores what public land is, its significance and how to redress the contention around its ownership or use. Similarly, the paper examines what constitutes historical land injustices and how to redress these injustices, drawing lessons from the experiences of

other states in Africa that have attempted to redress similar historical land and justice questions.

The papers by **Dr. Adams Oloo**, **Mr. Kipkemai arap Kirui** and **Mr. Kipchumba Murkomen**, separately examines how the new constitution has reconfigured representation and legislative processes. Whereas Dr. Oloo examines the nature of the Kenya's electoral systems, new provisions on representations and its limitations; arap Kirui and Murkomen look at the re-emergence of a bicameral house system and the challenges of legislation and superintending the executive.

If the other nine papers examine the structural changes wrought by the new constitution; the tenth paper, by **Mr. Steve Ouma**, examines the challenges and limitations of liberal constitutional order, especially the tensions between civic citizenship and cultural citizenship from an individual stand point. Perhaps Mr Ouma's paper underscores the possibility of a self-defined identity, the dangers of re-creating ethno-political identities based on old colonial border of the Native Reserves - the current 47 counties and the challenges of redressing social exclusion and the contemporary legacies of Kenya's ethno-centric politics.

The interpretation of the constitution is contested; so will be its implementation. We hope that this Working Paper Series will illuminate and inform

the public and academic discussions on Kenya's new social contract in a manner that secures the aspiration of the Kenyan people.

SID would like to sincerely thank all those who have made the publication of these papers possible, especially those who participated in the research conceptualization meeting and peer-reviewed the papers such as: **Dr. Godwin Murunga**, **Prof. Korwa Adar**, **Ms. Wanjiru Gikonyo**, **Dr. Joshua Kivuva**, **Dr. Richard Bosire**, **Dr. Tom Odhiambo**, **Ms. Miriam Omolo** and **Dr. Mutuma Ruteere**, for their invaluable input.

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Working Papers Series Coordinators

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Acronyms

| | |
|-------------|--|
| CJPC | Catholic Justice and Peace Commission |
| FORD-People | Forum for the Restoration of Democracy- People |
| FPTP | First Past The Post |
| GoK | Government of Kenya |
| IDEA | International Institute for Democracy and Electoral Assistance |
| IED | Institute for Education in Democracy |
| IPPG | Inter-Parties Parliamentary Group |
| IREC | Independent Review Commission |
| IREC | Independent Review Electoral Commission |
| KANU | Kenya African National Union |
| LPR | List Proportional Representation (LPR) |
| MMP | Mixed Member Proportional |
| NARC | National Alliance Rainbow Coalition |
| NCCK | National Council of Churches of Kenya |
| ODM | Orange Democratic Movement |
| ODM-Kenya | Orange Democratic Movement Kenya |
| PNU | Party for National Unity |
| PR | Proportional Representation |
| SID | Society for International Development |
| SIDA | Swedish International Development Agency |

1.0 Introduction

At the most basic level, electoral systems translate the votes cast in a general election into seats won by parties and candidates. The choice of an electoral system is therefore one of the most important institutional decisions for any democracy. Conversely, the electoral system provides an avenue for representation. Representation of citizens could fall into four categories. First, geographical representation implies that each region be it a town or a city, a province or an electoral district, has a member of the legislature whom it chooses and who is ultimately accountable to a particular geographical area. Second, the ideological divisions within society may be reflected in the legislature either through representatives from political parties or independent representatives or a combination of both.

Third, a legislature may be representative of the party-political situation that exists within the country even if political parties do not have an ideological base. Fourth, the concept of 'descriptive representation' considers that the legislature should be to some degree a 'mirror of the nation' which should look, feel, think and act in a way which reflects the people as a whole. In other words, an adequately representative legislature, would include both men and women, the young and the old, the wealthy and the poor and reflect the different religious affiliations, linguistic communities and ethnic groups within a society.

There are a number of shortcomings that have characterized Kenya's electoral system since independence. First, is the lack of equity of voice in the legislature and local authorities. This has meant that minorities in Kenya have either had very weak representation in the representative bodies or none at all. Such minority groups include women, the disabled, racial groups such as Asians, Arabs and Europeans and ethnic minorities such as the

Sengwer, the Nubian, the Ogiek, the El Molo, the Sakweri and the Illchamus (Oloo, 2007).

Second, is the mal-apportionment of votes. For instance in 2007, Embakasi in Nairobi had 351 per cent while Lamu East had only 18 per cent of the average registered voters, yet each constituency is represented by one member of parliament. Third, is the zero-sum character of electoral politics. For instance, in the 2007 elections in Kirinyaga Central Daniel Karaba won by only two votes over Kariuki John Ngata although the latter was mistakenly declared the winner (GoK 2008). The two, according to data retrieved from the Form 16 A, garnered 17,270 and 17,268 respectively (Ibid.). Several other candidates in the same constituency garnered a total of 19,738 votes. The import of this was that a total of 36,978 all went to waste under the winner take all first past the post system.

These anomalies in the representation process ought to have been addressed in the 2010 Constitution. However, as we show in this paper, they were only partially addressed. There are three key ingredients that are germane to an electoral system. First is the electoral formula used, that is, whether the electoral system used is a plurality/majority system; a proportional system or a mixed system. Second, whether a voter votes for a candidate or a party, and whether a voter makes a single choice or expresses a series of preferences. Third is the district magnitude, in other words, how many representatives to the legislature does a district elect. It is in these regards that we make recommendations on additional legislations that are needed in Kenya's electoral and representation process.

2.0 Electoral Systems and Divided Societies: Plurality/Majority Systems

There are five varieties of plurality/majority systems that can be identified: first past the post (FPTP); party block vote; alternative vote; and the two-round system (International Institute for Democracy and Electoral Assistance (IDEA, 2005). In this section we focus on the FPTP system due to the fact that it is the system that Kenya used in the old constitution (Chapter 3), and it is also the one adopted in the new Constitution (2010: Chapter 7).

The FPTP is the simplest form of plurality/majority system. Using single member districts and candidate-centered voting, a voter is presented with the names of the nominated candidates and votes by choosing one and only one of them. The winner is the candidate with the most votes but not necessarily an absolute majority of the votes.

FPTP like other plurality/majority electoral systems is defended primarily on the grounds of simplicity and its tendency to produce winners who are beholden to defined geographic areas. FPTP has several advantages for divided societies. First in severely ethnically or regionally divided societies, the system encourages political parties to be broad-based, encompassing many elements of society, particularly where there are only two major parties and many different societal groups. Those parties can then field a diverse array of candidates for election. Second, it provides a link between constituents and their representatives as it produces a legislature made up of representatives of geographical areas.

Moreover, electoral members represent defined areas of countries rather than just party labels.

This is important for developing countries. Third, it allows voters to choose between people rather than just between parties. Voters can assess the performance of individual candidates rather than just having to accept a list of candidates presented by a party as can happen under some List Proportional Representation electoral systems. Fourth, it gives a chance for popular independent candidates to be elected. This may be particularly important in developing party systems where politics still revolves more around extended ties of family, clan or kinship and are not based on strong party political organizations.

2.1 Proportional Representation System

There are two major types of proportional representation (PR). These are List Proportional Representation (LPR) and the Single Transferable Vote (IDEA, 2005). In this section we focus on the LPR because the 2010 Constitution marginally provides for it. The rationale underpinning all proportional representation (PR) systems is the conscious translation of a party's share of the votes into a proportional number of seats in the legislature. A PR system to this end requires the use of electoral districts with more than one member.

In many respects the strongest arguments for the LPR system derive from its ability to avoid the anomalous results of plurality/majority systems and to produce a more representative legislature. For many new democracies, particularly those that face deep societal divisions, the inclusion of all significant groups in the legislature can be a near-essential condition for democratic consolidation. The LPR system provides an avenue for ensuring that both minorities and majorities have a stake in developing the political system.

There are a number of advantages that accrue from the LPR system. First, it faithfully translates votes cast into seats won and thus avoids some of the destabilizing and unfair results that emanate from

the plurality/majority system. Second, it encourages the formation of political parties or groups of like-minded candidates to put forward lists. This may clarify policy, ideological or leadership differences within society. Third, it gives rise to very few wasted votes. When thresholds are low, almost all votes cast in the LPR elections go towards electing a candidate of choice. This increases the voters' perception that it is worth making the trip to the polling booth at election time, as they can be more confident that their vote will make a difference to the election outcome, however small (IDEA, 2005).

A second category of advantages relates to divided societies. First, the LPR facilitates minority parties' access to representation. This fulfils the principal of inclusion, which can be crucial to stability in divided societies and has benefits for decision making in established democracies. Second, it encourages parties to campaign beyond the districts in which they are strong or where the results are expected to be close. The incentive under the LPR system is to maximize the overall vote regardless of where those votes might come from. Third, it restricts the growth of regional fiefdoms. Because the LPR systems reward minority parties with a minority of the seats, they are less likely to lead to situations where a single party holds all the seats in a given province or district. This can be particularly important to minorities in a province which may not have significant regional concentrations or alternative points of access to power (Ibid.).

2.2 Mixed electoral systems

This system combines elements of the plurality/majority system and proportional representation system. This system loosely and minimally existed under the old constitution after the 1997 Inter-Parties Parliamentary Group (IPPG) reforms, and to an extent, it is provided for in the new constitution. Under Articles 98 (b) of the 2010 Constitution, a semblance of a PR system shall be applied in the election of 16 women county representatives. In addition, under Article 97 (c) of the same, 12

members will be nominated to represent special interest groups.

The mixed electoral system can take three forms. The first form, the Mixed Member Proportional system (MMP), refers to a system where two types of vote-counting are mixed: plurality/majoritarian system and proportional system. Both systems are used to determine representation. The plurality/majoritarian system is used to determine the allocation of legislative seats, while the proportional representation systems is used to compensate for the inequalities that may arise from the use of the plurality/ majority system. The second form, the Parallel system, refers to a system of separate voting and vote counting, where the allocation of legislative seats allocations is not dependent on each other. Under this system, a voter cast separate ballots: one vote indicating his or her party list choice under the PR system and another indicating his or her preferred constituency candidate under a plurality or majoritarian formula.

The third form refers to a system of voting and vote counting where the two systems are integrated. In principle, one round of ballots is cast for candidates on a plurality/majority basis and then a percentage of the legislative seats are allocated on the basis of a PR formula that reflects the strength of various political parties in an electoral contest. The advantage of the MMP is that while it retains the proportionality benefits of PR systems, it also ensures that elected representatives are linked to geographical districts. Furthermore, MMP can create two classes of legislators -- one group primarily responsible and beholden to a constituency and another from the national party list without geographical ties and beholden to the party. In translating votes into seats, the MMP system can be as proportional an electoral system as a pure LPR system, and therefore share its advantages

This increases the voters' perception that it is worth making the trip to the polling booth at election time, as they can be more confident that their vote will make a difference to the election outcome, however small (IDEA, 2005)

2.3 Multi-party elections in Kenya in the 1990s

Since 1992, Kenyans have mostly used the FPTP electoral system. The multi-party elections were held within a framework that has institutionalized the inequality of votes because of gerrymandering. The Kenyatta regime began the practice of unequal delineation of constituencies, but the Moi regime perfected it during the one party rule. In 1992, Moi won the presidency with 36 per cent of the total votes cast compared with the remainder, 64 percent, of the combined votes for the opposition. Since the electoral process had no threshold requirement for the winner to attain at least 50 per cent + 1 of the vote, Moi was declared president. In the parliamentary poll KANU won 53 percent of the seats with only 30 per cent of the total votes cast, courtesy of a constituency delimitation system that favored the less populated KANU supporting areas in Rift Valley, North-Eastern and Coast Provinces and the impact of the FPTP system in a multi-party election. The 1997 elections largely followed the contours of the 1992 elections. However, there were some notable exceptions.

The 2007 elections were hotly contested; however according to Independent Review Commission (IREC) Kenyans shall never know with certainty who won the elections.

Although Moi got a slightly higher percentage of votes in the presidential poll (40 per cent), KANU again won 51 per cent of the parliamentary seats with 38 per cent of the total votes cast. (IED, CJPC, NCCK, 1998) In the December 2002 elections, the National Alliance Rainbow Coalition (NARC) won by a significant margin. The party's presidential candidate, Mwai Kibaki, won 62 per cent of the total votes cast while Uhuru Kenyatta of KANU got 31 per cent. Simeon Nyachae of Ford-People got 6 per cent. NARC also won a big majority –though not absolute–of parliamentary seats. The party won 125 seats out of the 210 seats. KANU won 64 seats and Forum for the Restoration of Democracy- People (FORD-People) 14 seats. 7 seats went to 4 smaller parties. The disparity between electoral votes and

number of seats was minimal in this election because KANU won seats in the heavily populated Central province, and the Rift-Valley, especially in the Kikuyu-dominated constituencies. It also garnered numerous votes from the Kikuyu who reside Kiambu and Muranga, but are registered as voters in Nairobi (Institute for Education in Democracy (IED), 2003).

The 2007 elections were hotly contested; however according to Independent Review Commission (IREC) Kenyans shall never know with certainty who won the elections. In spite of this, the disbanded and defunct Electoral Commission of Kenya, declared Mwai Kibaki of the Party for National Unity (PNU) the winner on the basis that he had garnered 46 per cent of the total votes cast in the presidential elections. Raila Odinga of the Orange Democratic Movement (ODM) was said to have come a close second with 44 per cent and Kalonzo Musyoka (ODM-Kenya) a distant third with 9 per cent of the total votes cast in the presidential elections. At the parliamentary level, ODM was said to have won 99 seats, the PNU - 43, ODM-Kenya - 16, KANU - 14, Safina - 5, and others - 28. Although the 'true' results might never be known, there is no question that the elections between Kibaki and Raila were very closely contested. However, as the parliamentary results clearly show ODM was way ahead in terms of seats won, even when PNU affiliate parties are taken into account. In 2007, ODM therefore inherited the gerrymandered constituencies that had hitherto been the bedrock of KANU.

All the four multi-party elections since 1992 were held under the FPTP system, a system that could not effectively cater for the representation of minorities. However, without any reference to PR as an electoral device, the IPPG reforms adopted prior to the 1997 elections, had a semblance of a parallel PR system because it in effect allocated 'national seats' to parties on the basis of their share of directly elected seats, rather than the proportion of total votes cast that the PR system calls for. Loosely speaking, the successive Kenyan elections in 1997, 2002 and 2007 were run on a 'mixed parallel' basis, even though the seats

allocated on party PR basis amounted to only 6 per cent of the total seats in the legislature.

2.4 The new Constitution and representation

The meaning or characteristics of 'representation' and specifically of 'political representation' has been analyzed by many theorists such as John Locke, James Madison, and Robert Dahl. This discussion on the nature of politics focuses on their treatment of the concept. The concept of political representation has multiple, competing, and indeed conflicting dimensions. This links to political representation being seen as the activity of making citizens' voices, opinions and perspectives 'present' in public policy-making processes (Pitkin, 1967).

Political representation has four key components (Odida, 2009). First, a party that is representing another organized group, such as an elected official, an organization, movement or state agency. Second, a party that is represented by constituents, clients or members of a group. Third, something that is being represented such as interests, issues, opinions, views, and fourth, a political context or setting within which the activity of representation is taking place such as legislative assembly or a negotiation. Because of these multiple, competing and indeed conflicting dimensions to political representation it can mean different things to different people, often times with incompatible expectations and standards of accountability. The 2010 Constitution attempts to address these contradictions by advocating for inclusive representation.

2.5 Elections and representation

The 2010 Constitution endows the electoral system with a number of guiding principles: first, the freedom of citizens to exercise their political rights under Article 38. Second is the provision that not more than two-thirds of the members of elective public bodies shall be of the same gender (Article 27 (8)). Third, fair representation of persons with disabilities

has been provided for (Articles 97, 98, 100, 177 and 82). Fourth, universal suffrage based on aspirations towards fair representation and equality of vote (Article 81 (d)) and fifth, the right to free and fair elections has been provided for (Article 81). The 2010 Constitution finally provides for the election of representatives to four institutional bodies: the national assembly, the senate, the county assemblies and the presidency (Article 97, 98, 177, 138).

2.6 The National Assembly

The 2010 Constitution provides that there shall be 290 constituencies instead of the current 210.¹ Unlike the old constitution which is silent on a threshold, the new one establishes the maximum possible departure from the principle of the equality of the vote. The constituencies are ideally supposed to be equal in size in terms of population, except for the sparsely and densely populated areas where there can be a variation of up to 40 per cent.² But even other areas which are not densely populated can have a variation of 30 per cent. In short, moving towards equality will be a gradual process.

There will also be one woman elected from each county by the voters of the county in the National Assembly (Article 97 (b)). So at a minimum there will be at least 47 women in the 349 member National Assembly. And lastly there will be 12 members nominated to represent "special interests" including youth, persons with disability and workers (Article 97 (c)). This requirement calls for a new law for its implementation (Article 90 (2)).

This links to political representation being seen as the activity of making citizens' voices, opinions and perspectives 'present' in public policy-making processes (Pitkin, 1967).

¹ Article 97

² Article 89

2.7 The Senate

The Senate shall have a total of 67 members. First, one member will be elected by the voters for each of the 47 counties.³ Second, 16 women members will be nominated from party lists, and allocated to the parties in proportion to the number of seats they won in the country elections for Senate members.⁴ These members will be additional to any women elected directly from counties. Third, one man and one woman will represent youth and one man and one woman will represent persons with disability; all of whom will be taken from party lists.

2.8 County assemblies

Each county is to be divided into wards each of which will have one member directly elected by the voters of the ward.⁵ And within the counties there must be no more than two-thirds men or two-thirds women in the overall leadership (Article 177 (1) (b)). Just as the 2010 Constitution caters for the representation of women in the counties it also caters for other marginalized groups, including persons with disabilities and the youth as shall be prescribed by an Act of Parliament. (Article 177 (1) (c)).

2.9 Party lists

When the 2010 Constitution speaks of party lists, it means that before any election, each party should publish lists of candidates comprising women, youth, and persons with disabilities.⁶ If, on the basis of the results of the geographical seat election, a party is entitled to some seats for specific minorities it must take those members from their party list in the order in which they were published. Therefore if they get a seat for one woman they must take the person who headed the list of women. A person on the list can also stand for election at the constituency level. If elected to a constituency, they would of course be passed over on the list.

³ Article 98.

⁴ Article 90.

⁵ Article 177

⁶ Article 9.

3.0 Implications of the Provisions of the Constitution (2010) on the Equity of Voice

3.1 Women and representation

The guaranteed 47 seats in the National Assembly - one per county is similar to provisions in Rwanda and Uganda where seats are reserved for women. By itself, it guarantees only 47 out of 349 members (excluding the speaker) or 13.5 per cent of the House. The position of these 47 women will not be easy. They will have larger constituencies – a bigger area in which to campaign - and a bigger area to represent as constituency members. And there may be some risk that they are not treated as equals by their parties that might think “those are just women’s seats”. On the positive side – they do have to be elected by the voters at the county level, so if they do a good job they can gain respect.

In the senate there shall be at least 18 women out of a total of 67 (26.7 per cent). Again this is less than one-third, but women could win more county seats. The 18 seats guaranteed women in the senate will be more awkward than the 47 seats guaranteed women in the National Assembly. The women senators will sit in a body that has power only over matters related to counties. They cannot force any position on their county representatives. The senators will be consulted only on how to cast the county vote. However, the appropriate legislation on the senate which should be passed within 5 years also covers representation in the senate, and this may provide an opportunity for enhancing women representation at the Senate.

Perhaps, the situation in the county assemblies will be easier for women generally. Right from the beginning, not more than two-thirds of the members of any county assembly shall be of the

same gender.⁷ But the peculiar rule about special seats in county assemblies meant to ensure that no more than two-thirds of the members are of the same gender, probably means that for some time to come women may struggle to exceed one-third of the membership of these assemblies. Indeed there is a risk that these provisions will delay full equality for women, because parties know that there will be special seats for women and therefore they will not bother to nominate women for regular seats. On the other hand, it will give women a chance to show that they are capable of performing well. Hopefully, through their contributions, women will persuade their parties to nominate them, and maybe the 'special seats' will become unnecessary (unless and until there are so many women ward members that men have to be protected by special status seats).

3.2 Ethnic minorities and representation

A glance at the electoral roll of candidates for the presidential, parliamentary and civic elections from 1992 to 2007 clearly shows that a dismal number of minority candidates were fielded for elections. The first hurdle for minority electoral success has therefore got to do with the ability of minorities to become candidates of major parties. Political parties act as gatekeepers in the process of choosing candidates. Therefore, one of the necessary steps to redress the predicament of minorities is to have parties recognize the need for minority inclusion. Although, the 2010 Constitution does provide for independent candidates, this provision is unlikely to redress the plight of the minorities. Current indications suggest that party-sponsored candidates will remain dominant for the foreseeable future.

The type of electoral system also determines on how best to facilitate the election of minorities. Most minorities stand a better chance of being elected from large multi-member districts than small single-member districts. If a minority makes up 10

per cent of the population of a ten-member multi-member PR district they can vote together and win one seat, but if that district is divided into ten single member seats then the minority is unlikely to win anything. The electoral success of minorities also depends upon the geographically concentration or dispersal of the minority community in a given area.

Based on the above, it is therefore clear that the Kenyan parliament has to legislate for the inclusion of minorities if their voices and interests are to be catered for by the national and county assemblies. The Kenyan parliament can make the National Assembly and the county assemblies open to minorities through a revised electoral system or other methods of choosing representatives. In terms of the electoral system, the key variables will be: (i) whether the system is proportional or majoritarian; (ii) the number of members to be elected from each district; (iii) whether there is an imposed threshold for representation; (iv) whether voters can choose between candidates as well as parties; and finally (v) whether minority voters are clustered together or geographically dispersed. Minorities could also gain representation through special mechanisms such as reserved seats, quotas or mandated multi-ethnic 'slates'.

Parliament could also pass laws which enable marginalized groups to fully participate in government and politics. Legislation can be passed requiring minorities to be included in each party's slate of candidates (as is the case in Singapore) or requiring the allocation of a certain number of seats to specific minority groups (as is done in Lebanon).

The Kenyan parliament can make the National Assembly and the county assemblies open to minorities through a revised electoral system or other methods of choosing representatives.

⁷ Article 197(1)

4.0 The Challenges of Redressing Mal-Appportioned Votes and Zero-Sum Electoral Outcomes

The 2010 Constitution seeks to redress the inequality of votes. This is done through Article 89, which establishes principles to guide the process of boundary delimitation. For example, under clause 5 of the article there is a requirement that each constituency should as nearly as possible, have the same number of inhabitants, although it permits variations of up to 40 per cent for cities and sparsely populated areas, and 30 per cent for other areas based on such factors: as geographical features and urban centres; community of interest, historical, economic and cultural ties; and means of communication. Meeting these thresholds will, however, be a major challenge. During the voter registration that was concluded (prior to the Constitutional referendum of August 2010), Embakasi and Kasarani had 292,643 and 192,987 registered voters respectively, while Fafi and Lamu East had 9,113 and 9,181 respectively. These differences shed some light on a looming contradiction; that densely populated urban areas like Nairobi are likely to have numerous constituencies while rural areas in parts of the Coast, North Eastern and Rift Valley regions might end up with very few constituencies which might be very difficult to administer and represent due to their size.

In so far as the zero-sum character of electoral politics is concerned, the situation remains the same. The FPTP has been retained except for the 12 members who will represent 'special interests' in the National Assembly; the 16 women members who shall be nominated from party lists and allocated to the parties in proportion to the number of seats each party won in the county elections for Senate members.⁸ Also,

⁸ Article 90

at the Senate level there will be one man and one woman to represent the youth, and one man and one woman to represent persons with disabilities, also to be taken from the party lists. The end result: it is likely that under the 2010 Constitution there will be numerous "wasted" votes in close elections.

Although Article 90 speaks of "proportional representation" this is not entirely true. The PR system, as we have already stated, refers to a system under which seats are allocated in proportion to the votes received by a party. But under the 2010 Constitution, member lists will be allocated in proportion to the geographical constituency or ward seats each party received. The end result again will be that if the election for the geographical seats produces a disproportionate result, the list members will, if anything, increase.

5.0 Recommendations

5.1 The case for a mixed electoral system for Kenya

Kenya's experience with electoral politics shows that voters greatly value representatives who are diligent about their constituency responsibilities, and who consistently convey their voters' demands to the government. This partly explains the high turnover rates of members of Parliament at election time. This might also partly explain why the committee of experts engaged for the drafting of the 2010 Constitution, retained the FPTP system in the electoral process. In order to enhance equality between votes however, this paper suggests that this system should be accompanied by a run-off system. This is where parliamentary candidates, just as in the presidential race, would be required to receive more than half the votes cast in order to be declared outright winners. If the first round of voting does not produce an outright winner, the top two candidates must go for a second round of voting and the one whoever gets the highest number of votes wins. This will not only curtail the tendency of declaring

winners with a minority of the vote, but also would, in polarized multi-ethnic constituencies like most urban areas, enhance the outreach to more than simple majorities.

Though the continuation with the FPTP system may be justified, it does not address the mal-apportionment of votes and the zero-sum character of elections that currently permeates the electoral system with its winner takes-all formula. It is still necessary to examine what complementary electoral mechanisms are required to meet the challenges of Kenya's national politics which include the inadequate representation of women, ethnic, racial minorities and persons with disabilities. To deal with these anomalies, it would be advisable to adopt a parallel PR system based on party lists targeting these groups.

In general as has already observed, the PR system is thought to produce more balanced and representative tickets. In a PR system in multi-member constituencies, the allocation of seats will mirror the distribution of the popular vote. The candidate selection process under PR is more centralized, and because of the greater visibility of the whole slate of candidates, there is greater incentive for parties to present a list that mirrors the voter profile. In contrast, in majoritarian systems where candidates are selected for single-member districts the selection process is often in the hands of the local constituency party and there is little incentive for each to pick candidates that will produce a balanced ticket at the national level. Nominations under the PR system are also more idea-centered whereas nominations in single-member constituencies are more candidate-centered. In Israel, for instance, the system of PR ensures that persons belonging to the Arab minority are able to elect a number of members to the Knesset, which is fairly representative of the size of the Arab minority (Varenes, 2004). The PR system should, in this case, cater for multi-member districts.

In drawing up a scheme for a party list PR system geared to be cross-ethnic, Kenya could draw on examples from other parts of the world that have encountered similar political challenges. Among

states observing 'mixed FPTP and PR systems', Timor-Leste at one extreme, elects only 15 per cent of its legislature on a single-district FPTP basis and the rest on PR. At the opposite end of the spectrum, South Korea allocates 20 per cent of the seats under the PR system. Of the countries combining FPTP and PR in Africa, Senegal allocates 46 per cent of the total number of seats on a PR basis, compared to 36 per cent for Seychelles, 67 per cent in Guinea Conakry and 80 per cent in Tunisia (Chege, 1997).

PR lists would in this case specify the excluded ethnic and racial minorities. Under some rules, seats have been reserved for identifiable minorities – as has been done with “black communities” in Colombia, Tuaregs in Niger, and “tribes” and “scheduled castes” in India. This is a potential solution to the challenge of representation of the smallest minority groups in Kenya such as the Endorois, Ogiek, El Molo, etc. But it could also be applied to racial minorities that lack political representation even though they play a significant role in the economy, notably Kenyan Asians, Kenyan Whites as well as Kenyan Arabs. A combined FPTP and PR system has the advantage of better representation of politically excluded groups (Ibid.).

A majoritarian system of voting (such as has been retained for Kenya with mostly single-member constituencies) disadvantages minorities. Fortunately there is a requirement within the 2010 Constitution in Article 100 and Schedule 5 for a law to be enacted to promote the representation of minorities and marginalized groups which has to be done within five years after the promulgation of the 2010 Constitution. The paper therefore proposes the adoption of a mixed electoral system that combines both the plurality of the majoritarian system and the proportional system of representation. This proposal will require a constitutional amendment.

In general the PR system is thought to produce more balanced and representative tickets. In a PR system in multi-member constituencies, the allocation of seats will mirror the distribution of the popular vote.

5.2 The case for 'descriptive' representation

As earlier observed, the idea behind 'descriptive' representation is based on the notion that the government and the national assembly should be a miniature portrait of the society as a whole, reflecting divergent groups, opinions and traits. However, some issues have been raised about this notion. First, there is the question of what and who should be mirrored in the representative body as individuals/voters are bundles of different traits. Ethnic minorities and indigenous peoples are crucial parts of the mosaic of any state but they are not the only pieces in the puzzle. In Kenya, there are other groups that have been under-represented, or not represented at all - the poor, certain racial

groups and some ethnic groups that are very small in population size. Second, the mirror notion of descriptive representation may be deemed dangerous if it precludes citizens from choosing representatives who do not belong to their "group". One of the basic tenets of democracy is freedom of choice at the ballot box, but if one's choices are limited, with the voter having to vote for a candidate from their own "group", then that liberty is constrained.

Still, it is clear that some degree of descriptive representation is valuable, especially when minority groups have common interests; when they tend to vote

as a block in elections; and when they are broadly marginalized in decision-making. Such descriptive representation should then enhance the substantive influence of minority groups. Secondly, despite the shortcomings of this concept, this paper suggests that if a parliament includes none, or very few members of ethnic minorities, that is a worrying sign that those minority interests are not being taken care of. Minority parliamentarians to this end

can reassure a group that they are being heard and articulate needs which the majority may empathize with but may not fully understand or appreciate.

Thus, Kenya should reserve a minimum number of seats for representatives of certain minorities. For example in Romania, seats are reserved for small minorities that do not secure at least one deputy or senate mandate in parliamentary elections. Likewise in the New Zealand parliament, there are six seats reserved for the Mori community. In India, the constitution puts a limit on the size of the Lok Sabha (parliament) of 550 elected members, with two reserved seats for members who can be nominated by the president to represent the Anglo-Indian community. There are also provisions to ensure the representation of scheduled castes and tribes, with reserved constituencies where only candidates from these communities can stand for election. In Ethiopia, the Yefedereshn Mekir Bet (Council of the Federation) has 117 members, one each from the 22 minority nationalities and one from each professional sector of the remaining nationalities, designated by the regional councils which may elect them directly or provide their direct elections (Varenes, 2004).

Quotas, minority districts and similar statutory mechanisms of affirmative action are another route to enhancing the representation of minorities. Communal rolls and special electoral requirements to accommodate the representation of cultural groups based on language or religion exist in Lebanon, Belgium, Cyprus and Zimbabwe (Bird, 2004).

It is, however, necessary to note that all affirmative action initiatives have distinct drawbacks. Within the legislature, it may lead majority representatives to completely relinquish any responsibilities for minority interests. But on the positive side, reserved seats grant the minority ethnic groups greater control over the selection of their candidates, whereas quotas allow the majority group to assert control over the selection of the minority candidates.

Ethnic minorities and indigenous peoples are crucial parts of the mosaic of any state but they are not the only pieces in the puzzle. In Kenya, there are other groups that have been under-represented, or not represented at all - the poor, certain racial groups and some ethnic groups that are very small in population size.

This paper therefore proposes that ‘minorities’ whose interests require representation be identified and included in the legislature. The 2010 Constitution already envisages this in Article 100 which states that parliament shall enact legislation to promote the representation of such groups. The legislation that is envisaged to actualize these constitutional provisions, could amend Article 97 (c) to increase the number of nominated members to eighteen (from the current twelve), to allow room for the nomination of more minority groups as envisaged in Article 100.

Second, the envisaged legislation should cater for reserved seats. When minorities fail to “naturally” make it into legislatures through regular electoral competition, they can be guaranteed some representation through “communally based” reserved seats. Reserved seats are those seats in parliament, to which representatives would otherwise be either elected or appointed, but in this case they would be set aside for designated communities. Such parliamentarians may be chosen only by the members of the represented group (based on a communal roll), or by the voters as a whole, but only from among candidates taken from a specific community or group. This is the principle by which 47 seats were reserved for women. By their very definition, reserved seats usually rely upon a pre-determined assessment of what constitutes a ‘group’ and how large the group is. Reserved seats are a useful way of guaranteeing the inclusion of minority voices in parliament.

Thirdly, this paper proposes that the envisaged legislation also cater for minority inclusion in the county governments. More often than not, minorities are geographically clustered and this means that decentralizing power down to the county, city or municipality, will automatically empower a community which may be a minority nationally, but a majority locally.

6.0 Conclusion

Due to the rapid growth in the number of multiparty states and the diffusion of democratic norms and standards, the ability of minorities to be included and represented in parliament and government has taken on increasing importance. The protection of minority rights is best achieved and articulated through a combination of majority sensitivity and minority inclusion. Minority voices are heard, and minority rights more respected when representatives of minority groups enjoy full access to participation in the political sphere, public life and the relevant areas of decision making.

The full participation of minorities in government does not imply that elected minority representatives are the only politicians capable of protecting and advancing the dignity and political interests of marginalized communal groups. But it does imply that members of minority groups can run for office; have a fair chance at winning office; and consequently have a voice in national, county and local government structures. It is also true that having a representative of one’s own group in parliament is not the end of adequate representation or political involvement, but the beginning. It is crucial that minorities are included not just as tokens but as full players in the decision making process. In summary then, an inclusive parliament is one which demonstrates a social diversity which is appropriate to the nation and reassures minorities and indigenous peoples, women and other under-represented communities that they have a substantive role in decision making. It is a parliament which celebrates difference and sees the benefits of utilizing the talents of all the members and groups within its society.

Under Kenya’s new Constitution, the country must, within 5 years from the date of the promulgation of

The full participation of minorities in government does not imply that elected minority representatives are the only politicians capable of protecting and advancing the dignity and political interests of marginalized communal groups.

the 2010 Constitution, enact a law to “promote” the representation of minorities.⁹ The term “promote” however, does not mean the same as “guarantee”. In the long run, it is surely better to start championing for this legislation as soon as possible. This paper proposes a mixed electoral system that will encompass proportional representation, which is a system that faithfully translates votes cast into legislative seats won and thus avoids some of the destabilizing and unfair results that emanate from the FPTP system. We further noted that when thresholds are low, almost all votes cast in PR elections go towards electing a candidate of choice. This will redress the zero-sum character of the current electoral with its winner take-all tendencies.

9 Article 100

References

- Barber, B. (1984). *Strong democracy: Participatory politics of a new age*. Berkeley: University of California Press.
- Bird, K. (2004). The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research. *AMID Working Paper Series* (January). Available at: http://ipsa-rc19.anu.edu.au/papers/bird.htm#_ftn5 (Accessed on February 25th, 2011).
- Chege, M. (2007). The Case for Electoral System Reform in Kenya. In: *The Electoral System and Multi-Partyism in Kenya* (ed.). Nairobi: African Research and Resource Forum (ARRF) and Hans Seidel Foundation (HSF).
- Dahl, R. (1989). *Democracy and its critics*. New Haven: Yale University Press.
- Government of Kenya (2010) *The Constitution of Kenya*. Nairobi: Government Printers.
- Government of Kenya/Independent Review Commission (2008). *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*. Available at: www.communication.go.ke/Kriegler_IREC/FinalReport_consolidated.pdf (Accessed on February 25th, 2011).
- International Institute for Democracy and Electoral Assistance (International IDEA) (2006). *International Institute for Democracy and Electoral Assistance Annual Report 2005*. Stockholm: International IDEA. Available at: http://www.idea.int/publications/annualreport_2005/index.cfm (Accessed on February 25th, 2011).
- Institute for Education in Democracy (IED) (2003). *Enhancing the Electoral Process in Kenya. A Report on the Transition General Elections 2002* Nairobi: Lino Type Setters.
- Locke, J. (1960). *Two treatises on government* (Revised ed.). Cambridge: University Press.
- Madison, J. (1966). *The federalist papers No.10* (Revised ed). London: Everyman Publishers.
- Odida, I. (2010). Representation in the EAC political integration process. In: Let us talk about East African political federation. *EAC Occasional Papers* (1) (March). Arusha: EAC Secretariat.
- Oloo, A. (2007). Minority rights and transition politics. In Wanyande, P., Omosa, M., and L. Ludeki (eds.), *Governance and Transition Politics in Kenya* (pp.179-213). Nairobi: University of Nairobi Press.
- Pitkin, H.F. (1967). *The Concept of Representation*. Berkley: University of California Press.
- Varenes de, F. (1998). Towards Effective Political Participation and Representation of Minorities. *Working Paper 4* (May). Geneva: United Nations Working Group on the Rights of Minorities.
- Young, M (2000). *Inclusion and democracy*. Oxford: Oxford University Press.

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