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Kenya Research project by Robert M. Press [see: Press, Robert M. (2006) *Peaceful Resistance: Advancing Human Rights and Civil Liberties*. Aldershot, U. K.: Ashgate.

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Interview conducted and recorded by Robert M. Press (bob.press@usm.edu; press.bob@gmail.com)

Location of interview: Nairobi, Kenya; Land Mark Hotel, Westlands.

Date of interview: July 22, 2002.

Interviewee: Kivuta Kibwana. Kenyan academic and government critic; later elected as an opposition Member of Parliament.

Note: Bob = interviewer (Bob Press); M = co-interviewer, French scholar Marie-Emmanuelle Pommerolle, who recorded and transcribed the interview. K = Kibwana, the interviewee.

Bob (showed a graph he drew suggesting a decline in repression by the state from 1987 to 1997. Kibwana disagreed with the indication of a downward trend in state repression.)

K.: If you go to slums or to poor areas you talk to people, like attendants here, when they come home, routinely police will arrest them, and they will have to pay. One of the key problems today is the city center, and the police harassment in the cities. These people are more repressed today than they were, even in middle-class areas, like Eastlands. They do what they call « the train », people are queuing, they arrest them, if they can't pay, they will wait for the lorry, if you can't pay, you go to the police station where you have to pay more, and if your relatives come to pick you the day after, it will have increased again. Now they are targeting ordinary citizens, not in 1987. Now, there is less repression for people like us, like Kuria. The graph is correct concerning us, because of our contacts, that we have built and because of our visibility. Now it is difficult to prosecute us.

They want to create a sense of helplessness, and they want to make them believe that security will come back if KANU comes back. And it is a deliberate way to make them disassociate from the opposition.

Bob: But they don't know if these people harassed are from the opposition?

K: No, but you can see that this harassment is supported by the government, like the level of shootings now. A lot of people are shot today compare to the past. It is a pattern of creating disorder vis-à-vis poor people. It is to make it difficult to mobilize them. They target them because they are poor people. Now the state is targeting urban areas and instigating clashes, like in Kibera, Kariobangi. It can easily turn into major conflicts. They are saying that if we are not elected, we can destroy everything. And we won't leave anything.

The graph is OK for urban elites activists, they have much more protection. They know that to go against you will be at great cost for them; so they have to have very specific reasons, and they might even kill you, by poison, by making it not clear. There is now more urban repression at the approach of the elections, and it began in 2001. Because urban places tend to support opposition, they desire to break the opposition.

Bob: what would they get from disorder?

K.: the government uses disorder to get people to follow in line, for the government to be their saviour. It starts a problem and then finds a solution and gets credit out of it. In 1996-1997, I wrote some things about what will happen, and I wrote that KANU would be more

accommodating. But I was wrong, the repression increased, I was not right. If you concede lots of reform, for us, it is the beginning of the end... [unclear] For them, you don't open up, because it shows weakness, it invites you to exit.

But one thing I am sure, it is a factual point, is that repression is more than during the one-party system, notably in rural areas. There, the government is even more vicious against them than it was during the 80s. If the work of HR activists in the rural areas takes hold, it is the end of the dictatorship. There is a new chapter of HR activists, talking about land grabbing, police harassment, paralegal civic education. National groups have made it possible now for district groups to talk, even for HR CBOs. Now they have been able to go to the district levels, through civic education. When you go to villagers, they talk about their rights, and you get a lot of reactions. Those people in rural areas are at risks.

Who is repressing in rural areas?

Police administration, police, local and national elites regarding lands.

The question of notification since 1997: they can say no, and the time you make it public or challenge it, the meeting has gone, and they send you a symbolic message through that.

Bob: so, I have to change from urban to urban elites and say that I concentrate on urban elites.

K: Yes, Because before, people were not challenging, the chief there know the families, in my village, you have informers who go to the assistant chief, then to the chief, the DO, the DC and the PC and the office of the President. Even my father, he would say that things are going wrong, but that at the end KANU protects you. To go to the rural areas will make a break.

I would say, since I work in mid 1988, my work seems to suggest that democracy, and HR observance, and rule of law will become a reality when these rural areas are able to participate. When people in rural areas will be able to invite me, you will be able to say that there is a link between HR and democracy.

These HR groups at the local levels they fight for HR in a more expending way, they speak about teachers sleeping with pupils, FGM, they are not dividing only society and state, but they address the question inside the society itself. They talk about state local elites, about AIDS discrimination. And they address these issues without prompting national NGOS; the movement is growing from the bottom. Rural NGOs are the ones of the future.

Bob: What have more influence between individuals more important in the 80s and then organizations?

In the 80s, you had people of considerable courage, and fighting from moral position. For Kamau, law is a religion, so people of that calibre challenged the state.

At the University of Nairobi, there were also important people who are now working in the NGOS. Particularly at the faculty of law. It has to do with how constitutional law was taught. There were also other departments involved, like [unclear] Kinyatti, Michere. In 1989, we introduced HR as specific issues, it was not easy, but they argued that it is one topic in constitutional law. Senior faculties were blocking, even regarding questions like gender and law. For the question of constitutional, the vice chancellor had to intervene.

For instance, before, you had 2 courses, one theoretical and one practical which was taught by a teacher trusted by the government.

People from the faculty are now important people in NGOS, as director or resource persons.

Concerning changes, the question of donors is also important. When HR was an international issue, the donors came with support and identification of areas. Before 1989, the government

would not have agreed on those issues. For instance, NORAD was closed down because of its support to Koigi. So they come with an agenda, money and support towards the government by saying that it was respect of international agreement, and made the concept of civil society accepted. Some bilateral donors would back down, but donors like the Westminster foundation or AI would stay.

Me, as a University teacher, I feel like a stakeholder of how the state should be run, we are supposed to be inside and outside, to use it positively. In 1988, either you went away and tried to get influence from elsewhere, or you had to organize together to should I say « humanize » the state, or make it better.

K. In 1996-97, NCEC and parties worked together, the confluence enabled us, and then there was rivalry. Now it is similar as in 1998, the transition is here, and we must go together to make the state better, we have to try to pull together as elites. We have to use our influence, be clerics, university teacher, opposition, private sector, to make them partners. And here, it has been possible, this change, because there is a large middle-class compare to other African countries. The middle class is not confined to a small size of people who has captured the state.

But the problem is that there is no ideological consensus, if we can call that, so that middle class can become a proper engine of change, there is still this ethnic thing? All sorts of ethnic divides take away the consensus.

But it is possible: in 1988, the middle class went together because of the flagrant stealing of the elections, in 1996-97, it united around the question of the Constitution, that is why HR focused on this issue, and now we might do the same.

K: To come back to your question of the issue of Constitution, it is a way to do HR work by other means? If a constitutional environment is provided, if it provides more HR, procedures for their implementation, your work is minimized. If you have a proper legal, constitutional and international structures that are well domesticated, you have less HR work to do. It is assumed, for instance, that the police won't kill. A better constitution means democratization as well as less HR abuses. That is why there was a lot of investment on that.

M: I would have specific questions, on the law and Constitution as HR issues, and then on the relationships between NCEC and political parties and individuals.

First, you said that their was a new curriculum on HR in the faculty of law. But Gibson told me that there was not so much emphasis on Constitutional, issues because of the Common Law tradition, what would you say about that, about teachings on Constitutional issues at the university?

K: There was one Canadian professor, Robert Martin, he wrote, Personal Freedom in Tanzania, he taught first in Dar before coming in Nairobi. He got arrested here for apparently saying that Kenyatta was a stupid as his mother. When he was arrested, he decided that he did not want to continue. His teaching of Constitutional law was very progressive. The issues that were raised in Western countries were raised by him. It was in the 70s, I was his student, I was there from 73 to 76 in the [unclear].

There were also people like Gibson, Mutunga, who had a bit of liberal and even Marxist tradition, which the government was never able to deal with. It had never scared people on that. Even if these people were arrested, the tradition continued. In constitutional law, people would teach and give you examples from everywhere except form Kenya, but we had examples from South Africa. The idea of being critical was there.

About HR jurisprudence, it was not easy, not because of lack of knowledge, but, one you knew that the government was not going to let you do, and second, that the courts will not rule favourably, they would use technicalities to withdraw the case. But even within these periods, a bit of jurisprudence trying to litigate through the Constitution was done.

So what we got from the university was still here, even when people like Kuria left for private practice, the seeds for alternative thinking was already planted. It was not a question of [tactics?] but people chose not to be involved.

M: You were part of the change in the curriculum?

No, it was done from 1989. Then at that time, I was one of the young faculty people. They reviewed the curriculum, which was opening because of the general opening. People had studied abroad, and would say we must do what the others do. But the syllabus had to be approved by the Senate of the university. So we used tricks, we said that we were teaching what was in the Constitution; we called it « Fundamental freedoms and rights » which is chapter 5 of the Constitution. Before, international HR was part of the LLM level, later in 1989, it came to the LLB level. So, when I became dean, this had been approved, but we had to insist on the courses to be taught, because they were electives. So you have to create an environment in which people are not victimized because of their teachings, and to make students choose the courses, and created organizations, civil society in the University.

Do you see a difference in the HR approach of academics and private lawyers ?

When there was repression at the University, they tended to go out of it, to go in civil society. Those who did not want to leave open private practices, and they now contribute a lot to civil society. They're the resource persons in conferences; they found other places of expression. Things have been implemented after the University. That is also why the Kenyan civil society is so vibrant, because there is an intellectual leadership and guidance. There is some advanced thinking. People even got respected, and things are better accepted by donors. Definitely, it is one of our strengths, this intellectual leadership.

But to come back to the different approaches. First, you had ICJ-K which was in place thanks to the support of ICJ Geneva. First, all the lawyers went together to take the issue of the rule of law stuff. Everybody was together, KANU and opposition lawyers. It was a forum for everybody, so it was insulated against critics from the government.

But then, for people like Muite or Mutunga, the question was there is no more law to practice; You can't defend the law. The profession was threatened, so the profession came into this, not because of HR or valiant characters, but because the law was being threatened. You had to fight for the law. Kuria, he had no law to practice, the spirit of the law was disappearing. It leads to a crisis into the elites. Some of them organize because of the bandits state. We can't sustain it anymore because our interests are jeopardized. Up to today, even as political elites, our entire interests are jeopardized.

LSK, ICJ, lawyers were more concerned with the rule of law .They would not venture into corruption, but how do you secure the law, how do you gain legitimacy.

It is different from what NGOs are doing, organize people, carrying coffins, this is more traumatic, mass action. Form the point of view of the state, it is violence, and it will respond through violence. There, there is a new quantity in the political discourse.

And academic people, adds academic leadership, it continues up to now : they are strategizing, although political people don't trust them, even if some of them come form

academia (Kibaki was teaching in Makerere). The approaches then are varied and complementary.

But don't forget that now you have Kenyans in donors associations, donors from abroad, teaching, KCA.

[Political and civil society.]

The relationships between the civil and political society have been on a bumpy road. Before the 92 elections, people did not want to go into politics, after multipartyism, we worked for educating people, being critical. Work has still to be done to become a proper democratic society. People had come from the university, and people from KANU went to the opposition, after the rigged elections of 1988. Maybe for them it was more efficient, but they did not bring new ideas, they had no programme. Form 91, NGOS who should agitate for legal reforms were created, and there were a mushrooming of groups at this elite level. But what we don't do successfully is that we don't link with groups of people, we don't know what is the political terrain. Anyway, the system was not happy with that, because through it, we could recruit and empower young people (even abroad), there were new groups of leadership. Then in 96-97, we mobilized for comprehensive constitutional reforms. We invested so much power for civil society. We were leaders by default. And we developed a following. In 97, Moi was almost out, we could have probably achieved, we could have incited, but we did not do that.

Now it is different, we have to rebuild the movement from what happened between 97 and 2001. Politicians are now afraid of working with us; but at the same time, they want an intellectual leadership. In NAK, they still ask for Willy to chair it. They have come back to us, they need some glue .

But they still want to do that in control. Previously, we said we were non partisan because we thought there was a risk to compromise. Now we realized that the change can come from outside and inside, from everywhere. We think of another NCEC, with people who are reform minded, from the opposition and even from KANU, people from the Rift Valley, Northern East and the Coast.

M. What are now the activities in NCEC ?

We made a code of good conduct for leaders. In the National Constitutional assembly, which is the highest organ, we have between 600 and 1000 people. We have then the Provincial Constitutional Assemblies (9 of them, 2 from the Rift Valley). They make constitutional proposals for each province. Now we have the 5th NCA, and we have made proposals. And we put in place Constituency Constitutional Assembly to give us local input. They are made up of 150 to 200 members in each constituency. So far, 50 of the 210 have been covered. They will then report to the 6th NCA.

The movement has membership now, and we have about 20000 opinion leaders. Some of them are shared with political parties. We don't want that the NCA be a political party, but it will support people in political parties. There is now a NCA manifesto, a leadership code and discussions in plenaries.

We have noticed that there are new people wanting to go to Parliament and to sit in civic authorities. We hope that 50 to 60% of new people will enter the Parliament (in the past, there were about 50% of new people). We hope that half of them, which is 30% of the politicians will come from our group, there will be 30% of politicians of a different kind. From this leadership, we can develop a real opposition, and then a different kind of government.

M. What has been done is that from the national to the local level, the HR movements have permeated, they have socialized people in a new way. And there is a need for a political leadership which responds to that demand. Some, inside the HR movement don't like this idea of entering politics. It is not universal inside the human rights movement. So, candidates will be housed by existing parties, they will reform the parties from inside.

Mwalulu was the first candidate from NCEC ?

Mwalulu was a test case, but many of them, the politicians like to use the NCEC. Apart from Mwalulu, Orengo and Muite would like to destroy or take over or co-opt the NCEC. Whether they are within KANU or in opposition groups, they would like to destroy us or to take us away.

The parties now have a lot of influence on MPs, so they have to be careful otherwise they can be punished .

In Saba Saba (2002) ; we wanted to put a reform agenda, to rehabilitate it to give an identity to the opposition. But Orengo went with his Third Initiative, as for the NCEC we want a broad front, we are not about to support only one of them, that is why I was unhappy with Orengo, and I did not attend his meeting in Mombasa.

M. What about Anyang Nyong'o?

He provided the opposition with a theoretical political thinking. He tells us why we could influence, and shout. Whether we tell them that nicely or not, in the private or the public domain. He told them if you don't unite, Nyachae, Kibaki, Matiba, you will destroy Kenya. But now all this information don't go to them, they are subordinated to their party. He has a lot of influence towards Jaramogi, but not towards Raila.

Bob (question about human rights in rural communities).

We are trying to extend the HR movement to the masses. We want them to take on board the issue of HR in their organizations. For instance, the women are supposed to be the most organized group. They have associations in each village? And they are the groups exploited by politicians, by their husbands, so it is possible to convince them that they have got their history and their own constitutional structure, they can be strong. To the men, we could work with [unclear] or ethnic organizations, we try to see to what extent can they do the human rights within their own groups without overloading them.

M. What do you think of Kihoro, Muite, Gitobu, Kathangu, Anyang' Nyong'o, do you see them as extending HR, or you look for new people?

These have dissociated themselves from the mainstream HR. You have to get MPs still in contact with realities. A lot of information of the civil society, most of these politicians won't use it. It is conceding that these are stronger. But we try to legitimize the idea that the society and political societies have to work together easily.

In the West, you have the lobby system. We want to lobby. We do research, we rewrite model laws, we want to take that as a legislative agenda, we want them to have national platform. In terms of HR work, the movement is creating new actors. In 35 districts of 70, people are working up to the location level, they are trained.

When Moi will depart, the society will be invited to put inputs, and people today in civic education want to be councillors, and they will be accountable to people. We also want a group vocal enough in Parliament. We want these issues to be foregrounded, to have a national agenda, and to have a better visibility. That is a part of our strategy of inside, outside.

It is true that there is fragmentation even inside the civil society. There is fatigue since the 90s with very little change. Now it is harder to do things, it was easier before. One should expect that, with the subtle government. But whatever civil society we have, it must not be entirely co-opted in political society. There always must be a civil society, and then its political expression. That is why NCA can not be converted to a political party. If I go in politics, I can not be at the same time spokesman of the NCA. The NCA is the political expression of the civil society.

M. What about the CLARION deregistration?

It had to do with the corruption work. We were able to make the topic of corruption a public debate. Before, it was like the HR in the 80s, a no-go area. We introduced it in the national debate, now you have institutions like KACA. The way we did it was interesting: we were not inciters, we said that form the own sources of the government, see what is the pictures. We used Parliamentary debates, oversights committees in Parliament; official sources form the Auditor general. Before that, the reports were not followed, we brought them together, we used the medias since Independence. We also talk to people and asked ; who is most corrupted ? We had responses in terms of law, judicial, we had a well presented debate. And we found out that corruption was closely linked to the top. After disseminating the report , they wanted to do crazy things, but we had given personal advice on the NGO low, and it was difficult to deregister us as we knew the law very well. We went to court, and the case lasted one year, we worked under the cover of ICJ.

End of transcription