



# **DEMOCRATIZATION AND CONSTITUTIONAL REVIEW IN KENYA**

**A descriptive and explanatory analysis of democratization in  
Kenya in the case of the constitutional review process in between  
the general elections of 2002 and 2007.**



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The present thesis could not have been prepared without the skilled guidance and constructive criticisms of my university supervisor, Vibeke Andersson, the extremely helpful assistance of Tiberius Barasa of the Institute of Policy Analysis and Research (IPAR) in Nairobi in connection with my field work in Nairobi in September 2007, nor without the invaluable insights and experiences of the various interviewees that contributed greatly to the empirical data upon which the thesis is based.

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### **Summary**

The present thesis is devoted to answering the problem formulation: *How has democratization in Kenya developed in the case of the constitutional review process in the country in between the general elections of 2002 and 2007, and why have these developments regarding democratization (and/or the lack thereof) been created?*

This is pursued through analyzing the constitutional review process in Kenya in between the 2002 and 2007 elections as a single, retrospective, clinical case study, drawing upon four different theories in producing the comprehensive and nuanced answering of the problem formulation called for by the design of the thesis. The analysis is based in qualitative demos and key informant interviews, as well as in existing articles and analyses.

Hence, in analyzing how democratization has developed in the case, a modified version of Dahl's model of democracy is utilized. This analysis argues that Kenyan democratization has developed towards more *de facto* freedom of expression, associational autonomy, and a somewhat higher degree of enlightened understanding in the case. However, the overall assessment arrived at through the analysis with regards to *de facto* responsiveness, elected officials, effective participation and control of the agenda is that developments towards democratization have by and far been lacking. Furthermore, no constitutional *de jure* democratization developments were created in the case.

Regarding the second part of the analysis, focusing on explaining why these democratization developments were (or were not) created, in the analysis drawing upon Rudbeck's model it is argued that the somewhat expanded freedom of expression and association are the results of the President's calculations that the costs of continuing suppression would exceed the costs of giving in to some extent. With regards to the lacking developments regarding democratization, these seem to have been caused by a combination of the President and his supporters' attempts at resisting democratization by relying on alliances with members of civil society, development partners (DPs), as well as changing political actors in combination with other strategies and developments that have decreased the potential for popular

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contention to pressure for democratizing constitutional reforms. However, certain of these employed strategies also meant that the review process became very controversial and as such contributed to creating a heightened level of enlightened understanding.

Using historical institutionalism, it is argued that the institution of the constitution (which has constituted part of the enabling foundation for the strategic actions of the President), the CKRA (CKRA) (due to its institutional inefficiencies) and that of ethnicity (with the asymmetrical power relations embedded in it) appear also to constitute a significant part of the explanation of the lack of both *de facto* and *de jure* democratization. Moreover, although also hampering democratization, ethnicity may also have contributed to the improved level of *de facto* enlightened understanding.

Analyzing the Governance, Justice, Law and Order Sector Reform Programme (GJLOS RP) as an institution, it is furthermore argued that the *de facto* democratization concerning freedom of expression and associational autonomy has partly been created due to strategic calculations by the GoK under influence of donor employed norms. However, the creation of GJLOS has also been an explanatory factor in accounting for the lack of *de facto* and *de jure* democratization in the case, as its highly asymmetrical effects on domestic power relations have enabled Kibaki and his supporters to resist giving up executive power

In the analysis drawing upon Foucault, it is argued that the rules of correlation between the good governance discourse and that on constitutional review in Kenya have rendered the Presidential position less central in influencing the discursive practices in relation to the review process, contributing to a heightened *de facto* inclusion of adults and freedom of expression.

However, the rules of correlation between the two discourses also seem, due to the emphasis being more on the object of management than on politics in the good governance discourse, to have made possible the lack of *de facto* democratization. Moreover, it is argued that the lack of democratization has been created also by a combination of the introduction the concept of ‘contentious issues’, the lack of a discursive hegemony on constitutional review after the referendum, as well as certain discursive redistributions following the referendum.

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### **List of abbreviations**

4Cs	Citizens Coalition for Constitutional Change
ACP	African, Caribbean and Pacific States
AG	Attorney General
BFD	Basket Fund Donor (of GJLOS)
CEMIRIDE	Centre for Minority Rights Development
CDF	Community Development Fund
CEP	Commission of Eminent Persons
CKRA	Constitution of Kenya Review Act
CKRC	Constitution of Kenya Review Commission
CMD	Centre for Multiparty Democracy
CREAW	Centre for Rights Education and Awareness
CSO	Civil Society Organization
DAC	Development Assistance Committee
Danida	Danish International Development Agency
DP	Development Partner
DR	Danmarks Radio
EC	European Community
ECK	Electoral Commission of Kenya
ERSWEC	Economic Recovery Strategy for Wealth and Employment Creation
FMA	Financial Management Agent
GJLOS	Governance, Justice, Law and Order Sector
GNU	Government of National Unity
GoK	Government of Kenya
IFI	International Financial Institution
IMF	International Monetary Fund
IPAR	Institute of Policy Analysis and Research
IPCC	Inter-Parties Consultative Committee
IPPG	Inter-Parties Parliamentary Group
IRIN	Integrated Regional Information Networks
KACC	Kenya Anti-Corruption Commission
KANU	Kenya African National Union
KLRC	Kenya Law Reform Commission
KLS	Kenya Law Society
KNCHR	The Kenya National Commission on Human Rights
Ksh	Kenyan Shillings
KRA	Key Result Area
LDP	Liberal Democratic Party
NAK	National Alliance Party of Kenya
NBFP	Non-Basket Fund Partner
MDAs	Ministries, Departments and Agencies
MoJCA	Ministry of Justice and Constitutional Affairs
MP	Member of Parliament

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MS	Mellemfolkeligt Samvirke/ Danish Association for International Co-operation
MSC	Multi-Sectoral Commission
MSF	Multi-Sectoral Forum
MTS	Medium-Term Strategy
NARC	National Rainbow Coalition
NAK	National Alliance for Kenya
NCC	National Constitutional Conference
NCEC	National Convention Executive Council
NGO	Non-Governmental Organization
ODM	Orange Democratic Movement
OECD	Organization for Economic Cooperation and Development
PCAJLA	Parliamentary Committee of Administration of Justice and Legal Affairs
PCK	People's Commission of Kenya
PCO	Programme Coordination Office
PSC	Parliamentary Select Committee
PRSP	Poverty Reduction Strategy Paper
RP	Reform Program
STPP	Short Term Priorities Programme
SWAP	Sector-Wide Approach
TG	Thematic Group
TGCD	Thematic Group on Constitutional Development
UNC	Union for a New Constitution
UNDP	United Nations Development Programme
US(A)	The United States (of America)
USAID	United States Agency for International Development
WB	The World Bank
VP	Vice President

## **1. Introduction and problem formulation**

The former Secretary General of the United Nations, Kofi Annan, has argued that “[G]ood governance is perhaps the single most important factor in eradicating poverty and promoting development.” (UNDP, 2001: 1). In doing so, he made himself a spokesperson of a broad-based consensus on the importance of promoting good governance in development, which has emerged since the World Bank introduced it on the development agenda in the late 1980s. DPs have thus come to see the promotion of good governance as crucial for creating sustainable poverty reduction and focus large proportions of aid on improving governance in all of its aspects (Hede, 2006: 199; Degnbol-Martinussen & Engberg-Pedersen, 2003: 30-32; Kabbaj, 2003: 53-56).

While there is thus much agreement (at least among donors) on the importance of improving governance, many different definitions and interpretations of the term ‘good governance’ exist and are used. Yet, as can be derived from most definitions of the concept, good governance is perceived to be conceptually closely related to (I) democracy as characterizing the system of governance in both the political and administrative parts of the public sector, as well as (II) dealing with the part of the public sector that is termed as ‘non-political’, meaning the public sector excluding the government and parliament (Hede, 2006: 199). Whereas both of these aspects of good governance are recognized as important for the generation of development and poverty reduction, the establishment of a certain level of democratization through support to the wide concept of good governance is often perceived as necessary in order to develop good governance in the narrow sense (Danish Ministry of Foreign Affairs, 2007: 5, 8; Hede, 2006: 222)<sup>1</sup>.

However, while the intertwined character of the relationship between the two concepts of good governance and democratization is recognized in development

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<sup>1</sup> Moreover, while democratization and high economic growth or high per capita income are not necessarily causally connected, a certain degree of democracy is likely to be necessary if the growth that does occur is to be pro poor in the sense that it reduces material poverty and inequality in a sustainable fashion (Halperin, Siegle & Weinstein, 2005: 69-71; UNDP, undat.: 1).

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practice, this appears to be much less so in the literature on democratization. Much has thus been written and published regarding the main theoretical debate on why democratization arises and democratic institutions consolidate (Rudbeck, 2006: 4). However, very little of this seems to take into account the role played by international actors such as development agencies in supporting good governance reforms and programs that focus on strengthening democratization processes (cf. Abrahamsen, 2000: 1). This is so although the extensive growth in the literature on democratization has occurred during much the same period of time as the rise of the good governance agenda beginning in the late 1980s, spurred on by the end of the cold war and a wave of faltering authoritarian regimes embarking on a journey towards democratization (Hood, 2004: 5-6).

It thus appears that there exists a need for studies that seek to bridge the two areas of study to produce insight into how donor agencies and cooperation with these regarding good governance affect processes of democratization in developing countries.

Kenya is one of many developing countries, which is facing exactly this issue of how good governance policies, programs and reforms can contribute to democratization. The country is also among the relatively few Sub Sahara African states, which can be termed as aspiring democracies<sup>2</sup> (Ndulo, 2006: 23). Furthermore, Kenya is an interesting case due to its recent transition to democracy<sup>3</sup> with the first free and fair elections of Kenya in 2002<sup>4</sup> that resulted in the coming into government of the National Rainbow Coalition (NARC).

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<sup>2</sup> States that are either characterized by Freedom House as 'free', but not yet consolidated democracies, or 'partly free', but the transition to democracy of which has not stalled. Hence, countries that have made slow, but continuing progress towards democracy (Ndulo, 2006: 23).

<sup>3</sup> Some debate exists as to when exactly a transition to democracy has taken place, however, as the concept must refer to transition from one regime type to another (often from authoritarianism to democracy), the transition phase can be understood as beginning with the breakdown of the previous regime type and ending with the formal introduction of democracy as the form of government when institutions allowing for free elections are created and the first fully democratic, free and fair, elections are held (Hood, 2004: 20, 25-26; Sørensen, 1998: 39).

<sup>4</sup> Although the elections in Kenya in 1992 and 1997 arguably constituted important steps towards democratization in Kenya, these elections were characterized by observers as unfree and unfair (Rudbeck, 2005: ix, 203; Freedomhouse, 2002: 5) It should be noted, though, that some observers have

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In a Sub Sahara African context, Kenya thus currently constitutes a critical case in the sense that, while arguably on the forefront regarding democratization in the region in between the 2002 and 2007 elections, Kenya is still at a critical point in its democratic development, as one third of all new democracies fail within five years. As such, the lacking 'free and fair' character of Kenya's 2007 elections has stressed the importance of analyzing developments regarding democratization in the country in between the two elections (Pevehouse, 2005: 29; DR, 2008b: 1).

The present Constitution of Kenya was amended numerous times during the rules of Kenya's two first presidents to provide for a constitutionally founded authoritarian state and gives the president almost unlimited powers over all three arms of government as well as to suspend or limit the rights of Kenyans, thereby making the democratization process extremely vulnerable in that it is reliant upon the political inclinations of the incumbent president (cf. Appendix 1.B; Udvikling NR. 01/2007: 17). Hence, the comprehensive constitutional review process that was finally accepted and secured in law in the last tenure of Moi is of essential importance for democratization in Kenya. Furthermore, the events of the constitutional review process have also been of central importance in relation to the latest regrettable, dramatic and violent developments in relation to Kenya's democratization process surrounding the general elections of December 27 2007 (cf. Appendix 2; Frederiksen, 2008: 1).

In connection with the constitutional review process and generally, the most significant good governance reform initiative in Kenya is the Governance, Justice, Law and Order Sector Reform Programme (GJLOS RP) that was initiated in November 2003 with the partial objective of supporting the constitutional review process in bringing about a new and more democratic constitution.

The developments regarding the constitutional review process, supported through the good governance reform program of GJLOS, are thus central to democratization in

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termed the act of voting in itself as somewhat free and fair in the two elections in the 1990s, but the campaigning was characterized by significant problems with rigging, bribing and political violence, wherefore they should arguably, on a whole, not be characterized as 'free and fair' (Beetham et al., 2000: 28-30; Carson, 2003: 1-2; Freedomhouse, 2002: 2).

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Kenya following the transition to democracy and of much current interest. But concerning which dimensions of democracy has democratization developed in the constitutional review process (in the context of GJLOS and the good governance agenda), and not least why –due to which processes, actors, mechanisms, institutions, and ideas- have these democratization developments in Kenya taken place?

Based in these theoretical and empirical reflections, this thesis seeks to provide a nuanced answer of the following **problem formulation**:

*How has democratization in Kenya developed in the case of the constitutional review process in the country in between the general elections of 2002 and 2007, and why have these developments regarding democratization (and/or the lack thereof) been created?*

## **2. Design and methodology**

### **2.1 The aim of the thesis**

As it follows from the two parts of the problem formulation, the aim of the present thesis is two-fold. First, corresponding with the descriptive first part of the problem formulation, the aim is to discuss how democratization has developed in the constitutional review process in Kenya. That is, which dimensions democracy have been affected and in which direction?

Second, to answer the explanatory, second part of the problem formulation, the aim is to explain why these developments regarding democratization (and/or the lack thereof) have been created in the Kenyan case; i.e. which actors, dynamics, institutions, power relations and ideas have caused the creation of these democratization developments?

The analytical focus of the thesis is thus on the empirical case of the constitutional review process in Kenya and the overall aim of the thesis is thus to answer the problem formulation regarding this specific empirical case as nuanced, fully and comprehensively as possible<sup>5</sup>.

The two parts of the problem formulation are considered equally important in seeking to answer the problem formulation. A high quality discussion of the plausibility of different possible developments regarding democratization (and the character of such developments, to the extent that developments have been created) is thus fundamental to engaging in analyzing possible explanations as to why these varied developments regarding democratization seem to have been created. Spatially, the higher taxonomical level analysis of causal factors has been prioritized the highest, however.

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<sup>5</sup> On a higher level of abstraction, the thesis is thus (implicitly) preoccupied with the more theoretical question of describing and explaining the causal dynamics of democratization in developing countries under influence of, among other factors, international actors and ideas relating to the promotion of good governance and democracy (cf. Appendix 2 on theoretical generalizations).



## **2.2 Definition of central concepts**

The following presents the definitions of the most central concepts as they are employed in answering the problem formulation.

### **2.2.1 ‘The case of the constitutional review process’**

This is defined as constituted by the main events, statements and actions of the actors that have been most influential in shaping the developments in the constitutional review process relevant to democratization<sup>6</sup>. Time-wise, the case is defined as running from the reinitiation of the process of the comprehensive constitutional review provided for in the Constitution of Kenya Review Act<sup>7</sup> (CKRA) when Parliament as Kenya’s legislative body was inaugurated after the general elections on December 27<sup>th</sup> 2002 until October 23 2007, when Parliament was dissolved, thereby ending debate and negotiations on minimum constitutional reforms ahead of the 2007 elections.

The reconstruction of the course of the main events of the case in chapter 3 comprehensively defines what is understood as ‘the case of the constitutional review process’ in the thesis.

### **2.2.2 ‘Developments regarding democratization’**

Democratization is in the present project conceptualized as qualitative developments towards the in chapter 4 outlined standards and institutions of democracy and since the ideal standards of democracy can never be completely realized in practice, democratization can be understood as a never ending dynamic process (Abrahamsen, 2000: 82). Democratization in a concrete case can thus be characterized by developments in the direction of a higher degree of fulfillment of one of the ideal standards or institutions, while developments away from other standards or institutions (or no developments) may have taken place. As such it is important to

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<sup>6</sup> The main actors are identified to be President Kibaki and his changing supporters in government, leading members of opposition parties in Parliament, the most active members and organizations of civil society, as well as the most active MPs supporting GJLOS.

<sup>7</sup> Cf. Appendix 1.A.

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note that democratization phases<sup>8</sup> following the transition phase are in practice not just overlapping, but also most often characterized by conflict, crises and setbacks. In this connection it should also be noted that democratization is inevitably intertwined with (changing) power relations and that the concept is therefore normative and by no means politically neutral (cf. Appendix 3) (Sørensen, 1998: 39).

The project operates with two main types of democratization developments. First, developments in terms of implications for the standards and institutions of democracy via changes in the constitution or the legal framework emanating from the constitutional review process; termed *de jure* democratization developments in the thesis. Second, the more bottom-up oriented type of possible developments<sup>9</sup> relates to how the operation of Kenyan democracy in practice and with regards to the constitutional review process seems to have developed; these are termed *de facto* developments of democratization.

### 2.2.3 ‘Good governance’

While there is much agreement on the importance of improving governance, there is no universally agreed upon definition. Broadly speaking, international guidelines of the concept have been established within multilateral forums, and this conceptual framework is then filled out and specified by bilateral actors. (Hede, 2006: 199, 202-203)

Hence, serving also as a point of departure for OECD member states, The World Bank defines ‘governance’ as “...*the manner in which power is exercised in the management of a country’s economic and social resources for development*” and then outlines an analytical framework identifying three aspects of governance:

*“(i) the form of political regime (parliamentary/presidential, military/civilian, authoritarian/democratic);*

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<sup>8</sup> Termed ‘the decision phase’ (further adoption of democratic rules and institutions) by some and the consolidation phase by others; the latter is defined in relation to section 2.5 (Sørensen, 1998: 39, 42; Potter et al., 1997: 14).

<sup>9</sup> Since the practical operation of a democracy is arguably dependent on the behavior, attitudes and perceptions of the demos.

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- (ii) *the processes by which authority is exercised in the management of a country's economic and social resources; and*
- (iii) *the capacity of governments to design, formulate, and implement policies, and, in general to discharge government functions.”* (Hede, 2006: 206). (Hede, 2006: 216-217)

This definition is also similar to that of the Cotonou Partnership Agreement signed by EU member states and 79 developing countries<sup>10</sup> and it can thus be seen that the concept is perceived to be conceptually closely related to (among other areas) democracy. This aspect of good governance can, as it is done by Danida, be termed as ‘the wide concept of good governance’. This encompasses the political rule of a society relating to the government, parliament and the participation of the people in the development process (Hede, 2006: 222, 228-229).

As opposed to this, although closely connected to it, is ‘the narrow concept of good governance’, which deals with the part of the public sector that is seen as ‘non-political’, meaning the public sector excluding the Government and Parliament<sup>11</sup> (Hede, 2006: 222; Danish Ministry of Foreign Affairs, 2007: 3-5).

It is, however, critical to recognize that there is no clear-cut distinction of ‘either or’, but that the relationship between the political and managerial aspects of good governance is rather characterized by a tension (cf. Appendix 3; Degnbol-Martinussen & Engberg-Pedersen, 2003: 299).

### **2.3 Explanatory, clinical, retrospective single case study**

The present thesis is empirical and case centered as the aim is solely to analyze as fully and nuanced as possible the single case of how democratization has developed

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<sup>10</sup> The Cotonou Partnership Agreement thus defines ‘good governance’ as: “*The transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development, in the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law.*” (The European Commission, undated: 8).

<sup>11</sup> The narrow concept is thus preoccupied with the process through which authority is executed in society as well as with the functionality of the public sector, and in particular with the capacity of this sector to plan and implement policies and strategies (Hede, 2006: 222; Danish Ministry of Foreign Affairs, 2007: 3-5).

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and why in the case of the constitutional review process (ending with the dissolution of Parliament on October 23 2007). The thesis is therefore undertaken as an explanatory, clinical, retrospective single case study in which existing and mutually supplementing theories are used instrumentally to develop the best possible understanding and explanation of the empirical case.

First, the necessary components of a theoretical framework against which the developments regarding democratization in the constitutional review process in Kenya can be discussed and assessed.

Second, the theories chosen with the purpose of contributing to explaining the case are used in the analysis much like a clinician when faced with a specific case seeks to build up a full understanding of the case in order to explain what has happened and why based “...on a battery of potential explanations...” (de Vaus, 2001: 224). Different plausible explanations based in different theories are thus developed and discussed as they are held up against the understanding of the empirical case that has been reconstructed in chapter 3<sup>12</sup>.

### **2.4 Delimitations**

First of all, events relating to the Kenyan general elections of 2007 have occurred outside the case and are hence not part of the analytical focus of the thesis. The review process and the elections are, however, connected in various ways and these are noted throughout the analysis as well as briefly reflected upon in Appendix 2; due to pragmatic constraints related to the hand in date of the thesis, developments after January 15 when Kenya’s 10<sup>th</sup> Parliament convened for the first time, have not been considered.

An important threshold of the present project is that the constitutional review process is studied as a developmental political process, meaning that the more technical support and events relating to this within the GJLOS RP Thematic Group on Constitutional Development (TGCD) are only included to the extent that they have

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<sup>12</sup> Hence the term ‘clinical’ case study, as opposed to theory building or theory testing case studies (cf. de Vaus, 2001: 221-223).

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had some significance for progress (or lack thereof) of the constitutional review process in relation to democratization.

Similarly, in relation to *de jure* democratization, the Njoya case has been assessed to be outside the political focus of the thesis<sup>13</sup>.

Moreover, the establishment of the Kenya Anti-Corruption Commission (KACC), the Kenya National Commission on Human Rights (KNCHR) and the Community Development Fund (CDF) are outside the scope the analysis of the thesis since the two former time wise originate from prior to the elections in December 2002, while the latter was not introduced in relation to the review process (KACC, 2007: 1; KNCHR, 2007: 1; Thorup, 2003: 10; Kenya Institute for Policy Analysis and Research, 2007: 1).

Furthermore, the contents of the various draft constitutions and proposed minimum reforms are treated only to the extent needed to understand the review process, as none of the drafts have amounted to *de jure* democratization.

In relation to discussing the possible developments of *de facto* democratization in the first part of the analysis, this is not done regarding all the specific institutions that each standard of Dahl's democracy model relies upon. This is because doing so would lead to both many overlaps and an amount of detail that would render the analysis tedious reading as well as potentially disguise the more significant findings.

Regarding the analysis of the good governance discourse, analyzing the nuances in definitions and employment of individual donors of these concepts would be too comprehensive for what is needed in this thesis and so the point of departure is taken in the internationally outlined definitions that all donors in GJLOS have committed to either through the EU or the OECD.

Finally, due to spatial constraints, it has not been possible to treat explicitly nuances in relation to differences in the perceptions of democratization developments by socio-economic group based in the demos interviews.

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<sup>13</sup> In the Njoya case a court ruling established the precedence that so-called major changes to the constitution in the future require a supportive majority vote in a referendum (Torstensen et al., 2006: 4; Kuria Interview: 6; Cottrell & Ghai, 2004: 22-24).

## **2.5 Argumentation for the choice of theories**

In contrast to the approach of many analyses of democratization, it has been assessed that using a minimalist point of departure for discussing developments regarding democratization in this thesis would mean that much of the ability to discuss the quality of developments regarding Kenyan democratization would be lost and bias might be introduced since significant developments might be missed due to the use of a narrow definition of democracy. This also accounts for the choice of not using the concept of ‘consolidation’<sup>14</sup> in the first part of the analysis; especially considering the short timeframe of the case and only recent transition to democracy.

Robert A. Dahl has presented one of the most acclaimed descriptions of the modern conception of (ideal) democracy and it is widely used in the literature on democratization in developing countries<sup>15</sup>. Moreover, most scholars do agree on Dahl’s definition of democracy and rather than formulating alternatives, the critics argue for adding dimensions to Dahl’s. Hence, the core institutions and standards of liberal democracy described by Dahl, including such additional aspects, have been deemed the appropriate theoretical framework for discussing the developments regarding democratization in this thesis. (Rudbeck, 2005: 28-29; Hood, 2004: 19, 23-25; Doorenspleet, 2005: 18-19; Hede, 2006: 188)

With regards to the explanatory, second part of the analysis, the thesis draws upon three supplementary theories.

First, the explanatory model of democratization of Jens Rudbeck has been chosen, as this constitutes an attempt to combine the strengths of existing main approaches in democratization theory based in a categorization of these (see Table 2.1).

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<sup>14</sup> Although no universally accepted definition exists of ‘consolidation’, the most scholars seem to agree that consolidation has been achieved when the realization occurs that ‘democracy is the only game in town’ (Linz & Stepan, 1996: 5). That is, when no significant actors (national or international) seek to replace it, if a substantial majority perceives democracy to be the best type of government, and if both governmental and non-governmental actors agree to solve conflicts in accordance with the new democratic rules of conduct. This is termed as behavioral, attitudinal and constitutional consolidation, respectively; these are arguably implicitly encompassed by the theoretical framework outlined in section 4.1 (Linz & Stepan, 1996: 5-7; Düsing, 2002: 32; Hood, 2004: 26; see also Pevehouse, 2005: 28-29; Halpin, 2005: 83b; Codato, 2006: 63)).

<sup>15</sup> See e.g. Sørensen, 1998; Hede, 2006; Doorenspleet, 2005; Potter et al., 1997; Jakobsen & Kelstrup, 1999.

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Table 2.1: Major positions in the debate on democratization

	Structure-generated change	Agency-generated change
Top-down change	“State-making” (e.g. Gellner and Tilly)	“Elite negotiations” (Transitology)
Bottom-Up change	“Industrial capitalism” (e.g. Barrington Moore and Rueschemeyer, Stephens and Stephens)	“Civil Society” (e.g. Linz & Stepan/ Putnam)

(Based on Rudbeck, 2005: 47, 48-65)

Hence, based in a critique of existing theories<sup>16</sup>, Rudbeck’s model arguably draws upon insights and elements from transitology, the civil society approach, as well as more structurally-oriented theorists such as John Markoff and Charles Tilly by focusing on the importance of strategic interactions between elite actors and popular masses. The model has thus been chosen as the first explanatory theory, as it seems to contribute to the existing body of democratization theory an important aspect of how the *dynamics* between top-down/bottom-up/structure/agency related factors explain why democratization does or does not occur “...*under authoritarian rule as well as under processes of democratic reforms.*” (Rudbeck, 2005: 6). While Rudbeck uses the model primarily to explain transitions to democracy, the model does seem to hold explanatory power also in relation to the following phases as these are also closely intertwined with changing societal power relations. (Tilly, 2006: 8; Rudbeck, 2005: 6; Hadenius, 2002: 83; Boussard, 2002: 158-159)

However, Rudbeck’s model does not provide much depth in explaining how institutions upon which incumbents base their power strategies are developed or affect their interests and actions, nor the potential leverage of informal institutions, such as ethnicity<sup>17</sup>.

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<sup>16</sup> The two groups of structural theories are discarded for relying on structural determinism derived from European history, which is arguably problematic in connection with explaining positive developments towards democratization in developing countries in other parts of the world characterized by different structures (Potter et al., 1997: 18-22; Rudbeck, 2005: 45-46, 48-52, 52-58; Jakobsen & Kelstrup, 1999: 178-182).

<sup>17</sup> ‘Ethnicity’ is in the present thesis understood as a social identity having roots in ‘shared meaning’ of boundaries that identify and differentiate between different ethnic groups are thus created, recreated (hence open to change) through social interaction and which can be used instrumentally. The ‘shared

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Historical institutionalism has therefore been chosen as it can contribute with a more explicit focus on how institutions (both existing and new (including externally introduced ones)) may shape interests and enable and constrain behavior (of mass actors as well as incumbents and opposition as the elites) in certain ways by affecting power relations asymmetrically. However, this theory has a rather limited understanding of ideas (or knowledge) and their role in creating policy outcomes, such as democratization (cf. e.g. Hay & Wincott, 1998: 957; Peters, 2005: 75, 79-81; Hall & Taylor, 1996: 942).

Foucault's discourse theory has therefore been chosen as it can contribute to the explanatory power by enabling analysis of international factors in the form of the role of ideas and claims to knowledge regarding the good governance agenda in development as the actors, including the DPs, have engaged in constructing and reconstructing these in the review process, thereby enabling and constraining the behavior of the central actors in certain ways that may have protected or transformed power relations and thus affected democratization.

Consequently, none of the theories are perceived to be able to provide the *right* or *true* explanation of the underlying reasons for the character of the developments created regarding democratization. Because they each provide a partial understanding of democratization, using them as supplementary enables the analysis to develop a full and nuanced explanation, thereby fulfilling the aim of the thesis as a clinical case study. However, it is not perceived to be possible to produce *the* answer to the problem formulation as this is seen as non-existing; as such, the thesis is based on an anti-foundational epistemology and a non-positivist ontology (Baylis & Smith, 2001: 227; Kvale, 1996: 61-67).

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meaning' can e.g. relate to properties associated with or believed to be associated with "...the deeply-embedded belonging to a group with unique identity markers, such as myths of common ancestry, shared memories, cultural values, traditions and symbols, and ownership of territory." (Hagg & Muzondidya, 2006: 2). (Jenkins, 2001: 12-13; Chandra, 2006: 3).



## **2.6 Empirical data**

The chapter representing the reconstruction of the historical course of events within the case is based on a multitude of secondary data from different sources, predominantly in the form of newspaper articles from online databases, reviews of the GJLOS RP, press statements and existing comparative analyses of the draft constitutions.

The first part of the analysis discussing the developments regarding democratization in the case is based on the secondary data used to reconstruct the case, existing analyses of Kenyan democracy prior to the 2002 elections as well as on interviews with local observers of the review process and democratization in Kenya. Furthermore, qualitative data obtained through demos interviews was used.

The second part of the analysis explaining the creation of the developments regarding democratization (and/or the lack thereof) is also based on reconstructed case as well as a few existing analyses. Moreover, the explanatory analysis also draws extensively on compressed qualitative, primary data obtained via interviews with key informants.

## **2.7 Methods for field work**

Primary data has thus been obtained through two main types of semi-structured interviews during a 1-month stay in Nairobi, Kenya in September 2007.

### **2.7.1 Demos interviews**

First, as a means of including illustrative examples of the perceptions and understandings of members of the ‘demos’ with regards to *de facto* experienced developments regarding democratization, qualitative semi-structured harmonious focus group interviews and individual interviews (within the high income group, the former was not feasible) were taken out (Mikkelsen, 2005: 89, 172, 173). The choice of this method was based in the assessment that insights into the lived experiences of democratization of Kenyans from different socio-economical backgrounds would provide more nuanced and penetrating interpretations as a supplement to the more general data (cf. Kvale, 1996: 94).

The purpose of these interviews was thus to include a qualitative indication as to the popular scope and nuances of the lived experiences of the democratization

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developments and not be able to provide data representative of the wider population in any sense. Rather, the range of experiences of Kenyans was therefore of interest, which was also reflected in the strategic and stratified sampling of members of the ‘demos’ in that these were chosen using a rough distinction between citizens belonging to a category of ‘low income’, what can crudely be termed as ‘medium income’<sup>18</sup>, and ‘high income’ in Kenyan society<sup>19</sup>. Guided by the idea of conducting interviews within each group until more or less no new views were expressed by interviewees, relatively few subjects from each socio-economic group were interviewed (cf. Kvale, 1996: 102). Hence, 8 interviewees from the ‘low income’, 7 from the ‘medium income’, and 6 from the ‘high income’ group were interviewed.

Regarding defining these categorizations, no national level population by income statistical data has been obtainable. However, due to the purpose of the interviews, it has been important to obtain samples of interviewees that were differentiated by their belonging to socio-economic group defined by income to encompass potential differences of perceptions, rather than the labels and thresholds of the categories strictly reflecting representatively the income distribution by population groups in Kenya. It was therefore assessed as satisfactory to simply define the thresholds of these categories pragmatically by the actual income range of the interview subjects living in three different geographic areas of Nairobi, which, based in rent levels, were likely to provide interview subjects distributed by income in a manner appropriate to the three categories<sup>20</sup>. Before the interviews, participants were discretely asked to

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<sup>18</sup> It should be stressed that this is not intended as corresponding to the national level income median or mean income (per capita gross national income in Kenya was KSh 45.307 in 2006 (Kenya National Bureau of Statistics, 2007: 24)). Due to the purpose of the interviews, it has thus been important to obtain samples of interviewees that were differentiated by their belonging to socio-economic group defined by income to encompass potential differences of perceptions, rather than the labels and thresholds of the categories strictly reflecting the income distribution by population in Kenya.

<sup>19</sup> The choice of using such a distinction between these socio-economic groups is based in the reflection of Dahl, Abrahamsen and others regarding the importance of the degree of social and economical equality in approaching *de facto* political equality as the fundamental property of democracy (cf. chapter 4).

<sup>20</sup> This was performed with the assistance and local knowledge of Kenyan income issues of governance researcher Tibarius Barasa of IPAR. Unfortunately, due to time and resource constraints, it was not possible to include the geographical dimension to a higher extent by including interviews with members of the demos in rural areas; such members of the demos may arguably have been even more marginally positioned with regards to the review process (cf. Kariobangi Interview: 2-3; CEMIRIDE Interview: 7, 13; Westlands Interview: 4).

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indicate their income range. These ranges were below US\$ 1 PPP<sup>21</sup> for the ‘low income’ group, KSh 50.000- 100.000 for the ‘medium’ income group and above Ksh 150.000 for the ‘high income’ group. The sampling of interviewees within each income group was aided by local contacts in the form of a CBO in the low income area of the shanty town of Kariobangi, and local churches in the middle-income area of BuruBuru and high-income area of Westlands, all in Nairobi<sup>22</sup>. Sampling was dependent on voluntary participation, however, as acceptance was given with only minimal information on the subjects to be discussed provided beforehand<sup>23</sup> and all the contacted members of the demos were willing to participate, this has most likely not introduced bias.

### **2.7.2 Key informant interviews**

Second, semi-structured qualitative key informant interviews with key stakeholders of the constitutional review process have been performed by the researcher<sup>24</sup>, as have key informant interviews with local observers of the constitutional review process and/or democratization in Kenya (Mikkelsen, 2005: 72, 172). A list of all key informants interviewed is included in Appendix 4.

The key stakeholder interviewees engaged in the constitutional review process have all been selected due to their centrality in the review process<sup>25</sup>. The observers interviewed have been chosen based on their knowledge of and work in relation to the constitutional review process and democratization in Kenya.

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<sup>21</sup> The proportion of the Kenyan population living for less than US\$ 1 PPP was estimated to be 56 % in 2003 (Republic of Kenya, 2004b: 18, 116).

<sup>22</sup> Unfortunately, due to time and resource constraints, it was not possible to include the geographical dimension to a higher extent by including interviews with members of the demos in rural areas; such members of the demos may arguably have been even more marginally positioned with regards to the review process (cf. Kariobangi Interview: 2-3; CEMIRIDE Interview: 7, 13; Westlands Interview: 4).

<sup>23</sup> Interviewees only knew that the interviews were to be used in a Master’s thesis on the constitutional review process in Kenya.

<sup>24</sup> Representatives of the Kibaki wing in the GoK, representatives of the opposition/Odinga/ODM wing, representatives of the CSOs most active in the process, officers of DPs responsible for the involvement in the support to GJLOS, as well as the Chairmen of the KLRC and KNCHR.

<sup>25</sup> Most of these key informants are thus not only representatives of groups of actors which have been central in the case, but are actually the individuals who have been actively engaged in the process directly. However, as Kenyan politicians are extremely inaccessible, in relation to interviewees from the Kibaki wing of the GoK and representatives of the opposition/Odinga/ODM wing availability was also a factor and creativity in obtaining interviews therefore a necessity. The political affiliations of these interviewees is described in the introductions to each of the transcriptions.

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The purpose of these interviews has been to develop an understanding of the key stakeholders' and observers' perceptions and experiences in the review process, regarding the variables and units of analysis that the chosen explanatory theories focus on, through the interpretation of meanings and interaction with the interviewees (Kvale, 1996: 126-127).

### **2.7.3 Semi structured interview guides**

Semi structured interview guides (with themes, suggested question wordings provided with numbers and possible probes) for the demos and key informant interviews were carefully constructed and scrutinized well ahead of the interviews. The themes, questions and probes were chosen and formulated by operationalizing the components of the chosen theories. Each interview guide was then constructed by inclusion of the necessary and relevant themes, questions and probes based upon each theory, while formulations, order of questions and probes were also fine tuned to be as appropriate as possible for each group of interviewees.

The construction of interview guides was moreover informed by guidelines from textbooks on qualitative interviews<sup>26</sup> (Kvale, 1996: 124-135; Mikkelsen, 2005: 169-180).

In the practical interview situations, the sequence of the questions in the interview guides was adjusted to allow for as natural a flow as possible in the conversations, question wordings were accommodated to the different intersubjective situations, and questions were prioritized in cases where little time was available.

Concerning the demos interviews, the interviews were recorded and notes were taken. Due to resource constraints and the way the data was to be utilized in the analysis, the demos interviews were not transcribed but rather, summaries of the interviews were constructed based in field notes and audio recordings.

The key informant interviews were recorded and transcribed by the researcher<sup>27</sup>.

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<sup>26</sup> All interview guides are included in Appendix 5.

<sup>27</sup> Transcription was performed based in interpretations guided by mental notes of the interview situations and by seeking to strike a balance between ad verbatim and a relatively formalized written style in order to arrive at, within the time constraints, transcriptions that would approach somewhat how interviewees might have formulated their statements in writing. Based in the recognition that written language is fundamentally different from spoken language, a guiding threshold in this

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Each transcription and summary includes an introduction of the interviewee(s) and they are all included in Appendix 6.

## **2.8 Validity and reliability**

### **2.8.1 Internal validity**

To build as valid, full and well-rounded a foundation for the analysis as possible, the reconstruction of the case is based in the review of and triangulation between an extreme multiplicity of newspaper and scholarly articles regarding the constitutional review process. Furthermore, regarding the case the related causal accounts are interpreted within the wider context both in the descriptive (including comparing developments of democratization to existing analyses of Kenya's democracy prior to the 2002 elections as well as to the lived experiences in this regard of both members of the demos and key informants) and explanatory analysis (cf. Appendix 1 and 6)

In the form of Dahl's institutions and standards of democracy employed in both the *de jure* and *de facto* sense, a wide conception of democracy and democratization has been used to avoid introducing bias to the analysis by focusing only on developments based in a minimal definition.

Moreover, the three explanatory theories have been chosen based in the reconstructed case, and as such in a well-rounded understanding of it, to enable an analysis encompassing the most central potential explanatory variables by using theories that focus on different types of variables and supplement each other in terms of strengths and weaknesses. Explanatory bias has thereby been minimized and a high degree of internal validity been reached.

Furthermore, care was exerted in the interview situations to remain upon to the introduction of new interpretations or explanatory factors to avoid bias caused by the theoretical framework and interviewer's initial interpretations.

In addition, in relation to building up the understanding of the case with regards to both the descriptive and explanatory parts, testing of hypotheses based in the

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connection was that interview statements should make sense also in writing; and also to readers that had not been present at the interview. Moreover, to a small extent, certain passages of little or no relevance in relation to the topics of the interview were summarized or excluded in the transcriptions, respectively. Pauses were indicated by '...' (Kvale, 1996: 168-173).

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theoretical instruments and the researcher's original understanding of the case as well as meaning interpretation and validation<sup>28</sup> through interviews with key informants and members of the demos have been invaluable in enabling a continual refining of the understanding of the case and as such in constructing a high internal validity (Kvale, 1996: 65, 98, 201).

While the key informants interviewed have to a certain extent been the most central stakeholders of the group of which they are part in relation to the case (especially the civil society organizations (CSOs<sup>29</sup>) and basket donors), their views are not necessarily completely representative of all the nuances of interpretations within the group from which they have been chosen. However, the arguments of the analysis have been based in careful, widely and continually employed triangulation by means of critically comparing information from interviews with other interviews (both within, e.g. donors, and between groups), existing analyses, and the multiplicity of secondary texts upon which the reconstruction of the case is built to ensure a high internal validity of the arguments of the analysis (Kvale, 1996: 102-104). In addition, to the extent allowed by the spatial restrictional requirements of the thesis, the evidence and arguments of the interpretations in the analysis have been formulated explicitly, thereby providing for testing of the interpretations by others<sup>30</sup>.

All in all, the internal validity of the thesis is thus assessed to be quite high. (de Vaus, 2001: 27-28, 234-236)

### **2.8.2 External validity**

The findings of the descriptive analysis as well as the variety of plausible and supplementing explanations regarding democratization in this clinical case study in

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<sup>28</sup> I.e. communicative validation in between researcher and interviewees as a means of dialogical intersubjectivity, which "...refers to agreement through a rational discourse and reciprocal critique among those identifying and interpreting a phenomenon." (Kvale, 1996: 65).

<sup>29</sup> The use of the concepts of CSO and Non-Governmental Organization (NGO) are often used interchangeably as the organizational embodiment of civil society, however, the distinction should be noted. Hence, CSOs engage in influencing the outcomes of the political system by advocating reforms of public policy, while NGOs can be founded on issues not explicitly related to public policy (Lewis, 2001: 45-47). As the CSOs of interest in this thesis are ones engaging in advocating for constitutional change, the term CSO is used.

<sup>30</sup> This is thus in accordance with the concept of 'legitimate plurality of interpretations', which is also related to the fundamental epistemological point of departure of the thesis, namely that there does not exist "...one correct interpretation..." in the social sciences (Kvale, 1996: 211).

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terms of statistical generalization are limited to the case studied. However, by means of theoretical generalizations, the external validity of thesis is improved (see Appendix 2). Moreover, in the form of analytical generalization, it is quite likely that certain of the partial explanations relating to the causes of democratization developments will hold some degree of explanatory power in relation to democratization in other cases, especially within the region of East Africa<sup>31</sup>. (de Vaus, 2001: 28, 237; Kvale, 1996: 102-103, 233, 289)

### **2.8.3 Reliability**

While the view of research at the basis of this thesis is that all analysis in social science is contingent on interpretation, a relatively high degree of reliability is ensured by explication of methodological procedures as well as analytical interpretations, whereby it should be ensured that “...a reader, adopting the same viewpoint as articulated by the researcher, can also see what the researcher saw, whether or not he agrees with it.” (Kvale, 1996: 209). Moreover, the documentation of construction of interview guides, their use and audio recordings of interviews included in the thesis provides a measure of arithmetic intersubjectivity, as other interviewers following the same procedures and interview guides may come up with closely similar interviews from their subjects. (Kvale, 1996: 65, 163, 207, 235; de Vaus, 2001: 29-30)

## **2.9 Structure of the thesis**

Each chapter of the thesis sets out by introducing the purpose of the chapter and its structure. However, an outline of the general contents of the chapters here serves to provide overview.

Chapter 3 defines the constitutional review process by reconstructing the course of the most significant events in relation to democratization in between the 2002 and 2007 elections.

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<sup>31</sup> E.g. relating to how the employment of the concept of good governance in relation to guiding international principles in development aid as well as related institutions affect the power relational dynamics between power strategies of elites and mass popular contention; or the role that ethnicity plays in relation to these dynamics.

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In Chapter 4, the relevant parts of the chosen theoretical instruments needed to answer the problem formulation in the analyses are presented selectively.

Chapter 5 constitutes the descriptive, first part of the analysis discussing how democratization has developed in the case.

Chapters 6, 7, and 8 constitute the explanatory, second part of the analysis of why the in chapter 5 analyzed developments regarding democratization have been created (or not) using Rudbeck's model, historical institutionalism and Foucault's discourse theory, respectively.

Each of the four chapters of the analysis is opened by a brief description of the variables that it focuses on, how the theory is used and how it contributes to heightening the explanatory power.

Chapter 9 concludes on the most significant developments regarding democratization analyzed in the descriptive analysis as well as the most important partial explanations developed in the explanatory analysis, thereby constituting the nuanced and comprehensive answering of the problem formulation called for qua the quality of the thesis as a clinical case study.



### **3. Case description: The constitutional review process in Kenya in between the general elections in 2002 and 2007**

This chapter describes the main events of the constitutional review process relevant in connection with democratization in Kenya after the general elections in December 2002 and until October 23 2007 as a necessary background against which supplementary and more detailed information is introduced and interpreted in the analysis. The emphasis is on the most influential events, actions and statements related to the official bodies constituted to bring forward the development of a new, more democratic constitution.

#### **3.1 Resumption of the review process in 2003**

Kenya's new President Kibaki came to power with his coalition government promising the conclusion of the constitutional review process within 100 days and in **January 2003**, the new Ministry of Justice and Constitutional Affairs (MoJCA) was established to ensure constitutional development (Mureithi, 2003: 1).

While by the end of April 2003, the creation of a new constitution had still not been realized, the National Constitutional Conference (NCC)<sup>32</sup> was re-opened on **April 30** and the process of drafting a new constitution based on the report produced by the Constitution of Kenya Review Commission (CKRC) in September 2002 was embarked upon<sup>33</sup>. During his opening speech, Kibaki commended CSOs for having contributed to bringing the process forward to that stage and pledged that the GoK would support and not interfere with the process (Kibaki, 2003: 1).

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<sup>32</sup> A deliberative process taking place over several months between MPs, district representatives, and representatives of civil society (15 % of delegates), such as religious leaders and NGOs, to inform a draft constitution based in both the negotiations and upon the work of the CKRC, the key mandate of which was to collect the views of the Kenyan people and incorporate them in the draft constitution. This process was secured in the CKRA (Kuria, 2003: 4; Kibaki, 2006: 1). Cf. Appendix 1.A.

<sup>33</sup> The NCC, dubbed the Bomas (after the name of the conference center at the outskirts of Nairobi where negotiations took place), was conducted in three phases: Bomas I lasted from April – June, 2003; Bomas II lasted from August – September, 2003; Bomas III during which the Bomas Draft Constitutional Bill was completed lasted from January – March, 2004 (Andreassen & Torstensen, 2006: 2). Cf. Appendix 1.A.

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However, already in **August**, disagreements concerning the constitutional review were emerging between Kibaki and his ally in the elections and new Minister of Roads, Public Works and Housing, the Luo leader of the Liberal Democratic Party (LDP), Raila Odinga. Prior to the elections, the two had agreed on the so-called Memorandum of Understanding, according to which a post of executive prime minister was to be created and allocated to Odinga and his party, but Kibaki now ruled out that possibility arguing that most executive powers should stay with the presidency (Mwakugu, 2003: 1).

A week later, hundreds of university students clashed with police as they demonstrated against the killing of a Luo university professor who was chairing the discussions on the reduction of the powers of the President in the new constitution (BBC News, 2003a: 1; Harding, 2003: 1-2).

In **November 2003**, the GJLOS formulation phase was launched by the GoK and the first meeting between the new GoK and DPs was held, at which the GoK ensured that it was committed to finalize the constitutional review process by June 2004 (Government of the Republic of Kenya & The World Bank, 2003: 1, 3; BBC News, 2003b: 1).

### ***3.2 The Bomas draft and conflict over dividing executive power***

In **March 2004**, a document was presented at the NCC, which proposed to allocate the bulk of executive power with a prime minister in the new constitution, which resulted in the GoK officially withdrawing from the Bomas negotiations. However, the majority of the 629 delegates participating in the talks, including three ministers of Kibaki's cabinet, proceeded to approve the Bomas draft, which would significantly limit the executive powers of the presidency by proposing the creation of the post of an executive prime minister after the 2007 general elections<sup>34</sup>.

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<sup>34</sup> The draft constitution entailed, most significantly in relation to democratization, that (I) the elected president would appoint a prime minister, (II) the prime minister would appoint the cabinet, (III) the prime minister would lead the government and chair cabinet, while (IV) the president would remain head of the armed forces. (Phombeah, 2004: 1-2; BBC News, 2004a: 1)

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Towards the end of March, the final draft constitution was handed over to AG Amos Wako. (Phombeah, 2004: 1-2; BBC News, 2004a: 1)

However, in the last week of **June 2004**, Kibaki announced that the deadline of enacting a new constitution in that month would be missed due to political divisions along ethnic lines concerning key issues, but that he remained committed to the creation of a new constitution.

Another significant event of June 2004 was that the Parliamentary Select Committee (PSC) on Review of the Constitution of Kenya was reconstituted with parliamentary members from both sides of the dispute to iron out the differences on the contentious issues. (Torstensen et al., 2006: 4)

In the first week of **July 2004**, Kibaki incorporated members of the opposition from Kenya National African Union (KANU) into government. The failure to meet the deadline of June also spawned responses in the form of public rallies and demonstrations through July organized by Odinga's LDP demanding swifter constitutional change. In Kisumu police responded by firing live bullets at demonstrators (BBC News, 2004c: 1; BBC News, 2004d: 1).

In **November 2004**, the reconstituted PSC produced the so-called Naivasha draft as a compromise on some of the contentious issues, which compared to the NCC draft vested more powers in the presidency, while weakening the prime minister, parliament and other institutions (Torstensen et al, 2006: 4; Sihanya, 2005: 1-2).

The month of **December 2004**, witnessed the tabling in parliament of the Naivasha report as well as the passing in Parliament of a bill to allow changes to the NCC draft by only a simple majority in parliament. This led KANU leader Uhuru Kenyatta to accuse Kibaki of failing his promise of giving Kenyans a people-driven constitution and Members of Parliament (MPs) from KANU and LDP to stage a walk-out of Parliament. (BBC News, 2004e:1).

### **3.3 Disagreements on support to GJLOS and changes to Bomas draft**

While international DPs committed more than 2.5 billion kshs to the GJLOS RP in **January 2005**, the GoK was also faced with serious allegations that corruption had cost Kenya 1 billion \$ (almost 20 % of the state budget) during the rule of Kibaki's government. Kibaki responded to the crisis by means of a cabinet reshuffle to which he received criticism from donors and CSOs (International Commission of Jurists, 2005: 2; Aluanga, 2005: 2-3).

When Parliament was reopened in **March 2005**, Kibaki once again promised to introduce a new constitution, while demonstrators outside parliament expressed their fear that parliament would amend the Bomas draft to leave the president's powers largely untouched. The police responded by arresting nine people and using water canons and tear gas against the protesters (BBC News, 2005a:1).

In **April 2005**, DPs issued a joint statement saying that they remained committed to support the GoK in the GJLOS RP, provided that the GoK demonstrated real and continuing commitment to serious reform. The DPs also encouraged the GOK to continue with its work on participatory constitutional development (Everatt & Kanyinga, 2005: 105; the World Bank, 2005: 1, 5).

In **May 2005**, the PSC was again reconstituted in spite of the fact that a PSC already existed and excluding the LDP faction of NARC and the new PSC proceeded to hold new negotiations in Kilifi in **June 2005**. The resulting Kilifi report sought to maintain the executive powers of the president as Head of Government, while creating the new post of prime minister as practically powerless. (Torstensen et al., 2006: 4; Matheson, 2005: 2; BBC News, 2005d: 1)

When the PSC Kilifi report's changes to the Bomas draft were presented in Parliament in **July 2005**, it sparked fierce contestation from the opposition MPs and the LDP faction of NARC, as well as several days of demonstrations and riots in

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Nairobi as deliberations were going on in Parliament. CSOs and opposition parties joined under the Yellow Movement Multi-Sectoral Forum and organized mass popular action to oppose changes to the Bomas draft by MPs (Matheson, 2005: 2; BBC News, 2005b:1-2; BBC News, 2005c: 1; FIDH, 2005: 1-3).

However, on the 22<sup>nd</sup> of July, BBC News reported that, late at night and under turbulent circumstances, the proposed changes had been adopted by a majority of 102 votes against 61; a vote that seriously threatened to split the NARC, with four cabinet ministers voting against. (BBC News, 2005d: 1).

### **3.4 The Proposed New Constitution and national referendum**

In **August 2005**, the AG Amos Wako produced the Proposed New Constitution of Kenya (the Wako Bill), to be the subject of a referendum, based on the Bomas draft, but heavily influenced by especially the Kilifi report and thus left the presidential executive powers largely untouched<sup>35</sup> (Andreassen & Torstensen, 2006: 3).

The months leading up to the referendum in November 2005 saw Kibaki and his supporters in the GoK leading the ‘yes’ campaign, while Odinga and five other LDP ministers led the ‘no’ campaign; the latter later became the party the Orange Democratic Movement (ODM).

Although the contents of the draft were discussed during these months, three million free copies of the 197 page draft were published and a public awareness campaign was taken out, the run-up was also characterized by invectives on behalf of the political leaders on each side of the divide, violence in clashes between rival camps and the police resulting in the death of eight and injuring of several people (BBC News, 2005e: 1; IRIN, 2005: 1-3; People’s Daily Online, 2005: 1-3).

Despite minor clashes and reports of some rigging and bribing, referendum officials reported that the vote on the proposed constitution on **November 21<sup>st</sup> 2005** proceeded

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<sup>35</sup> The Wako Bill entailed (I) an executive president and a non-executive prime minister, (II) two-level devolution, national and provincial (as opposed to four level in the Bomas draft), and (III) a one-chamber parliament (as opposed to two chambers in the Bomas draft). Moreover, while the new draft limited presidential powers by removing the authority to prorogue and dissolve parliament and parliament was to control its own calendar, the prime minister was to be appointed and dismissed by the president (BBC News, 2005e: 1-2; Integrated Regional Information Networks (IRIN), 2005: 2; Mulama, 2005: 1-2).

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relatively smoothly. UNDP Kenya termed the referendum as ‘free and fair’ and stated that “[I]n an impressively peaceful display of responsible citizenry, Kenyans unanimously voted...” against (57 %) the Wako Bill (UNDP, 2005: 1).

Following the referendum, in **December 2005**, Kibaki recomposed his cabinet to remove the LDP members, thereby marking the dissolving of NARC (Wainaina, 2006: 1; UNDP, 2005: 1; Ngowi, 2005: 1-2).

### **3.5 Fits and starts: disagreements on reforms ahead of 2007 elections**

The first months of **2006** saw the appointment by Moi of a 15-member Committee of Eminent Persons (CEP) with the *raison d’être* of collecting the views of Kenyans on the strengths and weaknesses of the constitutional process thus far and provide a report of recommendations on the way forward to conclude the process (People’s Daily Online, 2006: 1; Kibaki, 2006: 1-3; Sihanya, 2005: 8).

In **May - June 2006**, the CEP reported that a majority of people wanted the Bomas draft to be enacted and an inclusive process was recommended as the way forward. The GoK stated that it recognized that Kenyans still wanted a new constitution and that it was committed to facilitating the review process along the lines recommended by the CEP. (Sihanya, 2005: 8; Otieno, 2006: 2; Mulama, 2007: 2)

On **August 21<sup>st</sup>**, the first meeting on the way forward in the constitutional review process between the Government and opposition since the referendum took place. It was agreed that a 15-member Inter-Parties Consultative Committee<sup>36</sup> (IPCC) was to examine the feasibility of introducing comprehensive reforms ahead of the 2007 elections. If deemed infeasible, it should propose so-called minimum constitutional reforms to be affected before the elections<sup>37</sup> (Nation Team, 2006: 2).

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<sup>36</sup> Consisting of a member from each party and one from the NGO The Centre for Multiparty Democracy (Nation Team, 2006: 1-2).

<sup>37</sup> The task of the team was thus similar to that carried out by the Parliamentary Committee on Administration of Justice and Legal Affairs (PCAJLA) chaired by Paul Muite (Nation Team, 2006: 3; Onyango & Mutai, 2006: 1).

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This reflected a fundamental disagreement in that the Kibaki wing only wished to discuss the CEP report and prospects for a comprehensive review, while ODM and KANU equally uncompromisingly called for ‘minimum reforms’<sup>38</sup> (Nation Team, 2006: 1-2; Omari & Mugonyi, 2006: 1-2).

In **September 2006**, the IPCC agreed on a two-pronged approach towards the enactment of a new constitution through a Multi-Sectoral Forum (MSF with a steering committee, the MSC) and a subsequent referendum before the general elections in 2007 or by establishing a new constitution via a constituent assembly in mid-2008. The committee also agreed to expand its members to 32 to accommodate religious leaders, CSOs and the private sector. However, in parallel, Muite as the head of the PCAJLA and other opposition members argued that minimum reforms were the sole viable option ahead of the elections.

When the report of the IPCC (“The November Package”) was published in **November 2006**, it bore striking resemblances to the one of the Parliamentary Committee of Administration of Justice and Legal Affairs (PCAJLA)<sup>39</sup>. And it was rejected by the GoK, causing the opposition members of the MSC to leave the meeting (Onyango & Mutai, 2006: 1-5; Standard Reporters, 2006: 1-3). The deep gulf between Kibaki’s government and the opposition thus remained clear, as the latter now demanded minimum reforms before the elections.

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<sup>38</sup> Including “...a reduction in the powers of the President; the right of Parliament to set its own timetable; affirmative action for women, young people and other disadvantaged minorities; the electoral commission to be strengthened to shield it from manipulation; voters abroad to have dual citizenship, and the right to vote; banning the use of public resources in election campaigns; and state funding for all political parties.” (Omari & Mugonyi, 2006: 1-2).

<sup>39</sup> ‘The November Package’ sought to entrench the review process into the constitution; secure the independence of the ECK and the parliamentary calendar; introduce the possibility of independent candidates for Parliament; expand the number of seats in Parliament from 222 to 316, allocating 90 seats for women<sup>39</sup> and 20 for youth, disabled people, trade unions, ethnic minorities and pastoralists; provide a legal basis for a referendum along with a law to secure the completion of the review process; as well as other constitutional and legal changes that aimed to ensure a free and fair election. (Onyango & Mutai, 2006: 1-5; Standard Reporters, 2006: 1-3)

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Before the end of the year, Kibaki prorogued cabinet, thereby changing its composition for the sixth time during his rule. (Nation Team, 2006: 1; Asimwe, 2006: 1-5; Gachuri, 2007: 2)

### **3.6 Debate on minimum reforms**

In late **January 2007**, Kibaki announced that the GoK had approved the Constitution of Kenya Amendment Bill and the Constitution of Kenya Review Bill to be presented to parliament to secure a constitutional basis for the road map of the review process, as well as the organs of the process (Kibaki, 2007a: 3).

In **February 2007**, CSOs, political parties (including Odinga and the ODM) and the PCAJLA created the Union for a New Constitution (UNC) advocating minimum reforms, to which the GoK responded by reiterating its opposition to such reforms<sup>40</sup> (Mulema, 2007: 1-2).

In late **March 2007** the GoK presented before Parliament the two bills that it had approved in January.

In parallel, the PCAJLA tabled an 11 point report on minimum reforms, which was based on issues addressed in the Bomas and the final draft of a new constitution<sup>41</sup>.

Already the next day, steps were taken by MPs towards unlocking the constitutional review deadlock by setting up an Inter-Party Parliamentary Group (IPPG) with 12 Government (now called the Government of National Unity (GNU)) and 10 opposition members to negotiate minimum reforms ahead of elections<sup>42</sup>. This was

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<sup>40</sup> Including among other amendments that members of the ECK be elected by political parties and approved by Parliament and reduced presidential influence over the judiciary (Mulama, 2007: 1).

<sup>41</sup> The proposals had first been tabled in parliament towards the end of 2006 by Muite but had lapsed due to the proroguing of the house and had amongst its most important points: (I) in order to obtain the presidency a candidate must, in addition to the 25 % in each of five provinces, obtain more than 50 % of the total vote or face a run-off with the runner up for obtaining the presidency; (II) fixed the number of cabinet ministers; (III) hindered poaching of opposition MPs; (IV) tripled the number of MPs to be nominated to 36 (with 24 to be women); (V) provided for a reconstitution of the ECK with no more than 9 members whom must be scrutinized by Parliament; (VI) aimed to ensure the independence of Parliament to control its calendar; (VII) sought to autonomy of the judiciary; (VIII) enabled vetting of all public appointments by Parliament; and (IX) provided for dual citizenship. (Orlale & Mugonyi, 2007: 2; Gachuri, 2007: 1) (Gachiri, 2007: 2).

<sup>42</sup> In June 2007, the IPPG is however, reportedly constituted by 14 government members, 13 opposition MPs, 6 representatives of civil society, and 3 ex officio members (Omari, 2007: 3).



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after a GNU meeting where a majority of its members voted pro minimum reforms (Orlale & Mugonyi, 2007: 3).

In **April 2007**, ODM and other MPs of the UNC (which supported the PCAJLA report of March), demanded equal representation to the GNU and stated that “[T]he position that we will not take our seats on the table if civil society is not included still stands.” (Harbitz, 2007: 1). (Kirwa, 2007: 1; Harbitz, 2007: 1; Clottey, 2007: 1-2).

By mid **May 2007**, the IPPG had agreed on minimum reforms regarding eight issues to be brought before Parliament in the end of June<sup>43</sup>. However, important issues were still to be resolved and CSOs still boycotted the talks since they had only been permitted to send 12 members to the negotiations (MoJCA, 2007: 56; Gakii, 2007: 1; Onyango & Maina, 2007: 1-3; Otieno & Mugonyi, 2007: 1-3).

Towards the end of May, MPs from both the GNU and the opposition rejected an attempt by the GoK to initiate debate in Parliament on the Constitution of Kenya Review Bill (Bill No. 1) because it was seen as conflicting with the mandate of the IPPG (East African Standard, 2007a: 1). A few days later, the IPPG also adopted the Parliamentary Calendar Bill aiming to make Parliament independent of the executive by removing the presidential powers to dissolve and prorogue Parliament; the bill then had to be published by the AG while the IPPG continued to work on the remaining issues (Teyie, 2007a: 1).

However, ultimo May and in the beginning of **June 2007**, the IPPG encountered new problems as first members of government and later ODM prevented meetings from taking place as they failed to show and towards the end of June, the IPPG draft met

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<sup>43</sup> The issues agreed upon were: (I) Merging of the Constitution of Kenya Amendment Bill 2007 with the so-called Keter Bill, implying that the review process will become entrenched in the constitution, as well as that Parliament will be given independence in the form of controlling its own calendar, to independently determine when it convenes and prorogues, as well as a fixed date for general elections; (II) Curtailment of the President's authority to appoint individuals to top public positions by requiring Parliament to vet all top appointments (such as constitutional office holders as well as other key public offices); (III) independence of the Judiciary; (IV) independence of the ECK; (V) Political Parties Bill outlining rules regarding the management and financing of political parties (the drafting of which was achieved with the support of GJLOS thematic group on constitutional development); (VI) quick disposal of election petitions; and (VII) dual citizenship (Onyango & Maina, 2007: 1-3; Otieno & Mugonyi, 2007: 1-3).

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opposition from both the GNU and ODM (Kikechi, 2007: 1; Njagih & Oguto, 2007: 1-2). In the last week of June, the IPPG draft received another blow by AG Wako as he stated that four proposals in the draft were in contravention of the constitution and therefore directed that a sub-committee of the IPPG was to fine-tune the draft.

However, these meetings never took place as they were cancelled by the Vice President (VP) (Ochola, 2007: 1; Limo, 2007: 1-2; Ohito, 2007: 1).

In the following weeks, and detached from the minimum reforms agenda, the number of constituencies and the methods for creating new ones became the center of debate and much dispute, polarizing parliament and threatening to tear apart the GNU (Amran, 2007: 1).

On July 27, Kibaki had authorized the publication of a bill entailing the creation of 40 new parliamentary constituencies and another 50 nominated seats reserved for women together with a bill to increase the wages of MPs (The Nation, 2007a: 1; Amran, 2007: 1-3; Muiruri & Ocholla: 2007: 1). Opposition leaders criticized the Government's move by stating that the two former issues should be part of the minimum reforms and that the GoK was violating the independency and mandate of the ECK by deciding on the number of new seats to be created (Saturday Standard Team, 2007: 1; (Kalekye, 2007: 1).

On **August 15 2007**, the GoK bill published in July was tabled and shot down in Parliament, as MPs walked out of Parliament and caused a quorum hitch in protest against the Government's failure to embrace minimum reforms (Ohito & Opiyo, 2007: 1-2; Kithi, 2007: 1; Mango & Mututa, 2007: 3).

On August 20, headed by the PCAJLA, MPs began collecting signatures from fellow MPs with the goal of obtaining 160 (thereby exceeding the minimum requirement of the support of 145 MPs needed for constitutional amendments) to petition Kibaki to make AG Wako produce before Parliament a bill to allow for minimum reforms ahead of elections (The Constitution of Kenya Amendment Bill 2006)<sup>44</sup>.

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<sup>44</sup> The draft amendment was based on negotiations between the PCAJLA and political parties and included among its key proposals the 50 % plus one criterion for election of presidents, the reduction of the powers of the executive to control the calendar of Parliament and to appoint holders of constitutional offices, that the President

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On **September 5**, MPs tabled the list of 168 signatures of MPs (among them the opposition leaders Odinga, Kalonzo, and Kenyatta as well as 29 assistant ministers) petitioning Kibaki to enact minimum reforms before the elections.

When opposition MPs asked questions in Parliament on August 29 and September 5 regarding progress on the IPPG minimum reform bills, the AG and Minister of Justice and Constitutional Affairs Karua dismissed the responsibility of introducing the bills to the other (East African Standard, 2007b: 1; East African Standard, 2007c: 1-2; Agina, 2007a: 1).

However on **October 23**, Kibaki dissolved Parliament and thereby marked the end for the possibilities of democratizing constitutional reforms in Kenya's first period after its transition to democracy in December 2002, as constitutional reforms were not among the 11 bills (among others a Political Parties Act) that he announced that he had signed into law (Murigi, 2007: 1; Beja & Kithi, 2007: 1-2; Kibaki, 2007b: 1-2).

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appoints no more than 25 and no less than 15 ministers, equity in the sharing of national resources, dual citizenship, the creation of a professional, lean and independent ECK, a free and independent Judiciary, as well as affirmative action in the form of 36 nominated MPs (as opposed to the current 12) with 24 reserved for women (Standard Reporter, 2007: 1-3).

## **4. Democracy and democratization in a theoretical perspective**

This chapter presents the theoretical instruments of the project, opening with a description of Dahl's theoretical framework consisting of the crucial institutions and ideal standards of democracy.

Second, the necessary components of the first theoretical tool to be used in the explanatory analysis, Rudbeck's explanatory model of democratization is presented. As Rudbeck's model is one of recent origin and (as of yet) little known among scholars of social science drawing upon elements of other main theoretical approaches to explaining democratization, these inspirations are made explicit to heighten the reader's understanding of the model within the main theoretical approaches to democratization.

The second theoretical tool to be used in the explanatory part of the analysis, historical new institutionalism, is then presented in a selective manner before the components of Foucault's discourse theory to be used in the analysis are described.

### **4.1 A framework for discussing developments of democratization**

At the most basic level, according to Dahl, democracy is based on the fundamental principle of political equality of all individuals that are part of the political entity to be governed. Since each individual is perceived to have individual interests different from the ones of others, in principle no one is better capable of pursuing the interests of a particular individual than the individual itself. Consequently, everyone can be seen as being equally qualified and all members should therefore be entitled to participate in making the decisions of the entity regarding its policies. Hence, the entity should be ruled by the people, which are the subjects of its binding decisions (i.e. democratically)<sup>45</sup>. (Dahl, 2000: 35-37; Dahl, 1989: 106-108; Hede, 2006: 183-184)

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<sup>45</sup> For a more detailed account of the assumptions upon which democracy is based, according to Dahl, please refer to e.g. Dahl, 1989: 106-108 or Hede, 2006: 183-184.

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In order to completely live up to this requirement equal participation in making decisions and formulating policies, at least five ideal standards would have to be lived up to. While it is not practically feasible for real world forms of government to do this, the closer each standard is to be realized in practice, the more democratic the system of government can be said to be. The ideal standards thus constitute useful tools in discussing how real world arrangements may be more or less democratic in the sense that “[t]hey represent ideas of human possibilities against which actualities may be compared.” (Dahl, 1989: 109). (Dahl, 1989: 108-109, 112)

The first standard is that of **effective participation**, meaning that prior to the adoption of a policy, all members must have equal and effective opportunities for voicing their preferences concerning what the policy should be to the other members<sup>46</sup>.

All individuals in the entity should thus have equal and adequate opportunities for placing questions or arguments for or against certain policies on the agenda. If this is not satisfied equally or adequately for all members, their interests can not be taken into account since they are either unknown or incorrectly perceived. If the preferences of the individuals as to the final outcome are not taken equally into account, then this is a rejection of the principle of equal consideration of interests deriving from the assumption of equal competences of individuals as to manage their own interests.

The second standard is **voting equality**, which means that when the moment of deciding what the policy should be, all members must have equal voting opportunities, all votes must count as equal, and at the decisive stage these choices (and no other factors) have to be taken into account. This is necessary in order to provide every citizen with the required personal autonomy to pursue what he/she

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<sup>46</sup> It should be noted here that the way Dahl uses the term ‘equal opportunities’ in his theory refers not just to formal equal opportunities, but to real or actual equal opportunity, meaning, for example, that if two individuals have very different resources available and the one therefore is able to participate more in political processes and also influence them more, then the two do not have ‘equal opportunities’ (Dahl, 1989: 114-115). Hence, this entails that Dahl’s theory in this way actually embraces the point (and critique of liberal democracy) made by e.g. Abrahamsen that not just rights providing for formal political equality, but also ones providing for social and economic equality would be needed to approach the democratic ideals in practice (Abrahamsen, 2000: 68, 76; Hede, 2006: 188). In this way, it also seems to be in accordance with Dahl’s idea of democracy to analyze real world democracies in terms of both *de jure* and *de facto* aspects.

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perceives to be his/her interests and to protect the intrinsic equality of each individual as well as the connected principle of equal consideration of interests.

***Enlightened understanding*** is the third standard. This entails that, while under influence of some constraints on time due to the need for a decision, each citizen should have what Dahl terms as equal and adequate opportunities to learn about the available policy alternatives and possible connected consequences for his/her own interests, as well as for other relevant persons. This is necessary for each member to be able to make informed decisions on what it perceives to be its interest and, consequently, to enable it to pursue its interests. As a result of this standard, conditions that limit or inhibit access to relevant information for some or all members of the entity or hinder debate on decisions to be taken although time is available, can be termed as undemocratic.

The fourth standard is that of ***control of the agenda*** in the sense that members need to have exclusive opportunity to decide how and, if they desire to, which issues and subjects are placed on the agenda. As a consequence, the democratic process enabled by the first three ideal standards is never closed, meaning that issues can always be reintroduced on the agenda and policies can always be changed, if the members decide to do so. This criterion is needed in order to avoid that a democracy is limited to a certain agenda defined externally to the democratic process as this is defined by the three preceding standards. As long as any matter can be retrieved by the people, the demos can thus delegate decision making power on some specified matters (e.g. in a hierarchic fashion to courts and administrative organs) and still live up to this democratic criterion.

The fifth standard, ***Inclusion of adults***, deals with the question of who the demos is, i.e. who qualifies to participate in 'government by the people' as implied by the first four criteria. As the absolute point of departure, all adults should be recognized as citizens and thereby as participants of the democratic process. Exclusion hereof can only be accepted as a result of incapability due to e.g. mental illness or because the person is not affected by the decisions taken in that he/she is not a permanent resident.

(Dahl, 1989: 109-115; Dahl, 2000: 37-40; Dahl, 2007: 185)

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In connection with empirical types of government aiming at fulfilling the five ideals of democracy in practice to the highest degree possible, Dahl argues that the fundamental property is that the political authorities are responsive to the preferences of the citizens. At a more concrete level, he outlines seven institutions that are seen as fundamental necessities for empirical political systems if they are to be characterized as ‘polyarchies’, meaning real world political systems that appropriate the five democratic ideal standards.

These institutions are:

1. Elected officials. Control over government decisions about policy is constitutionally vested in elected officials.
2. Free and fair elections. Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon.
3. Inclusive suffrage. Practically all adults have the right to vote in the election of officials.
4. Right to run for office. Practically all adults have the right to run for elective offices in government, though age limits may be higher for holding office than for the suffrage.
5. Freedom of expression. Citizens have the right to express themselves without the danger of severe punishment on political matters broadly defined, including criticism of officials, the government, the regime, the socioeconomic order and the prevailing ideology.
6. Alternative information. Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
7. Associational autonomy. To achieve their various rights, including those listed above, citizens also have a right to form relatively independent associations or organizations, including independent political parties and interest groups. (Copied from Dahl, 1989: 221)

While these institutions are necessary factors in the democratic process, they are not sufficient for the realization of the ideal of the democratic process. Table 4.1 shows the relationship between each of the ideal standards and the corresponding institutions that are necessary in the pursuit of the ideals in practice.

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Table 4.1 Polyarchy and the democratic process

The following institutions	-are necessary to fulfill the following standards:
1. Elected officials 3. Inclusive suffrage 4. Right to run for office 5. Freedom of expression 6. Alternative information 7. Associational autonomy	I) Effective participation
1. Elected officials 2. Free and fair elections	II) Voting equality
5. Freedom of expression 6. Alternative information 7. Associational autonomy	III) Enlightened understanding
1. Elected officials 2. Free and fair elections 3. Inclusive suffrage 4. Right to run for office 5. Freedom of expression 6. Alternative information 7. Associational autonomy	IV) Control of the agenda
3. Inclusive suffrage 4. Right to run for office 5. Freedom of expression 6. Alternative information 7. Associational autonomy	V) Inclusion of adults

(Dahl, 1989: 221-222)

So-called substantial conceptions of democracy have emphasized what can be termed as the *de facto* aspects of Dahl's institutions inherent in the ideal standards in that for real world political systems to approach the democratic ideal, it is not sufficient to embrace formal rules, laws and institutions that make democracy possible (i.e. *de jure* aspects of democracy). Rather, the democratic ideal standards must be pursued in the actual workings of the political system (and also in between elections). Discussing the extent to which and how democratic institutions and standards of democracy are adhered to (or not) in practice and characterize the way the form of government operates are thus important elements in analyzing the quality of democracy in empirical cases. Arguably, this means that the existence of a political democratic culture in which democratic standards and institutions are internalized into norms and values by means of being cherished and adhered to in behaviorally and attitudinally is a crucial element needed if actual political systems are to approach the ideal standards of democracy (Hede, 2006: 188-189; Hood, 2004: 21-25; Carew, 2006: 48).



## **4.2 Rudbeck's model: Elite negotiations and mass contention**

### **4.2.1 Strategic interaction among elites and masses**

Rudbeck's model can be interpreted as being somewhat based on a transitologist view of elite actors, incumbents and their supporters as rational agents pursuing their own individual interests to the widest extent possible. That is, at the most fundamental level to maintain or improve their own power position through employing a range of strategies by means of cost-benefit analysis. As such, when met with challenges to their position, such as pro-democratic claims or actions by other actors, power holders will weigh their options by calculating the costs of resisting the claims *vis-à-vis* the costs of giving in to democratic reforms. Based on a hypothesis proposed by Dahl, Rudbeck thus argues in relation to authoritarian regimes that *"...the likelihood that a government will tolerate an opposition increases when the costs of suppression exceed the costs of toleration, or when suppression fails to lower the costs that popular contention imposes upon the government."* (Rudbeck, 2005: 8). It can be derived from this that power holders will therefore only agree to democratic reforms if they are faced with a situation where not making democratic concessions poses a greater risk for their interests of staying in power than allowing for democratizing reforms does, or when incumbents are not able to employ a strategy that can decrease the costs that the pro-democracy claims impose on the government. Only when challengers to the government are capable of acting in ways that strike against the core power strategies that the government relies upon for staying in power and governing, is it likely that the government will give in to the pressure for democratic reforms. Furthermore, it is probable that the government will only make concessions to the extent that it needs to do so in order to establish a new foundation for governing based on a new combination of power strategies.

The strategic interaction between elites, incumbents and masses may thus take a 'cyclical' character of mutual accommodation and anticipation. The combinations of such strategies used by rulers contain the very means and limitations of rulers to stay

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in power<sup>47</sup> (Rudbeck, 2005: 7-8; Rudbeck & Sigurdsson, 1999: 1-2, 20-21; Codato, 2006: 60-61; Hadenius, 2002: 68-69; Potter et al., 1997: 15-16)

### 4.2.2 Power strategies

Based on the writings of other authors, Rudbeck categorizes the many different power strategies under three broad ideal types, namely those of *violence*, *elite alliances*, and *legitimacy*<sup>48</sup>, which incumbents combine to different extents and often employ towards different groups in the population. Since the political power struggles take place in relative terms according to Rudbeck, power strategies can be based, on the one hand, on institutions and networks of control that increase rulers' capacity to coerce, accumulate capital and resources for distribution among allies, and develop legitimacy. On the other hand, they can also rely on decreasing political opponents' opportunities in these three respects. Hence, the central issue for incumbents is to have superior capacity regarding the power strategies that they rely upon in relation to their challengers.

The ideal type strategy of *violence* is related to the exercise of physical force by the government, thereby seeking to secure the compliance of the ruled based on their fear of the physical repercussions that can result from non-compliance. By means such as executions, torture, forced expulsions, imprisonments without trials, destroying of property, resistance is thus repressed in that not just potential and existing challengers are eliminated or discouraged from countering the regime, but also ordinary people avoid being critical of the rulers in order not to fall victims of the strategy of violence. Typically, such violence is carried out by the armed forces, the secret police, mercenaries, paramilitary units or more or less controllable militias. (Rudbeck, 2005: 9, 11; Rudbeck & Sigurdsson, 1999: 22)

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<sup>47</sup> However, as Rudbeck has noted, "*Rulers' reliance on a broad set of institutions and networks of control, governance, and resource production makes it difficult, if not impossible, to identify the key institutions and networks involved in the predominant strategy at a certain point in time.*" (Rudbeck, 2005: 11)

<sup>48</sup> It can be noted here that it seems plausible that in cases in which the transition to democracy has taken place and democratization is ongoing, the combination of power strategies used by the government will arguably cluster more and more around the ideal types of elite alliances and legitimacy. In this connection, Rudbeck argues that e.g. the establishment of "...*regulated procedures for selecting political leadership could therefore be seen as a net move towards a strategy of legitimacy.*" (Rudbeck, 2005: 11).

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The second power strategy of *elite alliances*<sup>49</sup> refers to the exchange of resources in return for support or loyalty between incumbents and elites or among different groups of elites; a measure of reciprocity in relations among actors is thus necessary for them to qualify as alliances. This strategy thus encompasses neopatrimonialism and patron-client relationships in which different types of patronage are distributed to supporters in forms such as access to state jobs, contracts, favorable loans, possibilities of illegal gains, tax exemptions, access to government real estate and vehicles, subsidizing of university education, and import-export or business licenses. Furthermore, resources can also be distributed by different elite groups through clientele networks to clients further down the chain of hierarchy. Clientele networks in relation to elite alliances are often very difficult to identify and demarcate, as they extensively include ties and transfers of resources among many different actors across society. Commonly organized along ethnic lines, members of such alliances often include e.g. the civil service, politicians on local and national levels (even members of the opposition are sometimes ingratiated through patronage), large businesses of the private sector, and owners of big plantations and farms.

In addition, elite alliances empowering and constraining a ruler typically also involve foreign governments, international financial institutions (IFIs)<sup>50</sup>. In connection with alliances with foreign governments, resource transfers can include aid, investments, weapons, or technology in exchange of investments in national technology, private business contracts, political and military alliances. Alliances with IFIs may involve loans and grants in exchange for the implementation of certain development programs<sup>51</sup>. (Sørensen, 1998: 50; Hyden, 2006: 79; Rudbeck, 2005: 9-10; Rudbeck & Sigurdsson, 1999: 21-22; Codato, 2006: 65)

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<sup>49</sup> In the present project elites, in congruence with Rudbeck's use of the term, is taken to mean, in the words of Higley and Burton, "...top position-holders in the largest or most resource- rich political, governmental, economic, military, professional, communications, and cultural organizations and movements in society." Hence, it can be noted that particularly resourceful and/or influential CSOs might perhaps even form part of elite alliances in some cases.

<sup>50</sup> Elite alliances can also involve transnational companies, often based in granting of access to natural resources in return for bribes and/or commissions to political elites (Rudbeck, 2005: 21-22).

<sup>51</sup> To a certain extent, the same can arguably be said to be the case when bilateral donor agencies employ conditionalities for giving aid to a country, for example in relation to minimum requirements

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The third and last power strategy is that of *legitimacy*, which entails the empowerment of the ruler by the ruled. Consequently, for rulers to be able to draw on legitimacy as a power strategy, they must succeed in bonding with the ruled by means of promoting a perception among the ruled of the regime being the preferable form of political leadership. This can be pursued via references to tradition, religion and/or ideology, or through establishing a measure of admiration for the incumbent in the population based on charisma<sup>52</sup> or cult. Crucial for a head of government to be able to rely on legitimacy as a strategy, is the utilization of language, symbols, rituals, and different procedures to convince the population that the governing leaders are the most capable and that they are exercising power based in rules that are generally recognized and accepted.

One can distinguish between legitimacy and elite alliances (which could be interpreted to rely on legitimacy) as strategies of power in that the former includes a measure of idealism or ideology with regards to government. Also, concerning legitimacy, compliance on behalf of the ruled is not based in cost-benefit considerations, but on the idea that the relationship between the rulers and the ruled is enforced in correspondence with normative ideals. (Rudbeck, 2005: 10-11; Hyden, 2006: 81-82)

#### **4.2.3 Changing interests, strategies and behavior**

In agreement with a large part of the literature on democratization, according to Rudbeck's model, it is of central importance in explaining democratization to be able to account for how the interests and actions of elites may change during democratization. The general power strategies that an incumbent relies upon for governing and staying in power are dependent on certain institutions and networks and changes in this foundation can thus arguably cause rulers to opt for smaller or larger adjustments in strategies or in the balance between the utilized strategies.

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regarding good governance, democracy and human rights (Degnbol-Martinussen & Engberg-Pedersen, 2003: 30-32).

<sup>52</sup> In the words of Weber, charisma can be defined as "...devotion to sanctity, heroism, or exemplary character of an individual person, and the normative patterns or order revealed or ordained by him." (Hyden, 2006: 81)

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Hence, the interests and actions of rulers can be affected by the actions of other (notably mass) actors (chosen from repertoires of contention<sup>53</sup>) to the extent that these actions are able to strike against the institutions and networks that the more specific power strategies of the incumbent are based on, thereby raising the costs of continuing to rely on those strategies. Some forms of popular contention<sup>54</sup> are therefore more likely to be effective than others in relation to a certain specific type of power strategy; if, e.g., foreign aid is an important source of revenue for the state, large-scale public demonstrations are probably more effective than if the regime relied more on accumulating resources via marketing boards. Furthermore, while power strategies of two different regimes may seem similar on an overall level in that they both rely primarily on elite alliances, for instance, different repertoires of contention may be needed to cause political change because the power strategies are based on different networks or institutions.

Drawing on insights from the civil society and industrial capitalist approaches as well as authors seeking to bridge the divide between top-down and bottom-up theories, instead of focusing on either elite negotiations or mass mobilization, the model thus emphasizes dynamics; how strategic interaction in the struggle for power as part of the very process of democratization shapes interests and actions, which in turn affect the further course of democratization. (Rudbeck, 2005: 13-14, 37; Hadenius, 2002: 84; Potter et al. 1997: 18, 23; Markoff, 1996: 15, 20, 34-35; Tilly, 2006: 21-23; Nasong'o, 2005: 73)

### 4.2.4 Mass actions of contention

Concerning how groups of citizens come together to act on collective interests in such mass actions of contention, three core factors are outlined which affect the bottom-up drive for democracy. First, there is what can be termed as the *political opportunity structure* of a polity, referring to “...consistent –but not necessarily formal or permanent – dimensions of the political environment that provide incentives for

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<sup>53</sup> Citing Tilly, Rudbeck defines a repertoire of contention as “...the whole set of means (a group) has for making claims of different kind on different individuals or groups.” (Rudbeck, 2005: 2).

<sup>54</sup> Popular contention can be defined as the making of public, political and collective claims by some actors outside the ruling elites to political authorities (Tilly, 2006: 8; Rudbeck, 2005: 3).

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*people to undertake collective action by affecting their expectations of success or failure.*” (Rudbeck & Sigurdsson, 1999: 9). In other words, the likelihood of popular contention rises if a government seems weakened as a result of for example elite splits (which may also open up for possibilities of cooperating with political parties) or falling economic growth, or due to changes in the international political environment (such as e.g. the general change in attitudes following the end of the cold war in favor of good governance). Furthermore, if efforts by the incumbents to contain protests fail, this may encourage mass actors to engage in further protests. Popular contention thus often occurs in a cyclical manner, as it grows with the expansion of political opportunities until demands are either met or the rulers manage to employ a strategy that effectively controls the protestors. (Rudbeck & Sigurdsson, 1999: 2, 8-11; Rudbeck, 2005: 15-16; Nasong’o, 2005: 83-84)

Second, *access to resources, mobilizing networks and claims-making* is necessary for discontent citizens to come together in collective action. The rise, subsistence, and capacity of resistance to cooptation and patronization by outsiders of movements engaging in popular contention is to a large extent dependent on the existence of a certain capacity for leadership, communication and fund raising. The strength of the challengers is determined by the organization and mobilization of resources in forms such as money, labor, internal loyalty, and access to the media. Broader forms of resources also include displays of worthiness (via e.g. enrollment of respected and cherished public figures), unity (communicated through signs of common identity, such as uniforms or singing), numbers of protesters (the larger the number of protesters, the more do the claims appear to be shared by the entire population), and their commitment (the higher the commitment, the more are protestors willing to engage in high-risk activities).

While mass action is not limited to civil society actors or any other group or sector of society, successful popular contention is thus arguably likely to often be led by CSOs, political parties, or other formal organizations. However, it also needs to be stressed that opportunism is as important when it comes to understanding popular contention and mass actions, as it is to understand the interests of any other groups of actors in democratization processes. Mass actors are therefore not to be seen as necessarily

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being less preoccupied with pursuing their own individual interests than other actors or even as being particularly pro-democratic<sup>55</sup>. Rather, analyses of democratization processes should encompass how power holders and challengers continually shape and reshape each others' identities, interests and demands. (Rudbeck & Sigurdsson, 1999: 11-13; Rudbeck, 2005: 16, 38; cf. Nasong'o, 2005: 80-85)

Finally, but certainly not less important regarding the potential effects of popular contention on democratization, is the factor of the *repertoire of contention*. This has to do with the range of options which individuals have available with regards to acting collectively to make public demands on other actors, notably agents of governments. The specific repertoire of contention that a specific group is able to employ at a certain point in time is a cultural product of historical acts of popular contention, as well as of the present political opportunities. While mass action in theory could take the form of a large number of collective actions, at a certain point in time, mass action is constrained to a limited number of possibilities that have, on the one hand, been developed historically through a social learning process of trial and error (successful forms of contention are likely to be used again). Demonstrations, strikes, petitions, riots, blockades, boycotts, etc. are thus forms of contention that people have learned to use over time. Although such learning can transcend territorial boundaries, differences are most often identifiable over both time and space.

On the other hand, the process of contention and interaction with government authorities can also result in tactical innovations in the form of modifications of formerly used forms of contention. Repertoires of contention thus change mostly incrementally as minor strategic adjustments to known forms, although changes can also occur in bursts if radical developments in the political opportunity structure take place.

While the two first factors are necessary prerequisites for popular contention, Rudbeck stresses the repertoire of contention as the crucial factor to analyze, since it

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<sup>55</sup> This is much similar to the radical view of civil society as being replete with contradictions and conflicts between classes and groups of which Hegel can be seen to have been an early proponent and in line with which Mamdani has stated that "...neither civil society nor movements that arise from it can be idealized. In contrast, movements within civil society demand concrete analysis to be understood, for they harbour contradictory possibilities." (Nasong'o, 2005: 66). (Boussard, 2002: 160; Nasong'o, 2005: 82, 85; Lewis, 2001: 44-52).

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holds the potential of undermining the very foundation of a government's ability to govern. (Markoff, 1996: 27-31; Rudbeck & Sigurdsson, 1999: 14-15; Rudbeck, 2005: 16-18; Tilly, 2006: 8)

### ***4.3 Historical institutionalism: Institutions, asymmetrical power relations and path dependent policy outcomes***

#### **4.3.1 Definition of institutions**

Within the historical institutionalist theory of how struggles among political actors (and, eventually, policy outcomes) are mediated by the institutional context in which they are played out, the definition of institutions that is employed encompasses both formal organizations, as well as informal procedures and rules that shape agency. In the words of Hall & Taylor, institutions are defined as “...*the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy.*” (Hall & Taylor, 1996: 938) As such defined, institutions therefore can range from formal rules of a state's constitution regarding e.g. electoral procedures or formal government structures to informal routines or norms of a society that influence behavior of political actors, such as e.g. affectionate ties relating to affiliation to ethnic groups or geographic areas (Steinmo et al., 1992: 2; Hall & Taylor, 1996: 938; Peters, 2005: 74; Hyden, 2006: 85-88).

#### **4.3.2 Institutions and agency**

In its understanding of how institutions affect behavior of actors, the theory can be seen as taking an eclectic approach by drawing upon elements from both of the so-called calculus and cultural approaches, thus emphasizing that agency can simultaneously be influenced by both strategic calculations in pursuit of maximum attainment of self-interests, as well as by social norms and routine procedures (Hall & Taylor, 1996: 939-940, 955).

Actors are thus seen as strategically seeking to realize different mutually interconnected, complex and continually changing sets of interests and goals in a context replete with institutions and ideas about institutions. These institutions influence the strategies that actors employ to pursue their interests in that they, for any actor, make some types of behavior more likely than others. Institutions thereby



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regularize behavior, meaning that actors can choose among various strategies while being informed by the anticipation of what other actors might do. However, the information available to different actors and hence their perceptions of the institutional context in which they act and the behavior of others that they can anticipate is at best incomplete and often later turn out to have been inaccurate.

This is because institutions distribute access to knowledge of the institutional environment and other strategic resources unequally. This creates asymmetrical relations of power in between social groups and allows some groups or interests disproportionate access to the different decision-making processes. Historical institutionalists therefore also tend to emphasize how policy outcomes most often are inequalitarian in their effects on different groups in a society. Because different groups of actors are thus influenced dissimilarly by different institutions in terms of their interests, strategies and capacities to exercise leverage on decision-making, political processes are characterized by strategic conflict. This is important because the effect is the potential of the generation of unintended consequences or inefficiencies, both regarding policies and institutions. Furthermore, due to the acknowledgement of actors that institutions impact on power relations and policy outcomes, historical institutionalists also emphasize institutions themselves as subjects and points of focus in political struggles. (Hall & Taylor, 1996: 940-941; Hay & Wincott, 1998: 954, 956)

Moreover, institutions and ideas about institutions also affect more fundamentally the preference formation of actors by influencing which goals they perceive it to be in their interest to seek to realize. The institutional context and existing worldviews and policy paradigms thus provide ‘cognitive filters’ through which actors’ perceptions of what is desirable, legitimate, and feasible for them are formed. Both interests and strategies towards pursuing interests are thus influenced by institutions and consequently institutions also both constrain and enable certain types of action in an asymmetrical fashion across different groups of actors (Steinmo et al., 1992: 8-9, 13; Hay & Wincott, 1998: 956; Peters, 2005: 73). Steinmo and Thelen have formulated the historical institutionalist conception of the relationship between agency and structure by arguing that “...[T]he institutions that are at the center of historical

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*institutionalist analyses [...] can shape and constrain political strategies in important ways, but are themselves also the outcome (conscious or unintended) of deliberate political strategies, of political conflict, and of choice.” (Steinmo et al., 1992: 10)*

#### **4.3.3 Changes in institutions and policies (path dependency)**

As can be seen from the last part of the quote, the relationship between institutions, agency, policy outcomes and, again, institutions can be understood as being continually recreated in a cyclical manner. By enabling and constraining agency in certain ways, institutions make certain types of policy choices become more likely to be chosen (or even considered) than others; here, ideas are perceived to play a central part in that the absorption and diffusion of institutional and policy ideas is shaped by existing institutions.

In other words, strategic action can be seen as producing two types of effects which can become potential sources of change. On the one hand, *direct effects* leading to a partial transformation (but not necessarily as expected or intended) of the institutional and institutionalized context wherein the action is taking place, which may affect the course of future action (if only marginally). On the other hand, strategic action creates effects in terms of *strategic learning* as the implicated actors adjust their perceptions of their interests and strategies based on assessments of the degree to which their prior strategies helped them realize their former goals. This happens through assimilation of new information from external sources, as well as under consideration of the experienced opportunities and constraints of the institutional context (Hay & Wincott, 1998: 956).

These processes of continual adaptation and evolution in which structure and agency mutually shape each other in complex dualistic relationships develop along what historical institutionalists term as ‘paths’. Institutional and political developments are thus perceived to be ‘path dependent’ in that existing or previous institutions, agency and policy choices influence (but do not determine) future developments by eliminating “...whole ranges of possibilities from later choices while serving as the very condition of existence of others.” (Hay & Wincott, 1998: 955). (Steinmo et al.,

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1992: 23, 25; Hall & Taylor, 1996: 941-941; Hay & Wincott, 1998: 955-956; Peters, 2005: 73-74, 76, 79)

While change is thus understood as taking place in an incremental manner most of the time, within historical institutionalism the course of historical events is also understood through the use of the concept of ‘critical junctures’. By this is meant “...moments when substantial institutional change takes place thereby creating a ‘branching point’ from which historical development moves onto a new path.”<sup>56</sup> (Hall & Taylor, 1996: 942).

In this connection, Ian Greener has sought to improve the otherwise somewhat limited understanding within historical institutionalism of what causes such critical junctures (cf. e.g. Hall & Taylor, 1996: 942). According to Greener, such more radical changes can occur as the result of either endogenous or exogenous factors (or both). Endogenously generated radical change can take place in situations in which the dominating groups are fractured with regards to their structural interests and their base of ideas when the incompatibilities between the groups become insurmountable, thus leading to fragmentation. Such exposures of incompatibilities can cause other vested interests to act opportunistically against them, potentially creating splits in the support to a dominant coalition or idea.

Change generated by exogenous factors can emanate from for example shifts in structural relations in relation to economic crises or military conflicts, or due to the emergence of new, radically different ideas challenging existing ones and backed by influential interest groups. (Greener, 2005: 65-68; Hall & Taylor, 1996: 942)

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<sup>56</sup> However, arguably, this does not mean that the occurrence of path dependency restricts future development to taking place only within a certain specified path. Seemingly insignificant policy choices, institutional innovations, strategic learning, or the rise of new ideas, e.g., may over time incrementally lead to changes in the interpretations of goals and strategies on behalf of implicated actors, thereby potentially in time creating larger scale changes in policies or institutions; and over longer periods of time, perhaps even amounting to constituting a shift onto a path that may be termed as new compared to previous historical developments (cf. Andersen, 2003: 155-156).

## **4.4 Foucault's theorizations on the power of knowledge, disciplines and discourses**

### **4.4.1 General propositions on Foucauldian power**

A first general point of Foucault on power (in modern societies) is that it is not something that can be held by or belong to anyone, but rather can be understood as nothing more or less than the multiplicity of all social force relations. Power is relational and fluid in its existence of constant flux in the form of contradictions, inequalities, confrontations, struggles, integrations, and transformations of force relations between various groups of actors (such as Government, opposition parties, CSOs, and DPs), bureaucracies, institutions, and fields on all levels of social life. Power is contingent and mobile, something that exist as flows between all areas and actors, whereby relations of power are continuously and repeatedly being created and recreated. Power relations are therefore potentially open to very sudden changes, as power can very quickly flow from some points, areas or groups to others.

As such, power can be seen as anonymous and versatile, functioning through a great variety of institutional and organizational networks of top-down, but also bottom-up as well as horizontal relations. Also, power is inescapable in that it affects everyone, the dominant as well as the dominated, but it does so in different, non-egalitarian ways.

It follows logically from this conceptualization that relations of power are local and historically contingent, wherefore concrete and specific analyses are necessary in order to specify empirical power relations in a certain case. (Grace & Mchoul, 1995: 40, 63, 65, 84; Danaher et al., 2000: 70, 71, 74, 74 80; Hajer, 1995: 49; Foucault, 2002a: 193; Thomsen, 2000: 43-44)

One reason why power is of such a fluid, non-obtainable quality is that -while before and during the Renaissance, there were only few institutions or people capable of communicating in a public manner (such as the king, the church, universities, and artists) -in post-modern societies the space for public communication is much more open and no institution or group of individuals is perceived to have access to 'the truth'. In this sense, democracies can be conceived of as empty spaces in which claims can always be contested, leaving negotiations and alliances as central means

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for e.g. groups seeking to influence or control matters of state if they are to obtain support for their ideas, policies or agendas. (Danaher et al., 2000: 67, 72-73; Thomsen, 2000: 44)

### **4.4.2 Foucauldian power and knowledge**

As can be derived from the above, for Foucault power is inextricably connected with knowledge<sup>57</sup> in a dualistic and reciprocal relationship in which the two presuppose and contribute to the constitution of each other. Power can not be exercised without producing or reproducing certain versions of or claims as to what is 'true' in the sense of accepted systems of procedures for the production, regulation, and dissemination of statements; i.e. defining thresholds of what counts as knowledge. Power is thus productive, its circulation and exercise produces concepts, ideas and it even continually defines how reality is perceived as well as what can be accepted as knowledge and 'truth'. Since what qualifies as knowledge, and consequently as 'truth', is produced by certain power relations, like power, knowledge and 'truth' is situational and historically specific. This production happens through so-called discursive practices (cf. section 4.4.4). (Danaher et al., 2000: 74; Thomsen, 2000: 41-42; Jørgensen & Philips, 1999: 22-24; Grace & Mchoul, 1995: 58-59, 64, 83; Jørgensen & Phillips, 1999: 23-24)

### **4.4.3 Foucauldian power and discipline(s)**

Knowledge and disciplines (as bodies of knowledge) shape how power can be exercised through regularizing and normalizing individuals and their behavior by authorizing and legitimizing the exercise of power. There are many different forms of power at play in society according to Foucault (e.g. administrative, legal, and economic), but they all have certain characteristics in common with regards to the mechanisms through which they operate. They all draw on certain 'truths' derived from certain disciplines and they all rely on certain general power techniques and as such discipline people in connection with various institutions by "...organizing their

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<sup>57</sup> Within Foucault's thinking, knowledge can be defined as constituted of "...perspectives, ideas, narratives, commentaries, rules, categories, laws, terms, explanations and definitions produced and valorized by disciplines, fields and institutions through the application of scientific principles." (Danaher et al., 2000: xiii).

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*behaviour and regulating the place of bodies by the way they structure time, space and relations.”* (Danaher et al., 2000: 53). Hence, power in the Foucauldian view is also *disciplinary* and can more specifically be conceptualized as functioning via four major types of power techniques that can be applied by any institution. (Foucault, 2002a: 199-200; Danaher et al., 2000: 26, 50; Grace & Mchoul, 1995: 65-68; Thomsen, 2000: 46)

The first technique is distribution of individuals spatially in certain ways in relation to each other, which can be according to a defined belonging of individuals to different groups (e.g. Government, opposition, CSOs, Luos or Kikuyus), by assembling groups of people by certain categories in specific places (such as seminars, workshops, meetings or work groups) or by dividing people into networks of ranks (such as in the military or in ministries). Such dividing practices thus work to qualify or disqualify people as members of different social orders and according to Foucault the judges of normality who execute this surveillance are everywhere in social relations.

A second technique of disciplinary power revolves around controlling the activities of individuals and groups of actors as a means of extracting time and labor from bodies. Examples of this are timetables, standard operating procedures, work plans or requirements regarding number and time of meetings of working groups.

Third, discipline is also concerned with ways of organizing stages or segments of training in diverse areas of social learning relations by specifying a general code for the development from student to expert. This is achieved through the hierarchical organization of learning processes, each stage thereby indicating a positive development in comparison to the previous.

Finally, the fourth technique through which disciplinary power operates can be understood as a general co-ordination of the three first techniques requiring that *“...the training procedures directed at the human body are integrated into a more general ‘machinery’; that chronological series also become pieces of the machinery; and that a precise system of commands is activated.”* (Grace & Mchoul, 1995: 70). (Danaher et al., 2000: 50-53, 59-60; Grace & Mchoul, 1995: 68-71; Foucault, 2002a: 186, 197, 199-200)

#### **4.4.4 Power and discourses**

On a general level, discourses can be understood as “...*specific ensemble[s] of ideas, concepts, and categorizations that are produced, reproduced and transformed in a particular set of practices and through which meaning is given to physical and social realities.*” (Hajer, 1995: 44).

For the sake of providing some overview of the complex relations between discourses, knowledge and disciplines, it can be stated that discourses are knowledges and knowledges are organized into various disciplines, such as sociology, political science and economy. Hence, discourses that revolve around roughly the same issue may draw on knowledge from different disciplines<sup>58</sup> (Grace & Mchoul, 1995: 42; Hajer, 1995: 44).

Since discourses are thus specific bodies of knowledge, and knowledge is necessary for the exercise of power to be possible, discourses are also indispensable for power relations to work. Because discourses are thus constituted by bodies of knowledge and carry them as products of power relations, discourses also reflect specific power relations as well as hierarchies of different discourses mirror historically specific power relations. Discourses therefore need to be studied in the specificity of their contexts. (Grace & Mchoul, 1995: 44, 59)

This can be done through studying discourses as they are given expression through communication (for example via language), i.e. at the level of the enounced or the *statement*<sup>59</sup>, as Foucault calls it. While discourses have a deeper quality than this (in that they affect what can be done, said and thought), statements can thus be analyzed and understood not as mere components of discourses, but as the functional

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<sup>58</sup> While Hajer provides the example of environmental discourse (see Hajer, 1995: 45-46), in connection with the present thesis, one can arguably equally think of development as a broad discipline, within which a number of different discourses originating from different disciplines are associated regarding different issues. It is thus probable that several discourses drawing upon different disciplines can be identified as constantly competing for dominance with regards to producing knowledge and defining what can count as ‘truth’ in connection with e.g. ‘good governance’ or the Kenyan constitutional review process.

<sup>59</sup> Due to spatial constraints, the concept of the statement and how it operates across, but is distinct from, propositions, sentences and speech acts is not discussed here. For such a discussion, please refer to e.g. Grace & Mchoul, 1995: 35-39.

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expressions of the rules of discourses (Grace & Mchoul, 1995: 36-40; Danaher et al., 2000: 31-35)

In order to identify specific discourses, one can focus on four different types of components, which any discourse has and which contribute to setting it apart from others. First, there are the *objects* of the discourse; that is the things it studies or produces. Second, there are the *operations* which refer to the methods and techniques that are utilized to treat the objects within the discourse. Third are the *concepts*, meaning the ideas and terms applied routinely and which can constitute a unique vocabulary or language. The last component is the *theoretical options*, i.e. the different assumptions, hypotheses and theories available and which may at times require discoursing actors to choose between mutually incompatible options.

However, because discourses are not constant and static but rather exist in a quality of constant flux, reconstruction and redefinition by various discoursing subjects, these components can be difficult to identify and specify with much precision. Rather, these components of discourses can be analyzed via the rules that govern their *formation*, *transformation*, and *correlation*. The rules of formation refer to the conditions which enable the creation of the objects and concepts of a discourse in the first place. The rules of transformation define the limits of the capacities of a discourse to be modified from within it self, that is the 'threshold' from which new rules can be accepted and utilized. The rules of correlation are constituted by the various relations that a discourse has with other discourses at a certain point in time.

Related to this, Foucault distinguishes between three different kinds of discursive changes and argues that such discursive changes are actually what constitute historical change. While discourses are products of power relations, they also produce and reproduce power relations and it is therefore through discursive changes that historical changes in social relations, such as movements towards democratization, take place. Discursive changes can take place (I) within the discourse in relation to its contents and derivations, (II) in relation to the limits of the discourse (termed mutation), as well as (III) in the form of redistributions among two or more discourses with regards to their positions in hierarchies of discourses. (Grace & Mchoul, 1995: 44-47; Foucault, 2002b: 35-42)



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An important remark in connection with discourses is that the discursive rules that govern them imply exclusionary effects both with regards to what can be thought, written, said and done in connection with a discourse as well as in relation to which actors are able to participate in the construction and reconstruction of the specific discourse. At certain points in time, some actors thus have more significant positions than others in certain social structures where certain discourses are constructed – flows of power to define within certain discourses can thus be unevenly dispersed in social structures. Discourses are thus connected to politics via fields of power and the positions that they contribute to generating for its subjects. Different discourses provide different actors with different possibilities of contributing to the discursive processes (different positions in these processes) that produce and reproduce power relations and knowledge. (Grace & Mchoul, 1995: 36, 41, 56, 82; Hajer, 1995: 49-50) Another crucial point in relation to discourses is that the mentioned productive effects of discourses are not merely technical constructions that can be employed in strategic action by sovereign individuals, but more fundamentally gives direction to what individuals can say or do since one can not conceive of the world or anything in it from a position external to discourses. Consequently, actors' identities and interests are also discursively produced and can change over time depending on for example knowledge, negotiations and alliances (Hajer, 1995: 51; Grace & McHoul, 1993: 33, 35-36; Danaher et al., 2000: 48).

### **4.4.5 Power and resistance**

Connected to Foucault's points that information and knowledge are distributed across society through a multiplicity of various discourses and that power relations are therefore "*...always fragmented, competing with each other and operating in different sites along different lines*", is his view of resistance as an inherent feature of power relations (Simons, 1995: 83). (Danher et al., 2000: 68; Simons, 1995: 83, 81)

This is so in two respects. First, and this is closely connected with the disciplinary character of power, power produces via its techniques, institutions and discourses a nearly infinite variety of categories and sub categories of individuals and their

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behavior in terms of what is right, normal, or good. Conversely, this also inevitably means that definitions and categories of what is wrong, deviant, or bad are produced with the intention of regularizing and normalizing people. While this does result in affecting the identities, interests and behavior of people, the effect is often the opposite in that a multiplicity of variegated and disparate identities and behaviors are created as a result of groups of individuals categorized as deviant in some respect come to see themselves and act as exactly such, thereby creating effects that counter e.g. dominant discourses. (Danaher et al., 2000: 79-80; Grace & Mchoul, 1995: 72)

Second, partly because of the disciplinary effects of the first point, power is an open cluster of events that is more or less coordinated. Instead of any one authoritative discourse, institution or group in a state, there exist a great number of different discourses and groups which compete through seeking to gain support for their versions of events or their interpretations of specific bits of the surrounding world. This great dispersion of knowledge and information is important to Foucault in that it is part of what allows individuals to reflect on, criticize and question their own positions as social subjects as well as to negotiate (and negotiate with) the social order. Discourses do thus not go undisputed, but are constantly in the process of being transformed through ‘strategic games between liberties’ because people are “...*in a sense partly free to shop around for what [they] will believe or accept.*” (Danaher et al., 2000: 79). In power relations, the reach of power will always be sought extended to the point where it can direct the conduct of others with a certain consistency and precision. However, resistance is an inherent feature of power relations because it is generated not only as a defensive response to such expansion, but as a resistance aspiring itself to become a dominating strategy. Hence, power as well as its techniques and institutions through discourses produce an almost infinite variety of actors that compete and seek to control each other by means of trying to take part in and maximize their leverage in the discursive practices that constitute and transform power relations.

In politics, strategic maneuvers or tactics are therefore countered by opposing ones and in order to be effective, they must be directed at techniques of power (rather than power in general). As such, “...*resistance consists of refusing these techniques.*”

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(Grace & Mchoul, 1995: 86). Examples of how this can be done are through seeking to change decision making procedures, formal institutions or by contributing with inputs for political decision making processes. (Simons, 1995: 82, 84; Danaher et al., 2000: 44-45, 79-80; Grace & Mchoul, 1995: 84-85, 86-87)

## **Analysis Part 1**

### **5. Democratization in the constitutional review process in Kenya**

In this descriptive, first part of the analysis, the main tendencies regarding how democratization in Kenya has developed in the case of the constitutional review process in between the general elections in 2002 and 2007 are discussed. This is done by analyzing the developments relating to the different institutions (those deemed relevant in relation to the case) that, according to Dahl's conceptualization of democracy, are necessary for a real world democracy to approach the ideal standards of democracy. As the empirical developments in the case with regards to the different institutions are discussed, so is the degree of fulfillment of each of the ideal standards; this is also done by means of comparisons to pre December 2002 circumstances to ensure the internal validity of the arguments.

Since several of the institutions and standards are closely intertwined in practice, developments with regards to some of these are discussed in the same sections. Developments are discussed first of all in the form of the practical operation of democracy in the case (*de facto* developments) and when relevant, possible developments relating to a democratic culture in Kenya are also analyzed. Finally, the few developments with regards to the formal constitutional/legal framework of democracy in Kenya are analyzed (*de jure* developments). Step by step through the analysis, a more and more nuanced and comprehensive account of the democratization developments in the case is thus built, before the chapter closes with a summary of the analyzed developments in Kenya's democratization process in relation to the case.

#### **5.1 Freedom of expression**

Overall, while an observer noted that certain positive developments concerning *de facto* freedom of expression had begun to occur after 1997, there was broad agreement among the observers interviewed that there have been further positive developments in this regard after the 2002 elections in connection with the

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constitutional review process, including within the Bomas Conference. In the view of Dr. Muia<sup>60</sup>, in relation to the review process since the last elections, people who have wanted to express themselves on issues relating to the review have done so through the available media by participating in public debate through e.g. letters to the editor in newspapers, TV debate programs, and interactive radio stations. One of the most significant changes seem to be that after the 2002 elections, it has become possible for Kenyans to publicly express views opposing the president, which was not safe when Moi held the presidency and during the rule of which “...people were not so free to express their views, even Members of Parliament were afraid” (Barasa Interview: 4). (Muia Interview: 10; Kabelo Interview: 5; Barasa Interview: 4, 6 7; Gatere Interview: 16)

As described in the case chapter, the course of events in the constitutional review process has thus on the positive side seen several public expressions of opposition and criticism of Kibaki’s government. CSOs and the political opposition have criticized Kibaki and his government for a lack of political will in relation to the constitutional review process in relation to e.g. in July 2004 (opposition parties accused Kibaki of deliberately hindering the introduction of a new constitution that would limit his presidential powers), the cabinet reshuffle in January 2005, the reconstitution of PSC in June 2005, and in several instances in connection with the negotiations on minimum reforms in 2007. At the national political level, the most significant indication that it has been possible for politicians to express their views without fearing repercussions is perhaps constituted by the tabling by MPs in September 2007 of a list of 168 signatures of MPs petitioning Kibaki to enact minimum reforms before the elections. (International Commission of Jurists, 2005: 2; Aluanga, 2005: 2-3; BBC NEWS, 2004d: 1; Saturday Standard Team, 2007: 1).

Across all three economic demos groups interviewed, it was also expressed that after the elections in 2002, the degree of freedom of expression increased. It was felt that they generally and in relation to the review process have been free to say anything and ask any question; even to publicly criticize the president and the GoK, which it

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<sup>60</sup> Dr. Daniel Muia of the Department of Sociology, Moi University (cf. Appendix 6).

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was expressed was not possible before without risking imprisonment or torture (Kariobangi Focus Group: 5; Buruburu Focus Group: 5; Westlands Interview 1: 1). One of the interviewees from the high income group opined that although freedom of expression is still not absolute, it is largely there and that political harassment in this connection has decreased (Westlands Interview 2: 3).

Illustrating this development (but also clearly indicating problems relating to responsiveness), journalist and political commentator Ian Gatere explained: “...*we have the democratic expression, now you can talk and say whatever you want to, but your expression does not bring about change. You can shout as much as you like, but no one will listen. Nothing happens. Before, you could not even shout, you would whisper.*” (Gatere Interview: 9).

Importantly, however, despite these overall improvements, there have also been certain important limitations observable in the review process with regards to *de facto* freedom of expression in the sense that at certain occasions the police has disorganized peaceful demonstrations by using canes and tear gas<sup>61</sup>; this seems to especially have been the case if people have been demonstrating or speaking against certain economic or political “...*interests of the Kibaki government and certain interests globally...*” (Gatere Interview: 15). (Barasa Interview: 19; Kabelo Interview: 8). Yet, despite these serious limitations, a higher threshold of tolerance of expression of views through demonstration does seem to have developed in relation to the review process after 2002 compared to under Moi (Kabelo Interview: 9). It is thus critical to note that to a certain extent, the positive developments of the freedom of expression seem to have taken place mostly in connection with topics relatively uncontroversial to the incumbents of the political elite.

Another interesting point is that there in the review process have been a restriction to the freedom of expression in the form of citizens not fully accepting the right of

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<sup>61</sup> Examples hereof include public rallies and demonstrations in July 2004 (as a protest against the failure to enact a constitution within the deadline of June 2004 set by Kibaki's government), demonstrations outside of Parliament in March 2005 urging the MPs (both Government and opposition) to pass the Bomas draft untouched as well as in July the same year (BBC News, 2005b: 1-2).

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others to hold other political views than they do themselves<sup>62</sup>. Examples of this include when prior to the referendum, one of the leading politicians of the no-campaign was thrown out of a hotel in Central Province (Kibaki's home district) for opposing the president, as well as with regards to accepting differing views of religious minorities in the review process (Gatere Interview: 11, 13-15; Westlands Interview 4: 3; Westlands Interview 1: 1). This is a significant point as it may well indicate that the universal character of freedom of expression as a democratic institution is yet to be internalized in the mindsets of Kenyans and as such as part of the political culture.

With regards to the freedom of expression for the media in the case period, this suffered a violent blow with the raid of the Standard Media Group in March 2006; an incident that according to Amnesty International fitted within a range of forms of intimidation, which also included arrests of journalists and other raids on media houses under Kibaki's administration<sup>63</sup>. Yet, The KNCHR reported increasing freedom of the press in Kibaki's time, with the raid of the Standard as a one off incident (Otieno, 2006: 4-5). Compared to several serious cases of prosecution and harassment of journalists during Moi's last presidential tenure, the situation has debatably improved somewhat in the case, although clearly still being far from an optimal level; an interpretation that seems to be supported by the donors interviewed on the issue (BFD 4 Interview: 19; BFD 3 Interview: 11-12; BFD 1 Interview: 4-5; Beetham et al., 2000: 60-61; Freedomhouse, 2002: 11).

### **5.2 Associational autonomy**

With regards to associational autonomy in relation to the constitutional review process in the period in between the elections in 2002 and 2007, this seems to have been largely enjoyed by Kenyans. By and large, the observers interviewed on the operation of Kenyan democracy in this respect were thus positive in their assessments

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<sup>63</sup> The Standard Media Newsgroup has been among the more critical parts of the press with regards to the performance of Kibaki's government in relation to among other issues the constitutional review process and corruption wherefore the incidence has been assessed as relevant for the present analysis (Kabelo Interview: 17).

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and the formation of different CSOs pushing for reform was mention as showing that Kenyans are largely free to form associations<sup>64</sup> (Barasa Interview: 8; Kabelo Interview: 7-8). Dr. Muia thus explained that “[t]oday you can form any kind of group that you want, so long as it is legal and you go through the security vetting, which is a standard procedure, you can form an association any time ...” (Muia Interview: 13).

Ian Gatere mentioned, though, that there had been an example in which the associational autonomy had been compromised in relation to the review process in the form of the deregistering by authorities (and not through a legal process) of an association sought formed by the Maasai to fight for (among other issues) the incorporation of land rights of the Maasai in a new constitution. From interviewing organizations on the ground, the journalist had gotten the impression that in cases where the activities of an organization run counter to interests of the national and international elites present in the country, then “...there is quiet but very civil-looking pushing and stopping of people from these kinds of associations.” (Gatere Interview: 17). (Gatere Interview: 17-18)

Moreover, and closely intertwined with the above mentioned limitations with regards to expression of views through demonstrations, associational autonomy interpreted in a broader sense (as including the right to assembly), has been limited in certain cases. According to Kina, former member of the CSO Katiba (constitution) Watch Group, authorities have thus sought to hinder the holding of public rallies by proponents of a no-vote leading up to the referendum in 2005 (Kina Interview: 3).

During the latter years of Moi’s presidency there were cases of delayed registering of political parties (prior to the 1997 elections), organizations had been refused registration and defamed ‘illegal’ without an explanation of on which grounds this was done, and after the US Embassy bombings in August 1998, the registration of five Muslim CSOs was cancelled. Judged against this background, although the rights of political parties, labor unions and civil society groups to mobilize had also

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<sup>64</sup> Examples of this in review process include the Yellow Movement Multi-Sectoral Forum of July 2005, the Orange Democratic Movement that later developed into the ODM party, and the UNC of February 2007 (cf. chapter 3).



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improved to an unprecedented level towards the end of Moi's last tenure, it thus seems probable that, even though there have been serious limitations, the overall development within the review process after the 2002 elections has continued in the direction of greater *de facto* associational autonomy (Beetham et al., 2000: 17).

### **5.3 Alternative information and enlightened understanding**

In relation to the constitutional review process as it was taken up again after the 2002 elections, an increased number of different alternative sources have provided information to Kenyan citizens<sup>65</sup>. The media thus played an important role in providing alternative sources of information to the citizens by recording the process, reporting and educating on it, disseminating proposals and ideas of the CKRC, as well as promoting debate in TV, radio, as well as the written press. Concerning the character of the media coverage of the process, it has been assessed that it was largely fair and balanced on behalf of the major newspapers and TV channels and that the media were generally focusing on key issues of the constitutional review<sup>66</sup>. The CKRC also played an active role itself in the process through educating people on different issues both through the media and by performing comprehensive voter education coordinated by UNDP. Moreover, CSOs performed, according to Muia, Kabelo<sup>67</sup>, and UNDP quite extensive civic education across the country on the proposed constitution and some CSOs did the latter by comparing the proposed constitution to the Bomas draft and the existing constitution on essential sections<sup>68</sup>. (Cottrell & Ghai, 2004: 13; Andreassen & Torstensen, 2006: 4; Everatt & Kanyinga, 2005: 4; CEMIRIDE, 2005: 1-7; Kabelo Interview: 8; Muia Interview: 10, 11; UNDP, 2005: 1)

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<sup>65</sup> As Gatere said when asked about the availability of information in the case period as compared to before the 2002 elections: "*Oh, it has boomed, it has boomed. There are far more radio stations, TV stations, and they have all sorts of debates and all sorts of shows.*" (Gatere Interview: 16).

<sup>66</sup> The two main daily newspapers, Daily Nation and Standard, as well as the two main TV channels were by and far nuanced in their coverage of the review process all the way up to the referendum, whereas the Kenya Broadcasting Cooperation (state controlled) and the Citizen newspapers were greatly biased in favor of a yes-vote (Andreassen & Torstensen, 2006: 4).

<sup>67</sup> Adan Kabelo is a Governance Programme Officer of MS Kenya (cf. Appendix 6).

<sup>68</sup> It should, however, be noted that civic education in relation to the review process had begun before the elections in 2002, as well as that the increase with regards to alternative sources of information began before 2002 (Gatere Interview: 16; Cottrell & Ghai, 2004: 10-11).

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The amount and quality of these types of information on the constitutional review process was also seen by the observers interviewed as largely sufficient and by and large as not having been a restriction for citizens to make relatively informed decisions at the referendum. Furthermore, there appeared to be a great demand in the Kenyan citizenry for information on the review<sup>69</sup>. To some extent, members of the demos interviewed had also taken part in various civic education sessions during the review (Kariobangi Focus Group: 4; Westlands Interview 5: 1; Westlands Interview 3: 2). Also, the general perception expressed by both observers and the individuals interviewed as members of the demos was that ordinary Kenyans cared about, were to a certain degree aware of constitutional issues and discussed such issues both publicly and privately, especially in the months leading up to the referendum. Perhaps surprisingly, these points were also illustrated in the enthusiastic and heated debate during the focus group interview with poor and marginalized slum squatters in Kariobangi (cf. Kariobangi Focus Group: 2-3, e.g.). (Kariobangi Focus Group: 5; Westlands Interview 1: 4; Buruburu Focus Group: 3; Barasa Interview: 7, 8; Kabelo Interview: 7)

This is not to say that there were not any restrictions with regards to the information available in the review process, however. Generally the information available, both in terms of the media coverage and the political debate at national level, was lacking in terms of depth and focus on substantive constitutional issues. Public debate at the political level became ethnicized and focused on settling of political scores as well as personality contests between the yes and no proponents, especially in the form of ‘Kibaki vs. Odinga’ within the NARC Government. In addition, and in apparent contradiction with the views largely held by the observers interviewed, the ECK Chairman and Vice Chairman and others have expressed dissatisfaction with the civic education performed by civil society, as it itself became divided along ethnic lines and by the gorge that emerged between the yes and no side. Nuanced, non-distorted and more in-depth information and debate thus seems to have been difficult to come

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<sup>69</sup> A manager of one of the largest media houses thus reported great increases in audience ratings and sales during the process (Cottrell & Ghai, 2004: 13).

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by, especially for the majority of poor Kenyans and residents of rural areas. The mentioned restrictive factors thus seem to have limited the increase in enlightened understanding quite seriously, both with regards to the depth of understanding, as well as in terms of how many Kenyans were positively affected (Andreassen & Torstensen, 2006: 4). According to the ECK Chairman and Vice Chairman, the latter probably only amounted to 10-20 percent of the electorate, whereas the head of the CKRC, Yash Pal Ghai, has noted that “[S]urveys showed that a very large majority of Kenyans had familiarity with the review and the process...” (Cotrell & Ghai, 2004: 13). Furthermore, as has traditionally been the case with Kenyan general elections, voting in the referendum turned out to take place largely along ethnical lines, arguably indicating that for the majority of the 52.4 percent that voted, the appeals of their ethnical political leaders became the decisive factor, rather than an enlightened understanding of the substantial contents of the proposed draft (Andreassen & Torstensen, 2006: 4). In addition, after the referendum and regarding the debate on minimum reforms, according to the citizens and observers interviewed, this seems to have been something that even the minority of well educated Kenyans have only received snippets of information on and mostly if they have been keen on following the news on the process. (Cotrell & Ghai, 2004:14; Andreassen & Torstensen, 2006: 4, 6; Gatere Interview: 7, 10, 13, 16-17 19; Muia Interview: 12; Barasa Interview: 5; Kariobangi Focus Group: 2; Buruburu Focus Group: 4, 5; Westlands Interview 1: 4; Westlands Interview 4:4 ; Westlands Interview 2: 2, 5)

However, despite these described limitations that have also characterized the review process, the overall tendency seems to have been one towards *de facto* developments of democratization in the form of more alternative sources of information<sup>70</sup> available in many different forms, a generally higher level of understanding among the Kenyan citizenry of the constitution, to a certain extent also the issues connected to the existing and draft constitutions, as well as of human rights; i.e. arguably issues of

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<sup>70</sup> Including seemingly more, better and more readily available government information than prior to the 2002 elections; although one needs to know where to go and who to ask (Barasa Interview: 10; Gatere Interview: 17; Westlands Interview 4: 4).

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essentiality in a developing democracy. Hence, in the words of Dr. Muia “...you find that people are talking about their constitutional rights, something that was not there in the past [...] and they can even articulate them [...] Even about issues where people were not expected to have opinions, they now have an opinion about the constitution.” (Muia Interview: 11). (Barasa, 2007: 26; Barasa Interview: 9, 10, 11; Muia Interview: 11; Kariobangi Focus Group: 4; Westlands Interview 2: 3; Westlands Interview 4: 2; Westlands Interview 1: 4; Cottrell & Ghai, 2004: 10-11).

### **5.4 Control of the agenda, inclusion of adults, and effective participation in the NCC stage**

Regarding the NCC stage of the review process, this had its formal foundation in the CKRA adopted by Parliament and the President (cf. Appendix 1.A). It can as such be argued that decision making power in the form of deliberating and adopting a proposal for a draft constitution had been delegated to the participants at Bomas by the elected representatives of the demos, and to the extent that the matter of the new constitution can be seen to have been open to retrieve by the people in the form of the (guiding) referendum, this was thus plausibly a positive *de facto* development with regards to Dahl’s ideal standard of control of the agenda<sup>71</sup>.

The NCC was composed by all MPs, 3 delegates elected from each district, 42 representatives of political parties, as well as 125 representatives of NGOs, trade unions, the disabled, women’s, religious, and youth groups<sup>72</sup>. According to Yash Pal Ghai, the Chairman of the CKRC, the NCC was thus the most representative body ever assembled in Kenya and the observers interviewed by and large supported this view<sup>73</sup>; as Kabelo concluded on the matter: “[I] do not think that Kenyans had a

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<sup>71</sup> Although it should be noted that the delegation of decision making power to these representatives through the general elections of 1997 had not happened in a free and fair manner (Rudbeck, 2005: ix, 203; Freedomhouse, 2002: 5; Beetham et al., 2000: 42).

<sup>72</sup> According to the CKRA, the process was to be inclusive in the sense of accommodating the diversity of the Kenyan people “...including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged.” (Cottrell & Ghai, 2004: 6).

<sup>73</sup> However, certain problems regarding the composition of the NCC were mentioned in that some marginalized groups had not been included, that the process of appointing delegates was unclear as well as that the composition of the NCC (as delegates had been selected immediately before the 2002 elections) was probably characterized by about 60 % of the delegates being sympathetic to KANU and Raila Odinga’s Party at the time, the National Democratic Party (Gatere Interview: 8, 13; Kabelo Interview: 5; NBFP Interview: 4).

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*serious problem with the people who were there [at Bomas].” (Kabelo Interview: 5).*

As such it seems plausible that the composition of the NCC (perhaps especially by its affirmative action style of inclusion of marginalized groups<sup>74</sup>) in terms of Dahl’s standard of inclusion of adults can be regarded as a positive, though temporary, democratic development in the constitutional review process. (Kabelo Interview: 5; Barasa Interview: 4; Muia Interview: 14; Cottrell & Ghai, 2004: 6-7)

Moreover, despite reported problems with bribing of delegates on behalf of both the Government and the opposition, negotiations and horse trading among delegates outside the NCC and its sub committees, all the types of delegates (from MPs to representatives of marginalized groups) participated actively throughout the Bomas Conferences both in the plenary and in the various sub committees deliberating on the various sections to be included in the draft. In addition, before results were presented in plenary they had to be accepted by a majority vote by the delegates participating in the sub committee and the final proposed draft of the NCC could only be approved by a two-thirds vote of all members, “...whether present or voting or not.”; which it was in March 2004 (Cottrell & Ghai, 2004: 7). (Kabelo Interview: 5; Cottrell & Ghai, 2004: 12)

Despite the NCC thus being a far from flawless process, it does appear as plausible that it signified a *de facto* approach to (indirectly through both elected officials and representatives of a magnitude of different interests and minorities) the requirements of equal and effective opportunities for all members to voicing their preferences as well as of equal consideration of the preferences of individuals as to the final outcome<sup>75</sup>. All in all, it thus seems reasonable to regard the NCC in itself as having constituted a *de facto* development in Kenya’s democratization process towards the ideal standard of effective participation, especially when taken into account that the

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<sup>74</sup> Which seems a positive development, considering that prior to the constitutional review process after December 2002, women and other marginalized groups were thus in practice vulnerable in that they did not enjoy full citizenship rights in all respects and as such not all adults were recognized as (equal) participants of the democratic process (Beetham et al., 2000: 1, 29; Freedomhouse, 2002: 7).

<sup>75</sup> As Adan Kabelo of MS Kenya stated: “*The Bomas, in my own view, was the best that could have happened in terms of participatory dialogue. It invited people from all walks of life –the poor, the rich, the powerful, the powerless, the civil society, the state, politicians, religious people, the youth, the marginalized –I mean, there can not be a perfect situation in any way, but there was a big attempt to make it as widely consultative as possible.*” (Kabelo Interview: 5).

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NCC as part of the review process in between the elections in 2002 and 2007 was the first of its kind in the history of Kenya<sup>76</sup>. (Torstensen et al., 2006: 13; Gatere Interview: 11; Kabelo Interview: 6; Muia Interview: 9; Cottrell & Ghai: 11)

### **5.5 Effective participation, control of the agenda, elected officials, and responsiveness after the NCC**

#### **5.5.1 Effective participation, control of the agenda, and elected officials**

These positive experiences in relation to the NCC stage have, however, been (probably more than) countered by a number of developments problematic to Kenya's democratization in relation to phases of the review process that followed the adoption of the "Bomas Draft Constitution Bill" in March 2004. Significant developments have thus been connected to the reconstitutions of the PSCs that negotiated at Naivasha in November 2004 and Kilifi 2005 on the controversial issue of the form of government to be included in the new constitution<sup>77</sup>. As mentioned in the case description, the outcome was the Wako draft that was voted on in the referendum, in which the section on the form of government was changed to comply with the preferences of Kibaki and his supporters in the GoK that had been opposed by the majority of the members of the NCC. Furthermore, this draft was based in the PSC negotiations in Kilifi from which the proponents of a parliamentary system had been removed.

The PSC was mentioned in the CKRA and was to assist Parliament in performing its functions in relation to the review process. However, with regards to *de facto* control of the agenda it does appear highly problematic that the draft (and especially the central section on the form of government) proposed through Bomas was changed at

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<sup>76</sup> In the words of Tiberius Barasa, "...that [the NCC] was the first time Kenyans were invited in forming or deciding on the kind of society that they want or the kind of rules they want to govern them," (Barasa Interview: 5).

<sup>77</sup> I.e. whether Kenya in the future should have a parliamentary system of government with an executive prime minister and a less powerful president as head of state (as in the Bomas draft and as Odinga's wing of the NARC were proponents of) or a presidential system with a weak, non-executive prime minister (appointed by the president) and a strong president as head of state and government (as Kibaki's faction of the NARC favored) (Andreassen & Torstensen, 2006: 2).

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Naivasha by a select team of MPs. It does not appear that this was an option envisaged originally in the review act<sup>78</sup>.

The reconstitution of the PSC ahead of the Kilifi negotiations (which was unlawful (Torstensen et al., 2006: 4)) further constituted a negative *de facto* development with regards to the ideal of control of the agenda as well as that of effective participation, since the draft constitution was changed again by a group that only included MPs supportive of the Government's position. As such and hugely problematically, the changes were government decisions made outside the control of elected officials, the representatives of the people did not have equal or effective opportunities for partaking in or influencing these last minute changes, and the control of the agenda with regards to the review was limited to a group of Government representatives to which decision making power had not clearly been delegated on the constitutional issues discussed. This was thus a move that both members of the demos interviewed as well as observers saw as the review process being taken over and that "...people felt that their role had been hijacked..." (Barasa Interview: 2; cf. Kariobangi Focus Group: 3; Buruburu Focus Group: 4; Muia Interview: 6; Gatere Interview: 3). (Andreassen & Torstensen, 2006: 2; Cottrell & Ghai, 2004: 7)

One might argue in this connection that the fact that the changes to the Bomas draft by members of Kibaki's government to maintain the expansive powers of the president were adopted by Parliament in July 2005 by 102 votes to 61 and that the decision was as such subject of the control of elected officials. This was thus in accordance with the decision making power delegated to Parliament in the CKRA in that the National Assembly was to reject or approve the draft, but that it could not amend it (Cottrell & Ghai, 2004: 7). As such, this was thus not in conflict with the ideal of control of the agenda, as the agenda or contents of the proposed draft would

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<sup>78</sup> Rather the CKRC was to submit the final constitutional draft arrived at through the NCC "...to the Attorney-General for final 'technical revision'. The AG would then submit a Bill to Parliament for adoption as the new constitution, subject to popular approval through a referendum." (Andreassen & Torstensen, 2006: 2). However, the adoption in Parliament in December 2004 (following cooptation of opposition of KANU MPs into the GoK of an Act allowing for changes to the NCC draft by simple majority in Parliament made this possible (cf. chapter 3).

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have been controlled by both MPs as elected officials and the rest of the representatives at the NCC.

Furthermore, that MPs (both part of Government and part of opposition) throughout the constitutional review process in between the 2002 and 2007 elections at several occasions have opposed the policies with regards to reforming the constitution of Kibaki's government can be seen as indicating that Parliament has been strengthened compared to the previous Parliaments; this was a view expressed by some interviewees<sup>79</sup>. As such it could be argued that there has been a development towards Dahl's democratic institution of government decisions being controlled by elected officials.

### **5.5.2 Responsiveness**

However, these arguments are seriously negated by the significant problem of an experienced lack of responsiveness on behalf of political authorities (expressed by both observers and members of the demos interviewed) in the form that MPs have controlled the decisions of the Government in the review process to some extent -but that they have done so based in personal, narrow self interests rather than in the preferences of the electorate (Barasa Interview: 3; Kabelo Interview: 11; Muia Interview: 2; Buruburu Focus Group: 2; Westlands Interview 3: 1).

Unfortunately, this *de facto* lack of responsiveness on behalf of the elected officials towards the preferences of the Kenyan citizens with regards to constitutional reform seems to have been a general and serious factor impeding democratization in the constitutional review process throughout its course from 2002 to 2007.

Both the PSC drafts and the adoption of the Wako draft in Parliament in July 2005 were thus against the preferences of the majority of the Kenyan demos as represented at Bomas, in spite of opinion polls indicating that the majority of Kenyans supported the agreement made at Bomas regarding the form of government in the new

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<sup>79</sup> See e.g. Westlands Interview 3: 1; Barasa Interview: 3; and chapter 3.



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constitution, as well as despite massive public demonstrations in March and July of 2005 against changes to the Bomas draft<sup>80</sup>.

This lack of responsiveness was arguably further demonstrated during the phase of the review process after the referendum in November 2005 as the CEP appointed unilaterally by Kibaki concluded from its investigation into public opinion that the majority of Kenyans still preferred the Bomas draft and recommended an inclusive process as the way forward. However, these findings and recommendations did not effectively feed into the review process in the period until Parliament was dissolved in October 2007 in that even though the various proposals and negotiations on minimum reforms at times included measures to curtail the powers of the president, no adoption of constitutional reforms in any measure was reached in Parliament<sup>81</sup>. Adan Kabelo also remarked in this connection that minimum reforms were “...*not what Kenyans stood for, Kenyans stood for a complete constitutional change.*” (Kabelo Interview: 3). In addition to the thus pervasive lack of responsiveness, the relocation of the review process after the referendum to the level of the committees in which only a small selection of Government and opposition MPs, and at times certain members of civil society (organizations) participated, appears to have constituted a continuation of the problematic developments relating to *de facto* effective participation and control of the agenda that emerged in relation to the review process after the 2002 elections with the reconstitution of the PSC first in June 2004.

However, it did not appear from the interviews that this lack of democratization with regards to responsiveness (and as a result also regarding effective participation and control of the agenda) has been a new development, but rather a status quo situation compared to prior to the elections in 2002. Hence, as Gatere explained: “*Part of the problem with Kenya, some analysts say, is that it has been dominated by one class of*

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<sup>80</sup> Opinion polls showed in March, 2004 that 58 % of the polled supported a new constitution that would result in the creation of the post of an executive prime minister as the head of government and the president as the head of state (Phombeah, 2004: 2-3; BBC News, 2004b: 1-2).

<sup>81</sup> Nor was it pursued through an inclusive process, as participants from outside the political center were only included sporadically, reluctantly and to a minimal extent; cf. chapter 3 on the 15-member IPCC of August 2006 and the multi-sectoral forum with the MSC as its steering committee constituted by it in September 2006; the Parliamentary Committee on Administration of Justice, Law and Order; and the Inter-Party Parliamentary Group of February 2007.

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*people who have more or less refused change, because the balance still benefits them disproportionately...”* (Gatere Interview: 3).

To a large extent, the GoK and opposition were thus perceived across the three economic groups of the demos<sup>82</sup> as well as by the observers as being part of the same political elite or class and as having acted selfishly in pursuit of securing their own interests and positions throughout the review process, rather than having represented the interests of the people<sup>83</sup> (Gatere Interview: 1-4, 6, 13; Barasa Interview: 5; Kabelo Interview: 1- 3, 10; Muia Interview: 1). Extremely interesting, these findings thus clearly indicate that the basic property of responsiveness, which can plausibly be regarded as the necessary element for the relatively positive *de facto* developments with regards to certain of the fundamental institutions of democracy (analyzed in the above) to spill over into democratization in the form of a *de facto* appropriation with regards to effective participation and control of the agenda, has not yet become part of the political culture in Kenya at the national political level.

#### 5.5.3 Internalization of ‘responsiveness’ in the demos

Remarkably, however, it is possible that the fact that the referendum ended with a rejection of the proposed constitution can be at least partly interpreted as expressing a positive development in the demos in the form of a certain degree of internalization of the fundamental property of democracy, that is responsiveness of the political authorities to the preferences of the citizens. That this is a plausible interpretation is illustrated by the statement by a middle aged woman interviewed in the low income focus group interview that “... *we are the people, we have the power, we are the majority, they [the politicians] should do what we say.*” (Kariobangi Focus Group: 2). Similar statements were made by other participants during that interview as well as by Ian Gatere, when he assessed that “...*it is one of the changes you start seeing that people start believing that power comes from below*”. (Gatere Interview: 12).

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<sup>82</sup> Cf. Kariobangi Focus Group: 5; Buruburu Focus Group: 1-2; Westlands Interview 1: 2; Westland Interview 2; Westlands Interview 3: 1; Westlands Interview 4: 1-2; Westlands Interview 5: 1.

<sup>83</sup> As an example of this general perception, Dr. Daniel Muia thus stated that in the constitutional review process “...*what has really tended to happen is that the interests of the politicians really, married by partisan interests, are the ones that have dominated the process, so that ultimately it has not really been about getting a constitution in place, but securing individual interests.*” (Muia Interview: 1)

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(Kariobangi Focus Group: 5, 6) Arguably, further supporting such an interpretation is the fact that even though voting on the referendum largely followed ethnical lines, part of the reasons given by the no-side for why Kenyans should (as well as accounts for why they did by both low and high income interviewees, as well as one of the observers) reject the Wako draft was that it was the result of a non-democratic process led by Kibaki's government to pursue the interests of the MPs (Kariobangi Focus Group: 6; Westlands Interview 1: 4; Barasa, 2007: 34).

### 5.5.4 'Floor crossing'

Another type of events, also connected to the analyzed *de facto* lack of responsiveness, that has continued to take place in relation to the constitutional review process in the period focused on in the present thesis and which has constituted a lack of *de facto* development with regards to Dahl's institution of elected officials and ideal standard of control of the agenda is that of 'floor crossing' in Parliament. As shown in the case description, Kibaki has reshuffled his cabinet several times during the constitutional review process, whereby he has brought in not only new members from parties supporting him, but also members of the opposition without them defecting officially from their parties (Kabelo Interview: 12; Andreassen & Torstensen, 2006: 6). While this is by no means a new development in Kenya, during Kibaki's tenure the number of cabinet ministers and assistant ministers has grown to a historically unprecedented high with the majority of MPs holding a post in Kibaki's cabinet<sup>84</sup>. (Beetham et al., 2000: 37; Kabelo Interview: 3, 12; Muia Interview: 1; Kariobangi Focus Group: 6)

This has arguably constituted a major democratic problem, as it has decreased the potential of *de facto* control over government decisions by elected officials from the opposition in the sense that these reshuffles and increases in Cabinet positions may very well have been used deliberately as a means of silencing critical voices by means of co-opting or excluding parliamentarians from (extremely well paid<sup>85</sup>) government

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<sup>84</sup> Kibaki's Cabinet thus ended up having 33 ministers and about 80 assistant ministers out of 222 MPs with voting rights (Interview with Kabelo: 3; Torstensen et al, 2006: 8).

<sup>85</sup> In this connection MS Kenya governance officer Adan Kabelo critically stated that: "*It is corruption, because you appoint Cabinet ministers from the opposition, they are given 200.000 kshs*

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positions at will. This is especially so in that this practice has severely watered down the practical potential for Parliament to use its constitutional provision to pass a vote of no confidence in the Cabinet by simple majority. This can thus be seen as having constituted a lack of democratization in terms of control of government decisions by elected officials and as such also a problem with regards to the control of the agenda in that it has made it virtually impossible for the Kenyan demos to retrieve decision making power from government in connection with the review process through their elected representatives (Torstensen et al., 2006: 7).

The ‘floor crossing’ and unprecedented high number of cabinet posts has also meant that the participation of Kenyans in terms of having their preferences voiced at national level via their elected representatives has not been equal, in that the balance in Parliament has been eschewed non-representatively in favor of the preferences of the Government side; and as such, this also constitutes a lack of democratization with regards to effective participation. Hence, these problematic developments have also played a role in relation to the lack of *de facto* democratization with regards to the control of the agenda analyzed in the above in connection with that the constitutional review process after the NCC phase was largely limited to an agenda that did not include the option of a parliamentary system that the majority of Kenyans seemed to prefer

### **5.6 Free & fair elections and voting equality**

If Dahl’s institution of free and fair elections and standard of voting equality is extended to apply not only to the election of government executives and members of the legislature, but also to a national referendum, then the referendum held in Kenya in November 2005 can be seen as signifying a positive democratic development. As mentioned in the case description, in spite of minor violent clashes, the occurrence of some rigging and bribing as well as certain shortcomings at some polling stations, the referendum was by and large free and fair. The referendum thus constituted a first maintenance of the important democratic institution of free and fair elections

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*extra as salary every month. That is bribing them. You appoint 80 Assistant Ministers who do nothing [...] and they are paid a 100.000 kshs [in addition to their salaries as MPs]...” (Kabelo Interview: 12).*

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established with the 2002 elections, and may as such be seen as a positive *de facto* development of democratization<sup>86</sup> (UNDP, 2005: 1; Andreassen & Torstensen, 2006: 4-5; Barasa Interview: 10). Furthermore, the turn-out was 52.4 %, which although not impressive, is arguably high enough to show that a certain degree of equal voting opportunities existed.

In terms of *de facto* inclusion of adults in relation to the referendum, Kabelo did explain that it had been difficult for some people in rural areas, especially in the northern part of the country to access the polling stations (supported by a turn-out for North Eastern Province of only about 22 %), as well as with regards to issuing of voting ballots to the youth having recently obtained the right to vote (Andreassen & Torstensen, 2006: 6; Kabelo Interview: 9, 10). Although these are serious problems, they are not new in the Kenyan context compared to the conditions characterizing general elections, and the general situation thus seems to have been one in which the relatively inclusive *de jure* recognition of adults as citizens has also largely been reflected in a *de facto* potential for citizens to be part of the democratic process; i.e. the standard of inclusion of adults (Muia Interview: 14; Barasa Interview: 10, 11; Beetham et al., 2000: 29).

Finally, despite the referendum only being guiding in principle and not binding, the president accepted his and his government's defeat, meaning that at the decisive stage regarding Kenya's future constitution, the choices of the Kenyan demos were taken into account (cf. Dahl's standard of voting equality). That Kenyans experienced the first referendum in the country's history and that it lived up to the requirements of being free and fair, as well as to a certain extent approached the ideal standard of voting equality thus arguably constitutes an important development in Kenya's democratization process. (Gatere Interview: 11-12; Andreassen & Torstensen, 2006: 3-4, 6; Barasa, 2007: 34)

Moreover, looking at the final stage of the Bomas Conference when the draft was approved by the majority of the 629 participating delegates (thereby fulfilling the

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<sup>86</sup> Although it should be noted here that the highly questionable character in terms of being 'free and fair', turmoil, and violence in relation to the 2007 general elections has put the frailty and lacking consolidation of this institution in Kenya on display (Nielsen, 2008: 1).

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formal requirements of the process) through Dahl's theoretical lenses of voting equality, the members at the Bomas had equal voting opportunities, the votes counted as equal, and the votes resulted in the approval of the draft constitution. As such, the process of approving the Bomas draft within the conference can be seen as having been in accordance with the standard of voting equality and thereby as a positive experience in Kenya's democratization process. (Phombeah, 2004: 1-2; BBC News, 2004a: 1)

Conversely, a crucial point is, however, that due to the lacking responsiveness analyzed in the above<sup>87</sup>, the essence of voting equality can be said to have been missing in that what citizens could choose between did not include the alternative that the majority seemed to prefer; and which would arguably have led to the most positive developments regarding democratization as it was the most progressive draft (cf. the case description or Torstensen et al., 2006: 11, 13-14, 17, 21, 32, 37, 42). As Adan Kabelo put it: *"...the referendum was the loss of many years of struggle just because the government decided to mutilate the draft that was supposed to have been presented for the referendum from Bomas."* (Kabelo Interview: 2). In other words, the democratic value of the demos having equal voting opportunities, their votes counting as equal, and these choices being taken into account in the decisive stage within the constitutional review process is questionable in that the range of options available for voting did not include the Bomas draft; which *was* brought about in a participatory and somewhat democratic fashion and which seemed also to be the preferred draft of the Kenyan citizens (Andreassen & Torstensen, 2006: 3; Sihanya, 2005: 8; Mulama, 2007: 2).

The otherwise high potential for democratization developments relating to voting equality in connection with the referendum was thus significantly hollowed out by the serious problems in the review process in between the elections in 2002 and 2007

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<sup>87</sup> Relating to the PSC changes made to the Bomas draft that resulted in the production of the proposed constitution to be the subject of the referendum despite the NCC stage and opinion polls (and later also the results of the investigation into public opinion by Kibaki-appointed CEP) indicating that the Wako draft was not the draft that the majority of Kenyans wanted to vote on (cf. chapter 3).

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relating to responsiveness, effective participation and control of the agenda discussed in the above.

### **5.7 De jure democratization in the review process**

As the case description has shown, the constitutional review process in Kenya in the period between the general elections in 2002 and 2007 failed to produce any kind of constitutional change. Hence, in that form, no developments with regards to *de jure* democratization were created. The closest Kenya has come to significant developments with regards to *de jure* democratization in relation to the constitutional review process in the period therefore appears to be the adoption the Political Parties Act immediately prior to the dissolution of Parliament on October 23, 2007<sup>88</sup> (Kibaki, 2007b: 1-2; Fortunate & Mutua, 2007: 1-3).

This act is to regulate the funding and registration of political parties, an area that was also treated in the Bomas draft (but not in the Wako draft), and in the assessment of the Executive Director of Kenya's Centre for Multiparty Democracy, it "...is a significant step in Kenya's democratic development." (Netherlands Institute for Multiparty Democracy, 2007: 1). (Torstensen et al., 2006: 31-32). The act provides for funding of political parties from the Treasury via a political parties fund administered by a registrar<sup>89</sup> to change the current practice in which most of the budgets of the political parties are provided by party founders who use their positions to dictate the policies of the parties. Although certain reservations have been aired in connection with a risk of vulnerability to corruption in the form of a provision allowing for individuals to donate up to 5 million shilling per year, it thus appears likely that the act signifies a *de jure* improvement in relation to effective participation in that parties may come to provide for more equal and effective opportunities for the people to voice their preferences. Furthermore, arguably as another development in the direction of effective participation, while until now there have been no rules governing the registration or conduct of political parties as such, the new act places

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<sup>88</sup> Cf. the delimitations of the thesis in chapter 2.

<sup>89</sup> "80 % of the fund is disbursed proportionately, based on the number of votes for the party in the last general elections, 15 % is equally divided amongst all qualifying political parties and 5 % is reserved for the administrative costs of the fund." (Netherlands Institute for Multiparty Democracy, 2007: 1).

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certain demands on parties that may also improve the potential for equal and effective expression of preferences: *“The party’s governing body must include members of all provinces and at least one third of the leadership positions is to be reserved for women. National membership and the diversity of Kenyan communities needs to be reflected if a party applies for registration.”* (Netherlands Institute for Multiparty Democracy, 2007: 2). Moreover, the act provides measures for fighting the culture of ‘floor crossing’ mentioned in the above and as such it is possible that it will help in countering the *de facto* lack of democratization in relation to control of government decisions by elected officials, effective participation, and control of the agenda analyzed in the above. The act can therefore be interpreted as a *de jure* development to appropriate these elements of democracy outlined by Dahl<sup>90</sup>. To what extent it will succeed in doing so in practice is, however, yet to be seen. (Netherlands Institute for Multiparty Democracy, 2007: 1-2; Fortunate & Mutua, 2007: 1-3; The Nation, 2007a: 3)

### **5.8 Summary: the main developments of democratization**

In sum, Kenyan democratization has arguably to some extent developed towards more freedom of expression, associational autonomy, more and better available information from alternative sources and a somewhat more enlightened understanding in the case of the constitutional review process. There have also been positive developments with regards to voting equality and a continuation of the important democratic institution of free and fair elections attained with the 2002 elections. However, as the analysis of the developing Kenyan democracy has shown concerning

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<sup>90</sup> It should be noted here that the Political Parties Act was based in a draft prepared by the KLRC and other participants through the thematic group on constitutional development (TGCD), but amended in certain respects. As the Chairman of the KLRC with regret expressed it: *“we had very clear provisions that parties that would qualify to be funded by the state would have to obtain a certain ration of votes and would have to have a certain number of members in Parliament and they would also have to take into account the number of women MPs that the party has managed to get into Parliament. And then the Parliament itself changed all those provisions, the provision where we had been talking about taking into account the number of women MPs was changed to mean women who are officials of a political party, so you find that, which is really not very important compared to having a member of Parliament. The issue of taking into account the number of MPs that each party has was changed to parties that just have one Member of Parliament of 10 councilors in the local authorities to apply for state party funding; so a lot of changes, which unfortunately we are not in control of.”* (KLRC Interview: 4).



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elected officials, effective participation, and control of the agenda, the essence of democracy, the *de facto* responsiveness of political authorities to the preferences of the demos is still largely missing in Kenya's democracy in between elections; although it should be noted that slight changes in terms of citizens demanding responsiveness on behalf of the political authorities seem to have begun to emerge. Moreover, although certain positive *de facto* developments have been created in the review process (and especially the NCC stage), the overall picture arrived at through the analysis with regards to elected officials, effective participation and control of the agenda has been that democratization is largely still lacking in these respects in Kenyan practice. Furthermore, despite minor last minute *de jure* developments with regards to primarily effective participation with the Political Parties Act, the five years of constitutional review have not produced the type of developments that could arguably have constituted the most significant contribution to the country's democratization in this phase, namely a constitutional framework to secure *de jure* the institutions needed in a real world democracy to enable the approaching to the democratic ideal standards outlined by Dahl.

## **Analysis Part 2**

### **Explaining democratization in Kenya's constitutional review process**

In this explanatory, second part of the analysis, the main developments with regards to democratization analyzed in the previous chapter are sought explained through the use of Rudbeck's model, historical institutionalism, and Foucault's discourse theory. To provide optimal overview of the different possible partial explanatory factors relating to the different variables focused on by each of the theories, the analysis has been divided into three chapters, in each of which the contribution to the analysis by one of the three explanatory theories is developed.

### **6. Kibaki's power strategies and popular contention in the constitutional review process**

Using Rudbeck, the dynamics between, on the one hand, the changing power strategies of Kibaki and his supporters in the constitutional review process as well as the institutions and networks that they rely upon and, on the other hand, the changing potential for and actions of popular contention in the case are analyzed. This is performed in three different phases<sup>91</sup>, thereby providing partial explanations for why the analyzed *de facto* and *de jure* developments regarding democratization (and the lack thereof) in the constitutional review process have been created.

#### **6.1 The beginning of Kibaki's tenure**

##### **6.1.1 Building legitimacy**

When Kibaki came to power, he was riding on a wave of positivity and euphoria. The 39 year authoritarian rule of KANU had ended and gone was Moi who had continued Kenyatta's practice of transforming Kenya into a constitutional authoritarian state by concentrating executive power in the Presidency, who had resisted democratization in the 1990s (cf. Appendix 1.A), and during the rule of whom the country's economic

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<sup>91</sup> The beginning of Kibaki's tenure, changes to the Bomas draft and prelude to the referendum, and the post-referendum period.

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growth had stagnated and even turned negative in his last tenure (Harding, 2002: 1-2; USAID Kenya, 2006: 1). In his place, 62.2 % of Kenyans voted in the Kikuyu Kibaki in the first free and fair elections of the country based on policy campaign platform of a comprehensive reform program to ensure economic growth, more jobs, free primary education, better governance, lower corruption, a Kenya united across ethnic lines (as in the NARC) as well as specifically promising Kenyans a new constitution within 100 days of his coming into office (Udvikling, 2007: 16-17; Thorup, 2003: CREA Interview: 12; Carson, 2003: 4). Hence, Kibaki and his supporters through the election campaign succeeded in bonding with the ruled by means of convincing the population that NARC was the preferable option and that it would rule based in and to promote generally accepted rules of governance<sup>92</sup>. By employing a strategy of legitimacy, Kibaki was thus in the outset of his tenure able to enjoy levels of legitimacy unprecedented in Kenyan presidential history.

### **6.1.2 Forming of internal alliances with politicians**

Kibaki's initial high level of legitimacy was also made possible by the forming of an internal elite alliance through NARC that joined the opposition LDP (led by the Luo Raila Odinga) and National Alliance Party of Kenya (NAK)<sup>93</sup> together against KANU's presidential candidate Uhuru Kenyatta. The measure of reciprocity in this alliance was constituted through the Memorandum of Understanding (MoU) and meant that the LDP faction of NARC, in return for backing Kibaki as the presidential candidate, would get Odinga assigned to the post of executive prime minister that was to be created by the adoption of a new constitution within 100 days<sup>94</sup> (Torstensen et al., 2006: 3; Andreassen & Torstensen, 2006: 3; CEMIRIDE Interview: 25).

Kibaki's coming into power and the majority gained in Parliament (125 out of the 210 elected members) by NARC via the establishment of that elite alliance was also enabled by the tradition of voting largely along ethnic lines in Kenya. The

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<sup>92</sup> Cf. Rudbeck's definition of strategies of legitimacy.

<sup>93</sup> Comprised of the Democratic Party (Kibaki's party), FORD-Kenya, and the National Party of Kenya (Thorup, 2003: 7).

<sup>94</sup> The understanding was also that, based in the recommendations in the Bomas draft, a bill would be prepared by the AG and tabled for adoption in Parliament, which would not have authority to amend it (Torstensen et al., 2006: 3).

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relationship between politicians as ethnic leaders and the members of their ethnic group may thus to a certain extent be regarded in terms of patron-client relationships (cf. Rudbeck's model) in which candidates present themselves as running on behalf of their ethnic group and people vote for candidates from their own ethnic group to try to ensure that their community will get access to resources through their leader(s)<sup>95</sup>. The latter then use the support of these ethnic clientele networks as a bargaining chip in national level politics<sup>96</sup>. (CRADLE Interview: 15-17; Gatere Interview: 21; BFD 2a Interview: 11)

The internal elite alliances of NARC that Kibaki relied upon for governing in the beginning of his tenure was thus based upon alliances between Kibaki and politicians from different ethnic groups (relying on clientele networks along ethnic lines), in which Kibaki's candidature received the support of the latter (and to a large extent the votes of their ethnic groups<sup>97</sup>) in return for Cabinet seats in the Government, as shown in Table 6.1. (Thorup, 2003: 2-6).

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<sup>95</sup> As Gatere expressed it during the conversation with the researcher, leaders take “...*the easy option of hijacking their ethnic group and saying ‘it is our turn at the high seat, it is our time to eat.’*” (Gatere Interview: 21-22).

<sup>96</sup> However, it seems that the extent to which these relations can be understood as reciprocity-based patron-client networks is limited in how they operate in that “...*they [ethnic political elites] clearly do not give enough money to the poor people in their tribes, because they continue to live in poverty. Even the Kikuyu who are now in power. There are slums full of Kikuyu people; they clearly did not get their share of the cake...*” (BFD 2a Interview: 11). Ethnicity is therefore analyzed further using historical institutionalism.

<sup>97</sup> As Kabelo expressed it, “...*for the first time Kenyans voted in unison, the communities that would otherwise never vote for each other, that time they voted for him [Kibaki]. For example, the Luos are never friendly to the Kikuyus, but the Luos voted for him almost 100 %.*” (Kabelo Interview: 14)

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Table 6.1: Ethnicity of Cabinet Members, 2003

<i>Ethnic group</i>	<i>Number of cabinet members</i>
Kikuyu	5
Abaluhya	5**
Luo	4
Kalenjin	2
Kamba	2
Meru	2
Mijikenda (from Coast Province)	2
Maasai	2*
Embu	1
Somali	1
* Includes Minister of Education, Professor George Saitoti.	
** Includes Attorney General Amos Wako.	

(Thorup, 2003: 7)

Moreover, Kibaki also made dramatic changes in the civil service by replacing around  $\frac{3}{4}$  of the permanent secretaries and senior officials with members of his own ethnic group, thereby indicating that the ethnic patronage networks have continued to be an important foundation for the governing of Kenya's President. Apart from arguably extending his presidential powers to lower levels of government, due to the record of inefficiency and corruption of some of these civil servants removed, the move also served to strengthen the legitimacy of Kibaki's rule and hence his ability to rely on legitimacy as part of his strategies for governing (Barasa Interview: 13; Thorup, 2003: 8).

In this connection, elite alliances along ethnic lines -trading Cabinet posts (and the attached status, power and high wages) for political loyalty- also formed part of the basis for Kibaki's governing. He thus appointed members of 'the Kikuyu faction' and the associated ethnic communities of the Meru and Embu of NARC to key ministries, such as Murungaru as Minister of State, Mwiraria as Minister of Finance (who quickly secured the release of \$400 million from the World Bank and the International Monetary Fund (IMF), as well as the former human rights lawyer Murungi as Minister of the new MoJCA.

The latter replaced the Chief of Justice Chunga who was associated with the offenses of Moi's regime and was resigned along with other mistrusted members of the

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Judiciary. Interestingly, taken together with the reform programs of the new government mentioned in the above and the appointment of the much respected Chief of the Kenya Transparency International Branch, Githongo, as a permanent secretary of the Office of the President, these moves from Kibaki's hand can be interpreted as initial steps towards alliance building with DPs by sending signals of openness and of seriousness with regards to his campaign pledges of anti-corruption.

### **6.1.3 Forming of internal alliances with members of civil society**

The appointment of Githongo as well as that of Murungi can also be seen as part of a strategy of building elite alliances with leading personalities from CSOs (including the constitutional reform movement), who were co-opted into Kibaki's government in a trade where the former members of civil society gained wealth and influence while strengthening the reform image of the Government and thereby also its legitimacy in the eyes of the public as well as of the DPs<sup>98</sup>.

Further strengthening his basis for relying on legitimacy as a power strategy, Kibaki fulfilled his campaign pledge of establishing free primary education in his first major policy decision, thereby earning widespread goodwill across the country. He also appointed more than a dozen female politicians to Cabinet and sub-cabinet posts, which, apart from strengthening his basis for legitimacy, also can be seen as the initiation of an 'appeasement strategy' to take some of the edge of the constitutional reform movement ahead of Bomas (in which affirmative action was to be an issue close to the hearts of the many women's organizations) (Carson, 2003: 2-3; Thorup, 2003: 8-9; BFD 2b Interview: 9-10; Gatere Interview: 1; Kabelo Interview: 14)

Also relevant in this connection is that the NARC MoU before the 2002 elections was also signed by CSOs, whereby it arguably also constituted a form of elite alliance between NARC and CSOs (Torstensen et al., 2006: 3). This can be seen as having bought the new government time and peace with regards to the review process in its first days of government as well as contributed to its pro-reform image, while acting

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<sup>98</sup> Examples include Kibwana (Environment), Kituyi (Trade), Murungi, Kibonya (Minister of Finance), Karua (Minister of Justice and Constitutional Affairs after the Anglo Leasing Scandal), Wamwere (Information assistant minister), Koome (Judge), Wanjala (Deputy Director of the KACC), and Kuria (either in Government or closely allied to it, cf. Appendix 6) (BFD 2b Interview: 10-11; Namwaya, 2006: 4).

as an assurance to the CSOs that NARC would follow through with the review of the constitution and do so based in the Bomas draft.

#### **6.1.4 Forming of external alliances with DPs**

In addition to these internal alliances, at least partly due to its choice of strategies both in its election campaign and immediately after the elections, Kibaki's government was able to create external elite alliances with donors via its comprehensive reform agenda, as part of which especially the GJLOS RP was presented as a good opportunity for the GoK and donors to initiate cooperation. On the one hand, Kibaki's government thus managed to found a long-term relationship with donors through which it would receive funding for material modernization (Phase 1 of GJLOS) and reform (Phase 2 of GJLOS) of the sector as well as perhaps unofficially resources to maintain its patron-client networks within government<sup>99</sup> (cf. Rudbeck's model on external elite alliances). Donors, on the other hand, after many years of struggling with Moi's regime suddenly found themselves in a situation where they could work with the GoK via a long term commitment and a first attempt at a Sector Wide Approach to reform in Kenya. Illustrating this change in the relationship between the GoK and donors, a representative of a BFD explained:

*"I think the biggest reason that we started supporting it right after the 2002 elections was the optimistic mood that Kenya was on and I think that was read as an opportunity because everyone thought that once you set Moi aside [...] Kenya could really take a step forward..."* BFD 1 Interview: 3).

The GJLOS can thus be understood as being part of the institutional framework of reform programs on which Kibaki's government based its external alliances with DPs and as such as instrumental for Kibaki's capacity to govern through a reform agenda largely controlled by the GoK (cf. Appendix 1.C). (BFD 3 Interview: 1; BFD 2b Interview: 5).

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<sup>99</sup> The plausibility of the latter is possibly supported by the continuing problems with corruption during Kibaki's rule (Aluanga, 2005: 2-3).

### **6.1.5 A net move towards strategies of legitimacy and elite alliances**

In accordance with what one would expect from Rudbeck's model following a democratic transition, it thus appears that the beginning of Kibaki's tenure, compared to the last of Moi, constituted a net move towards a heavier reliance on strategies of legitimacy and especially towards external elite alliances with DPs, as well as internal elite alliances with both prominent reform figures of civil society and ethnic elites of other parties, most significantly Odinga's LDP and the Luos.

These changes in power strategies should probably be interpreted partly in the light of the developments of the latter part of Moi's rule during which he struggled to resist mounting popular contention in the form of mass demonstrations and rallies in favor of a new constitution led by CSOs and supported by opposition parties. Moi had sought to repress these calls for a new constitution and criticism of his regime by, among other means, using the police to strike brutally violently against demonstrators and citizens criticizing the regime. However, the employment of these strategies of violence had led to deteriorating relationships with DPs (withholding of \$400 million in July 1997), in the long term it had failed in decreasing popular contention in favor of constitutional reform and Moi was gradually forced to accept the constitutional review process along the lines of the CKRA under heavy domestic and international pressure (cf. Appendix 1.A; Cottrell & Ghai, 2004: 3-5; Barasa Interview: 7; Muia Interview: 15).

It thus seems quite plausible that Kibaki calculated against this background that the costs of continuing to repress the freedom of expression and associational autonomy (that had already begun to increase towards the end of Moi's rule) would by far exceed the costs of partly giving in to the popular pressure for democracy and allowing the developments of a somewhat expanded freedom of expression and associational autonomy analyzed in the previous chapter. Probably Kibaki even gained from thus decreasing the repression of the popular pressure for an opening up the democratic space, as this was also necessary for Kibaki to be able to strengthen his governmental foundation by alliance building with civil society members and DPs, and thereby letting out some of the pressure for democratization that had been



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building up under Moi. As such it is plausible that even the choice of increasing the freedom of expression and association was a conscious part of the before mentioned ‘appeasement strategy’ of Kibaki. Calculated against the background of the outlined developments of the 1990s and Kibaki’s campaigning pledges and pro-reform image, it would also have been likely to cause great disappointments and dissatisfaction already from the outset of his tenure if Kibaki to the same extent as Moi had sought to repress these democratic freedoms. It simply would not have gone hand in hand with Kibaki’s need for forming elite alliances and securing a solid legitimacy base ahead of the NCC review of the constitution (BFD 2b Interview: 5; BFD 3 Interview: 1).

### **6.2 Bomas and the prelude to the referendum**

#### **6.2.1 Changing interests and elite alliances**

As Rudbeck’s model emphasizes, the interests of elites are not necessarily constant throughout a democratization process and hence, only a few months into the NCC the interests of Kibaki and his supporters and those of Odinga’s LDP were clearly drifting apart. In accordance with what one would expect from Rudbeck’s model, now being in the position of the incumbent, Kibaki’s interests appeared to have shifted towards maintaining that power position and he and his supporters began arguing that most powers should stay with the Presidency and ruled out the creation of the post of executive prime minister<sup>100</sup> (BFD 4 Interview: 18; BFD 2b Interview: 11; Torstensen et al., 2006: 3). As such, the changed interests and their behavioral realization in the strategies to avoid losing their newfound power as a result of the constitutional review process play a central part in explaining the lack of developments found in the previous chapter with regards to *de facto* responsiveness, control of government policies by elected officials, effective participation, and control of the agenda.

Hence, first of all, Kibaki arguably continued the ‘appeasement strategy’ analyzed in the above as a way of strengthening his own relative power by weakening the unity of

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<sup>100</sup> This is not to say that Odinga’s LDP faction of NARC was interested in the curtailment of the excessive executive powers of the Presidency as such, but probably rather that this change in the expressed interests of Kibaki’s faction meant that they saw the realization of their interests of achieving a share of executive power fading in the horizon (BFD 2a Interview: 11).

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the constitutional reform movement and the public calls for a comprehensive and progressive review of the constitution by accommodating certain elements of the review agenda. In the words of one of the interviewed governance officers of the BFD 2, “[t]he women cry, and cry against... a program for a gender commission is founded; people say that there is too much corruption, so he allows the Kenya Anti-corruption Commission [...] and he makes sure that the Kenya National Commission on Human Rights is allowed to shed light on problems.” (BFD 2b Interview: 5).

In internal elite alliance terms, Kibaki thus gave away small victories to the groups of citizens behind the popular contention prior to the 2002 elections in a manner that would not infringe on his constitutionally vested presidential powers and perhaps even weaken the demand for significantly limiting these executive powers in a new constitution. (4 CS Interview: 4; Muia Interview: 16; BFD 2b Interview: 5)

Moreover, in the face of not being able to avoid the adoption of a parliamentary system of government in the Bomas draft that would entail a significant transfer of executive power to the post of prime minister<sup>101</sup>, Kibaki’s faction after the end of the NCC stage began trying to change the draft in the form of establishing elite alliances through the PSCs. Kibaki’s faction and the LDP faction of NARC in June 2004 thus agreed on an executive power sharing compromise at Naivasha (November 2004).

However, this would still mean a curtailment of the powers of the president and in July 2004 Kibaki succeeded in incorporating opposition MPs from KANU into government, thereby enrolling them into his clientele network<sup>102</sup>. This was a move that made the Kibaki wing less dependent on Odinga’s LDP faction when the draft

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<sup>101</sup> The adoption of the Bomas draft by the participants of the NCC by which the majority of the participants (of which most were not members of the elites) thus made a public claim to the political authorities that they wanted the new constitution of Kenya to include different measures to significantly limit the powers of the presidency (Cf. the case description or Torstensen et al. 2006). While this act of popular contention was limited in numbers, it was made by delegates who had been chosen to represent the Kenyan people and it constituted an attack on the basic foundation of Kibaki’s executive powers.

<sup>102</sup> Possibly indicating that such clientele networks based on patronage distribution have constituted a significant part of the foundation of governance also under Kibaki, the Kibaki Government was in January 2005 confronted with serious allegations that corruption had cost Kenya an amount equal to almost 20 % of the state budget during the first two years of his rule (Aluanga, 2005: 2-3; BFD 4 Interview: 14-15).

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was to be approved in Parliament<sup>103</sup>, and which therefore enabled Kibaki to controversially reconstitute the PSC in May 2005 so that it excluded the LDP members. This further made it possible to produce the Kilifi draft in June 2005, which largely maintained the presidential executive powers and formed the main basis of the Wako draft that was prepared by the AG in August 2005 and subjected to the referendum. (Andreassen & Torstensen, 2006: 3)

These largely successful changes in the networks on which Kibaki based his strategies of internal elite alliances with the political elite thus partly explain why the lack of *de facto* democratization analyzed in the previous chapter with regards to responsiveness, effective participation and control of the agenda was created. Kibaki moreover hereby succeeded in not only avoiding giving up executive power to any significant extent, but also in making sure that the whole preliminary phase ahead of the referendum, as well as the referendum itself, would be revolving around a draft that, if adopted, would not limit the executive powers of the Presidency more than he and his close internal alliance partners had decided that they could accept<sup>104</sup>.

Although Kibaki sought to maintain the levels of legitimacy that he and his government had enjoyed in the beginning of his tenure by repeatedly stating his commitment to enacting a new constitution (cf. the case description), as the analysis of developments with regards to *de facto* responsiveness in the previous chapter showed, he did largely not succeed in this. Hence, his reliance on internal elite alliances for resisting losing executive power did not come without costs. Yet, given the essentiality of the constitution as the fundamental institutional basis for his

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<sup>103</sup> Especially since the new alliance with KANU MPs also contributed to making possible the adoption in Parliament in December 2004 of the Act to provide for changes to the Bomas draft by simple majority in Parliament (cf. chapter 3).

<sup>104</sup> The thus beginning breakdown of the Kibaki/Kikuyu/NAK – Odinga/Luo/LDP alliance was as such a defining moment in Kenya's democratization process. Not only in the case of the constitutional review, but also with regards to the general elections in 2007 did this arguably play an extremely significant role, as it appears unlikely that the conflict regarding the election outcome between these two factions as well as the violent confrontations and killings involving especially Luo and Kikuyu would have occurred if Kibaki had honored the MoU and the coalition had continued to exist. Hence, this underlines the centrality of understanding the constitutional review process, as it will probably have consequences for Kenya's further democratization process (Nielsen, 2008: 1; Frederiksen, 2008: 1; DR, 2008b: 1).

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capacity to govern, the costs incurred from resisting giving up executive power in a new constitution would have to be extremely high in order to exceed the costs that giving up these powers would represent to Kibaki and thereby make him give in to the demand for curtailing the executive powers of the presidency<sup>105</sup>.

### 6.2.2 Decreased potential for popular contention

However, the strategy of building elite alliances with leading members of civil society as well as with DPs significantly weakened the resource base of the constitutional reform movement led by CSOs and as such the potential for popular contention to pressure Kibaki to accept curtailing of the presidential powers by striking against the networks and institutions that he had based his power strategies on. The constitutional reform movement was thus weakened relative to Kibaki's government in that *"...they lost a lot of the leadership to the political front because a lot of the leaders became appeased and those who came to fill the gap were not able to carry the same sort of momentum..."* (Gatere Interview: 1). In this connection, one of the interviewed governance officers thus noted that *"...the reformists [in government] are part of the strategists sucking up the pressure for a new constitution."* (BFD 2b Interview: 11).

Moreover, in terms of funding for the CSOs that had been at the forefront of the reform movement, the new external elite alliances between Kibaki's government and the DPs, of which GJLOS has been the most significant institution, had very concrete consequences<sup>106</sup>. Whereas the aid of donors in the democracy and human rights sector prior to the 2002 elections had been concentrated as support to CSOs, the new alliance with the GoK on GJLOS meant that the financial focus of the donors shifted in favor of funding for the state, reportedly resulting in an 83 % fall in donor funding to democracy and human rights NGOs from more than KSh 3 billion per year to KSh500 million. The remaining donor funds of Ksh 2.6 billion go to the government owned GJLOS Programme, which does not include support to civil society.

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<sup>105</sup> Cf. Rudbeck's Dahl-inspired proposition.

<sup>106</sup> As the interviewed governance officer of CRADLE, the civil society focal point of GJLOS, expressed the problematique regarding funding to CSOs: *"...you need to realize that immediately after the elections [in 2002], funding moved from civil society to government. So of course, whether we like it or not, civil society will have to be affected..."* (CRADLE Interview: 6).

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At the same time, the creation of GJLOS can also partly be understood as an attempt on behalf of Kibaki's government to establish an elite alliance with CSOs in yet another respect, which would allow CSOs to partake in the thematic group TG) meetings of the TGCD (and others) together with representatives of the Ministries, Departments and Agencies (MDAs) and DPs, while it would contribute positively the GoK's progressive, pro-reform image.

Furthermore, the changes that occurred after the 2002 elections analyzed in the above where Kenyans were optimistic that constitutional change was on its way as Kibaki's government had pledged, the comprehensive reform programs of the government, as well as the outreach to both donors and civil society can be seen as constituting significant changes in the political opportunity structure in Kenya.

Importantly, this meant that the CSOs that had been on the forefront of the constitutional reform movement now found themselves facing new types of challenges, resulting in what some have termed as a situation of 'perpetual paralysis of civil society' in which it was reduced to waiting for the government to initiate the NCC in accordance with the MoU. In the words of Patrick Onyango of 4Cs: "...we felt that 'yes, now we can get the reform from inside, now we can engage them'. So there was a feeling of inactivity, of people waiting to see these reformers inside there taking the push for the process." (4Cs Interview: 4).<sup>107</sup>

Moreover, the expansion of the political space that took place after the referendum in the form of increased freedom of expression and to a certain extent also heightened associational autonomy seems actually to have weakened the constitutional reform movement relative to Kibaki's government in the sense that, in the words of Dr. Muia, "...they were not as aggressive as it were; also because most of the issues related to the political space that they wanted [had] already been created." (Muia Interview: 15).

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<sup>107</sup> As the governance officer of the BFD 4 expressed the difficulties of civil society: "They were used to a situation in the past where, because the government was so bad nobody worked with government, all our funds for human rights went to civil society. So when GJLOS emerged as a program, civil society was not quite sure how to deal with that –and also because in the past they had not had a direct relationship with government, it was mostly a confrontational one." (BFD 4 Interview: 12).

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Kibaki's power strategies of elite alliances and legitimacy thus seriously weakened the potential of CSOs to through popular contention pressure Kibaki to accept giving up executive power, as they were faced with a new opportunity structure, a decreased resource base, as well as power strategies based in new institutions and networks. As such, this contributes to explaining the creation of both the lacking developments with regards to *de facto* and *de jure* democratization in the review process. (NCEC Interview: 4; 4Cs Interview: 4, 12-13; CEMIRIDE Interview: 15-16; Muia Interview: 15; Namwaya, 2006: 1-4; BFD 1 Interview: 10; BFD 2b Interview: 5; CRADLE Interview: 6, 14)

### **6.2.3 Popular contention in the review process until the referendum**

The first acts of popular contention under Kibaki's rule came already in August 2003 as a reaction to the killing of the Luo university professor in charge of the discussions on the reduction of the powers of the president at the NCC. Yet, the demonstrations that followed the killing did not amount to a hard blow against Kibaki's government, but rather as destabilizing the discussions at Bomas<sup>108</sup>. The numbers of the demonstrators were only in the hundreds, only attended by university students, it was never proven who was behind the killing, and the reaction on behalf of the DPs was limited to a press release urging the country to push the process onwards (BBC NEWS, 2003a: 1; Harding, 2003: 1-2).

The responses to the changes made to the Bomas draft by the Kibaki selected members of the political elite came in the form of public demonstrations outside Parliament against MPs amending the Bomas draft in both March and in July 2005. The police responded by violent means in both cases and in the latter case demonstrations and riots lasted several days and police arrested leading members of

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<sup>108</sup> Which may be seen as surprising considering that the incident might constitute the first indication of a reliance upon strategies of violence of Kibaki's faction in the NARC government as some interpreted it as a warning to Odinga and the LDP regarding their role in demanding for the creation of the post of a prime minister. This is especially so since none of the interviewees, including donors, with whom this issue was discussed were dismissive of this interpretation (cf. Appendix 6).

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the CSOs that had organized the demonstrations<sup>109</sup>. While it appears that the police has protected the interests of the political elite and Kibaki and his allies specifically (and as such again indicating that strategies of violence have been employed under Kibaki's rule, although in a more targeted and civil looking form than under Moi<sup>110</sup>), these acts of popular contention did clearly not constitute sufficient popular pressure for MPs to abstain from passing the proposed changes to the Bomas draft in July 2005. This may have been because the message of the latter demonstration was clouded by the fact that it escalated into youths throwing stones at the police and looting taking place, making it easier of MPs and the police alike to disregard the turbulent days as being the result of troublemakers planning chaos and mayhem. Furthermore, considering that corruption has continued to be a problem under Kibaki's government and involving directly some of his close allies and in that bribing reportedly was part of the game ahead of the voting at Bomas from both sides of the political divide<sup>111</sup>, it is not completely unlikely that patronage played a part in securing the majority vote in Parliament that passed the Kilifi proposals. (Kina Interview: 13,16; Cottrell & Ghai, 2004: 27; BBC News, 2005d: 1; Matheson, 2005: 2; BBC News, 2005b:1-2; BBC News, 2005c: 1; fidh.org, 2005: 1-3)

As such Kibaki managed to largely take the edge of the whole constitutional reform movement by forcing the leading CSOs and his main political opponents to spend time and resources (which for the democracy and human rights CSOs had already been greatly reduced as a result of the GJLOS elite alliance of the GoK with DPs) on a proposed constitution that did not include the central issues of curtailing the presidential executive powers that they had been fighting for.

In addition, GJLOS had also proved a strain on CSOs, given their decreased access to donor funding by constituting a lot of extra hours of preparation and meetings in the

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<sup>109</sup> This also meant that resources were extracted from these CSOs as their leaders had to show in court more than 42 times as they were being prosecuted before they were cleared of the charges (Kina Interview: 3)

<sup>110</sup> As one of the interviewed governance officers of the BFD 2 put it: "*He [Kibaki] is a bit like the snake killer: just the head. But Moi was mass, Moi was mass; there would be more broken skulls, more broken bones.*" (BFD 2b Interview: 18).

<sup>111</sup> In the words of the Chairman of the KNCHR, at Bomas "*...bribery was going on -on every side delegates were bribed like you can not believe by everybody...*" (KNCHR Interview: 2).

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TGCD (and others) with no extra funding to finance the extra hours needed to engage meaningfully in GJLOS.

As corruption allegations were mounting against the government, including ministers engaged in GJLOS, and it was becoming clear that there would be a referendum many CSOs began responding to the perceived anew changing political opportunity structure by pulling out of GJLOS. (CEMIRIDE Interview: 16; CRADLE Interview: 6, 8-9, 13-14; 4Cs Interview: 4)

Considering the argued reliance upon internal elite alliances in which patronage is likely to have been a factor, the corruption allegations of January 2005 thus arguably hit against networks of central importance to Kibaki's capacity for ruling and he sought to repair the damages to the anti-corruption image of his government by the means of a cabinet reshuffle that saw his close ally Murungaru switch to become the new Minister of Transport and the resigning of John Githongo as the Permanent Secretary for Ethics and Governance. The reshuffle appeased neither donors nor CSOs, though, and the elite alliances built in the beginning of his tenure with these actors seemed to suffer as a consequence, with donors terming it as too little, too late (Aluanga, 2005: 2-3). A group of CSOs arguably sought to draw advantage from this weakness in Kibaki's elite alliances (a change in the political opportunity structure) via publicly placing claims on the political authorities by stating that the specific modes of including civil society in the GJLOS RP had *"...tended to marginalize and fragment civil society within GJLOS..."* as well as that *"...the GJLOS is being instrumentalised to strengthen the influence and reach of the Ministry of Justice and Constitutional Affairs for political ends."* (International Commission of Jurists, 2005: 2). (International Commission of Jurists, 2005: 2; Aluanga, 2005: 2-3)

However, the results of this act of popular (perhaps partly because it was limited to a range of CSOs) contention were limited to Kibaki in March 2005 promising to introduce a new constitution, and DPs in April issuing a joint statement putting mild pressure on the GoK<sup>112</sup> (Everatt & Kanyinga, 2005: 105; the World Bank, 2005: 1, 5).

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<sup>112</sup> By stating that the government should demonstrate commitment to serious reform and continue its work on participatory constitutional development (International Commission of Jurists, 2005: 2; Aluanga, 2005: 2-3).



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The resource mobilization potential of CSOs advocating for constitutional reform was also influenced by the emerging split in the NARC elite alliance leading up to the referendum, as civil society (as the population in general) itself began to find that it was polarized both generally as they were pushing for reforms in different areas within the constitution (whereas prior to 2002 they had been united against Moi and for the review process) as well as on various issues discussed at Bomas<sup>113</sup>. The fragmentation of civil society increased as the campaigning regarding the referendum began, as it became entrenched by the ethnically defined dividing lines with especially the Kikuyu, Meru, and Embu supporting Kibaki's position (yes) and the Luo and others supporting Odinga's clamor for a no-vote.

In a paradoxical sense, Kibaki's changes to the draft by means of the shifts in internal elite alliance networks may actually have played a role in creating the increased enlightened understanding analyzed in chapter 5. Drawing upon an option from the repertoire of contention used against Moi in the clamor for constitutional change in the 1990s (cf. Appendix 1.A), civil society groups and political opposition parties (and significantly Odinga's LDP wing of NARC) came together in public demand for a rejection of the proposed constitution through nationwide rallies and demonstrations; while the proponents of the proposed Wako draft made use of similar means. Both sides disseminated information on the proposed constitution and agitated for people's support, and CSOs and the CKRC did perform a relatively comprehensive civic education (despite not as comprehensive as one could have hoped) financially aided by DPs. The fact that both the draft and the process producing it was so controversial, as well as that both sides had a lot to lose in the referendum thus resulted in all the major stakeholder groups engaging in the campaigning that (despite significant limitations) did produce an overall higher level

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<sup>113</sup> Also, some issues, it would seem, were introduced deliberately to destabilize and weaken the side opposing Kibaki's interests. An example is when Kibaki in 2004, when there was a certain amount of pressure from DPs for Bomas to be completed, tabled an anti-terrorism bill which shifted the focus of Muslim organizations, Christian movements, and human rights NGOs, thereby lowering the pressure on the new constitution. This also worked as a handout to strengthen the external elite alliance with the Embassy of the United States, who was beginning to criticize Kibaki on certain areas (BFD 2b Interview: 14-15)

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of enlightened understanding in the Kenyan demos. (NCEC Interview: 6; Kina Interview: 2-4; CEMIRIDE Interview: 16; CEMIRIDE, 2005: 1-7; Andreassen & Torstensen, 2006: 3-4; Matenjwa, 2005: 2; BBC News, 2005e: 1; IRIN, 2005: 1-3; People's Daily Online, 2005: 1-3; UNDP, 2005: 1)

Kibaki arguably did pay quite a high cost in the form of damaged legitimacy as well as in terms of his established elite alliances with CSOs, Odinga's LDP, and MPs for the employment of the strategies that enabled him to maintain the presidential executive powers and which as such contributed to creating both the lacking *de facto* and *de jure* democratization in the analyzed respects. However, the bottom line was that even though he lost the referendum, which may be seen as perhaps the greatest act of popular contention in Kenyan history<sup>114</sup>, the outcome of this phase of the constitutional review process was the power relational status quo and in that sense, he had actually managed to get his opponents in the process to work for his interests. Hence, this appears to explain the creation of the relatively positive development with regards to *de facto* democratization in the form of voting equality in relation to the referendum and Kibaki's acceptance of the outcome discussed in the descriptive analysis.

In a situation to a large extent created by Kibaki and his new power strategies (based in other networks and institutions than those of Moi) of weakened resources and a political opportunity structure that the remaining civil society leaders of the constitutional review process were struggling to come to terms with as their existing repertoire of contention was showing itself as largely inadequate to seriously challenge Kibaki's government, Kibaki thus forced popular contention to focus on yes or no to a constitution (that if accepted would not affect his power position much), rather than on directly pressuring for democratic reforms of the constitution. These dynamics thus contribute significantly to explaining the largely lacking democratization analyzed in the descriptive analysis with regards to *de facto* developments of effective participation, control of the agenda, and responsiveness, as

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<sup>114</sup> In the sense that it was a political, public, and collective claim to the political authorities by the majority of the Kenyan demos (cf. Rudbeck's definition of popular contention).

well as the lacking *de jure* democratization in the form of comprehensive constitutional change.

### **6.3 The post referendum period**

#### **6.3.1 Changing elite alliances after the referendum**

As described in the case chapter, immediately after the referendum, Kibaki finalized the dissolution of the elite alliance with Odinga's LDP in NARC by reconstituting his Cabinet entirely to remove all the LDP ministers. Among the new ministers brought in was the former influential member of the civil society led movement for constitutional reform, Martha Karua, as Minister of Justice and Constitutional Affairs, which probably constituted an attempt on behalf of Kibaki to repair the damages to both his external elite alliances with donors and civil society in favor of the Bomas draft. Moreover, to replace the Luo removed, Kibaki brought Kisii and Luhya MPs into his government, thus building new elite alliances to replace NARC<sup>115</sup> based in reconfigured ethnic clientele networks (see chapter 3; BFD 2b Interview: 16; CREAMW Interview: 13; Kina Interview: 5-6).

Furthermore, as John Githongo had revealed the involvement of Kibaki's (he also claimed that Kibaki himself was involved) close allies VP Moody Awori, former Justice Minister and present Energy Minister Kiraitu Murungi, Finance Minister David Mwiraria and former Transport Minister Chris Murungaru in the so-called Anglo-Leasing corruption scandal in 2006, the three latter were resigned from their Cabinet duties. Later, however, they were either included in the GoK again or were part of Kibaki's networks of elite alliances outside government<sup>116</sup> (BFD 2a Interview: 7-10; Barasa Interview: 14).

These changes in the networks of elite alliances have thus arguably played a role in enabling Kibaki to resist *de jure* democratization in the form of constitutional reform

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<sup>115</sup> Moreover, there were indications that Kibaki was building elite alliances with Moi, as meetings between the two began taking place regularly and Moi outright declared his public support for Kibaki's presidential candidature. The same did Uhuru Kenyatta, leader of KANU, fellow Kikuyu and son of the first president of Kenya, in September 2007. Remarkably, this arguably signifies an elite alliance between the three families to have held presidential power in Kenya since independence (CRADLE Interview: 15, 17-18; Kimani, 2007: 1-5; Udvikling, 2007: 17).

<sup>116</sup> By supporting actively his 2007 re-election campaign (BFD 2a Interview: 7-10).

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in the period after the elections by maintaining the support of numbers of MPs high enough to block proposals regarding constitutional amendments in Parliament and thus necessitating the IPCC and IPPG negotiations.

The central importance of these networks and the role that patronage in the form of corruption has played in enabling Kibaki's reliance on strategies of internal political elite alliances was perhaps also indicated by the violent response (the Standard raid) in March 2006 to the critical role that the newspaper the Standard had played in relation to publicizing the Anglo-Leasing scandal, regarding which the common understanding seems to be that the GoK probably was behind it (i.e. an employment of a strategy of violence to decrease media pressure on the GoK)<sup>117</sup>. DPs responded by withholding funds and putting the GJLOS cooperation on standby until the GoK had convinced them that such incidents would not occur again<sup>118</sup>. Hence, this constituted the most serious strain on and threat to Kibaki's elite alliances with DPs during the review process, but without seriously affecting Kibaki's ability to resist democratization through constitutional change in the short term as no connections to the review process were made (Barasa Interview: 21; Mulema, 2007: 1-2; BFD 2b Interview: 16-18; BFD 3 Interview: 11; BFD 4 Interview 18-19; NCEC Interview: 12).

### **6.3.2 Temporary internal elite alliances**

The split between the two blocks that had begun to emerge soon after the 2002 elections continued to characterize also the constitutional review process after the referendum, as they formed temporary alliances with each other as well as CSOs engaged with constitutional reform.

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<sup>117</sup> Another incident supporting this interpretation was the violence against and jailing of leaders of CSOs demonstrating against corruption during Kibaki's rule in August 2007. The severity of the violence employed by the police is illustrated by the words of Anne Nyabera of CREAM: *"The police beat us, they intimidated us. One of my colleagues who identified the policeman who had boxed him in the stomach, he asked him at the police station: 'why did you beat me when I was not resisting arrest?' and the police man told him in front of all of us: 'next time, I will shoot you.'* (CREAW Interview: 14-15).

<sup>118</sup> In this connection it is interesting to note that Kibaki after the 2007 elections limited the freedom of expression of the press again by banning live TV and radio transmissions (Al Jazeera, 2007: 1).

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The setup of the IPCC by Kibaki's government in August 2006 can arguably be seen as an attempt to isolate civil society actors from the political opposition by not allowing them to participate in the negotiations, thus weakening the pressure for democratizing constitutional reform. In trying to achieve this, Kibaki's government in elite alliance terms can be seen as having traded allowances for opposition committee members in addition to the pledge to embark on negotiations. (BFD 2a Interview: 9; Wainaina, 2006: 2; Nation Team, 2006: 1-2; Omari & Mugonyi, 2006: 1-2). When civil society was accommodated in the setting up of the Multi-Sectoral Forum the next month, the negotiations actually resulted in a reform package both providing a road map for comprehensive reform to be entrenched in the constitution as well as minimum reforms to improve the conditions for a democratic election in 2007.

However, on behalf of the GoK, Karua rejected the proposed changes, probably because they would both entail curtailment of the president's powers over Parliament and the ECK, commit the GoK to a new legally secured review process, as well as perhaps weaken the GoK's image with regards to being pro-reform (and thus its ability to rely on external elite alliances) relative to the opposition's.

In addition, probably to avoid the risk of a vote of no confidence in his Cabinet, before the end of 2006, Kibaki reshuffled his Cabinet for the sixth time during his rule, thereby arguably changing the top echelons of the clientele networks on which his political elite alliances relied.

The first half of 2007 saw CSOs and the political opposition come together in the UNC to pressure the government to engage in negotiations on minimum reforms to be enacted before the elections, thereby making use of a form of contention from the repertoire that had been successful in pressuring Moi to accept reforms in the 1990s. Also drawing upon the repertoire of contention used against Moi, CSOs sought to engage international actors in for the form of NEPAD and the African Union to put pressure on the GoK. To a limited extent, these forms of popular contention did succeed in engaging Kibaki's government in negotiating reforms in that it responded by setting up the IPPG in March 2007.

However, by doing so the GoK once again succeeded in polarizing the CSOs and the political opposition advocating for constitutional reform in that the former were

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excluded from the negotiations in the IPPG. It thus appears likely that this was a strategy employed by Kibaki to weaken the new UNC to enable him to stand the distance of resisting *de jure* democratization in the form constitutional changes in the remainder of this first presidential term<sup>119</sup>. Whether deliberate or not, the results of the negotiations of the IPPG included controversial provisions that neither the GNU nor the ODM wings would afterwards support and regarding which solutions were never found as meetings in the subcommittee to do so in July never took place; seemingly due to MPs on both sides focusing mostly on their reelection campaigns as well as changes in public focus (the opportunity structure) analyzed below (NCEC Interview: 9; CEMIRIDE Interview: 10; Kina Interview: 9; CREAM Interview: 5-8; 4Cs Interview: 10-11).

The controversial provisions of the IPPG draft may very well also be interpreted as part of another type of actions of Kibaki's government towards the end of Parliament's term<sup>120</sup> to decrease the pressure for reforms by Kibaki's opponents in the opposition and civil society by throwing up a number of policy balls<sup>121</sup> that had been part of the minimum reforms negotiations, thus fragmenting the focus of different opponent groups.

In a very last attempt at achieving minimum reforms 160 MPs in September tabled a petition to make Kibaki produce before Parliament the The Constitution of Kenya Amendment Bill 2006 (originally prepared by the Muite headed PCAJLA). Nothing

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<sup>119</sup> Moreover, according to interviewed members of organized civil society and ODM, Kibaki may also have been aided in the IPPG by an elite alliance with certain persona within the pro Government segment of civil society (probably trading the possibility of cooption in a possible future government of Kibaki for support to gain a majority in the IPPG) (NCEC Interview: 9; CEMIRIDE Interview: 10; Kina Interview: 9; CREAM Interview: 5-8; 4Cs Interview: 10-11).

<sup>120</sup> Cf. the government sponsored Constitution of Kenya Review Bill sought tabled in Parliament in April – August of 2007, the introduction of the controversial issues of creating new constituencies and affirmative action for women with regards to representation in Parliament of July – August (cf. the chapter 3).

<sup>121</sup> In connection with the tabling of the Proposed Constitution of Kenya Amendment Bill 2007 (of July) in Parliament by the GoK, it was also planned to table a bill providing for a 1.5 million wage increase to all MPs in the form of a gratuity at the end of the term. However, as the first bill was not passed, the latter was never tabled, thus arguably indicating that the wage increase was intended as part of a patronage based elite alliance to secure the adoption of the amendment bill; something that would probably strengthen the legitimacy base of Kibaki ahead of the elections (NCEC Interview: 13; The Nation, 2007a: 1; Amran, 2007: 1-3; Muiruri & Ocholla, 2007: 1; Ohito & Opiyo, 2007: 1-2; Kithi, 2007: 1; Mango & Mututa, 2007: 3).

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came of this though, seemingly due to responsibility shifting and shelving of the bill by Karua and the AG (who is appointed and discharged by the president and thus may have been an elite alliance partner of Kibaki in this respect).

Instead, perhaps in a late attempt to improve their reelection chances as MPs collectively were faced with severe criticism due to detrimental performance in terms of passing legislation and opinion polls showing that as many as 90 % of MPs might not return to Parliament, Parliament shortly before its dissolution approved a number of laws, including the Political Parties Act, which Kibaki enacted. Faced with the one type of contention through which Kenyans have really shown themselves to be effectively able to hold their rulers accountable (in the 2002 elections and the 2005 referendum, arguably) and publicly make claims to the political authorities that they are forced to listen to (cf. Rudbeck's definition of popular contention), the political elite thus adopted the one change that can be seen to have led to a form of *de jure* democratization in the case of the constitutional review process in Kenya in between the elections in 2002 and 2007 (CRADLE Interview: 18; KLRC Interview: 1-3, 7).

However, through the employment of various temporary elite alliances via the setting up of committees and other tactics to fragment the calls for minimum reforms by his opponents in ODM and civil society, Kibaki and his peers succeeded in sitting out the term without losing executive power to *de jure* democratization via constitutional amendments.

### **6.3.3 Decreased potential for popular contention and restrategizing**

Extremely important in relation to why Kibaki's power strategies were successful and as to explaining the lacking developments of democratization are also the preparatory elite alliances built in the beginning of his tenure to decrease the access to funding and leadership of CSOs within the human rights and democracy sector, as well as the fact that the public focus after the referendum largely seemed to have moved on to other issues<sup>122</sup>, thereby removing a great part of the foundation necessary for popular

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<sup>122</sup> Something that was also reflected in the focus of some CSOs which has meant that the degree of united pressure from civil society has been limited to a core of a few CSOs (CEMIRIDE Interview: 10, 17, 22-23).

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contention, namely resource mobilization in the form of public support<sup>123</sup>. The latter was probably also due to the fact that Kenya's economy during the five years Kibaki had been in power had gone from negative to positive growth of 6-7 %. Furthermore, the economic growth has also meant that the dependency of the GoK on donor funds has decreased significantly, while strengthening its perceived legitimacy with DPs; two factors that contribute to explaining the decreasing pressure from DPs for constitutional reforms throughout the case<sup>124</sup> (KLRC Interview: 10-11; NBFPP Interview: 15; BFD 2b Interview: 3; BFD 4 Interview: 17-18; NCEC Interview: 11-12; CEMIRIDE Interview: 10, 17, 22-23; Muia Interview: 15-16; Udvikling, 2007: 1).

During the constitutional review process in between the two elections, CSOs engaged in new forms of contention to bring about constitutional reform by engaging directly with the government in both GJLOS and the post referendum committees (attempts at tactical innovations of the repertoire of contention in the face of changed power strategies on behalf of the incumbent). In the words of Patrick Onyango of 4Cs, *"...we did not know how to deal with this ['the static paralysis syndrome'] or relate to this new government and so that informed the pact. Now we adopted more a policy dialogue in the hope that these things would work, we started holding meetings with relevant parliamentary committees, with members of Parliament in board rooms, in hotels, in their offices. We were no longer in the streets. But it became clear that that was not working and so we had to go back to action."* (4Cs Interview: 4).

Hence, after realizing that the new forms of contention, exercised under serious resource constraints in a in a changed political opportunity structure that they have continually struggled to come to terms with, had inadequate to undermine the power strategies to pressure the incumbent to give in to *de jure* democratization through constitutional reform, during 2007 CSOs thus returned to their sketching boards to

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<sup>123</sup> These conditions were thus in stark contrast to those in 1997 when minimum reforms were achieved ahead of the elections, with significant amounts of pressure for such reforms by donors and IFIs (cf. Appendix 1.A).

<sup>124</sup> See chapter 8 for more on this.



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build up a new wave of popular contention for democratizing constitutional reform<sup>125</sup>. (NCEC Interview: 2-3; CREAM Interview: 7-9; 4Cs Interview: 4-6, 16; CEMIRIDE Interview: 7, 10, 12; Katumanga, 2000:31-32).

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<sup>125</sup> I.e. new attempts at tactical innovations in the form of civil society conferences to produce a trimmed down and less detailed draft constitution based on a correlation of constitutional agreements reached through Bomas and later negotiations (cf. NCEC Interview: 2-3; CREAM Interview: 7-9; 4Cs Interview: 4-6, 16).

## **7. The institutional context of the constitutional review process**

This second part of the explanatory analysis drawing upon historical institutionalism focuses on how the most significant (and changing) institutional elements of the institutional context relating to the review process have influenced the different actors and thus their behavior to create the outcomes that are the democratization developments found in the descriptive analysis. Hence, the explanatory contributions of ethnicity in relation to political elites, the Constitution of Kenya, the CKRA, and the GJLOS to the creation of the developments of democratization are explored. The analysis thus elaborates and provides a supplementing insight into the role of the institutions touched upon using Rudbeck's model.

As Rudbeck's model and historical institutionalism are very similar in on a range of respects regarding certain issues<sup>126</sup>, the analysis using historical institutionalism only focuses on possible explanatory factors where it is deemed to provide additional explanatory power to the analysis using Rudbeck's model.

### **7.1 Ethnicity and political elites**

When the Mau Mau<sup>127</sup> was countered by the colonial administration in 1952 by banning all national political activities, this arguably constituted a critical juncture leading to a branching point in the organizational structure of the Kenyan polity (cf. Appendix 1.A (Barasa Interview: 17; NCEC Interview: 16; CRADLE Interview: 17; BFD 3 Interview: 14; Rudbeck, 2005: 134-150, 169)). This strategic action of the colonial administration thus created the direct effect of a transformation of the institutional context of the Kenyan polity by constraining the possible actions of local leaders to drawing on their local, ethnic communities. Furthermore, the strategic

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<sup>126</sup> Although there are nuances with regards to the understandings of the different theoretical issues treated in the theories, there are also significant similarities. For example regarding the focus on interactions between structures and groups of agents and how this has consequences for preferences and strategies of actors; how certain types of action are more likely than others in certain spaces and at certain points in time as a result of earlier actions and cultural learning; how institutions affects power of different groups in dissimilar ways; and the likelihood of unintended consequences and incremental changes (in repertoires of contention in Rudbeck's model).

<sup>127</sup> A rebellion/ civil war between radical nationalist landless farmers and colonial loyalist, African landholders (Rudbeck, 2005: 134-135).

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actions of ethnic leaders of distributing resources to their ethnic communities to be able to continue to enjoy their support have, on the one hand, created direct effects in the form of strengthening or weakening different ethnic groups, i.e. resulting in asymmetrical power relations along ethnic lines as access to resources government positions were distributed ethnic groups supporting the incumbent. On the other hand, these strategic actions of ethnic leaders have shaped the behavior of the members of the different ethnic groups, as they under influence of their experiences with the importance of informal relations within ethnic groups through strategic learning continually have adjusted their perceptions of their interests and viable strategies of pursuing them, thereby contributing to reinforcing and recreating ethnicity as an institution. However, as mentioned in the previous chapter and in accordance with historical institutionalism, the institution of ethnicity seems to go deeper than mere cost-benefit calculations among members of an ethnic group to constitute also a community of identity that shape the interests and actions of both leaders and common members within an ethnic group. As Ian Gatere phrased it “...*the leader goes and tells his ethnic group that ‘I am a member of your ethnic group and I am running for the presidency on your behalf’*. Now, [...] *if they do not support him, are they really Maasais?* [e.g.] *If they are true Maasai, they must support him! If they do not support him, even some of their own will say ‘but you are a Maasai, how can you not support this man when he is a Maasai?’*” (Gatere Interview: 21). However, at the same time, if the leader later decides that “...*he personally believes that someone else is now a better leader, he can not say it, because if he does say it, he is taken as having left or deflected [his ethnic group]: ‘he is no longer our representative.’*” (Gatere Interview: 21).

Analyzed as an institution, ethnicity in Kenya can thus be seen as based in informal norms and conventions of a shared understanding of ‘belonging’ among people within the same ethnic groups, of perceived shared identity and interest, as well as

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reciprocity among the individuals belonging to the group in the sense that the ethnic community constitutes a basic security network for its members<sup>128</sup>.

These informal norms of ethnicity as an institution are reflected in the national polity in the form of support to politicians and political parties along ethnic lines because people from a specific ethnic group expect the leaders from their own group to take care of their ethnically defined interests simply because they are from the same ethnic group –and expect leaders from other groups to do the same for their groups. Because of these basic norms and conventions of ethnicity and the anticipation that these norms also guide the behavior of everyone else as members of ethnic communities, the institution of ethnicity has kept reproducing itself through the behavior of Kenyans as they rely upon the basic perception that it is best to have one ‘of your own’ present at the centre of the polity (Gatere Interview: 20; Barasa Interview: 16).

Immediately after the elections in 2002, the result of the vote might have appeared as a potential critical juncture with regards to the institution of ethnicity with many members of other ethnic groups (even Luo) coming together to elect the Kikuyo Kibaki as the president. However, the united vote for Kibaki was based in mobilization of support by the ethnic leaders of the communities and so, considered together with the disintegration of NARC that began soon after the elections, the institution of ethnicity seems to rather have been reinforced as the basic component of Kenya’s political culture. The role of the institution of ethnicity in the constitutional review process thus seems to have been characterized by continued path dependency. Hence, the institution of ethnicity has played an important role in inhibiting democratization through *de jure* constitutional developments as the major point of continued disagreement has been based in short term ethnically biased considerations around having an executive prime minister or an executive president with ethnic leaders and their communities supporting the stance that would favor their ethnic groups, and therefore also themselves as leaders, the most. The norms and conventions of ethnicity have thus both enabled leaders to mobilize the support of

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<sup>128</sup> As one of the interviewees explained concerning the role of ethnicity: “...if you are excluded and have nowhere to belong, the best thing you can do is to go back to where you know best; so that is the culture of social security.” (CEMIRIDE Interview 26). Cf. also the definition of ethnicity in chapter 2.

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their ethnic groups in favor of the stance that they had decided on as well as influenced which options the ethnic leaders based in a culturally influenced form of rationality could choose. Apart from the detrimental effect that it would have on his own power position, the social pressure for conformity embedded in the norm of ethnicity that a leader should take care of his community and pay back to those who have supported him to get to where he is has thus arguably contributed to making it undesirable for Kibaki to honor the MoU made with Odinga and the Luo<sup>129</sup>. Hence, the institution of ethnicity appears also to constitute a significant part of the explanation of the lack of democratization with regards to *de facto* responsiveness, voting equality, effective participation and control of the agenda analyzed in the previous chapter emanating from the efforts of Kibaki and his supporters to maintain an executive presidency<sup>130 131</sup> (BFD 4 Interview: 3; BFD 1 Interview: 12; BFD 2a Interview: 8; Barasa Interview: 14-15, 17; Gatere Interview: 7, 21-22; Kabelo Interview: 14, 17-19; Muia Interview: 5; CEMIRIDE Interview: 24, 26; 4 Cs Interview: 7; CREAM Interview: 1, 10; CRADLE Interview: 16)

Furthermore, the mobilization potential of the institution of ethnicity can, on the one hand, be seen as having contributed to the high level of popular engagement in the

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<sup>129</sup> As a governance officer of the BFD 2 expressed this, “*Politicians, basically, always have people sitting on their doorstep saying ‘hey, now I want some money’ because I am your whatever –neighbor, aunt, niece. There is quite some pressure on politicians [...] leaders are expected to be rich and be giving some money.*” (BFD 2a Interview1).

<sup>130</sup> Beginning with the withdrawal from the NCC and the reconstitution of the PSC in March and June of 2004. As such, the path dependency of ethnicity may actually have contributed to causing an endogenously created branching point in the review process after which it became a political level game of maintaining or gaining power (cf. the section analyzing the CKRA).

<sup>131</sup> As perhaps indicated by Odinga’s and Kibaki’s refusals and later wide ranging conditions with regards to forming a new coalition government (even under heavy pressure by among others the US, the African Union and the EU) as well as continuing display of hostile attitudes during the first convening of Parliament on January 15, the fact that the historic MoU and coalition was not honored may also come to play an inhibiting role in relation to forming coalitions and political compromises in relation to producing a new constitution for Kenya in the future and as such for the democratization process. Moreover, the institution and its influence in Kenyan politics and democratization have seemingly continued and perhaps even become further entrenched not only by the breakdown of NARC, which has been interpreted as showing that Kenyans can not trust politicians from other ethnic groups, but also by the events of the 2007 elections. Hence, the voting, the conflicts regarding the contested outcome and possible election fraught as well as the violent clashes and killings all took place along ethnic lines; in relation to the latter, it has even been warned that there may have been an element of ethnic cleansing present (Barasa Interview: 18; Mutua & Machuka, 2008: 1-3; Nielsen, 2008: 1; Bloomsfeld, 2008: 1; Frederiksen, 2008: 1; DR, 2008b: 1; DR, 2008d: 1; DR, 2008e: 1; DR, 2008f: 1)

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review process, while, on the other hand, it has arguably also countered the development of democratization in the review process with regards to *de facto* enlightened understanding, as the institution of ethnicity seemed to harm both the amount of civic education performed by CSOs as well as the quality of public debate in the prelude to the referendum.

Hence it is remarkable that, with a reference to Putnam's concept of a civic community as the democratic culture of a society built with the bricks of social capital<sup>132</sup>, rather than being civic and generalized, the trust, norms and networks characterizing Kenya's political culture are ethnic and personalized. As such, at a basic level, the institution of ethnicity can be seen as working against the development of a democratic culture in Kenya and therefore also to be causally connected with the lack of internalization of and adherence to Dahl's democratic standards and institutions analyzed in chapter 5 (Putnam, 1993: 167; Torpe, 2006: 1; Lewis, 2001: 50; Hyden, 2006: 77; Barasa Interview: 18).

However, the strategic actions of ethnic leaders relating to unequal distribution of resources and posts through Kenya's history have also produced direct effects in terms of asymmetrical access to resources and power relations within ethnic groups resulting in the creation of a political elite that cuts across ethnic lines as resources distributed by ethnic leaders have not trickled down very far within each ethnic group (Gatere Interview: 3; BFD 2a Interview: 11). In practice therefore when it comes to distributing resources in between elections, the degree of reciprocity between the leaders and the led within ethnic groups is very limited<sup>133</sup>. Hence, the leaders as members of the political elite also seem to be influenced to a certain extent by norms and conventions of the political elite characterized by personal relationships<sup>134</sup> and a

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<sup>132</sup> Social capital, according to Putnam, "...refers to features of social organization, such as trust, norms [of reciprocity] and networks [of civic engagement], that can improve the efficiency of society by facilitating co-ordinated actions." (Putnam, 1993: 167)

<sup>133</sup> The Chairman of the NCEC went as far as terming it as a one way relationship in that the members of ethnic groups "... can not see that they are actually given access to state power and the resources, they see that 'our own is in'; but in doing what? In embracing himself." (NCEC Interview: 15).

<sup>134</sup> Many MPs in both the government and opposition wing are also former members of KANU that ruled Kenya for 40 years (Gatere Interview: 3; Kabelo Interview: 12-13).

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mutual understanding of cooperation across ethnic groups when ethnic elite interests converge and competition when they do not<sup>135</sup>. Quoting Gatere on the informal conventions within the political elite: “...*they are enemies here, friends here, partners there [...]* But generally, when you meet them sitting and talking, you would be surprised by the way that they laugh and talk with each other; you would think ‘I thought these guys were enemies’ [...] So, some of them, even their ties to each other and their own personal ties are greater than to their own ethnic community; and they always tend to use their ethnic community as a bargaining chip for personal gain...” (Gatere Interview: 20-21).

It is thus quite probable that the political elite, as a result of their similar positions in the institutional context as the elites of their ethnic groups, to some extent may have shared certain interests with regards to the review of the constitution. Many of the interviewees have thus presented a view of politicians as the political elite in Kenya as being more or less one group in that even though the elites of different ethnic groups are competing for power and wealth, none of them are basically interested in any transformations of the institutionalized context of asymmetrical power relations of which they benefit. (BFD 2a Interview: 7-8, 10; BFD 4 Interview: 15; BFD 1 Interview: 12-13; BFD 2b Interview: 9-10; Gatere Interview: 3; Kabelo Interview: 12; CEMIRIDE Interview: 14, 25; NCEC Interview: 14-16; 4 Cs Interview: 5, 15, 18; CREAMW Interview: 12; CRADLE Interview: 5, 15; Wainaina, 2006: 2)

Interestingly, it thus seems likely that as the elections approached in mid 2007 and the GoK and opposition was thus facing similar institutional contexts from similar power positions in terms of the possibility of winning the presidency, the interests of the two groups more or less converged towards maintaining the constitutional status quo which favors the incumbents<sup>136</sup>. As such the institution of ethnicity with the

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<sup>135</sup> Although in this connection it ought to be noted that the personal relationships within the political elite probably also include permanently less friendly ones, as exemplified by Luo Odingas’ relations with the Moisi and Kenyattas (Kalenjin and Kikuyo, respectively) under the rule of which the father of Raila Odinga, also a prominent politician, was detained and imprisoned in the 1960s and 1980s and Raila Odinga himself was imprisoned and forced into exile in the 1990s (Kuria Interview: 7; Frederiksen, 2008: 1).

<sup>136</sup> Cf. the coming to nothing of the negotiations on minimum reforms in the IPPG in mid 2007 as MPs began focusing on the 2007 elections (see chapter 3).

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asymmetrical power relations embedded in it across the different ethnic groups comes across as an explanatory factor as to the lack of *de jure* democratization in the form of constitutional changes in the prelude to the 2007 elections.

### **7.2 The Constitution of Kenya**

Through what may be viewed as an incremental process of path dependent change, the Constitution of Kenya was amended frequently during the rules of Kenyatta and Moi. This resulted in the formal institutional procedures of the Constitution of Kenya, regarded as the basic institution in which the formal procedures for governing in Kenya and in which the fundamental organizational structure and form of government of the polity are established, providing very expansive powers of the president as the executive over all three arms of government as well as to suspend or limit the political freedoms of Kenya's citizens<sup>137</sup>. The constitution has thus in itself fundamentally influenced the interests and behavior of actors in the constitutional review process (Kabelo Interview: 20-21; Barasa Interview: 19; Cottrell & Ghai: 2; Andreassen & Torstensen, 2006: 1; Katuo Cha Katiba, 2007: 1).

Most fundamentally, the constitution is the source of highly asymmetrical power relations in Kenyan society “...*in favor of a few elites to the exclusion of the majority of the citizens...*”, which seems to have had the direct and indirect effects of affecting the preferences of Kibaki and his supports and their strategic choice of actions in the direction of maintaining the status quo as well as interests and actions of the opposition as increasingly converging with those of the former group as the elections of 2007 approached (4Cs Interview: 1). (BFD 2b Interview: 6-7; 4Cs Interview: 17; Barasa Interview: 1)

Moreover, these highly asymmetrical power relations created by the constitution have enabled Kibaki's faction to pursue that goal through a number of means provided to the incumbent by the formal procedures of the constitution.

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<sup>137</sup> It should also be noted here that these constitutional developments have arguably also heightened the importance of being able to rely on the institution of ethnicity analyzed in the above, especially for the majority of poor Kenyans, as the Constitution increasingly did not secure their rights (cf. Appendix 1.A and 1.B).



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First, the current constitution does not include descriptions of formal procedures or norms concerning formation, management and supervision of political parties. This has thus enabled the strategic actions of Kibaki in the form of repeated cooptation of opposition MPs without them officially defecting from their parties as a means of securing majority in Parliament and as such of avoiding losing executive power (Kabelo Interview: 3, 11; NCEC Interview: 13, 15; 4Cs Interview: 17; Torstensen et al., 2006: 4, 31-32; BFD 2a Interview: 5; Andreassen & Torstensen, 2006: 2-3). Second, the lack of formal procedures and norms regarding political parties has practically excluded the possibility provided by the Constitution of forcing the president to resign or dissolve Parliament by means of a vote of no confidence passed by simple majority in Parliament. This has thus also been instrumental in creating an asymmetrical power relationship between President Kibaki and his supporters and the opposition in Parliament that has enabled Kibaki to resist the pressure for limiting the executive powers of the Presidency without risking to be forced to resign (Torstensen et al., 2006: 7; BFD 2a Interview: 5).<sup>138</sup> Most significantly, in these two respects, the constitution was thus an enabling factor for Kibaki to break the MoU with the LDP wing of NARC and CSOs and take control of the review process before the referendum by excluding those whose interests ran counter to his own from influencing the draft to be voted on.

Third, and closely connected to the Naivasha and Kilifi drafts, the formal procedures of the constitution also determines that the AG, even though he “...*shall not be subject to the direction or control of any other person or authority...*”, as an office in the public service is appointed and dismissed by the president (The Constitution of Kenya: 26 (8)). As such it is plausible that these formal procedures of the constitution may have had an influence on the AG as he drafted the Wako draft under influence of especially the Kilifi report that provided for the highest degree of status quo with regards to the executive powers of the presidency as well as in connection with the

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<sup>138</sup> It can also be noted that the constitution does not provide formal procedures for its own replacement, only for amendments to it which, according to the former Chairman of the CKRC Yash Pal Ghai, has been used strategically as a restraining and disruptive factor in the review process as its constitutionality has been called into question several times, e.g. to prevent the referendum from taking place (Cottrell & Ghai, 2004: 22-24; Torstensen et al., 2006: 8; Muia Interview: 9; Kabelo Interview: 11).

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failure to produce before Parliament the IPPG Constitutional Amendment Bill of June 2007 ahead of the elections in 2007 (Torstensen et al., 2006: 8, 10; The Constitution of Kenya: 26. (1)).

Finally, the Police Commissioner as the head of the police is also appointed by the president through the Minister of Defense, which has arguably enabled Kibaki to employ the police (as analyzed using Rudbeck's model) to destabilize and weaken the pressure for constitutional reform that would result in limiting the presidential powers<sup>139</sup> (Barasa Interview: 19; Kabelo Interview: 8).

Hence, these factors relating to the described continued existence of certain formal procedures and norms of the Kenyan Constitution as an institution can be said to constitute the fundamental institutional basis that has enabled the strategic actions of Kibaki to resist giving up his presidential executive powers. As such, in the analyzed respects, the current Constitution is in itself a fundamental factor in explaining the creation of the lack of *de facto* democratization found in chapter 5 in connection with responsiveness, voting equality, effective participation and control of the agenda, as well as the lack of *de jure* democratization though constitutional reform.

### **7.3 The Constitution of Kenya Review Act**

Turning to the CKRA, the adoption of its final amendment in 2001 can be seen as having constituted a both endogenously and exogenously affected critical juncture in the sense that it through its formal procedures and conventions laid down the framework guiding the constitutional review process up until the referendum/the adoption of the Bomas draft at the NCC<sup>140</sup>.

The adoption of the CKRA can thus be seen as having caused a branching point in the form of the coming into force of the CKRA in May 2001, the formal procedures of

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<sup>139</sup> As it was seemingly the case before the referendum in connection with the Chairman of the discussion of the reduction in the powers of the President as Bomas was killed in August 2003 and the following demonstrations as well as regarding the demonstrations against the Kibaki led changes to the Bomas draft to avoid sharing executive power of March and July in 2005 (cf. the case description; Barasa Interview: 19; Kabelo Interview: 8).

<sup>140</sup> The process was e.g. to be 'people driven', inclusive, performed in an open manner, based as much as possible in consensus with regards to decision making, and guided by principles of democracy, human rights and gender equity. Furthermore, the process was divided into three stages at the end of which Parliament, assisted by the PSC, was to either adopt or reject the draft (but not amend it) and in the case of the former, the draft would then be subject of an advisory referendum (cf. Appendix 1.A).

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which shaped the behavior of the key stakeholders of the process to change onto a new path of official, inclusive negotiations on a comprehensive constitutional reform for the first time since independence. Although the timeframe of the CKRA was not respected and the process was by no means without problems (cf. chapter 5), the formal procedures were sufficiently clear to guide the behavior of the key stakeholders so that the process succeeded in producing the direct result of contributing to *de facto* democratization by creating a higher degree of enlightened understanding in the citizenry, as well as leading to positive developments with regards to free and fair elections (the referendum), voting equality and inclusion of adults (relating to both the NCC stage and the referendum).

Furthermore, the formal procedures and norms of the institution of the CKRA seem also to have played an important role with regards to *de facto* democratization regarding the emerging internalization in the demos of Dahl's property of responsiveness of which indications were found in chapter 5. It thus appears plausible that the institution of the CKRA has constituted a new cognitive filter of democratic ideas through which Kenyans have participated in or observed the constitutional review process and as a result of which perceptions of what is desirable and feasible with regards to governance have been adjusted through strategic learning<sup>141</sup>. (BFD 4 Interview: 19-20; Barasa Interview: 15-16; Cottrell & Ghai, 2004: 6-10)

However, the formal procedures described in the CKRA were based on the assumption that the adoption of the Bomas draft in Parliament via simple majority would be a formality as all MPs had been part of the NCC, which in combination with the provision of the PSC, came to constitute an institutional inefficiency that provided Kibaki's wing with the option of shifting negotiations to the PSCs. The weaknesses in the formal procedures of the CKRA<sup>142</sup> can therefore also be seen as having generated the unintentional consequence of enabling Kibaki to embark on the path of strategic actions through which he managed to water down the provisions in the draft that threatened his own interests. Paradoxically, it hence appears that the

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<sup>141</sup> To a certain extent, this may also be seen as having been reflected in the major demonstrations in support of the allegations of election fraud against Kibaki and his Party of National Unity coalition following the elections on December 27, 2007 (DR, 2008e: 1; Nielsen, 2008: 1).

<sup>142</sup> The institution of the CKRA was itself the result of strategic conflict (cf. Appendix 1.A)

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policy choices made regarding the formal procedures that came to define the CKRA as an institution to constrain the actions of the stakeholders to create democratization through producing and enacting a new constitution are actually part of the explanation for the creation of the lack of *de facto* democratization developments with regards to responsiveness, voting equality, effective participation and control of the agenda discussed in chapter 5 (Cottrell & Ghai, 2004: 7-8; Andreassen & Torstensen, 2006: 2).

Furthermore, when the process provided for by the formal procedures of the institution of the CKRA ended with the referendum, this arguably constituted yet another critical juncture with regards to the institutional context of the constitutional review process in Kenya. The process was thus again (as under Moi in the 1990s) missing a formal institutional framework to constrain the behavioral options of the political elite and since the constitution had not been changed, the basic institutional context that the GoK and the opposition found themselves facing was thus much similar to that of the latter tenure of Moi. The return to an institutional context devoid of formal procedures, norms or conventions to secure a process in the form of “...a time bound roadmap that has consequences if not met and that [is] mandatory for everyone...”, thereby limiting the available options for strategic action to resist democratization of actors that have little or no interest in democratizing constitutional reform therefore adds explanatory power as to why no constitutional *de jure* democratization was achieved in the period after the referendum and before the 2007 general elections (CREAW Interview: 11). (Kina Interview: 13)

### **7.4 The Governance, Justice, Law and Order Sector Reform Programme**

The CKRA was far from the only change in the institutional context of the constitutional review process, as substantial changes also occurred after the 2002 elections in the form of the establishment of comprehensive reform programs. Building on existing institutions such as the Legal Sector Reform Program, the GJLOS was a fundamental part of the general reform agenda of the GoK and was to support the development of a new constitution, the enactment of which was also

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identified as crucial for successful implementation of the rest of the GJLOS (cf. Appendix 1.C). The creation of the GJLOS under the newly established MoJCA can thus arguably be interpreted as having constituted a central part of a critical juncture as bilateral cooperation in the sector of good governance, democracy and human rights was established (KLRC Interview: 10; BFD 2a Interview; BFD 3 Interview: 1; BFD 4 Interview: 6-7; BFD 1 Interview: 3)

Interpreted as an institution, GJLOS is (on a general level) based in formal norms relating to government to government cooperation, ownership by the GoK and commitment to the development of a broad democracy, rational, responsible and transparent governance, as well as fair treatment and human rights for all citizens through formal procedures for involvement of relevant stakeholders in different forums and stages as well as with regards to different key areas (cf. Appendix 1.C).

As analyzed using Rudbeck's model, GJLOS has resulted in unequal distribution of access to strategic resources such as donor funding and control of the reform agenda in between the GoK and other actors, such as CSOs advocating for constitutional reform. It seems plausible that already before the formulation phase of GJLOS was officially embarked upon in November 2003, the GoK may have anticipated that the establishment of an institution such as GJLOS could lead to the creation of some extent of asymmetrical relations of power in its favor, while affecting positively the anticipation of CSOs and donors in relation to the prospects for realizing a new constitution. However, as it is no secret that DPs are guided by norms relating to democracy, good governance and human rights in their development aid work, it is also likely that the GoK anticipated that a certain level of commitment to these norms would be necessary for donors to perceive cooperation with the NARC Government as a viable option. It thus seems plausible that the *de facto* democratization with regards to freedom of expression and associational autonomy that has been analyzed as having taken place in Kenya since 2002 in the constitutional review process has partly been caused by such strategic calculations by the GoK, but under influence of donor employed norms relating to the ideas of democracy, good governance and human rights.

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However, the strategic actions of the GoK, probably in a sense aided by the coming into force of the CKRA, that got DPs and civil society to anticipate a high likelihood for the realization of a new constitution under the NARC Government were so efficient that it resulted in certain institutional inefficiencies inherent in the GJLOS as an institution to promote (constitutional) reforms.

First and foremost, the initial perception of DPs (and CSOs for that matter) after the 2002 elections that they were now dealing with a government that had a real interest in reform generally and democratizing constitutional reform specifically was arguably based in what may be termed as inaccurate information about the intentions of Kibaki's government<sup>143</sup>. Hence, several of the representatives of the basket fund donors of GJLOS expressed the view in September 2007 that, contrary to immediately after the 2002 elections, they did not perceive the Government of Kibaki as being reformist (BFD 2a Interview: 1, 6, 9; BFD 3 Interview: 1, 6-7; BFD 1 Interview: 6-7; BFD 4 Interview: 6).

This initial perception of the interests of Kibaki's government may very well have been part of the reason for the original plan of basket donors of starting out working with the GoK and for civil society to receive funding later through GJLOS. However, CSOs were feared that it would compromise their independency and role as 'watch dogs' if the GoK controlled their access to funding. Instead, the setting up of a fund external to the GJLOS to provide funding for CSOs to engage in its thematic areas was pursued; yet, this has not yet resulted in funding for CSOs to engage in GJLOS. (NBFP Interview: 11; BFD 1 Interview: 10; BFD 2a Interview: 2-3, 6; BFD 4 Interview: 12; BFD 3 Interview: 3)

Furthermore, according to criticism on behalf of both donors and CSOs, an institutional inefficiency of GJLOS has been that the actual implementation of

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<sup>143</sup> This is supported by the fact that Kibaki already in August 2003 openly stated that most executive power should stay with the presidency, that central members of his government (Kibaki's first Controller of State House and the Minister of Internal Security) have later admitted that it was never the intention to honor the MoU with Odinga's LDP, as well as that their part in pressuring for constitutional reform during Moi's rule had mostly been a means of limiting his powers because they thought he would never resign. Apparently, after Moi did resign, the need for a new constitution was less imminent in the eyes of members of Kibaki's supporters in Parliament: "*Now that KANU is gone, I do not even see the necessity of a new constitution.*" (Muchiri Interview: 8). (Mwakugu, 2003: 1; Onyango, 2007: 3; Gatere Interview: 6; Muchiri Interview: 8, 11-12)

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reforms still largely remains to be seen. As such it seems to be the case that the (still relatively new) institution of GJLOS thus far predominantly has modernized and strengthened institutions such as the police, the judiciary, and the civil service (including the Office of the AG) that are constitutionally largely under the control of the president and some of which the analysis thus far have shown to have been used to hamper democratizing constitutional reform (NBFP Interview: 12; BFD 1 Interview: 5; CRADLE Interview: 7-8; NCEC Interview: 5).

It thus appears that, as an unintended consequence from the point of view of the DPs, the GJLOS as an institution has strengthened power position of the supply side, which has shown little interest in democratizing reform (especially in terms of the central issue of limiting the powers of the president), relative to the demand side<sup>144</sup> (KNCHR Interview: 3-8; KLRC Interview: 1; NBFC Interview: 11; 4Cs Interview: 9-10, 13; CREAM Interview: 15-18; NCEC Interview: 11; International Commission of Jurists, 2005: 2).

Regrettably, it therefore appears that the critical juncture in the institutional context of the central actors engaged in the constitutional review process constituted by the creation of GJLOS has been an enabling factor for Kibaki and his supporters the GoK to pursue the interest of maintaining the obtained powers vested in the Presidency by the institution of the Constitution. Hence, the unintended consequences emanating from the GJLOS institution seem an unfortunate but plausible part of the explanation for the lack of *de facto* democratization in the case of the review process with regards to responsiveness, voting equality, effective participation and control of the agenda, as well as *de jure* constitutional democratization.

In early 2005, however, the TGCD under GJLOS changed the procedures according to which it operated, signifying a change of strategy towards fulfilling its purpose of contributing to constitutional development. As it was anticipated, considering the

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<sup>144</sup> As the Chairman of the KNCHR bluntly expressed himself regarding this institutional inefficiency: "...we have a fundamental disagreement with the Ministry of Justice in terms of whether an agency or department or a ministry can lead reform when it itself is not reformist and has got no intention of reform. It is more interested in controlling than reforming and reform of course means diversification of power. You can not reform without diversifying power. But the Ministry of Justice wants to assemble and control power, so there is a contradiction there." (KNCHR Interview: 3-4).

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experience of the review that far, that the enactment of a new constitution was not forthcoming, the TG began reviewing laws and working on producing Bills in areas concerning which the formal procedures and norms of the Constitution was assessed to be wanting. While the influence of these strategic actions were dependent on the highly asymmetrical power relations between the TG and the AG's office as well as Parliament in the legislative process, the Political Parties Act was, although amended, originally produced by the TG 5. Thereby it seems plausible that the changed strategy of the TG through strategic learning within the institution of GJLOS contributes to explaining the creation of the limited *de jure* democratization in the constitutional review process in between the elections in 2002 and 2007 discussed in chapter 5. (KLRC Interview: 2-4; BFD 1 Interview: 1, 7-8; NBFP Interview: 4)



## **8. Discourses on good governance, the constitutional review process and changing flows of power**

In using Foucault's theorization on the power of knowledge, discourses and discipline, the dominant discourse on good governance and democratization in relation to GJLOS and support to constitutional development is analyzed first; this is thus largely (basket) donor oriented (section 8.1). Second, the various influences that this discourse seems to have had on the dominant discourse(s) on the constitutional review process are analyzed and structured in different themes; the discursive actors here are thus national actors under influence of rules of correlation with the first mentioned discourse (sections 8.2- 8.7).

Thereby analyzing the changes in the specific fluid power relations with regards to the review process under influence of international factors and ideas, explanatory power supplementary to the two preceding explanatory analyses is thus build as to why the democratization developments analyzed in chapter 5 have been created<sup>145</sup>.

### **8.1 Good governance, GJLOS and support to constitutional development in Kenya**

Analyzing the good governance agenda in Kenya as a discourse, the basic object treated by it is naturally good governance<sup>146</sup> of which GJLOS and support to constitutional development are part. Moreover, the objects of the good governance discourse of the bilateral donors are fundamentally based in the definitions of the concept by the WB/OECD and in the Cotonou Partnership Agreement<sup>147</sup>, as basket donors have committed to these as OECD and/or EU members. Basically, the discourse thus focuses on the objects of the management of national resources and the

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<sup>145</sup> It can thus be noted that Foucault would probably concur with the point stated in chapter 2 that democracy is inevitably intertwined with the exercise of power, that democratization therefore entails changing of power relations in society, and that in order to explain democratization one must focus on analyzing how and why the specific power relations have (or have not) changed (Thomsen, 2000: 47).

<sup>146</sup> Including democratization to some extent, as this is closely intertwined with the concept of good governance as defined by the WB Cotonou Partnership Agreement (cf. chapter 2).

<sup>147</sup> As shown in chapter 2, the Cotonou Partnership Agreement thus defines good governance as: *"The transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development, in the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law."* (The European Commission, Undat.: 8)

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political and institutional features of a society and treats these normatively through utilization of the concepts of transparency, accountability, democracy, human rights and rule of law (cf. section 6.6). More concretely, these rules of formation of the discourse can be seen to be treated through development programs that focus generally on supporting either the demand side or the supply side of society, which in the way these concepts are applied basically signifies support to CSOs and the state, respectively<sup>148</sup>. On the one hand, GJLOS as a central component in the good governance discourse is thus supported as a supply side program dealing predominantly with managerial and institutional oriented objects of the discourse<sup>149</sup>. On the other hand, and arguably more directly treating or influencing the object of the political features of society<sup>150</sup>, the demand side is supported both generally and with regards to the GJLOS thematic areas more specifically through funding to CSOs. As the governance officer of the BFD 3 explained, these two sides are “...*what we are trying to balance, but of course GJLOS is very much about management, but not only.*” (BFD 3 Interview: 13).

Generally, the good governance discourse in Kenya thus encompasses and recognizes explicitly both the more managerial and political aspects of good governance and these sides are sought balanced partly through supporting both the supply and demand side of governance. However, while GJLOS was originally envisioned as a channel for support to and cooperation between the demand and supply side, it ended up being only a supply side supporting program, although providing for some participatory inclusion of CSOs to represent the demand side. As such, this has arguably constituted a net shift in the balance between the two objects towards that of management within the discourse (BFD 4 Interview: 7, 10-11; BFD 1 Interview: 9-10; NBFP Interview: 9-11; BFD 3 Interview: 6, 12-13; BFD 2a Interview: 1-5; BFD 2b: 1-2; Abrahamsen, 2000: 12)

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<sup>148</sup> Although the private sector also places demands on the state (Lewis, 2001: 45-46).

<sup>149</sup> On behalf of the BFD 4 it was thus said that GJLOS “...*is more technical and the politics would probably be left to parliament and to the politicians in terms of the content of the process or what you approve of in terms of a new constitution.*” (BFD 4 Interview: 5).

<sup>150</sup> In this connection it should be noted that such support related more explicitly to democratization is also given in the form of support to elections, the electoral commission, and parliamentary reform, e.g. (BFD 4 Interview: 11; Republic of Kenya, 2005: 42; NBFP Interview: 7).

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More specifically, with regards to constitutional development, while this was defined and accepted as a central component in treating the objects of good governance and democratization of the discourse, the accepted perception regarding the realization of a new constitution was also based upon the assumption that it would be achieved through the constitutional review process<sup>151</sup>. Hence, the accepted ‘truth’ was that constitutional development was to be treated within the good governance discourse only through operations in the form of technical support following its adoption, i.e. not as a political object, but one relating to management. In spite of its agreed centrality for the main object of good governance, GJLOS was thus not to play a part in supporting or securing the process of arriving at an enactable, new constitution (Ministry of Justice and Constitutional Affairs, 2007: 19-20, 33; GJLOS, 2007a: 1; BFD 1 Interview: 1, 3, 8; KLRC Interview: 1-3).

Interestingly, this is closely connected to the utilization of certain concepts within the discourse on good governance (and GJLOS as an integral part of that) deriving from its relations with other development discourses, namely regarding the Cotonou Agreement, Poverty Reduction Strategy Papers (PRSPs) and the Paris Agenda<sup>152</sup>. As a significant component of the good governance discourse, the GJLOS is thus based in the concept of government ‘ownership’ in that it was initiated and is led by the GoK: “*GJLOS is very much a government of Kenya Program, I mean, we were involved in the beginning in formulating and assessing, but it came from the Ministry of Justice [...] So the ownership aspect is very strong.*” (BFD 4 Interview: 8-9). Furthermore, in accordance with the Paris Agenda, in exercising government leadership in relation to the ownership principle, the concept of ‘participation’ has also been applied in the good governance discourse in the sense of allowing both civil society and the private sector to partake in GJLOS at various levels, but especially in

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<sup>151</sup> Defined purely as ‘political’ and therefore as outside the discourse on good governance, cf. below.

<sup>152</sup> The similar principles of which have arguably gained international acceptance as the new body of knowledge concerning how development aid is to be delivered in order to contribute to development and poverty reduction (DIIS, 2007: 4; DIIS, 2003: 7, 14). In addition, the creation of GJLOS by the GoK in cooperation with donors as a Sector Wide Approach-aspiring program based in these concepts and objects can probably also in itself be seen as indicating the influence of the discourse on good governance on governance reform programs and as such also on governance in Kenya (cf. Degnbol-Martinussen & Engberg-Pedersen, 2003: 299; BFD 3 Interview: 1-2).

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the TG meetings (cf. Appendix 1.C and BFD 3 Interview: 2). (DIIS, 2003: 7, 14; High Level Forum, 2005: 3)

Also relating to ‘ownership’ in the Paris Agenda as well as the partnership-principle of the PRSPs, the donors have committed themselves to respecting the leadership of the partner country, which seems to have been applied in the discourse as a central concept resulting in donors occupying a less central and visible position in the discursive practices within GJLOS as a component of the good governance discourse and which is also arguably reflected in the often emphasized utilization of dialogue in the cooperation with the GoK<sup>153</sup> (cf. BFD 3 Interview: 11-12; BFD 4 Interview: 8). (BFD 3 Interview: 8; DIIS, 2003: 14; High Level Forum, 2005: 3; ACP/CE, 2000: 9)

The rules of formation of the good governance discourse regarding the GJLOS and support to constitutional development are thus based in adherence to these concepts in relation to the object of good governance (and inherently democratization). This is quite noteworthy as the potentially conflictual character of the relationship between the objects of good governance and democracy on the one hand and the concepts of partnership and ownership on the other hand has played a defining role in shaping the discourse on good governance in relation to GJLOS and constitutional review<sup>154</sup>. This is closely intertwined with the theoretical options and rules of transformation of the discourse and as such with shaping what can be done said and thought by actors affected by the discourse on good governance, which again is closely correlated with the in practice employed balance in the tensional relationship between the objects of politics and management generally inherent to the discourse on good governance<sup>155</sup>.

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<sup>153</sup> Moreover, the concepts of ‘harmonization’ and ‘coordination’ of the Paris Agenda (although they were also implicitly components of the PRSP discourse prior to 2005) have also been employed in the discourse on good governance and GJLOS. As the governance officer of the BFD 4 summed it up, “...it is sharing of duties, information sharing, and also streamlining the way we communicate with government and then we also have joint reviews of the program so that we do not all review GJLOS in parallel.” (BFD 4 Interview: 8). (BFD 4 Interview: 7; BFD 3 Interview: BFD 3 Interview: 8; BFD 1 Interview: 2-3; NBFP Interview: 6, 8)

<sup>154</sup> As Degnbol-Martinussen & Engberg-Pedersen has argued the two demands and wishes “...will often be conflicting: if donors accept the idea of full ownership, they must also accept national and local priorities that can conflict with donors’ conception of and demand for [...] institutional effectiveness and democratic political leadership.” (Degnbol-Martinussen & Engberg-Pedersen, 2003: 294).

<sup>155</sup> Cf. the definition of the concept of good governance in chapter 2 and Degnbol-Martinussen & Engberg-Pedersen, 2003: 299-300.

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Hence, the concepts of harmonization and coordination have been put to a test as donors have struggled to reach consensus regarding to which extent the primarily management oriented and owner- and partnership based GJLOS should be affected by political events relating to indications of lacking commitment to the objects of good governance of the GoK; this was thus e.g. the case following the Standard Media raid in March, 2006<sup>156</sup> (BFD 3 Interview: 11, 12, 13; BFD 4 Interview: 9; BFD 1 Interview: 4-5, 8-9; BFD 2a Interview: 3; NBFP Interview: 5, 10).

### **8.2 The Presidency as a less central discursive position**

As a fundamentally important point, the discourse on constitutional review has been based in rules of formation that seem to be influenced by some of the objects and concepts of the good governance discourse (cf. the principles of the CKRA<sup>157</sup>). The operations and concepts of the discourse on the object of creating a new constitution can thus be seen as based in certain of the rules of formation of the good governance discourse (the objects of good governance and democratization as well as the concept of participation). This appears to have had the significant effect of shifting the flows of power to include a greater number of groups of Kenyans and as such having rendered the presidential position less central in influencing the discursive practices in relation to the review process through which resistance<sup>158</sup> to the disciplinary powers historically exercised by the institution of the executive has resulted in a heightened *de facto* inclusion of adults and freedom of expression. In other words, the rules of formation of the good governance and democratization discourse seem to via its relations (rules of correlation) with the discourse on constitutional review to have created discursive rules that have placed a higher number of groups in a position to communicate publicly on, among other issues, the executive powers of the Presidency

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<sup>156</sup> This was thus illustrated by one of the interviewed governance officer of a BFD: "...we continued our support especially in the governance sector because we see that there are a lot of problems there; and even that is, at least from my point of view, a bit contradictory because you put money in the governance sector to improve governance, but if the sector itself is involved in all kinds of activities or implicated in corruption and all this, then are you doing anything good?". (BFD 1 Interview: 8).

<sup>157</sup> According to this, the constitutional review process was to be conducted in a manner guided by principles of democracy, human rights, openness (transparency), be accountable to the people, participatory and as much as possible based in consensus building (Cottrell & Ghai, 2004: 6).

<sup>158</sup> In the form criticism of the president and the executive powers of the post.

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and define this as a central object of the discourse<sup>159</sup>. Being under the discursive constraints of the good governance and democratization discourse, it thus seems plausible that the interests and behavior of Kibaki and his supporters changed as not allowing for a certain degree of freedom of expression and associational autonomy would not be conceivably acceptable within any of the two discourses anymore, wherefore such suppression/non-adherence to the rules of formation (related to democratic freedoms) might render their discursive positions even more peripheral.

### **8.3 The NCC, disciplinary power and resistance**

Another remarkable point with regards to the Bomas phase as part of the review process is that it can be understood as a kind of general ‘machinery’ through which participating groups have been disciplined by being divided into specific groups of different types of delegates; by extracting time and labor from the delegates through deliberations in a hierarchical organization of a learning process in which the negotiations were to progress towards agreement<sup>160</sup>. However, as this disciplinary power flowed through the discursive practices at Bomas regarding which claims to what would be right to include in the constitution were arrived at, a group of actors (still) occupying a central position (Kibaki’s faction of the NARC government) actually came to be defined as deviant in the sense that the theoretical option regarding maintaining the executive powers of the presidency argued for by this group was increasingly excluded from the discourse. While at that point the dominant discourse on the constitutional review process was thus developing in the direction of the theoretical option of an executive prime minister, this also created resistance by the Kibaki faction, which manifested itself in the boycotting of the NCC as well as in the introduction of the concept of ‘contentious issues’ in the discourse in June 2004. The emergence of this concept had the effect of legitimizing negotiations between the political actors outside the NCC and as such the reconstitution of the PSC that month. Furthermore, it is also possible that this may have been perceived as a legitimate (or at least viable) option under influence of the ownership principle of the good

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<sup>159</sup> Cf. Foucault’s proposition on power as fluid in post-modern societies with open spaces for public communication.

<sup>160</sup> Cf. Foucault’s four techniques of disciplinary power.

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governance discourse, according to which the GoK is to exercise leadership with regards to national reforms.

This change in the discourse on constitutional review thus entailed a sudden change in power relations as the GoK again became centrally positioned with regards to influencing the discursive struggles regarding the contents and limits of the discourse. Hence, these discursive developments contribute to explaining creation of the lack of *de facto* democratization regarding responsiveness, effective participation, control of the agenda and voting equality produced through the PSCs in which only actors sharing Kibaki's perception of what the discourse should entail could participate.

### ***8.4 Disciplinary power and the politics – management tensions of 'good governance' in the review process***

Remarkably, this change in the flows of power furthermore comes across as closely intertwined with the inherent potentially conflictual relationship between (I) the objects of good governance and democratization and (II) the concept of government owner- and leadership (and respect for these on behalf of donors) in the good governance discourse as well as the theoretical options of the discourse resulting from this relationship in the form of the tensional balance between politics and management. This has thus entailed that, despite a new constitution being defined as being of fundamental importance to governance and democratization in Kenya, the process towards its realization seems to have largely been defined as being too political for donor participants of the good governance to apply the Paris Agenda concept of 'mutual accountability' to<sup>161</sup>. The closest the basket donors came to applying the concept in relation to the review process during the PSC meetings was thus to issue a press statement in April 2005 putting mild pressure on the GoK<sup>162</sup>. (BFD 4 Interview: 5, 10; BFD 3 Interview: 7, 10-12; NBFP Interview: 5, 6, 10; BFD

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<sup>161</sup> As a governance officer of the BFD 3 (the GJLOS lead donor) expressed it, "...you should not link the political process to...or you should not take the programme hostage of the political issues that will be there. Of course you need to react. You need to have dialogue. But I think there are sometimes donors that would like to just send a letter with 'no, we do not want to work with you for the time being...'" (BFD 3 Interview: 11).

<sup>162</sup> By confirming their commitment to GJLOS provided that the GoK showed commitment to serious reform and continued its work on participatory constitutional development (cf. chapter 3).

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1 Interview: 4, 5, 8; BFD 2b Interview: 3-4; High Level Forum, 2005: 8; Degnbol-Martinussen & Engberg-Pedersen, 2003: 299-301).

In accordance with the good governance discourse, civil society actors (as well as the private sector) had thus participated in GJLOS and especially through its TGs. However in this respect, GJLOS has seemingly had disciplinary consequences in the sense of distributing individuals by different themes in groups defined by the GoK, extracting time and labor from the participants in hierarchically organized stages<sup>163</sup> (cf. Appendix 1.C). While the participation in the GJLOS discourse was seen as an option for influence by many CSOs in the discursive struggles with regards to their main purposes of existence, it seems to have had the effect of reducing these groups to less influential positions with regards to the discourse on the constitutional review process as they have not been able (considering their resource constraints) to engage in their core activities, GJLOS and advocacy for constitutional review at the same time.

In combination with the exclusion of civil society actors from the PSCs (and later also Odinga's LDP faction) negotiating on the component of the discourse of the 'contentious issues', the disciplinary power of GJLOS thus seems to have contributed to further decreasing the level of accountability enforced on Kibaki's government with regards to the government defined changes in the discourse on the constitutional review in the form of the changes to the Bomas draft. (Reality of Aid, 2007: 3; BFD 4 Interview: 5-7; NBFP Interview: 9-11; CEMIRIDE Interview: 16, 20; CREAM Interview: 16; CRADLE Interview: 8; 4Cs Interview: 13; NCEC Interview: 5; BFD 3 Interview: 3)

Regrettably, but extremely interesting is it thus that the concepts applied by the good governance discourse (including GJLOS as key component) to a certain extent in these respects very well indirectly may have permitted the lack of *de facto*

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<sup>163</sup> Interviewed representatives from CEMIRIDE in connection with GJLOS thus felt that "...we only get invited to sit and you know; they have already decided on the outputs etc. [...] so we are being muscled left, right and center." (CEMIRIDE Interview: 16). Moreover, it was concluded that "...we ended up technically doing support work, but not setting the agenda." (CEMIRIDE Interview: 20). Also interestingly, in the NBFP Interview the view was given that "...there is really not a demand side in GJLOS. It is lead by the Ministry of Justice –why would the ministry want a demand side- they want civil society to be engaged sometimes for service delivery..." (NBFP Interview: 11).



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democratization (with regards to responsiveness, voting equality, effective participation, and control of the agenda) emanating from the discursive changes relating to the events regarding the PSC reconstitutions and connected changes with regards to the contents and limits of the discourse on constitutional review<sup>164</sup>. It is thus paradoxical that the good governance discourse partly as a result of its rules of transformation regarding not meddling directly in political matters have influenced the power relations among the national actors engaged in the review process in favor of the status quo and thereby have contributed to the lack of progress regarding its own objective of democratization.

Finally, a potentially very telling point to make in relation to the good governance discourse and its relations to the internationally accepted ‘truths’ of development in the form of the concepts upon which the Cotonou Agreement, PRSPs and the Paris Agenda are based is that in the one respect in which the actors of the good governance discourse in relation to GJLOS shifted the weight on the scale of the management – politics continuum somewhat towards the latter (when the TGCD transformed its role to directly trying to affect the political discursive processes by introducing legislative ideas in the form of law proposals)<sup>165</sup>, this actually, although indirectly and in a changed form, seems to have contributed to the creation of the only *de jure* democratization development in the case of the constitutional review process.

### **8.5 The PSCs and resistance to the Wako draft**

The disciplinary power introduced by the reconstitutions of the PSCs arguably spawned their own resistance based in the concept of participation in relation to the good governance discourse on behalf of the large number of actors who had been engaged in the discursive struggles at Bomas to define the contents of the new constitution. The actors struggling against the proposed Wako draft in the campaigning leading up to the referendum were thus united in their perception of the

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<sup>164</sup> Cf. the first two types of discursive change outlined by Foucault.

<sup>165</sup> As the Chairman of the KLRC (the convener of the thematic group on constitutional development) concluded: “...our role has really changed, we have been working proactively, working three years on those 77 laws that we identified.” (KLRC Interview: 2).

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wrongness of the departure from the operation of the discourse characterized by participation that the government led PSC drafts signified.

Hence, in combination with the highly fragmented character of the discourse on the constitutional review process in the stages prior to the referendum that resulted in the drafts produced (including the Wako draft) being extremely detailed, complex and even self-contradictory, this seems to constitute a central part of the account for the rejection of the proposed draft in the referendum. Consequently, this also adds explanatory power with regards to the lack of *de jure* democratization in the case of the constitutional review process in that although the Wako draft was not as progressive with regards to curtailing the powers of the president (and other respects) as the Bomas draft was, it did include (among others) provisions that arguably could have contributed to *de jure* democratization developments if passed<sup>166</sup>. (KLRC Interview: 8; BFD 1 Interview: 1; CREA Interview: 9; BFD 2b Interview: 13)

### **8.6 Post referendum decreased focus on constitutional review**

Moreover, the relations between these discursive components and practices of the good governance discourse<sup>167</sup> and the discourse on the constitutional review process may have contributed to the redistributive discursive change that took place after the referendum in 2005 (cf. section 5.3)<sup>168</sup>.

This discursive redistribution in which the constitutional review discourse dropped from the top of the discursive hierarchy appears to have been caused also partly by the introduction of the IPCC (August 2006) and IPPG (March 2007), which placed the GoK and the opposition in the central discursive positions while being largely exclusive of actors outside the political center and to a large extent removing it from

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<sup>166</sup> With regards to devolution, independency and capacity to control the Executive and Parliament, the electoral system, human rights and affirmative action, e.g. (cf. Torstensen et al., 2006: 11, 13-14, 26, 32, 37, 42, 49-50).

<sup>167</sup> The potential conflict between the object good governance and the ownership related concepts, the rules of transformation related to the politics – management tension in which the latter has been predominant especially with regards to constitutional development, and the disciplinary power of GJLOS.

<sup>168</sup> Ian Gatere thus commented regarding the post referendum period “...*pro-government politicians are almost saying that if we have economic growth and improvements in good governance, really, constitutional change is not a priority [...] Opposition leaders are occasionally talking about constitutional review, but not anywhere near the same emphasis that they had – it is the third or fourth thing that they mention.*” (Gatere Interview: 2).

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the eye of the public. The discursive redistribution was thus contributed to producing a power relational status quo in relation to the review process that has contributed to the lack of *de jure* democratization in the form of constitutional developments as democratization through the constitutional review process was left dependent on the will of the political elite that enjoys the benefits of the status quo societal power relations. (Reality of Aid, 2007: 2; Muchiri Interview: 3, 5, 8, 11-12; Cotrell & Ghai, 2004: 14; Andreassen & Torstensen, 2006: 4, 6; Gatere Interview: 7, 10, 13, 16-17 19; Muia Interview: 12; Barasa Interview: 5)

### **8.7 Post referendum changes within the discourse on constitutional review**

This is causally closely linked to another important discursive change that took place after the referendum (and after the decline of the review process in the hierarchy of public discourses) in the form of discursive struggles between especially actors from the government and opposition to define the contents and limits of what should be accepted as legitimate claims within the discourse (cf. Foucault's first type of discursive change and that of mutation) via the IPCC. However, these negotiations saw the rise of what may actually be seen as two different discourses struggling for discursive hegemony characterized by fundamental disagreements regarding what exactly the object of constitutional reform should entail related to the concepts 'comprehensive reform' vs. 'minimum reforms' as well as with regards to the form of the negotiations in both committees (the operations of the discourses)<sup>169</sup> (Kina Interview: 7-9).

In addition, and closely connected to the concentration of the central discursive positions within the political elite as well as the discursive redistribution of the constitutional review process, claims to public legitimacy after the referendum became less dependent on constitutional review, which may have changed the

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<sup>169</sup> The IPCC and later the IPPG can also be seen as machineries through which disciplinary power influenced the power relations of actors engaged in the constitutional review discourse by defining which groupings of actors could participate in constructing the accepted claims of the post referendum discourse as well as controlling (or at least affecting) the activities of both the GoK, the opposition, and engaged CSOs by committing them to negotiations through meetings that were to progress in a hierarchical manner towards agreement on reforms (cf. Foucault's four techniques of disciplinary power).

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perceptions of the GoK and opposition in the direction of it being sufficient to try to discursively cultivate the idea of being ‘pro reform’ and of the opponents as hampering reforms<sup>170</sup>. In the words of Kamau Kuria “...*changing the constitution was really not a goal, it is to use whatever advantage there might be in presenting yourself as a reformer.*” (Kuria Interview: 5). These operations did arguably not contribute to creating a fertile environment for negotiations, but rather affected the identities (as both defined the others as dissidents) and interests of both sides towards not allowing the opponent discourse to win any ground in the form of actual progress with regards to reform.

Furthermore, by the time the discourse on minimum reforms finally became dominating in March 2007 as both the PCAJLA and a majority within the GNU supported it, discursive change took place again with regards to the contents and limits of the discourse on constitutional review<sup>171</sup>. In addition to the actors participating in the IPPG not agreeing on what the object of minimum reforms then should entail, the creation of new constituencies and establishment of affirmative action for women became objects of their own discourses, outside the discourse on minimum reforms (as described in chapter 3)<sup>172</sup>. These discursive changes thus resulted in the near total fragmentation of the discourse on constitutional review in the months leading up to the dissolution of Parliament in October 2007.

As thus shown, the lack of a discursive hegemony on the constitutional review after the referendum in combination with the low position of the discourse on any form of constitutional reform in the discursive hierarchy (towards which the discursive relation to the largely managerial focused good governance discourse in relation to constitutional development seems to some extent have been an enabling factor), arguably accounts partially for why no constitutional *de jure* democratization was

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<sup>170</sup> Cf. the case description and Kina Interview: 1, 6-7, 9, 13, 15-16; Otieno Interview: 3; Muchiri Interview: 4-5, 9; Kuria Interview: 5. These types of operations have also continued to characterize the discursive struggles after the 2007 elections, as both sides have accused the other of promoting ethnic hatred and violence, while trying to portray itself as being in favor of peace and a constructive solution (Nielsen, 2008: 1; DR, 2008b: 1; DR, 2008d: 1; DR, 2008e: 1; DR, 2008f: 1).

<sup>171</sup> That is, the first and second type of discursive change outlined by Foucault.

<sup>172</sup> The IPPG was probably established as a resistance oriented counter reaction to the newly hegemonic status of the discourse on minimum reforms by Kibaki’s faction who by their discursive positions became identified as dissidents.

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created during the first election period following the completion of the transition to democracy in 2002.

## **9. Conclusion**

The following concludes on the main findings of the analysis of how democratization has developed in the case of the constitutional review process in Kenya in between the general elections in 2002 and 2007, as well as on the main possible explanations developed in the analysis of why these developments regarding democratization (and the lack thereof) have been created.

As argued in the descriptive analysis, it seems that Kenyan democratization has developed towards more freedom of expression, associational autonomy, more and better available information from alternative sources and a to some extent higher enlightened understanding in relation to the constitutional review process in the period focused upon in this thesis. Also, there have been positive developments with regards to voting equality, inclusion of adults, and a first affirmation of the important democratic institution of free and fair elections with the 2005 referendum.

However, concerning elected officials, effective participation, and control of the agenda, the essence of democracy, the *de facto* responsiveness of political authorities to the preferences of the demos is still largely missing in Kenya's democracy in between elections. Slight changes in terms of citizens demanding responsiveness on behalf of the political authorities seem to have begun to emerge, however.

Moreover, the overall assessment arrived at through the analysis with regards to elected officials, effective participation and control of the agenda has been that developments towards democratization have by and far been lacking in these respects in Kenyan practice. Furthermore, despite minor developments regarding notably effective participation with the adoption of the Political Parties Act, the five years of constitutional review did not create the type of developments that could arguably have constituted the most significant contribution to the country's democratization in this phase, namely the constitutional framework to secure *de jure* the institutions necessary for a real world democracy outlined by Dahl.

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With regards to the developments regarding the somewhat expanded freedom of expression and association, utilizing Rudbeck's model, it seems quite plausible that Kibaki calculated against the background of Moi's eventual failure to suppress the clamor for democratizing constitutional review due to comprehensive popular contention and supporting pressure from DPs that the costs of continuing to repress these freedoms would by far exceed the costs of partly allowing their development. Especially, since this opened for reliance upon legitimacy and elite alliance building with civil society members and DPs, which came to play a fundamental role for the power strategies of Kibaki, as they contributed to decreasing the potential for popular contention through the creation of an opportunity structure characterized by optimism with regards to the GoK's reform intentions and a considerably lowered access to mobilizing resources of the constitutional reform movement in terms of funding, increases in activities, leadership, emerging political/ethnic divisions and fragmentation of focus. This left CSOs that had been leading the popular contention for reform in a reactive rather than proactive situation for much of the case period and as such contributes to explaining both the developments with regards to lacking *de facto* and *de jure* democratization, as the utilized forms of popular contention were inadequate to seriously destabilize the power strategies of Kibaki's government.

That the interests of the Kibaki faction had changed soon became apparent, however, as the co-opting members of KANU and exclusion of the Odinga/LDP faction of the Kilifi PSC (and later NARC) allowed changes to the Bomas draft to avoid a limiting of presidential executive powers. These changes in the networks of internal elite alliances with the political elite thus contribute to explaining why the lack of *de facto* democratization with regards to responsiveness, effective participation and control of the agenda was created.

Moreover, by changing the draft, Kibaki managed to largely take the wind out of the sails of the constitutional reform movement by forcing the leading CSOs and his main political opponents to spend time and (for the former already greatly reduced) resources on popular contention against a proposed constitution that did not include a curtailing of the presidential executive powers, rather than on directly pressuring for democratic reforms of the constitution. These dynamics thus contribute significantly

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to explaining the largely lacking democratization with regards to *de facto* developments of effective participation, control of the agenda, and responsiveness, as well as the lacking *de jure* democratization in the form of constitutional changes.

However, Kibaki's changes to the draft also meant that both the draft and the process producing it were extremely controversial, as well as that both sides had a lot to lose in the referendum. This resulted in all the major stakeholder groups engaging in the campaigning that did produce an overall higher level of enlightened understanding in the Kenyan demos.

Although Kibaki lost the referendum as a consequence of perhaps the greatest act of popular contention in Kenyan history, the outcome of this phase of the constitutional review process was the status quo in terms of his presidential powers. Hence, this appears to explain the creation of the relatively positive development with regards to *de facto* democratization in the form of voting equality in relation to the referendum and Kibaki's acceptance of the outcome discussed in the descriptive analysis.

After the referendum, Kibaki reconstituted his Cabinet, excluding the largely Luo LDP and incorporating MPs of other ethnic groups and former leaders of civil society for constitutional reform. These once again changed networks of elite alliances, in combination with the elite alliances with DPs and leading members of civil society, a once again changed opportunity structure (waning public focus on constitutional reforms and high economic growth), all with detrimental effects for the potential for popular contention, enabled Kibaki to resist *de jure* democratization in the form of constitutional reform in the period after the referendum.

Moreover, despite CSOs and the political opposition coming together and pressuring the GoK to engage in negotiations on reforms, through the employment of various temporary elite alliances via the setting up of committees and other tactics to fragment the calls for minimum reforms, Kibaki and his peers succeeded in sitting out the term without losing executive power to *de jure* democratization via constitutional amendments.

Popular contention (in a very civil form) may, however, indirectly have contributed to the creation of the one development of *de jure* democratization in the form of the Political Parties Act, as this was adopted by the political elite when they were faced



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with the one type of contention through which Kenyans have been able to efficiently make claims to and hold their rulers accountable (as in the 2002 elections and the 2005 referendum)

Using historical institutionalism, the analysis has shown that the norms and conventions of ethnicity have both enabled leaders to mobilize the support of their ethnic groups as well as influenced which options the ethnic leaders based in a culturally influenced form of rationality could choose. Apart from the detrimental effect that it would have on his own power position, the social pressure for conformity embedded in the norm of ethnicity has thus contributed to making it undesirable for Kibaki to honor the MoU causing the breakdown of NARC and an endogenously generated branching point in the review process. Hence, the institution of ethnicity appears also to constitute a significant part of the explanation of the lack of democratization with regards to *de facto* responsiveness, voting equality, effective participation and control of the agenda emanating from the efforts of Kibaki and his supporters to maintain an executive presidency with expansive powers.

Moreover, although also harmful in this respect, the mobilization potential of the institution of ethnicity has arguably contributed to the high level of popular engagement in the review process and as such to the improved level of *de facto* enlightened understanding.

In addition it seems that, as the 2007 elections approached, the interests of the GoK and opposition converged towards maintaining status quo regarding the institution of the constitution which favors the incumbents and has constituted the fundamental institutional basis that has enabled the strategic actions of Kibaki to resist giving up presidential executive power. As such, the institution of the constitution and that of ethnicity, with the asymmetrical power relations embedded in it across the different ethnic groups, have come across as explanatory factors as to the lack *de facto* democratization regarding responsiveness, voting equality, effective participation and control of the agenda, as well as the lack of *de jure* democratization though constitutional reform.

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Furthermore, the coming into force of the institution of the CKRA arguably caused a branching point by guiding the behavior of the key stakeholders so that the process succeeded in producing the direct result of contributing to *de facto* democratization by creating a higher degree of enlightened understanding in the citizenry, as well as leading to positive developments with regards to free and fair elections (the referendum), voting equality and inclusion of adults (relating to both the NCC stage and the referendum). Also, the formal procedures and norms of the institution of the CKRA seem also to have played an important role with regards to *de facto* democratization regarding the emerging change in expectations of citizens in connection with responsiveness of the political authorities.

However, the weaknesses in the formal procedures of the CKRA also created the unintentional consequence of enabling Kibaki to embark on the path of strategic actions through which he managed to water down the provisions in the draft that threatened his own interests and as such contribute to explaining the creation of the lack of *de facto* democratization developments with regards to responsiveness, voting equality, effective participation and control of the agenda. Furthermore, when the process provided for by the formal procedures of the institution of the CKRA ended with the referendum, this arguably constituted yet another critical juncture in the shape of a return to an institutional context devoid of formal procedures, norms or conventions to limit the available options for strategic action to resist democratization. Hence, this adds explanatory power as to why no constitutional *de jure* democratization was achieved after the referendum.

The analysis has also shown that it seems plausible that the *de facto* democratization with regards to freedom of expression and associational autonomy in the constitutional review process has partly been caused by strategic calculations by the GoK (regarding asymmetrical power relational effects in its favor as a result of the establishment of a donor supported institution such as GJLOS) under influence of donor employed norms relating to the ideas of democracy, good governance and human rights. However, the GJLOS as an institution has thus also strengthened the GoK as the supply side, which has shown little interest in democratizing reform, relative to the demand side. Hence, the critical juncture in the institutional context

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constituted by the creation of GJLOS has been an enabling factor for Kibaki and his supporters in government to pursue their interests in maintaining the extensive powers of the Presidency. As such, these unintended consequences emanating from the GJLOS institution seem an unfortunate but plausible part of the explanation for the lack of *de facto* and (more indirectly) *de jure* democratization in the case.

More positively with regards to GJLOS, though, the changed strategy of the TGCD through strategic learning has appeared to have contributed to explaining the creation of the limited *de jure* democratization in the constitutional review process in between the elections in 2002 and 2007 via the adoption of the Political Parties Act.

Drawing upon Foucault, the analysis has shown that the rules of formation of the good governance discourse (the objects of good governance and democratization as well as the concept of participation) seem to via its relations (rules of correlation) with the discourse on constitutional review to have created discursive rules that have placed a higher number of groups in a position to communicate publicly on, among other issues, the executive powers of the Presidency and define this as a central object of the discourse. This has had the significant effect of shifting the flows of power to include a greater number of groups of Kenyans and as such having rendered the presidential position less central in influencing the discursive practices in relation to the review process, which has resulted in a heightened *de facto* inclusion of adults and freedom of expression.

However, the introduction of the concept of ‘contentious issues’ in the constitutional review discourse in June 2004 had the effect of legitimizing negotiations between the political actors outside the NCC and as such the reconstitution of the PSC, which entailed a sudden change in power relations as the GoK was again centrally positioned with regards to defining the contents and limits of the discourse. Hence, these discursive developments contribute to explaining the lack of *de facto* democratization regarding responsiveness, elected officials, effective participation, control of the agenda and voting equality.

Remarkably, this change has been closely intertwined with the inherently conflictual relationship between (I) the objects of good governance and democratization and (II)

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the concepts of government owner- and leadership (and respect for these on behalf of donors) in the good governance discourse as well as the theoretical options of the discourse resulting from this relationship in the form of the employed practical balance in the tensional relationship between politics and management in the good governance discourse relating to the constitutional review, which has tended to emphasize the management side of good governance. It is thus extremely interesting that the concepts applied by the good governance discourse (including GJLOS as key component) to a certain extent in these respects seem to indirectly have permitted the lack of *de facto* democratization (with regards to responsiveness, voting equality, effective participation, and control of the agenda) emanating from the events regarding the PSC reconstitutions and connected changes within the discourse on constitutional review.

Also highly noteworthy is it that the one respect in which the good governance discourse in relation to GJLOS shifted the weight on the scale of the management – politics continuum somewhat towards the latter, this actually seems to have contributed to the creation of the only *de jure* democratization development in the case of the constitutional review process.

In relation to the referendum, the actors campaigning against the proposed Wako draft were united in their perception of the wrongness of the departure from the participatory operation of the constitutional review discourse that the government led PSC drafts signified. Hence, in combination with the highly fragmented character of the discourse on the constitutional review process in the stages prior to the referendum, this constitutes an important part of the account for the rejection of the proposed draft in the referendum. Consequently, this also adds explanatory power with regards to the lack of *de jure* democratization in the case of the constitutional review process.

Finally, the lack of a discursive hegemony on the constitutional review after the referendum, the low position of the discourses on any form of constitutional reform in the discursive hierarchy, as well as the discursive redistribution (which placed the GoK and the opposition in the central discursive positions while excluding actors outside the political center) also contribute to the explanation of why no constitutional

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*de jure* democratization was created during the first election period following the completion of the transition to democracy in 2002.

As a very general level closing remark, it can be concluded that the few respects in which developments towards democratization have taken place seem to be causally related to circumstances regarding which the incumbents in Kenya have only been one of several groups of influential actors, whereas the serious respects in which *de facto* and *de jure* democratization has been lacking appear as causally connected to variables related to circumstances regarding which the constitutional review process has been largely left dependent on the will of the political elite that reaps the benefits of the status quo societal power relations.

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## **Appendices**



## **Appendix 1: Contextual background information**

In this appendix, the most relevant parts of the context within which the case of the constitutional review process in between the general elections of 2002 and 2007 is situated are described in order to present the reader with a basic historical understanding of Kenyan politics with regards to democracy and constitutional development as well as to give the reader a necessary framework of understanding in relation to the case and the analysis of it. This is based in the view that this is needed as an initial threshold to interpreting the behavior and events of the case, as well as because earlier events may very well be causally related to the developments in the case (cf. de Vaus, 2001: 234-235).

The first section describes the main developments relating to the form of government and changes in the constitution from Moi's rise to power in 1978 until the end of his rule marked by the 2002 elections.

The second section gives a brief outline of the main features of the current Kenyan Constitution and certain circumstances regarding its practical employment prior to the 2002 elections, as basic knowledge of this is a useful backdrop for understanding both the constitutional review process in itself as well as the need for a constitutional review in Kenya.

The third section presents the main features of the GJLOS RP, as the good governance program of which a part is to feed into the wider constitutional reform process.

### ***1.A: Governance and constitutional development in Kenyan political history***

#### **Independence and the rule of Kenyatta**

Seven different major ethnic groups exist in Kenya (see Table 1) and this has imbued Kenyan politics ever since the colonial administration in 1952 countered the Mau Mau<sup>173</sup> rebellion/civil war by banning all national political activities. This meant that

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<sup>173</sup> As the first serious challenge to the colonial rule, the Mau Mau was a struggle over land in between radical nationalists (landless farmers) and loyalists (African landholders). By far most Kenyans rely on

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the political organizations in Kenya prior to independence were localized and based on big men drawing on support from particular ethnic groups (Rudbeck, 2005: 135-136).

Table 1: Ethnic groups in Kenya

<i>Ethnic group</i>	<i>% population</i>
Kikuyu	22
Abaluhya	14
Luo	13
Kalenjin	12
Kamba	11
Kisii	6
Meru	6
Other African (includes Mijikenda, Maasai, Embu and Somali)	15
Non-African (Asian, European and Arab)	1

*Source: CIA World Factbook.*

(Thorup, 2003: 2)

After independence was obtained in 1963, the rule of Kenya's first president, Kenyatta (a Kikuyu), the first leader of the influential political party KANU, was thus based on support from the three ethnic groups of the Kikuyu, Luo and Kamba; this resulted in KANU receiving 67 % of votes in the first parliamentary elections in 1961 (Rudbeck, 2005: 134,136-137). By the end of 1964, Kenya had developed into a de facto one party state and the period under President Kenyatta was characterized by increased authoritarianism until his death in 1978. The constitution was thus amended no less than 19 times in the period, predominantly increasing the formal power of the president and establishing a legal basis for an authoritarian state (Rudbeck 2005: 140-144).

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land as a basic resource for income-generation and the distribution of land has therefore, and is still, an important recurrent theme in Kenyan politics (Rudbeck, 2005: 134-135).

## **The rule of Moi and increasing authoritarianism**

When Moi, the Kalenjin Vice President of KANU<sup>174</sup>, became president after Kenyatta's death, he was facing a state apparatus heavily dominated by the Kikuyu and he was only intended to serve as a transition figure. Moi was aware of strong resentment of his person within the Kikuyu political and economic elite and acted carefully to consolidate his position by signaling that he was following in the footsteps of Kenyatta. To achieve this, he aligned himself with the two high-ranking Kikuyu political leaders Charles Njonjo and Mwai Kibaki, who were in favor of a government based on a broad ethnic foundation. In addition, he blocked the anti-Moi wing in KANU through a constitutional amendment in 1982, which established Kenya as a *de jure* one party state (Katumanga, 2000: 15; Rudbeck, 2005: 144-146). Spawned by the latter constitutional change, a failed coup attempt led by Kikuyu officers showed Moi that he could not trust the largely Kikuyu state apparatus and he thus introduced major changes in the institutions and networks of governance, removed numerous Kikuyus from the military and state administration and began concentrating power with the executive presidency to an even larger extent than Kenyatta had. A series of constitutional changes were made, which practically gave Moi unlimited authority and means of suppressing the political opposition and which undercut the independence of the judiciary<sup>175</sup>. Furthermore, censorship on the media grew and public surveillance became widespread. Moi also enrolled all MPs into his clientele networks by controlling who was allowed into Parliament (the National Assembly) and used frequent cabinet changes to repress potential opposition. Apart from the Church, Moi also blocked the most influential CSOs by among other means forcefully co-opting the labor movement into KANU in order to avoid the possibility of independent political organizations mobilizing popular discontent against the regime.

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<sup>174</sup> As a member of the third largest ethnic group and perceived as a politician without much ambition or vision, Kenyatta had used him to strengthen his position in the phase of instability in the Kikuyu-Luo alliance and Moi had enjoyed a quiet political career for 15 years in the KANU top (Rudbeck, 2005: 144).

<sup>175</sup> In the words of Grindle, these changes "...abolished appeals about electoral outcomes, gave central authorities the rights to regulate appointments to local governments, expanded police powers, and eliminated security of tenure for the attorney general, the auditor general, members of the public service commission, and high and appeal court judges." (Rudbeck, 2005: 147)

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Furthermore, Moi banned the Harambees (local and mostly Kikuyu-led self-help development organizations, which had become economically powerful) and eliminated the Kikuyu-owned banks via legal and technological means to crush the Kikuyu business elite. (Rudbeck, 2005: 146-150).

### **The return to multipartyism: the beginning of the transition to democracy**

However, Moi had grown increasingly dependent on the international donor community, which financed almost 30 % of the country's government expenditures to maintain the support of his clientele networks in the public sector. As the cold war ended and the donor community began to focus on good governance and democratization as conditionalities for development aid and the political repression and poor economic performance due to a highly unstable economic environment in Kenya became more apparent, the relations to the international community worsened. Pushed by domestic CSOs, large-scale demonstrations and politicians advocating for a return to multipartyism in Kenya, in November 1991, the international donor community decided to withhold foreign aid worth of 250 million \$ until steps towards improved governance were taken by Moi (Sabar, 236-240; Katumanga, 2000: 18; Rudbeck, 2005: 151-157).

This combined pressure for the reintroduction of multipartyism resulted in Moi reluctantly changing the constitution to repeal section 2A and other sections, thereby ending the era of *de jure* one-partyism in Kenya (but without other changes to make democracy a reality) and marking the beginning of the transition to democracy in Kenya. However, if one had the impression that the regime was now on a road of political reform, this was soon countered by constitutional amendments<sup>176</sup> to diminish any risk of Moi losing the upcoming elections later in 1992. Before the elections at the end of the year, no less than nine new parties were registered. However, their internal squabble and heavy election rigging, strategies of intimidation and violence

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<sup>176</sup> Such as the introduction of a rule stating that in order to win the presidency, a candidate had to obtain, in addition to absolute majority, at least 25 % of the votes in no less than five of eight provinces (Katumanga, 2000: 18). Another measure was the ban on political rallies prior to the elections (Rudbeck, 2005: 176).

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as well as bribery on the account of Moi and his supporters meant that the 1992 elections resulted in Moi returning to office after having received only about a third of the votes for President and KANU gaining 112 of 200 seats in Parliament. In spite of the unfree and unfair character of the elections, the donors repealed the suspension of aid after the elections; possibly to avoid throwing the country into an even more chaotic political crisis (Rudbeck, 2005: 160, 175-179; Katumanga, 2000: 18; Sabar, 2002: 245-246, 249-250)

Since the only changes to the constitution that Moi had made were to repeal section 2A, which stipulated that KANU was the only legal party, after the elections the regime returned to political practices similar to those before it was forced to return to multipartyism and took no initiatives towards democratic reform. Both Supreme Court and Appeal Court judges were still appointed and relieved by the President and the members of the commission that monitored the judicial system were also selected by the President. Hence, Moi could use the legal system, as well as the secret police to deal with political opponents if they were seen as threats. Also indicating the lack of political change, Moi used political and economic incentives to persuade 24 opposition MPs to join KANU from 1993 to 1996, giving the party the two thirds majority needed to change the constitution independently of the opposition (Rudbeck, 2005: 182-184).

### **Rising demand for democratizing constitutional reforms and the minimum reforms of 1997**

However, the political climate had changed somewhat in that donors were working to counter corruption, NGOs were mushrooming, and the political debate in the media had resumed. Towards the end of 1994 a group of lawyers<sup>177</sup> which had played a crucial role in advocating restoration of multipartyism issued a draft constitution (called 'Proposal for a Model Constitution'). This suggested a number of changes to strengthen civil and political rights as well as to put serious restraints on the powers of the President. This led to the creation of the National Convention of Constitutional

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<sup>177</sup> The group included members of Law Society of Kenya, The Kenya Human Rights Commission and the International Commission of Jurists (Rudbeck, 2005: 186).

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Reform under the leadership of the National Convention Executive Council (NCEC) by the Kenya Law Society (KLS) and a number of NGOs. In April 1997, the NCEC agreed on a number of minimum acceptable constitutional reforms<sup>178</sup>, which gained public support to a level where Moi could no longer ignore the demand for reforms. Especially not since the IMF, WB and bilateral donors in July reacted to brutal suppression of a demonstration in favor of the reforms by withholding 400 million \$. Although the NCEC sought to avoid it, this resulted in the success of Moi to place all debate on constitutional change in the hands of parliament. Thus sidelined, part of NCEC formed a constituent assembly to review the constitution as a parallel to parliament, while other members formed the Inter-Parties Parliamentary Group (IPPG) with reform-minded members of KANU (KANU-A). Moi agreed in October 1997 to negotiate reforms with IPPG on the conditions that they would be limited to securing a fair election campaign later same year, negotiations had to take place at parliament level, and the rule of minimum 25 % in five of eight districts to win presidency would not be reviewed. The MPs that were part of IPPG agreed on the terms and after delaying of the enactment of the IPPG's proposal by Moi, mass demonstrations to promote reforms, and heavy international pressure by especially the US, seven weeks before the 1997 election day, Moi introduced the first serious democratic reforms since 1991.

Parliament also passed the Constitution of Kenya Review Commission Act of 1997, under which the President was to select 29 members from a list of 40 persons nominated by various sectors of society to collect views from the public and create a draft for parliament for deliberation and possible enactment. Since the lawyers and Non-Governmental Organizations (NGOs) of NCEC had then been sidelined in the official process, the parallel Ufungamano civil society review process led by the church was initiated. (Rudbeck, 2005: 186-191; Beetham et al., 2000: vi, 18; Katumanga, 2000: 31-32)

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<sup>178</sup> Among other things, they required the winner of the presidency to obtain at least 50 % of the votes or face a runoff, removal of restrictions on the freedom of assembly, press freedom and of barriers to registering political parties (Rudbeck, 2005: 187).

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### **The last tenure of Moi and the Constitution of Kenya Review Act**

Although the IPPG-reforms of the constitution and better electoral monitoring lessened the scope of rigging and violence, both still occurred at the 1997 elections and in patterns much resembling those of 1992. Moi again won the presidency (with 40.4 % of votes) and with 107 seats in parliament KANU obtained a majority, although falling much short of the two-thirds needed to independently change the constitution. However, the donor community decided to embrace the results in spite of extensive rigging in eight polling districts.

The weakened position of KANU thus meant that Moi had to include non-KANU MPs in the 1998 parliamentary deliberations on constitutional reforms. He could, however, still largely control the pace and content of the negotiation process (Odote, 2002: 6; Sabar, 2002: 281; Rudbeck, 2005: 193, 197).

The civil society actors of the NCEC that had been left out of the official process continued to criticize this and in April 1998, on the same night that it had organized a strike against the government-led process, Moi announced the establishment of an Inter-Party Constitutional Commission (IPCC). This included a number of MPs who supported the views of NCEC and a program for the constitutional review process (Katumanga, 2000: 35; Beetham et al., 2000: 18).

However, in 1999 the process stalled again due to disagreements in discussions over the composition of the committee mandated to review the constitution; possibly a strategy used by Moi and KANU to derail the process (Rudbeck, 2005: 198).

Consequently, in 2000, parliament (by passing the Constitution of Kenya Amendment Bill) established the 15-member CKRA, which was headed by Professor Yash Pal Ghai and excluded representatives from both civil society and the opposition. The opposition and civil society then formed the People's Commission of Kenya (PCK) to lead a parallel review process.

However, in 2001, negotiations in between the two groups led by Professor Ghai succeeded in merging the two groups by increasing the number of members in CKRC to include representatives from PCK.

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Moreover and importantly, an amended CKRA was adopted, which laid down the principles and roadmap for a comprehensive constitutional review process. The process was to be ‘people driven’, inclusive, performed in an open manner, based as much as possible in consensus with regards to decision making, and guided by principles of democracy, human rights and gender equity. Furthermore, the process was divided into three stages starting with civic education and collection of views by the CKRC, followed by a phase for public debate to take place, and to be concluded by the NCC stage at which the draft proposed by the CKRC based in the views of the Kenyan people was to be discussed, amended if necessary and then adopted by a two-thirds majority of all its members (whether present or voting or not) and before submitting it to the Attorney-General for final ‘technical revision’. Assisted by a PSC, Parliament was then to either adopt or reject the draft (but could not amend it) within one week of its formal presentation. In the case of adoption, the draft would then be subject of an advisory referendum (as this was later decided by the needed two-thirds of the NCC). (Andreassen & Torstensen, 2006: 2; Cottrell & Ghai, 2004: 6-8; Katumanga, 2000: 42; Odote, 2002: 1-3; ICJ, 2003: 227).

Monumentally, the CKRC thus released a new Draft Constitution in September 2002, which “...*comprehensively addressed many of the concerns of Kenyans and was a radical departure form the current constitution.*” (Odote, 2002: 2) Yet, throughout the work of the CKRC, there were attempts to hinder progress and after the release of the draft, and KANU dismissed it as foreign and unworkable.

In October 2002, Moi also inhibited the debate of the draft at the NCC by dissolving parliament, the existence of which was required for the conference to take place, and by having the conference venue sealed off by armed police. Although the review commission refused to disband, it had to wait for a new Parliament to be in place before the constitutional conference could be resumed (Odote, 2002: 2-4, Human Rights Watch, 2003: 1).



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### **The 2002 elections: the completion of the transition to democracy**

Since the Draft Constitution was thus neither debated nor adopted, the constitutional framework governing the general elections in 2002 was thus basically the same as the one that had been in place in 1997 (Odote, 2002: 3).

However, in spite of the lack of democratic constitutional reforms prior to the 2002 elections, some improvements relating to registration of voters, reduced possibilities of election rigging, and the Electoral Commission of Kenya (ECK) managed to heighten its professionalism by learning from previous shortcomings. Following an amendment from 1992 limiting the number of consecutive turns as president to two, Moi was required to step down from the presidency and most observers expected his successor to win the presidency. However, the hand-down of power internally in KANU threw the party into an uproar that resulted in several of the top KANU politicians announcing their candidatures. Among these were Raila Odinga and former VP Saitoti, whom along with other influential KANU members went into the LDP and went on to form the NARC with the newly former NAK. The thus united opposition chose the aging Mwai Kibaki as their leader and presidential candidate.

Despite some strains between the former NAK and LDP as well as half-hearted, sporadic bribing, rigging and intimidation on the behalf of KANU, Kibaki defeated the son of Kenya's first president, Uhuru Kenyatta, by 62.2 % to 31.3 % of the votes and NARC won 132 (seven of these appointed by Kibaki as the new president) seats in parliament.

With a parliamentary backing just short of two-thirds, Mwai Kibaki thus won the presidency in what, based on assessments of election observers, were the first free and fair elections of Kenya's history, thus marking the end of the country's transition to democracy. (Thorup, 2003: 2-6; Odote, 2002: 7-8)

### **1.B: An outline of the Constitution of Kenya**

According to the current Constitution of Kenya, the President of Kenya is to be elected through direct elections, be elected a Member of Parliament and he must gain the plurality of votes cast among the candidates running for the post while receiving at least 25 % of the votes cast in no less than five of Kenya's eight provinces. The

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President is the Head of State and Commander-in-Chief as well as the Head of Government, is elected for a period of five years, and he may only be re-elected once. The executive powers of the Government are vested in the Presidency and may be exercised either directly or through subordinate officers. The President appoints his ministers (Cabinet) from the MPs and the Cabinet is to be collectively responsible to the latter. There are no limits as to the number of ministers or assistant ministers and the President may at any time prorogue or dissolve Parliament. In addition, as offices in the public service, both the Attorney-General and the Police Commissioner as the head of the police are appointed and dismissed by the President (Torstensen et al., 2006: 5-6, 8, 10; The Constitution of Kenya: 26. (1); Barasa Interview: 19).

Concerning the judiciary, this is formally independent of the executive. However, the latter exercises a high degree of influence over the former through appointment and dismissal of judges and covert control over decision-making powers of these (Beetham et al., 2000: 9).

The executive also holds disproportionate power over Parliament, in which legislative power is vested. MPs are elected through a system of first-past-the-post in single-member constituencies for five year terms simultaneously with the presidential election. Yet, 12 members are appointed by the president to represent special interests based on nomination by the political parties in relation to their number of seats.

Both ministers and regular MPs may introduce bills and once a bill is passed, the President is to assent to it. However, the President can refuse to do so, in the case of which Parliament has to reconsider the bill under influence of the President's reservations. After doing so, Parliament may pass the Bill again and resubmit it for assent in the same or an amended form; in the latter case, 65 % of MPs must support the Bill. While there is no Presidential veto power as such, the threshold for passing Bills against the will of the President is thus quite high.

With regards to constitutional amendments, such changes can only take place if adopted by a majority of at least 65 % of Parliament's members; the constitution thus provides procedures for its own amendment, but not its replacement

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Moreover, regarding bills that have money implications (which has been interpreted in a very wide sense with restrictive consequences for the potential for parliamentary control) Parliament can only proceed upon such bills if introduced by ministers. (Torstensen et al., 2006: 8-10; Cottrell & Ghai, 2004: 22-24; Beetham et al., 2000: 28-29, 37-38)

Furthermore, the constitution provides no option of removing the Head of State and Government through impeachment, but Parliament may by simple majority pass a vote of no confidence in the Cabinet, in the case of which, the President must either resign or dissolve Parliament within three days. However, this control mechanism is seriously weakened by the lack of formal maximum restrictions regarding the number of ministers and assistant ministers, as significant proportions of Parliament are often holders of such government posts. This is also connected to the fact that the constitution, despite establishing that Kenya is a multiparty democracy, does not include any provisions concerning the formation, management and supervision of political parties. This has (among other democratically problematic issues) made possible a practice of 'floor crossing' of opposition MPs into Government without these officially defecting from the political parties of which they were elected to Parliament (Torstensen et al., 2006: 7, 31; BFD 2a Interview: 5)

Political rights such as freedom of expression, assembly and association are secured in the constitution. However, the executive can always limit these through invoking residual acts, and violations of these rights, especially for women and children, remained a problem under Moi, while economic and social rights and access to these were largely unequally distributed (Beetham et al., 2000: 13, 20, 29; Odote, 2002: 3).

### ***1.C: The Governance, Justice, Law and Order Sector Reform Programme and constitutional development***

The GJLOS RP was introduced by the GoK in November 2003. Led by the GoK and involving 33 key institutions, the program aims to implement far reaching reforms of the public sector in order to enable better protection of human rights, rational, responsible and transparent governance and fair treatment for all citizens. One of the

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main challenges that the program is to serve to solve is to shape “...a common future around good governance, broad democracy and open, equal society through a sound constitutional and institutional framework.” (Republic of Kenya, 2005: 4)

The ERSWEC<sup>179</sup> of the GoK is based on three-part reform agenda, namely (I) Economic growth, (II) Equity and poverty reduction, and (III) Governance. The GJLOS reform program falls under the last pillar of governance, and is as such perceived as constituting the fundamental component of the general reform program, upon which the two other reform parts are based (Republic of Kenya, 2005: 6, 41). Pursuing a new constitutional order is identified as one of the main challenges under the governance pillar of the reform agenda and as key to the implementation of the rest of the GJLOS reform program (Republic of Kenya, 2005: 16).

The GJLOS program is taking place in the context of other major reforms in Kenya, among which the most significant are local government reform, public service reform, and financial planning and budget reform. Figure 3.1 shows how the GJLOS reform program (and the constitutional reform component to which GJLOS is contributing) is related to the rest of Kenya’s national reform agenda (Republic of Kenya, 2005: 42).

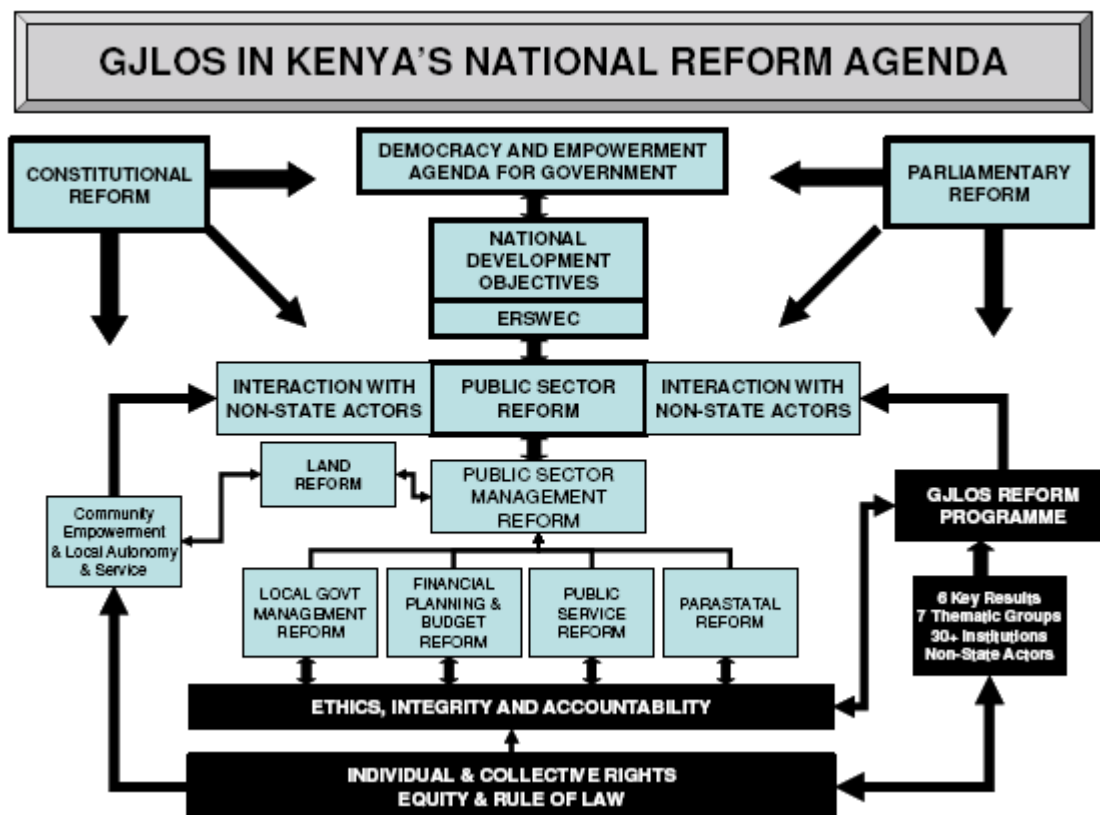
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<sup>179</sup> The Economic Recovery Strategy for Wealth and Employment Creation is Kenya’s Poverty Reduction Strategy Paper (cf. Republic of Kenya, 2004b).

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Figure 1.1: GJLOS in Kenya's National Reform Agenda



(Copied from Republic of Kenya, 2005: 42).

Following the formulation phase, implementation of GJLOS consists of two phases. The first was the Short Term Priorities Programme (STPP) running from July 1, 2004 until December 31, 2005 and focusing primarily on supply-side delivery and capacity building activities in preparation of the second phase, the Medium-Term Strategy (MTS). The MTS was embarked upon in January 2006 and is ongoing for completion in 2009 with the purpose of implementing a progressive reform agenda.

Initially, including during the STPP phase, the GJLOS was formulated to achieve results within 7 identified Key Result Areas (KRAs), namely (1) Ethics, Integrity and Anti-corruption, (2) Democracy, Human Rights and Rule of law, (3) Justice, Law and Order, (4) Enhance Public Safety and Security, (5) Constitutional Development, (6) Quality of Legal Services to Government and the Public, and (7) Capacity for Effective Leadership and Management of Change. A multi stakeholder Thematic Group (TG) was formed in connection with each of these KRAs, which meant that

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there was a direct linkage concerning the work planning of the Thematic Group on Constitutional Development (TGCD) and monitoring and evaluation of the outputs to be produced within the identified outputs within the area of constitutional development. (Ministry of Justice and Constitutional Affairs, 2007: 28-29)

However, due to criticisms relating to a lack of clarity as to the status of these KRAs (see Ministry of Justice and Constitutional Affairs, 2007: 28-29), when the MTS phase was initiated, these were reformulated into 6 new KRAs: (1) Responsive and enforceable policy, law and regulation, (2) Improved service delivery by the GJLOS institutions, (3) Reduction of corruption related impunity, (4) Improved access to justice, especially for the poor, marginalized and vulnerable, (5) More informed and participative citizenry, and (6) Effective management of the GJLOS reform program (Ministry of Justice and Constitutional Affairs, 2007: 5). This meant that the pursuit of a new constitution is now included as one of three challenges under the new KRA 1 (the other two are 'the embedding of human rights into the justice discourse' and 'law and order challenges' (Ministry of Justice and Constitutional Affairs, 2007: 19)). However, the TGs were left untouched by these changes and the enactment of a new constitution is thus still the key result of the TGCD. The purpose of this group is to constitute a forum for discussion of issues and also to assist the participating MDAs in developing work plans and implementing activities. The group consists of members drawn from the Kenya Law Reform Commission, acting as Convenor, implementing institutions, the Programme Coordination Office (PCO), the Financial Management Agent (FMA) for GJLOS, DPs, the private sector and civil society. (Ministry of Justice and Constitutional Affairs, 2007: 19-20, 33; GJLOS, 2007a: 1)

## **Appendix 2: Theoretical Generalizations**

In this section the theories used to analyze how democratization has developed in the case of the constitutional review process in Kenya in between the 2002 and 2007 elections and why these developments (and/or the lack thereof) have been created are reflected upon in terms of theoretical generalizations. The section thus presents a brief discussion of what the use of the theories in the analysis of the specific case has shown about the explanatory power of these theories regarding how and why democratization occurs (de Vaus, 2001: 223-224). In addition, due to the centrality of recent events related to the 2007 general elections of December 27 for Kenya's democratization process, to a limited extent, analytical generalizations are briefly discussed in the form of relating the use of the theories in analyzing the case to these recent developments.

### ***2.A Dahl's democracy model***

Regarding Dahl's democracy model, the utility of this for discussing qualitative developments regarding democratization in developing countries seems very high assessed from its use in analyzing the case of the present thesis, especially when criticism from so-called substantive approaches is taken in to include a measure of being able to discuss not just what has been termed as *de jure* but also *de facto* (including in between elections) democratization as well as the development of a democratic culture. A more explicit incorporation of these points of critique into Dahl's democracy model (or the other way around) could, however, produce a more readily employable theoretical framework for discussing developments regarding democratization.

Moreover, utilizing Dahl's model, rather than using the concept of consolidation and discussing whether behavioral, attitudinal or constitutional consolidation has been achieved, it has been possible to discuss more qualitatively and in a more nuanced manner developments in relation to these aspects in connection with the mentioned concrete dimensions of democracy. An example of this is thus that, while not necessarily reaching a level of consolidation, certain positive developments regarding

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*de facto* (arguably corresponding to the behavioral aspect) democratization with regards to freedom of expression and free and fair elections, e.g., seem to have been created, although *de facto* developments relating to important standards and fundamental properties have been lacking (responsiveness, notably); and these developments have taken place at the same time as a certain degree of internalization of responsiveness seems to have come into existence in the Kenyan demos. Dahl's democracy framework thus appears to have been very useful in capturing also the fluid character of democracy noted in chapter 2; the importance of which is arguably stressed by the events relating to the 2007 elections in terms of a continued expression of internalization of demanding responsiveness (to a certain extent) in the form of mass demonstrations against what appears to have been a negative development with regards to the institution of free and fair elections<sup>180</sup>.

However, in this connection, while the internalization of the property of responsiveness and the institution of elected officials of Dahl's model are closely connected with the concept of 'accountability', it has been the experience of the researcher that an explicit inclusion of the concept in the framework would be beneficial<sup>181</sup>.

### **2.B Rudbeck's model and historical institutionalism**

In connection with using Rudbeck's model, the analysis has shown that, apart from also holding explanatory power with regards to phases of democratization following the completion of the transition phase, the attempt to encompass explanatory elements across the actor/structure and top-down/bottom-up debates in relation to the causes of

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<sup>180</sup> Observers of the East African Union, the EU, the Commonwealth, the US, as well as domestic ones agree that the presidential election was seriously flawed (for an oversight of some of the flaws, see e.g. (DR, 2008e)). Even the Chairman of the ECK has admitted the occurrence of several mistakes in relation to the elections and that he does not know who the rightful winner of the presidential elections is. Yet, within an hour of the election results being announced, Kibaki was hastily inaugurated. As riots to spread as angered reactions to Kibaki's inauguration based in a flawed election, the GoK suspended all live radio and television news reports and outlawed all public rallies held by ODM. On January 8, resulting in new violent riots, Kibaki appointed 15 Cabinet ministers, including presidential candidate Kalonzo as Vice President and Martha Karua as reappointed Minister of Justice and Constitutional Affairs (Al Jazeera, 2007: 1-3; Mutua & Machuka, 2008: 1-3; Murigi, 2008: 1-3; Houreld, 2008: 1-2; Nielsen, 2008: 1).

<sup>181</sup> This could be achieved by means of drawing upon e.g. Beetham & Lord's notion of the concept (cf. Beetham & Lord, 1998: 71-75).



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democratization by stressing the strategic interactional dynamics and mechanisms between both actors and their structural environment as well as especially between mass actors/civil society and incumbents/elites seems an important positive theoretical development within the field. The central point that interests of and power relations between elites and mass actors (and that these affect each other and are generally open to change) has thus appeared crucial also in relation to Kenya's democratization after the completion of the transition to democracy, as the analysis of the case has emphasized that a transition does not mean that interests of incumbents and the poor majority converge.

To a certain extent, this is arguably also reflected in the continued instrumental use of the poor ethnic kinsmen as bargaining chips on behalf of the ethnic elites in trying to maximize their power and influence following the 2007 elections; power strategies for which it has predominantly been the poor who has paid the price. For example, while Kibaki has relied largely upon the support and votes of his fellow Kikuyus in combination (probably) with election fraud to regain the presidency, many poor Kikuyus have thus been killed and forced to flee their homes<sup>182</sup> (especially in the Rift Valley) (Nielsen, 2008: 1; Frederiksen, 2008: 1).

These strategic actions and events in relation to the 2007 elections have thus also stressed the importance of ethnicity as a factor related to elite alliances in explaining democratization analyzed in relation to the case. However, they also indicate one of certain further developments of Rudbeck's model which might be beneficial in terms of improving its explanatory power.

Hence, analyzing ethnicity merely as reciprocal patron-client networks along ethnic lines based in cost-benefit considerations on which strategies of elite alliances may be built has not come across as fully providing for an understanding the role of ethnicity in Kenyan democratization in the case (nor in relation to the 2007 elections).

In addition, the account of the explanatory role played by structures in the form of both informal and formal institutions has also showed itself to be limited within

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<sup>182</sup> As of January 15, the official number of people killed in the violent clashes following the general election was reported as above 700 by Human Rights Watch and hundreds of thousands have been forced to flee their homes (DR, 2008c: 1; DR, 2008e: 1-2).

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Rudbeck's model as it has been used in analyzing the case. The analysis thus also indicates that the power strategies of the incumbent in the case have been affected or inspired somewhat by strategies employed by the former incumbent (cf. e.g. the use of committees to stall reform negotiations and fragment opponents by both Kibaki and Moi, cooptation of opposition MPs, appointing members of his own ethnic group to influential positions in the civil service, frequent cabinet changes, as well as cooptation of civil society). Also, the analysis (using historical institutionalism) has indicated that existing institutions and networks may shape interests and strategies of the incumbent and thus that policy choices of incumbents may be based in a lower degree of rational utilization of institutions and networks for governing than in indicated in Rudbeck's model (the calculus approach). Hence, the analysis has shown that the incumbent is arguably also dependent on these<sup>183</sup>, which may have the consequence of making it difficult to change both institutions and strategies in the direction of democratizing developments.

As noted in chapter 4 presenting the theoretical instruments of the thesis, Rudbeck's model and historical institutionalism have many things in common and from the above reflections, it seems possible that the explanatory power of the former might benefit if it was to be situated explicitly within the theoretical framework of historical institutionalism, or by drawing more explicitly upon it<sup>184</sup>.

In connection with the political role of ethnicity in relation also to the 2007 elections, Frederiksen has interpreted the ethnic conflicts and violent clashes following the elections as a result of the process of consolidation and propagation of democracy in Kenya<sup>185</sup> (Frederiksen, 2008: 1). Based in the analysis of the present thesis drawing

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<sup>183</sup> Cf. the eclectic use of the cultural and calculus approach in historical institutionalism (and in Rudbeck's model regarding popular contentions, arguably).

<sup>184</sup> An alternative approach to developing the explanatory power of Rudbeck's model concerning ethnicity could be by elaborating the role that this plays explicitly in relation to democratization by drawing upon e.g. Hyden's theory of affection or Hellsten's concept of libertarian communitarianism; these however, are arguably most relevant in a Sub Sahara African context (cf. Hyden, 2006: 73-88; Hellsten, 2006: 12-16).

<sup>185</sup> It should be noted, however, that instrumental use of ethnicity politically on behalf of ethnikal leaders is far from a new tendency in Kenyan politics, as shown in e.g. the analysis drawing upon historical institutionalism.

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upon Rudbeck's model and historical institutionalism, it can be elaborated that these unfortunate events are arguably an indication of the continued conflict between the institution of ethnicity and the inherent asymmetrical power relations across ethnic groups, the power strategies of the elites to gain/maintain power for their own benefits (including strategies of elite alliances and violence in which the institution of ethnicity plays an instrumental role), as well as the in chapter 5 analyzed emerging internalization of responsiveness in the demos (which can be seen as a change in the political opportunity structure that has served as an enabling factor in mobilizing mass action against the alleged election fraud) in Kenya's democratization process (Nielsen, 2008: 1).

In this connection it should be noted that, with regards to the analyzed reliance on strategies of violence in which the police has been used against protests or demonstrations countering central interests of Kibaki's government in the case, this has also very much been the case after the 2007 elections. Human Rights Watch has thus reported that the police in its putting down of the opposition since the elections has killed numerous members of the opposition and has been shooting to kill (DR, 2008a: 1).

Moreover, as analyzed, the breakdown of the Kibaki/Kikuyu/NAK – Odinga/Luo/LDP alliance in the case of the constitutional review process constituted a defining moment in Kenya's democratization process. As mentioned in the analysis using historical institutionalism, this thus arguably constituted a 'critical juncture', which contributed to creating a branching point that resulted in a shift of the constitutional review process onto a new path in which the two political blocks through the informal norms of the institution of ethnicity and its relations to political elites polarized the nation<sup>186</sup>. However, not only in relation to the review process, but also with regards to the general elections in 2007 did this arguably play an extremely significant role, as it appears unlikely that the conflict regarding the election outcome

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<sup>186</sup> As also mentioned in the analysis, the breakdown of NARC as a result of the disagreements in the review process has arguably even strengthened these informal norms, as it constituted a betrayal of trust that the voting in of Kibaki and NARC across ethnic lines might have begun to build, which may thus also have contributed to the ethnic conflicts and violence in the aftermath of the elections (cf. Barasa Interview: 18; Frederiksen, 2008: 1; Nielsen, 2008: 1).

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between these two factions as well as the violent confrontations and killings involving especially Luo and Kikuyu would have occurred if Kibaki's faction had honored the MoU and the coalition had continued to exist (Nielsen, 2008: 1; Frederiksen, 2008: 1; DR, 2008b: 1). In addition, had a new constitution been enacted (or at least minimum reforms to secure e.g. the independency of the ECK (cf. chapter 3), it is quite possible that the 2007 elections would have been more 'free and fair' and that the ensuing violence and killings would thus not have occurred.

As the events of the constitutional review process have had and probably will continue to have consequences for Kenya's further democratization process, in combination with the threat of backtracking to Kenya's democratization process constituted by the character of the 2007 elections, the crucial importance of discussing the developments of democratization and explaining these in the period in between the 2002 transition to democracy and the 2007 elections, as this thesis has sought to in relation to the crucial and central constitutional review process, is thus emphasized.

Regarding the analysis drawing upon historical institutionalism, the theory has proved useful in explaining democratization processes (including a potential for a more explicit focus on the influence of international factors than within Rudbeck's model). However, the utilization of the theory in the analysis has arguably also shown that elaboration of the definition of institutions with regards the interrelations between *"...the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy..."* that the theory defines institutions as could be beneficial (Hall & Taylor, 1996: 938). That is, e.g., can an institution be constituted by both formal and informal procedures or would that per definition imply the existence of two separate, but related institutions?

Another regard in which the use of the theory in explaining democratization in the case has indicated that theoretical developments or elaborations could improve the explanatory power of the theory relates to the relatively weak definition of what constitutes a 'critical juncture'. This central concept is defined as *"...moments when substantial institutional change takes place thereby creating a 'branching point' from*

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*which historical development moves onto a new path.*” (Hall & Taylor, 1996: 942). But what exactly constitutes a ‘substantial’ institutional change? When is a given change ‘substantial’ enough to be characterized not as an incremental change, but a ‘critical juncture’? If a more elaborate definition could be developed, the potential for distinguishing between the two might thus be improved.

Finally, the role of ideas is emphasized as important in historical institutionalism, but the notion of ideas and their role is somewhat limited in depth, which has been reflected in the analysis in the form of the choice of using Foucault to analyze the explanatory potential of such variables. Further developments in this regard would thus improve the explanatory power of the theory generally as well as with regards to democratization processes (cf. e.g. Hay & Wincott, 1998: 957; Peters, 2005: 75, 79-81; Hall & Taylor, 1996: 942).

### ***2.C Foucault’s theorization of the power of knowledge, disciplines and discourses***

In using Foucault’s theorization of the power of knowledge, disciplines and discourses, the analysis has shown that the theory has a great potential for utilization in relation to explaining the role of ideas and knowledge in democratization processes as well as for more explicitly encompassing a focus on how international factors may affect democratization processes as not just a second rang factor, but as inextricably linked to domestic ones (cf. Abrahamsen, 2000: 11).

However, while the components of discourses identified and described by Foucault have shown themselves as extremely useful in the analysis, their definition could be clearer, as could their relations to the rules of formation, transformation and correlation. If these elements of the theory were to be further developed, it might thus further heighten the practical utilization of the theory.

Moreover, the use of Foucault in analyzing the role of the good governance agenda in relation to democratization in the case of the constitutional review process in Kenya also indicated the importance of consciously reflecting upon how to balance in good governance related development practice the tensional relationship between politics

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and management. Hence, while it is certainly not the intention of the author to argue for the disregarding of concepts such as ‘ownership’ on behalf of partner country governments (nor indeed that of national sovereignty), the analysis drawing upon Foucault<sup>187</sup> did arguably serve to stress the importance of questioning the balance employed in the good governance discourse and its conceptual components<sup>188</sup> regarding GJLOS and constitutional development in terms of how this balance relates to and affects power relations in Kenya’s democratization process (cf. Degnbol-Martinussen & Engberg-Pedersen, 2003: 299-301).

Hence, the analysis can be seen as having emphasized the importance of how the politics – management tension is balanced in development practice by donors and IFIs in through the employment of the balance between conditions such as human rights, good governance, and democratization and then concepts of ownership, leadership and partnership in general as well as in countries recently having experienced democratic transitions. In other words, the analysis of the case can be interpreted as indicating that great care needs to be exerted in relation to the degree of reliance upon ownership, leadership and partnership on behalf of donors following democratic transitions, as employment of these principles may affect power relations in vulnerable democratization processes in favor of elites that have little or no interest in the transformations of power relations that democratization requires.

Interpreted against this backdrop of the analysis, the probable election fraught of the 2007 elections in favor of Kibaki’s reelection, as well as Kenya’s present status as a nation struggling to avoid further fragmentation along ethnic lines and on the verge of backtracking democratically, it will thus be extremely interesting to see how the donors choose to respond after the dust settles in terms of the employed politics – management balance in the good governance discourse. Seen in this light it is

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<sup>187</sup> Through the remarkable point that the one respect in which the good governance discourse in relation to GJLOS moved somewhat towards a more political and less managerially focused object (when the thematic group on constitutional development began proactively working on drafting legislation) did result in the only *de jure* democratization development in the case (cf. section 8.4).

<sup>188</sup> Concerning the, in the case somewhat (and in general potentially) conflicting objects of promoting developments regarding the normative concepts of good governance and democratization on the one hand and on the other hand doing so by relying on the concepts related to ‘ownership’ (cf. Degnbol-Martinussen & Engberg-Pedersen, 2003: 294).

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therefore interesting that the Danish Ambassador, Mr Bo Jensen, in the capacity of the acting chair of the Development Co-operation Group<sup>189</sup> issued a statement on behalf of the group, in which it was warned that “...*if the commitment of the Government to good governance, democracy, the rule of law and human rights weakened, donors would reconsider direct or sector budget support and give assistance through community organisations and the private sector.*” (Agina, 2007b: 1).<sup>190</sup>

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<sup>189</sup> This group of donors includes the European Commission Delegation to Kenya, the United States, the United Kingdom, Denmark, Canada, Finland, France, Germany, Italy, Japan, Netherlands, Norway, and Spain (Agina, 2007b: 1; DR, 2008e: 1-2).

<sup>190</sup> Moreover, earlier the EU and US has cautioned that “...*it will not be business as usual until there is a political compromise that leads to a lasting solution "that reflects the will of the Kenyan people, wins their confidence and helps return Kenya to stability".*” (Mutua & Machuka, 2008: 2).





### **Appendix 3: The normative character of the concepts of ‘good governance’ and ‘democratization’**

As described in the methodology chapter, the distinction between political and administrative aspects of governance may be useful, but it is important to recognize that there does not exist a clear-cut distinction of ‘either or’ between the two, but that their relationship is rather characterized by a tensional balance. Hence, while the World Bank’s first dimension of governance relating to type of political regime is explicitly political, the two latter dimensions, claimed to be non-political, are arguably also political to a certain extent. For example, the second aspect of governance defined by the World Bank<sup>191</sup> will unavoidably be intertwined with for example political priorities between processes that may strengthen some aspects of governance, but weaken others (e.g. efficiency vs. consensus or individual rights vs. communal obligations). Different societies may thus desire different social and economic outcomes (or prioritize them differently) based in varied social and cultural norms and values. What constitutes ‘good’ governance is therefore a political and not a technical question (as emphasized by scholars such as Poluha & Rosendahl, Farazmand, and Degnbol-Martinussen & Engberg-Pedersen, and lately also Danida (Danish Ministry of Foreign Affairs, 2007: 8). (Abraham & Munshi, 2004: 19-20; Farazmand, 2004: 10)

Democracy can at its most basic be defined as the ruling of the people according to the will of the people. Although some scholars and politicians tend to think of, and indeed present, democracy as a universal good, it must not be forgotten that democracy too is a normative concept and that processes of democratization are therefore by no means politically neutral (nor unidirectional). Democracy can take any number of forms and the features of democracy in any state have wide ranging consequences for the well-being of the different social groups of its people.

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<sup>191</sup> Relating to “...the processes by which authority is exercised in the management of a country’s economic and social resources...” (Hede, 2006: 206).

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Since both concepts are thus normative, their promotion in practice is also likely to be in the interest of some social groups, while countering the interests of others. Hence, without some form of pressure from other actors in or outside the country, democratization is often not in the interests of the elites as long as the benefits they receive as a result of the non-democratic form of governance exceed the costs of resisting pressure to democratize (Pevehouse, 2005: 17; cf. Rudbeck's model).

However, democratization is not per default in the interest of the poor and marginalized either, but rather dependent on the features of the concrete democracy that is developing. Some scholars thus argue that the efforts of some international aid agencies (notably the World Bank, but also e.g. the DAC) to promote what they perceive to be good governance (as inherently linked to market economy and liberal democracy) has the effect of opening up the economy, rather than opening up the polity.

Hence, taken together, good governance and democratization do not necessarily decrease the 'hiatus between power and people' or serve the interests of the poor. Political parties participating in a democracy may themselves be undemocratic or high economic equality may prevent political equality in practice, whereby democratization can hold the risk of actually becoming the institutionalization of elite rule and status quo (Abraham & Abraham & Munshi, 2004: 33-35; Abrahamsen, 2000: 68, 75-76; Hede, 2006: 196-197).

While positive effects of democratization for poor and marginalized people are not a given, this does not mean that democracy is not a desirable moving target to strive for in developing countries. After all, democracy is recognized as the best (or least poor/problematic) form of government within political philosophy and, although democracy is not perfect as a government form<sup>192</sup>, it does hold many potential advantages (see e.g. Ndulo, 2006: 3, 13; Hood, 2004: 8; Carew, 2006: 5-15; Dahl, 2000: 44-61; Chapter 1 of the present project). At perhaps the most basic level, democracy can be understood as the form of government that, compared to any non-democratic alternative, at the same time allows for the highest amount of protection

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<sup>192</sup> One issue is for example the balance between majority rule and harm on minority rights or interests, an issue first discussed by de Tocqueville (Hede, 2006: 178; Dahl, 2000: 49-50).

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and care for fundamental rights of every individual, as well as maximum equality to allow for every individual to pursue what it perceives to be its interests (Dahl, 2000: 48; Hede, 2006: 179).

How ‘good’ governance and democratization is sought promoted and given meaning in concrete cases is thus of high importance to the well-being of different social groups in the country in question and consequently such processes play a central role in creating development and poverty reduction. These points emphasize the importance and necessity of analyzing the concrete features of real world developing democracies as well as, and in relation to, the concrete employment of the concept of ‘good governance in practice. These considerations have been a central part of the background for the preparation of the present thesis.



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### **Appendix 4: List of key informants interviewed**

- Representatives of the Kibaki wing of the GoK:
  - Kamau Kuria, constitutional lawyer, Kiratu Advocates
  - Adolph Alsack Muchiri, Democratic Party Nairobi Branch Chairman and Member of Parliament
- Representatives of the opposition/Odinga/ODM wing
  - Koitament Ole Kina, ODM Deputy Director/ former Vice Chairman of the Bomas Constitutional Conference/ former member of the CSO Katiba Watch Group
  - Dalmas Otieno, ODM Parliamentary candidate for the 2007 elections/ Party Representative at the Bomas National Constitutional Delegates Conference and Deputy Chair of the Technical Committee on the Executive/ former member of the Multisectoral Constitutional Review
- Representatives of CSOs advocating constitutional change:
  - Yobo Rutin, Deputy Executive Director and Adam Hussein Adam, Governance Programme Officer, CEMIRIDE
  - Patrick Onyango, Executive Director, and Hilda Obyerodhyambo, Deputy Executive Director, 4Cs
  - Gilbert Onyango, Policy & Legislative Advocacy Officer, The CRADLE
  - Ann W. Njogu, Executive Director, CREAM
- Governance officers of DPs responsible for the involvement in the support to GJLOS:
  - 5 anonymous Governance Officers of 4 different Basket Fund Donors in GJLOS
  - An anonymous Governance Officer of a major Non-Basket Fund Development Partner in GJLOS, Nairobi
- Representatives of commissions of the public sector engaged in the GJLOS Thematic Group on Constitutional Development:
  - Kathurima M'noti, Chairman, The Kenya Law Reform Commission (KLRC)

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- Maina Kiai, Chairman, the Kenya National Commission on Human Rights (KNCHR)
- Observers of the constitutional review process and democratization in general:
  - Tiberius Barasa of Governance and Development Policy Analysis of the Institute of Policy Analysis and Research (IPAR)
  - Dr. Daniel Muia of the Department of Sociology, Moi University
  - Adan Kabelo, Governance Programme Officer, Mellemsfolkeligt Samvirke/ Danish Association for International Co-operation (MS) Kenya
  - Ian Gatere, Kenyan journalist and observer of national politics

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### Appendix 5: Thematic interview guides

THEMATIC INTERVIEW GUIDE FOR CSOS .....	1
THEMATIC INTERVIEW GUIDE FOR ‘DEMOS-INTERVIEWS’ .....	12
THEMATIC INTERVIEW GUIDE FOR DPS .....	17
THEMATIC INTERVIEW GUIDE FOR MDAS .....	26
THEMATIC INTERVIEW GUIDE FOR OBSERVERS.....	30
THEMATIC INTERVIEW GUIDE FOR POLITICAL OPPOSITION PARTIES .....	41
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### Thematic interview guide for CSOs

#### *Foucault*

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Attention should be given to ‘resistance’ as a theme throughout the interviews based in Foucault; primarily in the sense of the countering of strategic maneuvers or tactics by opposing ones			Resistance as an inherent feature of power relations (Foucault).
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds	1. Try to describe to me what you understand to be the essence of the constitutional review process?	-The most central topics of reform?  -The purpose or aim of the process apart from producing a new constitution? [This also has relevance for	The discursive component of <b>objects</b> and the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)

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of components aided by the expressions of the rules of formation, transformation and correlation that govern them.		<p>‘theoretical options’]</p> <p>Which conditions do you see as the most important in making the constitutional review process possible in the first place?</p> <p>-How do you see the link between the GJLOS RP in connection with constitutional development and the constitutional reform process?</p> <p>-Has your perception of the constitutional reform process changed during the course of the process?</p> <p>-Has your perception of the role of the GJLOS in this connection changed? (In May 2005 the thematic group on const dev. Began proactively promoting progress in the review process?)</p> <p>-If so, how can this be?</p>	
Identification of the specific discourse(s) on the constitutional review process	2. How have you contributed to/taken part in the constitutional review process in practice during its course?	<p>[Devote attention to changes in this regard]</p> <p>-examples of different ways? E.g.</p>	The discursive components of <b>operations</b> and <b>concepts</b> , and <b>theoretical options</b> as well



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as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.		<p>in connection with the five consensus building stakeholder meetings in May 2005/ In May 2005 the thematic group on const dev. Began proactively promoting progress in the review process</p> <p>-Do you think that your role has changed during the process?</p> <p>Which conditions do you think have been most important in making you willing to participate in the constitutional review process?</p> <p>-Have there been any specific principles, considerations (or conditions, rules) that have guided you in engaging with the review process?</p>	as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation,	3. Can you think of any situations during the constitutional review process in which you have reconsidered your support to/participation in the process?	-What were your thoughts concerning the review of the constitution at that time?	The discursive components of <b>operations and concepts, and theoretical options</b> as well as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)

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transformation and correlation that govern them.			
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	4. Can you tell me about how your participation in the constitutional reform process relates to your other activities?	-Validation: Seek to understand and interpret how the organization's background with regards to expertise may affect its approach towards participating in the review process	Rules of correlation, which can be connected to the various types of components of other discourses. Perhaps especially concepts and theoretical options? (Foucault)
Operation of disciplinary power through the four major types of power techniques in the constitutional review process?	5. In connection with the GJLOS, how has it been decided which members/organizations from civil society could participate in the meetings of the thematic group on constitutional development?	[depending on whether or not the CSO has taken part in GJLOS meetings]  -Based in certain criteria? -Who have been present at the meetings? -Always the same organizations? [first technique] -E.g. in connection with the five consensus building stakeholder meetings in May 2005  -Who controls the activities of this group? (Sets the agenda for such	Disciplinary power and its forms of power techniques (Foucault)

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		<p>meetings/prepare work plans/meeting schedules?) [second technique]</p> <p>-Who participates actively in these meetings?</p> <p>-Have the activities under the thematic group on constitutional development included any forms of training or capacity building? -Describe them? -Involving which actors? [third technique]</p>	
Operation of disciplinary power through the four major types of power techniques in the constitutional review process?	6. In connection with the constitutional reform process, how has it been decided which CSOs could participate in the various committees?	<p>-With how many members? [first technique]</p> <p>-Which CSOs have participated/which have not? -Based in certain criteria? (Systematic inclusion/exclusion?) [first technique]</p> <p>-Concrete examples; e.g. the Inter-Parties Parliamentary Group of February 2007.</p> <p>-Who has controlled the activities of these committees? (Setting the agenda for meetings/meeting schedules?) [second</p>	Disciplinary power and its forms of power techniques (Foucault)

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		technique]	
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### ***Historical institutionalism***

<b>Theme</b>	<b>Suggested question wording</b>	<b>Suggested probe</b>	<b>Theoretical concept and source</b>
Persistent elements of the formal institutional environment (primarily relating to the constitution) that may have affected the behavior and strategies of the key stakeholders in the constitutional review process	7. Can you think of any situations in which you think that the present constitutional framework has influenced the course of the constitutional review process?	<p>-How do you feel that it has affected your possibilities of influencing the review process? [direct effects]</p> <p>-What did you do then? (changed goals or strategies?) [strategic learning]</p> <p>-Potential direct question: enabling vs. constraining?</p> <p>-In relation to other actors?</p>	Formal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes. Largely persistent features can cause path dependencies. (Historical institutionalism)
New elements of the formal institutional environment that may have affected range of actions and strategies available to the key stakeholders in the constitutional review process	8. Have there been any changes in the institutional environment which you feel have affected the ways in which you have been able to act in relation to the constitutional review process?	<p>-Or the ways in which others have been able to act?</p> <p>-How did these changes affect your possibilities of influencing the process? [direct effects]</p> <p>-Did this make you change your immediate goal in relation to the</p>	Formal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes. New features can constitute 'critical junctures', which can cause 'branching

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		<p>process? [strategic learning]</p> <p>-What did you do then (change of strategy?)? [strategic learning]</p>	<p>points' where policy developments moves on to new paths. (Historical institutionalism)</p>
<p>Conditions in the informal institutional environment which may have affected the behavior of actors in the constitutional review process</p>	<p>9. In connection with the review process, can you think of a situation in which you think that informal relations involving participants of the process have affected how they have behaved?</p>	<p>-Ask directly for informal relations within ethnic groups.</p> <p>-Could you try to describe how such informal relations may play a role (if they do) in Kenyan politics? -Now compared to under Moi?</p> <p>-Indirect question: Can you describe how people generally would expect a new president in Kenya to act in relation to his own ethnic group?</p> <p>-How do you think Kenyans perceive such informal relations or the way they work after Kibaki has become president? (Any</p>	<p>Informal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes in the form of either path dependency or developments on to new policy paths via critical junctures (Historical institutionalism)</p>

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		changes?)	
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### ***Rudbeck's model***

<b>Theme</b>	<b>Suggested question wording</b>	<b>Suggested probe</b>	<b>Theoretical concept and source</b>
The <b>repertoire of contention</b> available and sought applied by government challengers. (including how this may have changed over the course of the case)	10. Can you describe to me the ways in which you have tried to influence the review of the constitution from the beginning of the review process until now?	How did you decide on each of the particular types of action that you used at the different points in the review process?	Repertoire of contention (Rudbeck)
Features of the <b>political opportunity structure</b> which may have affected the potential for popular contention –or range of available options. (including how this may have changed over the course of the case)	11. Can you think of any conditions in the political environment which have affected your opportunities to act with other members of CS or political parties in relation to the constitutional review process?	This could be: -Splits in elite alliances? -Changes in the international political environment or attitudes of DPs? -Effectiveness of the authorities in containing protests or demonstrations – changes in expectations regarding potential gains from protesting?  -Seek to encourage narrations: ‘what happened then?’, ‘how did the authorities respond to that?’	The political opportunity structure of a polity (Rudbeck)
<b>Access to resources, mobilizing</b>	12. Have you experienced your possibilities for influencing the review	-Encourage examples where access to resources	Access to resources, mobilizing

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<p><b>networks and claims making</b> of the main challengers of the government. (including how this may have changed over the course of the case)</p>	<p>of the constitution to have been affected by your access to resources?</p>	<p>has affected possibilities for acting.</p> <p>Direct questions can be used to probe for access to resources such as:</p> <ul style="list-style-type: none"> <li>-money</li> <li>-labor</li> <li>-internal loyalty</li> <li>-access to the media</li> <li>-numbers of people engaged</li> <li>-commitment of people engaged</li> </ul>	<p>networks and claims making as necessary preconditions for popular contention (Rudbeck)</p>
<p>Occurrence of events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)</p>	<p>13. Now, concerning the demonstrations which have taken place in connection with the constitutional review process, can you tell me about how you have experienced the response of the police to those demonstrations?</p>	<p>-Concrete examples:</p> <ul style="list-style-type: none"> <li>-Police and demonstrators clash after killing of Luo University professor (August 2003)</li> <li>-Police fired live bullets at demonstrators after failure to meet draft deadline (July 2004)</li> <li>-Police arresting nine demonstrators and used water cannons and tear gas due to fear of parliament amendment of bomas draft (March 2005)</li> <li>-Jailing eight ngo activists, use of tear gas, ban of protest marches –protestors threw stones, looting- one protestor shot dead by police (July 2005)</li> </ul>	<p>Strategy of Violence (Rudbeck)</p>

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		<p>-Interpretational question in relation to the motives for the responses: maintain public order vs. discouraging demonstrators (also potential)</p> <p>-Direct question: Any plausible connections between the responses by the police and the interests of Kibaki's government?</p> <p>-Indirect relations Presidency – Police?</p>	
<p>Occurrence of events that might indicate the existence of <b>elite alliances</b> in between Kibaki and his government on the one hand and internal as well as external elites on the other? (including how these may have changed over the course of the case)</p>	<p>14. Can you think of any instances in which it has been suspected that Kibaki was trying to gain the support of groups outside his government by offering something in return/by means of horse trading? (Related to the review process)</p>	<p>-Seek to encourage narratives</p> <p>-Sum up 'the horse trade' in each story to validate your understanding</p> <p>-Specific links to ethnic groups and/or business elites e.g.</p> <p>-Some specific examples/hypotheses to be asked about directly could be:</p> <p>-Kenyatta: Kibaki was trying to use a clique of his friends in Parliament to amend the constitution (December 2004)</p> <p>-The different reshuffles in cabinet</p>	<p>Strategy of elite alliances (Rudbeck)</p>



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		<p>(e.g. November 2006)</p> <p>-There have also been continuing problems with corruption during Kibaki's presidential period... (1 billion \$ in January 2005)... He has been criticized for not doing enough to fight corruption?... How do you think people perceive his efforts in this regard?...</p> <p>Direct question: part of the solution or part of the problem?</p>	
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### Thematic interview guide for ‘demos-interviews’

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Introductory questions to place interviewee in economic group	<ul style="list-style-type: none"> <li>• Place of residence</li> <li>• Profession</li> <li>• Income range</li> </ul>		
Introductory question to avoid redundant interviewing	<ul style="list-style-type: none"> <li>• To what extent have you followed the constitutional review process?</li> </ul>		
1. De facto <b>effective participation</b> with regards to the constitutional review process	<p>1. Elected officials</p> <p>Try to think about the constitutional review process in the period in between the general elections in 2002 and now.</p> <p>1. Who has taken the lead in the constitutional review process?</p> <p>2. Which other institutions have been actively involved?</p> <p>3. What has the role of Parliament been?</p>	<p>-Has it for example been able to contribute with viewpoints, raise issues, or ask questions/ control the government regarding the review of the constitution?</p> <p>-Differences between government (-supportive)/opposition MPs?</p> <p>-Concrete positive or negative experiences in this regard? (In relation to the Bomas or the leading up to the referendum, e.g.?)</p> <p>-How do you think that this participation of Parliament has been compared to before the 2002 general elections?</p>	Dahl's first standard: Effective participation

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De facto <b>effective participation</b> with regards to the constitutional review process	<p>4. Have Kenyans who are not politicians participated in the review process?</p> <p>5. Who?</p> <p>6. Have you participated in the review process in some way?</p>	<p>-How? Able to presents their views?</p> <p>-When? Through e.g. the Bomas or the investigation into public opinion on constitutional reforms following the referendum in 2005? (the Commission of Eminent Persons)</p>	Dahl's first standard: Effective participation
De facto <b>effective participation</b> with regards to the constitutional review process	<p>5. Freedom of expression</p> <p>7. In connection with the participation in the review process, do you think that it has been possible for people to freely express their views on the review of the constitution?</p>	<p>To which extent/ how freely?)</p> <p>Who?</p> <p>-Political parties (government vs. opposition)?</p> <p>-Interest groups, NGOs, private companies?</p> <p>-The media?</p> <p>When?</p> <p>-Concrete examples?</p> <p>-Compared to before the elections in 2002?</p> <p>-Have you observed any changes in this regard over the course of the review process since the elections in 2002?</p>	Dahl's first standard: Effective participation
De facto <b>effective participation</b> with regards to the constitutional review process	<p>6. Alternative information</p> <p>8. How would you describe the availability of information (alternative) regarding the constitutional review?</p>	<p>-In connection with the referendum specifically?</p> <p>-Do you have any examples of issues regarding the process</p>	Dahl's first standard: Effective participation

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		<p>concerning which you think there has been particularly much or little information available?</p> <p>-How has the availability of information on the process been compared to before the 2002 elections?</p> <p>-Availability of information enabling or constraining?</p>	
De facto <b>effective participation</b> with regards to the constitutional review process	<p>7. Associational autonomy</p> <p>9. Have you heard about any obstructions or difficulties for people seeking to form associations or interest groups in relation to the constitutional review process?</p>		Dahl's first standard: Effective participation
2. De facto <b>voting equality</b> with regards to the constitutional review process (mostly referendum?)	<p>1. Elected officials</p> <p>10. Were you able to vote in the referendum on the proposed new constitution in November 2005?</p>	<p>-Experience of conditions that hindered or made voting difficult?</p> <p>-Did you?</p> <p>-If not, howcome?</p>	Dahl's second standard: Voting equality
3. De facto <b>enlightened understanding</b> in relation to the constitutional review process (availability of information + debate on decisions to be taken)	<p>11. How do you think that your opportunities have been to get information about the constitutional review process?</p>	<p>-Experience of conditions that have hindered access to information on the review process? (examples/personal experiences?)</p> <p>-Experience of conditions that have hindered public debate on issues to be</p>	Dahl's third standard: Enlightened understanding

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		<p>decided on in relation to a new constitution? (examples/personal experiences?)</p> <p>-Quality of information/debate?</p> <p>-Differences in various phases of the review process?</p> <p>-The institutions can be used as probes if necessary?</p> <p>5. Freedom of expression 6. Alternative information 7. Associational autonomy</p>	
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<p>4. De facto control of the agenda regarding the constitutional review process</p>	<p>[Only to be asked if interviewees seem knowledgeable of the review process]</p> <p>12. Could you try to tell me about your perception as to who has been controlling the agenda regarding the constitutional review process?</p>	<p>-Concrete examples?</p> <p>-Has it been the same people/groups throughout the process?</p> <p>-Have political parties or other groups (such as NGOs, interest groups, DPs) raised new issues or reintroduced issues on the agenda in connection with the constitutional review process?</p> <p>-How has the influence of groups outside the government been in the constitutional review process after the elections in 2002 as opposed to the review process before the elections?</p> <p>-Conditions that have been limiting access to influencing the agenda? (possibly relating to one or some of the institutions)</p>	<p>Dahl's fourth standard: Control of the agenda</p>
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### Thematic interview guide for DPs

#### ***Foucault***

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
The way the GJLOS RP was formulated with regards to constitutional development is likely to have affected the discourse on the constitutional review process as well as possibly creating more or less favorable discursive positions for different actors to gain influence in discursive practices on the constitutional review.	<p>[Only for the [CENSORED] governance officer in the function as the representative of the leading DP regarding GJLOS]</p> <p>A: How was the GJLOS RP formulated?</p>	<p>-By whom?</p> <p>-Could you describe the process?</p>	In connection with a certain discourse, different actors are positioned differently with regards to partaking in discursive practices dependent on the specific rules of the discourse. Possibly also relevant in connection with the fourth technique of disciplinary power. (Foucault)
Operation of disciplinary power through the four major types of power techniques in the constitutional review process?	1. In connection with the GJLOS, how has it been decided which members/organizations from civil society could participate in the meetings of the thematic group on	<p>-Based in certain criteria?</p> <p>-Who have been present at the meetings?</p> <p>-Always the same organizations? [first technique]</p> <p>-E.g. in connection with the five consensus</p>	Disciplinary power and its forms of power techniques (Foucault)

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	constitutional development?	<p>building stakeholder meetings in May 2005</p> <p>-Who controls the activities of this group? (Sets the agenda for such meetings/prepare work plans/meeting schedules?) [second technique]</p> <p>-Who participates actively in these meetings?</p> <p>-Have the activities under the thematic group on constitutional development included any forms of training or capacity building? Describe them?</p> <p>-Involving which actors? [third technique]</p>	
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	2. Could you describe to me what you perceive to be the essence of the constitutional review process?	<p>-The most central topics of reform?</p> <p>-The purpose or aim of the process apart from producing a new constitution? [This also has relevance for 'theoretical options']</p> <p>Which conditions do you see as the most important in making the constitutional review process possible in the first place after the elections in 2002?</p>	The discursive component of <b>objects</b> and the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)



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		<p>-How do you see the link between the GJLOS RP in connection with constitutional development and the constitutional reform process?</p> <p>-Has your perception of the constitutional reform process changed during the course of the process?</p> <p>-Has your perception of the role of the GJLOS in this connection changed? (In May 2005 the thematic group on const dev. Began proactively promoting progress in the review process?)</p> <p>-If so, how can this be?</p>	
<p>Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.</p>	<p>3. How have you contributed to/taken part in the constitutional review process in practice during its course?</p>	<p>[Devote attention to changes in this regard]</p> <p>-examples of different ways? E.g. in connection with the five consensus building stakeholder meetings in May 2005/ In May 2005 the thematic group on const dev. Began proactively promoting progress in the review process</p> <p>-Do you think that your role has changed during the process?</p>	<p>The discursive components of <b>operations and concepts, and theoretical options</b> as well as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)</p>

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		<p>(More pressure on participants at certain times e.g.?)</p> <p>Which conditions do you think have been most important in enabling you to give your support to/partake the constitutional review process?</p> <p>-Try to tell me about different principles or considerations that have guided you in engaging with the review process?</p> <p>-DPs: Harmonization, alignment, Ownership/partnership, e.g.?</p>	
<p>Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.</p>	<p>4. Can you think of any situations during the constitutional review process in which you have reconsidered your support to/participation in the process?</p>	<p>-What were your thoughts concerning the review of the constitution at that time?</p>	<p>The discursive components of <b>operations</b> and <b>concepts</b>, and <b>theoretical options</b> as well as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)</p>

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Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	5. Can you tell me about how your support to the constitutional review process through GJLOS fits within your wider good governance program in Kenya in terms of the approaches used?	Try to interpret in relation to the wide conception of good governance that includes political aspects explicitly (in terms of the political rule of a society relating to the government, parliament and the participation of the people in the development process) vs. the narrow conception of good governance focusing on the administrative aspects (primarily connected with public sector reform and management).	Rules of correlation, which can be connected to the various types of components of other discourses. Perhaps especially concepts and theoretical options? (Foucault)
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### *Rudbeck's model*

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
<b>Access to resources, mobilizing networks and claims making</b> of the main challengers of the government. (including how this may have changed over the course of the case)	6. Do you think the possibilities for groups outside government (e.g. CSOs and political parties) to influence the review of the constitution have been affected by the access to resources of these groups?	-Encourage examples where access to resources has affected possibilities for acting.  Direct questions can be used to probe for access to resources such as: -money -labor	Access to resources, mobilizing networks and claims making as necessary preconditions for popular contention (Rudbeck)

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		<ul style="list-style-type: none"> <li>-internal loyalty</li> <li>-access to the media</li> <li>-numbers of people engaged</li> <li>-commitment of people engaged</li> </ul>	
Occurrence of actions or events that might indicate attempts on behalf of Kibaki and his government to apply <b>strategies of legitimacy?</b> (including how these may have changed over the course of the case)	7. How aware do you think Kibaki is with regards to promoting among Kenyans a perception of him (and his government) to be the preferable leader of the country?	<ul style="list-style-type: none"> <li>-Does he place much emphasis on this through his actions or the way he speaks?</li> <li>-Concrete examples where he has done so?</li> <li>-Can you elaborate on how he seeks to promote such perceptions?</li> <li>-Sum up to validate</li> </ul>	Strategy of legitimacy (Rudbeck)
Occurrence of events that might indicate the existence of <b>elite alliances</b> in between Kibaki and his government on the one hand and internal as well as external elites on the other? (including how these may have changed over the course of the case)	8. Can you think of any instances in which it has been suspected that Kibaki was trying to gain the support of groups outside his government by offering something in return/by means of horse trading? (Related to the review process)	<ul style="list-style-type: none"> <li>-Seek to encourage narratives</li> <li>-Sum up 'the horse trade' in each story to validate your understanding</li> <li>-Specific links to ethnic groups and/or business elites e.g.</li> <li>-Some specific examples/hypotheses to be asked about directly could be: <ul style="list-style-type: none"> <li>-Kenyatta: Kibaki was trying to use a clique of his friends in Parliament to amend the constitution (December 2004)</li> </ul> </li> </ul>	Strategy of elite alliances (Rudbeck)

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		<p>-Appointment of the Commission of Eminent Persons to jumpstart the review after the referendum without consulting any other major stakeholders?</p> <p>-The different reshuffles in cabinet (e.g. November 2006)</p> <p>-There have also been continuing problems with corruption during Kibaki's presidential period... (1 billion \$ in January 2005)... He has been criticized for not doing enough to fight corruption?... How do you think people perceive his efforts in this regard?...</p> <p>Direct question: part of the solution or part of the problem?</p>	
<p>Occurrence of events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers?</p>	<p>9. Can you tell me about how you have experienced the response of the police to the demonstrations which have taken place in connection with the constitutional review process?</p>	<p>-The Mau Mau may be mentioned as historical frame of reference regarding the role that violence on behalf of incumbents has played as a means of maintaining political control.</p> <p>-Concrete examples: -Police and demonstrators clash</p>	<p>Strategy of Violence (Rudbeck)</p>

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(including how these may have changed over the course of the case)		<p>after killing of Luo University professor (August 2003)</p> <p>-Police fired live bullets at demonstrators after failure to meet draft deadline (July 2004)</p> <p>-Police arresting nine demonstrators and used water cannons and tear gas due to fear of parliament amendment of bomas draft (March 2005)</p> <p>-Jailing eight ngo activists, use of tear gas, ban of protest marches –protestors threw stones, looting- one protestor shot dead by police (July 2005)</p> <p>-Interpretational question in relation to the motives for the responses: maintain public order vs. discouraging demonstrators (also potential)</p> <p>-Direct question: Any plausible connections between the responses by the police and the interests of Kibaki's government?</p>	
Occurrence of	10. What did you make of	-Interpreting	Strategy of

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events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)	the raid of the Standard Media Newsgroup in March 2006?	question, potentially as a direct question: One-off incident (Kenya National Commission on Human Rights) Vs. part of several forms of intimidation (Amnesty International)  -Connection to any political groups or elites?	Violence (Rudbeck)
Occurrence of events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)	11. Can you describe the reactions to the killing of the Luo university professor in August 2003 (who was leading the discussions on the reduction of the powers of the president)? (Indirect question)	-Direct question: Some Luo: warning to Raila Odinga?  -Alleged or reported connections as to who was behind it?	Strategy of Violence (Rudbeck)

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### Thematic interview guide for MDAs

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Attention should be given to 'resistance' as a theme throughout the interviews based in Foucault; primarily in the sense of the countering of strategic maneuvers or tactics by opposing ones			Resistance as an inherent feature of power relations (Foucault).
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	1. Try to describe to me what you perceive to be the essence of the constitutional review process?	<p>-The most central topics of reform?</p> <p>-The purpose or aim of the process apart from producing a new constitution? [This also has relevance for 'theoretical options']</p> <p>Which conditions do you see as the most important in making the constitutional review process possible in the first place after the 2002 elections?</p> <p>-How do you see the link between the</p>	The discursive component of <b>objects</b> and the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)



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		<p>GJLOS RP in connection with constitutional development and the constitutional reform process?</p> <p>-Has your perception of the constitutional reform process changed during the course of the process?</p> <p>-Form &amp; type of reform vs. content of reform?</p> <p>-If so, how can this be?</p>	
<p>Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.</p>	<p>2. Can you try to tell me about how you have contributed to/taken part in the constitutional review process in practice during its course?</p>	<p>[Devote attention to changes in this regard]</p> <p>-examples of different ways/approach(es)?</p> <p>-Do you think that your role has changed during the process?</p> <p>Which conditions do you think have been most important in enabling you to give your support to/partake in the constitutional review process?</p> <p>-Try to tell me about different principles,</p>	<p>The discursive components of <b>operations and concepts, and theoretical options</b> as well as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)</p>

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		considerations that have guided you in engaging with the review process?	
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	3. Can you tell me about how you see your participation in the constitutional reform process in relation to your other activities?		Rules of correlation, which can be connected to the various types of components of other discourses. Perhaps especially concepts and theoretical options? (Foucault)
Operation of disciplinary power through the four major types of power techniques in the constitutional review process?	4. In connection with the GJLOS, how has it been decided which members/organizations from civil society could participate in the meetings of the thematic group on constitutional development?	<p>-Based in certain criteria?</p> <p>-Who have been present at the meetings?</p> <p>-Always the same organizations? [first technique]</p> <p>-E.g. in connection with the five consensus building stakeholder meetings in May 2005</p> <p>-Who controls the activities of this group? (Sets the agenda for such meetings/prepare work plans/meeting schedules?) [second technique]</p>	Disciplinary power and its forms of power techniques (Foucault)

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		<ul style="list-style-type: none"><li>-Who participates actively in these meetings?</li><li>-Have the activities under the thematic group on constitutional development included any forms of training or capacity building?</li><li>-Describe them?</li><li>-Involving which actors? [third technique]</li></ul>	
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## Thematic interview guide for observers

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
1. De facto <b>effective participation</b> with regards to the constitutional review process	<p>1. Elected officials</p> <p>Try to think about the constitutional review process in the period in between the general elections in 2002 and now.</p> <p>13. Who has taken the lead in the constitutional review process?</p> <p>14. Which other institutions have been actively involved?</p> <p>15. What has the role of Parliament been?</p>	<p>-Has it for example been able to contribute with viewpoints, raise issues, or ask questions/ control the government regarding the review of the constitution?</p> <p>-Concrete positive or negative experiences in this regard? (In relation to the leading up to the referendum, e.g.?)</p> <p>-How do you think that this participation of Parliament in the review process has been compared to before the 2002 GA elections?</p>	Dahl's first standard: Effective participation
De facto <b>effective participation</b> with regards to the constitutional review process	16. What is your assessment of the participatory aspects of the Bomas?	<p>-How was it decided who could participate?</p> <p>-Equal and effective opportunities for voicing preferences of the participants?</p>	Dahl's first standard: Effective participation
De facto <b>effective participation</b> with regards to	17. What is your assessment of the participatory aspects of the investigation into	-How was it decided who could participate?	Dahl's first standard: Effective participation

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the constitutional review process	public opinion on the constitutional review following the referendum?	-Equal and effective opportunities for voicing preferences of the participants?	
De facto <b>effective participation</b> with regards to the constitutional review process	18. Seen as participatory and democratic initiatives, were the bomas and the post referendum investigation of public opinion new types of initiatives in Kenya?	Examples?	Dahl's first standard: Effective participation
De facto <b>effective participation</b> with regards to the constitutional review process	5. Freedom of expression  19. In connection with the participation in the review process, do you think that people have been able to express their views freely?	To which extent/ how freely?)  Who? -Political parties (government vs. opposition)? -Interest groups, NGOs, private companies? -The media?  When? -Concrete examples?  -Have you observed any changes in this regard over the course of the review process since the elections in 2002?	Dahl's first standard: Effective participation
De facto <b>effective participation</b> with regards to the constitutional review process	6. Alternative information  20. How would you describe the availability of (alternative) information regarding the constitutional review?	-In connection with the referendum specifically?  -Positive/negative examples?  -How has the availability of	Dahl's first standard: Effective participation

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		<p>information on the process been compared to before the 2002 elections?</p> <p>-Sum up with interpretation: Availability of information enabling or constraining?</p>	
De facto <b>effective participation</b> with regards to the constitutional review process	<p>7. Associational autonomy</p> <p>21. Have you observed any obstructions or difficulties for people seeking to form associations or interest groups in relation to the constitutional review process?</p>		Dahl's first standard: Effective participation
2. De facto <b>voting equality</b> with regards to the constitutional review process (mostly referendum?)	<p>22. Concerning the referendum in 2005, were there any people or groups who experienced systematic difficulties concerning casting their votes?</p>	<p>1. Elected officials</p> <p>2. Free and fair elections</p>	Dahl's second standard: Voting equality
3. De facto <b>enlightened understanding</b> in relation to the constitutional review process (availability of information + debate on decisions to be taken)	<p>23. How do you think that the people of Kenya's opportunities have been to get information about the constitutional review process?</p>	<p>-Experience of conditions that have hindered access to information on the review process? (examples/personal experiences?)</p> <p>-Experience of conditions that have hindered public debate on issues to be decided on in relation to a new constitution? (examples/personal experiences?)</p>	Dahl's third standard: Enlightened understanding

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		<p>-Quality of information/debate?</p> <p>-Differences in various phases of the review process?</p> <p>-The institutions can be used as probes?</p> <p>5. Freedom of expression</p> <p>6. Alternative information</p> <p>7. Associational autonomy</p>	
4. De facto control of the agenda regarding the constitutional review process	24. Could you try to tell me about your perception as to who has been controlling the agenda regarding the constitutional review process?	<p>-Concrete examples?</p> <p>-Has it been the same people/groups throughout the process?</p> <p>-Have political parties or other groups (such as NGOs, interest groups, DPs) raised new issues or reintroduced issues on the agenda in connection with the constitutional review process?</p> <p>-How has the influence of groups outside the government been in the constitutional review process after the elections in 2002 as opposed to the review process</p>	Dahl's fourth standard: Control of the agenda

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		<p>before the elections?</p> <p>-Conditions that have been limiting access to influencing the agenda? (possibly relating to one or some of the institutions)</p>	
5. De facto Inclusion of adults in the constitutional review process	25. I was wondering if there are any groups of people in Kenya (e.g. ethnic) which have not, at least indirectly via parliamentary MPs, been included in the constitutional review process?	<p>-In the sense that they are not represented in Parliament and/or have not been represented in one way or another in the review process; i.e. marginalized groups of adults who do not enjoy full political citizen rights or have had difficulties in exorcizing them in practice (in relation to the constitutional review process)?</p> <p>-Such as pastoralists?</p> <p>-Elaborate on examples?</p> <p>-Existence of conditions or events that have limited the inclusion of adults in the review process?</p>	Dahl's fifth standard: Inclusion of adults



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### ***Rudbeck's model***

<b>Theme</b>	<b>Suggested question wording</b>	<b>Suggested probe</b>	<b>Theoretical concept and source</b>
Occurrence of actions or events that might indicate attempts on behalf of Kibaki and his government to apply <b>strategies of legitimacy?</b> (including how these may have changed over the course of the case)	26. How aware do you think Kibaki is with regards to promoting among Kenyans a perception of him (and his government) to be the preferable leader of the country?	<p>-Does he place much emphasis on this through his actions or the way he speaks?</p> <p>-Concrete examples where he has done so?</p> <p>-Can you elaborate on how he seeks to promote such perceptions?</p> <p>-Sum up to validate</p> <p>-Existence of surveys with data on the perceptions of Kenyans' regarding their president?</p>	Strategy of legitimacy (Rudbeck)
Features of <b>the political opportunity structure</b> which may have affected the potential for popular contention –or range of available options. (including how this may have changed over the course of the case)	27. Can you think of any changes in the conditions of the political environment which have affected the opportunities for e.g. civil society actors or political parties to undertake collective action relating to the constitutional review process?	<p>This could be:</p> <p>-Splits in elite alliances?</p> <p>-Changes in the international political environment or attitudes of DPs?</p> <p>-Effectiveness of the authorities in containing protests or demonstrations – changes in expectations regarding potential gains from protesting?</p> <p>-Seek to encourage narrations: 'what</p>	The political opportunity structure of a polity (Rudbeck)

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		happened then?’, ‘how did the authorities respond to that?’	
Occurrence of events that might indicate the existence of <b>elite alliances</b> in between Kibaki and his government on the one hand and internal as well as external elites on the other? (including how these may have changed over the course of the case)	28. Can you think of any instances in which it has been suspected that Kibaki was trying to gain the support of groups outside his government by offering something in return/by means of horse trading? (Related to the review process)	<p>-Seek to encourage narratives</p> <p>-Sum up ‘the horse trade’ in each story to validate your understanding</p> <p>-Specific links to ethnic groups and/or business elites e.g.</p> <p>-Some specific examples/hypotheses to be asked about directly could be:</p> <p>-Kenyatta: Kibaki was trying to use a clique of his friends in Parliament to amend the constitution (December 2004)</p> <p>-The different reshuffles in cabinet (e.g. November 2006)</p> <p>-There have also been continuing problems with corruption during Kibaki’s presidential period... (1 billion \$ in January 2005)... He has been criticized for not doing enough to fight corruption?... How do you think people perceive his</p>	Strategy of elite alliances (Rudbeck)

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		efforts in this regard?... Direct question: part of the solution or part of the problem?	
Occurrence of events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)	29. Now, concerning the demonstrations which have taken place in connection with the constitutional review process, can you tell me about how you have experienced the response of the police to those?	<p>-The Mau Mau may be mentioned as historical frame of reference regarding the role that violence on behalf of incumbents has played as a means of maintaining political control.</p> <p>-Concrete examples:            -Police and demonstrators clash after killing of Luo University professor (August 2003)            -Police fired live bullets at demonstrators after failure to meet draft deadline (July 2004)            -Police arresting nine demonstrators and used water cannons and tear gas due to fear of parliament amendment of bomas draft (March 2005)            -Jailing eight ngo activists, use of tear gas, ban of protest marches –protestors threw stones, looting- one protestor shot dead by police (July 2005)</p>	Strategy of Violence (Rudbeck)

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		<p>-Interpretational question in relation to the motives for the responses: maintain public order vs. discouraging demonstrators (also potential)</p> <p>-Direct question: Any plausible connections between the responses by the police and the interests of Kibaki's government?</p> <p>-Indirectly?</p>	
Occurrence of events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)	30. What did you make of the raid of the Standard Media Newsgroup in March 2006?	<p>-Interpreting question, potentially as a direct question: One-off incident (Kenya National Commission on Human Rights) Vs. part of several forms of intimidation (Amnesty International)</p> <p>-Connection to any political groups or elites?</p>	
Occurrence of events that might indicate that <b>strategies of violence</b> have been	31. Can you describe the reactions to the killing of the Luo university professor in August 2003 (who was leading the discussions	<p>-Direct question: Some Luo: warning to Raila Odinga?</p> <p>-Alleged or reported connections as to</p>	

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employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)	on the reduction of the powers of the president)? (Indirect question)	who was behind it?	
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### ***Historical institutionalism***

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Conditions in the informal institutional environment which may have affected the behavior of actors in the constitutional review process	<p>According to some analysts, informal ties and institutions are pivotal in understanding African politics.</p> <p>32. In connection with the review process, can you think of a situation where you think that informal relations involving participants of the process have affected how they have behaved?</p>	<p>-Ask directly for informal relations within ethnic groups.</p> <p>-Try to describe how such informal relations may work.</p> <p>-How do such informal relations play a role (if they do) in Kenyan politics?</p> <p>-Now compared to under Moi?</p> <p>-Indirect question: Can you describe how people generally would expect a new president in Kenya to act in relation to his</p>	<p>Informal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes in the form of either path dependency or developments on to new policy paths via critical junctures (Historical institutionalism)</p>

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		<p>own ethnic group?</p> <p>-How do you think Kenyans perceive such informal relations or the way they work since Kibaki have become president? (any changes?)</p>	
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### Thematic interview guide for political opposition parties

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Attention should be given to 'resistance' as a theme throughout the interviews based in Foucault; primarily in the sense of the countering of strategic maneuvers or tactics by opposing ones			Resistance as an inherent feature of power relations (Foucault).
Introductory question to ensure appropriate grouping	-Current affiliation to political party? -Former affiliation to political party?		
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	1. Try to describe to me what you understand to be the essence of the constitutional review process?	-The most central topics of reform?  -The purpose or aim of the process apart from producing a new constitution? [This also has relevance for 'theoretical options']  Which conditions do you see as the most important in making the constitutional review process possible in the first place?	The discursive component of <b>objects</b> and the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)

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		<p>-How do you see the link between the GJLOS RP in connection with constitutional development and the constitutional reform process?</p> <p>-Has your perception of the constitutional reform process changed during the course of the process?</p> <p>-Form &amp; type of reform vs. content of reform?</p> <p>-If so, how can this be?</p>	
<p>Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.</p>	<p>2. Can you try to tell me about how you have contributed to/taken part in the constitutional review process in practice during its course?</p>	<p>[Devote attention to changes in this regard]</p> <p>-examples of different ways?</p> <p>-Do you think that your role has changed during the process?</p> <p>Which conditions do you think have been most important in enabling you to give your support to/partake in the constitutional review process?</p> <p>-Try to tell me about</p>	<p>The discursive components of <b>operations and concepts, and theoretical options</b> as well as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)</p>



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		different principles, considerations that have guided you in engaging with the review process?	
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	3. Can you think of any situations during the constitutional review process in which you have reconsidered your support to/participation in the process?	-What were your thoughts concerning the review of the constitution at that time?  -What did you choose to do?	The discursive components of <b>operations</b> and <b>concepts</b> , and <b>theoretical options</b> as well as the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	4. Can you tell me about how you see your participation in the constitutional reform process in relation to your other activities/policies?		Rules of correlation, which can be connected to the various types of components of other discourses. Perhaps especially concepts and theoretical options? (Foucault)
Operation of disciplinary power through the four major	5. In connection with the constitutional reform process, how has it been decided	-With how many members? [first technique]	Disciplinary power and its forms of power techniques

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types of power techniques in the constitutional review process?	which parties and CSOs could participate in the various committees?	<p>-Which CSOs have participated/which have not?</p> <p>-Based in certain criteria? (Systematic inclusion/exclusion?) [first technique]</p> <p>-Concrete examples; e.g. the reconstitution of the PSC in May resulting in exclusion of the opposition faction of NARC (LDP); the Inter-Parties Parliamentary Group of February 2007.</p> <p>-Who has controlled the activities of these committees? (Setting the agenda for meetings/meeting schedules?) [second technique]</p>	(Foucault)
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### ***Historical institutionalism***

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Persistent elements of the formal institutional environment (primarily relating to the constitution) that may have affected the	6. Can you think of any situations in which you think that the present constitutional framework has influenced the course of the constitutional review process?	<p>-How do you feel that it has affected your possibilities of influencing the review process? [direct effects]</p> <p>-What did you do then? (changed</p>	Formal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes.

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behavior and strategies of the key stakeholders in the constitutional review process		goals or strategies?) [strategic learning]  -Potential direct question: enabling vs. constraining?  -In relation to other actors?	Largely persistent features can cause path dependencies. (Historical institutionalism)
New elements of the formal institutional environment that may have affected range of actions and strategies available to the key stakeholders in the constitutional review process	7. Can you please describe to me any changes in the institutional environment which you feel have affected the ways in which you have been able to act in relation to the constitutional review process?	-How did these changes affect your possibilities of influencing the process? [direct effects]  -Did this make you change your immediate goal in relation to the process? [strategic learning]  -What did you do then (change of strategy?)? [strategic learning]  -Or the ways in which others have been able to act?	Formal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes. New features can constitute 'critical junctures', which can cause 'branching points' where policy developments moves on to new paths. (Historical institutionalism)

### *Rudbeck's model*

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
The repertoire of contention	8. Can you describe to me the ways in which you	How did you decide on each of the	Repertoire of contention

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available and sought applied by government challengers. (including how this may have changed over the course of the case)	have tried to influence the review of the constitution from the beginning of the review process until now?	particular types of action that you used at the different points in the review process? E.g. the creation of Union for a New Constitution advocating minimum reforms (Feb 2007)	(Rudbeck)
Features of <b>the political opportunity structure</b> which may have affected the potential for popular contention –or range of available options. (including how this may have changed over the course of the case)	9. Can you think of any conditions in the political environment which have affected your opportunities to act with other parties or members of CS in relation to the constitutional review process?	This could be: -Splits in elite alliances? -Changes in the international political environment or attitudes of DPs? -Effectiveness of the authorities in containing protests or demonstrations – changes in expectations regarding potential gains from protesting?  -Seek to encourage narrations: ‘what happened then?’, ‘how did the authorities respond to that?’	The political opportunity structure of a polity (Rudbeck)
<b>Access to resources, mobilizing networks and claims making</b> of the main challengers of the government. (including how this may have	10. How have you experienced your possibilities for influencing the review of the constitution to have been affected by your access to resources?	-Encourage examples where access to resources has affected possibilities for acting.  Direct questions can be used to probe for access to resources	Access to resources, mobilizing networks and claims making as necessary preconditions for popular contention

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changed over the course of the case)		such as: -money -labor -internal loyalty -access to the media -numbers of people engaged -commitment of people engaged	(Rudbeck)
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Occurrence of events that might indicate that <b>strategies of violence</b> have been employed to gain superior capacity on behalf of Kibaki and his government <i>vis-à-vis</i> challengers? (including how these may have changed over the course of the case)	11. Can you describe the reactions to the killing of the Luo university professor in August 2003 (who was leading the discussions on the reduction of the powers of the president)? (Indirect question)	-Direct question: Some Luo: warning to Raila Odinga?  -Alleged or reported connections as to who was behind it?	Strategy of Violence (Rudbeck)
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### Thematic interview guide for the GoK

Theme	Suggested question wording	Suggested probe	Theoretical concept and source
Attention should be given to 'resistance' as a theme throughout the interviews based in Foucault; primarily in the sense of the countering of strategic maneuvers or tactics by opposing ones			Resistance as an inherent feature of power relations (Foucault).
Introductory question to ensure appropriate grouping	-Current affiliation to political party? -Former affiliation to political party?		
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	1. Try to describe to me what you understand to be the essence of the constitutional review process?	-The most central topics of reform?  -The purpose or aim of the process apart from producing a new constitution? [This also has relevance for 'theoretical options']  Which conditions do you see as the most important in making the constitutional review process possible in the first place after the 2002 elections?	The discursive component of <b>objects</b> and the rules of <b>formation, transformation, and correlation</b> that govern these. (Foucault)

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		<p>-How do you see the link between the GJLOS RP in connection with constitutional development and the constitutional reform process?</p> <p>-Has your perception of the constitutional reform process changed during the course of the process?</p> <p>-Form &amp; type of reform vs. content of reform?</p> <p>-If so, how can this be?</p>	
<p>Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.</p>	<p>2. Can you try to tell me about how you have contributed to/taken part in the constitutional review process in practice during its course?</p>	<p>[Devote attention to changes in this regard]</p> <p>-examples of different ways/approach(es)?</p> <p>-Do you think that your role has changed during the process?</p> <p>Which conditions do you think have been most important in enabling you to give your support to/partake in the constitutional review process?</p> <p>-Try to tell me about</p>	<p>The discursive components of <b>operations</b> and <b>concepts</b>, and <b>theoretical options</b> as well as the rules of <b>formation</b>, <b>transformation</b>, and <b>correlation</b> that govern these. (Foucault)</p>



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		different principles, considerations that have guided you in engaging with the review process?	
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	3. Can you think of any situations during the constitutional review process in which you have reconsidered your support to/participation in the process?	<p>-What were your thoughts concerning the review of the constitution at that time? E.g. at the Bomas or after the referendum?</p> <p>-What did you choose to do?</p>	The discursive components of <b>operations</b> and <b>concepts</b> , and <b>theoretical options</b> as well as the rules of <b>formation</b> , <b>transformation</b> , and <b>correlation</b> that govern these. (Foucault)
Identification of the specific discourse(s) on the constitutional review process as constituted by the four different kinds of components aided by the expressions of the rules of formation, transformation and correlation that govern them.	4. Can you tell me about how you see your participation in the constitutional reform process in relation to your other activities/policies?		Rules of correlation, which can be connected to the various types of components of other discourses. Perhaps especially concepts and theoretical options? (Foucault)
Operation of disciplinary power through the four major	5. In connection with the constitutional reform process, how has it been decided	-With how many members? [first technique]	Disciplinary power and its forms of power techniques

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types of power techniques in the constitutional review process?	which parties and CSOs could participate in the various committees?	<p>-Which CSOs have participated/which have not?</p> <p>-Based in certain criteria? (Systematic inclusion/exclusion?) [first technique]</p> <p>-Concrete examples; e.g. the reconstitution of the PSC in May; the Inter-Parties Parliamentary Group of February 2007.</p> <p>-Who has controlled the activities of these committees? (Setting the agenda for meetings/meeting schedules?) [second technique]</p>	(Foucault)
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### ***Historical institutionalism***

<b>Theme</b>	<b>Suggested question wording</b>	<b>Suggested probe</b>	<b>Theoretical concept and source</b>
Persistent elements of the formal institutional environment (primarily relating to the constitution) that may have affected the behavior and strategies of the key stakeholders in	6. Can you think of any situations in which you think that the present constitutional framework has influenced the course of the constitutional review process?	<p>-How do you feel that it has affected your possibilities of influencing the review process? [direct effects]</p> <p>-What did you do then? (changed goals or strategies?) [strategic learning]</p>	Formal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes. Largely persistent features can cause path

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the constitutional review process		<p>-Potential direct question: enabling vs. constraining?</p> <p>-In relation to other actors?</p>	dependencies. (Historical institutionalism)
New elements of the formal institutional environment that may have affected range of actions and strategies available to the key stakeholders in the constitutional review process	7. Can you please describe to me any changes in the institutional environment which you feel have affected the ways in which you have been able to act in relation to the constitutional review process?	<p>-How did these changes affect your possibilities of influencing the process? [direct effects]</p> <p>-Did this make you change your immediate goal in relation to the process? [strategic learning]</p> <p>-What did you do then (change of strategy?)? [strategic learning]</p> <p>-Or the ways in which others have been able to act?</p>	Formal institutional environment is pivotal in shaping interests, strategies, behavior and in turn policy outcomes. New features can constitute 'critical junctures', which can cause 'branching points' where policy developments moves on to new paths. (Historical institutionalism)



## **Appendix 6: Interviews**

### **4Cs Interview**

The following is the transcription of the Interview with Hilda Obyerodhyambo (Interviewee B), Deputy Executive Director and Patrick Onyango (Interviewee A), Director of the CSO Citizens Coalition for Constitutional Change/ 4Cs ([www.4cskenyatuikakayo.org](http://www.4cskenyatuikakayo.org)). 4Cs has been the actively engaged CSOs in connection with constitutional review in Kenya both prior to and after 2002 as well as in connection with the GJLOS RP. The organization receives funding from the BFD 2 (BFD 2a Interview: 4). The interview took place on 14.09.07 in the board room at the organization's head quarters and lasted 1.37.31 hours. Present at the interview were only the interviewer and the interviewed.

**Interviewer 2:** First of all, I am interested in how in practice you in your organization have contributed to or taken part in the constitutional review process?

**Interviewee A2:** One can not talk about the contribution of this organization to the review process, without looking at certain historical benchmarks, without details of these. I think the constitutional review process in this country has been ongoing really as part of the transition from colonial regime to the current situation, because really the supreme law of the land that we have now has not been negotiated in the sense of a central contract between the people themselves and in terms of defining the institutions of governance, of how they would like society to be organized and managed. So that has not happened and as a result of that we have in this country a situation where have [inaudible word] sometimes, a paradigm where on the one hand we have a majority of the citizens of this country whose access to justice is inhibited by the structure of the current constitution that we have and as a result of that inhibition, there is discrimination in terms of their access to justice and to treatment before the law. So for them, the majority of the poor the law is repressive and so is justice. But it is protective of the few rich. That conflict is something that only a new

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constitution can resolve and then of course development likewise, because of the current power relations, with the constitution that we have, which is basically a power constitution in favor of a few elites to the exclusion of the majority of the citizens of this country. And therefore, because of the power relations, when it comes to issues of distribution of resources, access [inaudible words] resources, again it is pinned against the majority poor. So you have again an ideological paradigm where on the one hand there is GDP growth of 5.8 to 6 %, while on the other hand for the majority there is poverty and it is increasing. Therefore there was need for a new constitution. Of course, initially we thought that if we moved section 2A which was in the constitution, which made Kenya a one-party state in 1982, then we thought that if we brought back multipartyism, the battles would not be there. But we have discovered painfully the last 15 years that multiparty politics without corresponding constitutional changes can not guarantee better governance, the better society that we have always desired to have. So therefore again, we could still go back to the constitution as the foundation of [inaudible word]. So in terms of our contribution we have used three levels of interventions: the grassroots levels in terms of mobilization of people, conscientizing people to us, engaging in the constitutional review process and therefore the social contract. In the mid-level with the middle class in terms of mobilizing them to support because they are able to interpret, these are the lawyers, etc. And at the national level, state level the institutions of governance, Parliament, ministries, the office of the Attorney General, so that we get a process, which is more people driven and people sensitive at all levels; so in a broad sense, we have kept the constitutional review process alive in this country. Every time the political elite say that constitution making is not for everybody, but should be for experts and so constantly, the review process has been captive to the contestations on power of the political class and citizens have been forced to spectate as the game goes on and decisions are made. So basically that is where we have come from and the contributions we have made.

**Interviewer 2.1: So in more practical terms, how has the organization engaged at these three different levels?**

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**Interviewee B2.1:** Of course, we do have constitutional education across, we work in 15 districts, but we have constantly initiated activities at the three different levels. At the grassroots level, we do constitutional education and what we call community organizing, we try to get community people to understand what the constitution is; they can even organize their own constitution at that level and then we try and translate this into the bigger picture of the country. At the mid-level with lawyers, professionals they understand the constitution, those who are interested, they can translate it and so they are able to for example contribute towards the drafting if there is any work that needs to be done, analyzing and all that. And then of course the political class, because for a long time, we have been hanging, the constitutional process always has to go back to Parliament especially for enactment and all that; so we keep lobbying them, for example we have been lobbying for them to change section 47 which allows for the enactment of a new constitution. Even if we had a new document today, we would not be able to actually enact it because there is no provision for it in the current constitution.

**Interviewer 2.2:** Have you changed your approach or strategies during the review process?

**Interviewee A2.2:** What we can say is that yes, we have seen some incremental gains which can be seen to be some aspects of change. Because when we work we get views from the people, we package them here in to kind of constitutional models, which have then been used as advocacy tools in terms of contents of the kind of constitution that we want and then we use this to lobby the institutions of government; so it is like a standard setting and actually there has been certain progression but not in terms of the kind of comprehensive constitutional reform that we want, but in terms of certainly this mission being put in place to kind of slow down this discretion that civil society is giving constitutional reform. So you find that instead of having a constitution commission on human rights, you have a Kenya National Commission on Human Rights, of course a governmental organization, but which has got no constitutional guarantee; it is again the political class which would like to have tools to play around with. Then we wanted a commission on gender, then we the National Commission on Gender created by acts of parliament.

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**Interviewer 2.3:** So some of these issues have been accommodated in another way outside of the constitution.

**Interviewee A2.3:** Yes. There was also the sexual offenses bill. We also had as part of that content of the model constitution process governance structures like devolution. The political class in power is already devolving certain services through the local authorities, and through now what we have come to realize, the Constituency Development Funds and several other funds, which are devolved to the [inaudible word]. Now the problem with this kind of arrangement if it is not having a constitutional foundation is that it is an extension of that political class and the executive to the low levels with the participation of the citizens still remote. The exclusion of the citizens from amendment affairs has not been resolved [inaudible word]. The whole question of distribution of resources has not been devolved. So you these things are working, so to that extent, yes, we can say there have been movements but not enough, or not just even enough to start satisfying the demands [inaudible words].

**Interviewer 2.4:** So concerning the different ways that you have tried to influence the review process, have changed or developed these during the process?

**Interviewee A2.4:** In the period before 2002, I think civil society, we were warlike, if you wish, going wandering in the streets, screaming, not asking for permission of no one, a lot of demonstrations; street protests. After 2002, there was the kind of development in civil society, which I think has affected the engagement, even our engagement with the constitutional review process. Because we felt, those of us who were fighting for the review and reform of the constitution, found themselves in government and so we felt that ‘yes, now we can get the reform from inside, now we engage them’. So there was a feeling of inactivity, of people waiting to see these reformers inside there taking the push for the process. Unfortunately, within a short time they became visionists and they became revivalists, they started arguing that governments are of a nature conservative; so civil society was afflicted by a disease which we call static paralysis syndrome. What happened was that we had brought this government into being, on the other hand we were stuck, we did not know how to



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deal with this or relate to this new government and so that informed the pact. Now we adopted more a policy dialogue in the hope that these things would work, we started holding meeting with relevant parliamentary committees, with members of parliament in board rooms, in hotels, in their offices. We were no longer in the streets. But it became clear that that was not working and so we had to go back action.

**Interviewee B2.4:** The other strategy that we have used is that every little window that we get if we can influence whatever decision that is going to be made or policies, we do that. Whatever small opening there is, you move in and in terms of, a lot of the government and leaders do not do a lot of reading, so they will almost just pass anything, so when you get the opportunity, you go and influence them and if you do not, you push that forward and you say ‘okay, at least we have reached this level’. So little gains, little gains.

**Interviewee A2.4(2):** That is where the GJLOS was one such window, because under the GJLOS there is thematic area number 5 dealing with constitutional development and we were using that as a window.

**Interviewer 2.5:** So you contributed at these meetings. I am wondering how these meetings are in terms of whether you were able to contribute with your views?

**Interviewee A2.5:** Most definitely, a lot and it lets you in on some... For example we were able to move to a level where we in fact agreed among government and civil society ourselves on enabling the legislative framework for the conclusion of the review process, which was accepted by the government on legislative and constitutional reforms, we had reached agreements on the critical areas of the current constitution. First, with regards to the current constitution, there was sufficient consensus on the fact that you can not bring into being a new constitution without allowing the current constitution to permit its death. So that was agreed, that we need to amend certain sections of the current constitution to allow a new one to come into being. And the key areas of amendments of the current constitution were agreed and we drafted it within the thematic group. Even how the process would go, we had mobilized members of Parliament and we were in agreement. Then something always happens when there is a difference of power fallouts [inaudible words] and we were back to square one.

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**Interviewer 2.6:** When are we talking about, when you had agreed on these issues?

**Interviewer B2.6:** This was from last year to this year up to June and then they went on recess and there was kind of a slow process and when they came back the focus was on elections.

**Interviewee A2.6:** And that bill, those statutes are still out there waiting to be introduced in Parliament and so one of the people, one strategy which was adopted, it was by the committee on the constitution and justice in Parliament, now yesterday we saw that they were able to submit to the president some of the things we had agreed upon as a constitution and it is a constitutional requirement that when the president receives certain petitions, he is supposed to act and he has given direction that this thing be brought back to Parliament for approval. We hope that this week or next week, maybe before they go home. That is how we influenced contents and the process through dialogue at policy level and at technical and professional levels; which development has relied upon civil society, really.

**Interviewee B2.6(2):** Yes, because even the bill that the Minister of Justice and Constitutional Affairs was tabling was largely borrowed from what work we had done, only it was a bit twisted at one point so that it goes back to Parliament; the same people who have killed the process again and again. So at that point, we disagreed.

**Interviewee A2.6(2):** So we disengaged. So we have now started a people's process where –because to get a constitution, although Kenya is doing it in peace time -there is a saying in the international elite profession that a country can not get a new constitution in peace time and that constitutions have always been negotiated in the form of ceasefire documents. But we are arguing here as 4Cs that looking at what has happened in the review process to this moment, together, we have more than a civil war at stake, so it is more than sufficient reason for us to go ahead and have a new constitution. I just wanted to say that apart from the local engagements, we as 4Cs have also used regional and international instruments as part of putting pressure on the review process.

**Interviewer 2.7:** When you say instruments, what do you mean?

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**Interviewee A2.7:** For example we have involved NEPAD, and the Africa Union as part of an independent and more objective [inaudible word] for purposes of facilitating negotiations of the review process. Of course, it was taken up by the government, they put in place a committee led by the Vice President, but of course again the electoral process overtook that, so it took a backseat.

**Interviewee B.2.7:** Yes, and they have not engaged principles of negotiation and mediation outrightly, so the process was definitely not going to take off; because there is no way you are going to call for a negotiation when you have locked heads for a long time and not met eye to eye, we need a third party to mediate. Now, they failed to do that and the whole process just collapsed because the opposition walked out of the process.

**Interviewer 2.8: When exactly are you talking about now?**

**Interviewee A2.8:** There was the negotiation process there was being led by the Vice President around April this year. But before that the same walkout happened with what was initiated under the GJLOS by the Ministry of Justice and Constitutional Affairs, which was being called at Windsor –the multisectoral forum. There was a whole process, one building into the other. That was when the opposition walked out, because principles that were agreed last evening, over night they had changed so that when they return to the plenary, all the things that were agreed are already different. So immediately, they walked away. Then civil society kept coming back to move [inaudible word], so the last time there was a fallout, that was when we involved NEPAD and because of fear of sanctions from other governments in Africa under the [inaudible word], the president constituted the committee headed by the vice president and made sure that key members of that committee were working there in terms of technical input and therefore were able to influence the outcome without being physically present there.

**Interviewee B2.8:** You might also want to note that all these processes have actually been initiated by the civil society. Civil society initiates a process and they say it is people driven and they get to a point and say ‘Okay, we need to involve the leadership at this level, the legislature’ and at that point, every time, it gets taken away from us. So there is a lot of work that has been done over time and every time

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they kill it and it comes back to civil society, and they invite it and they push it on; so it is constant.

**Interviewee A2.8(2):** That is why now we are pushing for a parallel process as civil society, because basically from the analysis that we have done here at 4Cs, we do not see any major areas of disagreement; in fact there is more unanimity on almost all the areas. –Except the one area which is of such entrenched interest to the political class, that is the system of government and the power relations, which system they would like to have, is it a parliamentary or a presidential system; so that is where the contest is. Our political class have been fixated with this American presidential arrangement; that is the one they know and any thing else that is likely to take that away, to disperse those powers and check them is not very welcome. So basically they disagree on that part and once they disagree, the entire process, including the gains, everything is lost. That is what happened at the referendum.

**Interviewee B2.8(2):** You may actually want to say that that is the only contentious issue within the constitutional process; because everything else has been agreed on. So when it came to the type of government, they just could not agree because of personal interests.

**Interviewer 2.9:** Which conditions do you think have been most important in making you willing to participate in the constitutional review process in the first place?

**Interviewee B2.9:** Our interest as an organization in the constitutional process... Our mandate was put together to actually drive the constitutional process and to see that the Kenyan people get a new constitution. But it has been over 10 years the organization has been existing and we have not been able to get a new constitution, so our mandate still stands.

**Interviewee A2.9:** And of course, those conditions what we described earlier, the kind of exclusion of citizens from decision making, public affairs, they have not changed. And therefore until these things change, the need for another constitution will continue and people work with it. It may not be a panacea, but as a pillar of governance within the state, a constitution is very important, so if you have a constitution that [inaudible words] and grants the president power to give amnesty,

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grants parliament draconian powers to give amnesty like they have done in the recent few days; if there were proper systems of checks and balances, such things can not happen. But they are happening because of the kind of constitution that we have, so the checks and balances have not been effective and until it is effective, we can not say that we should stop our surge for a new constitution, because it is only through a new constitution that that problem can be resolved.

**Interviewee B2.9(2):** And the evidence is all there. We are in our 9<sup>th</sup> Parliament, actually coming to an end and you can say that we have changed regimes over time, but nothing else has changed in terms of governance, in terms of democracy; it is constant. We are at that point where we are saying that perhaps it is only the constitution, the change of the constitution that can bring real democratic change. Because if you change regimes and nothing changes, then definitely there is something wrong. So what we are saying that actually, what we need to have in place is a new constitution and a new constitution is what will probably bring in a new democracy, if you can call it that.

**Interviewer 1:** So these issues that you are talking about, concerning division of powers, and the powers of the executive; are these the issues that you think are the most important and central in the constitutional review process?

**Interviewee B1:** Yes, and what has largely happened in this country is that whoever is in leadership, it is also driven by ethnic needs, so whoever is in power then accumulates all the power around him. So we have that community benefiting, the other communities are isolated, resources are not devolved so that resources are going to one community. So the belief has been that if you do not have one of your own in power, ruling the country then you will never get any resources. And well, that has been the practice over time; but we want to change that, because we are saying that there are enough resources in this country for everyone and if they are equitably distributed, everyone should be able to get at least basic services, like water and health services, education. As it is now, you will find parts of the country, like in the northern part of Kenya, it is almost like it does not exist and you can not compare the development in this region and that region; it is completely neglected.

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**Interviewee A1:** Related to that and with regards to again discrimination, there are so-called grievances which have accrued over time; cases of deliberate exclusion of certain regions and communities from the mainstream of public affairs participation, in terms of resources; grievances relating to crimes against humanity, abuse of human rights, economic crimes, all that; issues relating to transition justice questions like impunity. Now these have not been resolved. For example, we are pushing for the establishment of a transitional justice commission in this country that is being resisted because they are saying it is going to open up a kind of war, [inaudible words] and people are going to start fighting and so the unfinished issues of transitional justice and grievances whether of communities or individuals or as a country; that can only be resolved through a negotiated constitution and therefore our continued interest in this area.

**Interviewer 1.1:** How do you see the link between the GJLOS reform program in connection with constitutional development and then the wider constitutional reform process? If there is a link?

**Interviewee B1.1:** The constitutional process has not been driven too much within GJLOS, we have had reforms in the form of state organs, state institutions, the police, or the prisons, but there is in fact some funds within GJLOS, I think, for the whole constitutional process, but up to now, I do not think any of it has been used -perhaps for organizing state driven initiatives.

**Interviewee A1.1:** Also, they used part of it during the referendum for the prints and copies and to CKRC before it was disbanded for constitutional education. Actually, the funds have been used to serve government interests. The implication of all that is that yes, constitutional development is a key pillar of GJLOS, but constitutional development is not a government project and it should not be, really, because it is an interested party in this process and in any case, the institutions of governance and government are the ones that are subject to the review in the framework of the new constitution. So as an interested party it can not initiate and direct this process within the framework of GJLOS; that is why the amounts that have been given for constitutional development under the GJLOS process have not been available for the wider civil society and the Kenyan people in terms of the constitutional review

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process, because the government has a clear mind of the kind of constitution that it wants and that mindset is at [inaudible word] and opposed to the aspirations of the Kenyan people the way we know it.

To a certain extent, as mentioned earlier, the thematic group in GJLOS is a window for engagement, but that is as far as it goes, it does not translate into a successful completion of the constitutional process. Although I think in a sense our suspicion has been that they use the technical expertise of civil society, pick their brains and run away with whatever they have gotten and dump civil society. Once they have gotten these things, they do not go through to the level that we want to go.

**Interviewee B1.1(2):** The Kenyans are also at a different level now, they know that the constitution is actually supposed to come from the people because they have been watching all these initiatives, that the government failed, the political elite have initiated several things, but they have come to no solution. So it is clear in their mind that this process can only come from the people, it is the people who decide what they want, not the government. So any motion by government you can be sure is not going to go very far.

**Interviewee A1.1(2):** And therefore we get road blocks in the formal advocacy framework, we shift that advocacy outside, we advocate together with the people now, then again pressure mounts on the government, which then make grudging steps, very reluctant steps to be seen to be doing something.

**Interviewer 3: Have there been any situations in the review process in which you reconsidered your support to or participation in the process?**

**Interviewee B3:** Well, we have changed strategies as we have talked about, and ever time we actually go back to the drawing board and analyze the situation and say 'okay, perhaps at this moment, we need to initiate something else'.

**Interviewer 3.1: Could you elaborate on how you analyze the situation?**

**Interviewee B3.1:** That is part of the reason for example that at the time we wrote the APRM, NEPAD, we thought that we had reached that level where negotiation needed to have some support from the outside or some kind of nurturing and mediation.

**Interviewee A3.1:** Because already all the stakeholders of the constitutional process had reached dead ends and nobody was going to give in. And none of them trusts the

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other, including civil society, there has been this love/hate relationship between on the one hand the government and on the other hand the current opposition and they are all enacting civil society; when you give in to something then the government tells the political ‘we have them now’ and every time the political opposition is stuck, they look for an alliance with civil society to leverage or gain power with the state. So once that is achieved, as it was achieved recently when they went to table with the government, they quickly forget about civil society; for example they decided to limit the number of representation by civil society in that Vice President’s committee. Yet, before civil society put pressure on the president and the government to establish that committee, the political opposition was weaker positioned. But with the backing of civil society, then it was leveraged and the government gave in.

**Interviewer 3.2: So both the government and the political opposition have been trying to use civil society. Has that lead to divisions within civil society?**

**Interviewee A3.2:** Yes, it depends on what [inaudible word], there are progressive elements within civil society that is clear about the vision, about where the process should go and then of course there are those who are also aspiring to be politicians and to take the place of who are in the state positions. So you find in civil society a situation where a section [inaudible word] towards favoring the state, but there is this core Kenya of reform civil society groups that have traditionally initiated for reform movement in this country, which have been very consistent with regards to where the process should go. This traditional wave is the one that keeps pushing the reform agenda on the basis of the aspirations of the Kenyan people. So yes, to that extent therefore you have some divisions in civil society. But again, this is healthy, we are a plural society, people have a right to choose; the only difficulty we have or where we disagree is where that plurality is managed in such a manner that there are separations of our people from which the [inaudible word] is misdirected.

**Interviewer 3.2: Yes. I have been talking to some of the donors who appear to be seeing civil society as having difficulties in the form of different splits within it.**

**Interviewee A3.2:** These are healthy splits and people must accept them.

**Interviewee B3.2:** You can not have a homogeneous... People have different views and it is legitimate and they have the right to do that. Sometimes we just do not see



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things in the same way, but those who see it in out way and those who see it in another way, they come together and discuss and sometimes we come together when we see it in the same way and work together; civil society has worked together largely, during the multisectoral forum, the referendum...

**Interviewer 3.3:** I guess it also depends on the way you see civil society; if you see it as something that should be largely homogenous or as more conflictual...

**Interviewee B3.3:** And civil society is not just organizations like 4Cs, civil society is the people out there, the people that we work with, that is civil society, because what 4Cs stands for is what the people out there have said.

**Interviewee A3.3:** I think also that some of the problems in this process of review have been contributed to by the donors themselves. Because for example after the 2002 elections, instead of strengthening the hand of civil society, the reform wing of civil society, they suddenly shifted their love to the government and left civil society to starve for its love.

**Interviewee B3.3(2):** But you can not blame them because there were also a lot of shifts from civil society to government, so probably they were following the wave.

**Interviewee A3.3(2):** And that is where the problem is, because the perceived so-called split in civil society from the eyes of the donor community is based on personalities within civil society and [inaudible word] on splits relating to argumentation and issues also; which we would accept is legitimate differences in terms of issues, strategies, approaches and argumentation. These are things that we have to live with, because civil society has to be competitive in terms of ideas and innovation.

**Interviewee B3.3(3):** And then the issues of institutions and individuals, do you fund 4Cs because Paddy Njongo is in 4Cs; if Paddy moves into 5Cs, will you fund that or are you funding the institution and what it stands for.

**Interviewee A3.3(3):** Based on its assessments, strength, and its institutionalization systems. This was the disease that the donors suffered from. While the civil society was suffering from paralysis during and after the transition, the donors were still trapped in the personal relations with the people who actually moved into government. So even the funding moved and that is what came back to GJLOS,

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because several personalities have moved in there, therefore 'let us start the Governance, Justice, Law and Order'. But little did we know that our colleagues that were with us in the trenches in the reform war, were now not willing to have civil society play a watch dog role over them in terms of demanding accountability in their performance. So GJLOS was designed to systematically weaken civil society, so that under GJOS you have the government doing those things that ordinarily civil society, the advocacy and governance sector and human rights were doing. So the donors say 'yes, the Ministry of Justice is doing it, they have education and they are good people...' And of course, now they know better. A painful experience for all of us and so now we are getting back together as friends; hopefully this time, we will be more careful about the changes coming next January.

**Interviewee B3.3(4):** And plus the whole structure of GJLOS was actually flawed in terms of government – civil society engagement, because government was going to be very powerful over civil society and they were actually going to control civil society. That relation was not going to work, especially when you are going to be active as the opposition in the country.

**Interviewee A3.3(4):** Again, those structures were one of the relations could not work, given the nature of civil society vis-a-vis the state, you go in to jail and all of civil society get trapped; it is what we are calling soft cooption. You are coopted without you knowing that you are coopted, but you are playing along, which means you are spending more time trying to engage with this instead of spending more time trying to leverage the demand side on the performance of government with regards to reforms. And it has moved to a level, where I think that engagement is out of GJLOS because these things have not been resolved.

**Interviewee B3.3(5):** Yes. Several meetings have taken place and civil society has given its views on what they feel about the whole process. But a lot of it has not been implemented or they are not willing to do so...

**Interviewee A3.3(5):** So that is where we are at the moment. But GJLOS as an idea is good insofar as it was going to initiate reforms by the anti-reformist themselves. So it was the government itself driving those reforms. So that extent, we have seen certain positive things happening, but then I think there has been a lot of time spent

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on the hardware side of it. It has not gone to the software, which is attitudinal and behavioral change and reform. So you find that you give the police new uniforms, new cars, proper equipment, they buy more specialized tear gas canisters, water cannons, new uniforms for prisoners, watching TV and getting an education, but there is still a lot of abuse in prisons. Like for example, with GJLOS we would have liked to see a reduction of extrajudicial killings if GJLOS had reached the software level, but that does not seem to have changed.

**Interviewer 5: In connection with the GJLOS, I am interested in how it has been decided which representatives of civil society that could participate?**

**Interviewee A5:** Discussion initially was on predominant thematic areas, that is why, because of the activities of 4Cs, there was no way GJLOS to ignore constitutional development as a key area. There are those areas dealing with women, gender, areas dealing with access to justice in the judiciary and human rights, areas dealing with national security and [inaudible word]. So these were initial brainstorm sessions and that is how a few civil society organizations that were visible were actually invited to sit in these thematic groups, but in terms of structure that is just it, they have no control over the [inaudible words], on what policy, what reform, what else happens. But the civil society influenced the sectoral approach system.

**Interviewee B5:** Actually civil society should give itself credit for the concept of GJLOS, since it was live contributed to by civil society.

**Interviewee A5(2):** There is also something that we do not want to lose out on, which is that civil society through this on and off engagement under GJLOS has influenced the way bureaucrats do their business; for example, right now if you go to various documentation of government ministries, you find approaches such as research based approach, research based planning, human rights based development planning, budgeting; so those are things that are very invisible, but they are quite some things. There are little public services that actually have improved, we must give credit also.

**Interviewer 5.1: Okay, so the civil society organizations that were perceived as leading in the various areas were invited, but some were left out?**

**Interviewee A5.1:** Initially, again the invitations to these initial discussions of GJLOS was influenced by the exodus of leadership into government; so Paddy leaves

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4Cs, goes to the government, the Ministry of Justice and Constitutional Affairs, a program is coming, the first person I think of is Hilda.

**Interviewer 5.2: So the informal relations have had a lot to say?**

**Interviewee A5.2:** Yes, informal relations were built on; but it was a good thing, I can see that it has produced some results in a way. It has kept the dialogue between civil society and government going, although I think it is a love/hate thing. And most is at the board room level. At the actual implementation level...

**Interviewer 6: There were also all these different committees on constitutional reform set up by government and then civil society having so and so many seats. But how has civil society been included or participated in these committees?**

**Interviewee B6:** Of course, civil society organizations like 4Cs that have been driving the constitutional process and who have a track record, so if you leave 4Cs out of the constitutional process, we have all the [inaudible word] out here, it would actually not be justified and all the other organizations that have been driving the constitutional process, so a lot of times, you look at that kind of setup and probably you approach them. But again the government process has been very much influenced by who is pro government in terms of their views in the process and those are the people who a lot of times they have coopted. Civil society sometimes has forced itself into the process, but again every time civil society members force themselves into the process, the numbers are very limited and hence they are overwhelmed by the government side and sometimes the opposition.

**Interviewee A6:** The politicians, the political class is a [inaudible words] animal, because when we have sat tabled with the government and opposition, where the political interests of both sides concur, they do not want to hear about civil society, they do not want to hear anything about the public's opinion or interests. They have this capacity for strategic alliances, alliances of convenience to deal with a particular crisis, then after that they fall apart; this is what they have done in Parliament, you can see. So that has been a culture which it is very difficult for civil society to respond to. Because we would have liked when they are so different, then you can see how you can manipulate them, but in the end they quickly become one force and we do not now how to deal with that kind of force. The other thing that is related to that

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kind of debacle is because that for a long time civil society was seen as an NGO, quite homogenous and organized under the national council of NGOs, the NGO Council. But the NGO Council has effectively been coopted by the government and it is from its ranks that most of the people who have been given room in government initiated processes are drawn and now the NGO Council which is a statutory body is soon to be made a department of government if the review of the NGO Condition Act, which is now coming up in Parliament, is approved. There is a policy document on the NGO sector at the moment and they are carrying out a survey to establish that. And therefore, because of the weakness of civil society, in terms of coordinated action, so that what you have is coordinated action by a section that is likeminded and has a history of reform that is the core group that then pushes the [inaudible word]. But our experience is that that kind of core is not sufficient to sustain this development around processes, you need a wider foundation and that is why 4Cs is facilitating strengthening of civil society in terms of the establishment and formation of the National Civil Society Congress. We believe that with that kind of coordination and structure the voices will be more consistent, predictable, and stronger. While at the same time we look at internal governance standards by the various groups.

**Interviewer 12: So they are conscious attempts to increase the capacity of civil society.**

**Interviewee A12:** Yes, that is through the National Civil Society Congress.

**Interviewer 7: Can you think of any situations in which you think that the present constitutional framework has influenced the course of the constitutional review process? I am trying to test a hypothesis that I am working with that changing something from within the limitations of what you are trying to change can be quite difficult.**

**Interviewee A7:** True, true. One of the conditions that still persists is that the current constitution will require any attempts at replacing it are embedded or retrenched within it. But its construction is such that it demands two things: One, that whatever amendment to entrench the current constitution process in it should be such that it does not fundamentally alter the structure and form of the current constitution. That is one test and so, how do you ensure that if you assert a section 3A of the constitution

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which provides for mechanism for the current review process you shall not have fundamentally alter the structure of the current constitution? A second challenge is that the current constitution expresses specific issues, as the number of votes required to amend any of the constitution. But the [inaudible word] of our nation is that the wheeling dealing and deal cutting in our Parliament is such that no one side, government or opposition, can raise the number of members of Parliament required to amend a section in the constitution. Now, this is where the problem comes: on the one hand, you have now MPs running around signing a petition to the president, 167 but it only needs 135 of them to alter the constitution. Why then did they have to go petition [inaudible word] when they have those numbers? It is because of the wheeling and dealing and corruption, so by going through that route, they hope that they will have sufficiently induced by giving [inaudible word], like the 1.5 bn retirement package, that was part of the deal cutting. Then number three, there is also the judiciary. Kenyans are so adept at rushing to court and most of the time, it is gaited by the political class; when their interests are not going to be better served by amending this constitution, so the moment someone starts to go to the amendment process, cases are banged in court; they have to declare that that process is unconstitutional in itself. So you can see that we have difficulties with this kind of constitution. And then the fourth one, which is a soft one, is that it gives so much power to one center of power and therefore by estimate it is more attractive to those who are in power and those aspiring to power such that they will not be wailing to have those arrangements.

**Interviewee B7:** And that is why it does not matter how many regimes or changes of government we have; we can change even 20-30, but with the constitution as it is, there will be no change. When someone else comes into power, they start enjoying it and ‘why should we change it?’

**Interviewee A7(2):** The only person who would have allowed political good will to let Kenyans have a constitution was the previous regime, because they had come to the end of their term. So they had nothing to lose but it would have been in their interest as they were going out of power to make sure that there was a constitution that protects their interests, makes it comfortable outside of power. Now, that was lost

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and now we have these elections and we do not know who is going to come in and therefore, if we lose that thinking, or that theory, then it would mean that we must vote in the current president so that he goes the final term and then towards the end of his term, he says ‘Ah, I will give them a constitution, I have really enjoyed it’.

**Interviewer 7.1: But some of the former power holders are still part of the political elite, so your interests do not necessarily change when you exit government?**

**Interviewee A7.1:** Of course, the horizon is so bleak because most of those people who are angling around the Pentagon are the ones who refused to give us a constitution in the last regime –the majority of them. So you see again, that is therefore where civil society has a role to put pressure, to heighten the demand side.

**Interviewee B7.1:** And the thinking of the people is changing, slowly people are becoming interested, for a long time people were not interested in the constitution and believed that it was something that had to be handled with the lawyers and the leaders but the Kenyan person right now at the village level is interested in knowing ‘what is this constitution’, ‘how can it put food on my table?’. And we go out and do that education and the level of awareness has risen, so the society is also changing and the games that the politicians are playing will slowly –they will probably come to a dead end; it might take time, but we will come to a point where they can not play games anymore.

**Interviewee A7.1(2):** So there is incremental appreciation by people of the linkage between the material conditions for survival and the kind of constitution that we have in terms of access to resources, access to justice, protection of elemental rights, etc.

**Interviewer 11: Okay, for a last question. This is something that we have touched upon. Can you think of any conditions in the political environment that have affected your opportunities to act with other members of civil society or even political parties in connection with the review process?**

**Interviewee A11:** Yes, at two levels. One, the level of civil society cohesion; whenever political blocks emerge at the national level and contestations become ethnicized or regionalized at that level, that tends to trickle down to civil society and so groups find themselves tending to be claimed by those cliques out there; so that if I

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have 4Cs and I come from Western, then I must be a FORD-Kenya member. The political class expects loyalty from individual leaders of organizations on the bases of the regions where those leaders come from.

**Interviewer 9: So the ethnic ties also entrench civil society?**

**Interviewee A9:** Yes and that creates tension, I guess that is one of the things the donors you have been speaking to must have been seeing, because again it manifests itself in terms of levels and pigeonholing so that a Kikuyu [inaudible word] civil society organization must of course be part of the Kenya mafia, irrespectively of whether they are professional and consciously principled in terms of their work; a Luo must of course be ODM whether they have demonstrated history of neutrality and working on the basis of issues; so these things come to affect civil society. Again, at the national level, where you have for example US policy regarding the region in terms of for example terrorism, in terms of establishment of the international criminal court, then you have organizations' work also split. In the case of terrorism, there has been a revive, because there are people who believe that Kenya should have a very strong anti-terrorism law, but there are some of us, and in 4Cs, who believe that you do not need a US fronted, imposed anti-terrorism law and that we have sufficient legislation in this country to respond adequately to international terrorism and that what you do is to [inaudible words] for the agencies of security in the country; therefore, Kenya has not enacted any anti-terrorism law and we are saying if we want to enact then we have to be prepared to then disintegrate constitutional provisions. As bad as our constitution is, it does have certain safeguards it gives in chapter 5 with regards to freedom of the person, freedom of movement, freedom of access. So once that happens, you find that the so-called Christian based civil society organizations parting ways with human rights organizations, which are against the anti-terrorism law. Because then the Christina civil society opponent thinks that these democratization and human rights organizations are siding with the Muslims, with the terrorists; so it has affected in a way the [inaudible word] relationship at that level.

The other difficulty civil society encounters is political developments in the country is that if like now various [inaudible word], now they are called donkeys, horses or zebras. When we go to our constituencies on the ground, the people we work with,



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because we work with groups throughout the country –fortunately at 4Cs, we have maintained a neutral ground in terms of direct political alignments- other groups have difficulties going down to the ground, because those communities expect that you must not do anything against their default block. I will give you an example: There was a research that was being carried out by the University of Nairobi, the Institute of Development Studies on retirement age for public servants; what do people think about retirement age. So these researchers go to the valley where the president comes from and so they are in this focus group discussion with about 30 women of various age levels and so people are saying that they think retirement age should be 70 or something like that, but then on the spot, one lady says that ‘if we say that, will that mean that President Kibaki has to resign?’ So those are some of the difficulties that you get: ‘How will our man be affected by this, is this safe to our man’. So you have to know your skills on communicating your message on issues of governance.

**Interviewee B9:** The other challenge that we face in terms of civil society – donor relations is that donors are always moving their focus. At one time the focus is HIV and AIDS, the next time, if you are doing constitutional education, the focus has changed, it is now gender in development and they are wondering ‘okay, where do we follow gender in development within the constitutional process’. Somehow then you are left hanging with your whole constitutional affair or human rights or whatever it is, it keeps moving; structural adjustment, the MDGs and we do not know what is coming in next. So it kind of confuses and you find that if a project had been designed to last five years or more, suddenly after three years there is no interest in that particular thing and then the whole thing is left hanging and there is very little social impact.

**Interviewee A9(2):** For example, with regards to shifting or evolving the donor policies, I think they must be shifting, but they are more of in evolution, they are shifting from the norm and therefore are affecting the systemic intervention that civil society groups in their various areas, which are applied in their work vis-à-vis for example the Paris Agenda from 2005 where donors met and developed this HAC; so the harmonization of their engagement and in the case of Kenya, we now have the KJAS, Kenya Joint Assistance Strategy. Now, the problem with that strategy, unless

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it is made adoptable to the Kenyan situation, is that it is a more grandiose form of a basket arrangement, so of course to the donors to limit their own administrative nightmares, but in terms of affecting the work of civil society, it will mean that many civil society organizations will actually have to collapse or be wiped out, because KJAS will be focusing on certain key areas, which are conventional to them but which do not allow emerging innovations, new innovations, which do not fit within that bracket. So it will affect innovativeness and in a way it might make civil society static and [inaudible word] in terms of development. And then again, the funding partnership will not be more systematized, it will be more of event based rather than process oriented; with regard to which we have found process interventions to have more sustainable effects. In being proactive against these developments, civil society is countering it by the National Civil Society Congress idea, because then there will be a bigger bargaining power and greater sensitization of innovativeness within these arrangements, so that this Paris Agenda does not affect civil society.

And so what is prioritized is not necessarily the aspirations of the country's citizens. The prioritizations under KJAS is not sensitive to the needs of the [inaudible word]; so for example it might place emphasis on IT and so it will mean that organizations that previously were not dealing with IT now have to refocus, abandoning the foundation and enabling conditions that would allow IT to anchor on that basis; so IT is going to come into an environment in which it does not fit. And then the computer idea is eventually may be completely withdrawn and then there is something else introduced. So we have raised these concerns with the partners and they have tried to refine it, but they still need to do a lot of convincing and in a nutshell, the suspicion from civil society -and which is under donor – civil society relations that have not been as cozy and will not be in the next foreseeable future- is that it is perceived, and I am using the word perceived, as a donor strategy of having civil society controlled by government; because for KJAS to work, it has to be sanctioned by the government and therefore the government will have a say on which organizations access those resources that are there; the government will have control and therefore will decide. And we have seen situations where 4Cs, for example, when it comes to certain things,

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because we are so independent tried [inaudible words]. So that will be a recipe for the corpse for civil society organizations.

**Interviewer: Okay. Thank you very much.**

## **Barasa Interview**

The following is the transcription of the interview with Tiberius Barasa, Assistant Research Fellow of Governance and Development Policy Analysis at The Institute of Policy Analysis and Research/IPAR in Nairobi ([www.ipar.or.ke](http://www.ipar.or.ke)). Mr. Barasa has studied and published articles on governance and democracy in Kenya (cf. e.g. Barasa, 2007) and observed the constitutional review process through its course. Moreover, he acted as a temporary supervisor of the researcher during the field work in Nairobi, Kenya in the month of September 2007. The interview took place at the office of Mr. Barasa on 25.09.07 and present at the interview were only the interviewee and the interviewer. The interview was of a duration of 1.17.22 hours.

**Interviewer 1: First of all, if you think of the constitutional review process in between the last elections and now, who do you think has taken the lead in the review process?**

**Officer 1:** Yes, it was clear in the process that the government actually took the lead in the review process and that was evident in terms of how they facilitated especially the last beat of the review process. When the review process started, it was actually the people's initiative, they somehow demanded from the government that the constitution should be reviewed and then the government was actually forced to constitute a committee to review the constitution. Now, that came from the people because people were tired of the way the government was behaving, how it was governing, seeing that it did not work well for the people; so people were angry and they were actually ready for change, so they demanded that there should be change in the constitution. Now, after the constitution of the review committee, then the Bomas got into process, and the Bomas got representation from different people, although there was some dissatisfaction that the way even the Bomas was constituted was not

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actually constitutional and it was not more representative as such. But those were the views from just a few people who were kind of a scrambled bunch; mainly they were coming from members who were in the government at that particular time. Even after the Bomas process went on very well, and they came up with the draft constitution, still there were sentiments that the process was not good, to undermine the Bomas. Now, we had a break and went to elections in 2002 and then the government of the day somehow stopped the whole process. Then the incumbent government took over the process when it formed the government and somehow, they changed the style of the game. Before they joined the government, they were on the people's side, but when they formed the government, they actually went now against the people. So they actually took over the advocate's role of the previous government to kind of scuttle the review process. But people still persisted and that is why when the first draft was presented, they walked out [the government] of the Bomas and then it refused to receive the draft constitution. Now, that is where the problems started and then it became very clear that the government was now steering the process with force and the people was not happy with that. So the people felt that their role had been hijacked and that was why they were saying that our 'wanjiko [common Kenyan] has been taken over by the government, so he is not free'. So from there, the people started complaining, asking the government to involve them and to let the constitution be people driven as opposed to government driven because it was evident that the government was driving the whole process. That was when they came with several drafts and committees –the Kilifi, the Naivasha, all that. Government just trying to reconcile itself without the representative of the people, who were on the side of the people and at that time, the majority was actually in the opposition and they became part of the people and they wanted that the Bomas draft should be adopted wholly as it was presented. Because it was the views of the people, all the people in this pocket and it was not sectional. So that was the issue. So when you ask whether it was people driven or government driven, then you realize that there were these two forces that were fighting with each other and the government, given that they had the opportunities and machines to fight, so they kind of took over from the people. But then it came out evidently that the people rejected their output when

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whatever they presented to the people at the referendum was overwhelmingly rejected by the people.

**Interviewer 1.1: What about the role of Parliament in this connection?**

**Officer 1.1:** Well, the Parliament was actually divided. There were members of the Parliament who were on the side of the government and there were those who were on the side of the people. So those who were on the side of the government were actually supporting the government views and those who were on the side of the people, supported the views of the people and the views of NGOs that represented the majority of the people; because there were some demonstrations also, rejection as the government should involve the people and not hijack the whole process.

**Interviewer 1.2: So the role of Parliament has been more to support either the one side or the other side, and not as much to contribute with its own views?**

**Officer 1.2:** Well, the Parliament of course, when you have two camps, there is a camp that will seek sympathy from either side so the camp that was supporting the government, the government was getting sympathy from that side of Parliament and the side that was on the side of the people, was the opposition side and then they presented a strong case in Parliament, which was also being opposed by the government. So you see, that is how they are fighting. So when they go to meetings, the meetings are bought; when parliament has a session, the meeting is bought so they do not actually agree on one particular issue because they have refused to reconcile. Every group holds its own opinion strongly and is not ready to compromise. That is why you found that some members of civil society formed a collective group and now they have tried somehow to steer the whole process, but still again, it did not work.

**Interviewer 1.3: Has Parliament been able to control the Government in this process in terms of democratic checks and balances?**

**Officer 1.3:** Well, it has tried to a large extent, because if the parliament had not controlled... Let us not talk Parliament in totality as a group that is unanimous and they have one opinion as opposed to the government. Let us talk of the Parliament in terms of also being divided. There are supporters of the government and then the opposition. So to a large extent, we are talking about the opposition, and the opposition has been strong on stifling the government from imposing the constitution

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on the people. That is why they have not gone to the extent of passing through the constitution.

**Interviewer 1.4: So to some extent, the opposition side of Parliament has been controlling and trying to affect the process?**

**Officer 1.4:** Yes, to a large extent. It did affect the process, and also civil society organizations.

**Interviewer 1.5: So this participation of Parliament and especially of the opposition side, how do you think that has been compared to under the former government?**

**Officer 1.5:** The participation of the current parliament compared to the one before... Yes, this one has actually been more dynamic and more precise in terms of the objectives and also in terms of where they start; they declare that they are for the people or they are for the government. They are precise; if they are supporting the government, they support the government. They section that supports the people supports the people and they are the ones to associate with the people, they join and they consult the people. The previous government to a large extent was domineering because it had different strategies of domineering, using money, intimidation and all that. So people were not so free to express their views, even members of Parliament were afraid and money was somehow used to buy the views of the members of Parliament. And so the [inaudible word] compromised as opposed to the current Parliament. So these ones have not been easily compromised by money, but the previous parliament was easily compromised and also at that time, the sitting President was very powerful and people feared him.

**Interviewer 1.6: So to some extent the position of parliament has been strengthened?**

**Officer 1.6:** Yes, to a large extent the position of parliament has been strengthened, although they have not performed according to expectations of Kenyans.

**Interviewer 1.7: Their position has been strengthened, but what they have used the position for has been more questionable?**

**Officer 1.7:** Yes.

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**Interviewer 4: In connection with the Bomas what is your assessment of the participatory aspects of it?**

**Officer 4:** Bomas was more participatory and more representative that is what I say, because when it was constituted, even members people were coming all the way from all parts of the country, it was very representative and that is why even now the draft that came out of Bomas is very crucial and very important. That is why some people have been saying that that draft should just be adopted wholly as the constitution without changes; maybe minor editing here and there in terms of [inaudible word] and that is why even the current opposition wants to adopt wholly the Bomas draft. Because they believe that it is the views of the people and that is the way they want to be governed. So it was to a large extent participatory and more representative.

**Interviewer 5: After the referendum, there was also the investigation into public opinion by the commission of eminent persons appointed by Kibaki. Did you see that as a participatory initiative?**

**Officer 5:** No, it was not participatory because they were appointed by the government without even consultation of the main stakeholders. It was actually names that were nominated by the minister of justice and legal affairs. Most of these members were people from the university and a few people here and there, maybe friends and people reacted to that approach because it was not representative enough, it was not participatory.

**Interviewer 5.1: But they went and collected views again?**

**Officer 5.1:** Yes, they collected views from the people, but the views of the people were the same, they had not changed, they were just the same as the Bomas draft. So they even felt ashamed actually to present it to the people.

**Interviewer 5.2: As we mentioned, these persons were appointed by Kibaki, but still what they reported seems actually to have been the views that they received from the people, which were in the Bomas draft but which were not corresponding with Kibaki's interest.**

**Officer 5.2:** And they never expected that by the way, as I said, things had not changed. People still wanted the Bomas draft, so what was constituted in the Bomas

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draft are the same things that people are saying. So the commission of the eminent persons just went like that, you do not hear of it anymore.

**Interviewer 5.3:** So after the report was published it was like ‘we can not use that, so -’

**Officer 5.3:** -The report, well, in fact I do not know whether –I myself did not even see it. It never became public, people have been asking ‘where is the report?’.

**Interviewer 6:** The Bomas and to a lesser degree then the investigation into public opinion, as participatory initiatives –was that something new seen in the history of Kenya?

**Officer 6:** Well, participatory was new at that time because that was the first time Kenyans were being invited in forming or deciding on the kind of society that they want, or the kind of rules they want to govern them. You remember the first constitution that we got at independence, it was done in England. They got a few people here in Kenya, and the majority of the people were whites who were vested in England and they handpicked a few Africans to go and sit in that committee and then they designed the constitution and brought it up. Although that constitution did not involve so many Kenyans, it was very good, it was very good. But the first President and his government, they did not like that constitution because it was protecting the rights of everybody, including the whites who had been oppressing them and they did not like that. So they refused it because they wanted to perpetrate the structure that had been laid down by the white man and that structure, they knew it was oppressive, it was undermining other people’s rights, so when they came to power they adopted that structure to undermine their fellow Africans. That was what happened. So even when the first president died with all those atrocities that he had committed, the one who succeeded him, Moi, he just did everything point blank and they could not take him anywhere because the constitution had been neglected and it was in his favor, so they had actually returned to the way they were governed during the colonial period. And people did not like that, so people have been fighting that for a very long time but they had not gotten an outlet, and now, they were becoming restless, they tried to overturn the government with a coup, but it did not work. So now people were saying ‘should we go back again with the coup, where many people are going to die or



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should we just push the government and also international communities, the donor communities, to freeze funding for the country so that the president can actually be pushed to change the constitution'. That was what happened.

**Interviewer 7: Yes... You just mentioned this earlier in connection with Parliament. In connection with the participation in the review process, do you think that people have been able to freely express their views?**

**Officer 7:** Certainly, certainly, people have really expressed their views. Because when the constitutional review commission was initially staged, they went through the whole of the country and collected the views of the people on specific issues and they took note of whatever was said. They came, looked at it, collected the issues, and produced the report, a summary report of the views of the people and they presented that summary report noting every item that people wanted. And that is what formed the basis of the Bomas draft. Because they looked at the views of the people that came from the report, they presented to the public copies of the report, and the Bomas draft was all available, people saw it and they accepted 'yes, this is what we want; so let us formulate a constitution based on that'.

**Interviewer 7.1: So in connection with the freedom of expression, do you see this as a change as compared to before the 2002 elections?**

**Officer 7.2:** Well, the freedom of expression, yes there is no doubt it has changed in this country. And that has changed due to the demands that people have placed on the government or the receding president. It is not something that someone can be proud of, like the government saying that 'we have allowed that'; it has just come because of the pressure of the people because we reached a time, when people were fed up with issues and they said 'the government misbehaves' and they went to the streets to tell the government that it is wrong. And they were not intimidated even by the threats of the government or the forces of the government, they were just there saying 'well, if you want to kill us, kill us but this is where we stand on this issue.' So the government just gave up, they said 'no, we can not keep killing the people we are ruling'.

**Interviewer 7.3: 'The stakes are too high'?**

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**Officer 7.3:** Yes, so they just said ‘allow them to do whatever they want to do’. So it came with pressure, not in terms of that the government has allowed it, but it is the people that has demanded it as their right and the government had no option but to comply.

**Interviewer 8:** Also in connection with the constitutional reform process, of course. How would you describe the availability of information alternative to what the government presents?

**Officer 8:** With regard to that, information was available generally, because there was a comprehensive civic education that was carried out before the views were collected, so people were educated. They were told the essence of the government, why it is necessary to elect the government, why they have representation, the essence of the constitution, why they needed a new constitution, and why they needed to participate, not to be afraid, and why they needed to be governed; and they were even told about different forms of governance. Especially the people who came to Bomas. You could say that in the rural areas, it was more of an elementary character, but the people who came to Bomas, the delegates, were taking in to training on these concepts.

**Interviewer 8.1:** Who performed that training?

**Officer 8.1:** It was part of the constitutional review commission. They were given the resources to do it, and it was part of their mandate to educate people.

**Interviewer 8.2:** So it was relatively impartial?

**Officer 8.2:** Exactly.

**Interviewer 8.3:** So then what about the availability of information in the phase leading up to the referendum?

**Officer 8.3:** Information was available, but somewhat distorted because the information, it came from two documents, the Bomas document and then the government document, or the Wako draft –but initially it was also the Kilifi draft. So information was distorted somehow in the government draft because it seemed to contradict the Bomas draft, so people took their time to go through the two documents. But those who could not find time, they listened to their members of Parliament and to NGOs that were educating people on the two. So, the information

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was available for whoever wanted it. It was being done by the government, it was being done by the opposition, it was being done by NGOs.

**Interviewer 8.4: So different views were available.**

**Officer 8.4:** Yes, different views. So the views of the NGOs and the views of the opposition seemed to concur; they all somehow rooted for the Bomas draft. The view of the government was not that independent, probably a bit distorted and that was why you could say that probably it helped people actually make a decision. So the information was available freely.

**Interviewer 9: Also in connection with the review process: Have you observed or heard about any obstructions or difficulties for people seeking to form associations or interest groups?**

**Officer 9:** Oh, people are free to form associations, that is why civil society has been forming different groups to kind of push ahead the referendum and the review process. You will find even churches coming together, uniting with the civil society organizations, and then they say this is our agenda or this is our way forward with the constitution and they present that and it was up to the government to reject or to accept it. And also the parliament coming up with its own agenda, members of the opposition, the government or even different groups within the government, civil society, the opposition coming up with an agenda and saying 'let us sit and let us chat away' and if it does not work, then they say 'great'. So those are alliances and associations that have been formed and they have formed them freely.

**Interviewer 9.1: So the space is actually there, and the possibility of entering the space is also there.**

**Officer 9.1:** Oh, yes.

**Interviewer 9.2: Still concerning the availability of information on the review process, how has that been compared to the availability of information before the 2002 elections in general?**

**Officer 9.2:** Information regarding the review process, the former government did not make available any information to the people. The NGOs and the elite society that is somehow educated people who know the process, the history of constitution making in Kenya and different forums for debate, for discussion, presentation of papers –even

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IPAR presented so many papers on constitutional making- the kind of things that people need to know; there were several forums and work shops just as preliminary, but the government had of course left everything to the CKRC committee. So it did not play a major role in that. I think that the former government wanted people to remain ignorant so that it would be easy for them to be in government. But that also happened because of the educational levels of the people. The people were not so educated at that particular time, and also the interest in civic issues was very low because they thought that it was the work of the politicians. But now, with education, people are becoming aware that they need to take up their own destiny, they need to be responsible and decide how they need to live and even understand that the government is there to serve them and not to intimidate them, not to gain profit from them. So that has changes with education in the country in terms of adequate education, civic education, social education and all that. That has somehow improved the awareness of citizens of their rights, and that they should participate in their government.

**Interviewer 9.3: So it sounds like you could say that this rising awareness among Kenyans has then forced government to start trying to influence and take part in the debate, for example?**

**Officer 9.3:** Yes, yes. In fact the rising awareness has pushed the government, because from the awareness, came the demands, people demanding that they want this: ‘this is our right. You are there to serve us, and not us to serve you. We give you so that you can serve us from our tax, we need you to provide us with security, you need to built roads for us, you need to provide us with water, with education, health facilities, with all that’. So the government is taken into task, it is like people are rising up in arms saying that ‘you are there to serve us, and if you do not, we will bring you down because we have the responsibility of electing you.

**Interviewer 9.4: So government dispersing information about what it is doing, is that something new?**

**Officer 9.4:** Well, it is not new, but we could say that the government disperses more information about its activities and its procedures than before. Before, information could be produced, but not be available to the people. Or some information was not

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even produced. But these days, to a large extent some good information is produced and also is available, although not to the level that we expect. Like, a survey I just did about information about budgeting, I realize that it is still below average, around 34, and that is not expected in a country like that. And that is because people are not demanding for this information, but when they start demanding for it then the government has to produce it. People are not so interested in budgeting and they find it too technical for us to understand, so even if they are given a report, they may not understand. But when it comes to the awareness, and they also simplify their procedures, people will be interested, they will want to know how much they have spent, how their money has been used and when they say 'how do we get that information?', then they say 'okay, it is here' and they can take it or they find that it is not there and they ask 'why is it not there?' Then the government will be taken to task to produce it. So awareness creates demand, and demand elicits a response.

**Interviewer 9.5: So this is slowly developing?**

**Officer 9.5:** Yes, it is a developmental process, it does not happen [inaudible words] and I think you also know the history of Europe, it is the same process; it is a slow, gradual process.

**Interviewer 10: Concerning the referendum in 2005 were there to your knowledge any groups who experienced difficulties in casting their votes?**

**Officer 10:** Well, as far as I remember, there were not so many incidents of intimidation deterring people from casting their votes, no. It went on smoothly and there were no incidents of rigging and all that.

**Interviewer 10.1: It was largely free and fair.**

**Officer 10.1:** Free and fair, yes.

**Interviewer 10.2: But apart from that, I am wondering if groups like pastoralists were able to vote?**

**Officer 10.2:** Oh, they voted! Yes, those people voted very well and also because they were made aware, they were educated on their rights and they voted very well. So they participated, even the pastoralist communities are one of the communities in Kenya that have a very low literacy level, but with the civic education that has been facilitated by so many NGOs, they are actually aware. They may not speak the

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language, English and Swahili, but in their mother tongues they have been made aware of what government is and their rights, although most of them or some of them do not know it very well. But I think that to a large extent, several communities are aware. That is why they claim for their resources, people living in Maasai Mara or around that community, they want a share of that and they say that ‘this is a community resource, so how do we benefit from this?’ So demands are coming from the people.

**Interviewer 10.3: And also from these marginalized groups.**

**Officer 10.3:** Oh, yes.

**Interviewer 13: So in that sense you do not think that there have been any groups that have not been represented in the review process?**

**Officer 13:** Not to my knowledge, because the way that Kenya is geographically categorized in terms of eight provinces, and all the districts... You will find that there was representation from every district and every province and it started from every district to have people elected to represent them from the locational and even sub locational, to the district and to the province and up to the national level with the Bomas draft. That was how the representation came about, so there was good representation; the only thing you could say is that maybe in Kenya there is not one single community who does not have people who are educated up to university level. And these people can understand and articulate issues and in every community you will find someone who has been to the university or who is working in the government and is even more informed. So in every community you will find someone who can understand such issues, articulate issues and even digest such issues for the others to understand. So I think that we have achieved that.

**Interviewer 13.1: Is that different from before the 2002 elections?**

**Officer 13.1:** Oh yes, in the 1980 or even the early 90ies, some communities did not even have people up to high school, or university, or someone who was working in government or an NGO.

**Interviewer 15: Okay. Now for another group of questions. Can you think of any changes in the conditions of the political environment that have affected the**

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### **opportunities of civil society or political parties to undertake collective action in connection to the review process?**

**Officer 15:** Well, there have been changes. One factor you can actually point out is education, which has played a very crucial role in affecting the societies and even communities to kind of define the kind of life they want; also in the content of debate in Parliament, in the choice of the executives, you will find that, like in the current government, most ministers are people who are educated up to university level and are professionals in their field. So they understand the issues they are dealing with. The majority of the members of parliament are people who are educated and most of them have gone to university, some have PhDs, they are professors... And that has also informed the quality of debate in Parliament. And with regards to civil society it is the same, you will find that people who are working in civil society are very informed and highly educated and they can challenge government because they understand the issues, they understand the decision, they will tell them ‘this decision is wrong, this one will work, this one will not work’. They are people who can mount advocacy campaigns against a particular issue or a particular agenda and the government sees that it is [inaudible word] in the community. Another issue is the international community, which has also been pushing. They come up also with the conditions, in terms of aid, they will tell you ‘we want you to this, to change this, and if you do not change this, we are not giving you money this project’.

### **Interviewer 15.1: Even after 2002?**

**Officer 15.1:** Well, even after that, they still came with that although they have softened; their conditions are packaged in a way that you will have to have a procedure, a framework: ‘if we do not see a framework, we will not give you the money’. That is still a condition. ‘And in that framework, this is what we want to see. So formulate a framework or a strategy, let us discuss that strategy and then we will give you the money’. Or ‘we want to form an alliance in terms of trade: we have this you can buy from us and so we will buy from you’; that kind of thing. And also there is streamlining of the procurement procedures, that one was mainly donor driven. Money used to be lost through the procurement process to corruption, so they said ‘we need the procurement act and you must say how you will procure and where you

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will procure, how you will tender and that kind of thing'. The other factor is the cultural of course. The cultural factor is still shaping Kenyan politics and democratization: the ethnicity and people still thinking in terms of where they come from in terms of employment, and so when this government came into power it staffed the agencies with people from a particular tribe who is the majority in the civil service and in government: the ministers, assistant ministers, senior officials in government and all that. Also, I should not forget that the review process itself was a major factor in strengthening the civil society and communities because there were so many issues that came up that people did not know about so that was a major source in terms of determining the capacity of the civil society.

**Interviewer 15.2: How so?**

**Officer 15.2:** Determining in the sense of shaping the way they understood the society and the way they wanted the society to be governed. Because these were forums and in the forums, people are sharing ideas and the forums were made up of people from all different backgrounds in terms of educational level, cultural influence. So bringing in all of these ideas meant that it was more of a learning environment because people's minds were shared.

**Interviewer 15.3: So in that sense it was a good opportunity for civil society to play a big part?**

**Officer 15.3:** Oh, yes, it was.

**Interviewer 16: Also related to the review process, can you think of any instances in which it has been suspected that Kibaki has been trying to gain the support of groups outside of government by means of horse trading?**

**Officer 16:** Well, with the way the system works, it is sometimes difficult to tell with certainty that this is what has happened. Kibaki has relied on his friends, ministers and close friends, including the business communities and these are people who have been advising him to some extent. And there are people who are somehow parading their issues and their ideas and doing so as if they are Kibaki's ideas and that is what we are seeing to some extent. To a large extent it may not have been outside, like horse trading. It would actually not take it in that sense. But I would take it in the sense that within the government he has people who are close to him and people who



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are shaping his ideas in terms of advice and even information. And also within the business community he has friends and they also kind of share with him some issues or some ideas. But the people who are close to him might be the ones who are horse trading, but not exactly himself.

### **Interviewer 16.1: But there have been many resources in his cabinet?**

**Officer 16.1:** Yes, he did that and he did that because it was necessary to do it, he felt let down after the referendum, so somehow he was not happy with some of the members of his government. They had misbehaved and he did not want it and it also came because it was the opposition within the government that was derailing his progress. In NARC there were those that were for him and those who were not for him, so it was difficult for him to contain those that were not for him in the government; that is why he took to do the reshuffle. He had no option, but to do it and also to gain the support of those that were in the opposition and other parties to gain the support to form the Government of National Unity. It was to lobby so that governance would be easy for him, because at that time the opposition had made it very difficult for him and he was not making progress. So that was the only way to proceed.

### **Interviewer 16.2: There have also been continuing problems with corruption under Kibaki's rule and he has been criticized for not doing enough to fight corruption. How do you perceive his efforts in this regard?**

**Officer 16.2:** Not to my satisfaction, he has not done much in fact in corruption in the country. In fact, he has concealed corruption in government, he has concealed corruption. Because during his time that is when we experienced major scandals and victims who were identified where not brought to justice. The worst thing he did to these victims was that he used to suspend the purported victims only for a certain period of time and then bring them back to his government and that was very frustrating for Kenyans. So far, no serious person involved in corruption has been arrested or even charged in court. Not a single one. They have only been following up small people who take up 100 shillings, the policemen who are given 1000 shillings; that kind of thing. But serious people who have taken government money and stashed it somewhere in the country have been left free.

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**Interviewer 16.3:** This sort of makes me wonder if he himself is part of the problem; that this continuing corruption is an indication of –

**Officer 16.3:** -Well, I do not know if he himself is a beneficiary but maybe in [inaudible word] them to steal, he is a beneficiary; that is why he does not want to book, because these are his close allies that are involved in corruption, very close allies, friends. So... Maybe he is also a victim and probably that is why he does not want to bring anybody to book. People have been having problems with the agencies dealing with corruption issues, so up to now, it is still an issue. I remember in Parliament recently, they wanted to clip off some of the powers of the commission and they went, somehow...

**Interviewer 16.4:** So we have a president who obviously has some informal ties to some political allies and some business communities and then to his ethnic group.

**Officer 16.4:** Yes...

**Interviewer 20:** Now, when you get a position like the presidency, I could imagine that these relations -you have relied upon to get there, I suspect?

**Officer 20:** Yes.

**Interviewer 20.1:** ...and so it can be difficult to change? I could imagine that people would be expecting to get something in return?

**Officer 20.1:** If you think that it will happen for every leader in this country, I say no. That will not be the situation for every leader. Such a situation prevails because of the framework, of governance in place that allows it and also the political culture of the people and their perception of what a presidency is and how the country should be governed. But you see, once people change their perceptions, then even the political culture changes and as we talk now, the Kenyan political culture is not the same as the one that was there even in 2002. It has changed a great deal. Because of what has been happening, you can actually tell that the perceptions of people have changed. I will give you an example even: We are approaching the elections, but most Kenyans during elections that is the time they think of getting money, especially from the members of Parliament and –the people who are campaigning to go to Parliament. So sometimes they even become rich during the campaigns and they will take the money

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and vote for that part that is giving them the money, even if it is 20 shillings. But now, that is not the case. They will tell you ‘yes, give us the money –because it is our money, we know where you got it from- but we are not going to vote for you, we know who we are going to vote for, we know our candidate. You, you are a thief, you did this, you are incapable, you did not do anything for us and you have been there for 10 years. How do you expect us to take you back?’ So to some extent, actually to a large extent you realize that political culture in terms of deliverables is changing. But the political culture also, maybe to a small extent, it is on –ethnicity is changing. But there are some dominant communities that are not able to come out of it.

**Interviewer 20.2: How do you think the ethnicity aspect is changing?**

**Officer 20.2:** The ethnicity aspect is changing in the sense that you will find some communities who will actually not want to be identified so much with their communities. They are somehow going beyond that and a majority of young people do actually not value their community so much. You can see that in terms of sport, you can see that in terms of music and you can see that in terms of education, in terms of their relationships, in terms of their marriages, friends. They are transcending that and the only obstacle is the old members of Parliament who still want them to remain in their ethnic groups. So to minor extent, I am saying that it is changing and although in terms of campaigning and voting, the politicians are still manipulating that. So it has not changed much in terms of that, but there are some changes, although they are very gradual; very gradual. Because when people are defeated, the only alternative is to retreat to their community; if they are overpowered, then they retreat to their community to find solace. But that is typical behavior of almost all communities in the world that have not been integrated very well.

**Interviewer 20.3: I remember that one day when we were talking, I mentioned that I have heard about a younger generation of Kenyan politicians which may have a different political culture. But then I think you mentioned that some of the more conservative or older political forces that are still in power, they also recruit young people?**

**Officer 20.4:** Yes, they do that. But what has happened is that the older generation is not actually sharing much with the younger generation in terms of ideas. They are

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sharing much in terms of wealth, still they are teaching the young generation how to steal and how to change the truth to be false. That is how they are coaching them in manipulation. But you will find that very few from the old generation, those who belong to that generation, most of them are dying out and the few who are remaining are unlikely to make it to the next Parliament. And the crop of young people that we have there, although they still have affiliations to their communities, they are people who are ready to compromise their community interest for the sake of the wider nation. So it is not happening drastically, but also very gradually; it is a slow process. Because it is very difficult for Kenya to come out of this ethnic confinement and just to be so free just like that; it is not easy. Because the way that it was formed by the colonialists, and consolidated by the first two regimes, and even the current regime; so it is very difficult. It has to be a slow process. But we are optimistic that we will come out of it. And that is one thing that has engineered corruption in this country; that the ties with the community, that 'I belong to a community, I do not belong to myself. My decision should come from the community and my decision should follow my community'. That kind of thing. So, 'I move myself and my community together, there is no way I can move myself and leave the community, because I belong to my community and when I am out there, my community will say "that is ours"'. So individuality is what we are lacking, I think that is a very good aspect; and the why the western world has defeated us on that. That individuality aspect of feeling that 'I am myself, regardless of my community, I am my own person and my own decision'.

**Interviewer 20.5: So do you think that that still plays a role in how people would expect a new president in Kenya to behave in relation to his own ethnic group or community?**

**Officer 20.5:** Well, people want an integrating president and they want a president that is not going to judge people in terms of where they come from, but to judge people on who they are as individuals.

**Interviewer 20.6: But yet, most people vote for someone from their own tribe?**

**Officer 20.6:** Well, they have to do that because they still do not know who has come out clearly to say that he or she is his or her own self; but they are longing for that

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kind of person. So they want someone who will liberate them from these tribal cocoons, to where people can feel free.

**Interviewer 20.6: So it is also a matter of trust?**

**Officer 20.6:** Trust, exactly. And that is what has been a big problem, building trust in Kenya; because that trust was betrayed. The trust initially built when fighting the colonial government because they united and they were one in trust that they had a common enemy and when the common enemy went, they created enemies within themselves and the one that was in power betrayed the trust of the others, excluded them from sharing the profits of independence.

**Interviewer 20.7: In this connection I think perhaps that you can see it as a positive thing that when the NARC government came in, it was both Kikuyus and Luos voted for them because the leaders were in alliance with each other. But then what happened was that it broke up.**

**Officer 20.7:** Exactly. That is the betrayal of trust I was talking about and that trust is betrayed almost on a daily basis. You come and you agree that you are going to do this, as gentlemen and then you change: you say ‘no, we did not agree’ or ‘yes, we agreed, but we can not implement it’, it is difficult. So that is the trust we are talking about, we are talking about the trust to deliver to the people what it promised to deliver, so when people do not see you delivering what you promised to deliver, they feel that their trust has been betrayed, so they will not trust you anymore. They will say that ‘you were saying this, how come you are doing the contrary? How come you are not providing?’ For instance, the NARC government promised to deliver a new constitution to the people and today people are still asking ‘wait a minute, where is the constitution? You promised, it is here, written clearly’. Then you begin to defend yourself and people say ‘okay, fine, but then how do you expect us to trust you?’

**Interviewer 20.8: The trust aspect of it I guess is very important for the way that ethnic ties work?**

**Officer 20.8:** The community should relate, the way the communities should coexist; that trust is not there. It is very minimal and building it is a challenge. It has to be institutionalized and how do you institutionalize that trust? You need a leader who can integrate people, all the communities, and provide equally to them to sustain that

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trust and to build that trust. So that I know that whoever is there as a president will give me what I want, what I need; whether it is a Kikuyo, a Luo, even if he comes from America, a muzungu and he is here in Kenya as the president, we have the constitution, we have this framework and he will deliver, he will give me what I need. So that trust is not there.

**Interviewer 20.9: But the constitutional framework is not there either.**

**Officer 20.9:** The constitutional framework that will guarantee that trust is not there either. So people are suspicious, people are skeptical.

**Interviewer 20.10: Maybe a last question?**

**Officer 20.10:** Yes, fine.

**Interviewer 17: There were many different demonstrations in connection with the review process, especially before the referendum. How have you experienced the response of the police in those cases?**

**Officer 17:** Well there were some demonstrations where the police used excessive force and there were some where they acted as gentlemen. But on average, the police have used excessive force against most of these demonstrations in the review process; which was not called for, which was not necessary. Because excessive force to me will mean teargassing people, pushing people out of the street and they even hurt some of them, they were going to the extent of shooting some of them. Or when people are having a peaceful demonstration and then you come and disorganize them; caning them and people are running for their safety and then you teargas them and they get hurt. Yes, that is violence.

**Interviewer 17.1: So the right to assembly is limited?**

**Officer 17.1:** Yes, somehow the right to assembly is interfered with.

**Interviewer 17.2: In connection with this you could say that Kenya has a history of the police being part of a tool for the incumbent. Do you think that it is still like that?**

**Officer 17.2:** Yes, although it is changing slightly; but to a large extent, it is still the machinery of the government. The police is not neutral, the Kenyan police has not attained that level of neutrality where they can be considered as at least serving the civilians or the people –unlike the military. The military in Kenya has achieved that;

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it is very disciplined and even if the president orders it to go scare off, they will not do it; even if the president orders it to go to take over the government in terms of a coup when he steps down, they will not do it. But the police, the police will go there to loot and create disharmony; because the majority actually is not disciplined. In the police force, most of them are also involved in crime and they let out their guns for thieves to steal and they share the goods. They are people who also distil bribes. So, they have not changed much, that is why you find them being involved in petty corruption, of bribery, getting 100 shillings, or recurring this and this, even hiring out their uniforms to the thieves.

**Interviewer 17.3: So there are some problems with the norms and values within the police.**

**Officer 17.3:** Yes, I think the training and to me it is also primarily the recruitment, and the remunerations and living conditions or work conditions. Five factors that actually impact on the performance of the police in Kenya; if those factors are addressed, the police in Kenya will be a good force, a disciplined and elite force. But as it is, it is not.

**Interviewer 17.4: But as it is, do the police still have more direct relations with the executive?**

**Officer 17.4:** Of course, the police are under the office of the president and the head of the police, the police commission, is appointed by the president through the minister of the defense and that is right in the office of the president. So all these things are done by the president and so he will possibly stay clear of the president; if the president orders him to do something he will obey, if the minister orders the commission to do something, he will obey, in fear of his job; and that is why you can order the police to go and destabilize even a strike or a peaceful demonstration and they will go and do it. They will be used to go and create disharmony even among the communities.

**Interviewer 17.5: So they have been used also after the elections in 2002?**

**Officer 17.5:** Yes, they have been used to interrogate people in several places, even in some land clashes we have had in Rift Valley, the police have been sent there to destabilize people even after the elections. There was also the Standard raid, it was a

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police intervention, the people who invaded the media house were police officers that were sent by the minister of defense. So we are talking of things that are still happening.

**Interviewer 18: But there were also strong reactions to the Standard media raid?**

**Officer 18:** The Standard reacted, civil society, the citizens reacted, members of the opposition reacted and even some members of the government reacted. The donor communities reacted to it. It was quite evident that the government was involved, and the minister of defense was the one who hired the ‘terrorists’ who claimed they were Armenians and they went there with the police force.

**Interviewer 18.1: So, they claimed that it was Armenians that were behind it?**

**Officer 18.1:** Yes, it seems they had their own agenda, so the Armenians were brought in for many reasons. Some people were saying that they were to assassinate the opposition leaders, basically Raila, Kalonzo, whoever and also to be used to loot for the government, to steal for the government. They also trained some thugs on how to be efficient in [inaudible word] or stealing or killing. So this time they went with the police by way of training them and also the police officers showing them the way to the offices; so that is how it happened.

**Interviewer 18.2: So that was actually recruitment of resources from outside?**

**Officer 18.2:** Oh yes. And the police were involved; it was not just the Armenians who were two.

**Interviewer: Okay... So, that was it. Thank you very much for your time.**

**Officer: Okay, I hope that it will be helpful to you.**

## **BFD 1 Interview**

The Following is the transcription of the interview with an anonymous governance officer of a basket donor of GJLOS. Which has been among the most active donors in connection with the thematic group on constitutional development of GJLOS and the governance officer has been personally engaged herein (GJLOS, 2007b: 1). The interview took place at the office of the interviewee at the Embassy of the interviewee



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on 24.09.07 and lasted 0.47.42 hours. Present was only the interviewer and the interviewee.

**Interviewer 3: First of all, I am interested in how you from the Finish Embassy have contributed to or taken part in the constitutional review process during its course?**

**Officer 3:** Importantly, I think we have mostly only taken part in it through the GJLOS Program, which we have been supporting. –And of course observing the referendum, but mostly within the GJLOS.

**Interviewer 3.1: -And you have been the lead donor in the constitutional thematic group?**

**Officer 3.1:** Well, we have been that, yes, it is called the constitutional review –but I only came here after the referendum, so basically that thematic group is now focusing just on law reform in general. Because after the referendum, and after the proposal for the new constitution was down, they realized that it is not likely that it is going to happen –at least not in this period before the next elections. So what they did, they were actually taking the whole Kenyan legal framework and they were looking through all the laws and legislation and trying to see what is outdated, what might be moved on. So in some sense, they took the opposite approach. They saw that the constitution is not going to be renewed quite yet, so let us look at the legislative framework and see what we can change there so that we can move forward. And then they have been working on all these new laws, also including the merits law, the political parties' law, some of these that were supposed to be in the constitution. – Which actually makes sense to me, because there was a problem –I read both the Wako draft and the Bomas draft- and the way Kenyans (and I think many other African countries) try to do the constitution is to put everything in the constitution, and it becomes huge as well as almost impossible to implement. After that constitution then, it is almost impossible to work on the legislative framework because it is tied with the constitution, so you have to start amending the constitution from the beginning, again; and that is a big problem. So I think it makes sense that they would work on the legal framework after the constitution process. Well, the

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contribution, my own contribution, when we talking here about the contribution to the constitution, is to try to think of it as a very simple document –like the American or even the Nordic ones. You know, you have the division of powers, and then you have the basic rights and then, if you want, responsibilities –and then, you make the legal framework around that, not having everything in the constitution. -Which is the problem even now, as we see the presidential candidate Raila Odinga has promised a new constitution within six months from he is in power and from his point of the view, the constitution has to have new division of powers in the sense that presidential powers are not going to go down, but he has to create a new position like the prime minister and assistant prime minister, assistant vice president and various other positions so that he can share the power with everybody who is supporting him now. So the whole constitution process has been made too political, and that makes it stuck, because none of the governments, when in power, want to share the presidential powers, want to diminish presidential powers. But all the ones who come in, they want to make these deals and promise to change the power relations. So I think the whole process is a bit in the wrong order, and it should not be captive of politics and it should not be some kind of election promise. I think everybody knew after the referendum that it was not going to happen before the elections. And these amendments, they have had the same things happening in Tanzania, they have this constitution and then they start amending it and amending it and you take a look at it, and see that article one is in total contradiction with article three and you have all these loopholes which can be interpreted in every way you want it.

**Interviewer 3.2: So after the referendum, the role of the Finish Embassy as a donor change, it could seem?**

**Officer: 3.2:** I would not say that the role as a donor changed, because I mean this is part of the GJLOS Program that we support. First of all, about the donor roles, they are not substantive; it is a government program that we are supporting, it is a government led program by the Kenyan authorities in general, so the donors do not have that much to say. GJLOS is fairly interactive and we have these thematic groups so we actually can discuss with the government representatives, civil society representatives, all the stakeholders, and give our points of view, but it is not actually

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that we are there to be the technical expert as such and that goes throughout the whole program. –But the support has not changed, all the countries that have been with the GJLOS have continued supporting the program.

**Interviewer 3.3:** So the focus of thematic group 5 has changed from the constitution to the legal framework, but the type of support that you are giving is of the same type?

**Officer 3.3:** Yes.

**Interviewer 3.4:** Okay. Which conditions do you think have been most important in enabling [REDACTED] to give its support to the constitutional review process in the first place?

**Officer 3.4:** I think that the question is quite interesting, but I do not think that we are thinking it as giving support in general to the constitutional development or constitution-making, but it is more like the democratization process and enforcing the rule of law in the country. I think the biggest reason that we started supporting it right after the 2002 elections was the optimistic mood that Kenya was on and I think that was read as an opportunity because everyone thought that once you set Moi aside –I personally found that interesting because Moi was already stepping aside, he was not running- Kenya could really take a step forward –and the Kenyan people were also quite optimistic in the sense that they had plans, thought that something was going to happen. For example, we have not had any other bilateral, government to government programs here, before GJLOS; we only supported civil society. So I would say that it was basically the expectations after the 2002 elections and also seeing that Kenya can hold a democratic election and that they were lasting for reforms at that time and hoping to help them get the process going.

**Interviewer 3.5:** Have there been any specific principles that have guided you in engaging with the support to the process?

**Officer 3.5:** I guess the Paris Agenda is the basis for everyone's support and in general [CENSORED] has historically supported human rights, like Sweden that also has a human rights based approach, and especially good governance and anti corruption efforts; and backed by that we are still one of the least corrupt countries that has remains on the agenda. That is the basic foundation for our development

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cooperation anywhere, the poverty reduction and then the good governance and human rights, which then includes the democratization and the rule of law.

**Interviewer 3.5: Something like the Paris Agenda, how do you think that has played a role in connection with your support to GJLOS specifically?**

**Officer 3.5:** I think it is only now starting to play a role, I mean in some sense, basically because it is more about the division also of labor within the donors and the [inaudible word] and we have just now signed the KJAS, which is making the whole donor group reorient a little bit and focus on the fields that they have the most to offer to. It has had some impact on the side of the donor coordination; but of course in the Kenyan case it is a little bit different because there is no budget support here. So with the Paris Agenda you are supposed to go directly into the whole country systems and the ownership should be even more heavily given to the government of the recipient country, and here that has been the [inaudible word] one, especially with GJLOS, there have been some incidents –for example with Standard raid- really not with GJLOS in itself, but it is about human rights and democracy and all these institutions –and the police is part of the program and the internal security ministry and all this- it kind of... The whole situation was reacted by the program with donors saying that ‘this is against the principles that we were following when we came into this program and now you are breaking it from your side’ and that caused a lot of problems with the program forward. Especially with the donor-government relationships and how was this related to the Paris Agenda, I think everybody, all the parties are still trying to understand what it really means and how you can make it work.

**Interviewer 3.6: Okay. In connection with the Paris Agenda and the Standard raid, I think it is an interesting issue because it touches upon two principles that are part of the agenda and that guide donor behavior: Ownership one the one hand and then that you need some measure of good governance and democracy in order to rely on the host government, on the other hand. I am wondering if these principles are hard to balance in practice?**

**Officer 3.6:** I think that sometimes they are, but on the other hand, they should not be. They should go together. If you have a program on governance issues, justice, law and order, then you sit committed to these principles yourself, and if you think that

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the ownership can not mean that you break the principles on which the program was based on because they have started to be contradicting –and that was exactly what happened and I think that was basically the donor response, that ‘you are now breaking some of the principles that you were basing the reform on’; but of course the government was responding that ‘you should not get involved in that sense’. And sometimes I agree that the programs themselves should not be captives of the political situation, there are other ways for the international community to react. But in the end it is a problem because this a program and it is partly funded by the donors and if the donors decide to pull out the funding...

**Interviewer 3.7: -Then that is the end of it?**

**Officer 3.7:** Yes. But it is the whole question in itself is very interesting, and it would be interesting if somebody was doing some research on the Paris Agenda and the outer contradictions it might lead into and some examples that would have happened anywhere. But I think in some sense, it is just in making and it is a long and painful process. And I think the harmonization has not actually made things easier, but more complicated.

**Interviewer 3.8:** Okay, yes... I mean, as I see it, on the one hand, you have the government of Kenya which has not shown that much dedication to creating a new constitution and on the other hand, you have the donors that are trying to support this process –of course without meddling directly in it- and letting the government take the lead based in ideally a good principle, but it might lead to... It is much dependent on what that government does then?

**Officer 3.8:** Yes, it is. But if it is a reform program, it should make reforms, not just, you know... Like in the MDAs involved in GJLOS, there is already whether this is a reform program or just a modernization program. And how do you actually make them go together, how can you use the modernization to reform. Which is quite interesting, I mean, you can get a new computer, but if there is no attitudinal or institutional reform, it is not going to lead anywhere. You have to, even if you have a reformist mind and you do not have a computer or phone in your office, then you can not make it work.

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**Interviewer 2: Could you describe to me what you perceive as the most central topics of reform in connection with the constitutional review?**

**Officer 2:** First of all, as I said in the beginning, within the constitution itself, it should be very clear, that it is just a framework of the basic rights and all this; the constitution should be much simpler, and it would be very important for people just first to conceptualize on what is really meant by constitution, what is it needed for, and in that sense one of the main issues is that it has to be taken off from the daily politics, you have to look a long distance. Now, when they are drafting the constitution, they are looking at the next five years, and it is all tied to the elections, everything has to be in the constitution; because even the constitution is sometimes personalized in the political setting of today. So I think there should be a big debate, first of all on what a constitution is and what it is for, that would be very important. Then, focus on the main issues, what you need there. Here, on the other side, the law reform and the legislative framework should also be taken into account, that it is going to be matching. Because I can see that what happens here is that you draft a constitution and accept it, and then you realize that the rest of the framework is not even fitting with it. So those issues should be opened for much more stakeholder meetings.

**Interviewer 2.1: Do you see a link between the GJLOS reform program in connection with constitutional development and then the wider constitutional reform process?**

**Officer 2.1:** Yes, I think so. Like I said, after the elections, nothing is going to happen now before the elections. But even with Law Reform Commission and their work, and especially after the elections, if there is a change in the presidency who promised a new constitution is going to have a very important role in helping the draft and I hope it takes the role more seriously and really looks at what is needed and what was the problem, why did neither one of these drafts work? And I guess related to this are the issues of the traditional rights, traditional systems of justice and alternative systems of justice that you have to make work with the constitution. The basic is also the conflict between individual and collective rights and how to make them fit together –or even individual rights and potential social responsibilities, which are

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listed there. So you really have to look at the loopholes and that you do not make contradictory articles. But I think the program can be very central in that, and especially because it does support all the justice institutions. So all the people who would be involved in making the constitution would be one way or another within the stakeholders of the GJLSO Program. If the current government and president remains the same, then I do not think there is going to be a new constitution for another five years.

**Interviewer 2.2: Has your perception of the constitutional reform process changed during the process from the last elections and then until now?**

**Officer 2.2:** I think my personal perception has not really changed, because I have been on this side of the road for quite long, and I actually did not expect that they would be able to push through the new constitution. I figured that it was going to get amended and amended and amended and it is not going to happen, but I think that in general people's [inaudible word] has been chasing because they had just so high hopes and Kenya especially has been told for so long that it needs a new constitution and there has been internal discussing and people were hoping that finally they were going to move forward and now it looks like it is stalling; and everybody knows that it is a political issue and it has nothing to do with having a real democracy.

**Interviewer 2.3: So the way you see GJLOS in this connection, has that changed?**

**Officer 2.3:** Well, maybe, probably, I think we all on the donor side were probably more optimistic about the GJLOS and how it could move forward, and then with the anglo leasing, with the Standard raid and with all this corruption scandals popping up here and there and nothing to be dealt with because part of this program was enforcing the anti corruption agenda, support advocacy, the international anti corruption plan, all these public institutions and it does not seem to be happening, so I think maybe people are getting a bit more frustrated with the program, and I think it needs to be energized –and I also think a lot is going to depend on the elections and what is going to happen from there.

**Interviewer 2.4: Okay. I read in one of the mid-term review reports of the GJLOS that in May 2005 the thematic group 5 started proactively promoting**

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**progress in the review process -and it did not elaborate on that, so I was wondering if maybe you could tell me about that?**

**Officer 2.4:** I have to tell you that I was not here at that time, so I am not sure, but I think that they may have had some problems with the law reform issues that they tried to solve by e.g. getting more contacts in Parliament but they do not seem to be able to tap to the main agents; they are just working on the bills and drafting the bills and sending them forward, but then there seems to be some disconnect, even already Attorney General's office and that they do not necessarily know what is happening with the work that they have been doing and while they would like to be active and have these contacts, it seems that all these other parties in this process are not really getting back with them. We just had a meeting last week and we were following upon quite a few laws, the political parties bill and some of the freedom of information and all these other bills, and basically, many of them had been drafted or at least assisted by the Law Reform Commission, but then it got to Parliament and it is discussed and amended over there and the law that comes out of there might be very different from what they had actually initially pushed forward. And they can not follow up all the time, and I think that what you mentioned might be related to that; that they were really trying to be more interactive in the sense that they sensed it would be necessary, but there was not response.

**Interviewer 2.5: So they switched to actively providing input into Parliament?**

**Officer 2.5:** That is what my guess is –and then they end up not getting the response.

**Interviewer 4: have there been any situations during the constitutional reform process in which you have reconsidered your support to or participation in the process?**

**Officer 4:** I think it is a bit limited to say the constitutional reform process, I think it is the whole democratization process. Think that [REDACTED] had actually, we did the review last year of our Kenya programs after all these corruption scandals came out and the Standard raid; because we are in the process, I guess as many other countries, of trying to increase our development aid percentage and Kenya was after 2002 chosen to be one of our main partners, which it was not before. So, from the head quarters, there was pressure to increase the aid here and so we did the review



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and during that review, we came to the conclusion that we should not increase too fast, and that we continued our support especially in the governance sector because we see that there are a lot of problems there; and even that is, at least from my point of view, a bit contradictory because you put money in the governance sector to improve governance, but if the sector itself is involved in all kinds of activities or implicated in corruption and all this, then are you doing anything good? And also what happens within the sector with the KACC, the Kenya Anti Corruption Commission, and the attorney general's office; if they can not work together, how do you use the program and these resources to improve the situation? But I mean, we did the review, but we did not change our anything as there is not the space to increase our aid volume here.

**Interviewer 4.1:** Aha. So you could say that there has been a certain degree of reluctance?

**Officer 4.1:** You would say that there have been considerations, but it has not changed anything in practice. I think many of the countries have had the same kind of considerations; and of course it is very difficult, because if you make a pledge to a program and then pull out from it, then it has to be very serious.

**Interviewer 5:** Can you tell me about how your support to the constitutional review process through the GJLOS Program relates to you wider good governance program in Kenya?

**Officer 5:** Well, GJLOS is still more or less the only big program that we are supporting, it is the only sector wide approach. It is the only sector where we have the full support and it is the only one we are supporting. So in a sense, our other programs relate to GJLOS and the constitutional reform process within it in the sense that now we are also going to support the gender and governance program, so we are going to try to get more women involved in politics or at least give them a chance to be part of decision making and take part in the constitution process in a sense, because one of the issues has also been women's rights, especially within the religious communities, women's inheritance rights and related issues; and that was actually why the draft was turned down by some communities –because they thought that is too progressive and against their traditional values. And there were several of

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these religious communities that did not really think that gender equality is necessarily something that should be mentioned in a constitution. So that is one, and we are also now getting into support public service reform, and that we see actually to be more like the foundation of all these other sector programs because PS of any other sector, like the PS of ministry of justice, she has to sign a performance contract and the success and implementation of GJLOS is part of her contract; and in general, to good governance, I mean, if you can change the attitudes of the public service in a wider perspective in all the sectors, then the other programs are more likely to work. So we fit them together, and of course partly, and this is also what we did before, we support civil society through our local funds –and I think it is about 50 %, but I can not remember for sure. But we are supporting many of the human rights organizations, paralegal organizations and organizations that are giving people legal education and understanding the principle of democracy, including the constitution, human rights, civic rights.

**Interviewer 5.1: Your support to civil society now, is that outside the GJLSO Program?**

**Officer 5.1:** Yes, outside. In GJLOS there is no civil society support as such, they can participate in the thematic groups and there is also the non-state actor facility that they have been working on, but which is not functional yet. So our civil society support comes through our so-called local development funds on an annual basis.

**Interviewer 6: Now, somewhat in this connection, do you think that the possibilities of groups outside of government such as CSOs or political parties to influence the review process have been affected by their access to resources?**

**Officer 6:** I think it has. Because before the referendum, during the kind of review process after the 2002 elections, the civil society organizations were extremely active, and they were organizing a lot of stakeholder meetings and they were taking very seriously the regions away from Nairobi, and I think that people would not have been able to get that much information or understanding of what was happening without civil society. And because they got resources that were useful; I think they got quite a bit of resources at that time, but the review process was in itself very big –and that is the pity, because both the government and the donors put lots of resources in the

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review process and the result was not exactly... I mean, the constitution was not there, and I do not think the drafts were good enough. I think also that the problem of the review process was that they were trying to take into account too much the views of every community, and that is impossible in a constitution. Especially in a very heterogenic society with very different value systems and they have to decide whether to go with the values of constitutionalism or the values of the traditional communities.

**Interviewer 7: How aware do you think that Kibaki is with regards to promoting a perception among Kenyans of him as being the best available option?**

**Officer 7:** Now that there are elections? I think that is the thing that he is focusing on, basically, but he started his campaign quite a long time ago and I think he thought that everybody should hold that image of him already, despite of the fact that he did not deliver the new constitution and he did not deliver those lower levels of corruption and the other things that he did not deliver; so I think that he is now focusing more on that. –I think he is very aware, I think that he is also very aware that he is going to have tough competition.

**Interviewer 7.1: It seems to me that this is something relatively new in a Kenyan context?**

**Officer 7.1:** You mean that Moi did not pay much attention to what people thought of him?

**Interviewer 7.2: Well, if you do not have much competition, you do not really have to focus that much on it?**

**Officer 7.2:** Yes, and he was not challenged much either. Yes, in that sense, I think that it is new. I think the leaders actually...Not maybe as much as we would hope for, but they have to pay attention more to the people. I mean, first, they know that things can change suddenly, you know, they can be on their way out, and it can be surprisingly maybe –so they take that into consideration. But I think this is very much in the transition process –maybe after the 2012 it will be different, I think still the elections are still like a market place –you can sell anything; votes, people, parties, commitments –everything is on sale and there are no ideologies as such. That also relate to the constitution, because why do you want a new constitution, what is the

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goal, what is the objective? So you have to have some kind of ideology that you are looking for.

**Interviewer 8:** In this connection, has there been instances in which it has been suspected that Kibaki in connection with the review process has been trying to gain the support of groups outside of government by means such as horse trading?

**Officer 8:** Well, I think that probably before the referendum, I am sure that there were lots of attempts to get people to back you up. But he did not, because he dissolved the Parliament and as such rearranged the whole political scene afterwards; so I am sure that there were lots of things, but I [inaudible words].

**Interviewer 8.1:** So you are not aware of any specific connections to any specific groups?

**Officer 8.1:** No... I can not say that, not for sure.

**Interviewer 8.2:** Okay. What about the role of ethnic groups in this connection?

**Officer 8.2:** Well, I mean that is the whole thing, everything is based on ethnicity here, even the referendum. I do not think most people, and if you talk to the Kenyans, they will agree with you, they do not know what the constitution was about and even most educated people never read either of the drafts that the government printed and it was mostly, especially outside of Nairobi, about getting the ethnic support. Because people were told that 'this constitution draft is not good for you because it is done by the others and you have to support ours because that is better for you in the future'. I was in Tanzania at the time that they had the review process, and I found it very interesting that while I was over there, in some remote parts of Kenya –you know, katiba means constitution in Swahili and it is quite close to Kibaki- and Kibaki had been elected and all this and they had been asking people about the president and the constitution and what should be done, and people were saying that –they were confused, they did not know what it was- 'if you bring me this Katiba fellow, I tell him what I think of him!'. They even had no idea of the difference between the president and the constitution. So, in the end I do not think that the vote was really informed.

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**Interviewer 8.3:** So the dynamics of the referendum were somewhat alike to those of a general election?

**Officer 8.3:** I think so. Everything is still based on ethnicity there, whether it is about the referendum, human rights legislation, elections...

**Interviewer 8.4:** Something that I think is interesting is this connection is that on the one hand you have the ethnic groups which play a large role in the elections, but then, on the other hand, when you look at what the political actors are actually doing when it is not election time, they are not exactly looking after their ethnic groups.

**Officer 8.4:** No.

**Interviewer 8.5:** Only to a small extent, the resources only go down to a certain level?

**Officer 8.5:** Yes... I wrote a paper in which I kind of introduced a new concept and I am talking about libertarian communitarianism in Kenya; which is kind of like this, you need the collective support, but in the end, you still go after more of your own individual interest and in that sequence; and sometimes I think Kenya is the most [inaudible word] country I have met, but it has more kind of a communalist background. I see it as a libertarian communitarianism. I am going to have to go...

**Interviewer:** Okay. We just made it through the most important topics. Thanks for you time.

**Officer:** Okay. If there is anything else, you can always email me, if you need some clarification on something.

### **BFD 2a Interview**

The following is the transcription of the interview with an anonymous governance officer of BFD 2 in Nairobi. The BFD 2 is one of the basket donors of GJLOS (GJLOS, 2007b: 1). Present at the interview was only the interviewee and the interviewer. The interview took place in the office of the interviewee at the BFD 2 in Nairobi on 05/09/07 and was of a duration of 0.47.32 hours.

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**Interviewer 5:** Could you try to tell me about how your support to the constitutional review process through the GJLOS program fits within your wider approach to good governance in Kenya?

**Officer 5:** Okay. Well, first, about our involvement in Kenya, of the [CENSORED] Government, we have been building up our programs since 1999 and then we started out with programs for civil society etc. But then, when Kibaki was elected in office, we felt that there were new opportunities to work with the government and tackling corruption, having a new constitution etc. So we felt that it was important to help the government there so from the very start we were involved in the GJLOS program. That started in the end of 2003 or actually in 2004. We are together with some other donors and we are involved and, well, the constitutional process is one of the thematic groups where also civil society is involved; so it's a platform between government, civil society and donors. But it has been very difficult to achieve any results in that respect.

**Interviewer 5.1: within the thematic group?**

**Officer 5.1:** Well, within the thematic group, there were always good discussions etc and good ideas. But when I got here in 2005 it was the time of the referendum and there was at that point, that was my feeling, people were not looking any more at the content of the constitution, of the proposal to government, but it was all politicized. The vote of people for the constitution, yes or no, was more of a political role and also what started to play a role was the rumour that was around that women would obtain far too many rights, for example that they could inherit land, which for some men in this country, among which the vice president, was not acceptable. So the impression was infused in society that women would take over if this constitution would be accepted and that would be very threatening for men. So these kinds of things totally disturbed the process, all these rumors on the basis of...

**Interviewer 5.2: ...something that did not have any hold in the actual contents of the...**

**Officer 5.2:** Well, yes, of course women would obtain more rights, which was a very positive thing about the constitution, but was used in a political way to install some

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fear with some men that would fear more rights for women. I don't know, I think it was a perception thing.

**Interviewer 5.3: Okay. So your support to civil society, does that not go through the GJLOS program?**

**Officer 5.3:** That's an interesting question. Because the GJLOS was set out to be an all comprehensive program where we would channel support to government and also to civil society. But it turned out that civil society and government didn't really want to be in the same basket. And there were a lot of differences over this, so the donors started out with the government and civil society would come later, but that turned out to be very difficult. The European Commission has been working on that for years and now that... The donors decided to make a separate facility for civil society to work on the Key Result Areas of the GJLOS program. So corruption, human rights, the constitutional process, etc. and donors would then invest in the demand side, so civil society would then have to demand reforms in these areas. That is what the [CENSORED] embassy is now trying to work on to bring to life this facility that has been in theory for a long time, but now totally separate from the government.

**Interviewer 5.4: Okay, so it's not part of the program?**

**Officer 5.4:** It's not part of the GJLSO program anymore. In the beginning it was meant to be, and then it turned out to be very difficult as the government and civil society are very antagonized.

**Interviewer 5.5: So that has nothing to do with the umbrella civil society organization, CRADLE?**

**Officer 5.5:** No, it has to do with that actually. So CRADLE is the representative of civil society within the GJLOS and it was also from CRADLE that we understood that civil society doesn't want to be together with government in one basket. So, for us that was clear. Okay, so this is a path that we cannot go, we are going to have to choose another path. But the missed opportunity here was of course that civil society could have worked together on something within the GJLOS key result areas, which was really necessary for issues like the constitutional process, they need to be united in order to make a stand. And for the time being, they are not united and we felt that they could have done this within the GJLOS and that that could unite them –but it

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didn't. It absolutely didn't. So now, we take another path, but it's very late and we can only start with this after the elections. That's the thing, for example with the constitution, it's not going to work anymore, also because there is no united push from civil society for this to happen. There are some very strong people there, like Patrick Onyango, but he can not do this by himself. And like Ann Ajogu from CREW, she is also very strong, but hey. The donors now try to work together on the demand side and that's why we have founded this facility.

**Interviewer 5.6: Okay. So now the influence from the demand side is now outside the GJLOS program?**

**Officer 6.6:** Yes, but within the same areas.

**Interviewer 5.7: When did this change occur?**

**Officer 6.7:** Well, that happened within the last half a year, basically. It came out clear that civil society doesn't want to be associated with GJLOS, because it's too much of a government area. And you know, it's election time, so maybe that is understandable.

**Interviewer 5.8: So they don't want to be connected with any political**

**Officer 5.8:** I think they want to be connected with some political –but not with the government.

**Interviewer 5.9: So in terms of the approach used, in practice how do you work with civil society for example in connection with the GJLOS program?... Is it like technical inputs or do you also discuss political issues?**

**Officer 5.9:** So the involvement of civil society in GJLOS is such that they can come to thematic groups and I am for example in the thematic group on anticorruption, so I am dealing with for example Transparency International, they are very good because they would address the Kenya Anticorruption Commission and ask them, 'have you done that or have you done that?' So that is very good and civil society is also represented in the Technical Coordination Committee (the TCC), which is a high decision making body. So they have decision making powers and they would also come to our annual review meeting and there, they are quite vocal. They are quite vocal. So that is their role.



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**Interviewer 5.10:** Could you try to elaborate on your role, the [CENSORED] Embassy, in this connection?

**Officer 5.10:** So, we only deal with them through these for a within GJLOS, but outside GJLOS, we have a whole program to support civil society and one of the NGOs that we support is the 4cs. That is the of Patrick Onyango for constitutional change and other NGOs that we support are e.g. Transparency International, The Institute for Education and Democracy just for the elections, and we are supporting an NGO called Media Focus on Africa, which is focusing on very general governance issues, leadership issues, to make clear to Kenyans what a good leader is and if you are voting, you could vote in a good leader. So that is interesting stuff as well, and then we have supported the NCKK, which a religious organization for peace building and these kinds of things. And then we are involved in three baskets that all work on legal reform so it's all relevant for the constitution; especially this one, the Gender and Governance Program, which is focusing on all kinds of ways to empower the role of women in society and in politics, all levels of politics. So that is one program and then the other program is the National Civic Education Program, NCEP, and all kinds of issues are being addressed; also the issues that I just mentioned, what is good leader and how do I demand good leadership, what am I entitled to have as a citizen, you know, public service etc. Because most Kenyans don't even know that they are entitled to have this and that from a politician. Then we are also involved in the Elections Program Basket, which is managed by UNDP and lots of NGOs are involved there and they do voter education and media monitoring, for example on hate speech, because there is a lot of hate speech here, like ethnic things, etc. Domestic observation, NGOs all over the country will do monitoring of the nomination process and of the actual elections, campaigns, and the E-day. So that's a lot of that goes straight to NGOs and the total amount of our governance program is like 6-7 million and then of that 2 ½ million euro per year will go to the GJLOS program, so that is government. So the slightly bigger part goes to civil society.

**Interviewer 5.11:** So if understand you correctly, your approach to governance is quite broad, it is not only going to more managerial or technical issues. It is based in a wide conception of governance?

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**Officer:** Yes, for us our main priority is human rights, well, that is always everyone's, and the [CENSORED] promote that. Gender and anticorruption, so that also shows which kinds of NGOs that we support; that they reflect our priorities. But now, we are looking at transforming this program where we support different NGOs to be involved in the multi donor basket, which relates to the GJLOS Key Result Areas. So promoting the demand side, we try to do that with other donors and start after the elections. Because, NGOs always have to shop everywhere for money and sometimes there are gaps, so our idea is give them long term support, core funding, so they know that they can strategize better instead of having to always shop around, as that is really not good for the management and strategies.

**Interviewer 6: Considering these groups outside of government, such as CSOs and political parties, how do you think that their possibilities to contribute to the constitutional review process have been affected by their access to resources?**

**Officer:** Access to resources from donors, you mean. Political parties, that is another story. Political parties here, I mean, are quite unstable and unpredictable. There is not enough legislation yet on political parties and basically there are not a lot of political parties that have a clear manifesto. Well, as you can read in the papers, it is all about personalities and those personalities, they can hop at the very last moment to another political party, because there is not legislation that forbids them to do so. So, in terms of the stability and image of a political party, it is very unreliable and that is a shame. But now that the political parties bill is before parliament, I don't think it will be approved before the elections, but what is interesting is that they would now be entitled, if they are registered correctly etc, to have some government money. That is interesting, because ever since, political parties mushroomed. I think there are now 120 registered political parties. And it is clear why they registered, because when time comes, they can get some money. But of course, the political parties bill, that is really what Kenya needs and they needed that before the elections, but Parliament will be going in recess now, so I don't think so. It will be suspended now, so I don't think that there will be any opportunity. So, I don't think political parties really contribute to the constitutional review process, I don't even see the link.

**Interviewer 6.1: It's that diffuse?**

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**Officer:** Yes, or else I would have had to study their manifestos, but from the media, I am not finding out what their agenda is with regards to constitutional reform. Okay, we heard Raila Odinga of ODM say that within six months after he would be elected, he would have a new constitution. Well.

**Interviewer 6.2: That sounds like what Kibaki said?**

**Officer:** Yes, yes, exactly. So, that is rhetoric, I think. I mean, is there really a plan, are they working on a new draft, are they consulting stakeholders, I don't think so. Then you mentioned civil society?

**Interviewer 6.3: Yes, you mentioned that it is relatively weak and fragmented. So I was interested in if that had any links to their access to resources or to funding?**

**Officer 6.3:** Well, the thing is, that is reality of life. Most civil society organizations, if they lobby hard enough, if they are represented in Nairobi, they would receive funding. Lots of them have special relations with donors. It's just that donors in that sense are not very reliable, at some point they stop the funding and then there is a gap: what should they do? So that is also why we want to have a long term multi donor basket, for example, we can support the organizations that are active in the constitutional reform process so that they can say 'okay, now we have funding for three years, so we can this and this and this, in terms of strategy'. That is our purpose now and I am sure it is going to work. But we have made some mistakes in terms of everyone, every donor giving different funding to NGOs and they always have to compete and they already have problems with their internal management. Their financial management is often scarily...Well, not living up to our standards. And internal problems, like problems with their boards. It sounds weird, but these kinds of problems can really destabilize an organization. Like it did with Transparency International in 2006 and the organization couldn't do anything anymore because there were problems with the board. They need firm commitments, they need long time perspectives, and we hope that they can work together and get something done, because with the constitutional process, they did not manage to do so.

**Interviewer 6.4: So when did you change to this approach of the long term commitments?**

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**Officer 6.4:** We always felt that it was needed and we always hoped it would work within the GJLOS, but that didn't work so we had to change. The [CENSORED] Embassy has done a governance program review in May 2007, and it came out clear that this was not a way to continue, that it was not good for civil society and donors, that we should find another approach and do something long term with open competition. Of course, NGOs will always compete with each other, you can't get around that, but at least they would have something long term this way.

**Interviewer 8:** You have been touching a little bit upon, as I have understood what you have said, informal relations between politicians in Kenya and in between different ethnic groups. Can you think of any instances in which Kibaki has been trying to gain the support of groups outside of government through means of horse trading?

**Officer 8:** As far as Kibaki is concerned, that is the thing, the president does not say a lot. It is always people claiming to speak on behalf of him, but we don't know whether he agreed.

**Interviewer 8.1:** Isn't that different from what previous presidents have done?

**Officer 8.1:** Yes. He is quite a silent president, which makes him quite charming for most people, and it also makes him popular because there is a kind of mysticism around him. For example, he is still not declaring for which political party he intends to run so it's very clear that he is quite popular and if he continues like this, he has major chances to win the election. I find it interesting to see in the papers all those, by the way old men, that allegedly played quite a role on corruption scandals, all those men are now saying 'oh yes, we support Kibaki and we are going to give him our votes'. Because those men guarantee particular votes from certain areas. But as far as we are concerned, we look at those men as having...you know, quite a record and it's interesting that they are allowed to play such a political role while it is clear that they are involved in corruption –well of course, I have not seen any proof, but the odds are against them, let's put it like that. So, it's the same clique.

**Interviewer 8.2:** But Kibaki does not distance himself from them?

**Officer 8.2:** No, he does not. Some people hope that he would, but getting votes is much more important than having corruption issues in mind. It's not an issue

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anymore, that's what turned out this weekend when this report was published of the major corruption scandal during the Moi period. We hoped that, you know, it would lead to big upheavals, that civil society would 'yes, you see, those people they can not play a role anymore in politics' –but they can! Nobody is objecting. Those people are mentioned in that report, which was actually commissioned by the government itself, so there must be a sense of truth in it. But nobody is saying that there should be political consequences, no, no.

Let me show you something.

[Retrieves a paper and shows the interviewer the front page, which has pictures of Kibaki in the middle with another man on each side]

This man, Biwott, he owns half of Nairobi in terms of real estate, etc. He is very rich and they all know it, but he says 'no, I have nothing to do with it'. This man, Mwiraria, was fired as a minister of finance when he was accused of being involved in the Anglo leasing scandal. And now, clearly, he is playing a key role in the reelection campaign of Kibaki. So we are a bit amazed about that. But then, it seems to be clear that getting the votes is much more important for Kibaki than dealing with their corruption past.

**Interviewer 8.3: Okay. So, it could seem that there are some connection between the economical elite and the political players?**

**Officer 8.3:** Yes...It's one thing here. And there is a huge Indian business community here and, I mean, they just do business, and they have been doing well in the last couple of years. They will probably at some point come out and say 'we will vote for Kibaki'.

**Interviewer 8.4: Okay, but they are not yet playing a large political role?**

**Officer 8.4:** No, they are not yet playing a large political role. They don't need to, I mean there have been some Indian business men involved in big corruption scandals, that is clear; it is in all the reports. But that doesn't mean...You can not generalize about that business community, but it is a fact that the economic elites in Kenya have been doing quite well the last years because of the economic growth. It is just a shame that the poverty has not gone down, because the poor people are just as poor or even poorer, so it is the economic elites that have profited from this.

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**Interviewer 8.5:** Now, we have talked a little bit about it already, but could you try to elaborate on the role played by the alignment of political parties in Kenya along ethnical lines?

**Officer 8.5:** Yes, I find it very complicated –on the other hand, you should look at it that way, because the ethnic factor is the most important factor in politics still, it seems; whereas it is something not familiar to me as a [CENSORED] person. I can tell you about these things, but in connection with the constitutional reforms, the thing is that I do not know what the political parties want with that. I know that it did play a role, that the government, which was at that time the government, had proposed a constitution and it lost. So there are within the government certain groups that still promote legal reform. But I think you have to look at specific topics.

**Interviewer 8.6:** Yes. It seems that the government is divided on whether it wants to try to bring the process forward or trying to stall it?

**Officer 8.6:** Yes, it has been creating all kinds of commissions which were very expensive with sitting allowances, you know, these men (because it is mainly men), they sit there all day talking with each other about things and they would earn a lot of money. –Although they also have their normal salary.

**Interviewer 8.7:** Yes, so it is not attached to any outcome.

**Officer 8.7:** No! There was this Kiplagat Commission, concerning ambassador Kiplagat, who was in the Committee of Eminent Persons? As far as I am concerned, it cost a lot of money and there was basically no result. Because, is there going to be a new proposal for a constitution? I have not seen it. So they have to start again from scratch. I am wondering what all those commissions do with the tax payers' money.

**Interviewer 8.8:** Now, we have talked about corruption and there have been continuing problems under Kinaki with corruption. I have read that he has been criticized also from donors for not doing enough to fight corruption, he has been removing some of his ministers, but

**Officer 8.8:** -They are back! They are back.

**Interviewer 8.9:** So it has been more of a reshuffle?

**Officer 8.9:** Yes, I mean he...first, after the referendum, he reshuffled his cabinet and one of the real, you know, suspected people, Murungaru, he was basically fired; he

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could not come back. He was one of the first ones...It was around that the was accused of being involved in the Anglo leasing scandal so when there was a reshuffle at the end of 2005, beginning of 2006, he could not come back. Then in April...before, it was John Githongo, who came with his revelations about the Anglo Leasing affair; tapes etc. There, Murungi was accused for being involved, he was the minister of justice and constitutional affairs, he was the one who actually pushed the constitution and he said that he was reform-minded –and he was, you know, the minister and there was no doubt that he was involved in the Anglo Leasing affair, his voice were on tapes. He was fired. Then the minister of Finance was also fired. Actually we, the [CENSORED], had a lot of questions from our Parliament on this and we had to suspend and suspend our assistance to some of our programs that were about to start. In the fields of education and in the field of water and environment, we suspended out assistance programs because of the corruption scandal. And then, in the end of 2006/beginning of 2007, Murungaru was reinstated as the minister for transport. And Mwiraria is now playing a key role in the reelection campaign...So, there are no political consequences at all, they are even stars of the political scene.

**Interviewer 8.10: So it seems like Kibaki might have removed these people from focus to relieve pressure?**

**Officer 8.10:** Yes, to please some people and when people are not so excited about it anymore, he just...Yes.

**Interviewer 8.11: Eases them back in?**

**Officer 8.11:** Yes! So for us it was quite disappointing also, because our Parliament was waiting also for more results and some real stands against corruption. But it has not been there, it is not going to be there. Corruption is not on the agenda, even when a report is being leaked like it was this weekend with quite some material. But it does not really make a difference. There is no real reaction, no one is saying ‘those people should be brought to court’. The Attorney General was saying ‘I have never seen the report so how can we say something about this?’. Excuse me, it has been there since 2004!

**Interviewer 8.12: It seems puzzling that the political opposition does not use this in their campaigns?**

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**Officer 8.12:** It [the opposition] does not. I would find it logical if they would, because it is a very easy way to destroy the reputation of some people on the other side. But they are not doing it; and to me that is a sign that to the Kenyan population it does not seem to be that important. From polls it also came out clear that what is important for them is their daily life, things like that they need jobs, they want to get out of poverty and they do not really make the link to corruption. It seems that if you are a politician here, you need to collect as much money as possible and if you are clever, you become very rich; which is corruption, but they do not really call it that. If you become a politician, it is ‘time for you to eat’, they call it. But the big advantage in Kenya, which is not the case in Tanzania or Uganda, is that the media in general are quite critical. They are really bringing a lot of attention to corruption, etc. –Oh, I have to be leaving in a few minutes.

**Interviewer 8.13:** Okay. You say that that when you become a politician, it is ‘time to eat’, but I could imagine that in order to get to high positions, you need to have good connections.

**Officer 8.13:** Yes.

**Interviewer 8.14:** And when you get there, there might be some people who might be expecting something in return?

**Officer 8.14:** That is it. It is a vicious circle. Politicians, basically, always have people sitting on their doorstep, saying ‘hey, now I want some money’ because I am your whatever –neighbor, aunt, niece. There is quite some pressure on politicians –not that I feel sorry for them, but I understand how the culture works and I understand that here, leaders are expected to be rich and be giving some money. It is just that they clearly do not give enough money to the poor people in their tribes, because they continue to live in poverty. Even the Kikuyu people who are now in power. There are slums full of Kikuyu people; they clearly did not get their share of the cake and that is a shame.

**Interviewer 8.15:** Okay, thank you very much for your time!

**Interviewer 8.15:** You are very welcome!



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### **BFD 2b Interview**

The following is a transcription of the interview with a governance officer of the BFD 2 in Nairobi. The BFD 2 is one of the basket donors of GJLOS (GJLOS, 2007b: 1). Present at the interview was only the interviewee and the interviewer. The interview took place in the office of the interviewee at the BFD 2 in Nairobi on 05/09/07 and took 1.19.32 hours.

#### **Interviewer 2: How have you contributed to or taken part in the constitutional review process in practice during its course?**

**Officer 2:** In terms of, the work here, I am in charge of human rights and environmental governance, which is a very thin portfolio, given the approach and the financing. But certainly I can give a small correlation. One, the civil society groups that we work with, basically Kenya Alliance for the Advancement of Children Rights, which is our main partner in the juvenile rights program, has been on the forefront of a campaign to expand Kenya's Bill of Rights throughout the constitutional reform agenda. For groups in advocacy and human rights, one of the main areas of intention was in the limited scope of the area of bill of rights to meet people's needs and as Kenya's constitution does not outright disallow discrimination on the basis of age. So the aim of these organizations was first of to make sure that by the time, we get a new constitution, discrimination on the basis of age is banished and then to get the bill of rights expanded to assure children more access to conditions for the realization of their basic needs. There was a wider campaign in which juvenile partners were involved to make sure that socio-economic rights are enshrined in the bill of rights and that more space is afforded to people to access facilitative conditions for the protection and promotion of all of the rights that are assured; whether it is the right of organization, whether it is your right to security –which traditionally are assured in Kenya's Bill of Rights, but there are always clawback provisions. So in practice, they are not being realized. I will give an example: on realization of any rights of Kenyans you need a lot of information, government information on what government programs are, what government spending is like, what government policies and programs are

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informed about and yet, there has been this Official Secrets Act that we picked from the British colonialists and it has been very inhibitive. Even for groups working on children problems, a document that is showing spending to a children's department may on one occasion be on the table for discussion and the next day, it has been taken and stamped 'top secret'. So what basically happens is that a campaign that was to favor children's rights ends up doing very many other things, which are now questions of general constitutional nature and common constitutional questions. So KAK, which is the partner there, basically entered this a children's group, but... Very many of these organizations were then in the Bomas, some as delegates, others as observers, and in fact all actors are still very active participants and resource persons. So, another group called the CRADLE had a person there, who ended up chairing one of the tents, actually I think she was in the tent for the basic rights committee, one of the technical committees of the Bomas. So that is as it goes in one way.

Secondly, and generally on my own desk here in human rights, we support groups that have been involved in civic education. Now, civic education is not anything new - from the time Kenya introduced political pluralism in 1992- but in a sense people did not know, why we need to realize their franchise. People did not know the difference is between business as usual and good leadership, among other things. So civic education has been an entrenched program in opening up people's participation and informed decision making. This year, we have just put in one million Euros in a national civic education program, which is a multi donor basket fund and Ann Nyabera from your embassy is a very active person in the group. And civic education programs, whether it is this one or others, were very instrumental in calling out people's attention, to shipping up the constitutional review questions. So by the time the review commissioners were working around the promises, a lot of structured responses, and a lot of ideas that people were discussing to be part of the content of the new constitution were in part informed by their civic awareness. Some of which are directly correlated with donor's work in civil society. So whether it is a matter of devolved funds and you have discussed between corruption and local governance, people then got to know that 'yes, there is space for government financing coming from the capitol and once here, we need to be part of it'. Then they would find out,

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they would tell the commissioners this, and the commissioners would find a way to give that expression in the draft constitution. Whether it was a question of, you know, I participated on some of the hearings, people would have an issue like that lawyers should not be allowed to be legislators, they should not run for positions of Parliament –and as this person explains his or her own thing, you get to see that the matter that he or she is trying to constitutionalize, is a matter of corruption. So they say that lawyers normally get compensation from the client, but they never forward this money the guy who was the accident or the family of the diseased and they become in peace, they are more shielded from the scrutiny. So if you look at that, people in different ways got to express what they wanted in the new constitution, with some of it informed by their civic consciousness, some of which have been motivated by programs such as this. So these are some of the ways that I can correlate my desk with the constitutional review process. And of course, in connection with civic education, one of the very central topics has always been the constitution and constitutionalism. What the constitution is, what constitutionalism is, what rule of law is in practice, in life ruled by your country's constitution.

**Interviewer 2.1: Do you think that the role of the embassy has changed during the course of the process in terms of the ways that it engages in it?**

**Officer 2.1:** I have only been here for three years, during which nothing much has changed. But speaking with a hindsight, I do not think that this embassy has a role beyond saying that Kenyans must participate in the process. I do not think that they favored one content over the other. So it has been from a very neutral, plane perspective of promoting the participative...They have not had a role even to influence what was the content of the constitution. You wish they did, like, I wish they were much stronger on certain values, like the omission of the death penalty. I wish our influence was also on the content, but that is not the case.

**Interviewer 2.2: But have you tried to actually provide input into the process?**

**Officer 2.2:** I do not think that I have that space. But it could have happened, you could have come out to support only certain types of advocacy for the constitution. Then you may influence it. I know that the American Embassy has been, or was accused during the Bomas process of trying to solve its wars with the Muslim

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population in this country through its support to certain organizations that were purely advancing Christian supremacy in the draft constitution.

**Interviewer 2.3: -As a way of sidelining Muslim organizations?**

**Officer 2.3:** Yes, yes. There was a very big rift between the so-called, I think the tent was call the Charter of God, where these Christian organizations would gather and push for their things and demand for example that the court of the chief [inaudible word] be removed from the constitution, it was in the draft constitution. And a Christian congregation of organizations hit the sky and it was a very big rift, the Muslims also the formed together in some other group that. It was a very big rift, and I know that at that time, the American Embassy was...Accusations were cast at the American Embassy for trying to vouch in their own religious intents with the draft. But here, it has been plain neutral, and almost a lazy involvement that remains at the level of the youth.

**Interviewer 2.4: Can you elaborate on that –lazy?**

**Officer 2.4:** Well, I can imagine that form the values of the [CENSORED], they would have wanted a more tolerant, more corruption-free society, the omission of the death penalty thing –there are certain things that they could strictly have favored to advance in the draft, but that has not been the approach of the embassy.

**Interviewer 2.5: So, could you try to tell me about what the approach has been instead?**

**Officer 2.5:** Yes, that is what I am saying, the National Civic Education Program, it is based on donors understanding that civic education is good and they let it out, so they just give this commitment of half a million Euros per year, but then, they do not get into this kind of content being pushed; the do not do that.

**Interviewer 2.6: So it is only indirect, direct support for someone who is then pushing as opposed to pushing directly.**

**Officer 2.6:** Yes, certainly. So, maybe they leave it at that Kenyans know what they want, but I think that...people never know what they want. What they want is what the common humanity wants so these things has put them to debate, put them to contention.

**Interviewer 2.7: So this role, has that been the same?**

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**Officer 2.7:** Yes, yes, it has been the same. So I am saying that the role has hugely been concentrated on the Euro support and then nothing else -that has been the same for the last three years, in my opinion.

**Interviewer 2.8:** Which conditions do you think have been most important in enabling the Embassy of the [CENSORED] to support the constitutional review process in the first place?

**Officer 2.8:** Conditions...I think, well, first the transition in 2002 was a hugely monumental in the sense that Moi was a daft tin pot, you did not have space for any new ideas. For instance, if you looked at NGOs and civil society as stooges of foreign masters, when Kibaki came in, Kibaki is a laid back almost stupid president, so when he came in, there was quite some space for NGOs to get back and work for constitutional reforms. The government itself had promised a new constitution within the first 100 days, so there was a lot of jubilation, and a lot of optimism that that would happen. But also, Kibaki is very cunning, so what he did was to, there has been conditions for people's populist participation like I told you before, but with out any movement; too much screeching of the brakes with any stopping, too much noise without any tangible activity. So he did that on one hand and allowed groups and promoted a picture this way...And on the other hand, he reached for donors, saying that it was a very good opportunity for government to work with donors. And the donors, you know are like bride groups, virgin brides, waiting for...They just jumped into the holy matrimony and so a program like the GJLOS was formed and it looked like it would be a very wonderful opportunity for donors to influence the new constitution. Again, in terms of this embassy here, the new constitution was prioritized in the multi annual strategic plan for last year because you look at signs and you think it will happen. But eventually, it did not happen because eventually, you know...All this... manipulation by the government went on and on and on, but no constitution was being produced, but there would be talks taking place about a constitution. So the conditions were, one, the transition, two, the apparent openness and receptivity by the new political class to discuss in society for a new constitution. But inherent and deeply embedded in it was also a very deliberate self strangulation mode, you know, as soon as...There have been opinions that the Kenyan Constitution

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has served the country for 40 years, so why should it be changed. If it is a little bad, why don't we just fix the sections and I think Kibaki believes that, he got into fixing things. The women cry, and cry against... a program for a gender commission is founded; people say that there is too much corruption, so he allows the Kenya Anticorruption Commission, the Anti Economic Crimes Act that now sets the commission and he makes sure that the Kenya National Commission on Human Rights is allowed to shed light on problems. So when you look at the man, he is a minimalist and he believed in incremental changes to the constitution but never a comprehensive review.

**Interviewer 2.9: Do you think that has been the strategy from the beginning?**

**Officer 2.9:** I think so. Kibaki is a chameleon. He has looked for safe spots that are not permanent, the chameleon is blue now and it could be red the next moment and if that allows him to survive; that has been his character from his time as Vice President and even before.

**Interviewer 2.10: Mostly focusing on survival?**

**Officer 2.10:** Yes, yes, survival and...If Kibaki was a baker, the sweetness of his cake would always stay on the icing, because that is what he is.

**Interviewer 2.11: It is an image that he projects?**

**Officer 2.11:** Yes.

**Interviewer 3: Okay. Could you try to describe to me what you perceive to be the essence of the constitutional review process in terms of the most central topics of reform seen from your position in the Embassy of the [CENSORED]?**

**Officer 3:** So like the main issues. Well, should the constitution be changed? Yes. The point is that the imperial presidency that Kenya got from the British –well, they say it is a mix of things, but I think that apart from the prime minister now being called a president, they also got the American presidential powers along with it. So Kenya's presidential system is very imperial, so a lot of power is still concentrated in the executive and that is not attuned to today's governments, it can not be. Because of technology, it can not be because of the population and the leaders and their role today and it can not be because as the world becomes more global, even citizenship has acquired new meanings and you can not have one small president, one small king

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in Kenya, trying to have control of the destiny of 33 million people in Kenya, with a monopoly of powers and ideas. That probably could have happened in 1964 when Kenyatta was president and we were 8 million people and less than 30 % of the people were literate, but not today. And in a sense, that centeredness of authority in the executive has compromised not just Parliament –you know, Kibaki would still be...you know if he does not have enough MPs, he calls the opposition parties and says ‘hey, I can put you into the Cabinet’...He can still manipulate the budget, he appoints all parracital (look up spelling) heads, he appoints the chief of justice, judicial officials. I mean, his powers are still very perverse. And he has no checks, the Parliament does not check him, the judiciary does not check him, he appoints the Attorney General. So, that must be curtailed somewhat. There have been the views that Kenya requires a Prime Minister, I do not quite agree, but I think that the President needs to be checked more by the Parliament and the Parliament at the same time, should be checked more by the constitution. Because the last four years, we have seen serious attempts to institute also a parliamentary dictatorship; so long as they can allow the President to tango in this dance, they want to get partner so all these alliances, all the privileges, they want to live like small kings –every MP wants to be a princess if the President is the king. So that is for example as far as the checks and balances would go. But also, as a human rights oriented person, the Bill of Rights is still very weak, what is retained is not what we get –the claw-back provisions are still too much so that if it can be demonstrated that by my... expression that Kibaki is this or that, it can cause the public a problem or interfere in the public order then I could still be arrested. There is still everything that is not given in that bill of rights, except in writing, because one right can be subtracted, another provisioned and that is for civic and political rights. But even if that were to be addressed, I am one of those people that think that socio-economic rights should be entrenched in the bill of rights and that it is possible to do so by more social welfare oriented policies, not necessarily calling for a socialist government or an interventionist government, but in a more facilitative role.

Devolution is a very big thing, devolution and decentralization, out of Nairobi, we live like mushrooms by the road –organic mushrooms are better, because you can call

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them organic –because nobody cares about how regional authorities are conducting their affairs. The little money that comes from Nairobi, reaches there only to very corrupt hands, very incompetent officers. Also, it is very little money and the officers are not up for election, except for the councilors. Devolution, there is more need for real devolution and devolved structures at that level. But also decentralization, in which case, why should five million plus be in Nairobi, and every year that population keeps increasing, when many small towns are dying because there are no opportunities in those towns? Everybody who completes school must come to Nairobi to try and get something. So Kenya is a story of two worlds apart, just outside Nairobi, if you get to some of the slums, that is the real life that is comparable to most of the rural areas that we come from.

There are a lot of social issues that the constitution could solve, and it would rather do so. This is from the gender rights, women think that the men are the enemies, but, I am a man, and I think also that more so the constitution is setting answers to the perceived marginalization of vulnerable groups like women and people with disabilities and the children. I also think that in terms of those social issues, something like ethnicity. Ethnicity is very bad, actually I should not call it ethnicity, let me call it tribalism. It is very bad, and you can equate it with centralization. Because Africa will still subsist on personal code, so the President is the master patron and the rest of us are the clients. Now, if the patron shares with you some kinship –you know, only in theory do we say that no, it does not happen and it is changing, but I do not think that this is an interview to appease you –so in practice, the role of tribalism in this country unacceptable. Jobs, particularly posh jobs, are given to those that are in the presidency and a community like my own people, the rural people, it is like we live despite...If there could be a way to spray us dead, I think we would be very few today. Because I come from a community of people who are so voluble and apart from making noise, they always think that they are born police men. And I think they have this Jewish mentality that they are always being persecuted. So of course that does not make it any easier for them, for any government I power, but as victims of tribalism, it is something that I see everyday. Inequality is to me mostly taking the face of tribalism and sometimes when we get



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educated, we think that we are better than others who have not been to school. But this feeling of supremacy is also close to tribalism.

So this plays a role in politics, I think for example that you will hear in the presidential campaigns that Raila Odinga [as a Luo] is not circumcised, so he can not lead because he is then a child. But all those are things that you can give a constitutional interpretation. We are in a situation where we talk discrimination, but we allow it and the constitution allows it. So I think, if we were serious, even our draft constitution, should ban discrimination based on tribe.

**Interviewer 8: Is this tribalism also playing a role in the constitutional review process?**

**Officer 8:** It has done that, it has done that a lot. It was the case for which the Bomas went under, but it was also the case that it was more tribalism than even the content, that tribes that felt that they were not part of this government, including my own tribe, the ganged up against the draft constitution that had quite some very progressive provisions. But they just ganged up and the ethnic leaders, these stakeholders, they do not do any leadership, they come out as ethnic kingpins. So these ethnic kingpins came around and said ‘hey, hey, these things are even talking about gays and lesbians being allowed in this community’ –things that were not evening the constitution. But you know, they just get their tribe and they say these things are given your land to women although women themselves also had said they wanted to inherit land, they said ‘no, in our castle, women do not inherit land’. So it was never even on the content, but tribes ganged up together and of course the Kikuyu ganged up to say that his was the best constitution. The banana and orange movement, they are not more than tribal cocoons backing against each other. Tribalism has been a way of trying to obfuscate the issues and that has been the case all around this constitution. When Moi was a president, clearly he did not want a new constitution, they thought it was a tool to dethrone their own from the presidency. When Kibaki became president, he began foot dragging on reforms, all this time he has done it and one day one of his ministers said in public that they wanted reforms because they did not know that Moi would get away, so they did this as a way to get rid of Moi. He said this in public, and he is a minister. So it is a discussion that I am happy to give up because I am an

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anthropologist; a lot of Kenyans try to hide this behind using some English words, but this is a very serious thing. I think yet the constitution can provide some space to solve it.

**Interviewer 8.1: But within the government, there have also been voices that have seemed to be trying to move more towards a new constitution than others?**

**Officer 8.1:** No. This government has a lot of people, who in the yesteryears were activists and so-called reform minded people. So they know the language to speak. But better still, they know the strategies to use to stop the reformists of today from changing the constitution. Because they know that some of them, for example the GJLOS director, if you talk to him, he was the director of a public law institute, he was in the civil society. Even the Kenya Law Reform Commission, brilliant people like Kathurima M'inoti, he was a very good civil society resource person, he was very good. So one way is that you go to the other side and you get very good salaries, more than what you probably pay in your own country, I think some get 600.000 Euros. So when they get there, they call on all these good people and they imbue you, good positions, good salaries, and you do not talk anymore about the constitution. And then you are the one who meets researchers and diplomats and you try to tell them 'no, this thing is being bad like this'. So cooptation of civil society is one thing. But also acquiring the language of civil society and in that process obfuscating the remissions, so e.g. if Martha Karua were to give a presentation, she would be very wonderful on the kind of constitution that we need and how much they are pushing for it. But she would not be believing in it, she would not be. But I am saying, they were in civil society, they were our friends, they know us. So they know that if there is a demonstration on this, so and so is likely to lead, and this is how we need to tackle it. So and so have this problem, could not pay his rent, so give him this job. Or in terms of this embassy, you would think that it was more interested in what we were doing, or you would ask the president to like, one defeat –you know, that they would like the standard charter to...not to have the work on it renewed unless you got... I mean they are the real manipulators. This government, they are being vile on certain fronts, but they are...You could not for the moment pass this government for being reform

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oriented, at least not on the constitution. But they know the issues, they know the issues probably better than even civil society.

**Interviewer 7: So if I am hearing you correctly, Kibaki and his government seem to be relatively aware of how they are perceived by the Kenyan people?**

**Officer 7:** They know. They back work, they back work. You know, Kibaki him self comes from a closet of conservative, real conservative politicians that have sat in every government there has ever been. The back work of his younger administrators and politicians are people who actually in the opposition, were on the leadership of Kenya's civil society. So that has made a perfect collaboration on their part now, as status quo. To control the debates and to try and manipulate the issues involved, so this is... Most of the ministers, they were here, they were in the civil society, they were writing papers, they were leading, they were focusing the issues of the day then.

**Interviewer 7.1: Can you give me any examples of which ministers these are?**

**Officer:** Kimunya was the head of the NCC for years and of another organization in 1994 the [CENSORED] Embassy supported the group by Kimunya, he had a research team, which won a lot of honors from Denmark on corruption in Kenya, that book was hugely acclaimed by KLARION [?]. He is today the minister of finance, he knows what these things are about. Martha Karua was among the first leaders of the League of Kenya Women, she just left the board to become a minister, she knows about these things and she was also in FIDA. Murungi has been in the board of CGD, he founded the group, Center for Governance and Development, he is the minister for energy, he was the former minister...He was the one who busted Bomas, if you could say so. Kimunya, the minister of finance, he was a consultant here in the matrix group, very close civil society consultancy group.

**Interviewer 7.2: So there are many examples of this?**

**Officer 7.2:** Yes, the examples are numerous.

**Interviewer 7.3: That cooptation of civil society, did that take place after the elections?**

**Officer 7.3:** Yes, soon after the transition.

**Interviewer 7.4: But Kibaki does he still have, as you mentioned, the ties to the old school of conservatives?**

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**Officer 7.4:** Ah, yes, they are the moneyed. They are the moneyed; they are the ones with the resources. So, he is captive, he is captive of his own tradition, he is very conservative. You know he is in the party, the DP, it is in the alliance of conservative parties, the international group of conservative parties. So that is why I know that at the end of the day, they do not want the constitution. Even if they were not in bed with these reformists, they would still not have wanted the constitution, they would be looking at small patches or amendments. So even without these reformists in government, Kibaki would still be doing what he is doing now. The reformists are part of the strategists sucking up the pressure for a new constitution. These former executive directors of civil society etc. they are now the ones to tell you about how much they are really trying, how difficult the process is and that it was Kenyans who rejected the draft constitution. They will tell you this in very good English, how the draft constitution was very progressive, that it was Kenyans who rejected it. They will not be telling you how much they are paying their commissioners a month, of how expensive the process has been, of how tribalised it became, of the varying intentions as to why they did not make the constitution. They would tell you that they are committed to the constitution, it is the opposition that politicized it. So Kenya's constitutional review, I think is a question of who you talk to last. Because all sides are very informed. That is the stage you have reached, I mean, this thing has been with us for more that 15 years or more.

**Interviewer 7.5:** So both sides seem very aware of trying to promote an image of themselves as being reformist?

**Officer 7.5:** Yes.

**Interviewer 7.6:** But in practice

**Officer 7.5:** -In practice, I am not even convinced that the opposition is committed to a new, progressive constitution.

**Interviewer 3.1:** Okay. How do you see the link between the constitutional review process on the one hand and then the efforts of the donors within the GJLOS program to contribute to the development of the constitution?

**Officer 3.1:** For me, I would say no link. The GJLOS have talked a lot on corruption, but there are so many statutes, even by the constitution itself, there are very many

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constitutional offices in the constitution as it is that fight corruption. Laws have been put in place, but corruption is not just a matter of the law instrument, so in terms of GJLOS donors, I see them talk about corruption, I do not see that they make a link to the new constitution.

**Interviewer 3.2: But there is a thematic group on constitutional development?**

**Officer 3.2:** I think there must be.

**Interviewer 3.3: But they have not provided input that has been visible to you?**

**Officer 3.3:** No, not to me.

**Interviewer 3.4: Okay... Has your perception of the constitutional reform process changed during its course?**

**Officer 3.4:** No... My perception has always been that this was a rigmarole... It is a class struggle and they are sucking up the poor to something that they are not part of. I do not see a new constitution soon. I have seen that Raila has promised a new constitution six months into his government... If that comes to pass, in my opinion, it will not be... any more progressive. Actually, I will be pleasantly surprised if we get the constitution that addresses the things that I was talking about.

**Interviewer 3.5: Although, for example the reduction of the powers of the president, independency of the judiciary, and Parliament, the ECK, that has been part of the discussions on minimum reforms?**

**Officer 3.5:** Yes, but how more independent can... Or, how detailed can a constitution be? Even in the present constitution, the ECK is independent.

**Interviewer 3.6: But as you said, the president has powers to**

**Officer 3.6:** -The president has powers to nominate the members of the ECK. In the amendments made in 1997, these people were first of all to be nominees of the political parties. Recent nominations to the ECK were done by Kibaki without any consultation. But nobody took them to court, nobody took Kibaki to court. Nobody made any noise about it. I am saying that even if now we were to say that, like the draft Bomas constitution says, that now the ECK nominees come from Parliament, does that make it anymore independent? I do not know how detailed, and you will be surprised looking at Bomas -I have the Danish constitution at home, I think it is like 33 pages- you will be treated to a document of 200 pages. How more detailed can a

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constitution be? We are talking about powers of the presidency, yes, a lot of work is still required on that end, but... Kenyans have an understanding that God must actually have been standing in Kenya as he was creating humanity, you know, if you took theology that way; if they defined where the Garden of Eden was, then that was Kenya before it went somewhere else. Kenyans talk a lot, and I think there should also be a parameter of where our constitutional wishes should have ended; because you may get lost in the maze of drafts and the wishes that people wanted in the constitution. People even wanted different buildings to be painted green as they wanted that to be part of the constitution, and since it is still not there, then the discussion must continue.

**Interviewer 4: So let us move on to a new issue. Have there been any situations during the constitutional review process where the support of this embassy has been reconsidered?**

**Officer 4:** Not while I have been here.

**Interviewer 4.1; I mean, not necessarily in the form of putting it on hold, but perhaps reshaping it?**

**Officer 4.1:** No. You know, last year there was a discussion in the [CENSORED] Parliament of whether aid should continue to this country or not. But it was a matter of corruption, never on the constitution. As a matter of fact, there has not been a lot, I know there has been push on behalf of the embassy with regards to Kenya's review.

**Interviewer 6: Okay, so now for something completely different. How do you think that the possibilities for groups outside of Government to influence the review process have been affected by their access to resources?**

**Officer 6:** Mmm, pretty much, urban based groups have had tremendous access to resources and therefore are more organized to influence the debate, to influence meetings, to influence content, because they are able to hire resource people and make the discussions. But it means to me that up-country or rural based lobbies and groups always became rubber stamps and appendages of urban CSOs in influencing the reform process; I think that would be my summary. They have been hugely disadvantaged in gaining whatever types of resources.

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**Interviewer 8:** We have been taking about this somewhat. Can you think of any concrete instances in relation to the constitutional review in which it has been suspected that Kibaki has been trying to gain support of groups outside of Government by means of horse trading?

**Officer 8:** Well, you see, Kibaki is a gambler. Kibaki has to me been the best president after Moi, but it stops there because there have been no other presidents. But he is a typical gambler and therefore, he is a horse trader. This is the most typical example: By 2003, the constitution review debate is very high, but first, to assuage people, he comes with a task force to enquire and advice on the necessity of... Well, a truth and reconciliation commission because of the horrendous nature of Moi's dictatorship. So, that process was like a horse trading process, because him assuaging feelings on the demand of the new constitution. So, for a while it looked like it was a destruction and people thought that we would now go the way of the truth and reconciliation commission. Of course, nothing happened with it and the pressure for the Bomas continued, so people went back to the review process; so that failed. Down the line, by 2004, there is still pressure on Bomas and foreign observers were saying that Kenya should finish... You know, those statements that diplomats give that they would like a new constitution and there is some pressure on Bomas. Then what Kibaki does is typically a recess there and he tables the anti-terrorism bill; and the bill was quite a destruction because it was going to be very draconian. So the Muslims make so much noise, and in my view the shelving of that bill was also to make, not just the Muslims, be a little quiet about what they thought they were losing at Bomas. Because they were distracted to, actually it was called the Suppression of Terrorism Bill, they were distracted by that and for some time, they left this discussion about the constitution and then the bill was shelved. So pressure on the new constitution goes down because after all, they will not be harassed on terrorism. Then, he releases it again as anti-something, they devise certain classes there still on terrorism and releases it; but also there I think the horse trading was also with the Americans. They give it out also when the Americans think that Kibaki is not fine on certain areas, and they come out with 'we are fighting terrorism'. So he is a typical horse trader and I will relate the task force on investigation and the advice of the truth and reconciliation

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commission, I would relate the suppression of terrorism bill, and even the investigation on the Goldenberger quarry; it would relate all of those to horse trading.

**Interviewer 8.1: So none of these bills were actually**

**Officer 8.2:** Nothing came of all of these, and I think that when the Americans insisted or asked again about this bill, it was now time to trade on Somalia. The renditions that Kenya made, you know, we renditioned more than 81 people back to Somalia and Ethiopia. People who were caught in conflict, we again took them to the same parties that were fighting and some of the Kenyans we allowed to be flown out of the country, there was a case of, there is a Kenyan in Guantanamo Bay. So to me all those are, you know, like on a pressure cooker, sometimes when it is too hot, you let our steam to release the pressure.

**Interviewer 8.2: So the Kenyan in Guantanamo, for example, was he released by Kibaki as part of a horse trade?**

**Officer 8.3:** To me, yes. There is interest in looking at where that suppression of terrorism bill went and at that point Kibaki does also not want to do it because that would confront the Muslim electorate, so at that point he looks for one person to allow them to take out –he horse trades and he does so around Muslim politics in Kenya, around the reconciliation expectations, and then the corruption investigations. He horse trades.

**Interviewer 8.3: Apart from the types of horse trading that you have mentioned now, do you also see connections to ethnic groups as we have talked about earlier, like his own ethnic group?**

**Officer 8.3:** In terms of tribes, you know after the referendum, the Luo voted no, so the few of them that were in government were thrown out, all of them. Then he got more Kissii into government, Kissi also come from Nyanza, so he forms something called the Government of National Unity. The Luhyas, fairly a lot of them, no, some or a few of them voted banana, so he got more of them into positions and when Komba said that these were not enough and he refused to take his position, he got again, I think to PSs and two ministers that were Luhyas. He took a ministry like Science and Technology and divided it into two, and he got one like Land and



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Housing and dived that into two. We now have more than 30 ministries... That is in his gene to do.

**Interviewer 8.4:** Also, somewhat in connection with this, problems with corruption have been continuing also under Kibaki. He has been criticized for not doing enough to fight corruption and I am wondering if people see him as, to put it bluntly, part of the solution or as part of the problem?

**Officer 8.4:** Today, everyone is very skeptical about this corruption thing. I am very skeptical. I mean, I do not know what it means to put Kibaki on the spot for it, because even the people putting Kibaki on the spot for it are corrupt, including donors. But of course not this embassy, but I am sure, including donors... So, politics aside I am very skeptical. Because I do not think that it is in the interest of Kibaki to fight corruption. He needs the French on his side, he needs the Japanese on his side. The Japanese are very good people, let me say. He needs the Italians on his side... And you know, I have heard quietly some people say that most corruption in Kenya does not involve donor funds, it is public taxes by Kenyans, so we do not want to get involved. So those are swivel chair mentalities... Kibaki is not committed to fighting corruption, because it is not in his interest to do so, that is one. Two, there is no neutral party, which in this case could have been donors, to put him on the spot; because somehow they subsist. So maybe the World Bank –actually, under Kibaki's time, maybe the World Bank. But the Kaufman report kind of passed Kenya.

**Interviewer 8.5:** So they have been the closest to put Kibaki on the spot?

**Officer 8.5:** Yes. So, he needs corruption to fund his elections, he needs corruption to keep his ethnic elites alive. And there have been allegations in this connection of manipulation of share prices at the Nairobi Stock Exchange. These allegations began after the swearing in of Kibaki and they are proven throughout his tenure. So, it does not matter.

**Interviewer 8.6:** But nothing has been done?

**Officer 8.6:** Nothing will be done.

**Interviewer 8.7:** Even though it has been proven?

**Officer 8.7:** Uchumi has gone under, that was Kenya's leading... It was like Walmart... And I think another company... And yes, nothing happened. It is not in

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his interest to fight corruption. To prove that, the ministers that were involved in the Anglo Leasing Scandal came back to the Cabinet, and the Attorney General still says that he did not see the Kraul [?] report. Somebody should show him to the internet.

**Interviewer 9: Kenya has a history of the incumbents applying violence as a strategy dating back to the imperial period with the Mau Mau. There have been several demonstrations in connection with the constitutional review process. The response by the police in these cases, how do you interpret that?**

**Officer 9:** Of course it has been excessive. Excessive and brutal. But...It is more a matter of tradition, but I suspect that Kibaki is... His culture is less violent than, say, Moi. But it is more in the tradition of the police to bust demonstrations that way. Actually, God forbid, but under Raila's government, it may be worse. Because there are also cultural applications involved, you know.

**Interviewer 9.1: How –can you elaborate on that?**

**Officer 9.1:** Well, there are people who are very protective of a government and their style of politics will tend to reflect it. So Kibaki's style has tried to... You see, like with the raid of the standard, it is a small clique of policemen and they go very fast and they do it and they disable it, and the media can not talk. They called it the Rapid Rescue Squad. In Moi's era it would probably have been the whole squad of police and a lot of harassments, so Kibaki's violence in that sense is elitist, selected and targeted on the spot. It is very elitist violence and in that sense it can be the violence that just picks the leadership. Like the arrest of the five civil society leaders in front of Parliament. Just like that. He is a little bit like the snake killer: just the head. But Moi was mass, Moi was mass; there would be more broken skulls, more broken bones.

**Interviewer 9.2: But there have also been cases of killings by the police?**

**Officer 9.2:** Oh, we can not get there [due to time constraints] but extrajudicial killings is the main human rights issue to day in Kenya.

**Interviewer 9.3: Also, a few demonstrators have been killed by the police?**

**Officer 9.3:** Oh yes, you know, in that sense –there was the Chairman of the devolution sub committee of the Bomas was killed. He disappeared and of course, he was killed. That is in Kibaki's style to do.

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**Interviewer 9.4: You see a connection between that and Kibaki?**

**Officer 9.4:** Yes, of course we know a little more, but there was a connection. Yes.

**Interviewer: Okay. So, that was all that I had and I appreciate your participation.**

**Officer:** It is okay. Here is my direct contact information, so if you need to get back to me, please do so.

## **BFD 3 Interview**

The following is the transcription of the interview with a governance officer of the BFD 3 in Nairobi. The interview took place at the office of the programme officer at the Embassy on 04.09.07 and was of a duration of 0.59.23 hours. Present were only the interviewee and the interviewer.

**Interviewer A: I was wondering how the GJLOS Reform Program was formulated originally?**

**Officer A.1:** Yes, the GJLOS RP started in 2003 after the last election where you... Well before it was not possible to have these kinds of reform programs... It was not something new that just fell down from the sky, it was built on other activities, programs that donors had in the government, in the legal sector. After the elections, the ministry of justice was formed and the new minister, he was very committed to this kind of reform. So it was a reform mood, so to say to try to do something with these scattered activities that had been in the legal sector do a joint program. So that was the start. And as you know, there are six ministries, seven if you include the judiciary, and there are in to 33 MDAs, so it is a quite complex program and for the moment, we are about 15-17 donors, six are channeling their support through a basket, the others are direct. So we are many actors, but many of us were active in this process to getting GJLOS on board. What was decided was to have one year, what was called the STTP. Because many of these institutions, like I said, the ministry of justice was a new one, many of the others had been very marginalized, I would say, also when it comes to budget. So it was tried to boost them, the status of

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them, and also a little bit equipment wise. I think it was a joint process to get this on board, but the donors played quite the substantial role, I would say.

**Interviewer A.2: But it was initiated by the Government?**

**Officer: A.2:** Well, as I said it was from Government programmes, supported by donors from the beginning, so I think it was a joined process and coming after the election it was not only the legal sector but other sectors. Very much this “we want reform, we want to have new reform programs”, the new ministries were very active in trying to establish that kind of momentum. So I think it was a joined, but very much supported by donors, [CENSORED] being one of them, being very active in the establishment of this program.

**Interviewer A.3: So was the [CENSORED] Embassy the lead donor from the beginning?**

**Officer A.3:** No, not from the beginning.

**Interviewer A.4: so that has changed?**

**Officer A.4:** That has changed. But in March next year, we will have been that in four years. That is a long time.

**Interviewer A.5: Yes. So who started out being the lead donor?**

**Officer A.6:** I am not sure. DFID, I think, because they also had programs from the beginning. So they were involved in the legal sector, I think they were the first one to be the lead.

**Interviewer 1: Okay. In connection with the GJLOS program, I was wondering how it has been decided which members and organizations from civil society could participate in the meetings of the thematic group on constitutional development?**

**Officer 1:** Yes, this I think you will hear when you go to civil society, you will hear many different voices. There were so to say election... Just to take one step back: One important issue with this program, and that is also one key result area, is also to have the participatory approach and also to have the non-state actors involved in this process, not only civil society, but also the private sector. Then it was process for the civil society and for the private sector to select one representative. And for the private sector it is very easy because they have this KEPSA coalition and they are very

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much... Their understanding is clear, they are the ones to represent the private sector, in the thematic groups, in the joint review meetings, in all stakeholder foras. For civil society, it was CRADLE that were elected. But they have also a list of who is going to participate in the joint review meetings and they circulate this.

### **Interviewer 1.1: a list of the member organizations?**

**Interviewer 1.1:** Yes, all the member organizations. But there is a feeling that, of the organizations that may not have been at that meeting where they elected or selected CRADLE, there might be some that do not feel comfortable with this. So you hear those voices all the time of “who is going to the joint review meeting, always CRADLE and you know that they get them their daily allowances and nice hotels etc. So you will always hear that and I think that there was process, but as we don’t have this NGO Council, you know the NGO Council collapsed, so there is no coordinating body within the civil society. You have different networks, a lot of different networks. Some are working very well and some NGOs are in more than one and I think that is a problem. You don’t have one coordinating body and you will see that the civil society was very strong before the last election in 2002 and then... I mean, it was the election, new government, many from civil society incorporated in the government structures and now a new government that opened up the space for civil society to work together with the government, ones they might have met. You will find civil society really not being able to take that role, being divided, of course, competing with each other on thematic areas, but also money wise of course. So you have a civil society that has not really been able to take that role. And of course, it is a difficult role. Because at one time, you want to cooperate with the government. You want to sit in the thematic groups and discuss the relevance of an ombudsman function, for example, and then when you leave that table to go out and you criticize the government for not doing this and that. So it is a watchdog role that they want to keep and that they should keep but it is difficult for these roles to find a way of collaboration, I think... And just to mention that what was decided from the beginning in the GJLOS program was to establish this kind of facility that we call the non-state actor facility for the private sector and for the civil society to apply for funding for activities in relation to GJLOS. And we have been working very hard on

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that and the European Commission has been leading that and my understanding is that the process has been very participatory... But that civil society at that high level meetings being rejected at that facility –not the private sector, but the civil society– meaning that there had not been enough with consultation that there were questions about the...involvement of the government in this facility. So now...that means that we have worked for two years and they rejected this facility.

### **Interviewer 1.2: Civil society?**

**Officer 1.2:** Yes, civil society and when you talk to civil society, it was CRADLE that participated in that meeting, that they [CRADLE] don't have the support of all. They might have the support from some, but not from all. –And also, we have to remember that we are in an election year, so civil society they have a lot of money for elections –for civil education, voter education, etc.– that donors are supporting as well for the election basket fund. So they don't really need the money to do anything for the time being because they are involved. But now I am talking about the bigger organizations, the smaller organizations are maybe not in the same financial position, but they were not the ones that were able to start that meeting. So you have a divided civil society, but we as donors are trying now to find a way in which we can launch again this facility. In what sense it will be, we don't really know yet, but we know that there is an interest –but maybe the timing is not right now, as we are coming closer to the elections. So this is the start of the civil society.

### **Interviewer 1.3: So I was wondering if you could give me some concrete examples of which civil society organizations are included more under CRADLE and which have been...**

**Officer 1.3:** I don't know that really, but the big ones of course have a stronger voice in that, but there is a list of all the organizations that participate and that are in this basket, so to say. But over time, I mean, you will have some that are very much into one area or one theme that we are working on, and they are very supportive and participate a lot and others that don't –but I think that it differs very much from time to time.

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**Interviewer 1.4:** So the civil society organizations that participate in these meetings of the thematic group on constitutional development, are they very active at the meetings?

**Officer 1.4:** I don't go to that thematic group, the donors, we have divided among ourselves which groups we lead in. So I am leading the thematic group 2, it is human rights and rule of law and I am leading 7, that is more the overall steering of it. And then I am deputy in the police and prison one also, number 4. But it is Finland that goes pretty often to the meetings of group 5 [constitutional development]. Because as you understand, with this complex setup, there are so many groups and so many meetings so according to the Paris agenda, we have divided responsibility among us.

**Interviewer 2:** Could you try to describe to me what you perceive to be the essence of the constitutional review process?

**Officer 2:** You mean then what we are doing through the GJLOS or..?

**Interviewer 2.1:** Well, there are of course the two different parts of the process there, the constitutional review process, and the GJLOS contribution...

**Officer 2.1:** Yes. Well, you know for this thematic group on constitutional development, we have only two of these 33 actors that participated, it is the Kenya Law Reform Commission and it is the legal department within the ministry of justice. So... I mean, also now, you know that the constitution was not adopted and like I said before, we have this election year... I mean, in this country, you start the election campaigns very, very early... I mean, it started last year and last year during summer or autumn so I think that this process somehow had complications for the revised constitution to be accepted because you will always have the opposition saying that these changes to the constitution are only to prepare for the current government to come in the next time. So I think that has been the shortcomings of that process with the difficult issues. I think there are many good things in the suggestions for the new constitution and that all I think many would like the changes to happen, but maybe not now when we have the election. In thematic group 5 they are working quite hard to –I mean there was this stalemate- they have really tried to figure out what can we do and what are the obstacles. But they look into a lot of different acts and the period

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we are in now, that started in July this year and goes on to June next year, they are focusing on six acts and to try to revise them. Also they are looking pretty much into the possibility to genderize these acts.

**Interviewer 2.2: Could you tell me about what these acts include?**

**Officer 2.2:** Well, I mean, you can read a lot of the acts they have been working on, the section of [inaudible word] that was not...that they have been working on. The affirmative action that was not taken by the Parliament because I think they mixed it up with these constituencies, so that area they worked pretty hard on. Also, now they will work on labor, legislation in relation to labor laws and also the community service order act is one that they will work on. There are different and I don't remember them all, but I have the list –these are the ones that I think they will be focusing on for the time being.

**Interviewer 2.3: so are these the ones you see as the most important ones?**

**Officer 2.3:** Well, this is very much the government that has decided which acts to focus on, but if you look into the GJLOS, you have these key result areas and I think it is very clear from that perspective what was important... You could always say that I would prefer another act to be among the six that they have proposed but I think that it is a process and that they have to decide. They have worked on...ehm, quite a few important acts and they are still doing that. I wouldn't say that the focus is bad, I would say it is okay.

**Interviewer 2.4: Okay. Which part of the focus do you think is most positive?**

**Officer 2.4:** I mean, they have worked on children's act, sexual offenses act even though it was not...it could have been better...These are very important, I mean, the gender issue in Kenya is huge, you have very high figures of gender violence and discrimination and I think these are very important acts to work on –the family act is also what they call it- and this legal aid scheme act that they have worked on also... And this community service order act, I think is also an important act if you want to increase the access to justice of poor people. But then of course you will have other people say that acts in relation to anti corruption... So, yes, it depends on from where you come. I think what is important with this program is of course very much to increase the human rights and access to justice.



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**Interviewer 2.5: So that's what you see as the main purpose of producing a new constitution seen from the GJLOS perspective?**

**Officer 2.5:** Yes, I think that is.. To increase the opportunities for the poor people to get access to justice and to get human rights implemented. I think that is the most import. Of course the transparency and the accountability of the government are important factors.

**Interviewer 2.6: Which conditions do you see as the most important in making the constitutional review process possible in the first place? –You mentioned that there was sort of a reform mood?**

**Officer 2.6:** I mean, if you look in theory you will have a on year grace period, where you can do a lot of reforms and then you will see a stagnation and I think that is what has happened here. And that is what we have seen in the GJLOS program as an overall. But you had a lot of interest and will to do this reform... And then you will also see that within the government you will have non reformist people. And if you are a reformer you will be fed up and tired struggling with that, and also trying to balance if you are continuing to trying to move your program between these non reformist people. So yes, I think that the reform mood is not here for the time being but that the election is a big factor. Because the election is not an issue-based thing in Kenya.

**Intervier 2.7: No?**

**Officer 2.7 :**No. It is not. It is very ethnical and you have here a president who has not announced which party he will stand up for and we are three months from the election. So that says a lot about the election process here, that you need to get your network going and that it is difficult to focus. That's what all are saying, that now entering in September it will be very difficult to get any big decisions in any reform programs, and not least this that is so sensitive a program –because they will be out campaigning. So I think the reform mood is not there for the time being, but hopefully with the new government, when they have settled, there will be...

**Interviewer 2.8: Okay. You have mentioned it a little bit, but how do you see the link between the GJLOS program in terms of its contribution to the constitutional development and then the constitutional reform process?**

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**Officer 2.8:** Yes, I mean, it is one part of the GJLOS, constitutional development, I forgot exactly how we fraise it...We call it Responsive and Enforceable Policy, Law and Regulations. And we have one thematic group, as you know, that it working on it so it is a big part of it but of course it is not the whole thing. For example, we do not work with the Parliament in the GJLOS and of course, you need also to have them on board and to understand the issues so it is not one part against the other. So you can say that the GJLOS is contributing, hopefully, to this process, but it is not the only actor.

**Interviewer 3:** Could you maybe elaborate a little bit on how, in practice, the program is contributing?

**Officer 3:** I think you should talk to Sirkku, they [The Embassy of Finland] have been much more active in this.

**Interviewer 3.1:** Okay... But do you have ways of coordinating your approach to how Finland should try to support the process?

**Officer 3.1:** Are you talking about more political support?

**Interviewer 3.2:** Well, I am trying to find out which type of support that is being utilized?

**Officer 3.2:** I mean, of course, we are all supporting civil society in addition, you know we don't have this non-state actor facility, or what it is going to be called, yet, but...so we are supporting financially the GJLOS program and the actors to take an active part in this process and to facilitate for them and at the same time, we are supporting the demand side for civil society to be able to push this. And we support the Kenya National Commission for Human Rights in one of these 33 MDAs in the GJLOS and they are also an active actor in this. I mean Sirkku is also the political advisor at the Finish Embassy and I think that she will also be able to more in detail explain what the donors are trying to do and not to do.

**Interviewer 3.3:** Okay, so let's go forward to something else. You mentioned the Paris Declaration earlier. Could you try to describe the different principles or considerations that have guided you in engaging with GJLOS?

**Officer 3.3:** Well, of course you know the harmonization, alignment and coordination and these three are of course guiding us and... Coordination, with this donor group

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that we have, with the six basket and about nine direct, we have one workplan, and this is the work plan for the whole GJLSO. We have direct funding, we have basket funding, we have government funding. We have aligned to one work plan although we have different ways of financing it and that is one way... It is working but... I mean, this is a new way of cooperation and for us sic donors that are in the basket, it means that you are not as visible as you used to be and for the direct, maybe that is one reason for not being in –also the regulations might be another reason for not putting the money in the basket.

### **Interviewer 3.4: Which kinds of regulation?**

**Officer 3.4:** I mean, there are internal regulations, there are some of the donors who are not able at the moment to finance programs through a basket fund, for example. But of course you could always want that some of the direct donors could coordinate a little bit better and we have really tried with some of them to integrate more in the GJLOS, but we are happy still that they are in the work plan.

Alignment, I mean yes and know, GJLOS is one of the programs that is moving towards a SWAP, but we are not there and when we started in 2003, the systems were not there to channel the funds through a special account, through central bank. I know that has been done in other sectors, but this is a very sensitive sector; you have the police, you have the judiciary, you have a lot of violations against the human rights in this sector... And you have a lot of experience on corruption so... Yes, you can argue that the GJLOS has been floating a little bit on its own not integrated in the government system with a donor financial management agent doing the procurement, doing the financial management and also doing the dispersion. With a project coordinating office coordinating the departments, coordinating the work plans, etc. But we are now in the middle of trying to... We are slower than anticipated, because, I mean, the experience when you are working with external bodies is that it is not that easy to develop capacity in the internal constructions, so to say. But we are on our way now, we are just about to have finalized the recruitment of a new financial management agent that will have another terms of reference. It will be the MDAs, they will do the procurement, the new FMA [Financial Management Agent] will more monitor the procurement process and they will do the dispersion based on

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checklists and that everything has been okay. But that is because we now have a new procurement act from last year, we have a public procurement oversight authority, which was not there when we started so there are structures in place to try to move and we hope that in one years time, we will be able to put the money in a special account. But of course, we don't know, but that is the aim, so to say –and also this external project coordinating office, even though it is situated in the minister of justice, they are just about now to recruit the people for coordinating the department that will be placed within the ministry of justice, but that will serve the whole programme. So we are working towards that end goal of a SWAP, but we are not there for the time being.

### **Interviewer 3.5: It is a matter of building capacity?**

**Officer 3.5:** Yes, and safeguard mechanisms, you need to have everything in place before you do that, so that is what we are developing now. And I think the GJLOS program is under transition now, we are trying to move them towards a government system.

### **Interviewer 3.6: Harmonization?**

**Officer 3.6:** Yes, harmonize in the way that we are... I mean, we have the basket, for example, we are harmonizing our procedures and accepting common reporting and as I said in the beginning, we will launch a KJAS [Kenya Joint Assistance Strategy] on Monday, GJLOS is a program in that strategy and -yes I think that we are committed to this process, and I would say that [CENSORED] is very committed to this and we were leading the [inaudible word –act?] secretariat when we started this KJAS process. It takes time with this also for donors, as I said, because they have the regulations and they need to change them from head quarters in order to...and also to coordinate or concentrate...if you read the KJAS, you will see a matrix of what donors are going to concentrate on or not, leaving behind them sectors or not. This sector of democratic governance, of which the GJLOS is one part, is not an area that anyone will leave. Because, I think also from more or less all head quarters, one of the goals is to focus on democratic governance. As I said, we are 17 donors in GJLOS, we are pretty many, we are many in the public management reform, the

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public sector reform, etc. so these are ‘hot stuff’, so to say. For the time being, these are not sectors where we will see donors leave.

**Interviewer 3.7: So that is also something that is in the process of being harmonized?**

**Officer 3.7:** Yes, and I think also the KJAS, what we have said now, we have one year and people are committed to this, but then we will see what is going to happen – we also have our parliaments and decisions taken at head quarter level and we don’t know for sure that that will actually be the case, that we have promised to do this or that and it is always someone else that is going to take the final decision. [CENSORED] for example, we are going to phase out from the health sector, but that decision is not taken at government level yet, so it could also be that we will leave the urban sector instead. We got the choice to decide if we want to leave the urban or the health and we have argued for leaving health sector –but it could in the end be with the government saying no. So we don’t know. This is a process.

**Interviewer 3.8: Can you situations during the constitutional review process in which it has been considered on behalf of [CENSORED] to reconsider the support to the process via GJLOS?**

**Officer 3.8:** No. I say no, we are clear. I wouldn’t say the constitutional review process per se has been sensitive for the donors but other...occasions where the donors have wanted to pull out from the GJLOS and also incidents where other donors that are not part of the GJLOS have wanted us to put the program on ice. But I think [CENSORED], we are very committed to this legal sector reform program and we are talking about reforms, it is not taking 3,4, 5 years we are talking 15 years. So I think this is the problem with this kind of program that you are trying to link sometimes the political process too much to the program and [CENSORED]’s view is that you shouldn’t. So we are not doing that. I mean, we have this reform program and of course there will be times, and we have seen times, that the political activities might influence this program, but we shouldn’t try...I mean, of course, if it is something that really, really makes a lot of difference to the program, it is something that we will raise, of course. But sometimes we feel that donors are maybe a little too sensitive; you will have an ambassador saying ‘now we are leaving’ and all of a

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sudden they are back. So they are not consistent and some you will find –the [CENSORED] for example, you will find that they have a very strong Parliament, so even though the embassy here would like to stay, the Parliament demands them to go. So, I say no to this question, we are very consistent on working on this, that we are committed.

**Interviewer 4.1:** But you have in fact experienced pressure from other donors to put the program on ice?

**Officer 4.1:** No. Well...there was an incident with the standard raid. In March 2006, when the newspaper standard was raided by the police or people from the police or...and they destroyed a lot and then there was this debate among the donors ‘how are we going to react on this kind of incident’ and I think on e big issue was that the minister of justice didn’t really condemn publicly this incident. But then also, I mean, I think it was Germany, but I am not sure, that said ‘oh we are going to pull out’. The civil society also said that they were not going to be walled. But it was a common understanding among the majority though to continue the dialogue, even though we postponed a joint review meeting saying that for the time being we can not have this. So I think that that dialogue has to be taken at a more political level. We can have that but you shouldn’t really play with the program. Because you would never do the same for example with the land reform program, the agriculture extension program, they are never in that kind of position, you don’t play around with them like that if someone is doing this or that in the government. So these programs are sometimes taken hostage, I think.

**Interviewer 4.2:** So you would say that [CENSORED] is trying to put continuity over conditions?

**Officer 4.2:** ...Ehm, yes, but I... Yes, I mean that you shouldn’t link the political process to...or you shouldn’t take the program hostage of the political issues that will be there. Of course you need to react. You need to have a dialogue. But I think there are sometimes donors that would like to just send a letter with ‘no, we don’t work with you for the time being, come back to us and we will be speaking in terms again’. But we don’t feel that that is the way you cooperate with someone, so you need to have a dialogue on the kinds of issues. But you shouldn’t stall the program if it is

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not...Maybe you can stall parts of it, but you shouldn't stall everything. So I think we are really trying to not let the political activities guide us too much.

**Interviewer 4.3: But you are sort of reacting, as you say, by sending signals?**

**Officer 4.3:** I mean, dialogue, ask for a conversation and dialogue on what is happening and 'how do you explain this', for example. But I think also that after this incident when we very much decided to postpone this joint review meeting there has been a little bit lack of trust between donors and government; and civil society and government also after this standard raid. And that, I mean, we took the decision to postpone and we didn't really have the dialogue first. It was some of the donors that wanted that –and some of the donors wanted to have the dialogue. I think it is fairer that you come and say 'these are the problems that we see, we will not be able to continue with this for the time being' –and then you send the letter. But you have informed them of what you are going to do. So this is really what we are trying as the lead, with Finland as the deputy, to work on the trust issue, to have a sincere and open dialogue on issues and these issues are not easy, as you understand, and I think that it is very important to create that atmosphere of trust.

**Interviewer 5: You have touched upon it, but could you tell me about how your support to the constitutional review process through the GJLOS fits within the wider good governance program in Kenya?**

**Officer 5:** Yes, what I've said...What we are trying to do very much with our program, the [CENSORED] program, is to complement what we are supporting in the GoK reform programs, we are trying to complement them with support through the civil society. So GJLOS is of course one of our important programs, but as I told you before, our support to the civil society is also very much linked to that.

**Interviewer 5.1: But separate from it (GJLOS)?**

**Officer 5.1:** But separate from it and it will be separate also. But we have supported, or support, the demand side of the GJLOS and we work with these kinds of issues. We have done that through the UNDP, we are not giving direct support because that is taking too much of our time.

**Interviewer 5.2: So the type of support that is given through GJLOS is that more focusing on the management side of good governance?**

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**Officer 5.2:** No, but what I am saying is that the demand side...I mean, the GJLOS is a supply side, the government is going to supply services for the people. So of course it is very much working to have more effective institutions that can deliver service for the people in a better way to have transparent, accountable institutions and I mean, the civil society is more to get civil society, to get the people to demand their rights and their services. So I think that is what we are trying to balance, but of course GJLOS is very much about management, but not only. It is institutional building, I think, that is very important and many institutions...I mean, with the GJLOS program, we have seen some new institutions being built, the Kenya National Commission on Human Rights being one, Kenya Anti Corruption Commission being another one; and new legislation regarding these institutions etc. So of course it is very much on institutional and management and...but as I said, it is a long journey also and the GJLOS, I mean, there are many weak organizations that didn't really have a substantial financial basis to work on and now they have really been able to develop under this program. So yes, institutional building is important.

**Interviewer 9:** You mentioned the standard raid. There have also been a bit rough responses by the police to demonstrations in connection with the constitutional review process. Do you see any connections between these responses by the police and the interests of the government?

**Officer 9:** ...I don't know...I don't think I want to comment upon this issue...But what I would like to add, I mean, when we are -we touched upon that before- that we don't want to take this program hostage. When these incidents are occurring, we are very much trying to target them in the thematic groups and to raise them with the stakeholders and you will have police sitting there and the police commissioners etc....

**Interviewer 9.1:** So such issues are taken up?

**Officer 9.1:** Such issues are taken up, yes, and discussed.

**Interviewer 8:** You also mentioned that there are of course big problems still with corruption in Kenya and I remember reading that Kibaki has been criticized for not doing enough to fight corruption...



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**Officer 8:** I think the prosecution, yes, they started to dismiss a lot of judges, I think it was about 70 judges they dismissed. People have been dismissed and some have come back, but to take them to court and the prosecution has not really been there. That is a debate, yes. If they are able to do that or not; if you read the newspapers today also you have this Anglo Leasing report that they are talking about, it is also part of all this big corruption. But then you have the petty corruption and very much what this program is doing, I mean the anticorruption component is focused of course on this big –anglo leasing and Goldenburg and all these commissions. But trying to get rid of the petty corruption is of course another more difficult and long term issue because it is people's perceptions but also people's behavior and attitudes. What I think is corruption, a Kenyan maybe doesn't think is corruption and we are working very hard with the police and they are just now developing a behavior and attitudes changing training for the police. Petty corruption is of course a very important thing for the police for example. As I said, we have established the Kenya Anticorruption commission and we have a national action plan, etc. so there are a lot and I think that we have come a long way, but I would say that the prosecutions are not there.

**Interviewer 8.1:** Okay. Do you see any connections between, as you said, the higher level corruption and then, you mentioned also that Kenyan politics are very much arranged along ethnic lines?

**Officer 8.1:**...I think that could play one part, yes, but it is not the whole explanation. I think that if you look back at this country's history, you can find a lot of reasons why it has developed the way it has, so of course you have to be able to get a position etc. to keep the power...to have your corrupt network and trying to tear that network down, that will take a lot of time. But of course that you have these family affiliations, etc. is of course supporting this. You will see that in other societies also, that you have this tribalism; and the elite also for example although the corruption is maybe not that high, you will have these favors. That could be one explanation. But I think you need to look back at the whole history and also how the British have played out different groups against each other.

**Interviewer:** okay. Well, that was all I have for now, thank you.

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**Officer:** Okay, thank you. But you are free to come back if there is anything you need to ask again or... yes. So good luck!

**Interviewer:** Thank you. And thanks for your time!

### **BFD 4 Interview**

The below is the transcription of the interview with a Programme Officer of Good Governance at BFD 4 Embassy in Nairobi. The BFD 4 is one of the original basket donors of GJLOS. The interview was performed on 07/09/07, lasted for 1.10.15 hours at the Embassy in Nairobi and present was only the interviewee and the interviewer.

**Interviewer 2:** To start off, can you tell me about how you, at the [CENSORED] Embassy, has contributed to or taken part in the constitutional review process during its course?

**Officer 2:** Yes. It would not say that the embassy has been directly involved, but through our support to civil society, you would say that we were involved in the constitutional review. Because most of, or I would probably argue all of, the CSOs participating in the Bomas, had either had [CENSORED] funding in the past or had current [CENSORED] funding when they participated in the conference. So in that sense, the embassy participated. We did not take position on any of the issues that were being discussed at the conference. The you could also say that we have been contributing to it through the GJLOS Program, because we are funding the GJLOS Program and we are one of the larger Basket Fund donors to GJLOS and of course, constitutional development is one of the thematic areas. But under the GJLOS Program, you would not say that too much progress has been recorded because there was a lot of anticipation that the referendum would be successful and when it was not, that was a bit of a set back to GJLOS.

**Interviewer 2.1:** So, in terms of the practical ways that you have worked through the GJLOS Program, has that changes during the process? E.g. after the referendum as opposed to before?

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**Officer 2.1:** For the embassy, we put more emphasis on key result area one and key result area 3; one is anticorruption and 3 is justice, law and order. Those are the two that we have chosen to focus on. So I would not say that we are particularly active – actually we are not active at all in the constitutional development thematic group.

**Interviewer 2.2: And that has been the same throughout?**

**Officer 2.2:** Yes, that has always been the case since GJLOS started. So in that sense, our role has been consistent.

**Interviewer 2.3: I am wondering which conditions have been most important in enabling you to support the constitutional review process when it started out again after the elections in 2002?**

**Officer 2.3:** Again, I would not say that the Embassy set out to involve itself in the constitutional review process at all. As I said, it was mostly through the fact that we were supporting civil society activities, whether it was civic education on the constitutional review process or it was actual engagement in the Bomas. We ourselves did not attend the Bomas Conference. Some of the embassies had quite active participation –I mean, of course, they were there as observers, but they attended the conference consistently, while we ourselves took a pretty back seat position. I think the position of the embassy at the time, and I think it still continues to be the case, was to leave it to Kenyans to do the process themselves and not necessarily be seen to be taken any kind of position or participating too much in the conference. And that is quite different from other embassies, there were some that were very active and took positions on some of the issues that were being discussed. So I think that was the position that we took.

**Interviewer 2.4: Can you give me some examples of some of the embassies that were more active?**

**Officer 2.4:** I believe... The Americans would have been more vocal, the Germans at the time would have been more vocal; that so in terms of taking a position on decentralization for instance, on various clauses such as elimination of the death penalty in Kenya, and things like that. I think some embassies were more vocal.

**Interviewer 2.5: So you tried to take a less active involvement in actual political...**

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**Officer 2.5:** Yes, exactly, and I think that some embassies would also have made statements on affirmative actions for various groups; for women, disadvantaged minorities, but we did not do it.

**Interviewer 2.6:** So how do you in practice –you said that you supported civil society as an indirect way of supporting the process- can you tell me about how you have done that in practice?

**Officer 2.6:** The [CENSORED] Embassy has always had a very long history with civil society in Kenya, even when it was not very fashionable to –in the Moi days it was actual quite dangerous to support civil society. So I think that was the natural progression of old ties that we have had with organizations like FIDA Kenya, Kenya Human Rights Commission and all that. I should say, however, now that I have mentioned FIDA Kenya it occurs to me that in that context, we did give a grant to FIDA and it was a consortium, it was FIDA Kenya, Kenya Human Rights Commission and Institute or League of Kenya Women Voters, three organizations that were very active in working on safeguarding the gains of women in the Constitutional Review Process and came up with even a gender sensitive draft of the constitution. But again, it is really their work, we simply facilitated it –oh, we were not very actively involved. –That is quite notable actually, I mean that was very good work, very effective lobbying. I think that was a helpful grant at that particular time when the Bomas was on.

**Interviewer 2.7:** Has your perception of the constitutional review process changed during the course of it?

**Officer 2.7:** As an embassy I do not think that our perception has changed, but I can give you my personal opinion. I think that the process of constitutional review in Kenya has become so politicized now that it is unlikely that Kenyans will have a new constitution before this coming election and there is no way whatsoever of telling whether it will happen with the next government. I mean, if you look at the fact that NARC had come into power on this promise that Kenyans would have a new constitution within 100 days and how that became such a disaster...I doubt that if they win the next elections that they will have the strength or the stomach for it. If the opposition win, they too may make that kind of promise of saying that –and I think

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that they already have in their campaigns, I think that Raila Odinga has already said that to deliver a new constitution as soon as possible- but I do not see how that could happen. In the same political environment, where everything is so politicized; affirmative action, decentralization, the creation of a prime minister position is all so politicized. I do not see that he would be anymore successful than the past government. I also think that the process proved to be so terribly expensive, both Bomas and the referendum, that Kenyans also may feel that too much money has gone down the drain on this one and should we –because there is no way of just waking up one day and saying ‘here is a draft, vote on it’. That in it self will cost money. It is very likely that a new government would like to constitute yet another Bomas Conference and some kind of deliberative process that will again cost a lot of money. So I think that Kenyans are very unlikely to support the process. I think that it has taken to long, there have been to many twists and turns.

**Interviewer 2.8: So you actually think that the public demand or support for a new constitution is waning?**

**Officer 2.8:** Yes. Yes. I think so from the frustration of the politics around it and from the cost factor.

**Interviewer 2.9: In connection with what we just talked about, has your perception of the role of the GJLOS program in connection with the wider process changed?**

**Officer 2.9:** The Embassy’s perception of the whole GJLOS Program was not really changed. We continue to support it and I think that we have stepped up quite a bit our involvement in the program. But as I said, because we were never actively involved in that thematic group, it does not change either way. We are still very much involved in the program, just not in the focus group on the constitutional aspects of it.

**Interviewer 3: Could you try to describe to me what you perceive to be the essence of the constitutional review process from the embassy’s viewpoint?**

**Officer 3:** I could guess that the Embassy’s view would be that the process should be as participatory and transparent as possible, that it should not necessarily be an elite thing; which is always the two arguments: ‘Whereas the participatory does not seem to get anywhere, so why don’t you just get a few experts to do it’ –I think that we

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would probably be more for the more participatory aspect of it. I think we would, if we were to voice an opinion, support affirmative action for women and for disadvantaged groups, I mean that would be in line with [CENSORED]'s policy on gender. We would also support clauses on the environment that would strongly protect the environment, I think that would also be in line with [CENSORED]. I think that if we were to articulate, these are some of the issues that we would articulate. But as such I would like to emphasize that we have chosen not to be so vocal about the position that we take.

**Interviewer 3.1: So these are not policies that were formulated within the embassy?**

**Officer 3.1:** No, no.

**Interviewer 3.2: How do you see the link between the GJLOS Reform Program with regards to constitutional development and then the constitutional reform process?**

**Officer 3.2:** Well, I think that the obvious link is that if we do get a new constitution, then the GJLOS Program would be quite on the forefront of operationalizing a new constitution in the sense of legislative change and drafting new laws to be in line with the new constitution. That is the whole idea behind that thematic group, that there was an assumption that there would be a new constitution and there would be a whole raft of laws that would probably need to be either redrafted or completely new laws would need to be made. So you have a body like the Law Reform Commission being very active in that thematic group and it is quite obvious why they would be, since they would be on the forefront of working with the Attorney Generals chambers in drafting new legislation. So that is the link.

**Interviewer 3.3: So the type of support from the GJLOS Program to the process is mostly of a more technical character?**

**Officer 3.3:** Yes! Yes, I would argue that it is more technical and the politics would probably be left to parliament and to the politicians in terms of the content of the process or what you approve in the terms of a new constitution. I think that is largely political and then the technocrats need to operationalize that, the laws to be in line with the new constitution.

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**Interviewer 3.4:** Do you have any insight into how the discussions proceed within the thematic group on constitutional development, which kinds of issues are discussed?

**Officer 3.4:** Unfortunately, I have not attended any of those meetings. The GJLOS Program has also had problems in the sense that thematic groups do not necessarily meet as often as they should and when they do, it is mostly in the work planning process to come up with activities for a certain time frame. So you might not be able to gage much about the discussion itself, it might be more about which activities that group should be engaging in, in terms of funding.

**Interviewer 4:** So for a new subject. Can you think of any situations during the constitutional review process in which the embassy has reconsidered its support to the constitutional review process?

**Officer 4:** No, well since we did not do it directly, the CKRC, we did not directly fund it, so in that sense no.

**Interviewer 4.1:** There have not been any events that have affected your participation in the GJLOS Program?

**Officer 4.1:** Yes, there was a slight event, or big, during the time when John Githongo, the Anticorruption [inaudible word] was fired and... Well, we did not hold back funding, but there was an interruption in the program because some donors did, the Americans and the Germans. But concerning specifically the raid on the Standard newspaper, then we did hold funding very briefly, very briefly. We did not actually terminate it, we did communicate to the government that we would withhold it but we just did not disperse for a few months and the government was aware of why we were doing that; we were trying to get more of a commitment from them that the government needs to respect the media freedoms. It was a deliberate attempt to send a message without being too official about it.

**Interviewer 4.2:** So were you in dialogue with the government during that time?

**Officer 4.2:** Yes, yes we were in dialogue with the minister of justice and at some point we thought that we had received adequate assurance from the minister that things were on track and that this was a one off and that it would not be happening again, essentially.

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**Interviewer 3.5:** Now, you have not engaged directly in the constitutional review process, of course, but maybe you could try to tell me about if there have been any specific principles that have been guiding your participation in the GJLOS?

**Officer 3.5:** Yes, I think we are in the GJLOS Program because of first of all because it is a sector wide approach, you know, which we are very much going into now as [CENSORED]. But also because we have always been actively involved in the governance sector and access to justice issues and human rights and those are some of the key pillars of GJLOS, so it was natural that we would fund such a program. And it is a good balance for us because we also fund civil society organizations, so on the one hand, we are funding the demand side and with the GJLOS Program we are funding the supply side. Part of the rationale of our current funding to civil society is that they must engage with the GJLOS Program in some shape or form. Most of them are already actively involved in reform issues –prisons reform, in providing legal aid and all that- so it is natural that then there will be that relationship whether it is in terms of actually providing services for the sector or monitoring the government's reform agenda. So it is trying to get the balance right between the institutions and the demand side.

**Interviewer 5:** So there is the more technical side of the matter within the GJLOS Program and then the wider approach outside the program, is that how your support to GJLOS is situated within your wider approach to improving governance?

**Officer 5:** Yes, GJLOS is one of our approaches; we are also funding public financial management and public service reforms as part of our support to the government, so GJLOS is not the only one. But it certainly is key because it is a sector wide program that expands so many of the very key institutions that have had governance problems. We are talking about the judiciary, the police, the state law office, prisons, a lot of these institutions that citizens come into contact with and that have always had problems with human rights violations, delivery of services; if you look at the judiciary it is about delays. In the past, we have done it only through civil society, there was not a government that we wanted to deal with, but after NARC came into power and the fact that they had this program, we also stepped in.



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**Interviewer 3.6: In connection with different principles that have guided you in practice, I am wondering about whether or how the Paris Agenda plays a role?**

**Officer 3.6:** Oh yes, absolutely. We give our support through a basket fund, which means that we are harmonizing our support and we are coordinating it with the other donors even when donors are not necessarily able to fund through the basket, such as USAID and the EC and several others, so it is definitely in line with the Paris Agenda in terms of harmonization and coordination. Eventually, we will go in to alignment if we get out of using a fund managing agent and instead give our funds directly to the government as budget support for the sector.

**Interviewer 3.7: So, with regards to harmonization, I am curious about how you do that in practice with the other donors?**

**Officer 3.7:** We have a donor coordination group and essentially, we have coordinated a lead donor, which is currently the [CENSORED] Embassy, and what it means is that it reduces the time and transaction costs of the government, we do not all call the government when we have an issue with GJLOS, it is done through the [CENSORED] Embassy as the lead donor. When we have issues to resolve in terms of how things are progressing or even giving progress reports on certain initiatives on the thematic groups, the we do it in that donor group. We have shared the duties so that for instance thematic group one is meeting tomorrow, I will go to that because the [CENSORED] Embassy is interested in that group and then whoever attends, me and another donor, would do a report for the other donors. So again, it also helps everybody because you do not have time to go all the thematic groups at once, you could not, actually, it is impossible. So it is sharing of duties, information sharing, and also streamlining the way we communicate with government and then we also have joint reviews of the program so that we do not all review GJLOS on parallel. We get common financial reports, we get common narrative reports so again, it saves the government time and is in that sense very much in line with the Paris Agenda.

**Interviewer 3.8: So does it go as far as the donors in the basket fund actually discussing and agreeing on a common position with regards to what is going to be presented by the delegate who is going to thematic group meeting on constitutional development?**

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**Officer 3.8:** Yes, yes, we have an agreed... We know who the lead donor is in that thematic group and it is the responsibility of that lead donor per thematic group to alert the other members on that thematic group when there is a meeting and if they can attend or if they will have to assign the lead donorship to somebody else and all that, it is very organized. So there is a common position, which is arrived at through a process of consensus building and discussions. If you attend a meeting in a thematic group and you think that something did not go right, you will email and speak to everybody and say 'these are the issues that came up, this is my position, I think we should communicate to the government that perhaps they should not be buying so many cars, perhaps they should be spending the money on something else'.

**Interviewer 3.9:** So there is an informal system in place.

**Officer 3.9:** Exactly.

**Interviewer 3.10:** Still concerning the Paris Declaration, there is also the principle of ownership on behalf of host governments?

**Officer 3.10:** GJLOS is very much a Government of Kenya program, I mean, we were involved in the beginning in formulating and assessing, but it came in from the Ministry of Justice, it was not a donor program that we got together and put together and said 'we think that you should do this!'. So the ownership aspect is very strong.

**Interviewer 3.11:** I am wondering how you balance the ownership principle on the one hand and then harmonization on the other hand, I could imagine that sometimes there could be some of a conflict there?

**Officer 3.11:** Ownership is not hard to balance. Well, okay, maybe it is – sometimes...

**Interviewer 3.12:** -If donors and governments do not agree?

**Officer: 3.12:** Well, that is more of a problem on the harmonization side. It is true that it is very difficult that it is difficult to arrive at consensus at certain issues. For instance with the Standard raid there was not a clear line on how we should react; some donors felt we should definitely stop dispersing to the basket and have very serious renegotiations with the government to get the message across that it should not happen, especially because this was a governance program, the argument was that then everybody should do it, people should stop funding it because this is such a big

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issue. It is a big issue for us because we are working in the governance sector and this is clearly a governance issue. Then there were some that said ‘big deal, let us just carry on with business as usual’. So there was quite... It was an interesting meeting and several weeks before we calmed down a bit. Harmonization is more the difficult one, especially in a program that is political, because then we are also receiving different signals from your head quarters. You can not control how the [CENSORED] Parliament will react upon reading that some big paper has been shut down in Kenya; neither can the Swedes, not the Fins –so there could be here on the ground thinking that it is a big issue, but we can still work around it, but your head quarters thinks that is the worst thing that ever happened; ‘shut it down, shut it down’. So you are all going to that table with a lot of other pressures, it is not just...

**Interviewer 3.13: There are a lot of different interests?**

**Officer 3.13:** Exactly, a lot of different and sometimes competing interests.

**Interviewer 3.14: But there must also be that when you then go to the government, as you say it is very much a government owned program, but you still have to agree with the government as well?**

**Officer 3.14:** Yes. That is why we try very much to resolve our issues in the donor group and to limit who goes to meet with the government on our behalf.

**Interviewer 3.15: Then when, for example, the Finish representative goes to the thematic group 5 meetings with your more or less shared understanding, there have not been any difficulties**

**Officer 3.15:** In the thematic groups, no. There, we are usually expressing the same things, because we want to see efficiency, you want to see that you do not buy too much hardware without necessarily doing reform things. For instance it makes no sense to buy the police, at least in our opinion, a whole fleet of cars if they still continue to torture people or shoot criminals on site. And it is the reform thing that we want to work on, what kind of training do we need, should the government be changing how they recruit policemen, those kinds of things are the ones that we want to discuss often as donors. But the government when they come, because you see there is a lot of money in this program, they will say that if the police have no cars,

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they can not catch criminals. So it is always a balance, but at least we are usually saying the same thing.

**Interviewer 5:** Can you tell me about how your support to the constitutional review process through the GJLOS Program fits within your wider approach to supporting good governance in Kenya in terms of the type of support?

**Officer 5:** Yes, GJLOS in its entirety with the constitutional aspect as part of it, it fits very well within our governance support, because one of our key concerns in terms of governance support is promoting access to justice and for instance if the judiciary was to be reformed through the constitutional development process that would most likely be promoting access to justice. Then about human rights promotion and again constitutional reforms such as having a human rights commission, which we have, actually, which would be a constitutional provision; it is not currently. But that is the kind of thing that would be of interest to us. So it fits in quite nicely within our whole governance agenda; anticorruption, which is very big in GJLOS, access to justice, human rights promotion.

**Interviewer 5.1:** I know that [CENSORED] in this connection distinguishes between a wide conception of good governance that encompasses more political issues and democratization and then a narrower concept focusing on the more administrative side. Could you try to elaborate on how GJLOS is situated in connection with these two concepts?

**Officer 5.1:** GJLOS is for us under the rubric of access to justice and enabling government to deliver better services, because it is also targeting institutions and in our program, our current program, then it is under component 1, which is access to justice, so there we have GJLOS and we also have public financial management reforms. Then the second component is the democratization component and that is where we draw a distinction, because under that component, we support elections, the electoral commission of Kenya and we support civic education activities by civil society. Then the third component is civil society support that preaches very much support to the first component because as I said, we are funding them to do the demand side on GJLOS Program. So that is the rationale.

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**Interviewer 6:** Okay, let us move on to something different from what we have been talking about until now. Concerning the possibilities of groups outside of government to influence the review of the constitution, do you think that their possibilities have been affected by their access to resources?

**Officer 6:** Certainly it has been a constraint for many of them. I would argue that bigger civil society organizations such as the Kenya Human Rights Commission and FIDA, they have enough resources to engage with the process, especially now they are some of our partners in the current program, and we have given them core funding, which means that we fund their operations, we do not do project funding. We do not restrict our funding, so they are quite free to use the funds as they see fit. So for instance, if there was to be another Bomas Conference, they could very easily use [CENSORED] funds to participate in that without necessarily having to raise specific money for it. But smaller organizations obviously have problems. Groups such as the disabled may not have access to as much funding because they are less likely to be organized in groups and organizations that can access the funding. Minorities, indigenous groups and all that, they feel those kinds of constraints and that obviously limits their participation. That is why I think there was that effort to have a conference that was funded by the government so that representatives of these minority organizations and groups without necessarily soliciting donor funds to do that.

**Interviewer 6.1:** As you mentioned earlier, you try to support CSOs which are actively engaged in parts of the GJLOS Program. But I could imagine that some CSOs have experienced difficulties to participate?

**Officer 6.1:** Well, yes. That is not going very well, generally. I think civil society had quite a bit of trouble with the paradigm shift that happened; that we were now going to be dealing with the government as well as civil society. They were used to a situation in the past where, because the government was so bad nobody worked with government, all our funds for human rights went to civil society. So when GJLOS emerged as a program, civil society was not quite sure how to deal with that –and also because in the past they had not had a direct relationship with government, it was mostly a confrontational one. So it was hard for them conceptually to understand that

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they could work with the government in a thematic group meeting and participate even though it was likely that most of the participants are likely to be government representatives; because it is a government program. And how to carve a niche for yourself and say ‘we active in prisons and that is why we have come to that thematic group and we want to input in terms of some of the experiences that we have had working in the prisons and also criticize the work plans and put emphasis on this may not be the best right thing at the moment, maybe you should be focusing on that’. So, a lot of them had problems with that, there was quite a big debate, and I think that debate still continues, on whether you should work with government at all. Whether going to the thematic groups and what not would compromise them as watch dogs. So there has been quite a debate. The alternative was to set up a civil society fund, money that would go directly to civil society to enable them to participate, because some argued that they did not have the resources to even attend these meetings; but that is not going very well. We still do not have one despite we have had negotiations for two years now. The donors were very actively involved in trying to design this facility and a lot of us have funding for it, but ultimately civil society has rejected the framework that we had developed.

**Interviewer 6.2: -Within the GJLOS?**

**Officer 6.2:** Yes, yes.

**Interviewer 6.3: Someone I was talking to told be that, because that did not really work out, donors in the basket fund have tried to set up collaboration on the same issues as within the GJLOS, but outside the program?**

**Officer 6.3:** Yes, and we want to do it outside completely and it is going to probably be broader than just GJLOS –well, it will be very much in tandem in terms of being organized around the thematic groups, I think there will be funding in that fund for other activities as well that are not necessarily directly related to GJLOS. But yes that is the thing, but it is not finalized yet.

**Interviewer 6.4: With the members of civil society participating directly in the program, then how do you ensure that the views of civil society are heard?**

**Officer 6.4:** Well, that is up to the individual civil society organization, I think. Some have argued that they have gone to thematic group meetings and have put forward

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proposals and they have not been taken up. Clearly, that is a problem, and that may have to do with individual thematic groups. But I attend thematic group 1 on anticorruption and transparency international attends that thematic group and they are extremely active and it is clear that their views are taken on board. So sometimes it depends on who is convening the group and whether they have had previous relationships with civil society –it is all very new for everyone. It is strange for the government to have civil society sitting there at their meetings, it is strange for them to have development partners also at their meetings. I think it took some getting used to, but certainly in thematic group 1, I would argue that things are going quite well. That might be because it is convened by the Kenya Anticorruption Commission and the person who usually chairs it is the deputy of the commission, and he used to work within civil society before he went over to the commission. So clearly, he knows how civil society operates so he is quite comfortable in that role. But, I mean, it may vary from thematic group to thematic group.

**Interviewer 7: Concerning Kibaki's style of governing, how aware do you think that he is with regards to promoting among Kenyans a perception of him and his government as the best option?**

**Officer 7:** Wow, that is a very... Erh, this is definitely not the [CENSORED] Embassy's opinion, but my opinion. How well he is selling himself... I think a lot has happened under the Kibaki government, I mean these reform programs have done a lot for the civil service and for institutions. They are now out in the public lime light, we are asking them tough questions that they never used to be asked before and under the GJLOS program, the judiciary has held a judiciary open day –and it was highly successful. I mean, the judiciary, again my personal opinion, is traditionally for the judges and high courts etc to be very snobbish, not very comfortable with the public. And they got some very tough and direct questions and there were put on the carpet for the public, and I think that was good for them. The reforms are largely transforming institutions in the public service. Politicians remain unchanged, they are just as horrible. In GJLOS it took us a while to start selling the program, or even disseminating information... Well, it is a difficult program, it is difficult to say the GJLOS does this, does that. It is easier to sort of picture what the reforms may lead to

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and we have had advertisements in the newspapers lately trying to promote GJLOS and police reforms, this is what GJLOS is for, promoting children's rights etc., breaking it down to something that the common Kenyan can sort of identify with. So we are trying to capture that now and send out a public message. But it took too long, I mean, we should have started right from the beginning. And I think that also relates to Kibaki's government. It has taken them really too long to start selling themselves and sort of capturing what it is that has changed since the last regime. So I think that has been the problem, communicating those changes to the public.

**Interviewer 7.1: So it sounds like he and his government has become, from when they came into office and until now, have become more aware?**

**Officer 7.1:** Yes, that they need to sell themselves, that they need to communicate the reforms, they need to communicate what changes are happening, because there are changes. There is a lot of work and it has taken them four years now.

**Interviewer 8: So, another issue, but still in connection with Kibaki. Can you think of any instances in which it has been suspected that Kibaki has been trying to gain support of groups outside of government by means of horse trading?**

**Officer 8:** ...Yes, certainly in Parliament, he has tried to resort to other political parties other than NARC that got him elected. There have been charges that he has tried to buy off other parties by offering them positions in the cabinet or even in the Foreign Service as ambassadors and all that. Yes, sure, he is a horse trader. He understands the political dynamics. But you know, because the political landscape is so complicated –NARC has broken up, new political parties have come up, nobody knows which political party Kibaki is in – it makes it a bit difficult to make an assessment of where all this is going to lead him.

**Interviewer 8.1: Do you even see that as a strategy perhaps on behalf of Kibaki – that he is not affiliated with a political party?**

**Officer 8.1:** Yes, I think that he is waiting until the end to see how the opposition groups itself before he... And to see whether his supporters will also form a coalition, because right now he has got various parties supporting him or even claiming that he is their candidate. But they are antagonistic to each other, so I think he would want them to be more unified before he makes his move.



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**Interviewer 8.2:** In these types of horse trading –I have been reading a lot about how ethnic groups play a big part in Kenyan politics- is that also a factor in this connection?

**Officer 8.2:** Oh, yes, that is absolutely true. Ethnicity is very much used as a weapon by politicians to manipulate voters, and a lot of the political party groupings are seen to be ethnic based. So for instance, the party supporting Kibaki would be largely Kikuyu and the party supporting the opposition would be largely Luo or any other community that is not... Kikuyu! –All the non-Kikuyus, that is the way it works.

**Interviewer 8.3:** Are there also links between these ethnic groups and politicians and then certain business elites?

**Officer 8.3:** ...Well, I think the way corruption works is very much linked to political patronage and there have always been concerns especially around elections that those who support candidates with money, especially the businesses and companies or whatever, expects some kind of pay-off after the elections and that is how you end up with all these corruption scandals. That it is the government that is trying to influence tenders, procurements and whatnot to be able to pay back. Either to steal the money or to award tenders to companies or individuals that were supportive of them during the elections.

**Interviewer 8.4:** That is something that is expected when a new president is elected?

**Officer 8.4:** Yes. Yes.

**Interviewer 8.5:** There have been, as we talked about, been continuing problems with corruption under Kibaki even though I think that was one of his high horses, and he has been criticized for not doing enough to fight corruption. What is your view of this issue?

**Officer 8.5:** I think the [CENSORED] position is that he is trying. My personal opinion would be that he is not trying very hard. There have not been any prosecutions at all. There he could argue that the Kenya anticorruption commission had not done a good job in outing together the information that the Attorney General needs to prosecute; or that when these cases go to the judiciary, there are so many constitutional references; or they just hire good lawyers and are able to delay the

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process simply or have the case thrown out. So he can fall back on any of those suggestions, but I would say that it is not enough, not enough has been done.

**Interviewer 8.6:** Could you even say that the current president is part of the problem of the continuing corruption?

... I mean, in my understanding, it seems that in order to rise to high positions, you have to make a lot of friends?

**Officer 8.5:** Oh yes, I think...If he wins this election, some people have speculated that the temptation to engage in corruption will be high because he does not have to face another election. If he loses, there is a possibility that we will see a lot of, if there is a new government, the kinds of things that we saw in the beginning of the NARC regime, which is charges of corruption against the former regime so that finally Kibaki will be put on the spot. Whether he gets prosecuted is yet another matter, it depends on what kind of deal he can broker with the new guys. I think he is going to win so...

**Interviewer 9:** You could say that Kenya has an experienced history of political violence and also of being used maybe even as part of a strategy to control politics dating back to the Mau Mau. There have been many demonstrations in connection with the constitutional review process, which the police have responded to. Can you tell me about how you have experienced the response of the police?

**Officer 9:** Yes, I mean it is typical... Especially around the referendum time it was quite tense and there was quite a bit of violence against Kenyans that were demonstrating. It is a typical Kenyan way of doing things, I would say. There has been a reduction under Kibaki, there were far more violent protests under Moi. Of course, the recent arrest of civil society activists was not quite so good, but it really could not be put at the same level as the Moi regime. It definitely is at least coming down, it is coming down. And I think citizens are also looking at alternative ways of expressing political dissent other than demonstrations and all that. I think because of the civic education activities that have taken place over the years, done mostly by civil society, that many citizens now know that the best way to actually show your dissent is through the ballot box. So there is a lot of people now waiting for the

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elections so that they can get rid of the MP or politicians that they think have been totally useless. I mean, that is what you are seeing in polls –that as high as 90 % of the current MPs will not go back to Parliament. So there is a recognition that there is really no need to be so violent, just vote them out –and the economy is doing better. I mean, economic growth also has an impact. I think that under the Moi regime there was such despondency and there was the perception that things were not ever going to work and the corruption was such that –the economy had almost come to a stand still under Moi. And now you can see that we have got construction work like this [points out the window] and that hires 200 people a day for two years. They do not have the time to go and protest. It is as simple as that. So, the economic growth also has an impact on the way that people express themselves politically.

**Interviewer 9.1: Even though, to my knowledge, the economic growth has mostly benefited the...**

**Officer 9.1:** -It has not trickled down. It has not trickled down. Certainly, the economic growth has not favored all the classes as equally as it should. I would not say that there has been no trickle down, I think there has been some trickle down; and also the introduction of the constituency development funds where funds go straight to the constituencies and is used for immediate needs such as schools, dispensaries, and water wells and things like that –that has also changed the landscape quite a bit.

**Interviewer 9.2: In connection with the improved economic growth, is that also something that has influenced the relationship between government and donors?**

**Officer 9.2:** Well, you know, Kenya has never really been very reliable on donor funds, it is very small; 7-12 % depending on whose figures you are looking at. Economic growth is definitely a good thing, it increases, I think, donor confidence in the performance of the government, really. But economic growth also means that the government has more leeway in the way it deals with donors. It is not so reliant on donor funds –you can see that in the interaction that we have with the government.

**Interviewer 9.3: -And the tax income has also increased?**

**Officer 9.3:** The tax income has gone up dramatically. So the more independent it becomes as a government, the less donors can really flex their muscles. Good thing, it

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could also be a bad thing, it could also mean that the government could violate human rights and say ‘to hell with you’. But so far, so good.

**Interviewer 9.4:** In that connection, I have seen some commentators note, I think actually it was the [CENSORED] Ambassador, that the problem with the current constitution is that the functioning of democracy is very dependent on the characteristics of the president, because the constitution allows him many powers.

**Officer 9.4:** Yes. That remains a problem, certainly; if you get a good one, lucky thing, if you get a bad one, not so good. That is true. That was also, some of the big issues that were being contested in the review, the whole thing of limiting the power of the presidency was the rationale behind creating a prime minister and all that to diffuse the power and take it away from the center. But that is one of the reasons also that the review process... -Because nobody who is in power wants to give up the power. I think you will see that the same guys, if they win, the opposition, going in and saying ‘well, maybe we do not want to share power so much’.

**Interviewer 9.5:** To return a little bit to the response of the police to the demonstrations, I think that earlier there have been relatively informal ties between the police and the incumbents in Kenya. Could you comment on how that relationship is now?

**Officer 9.5:** Whether the police are becoming more independent –no, I do not think the police are becoming more independent. Even under the GJLOS, the police have been one of the harder institutions to get to... And this is more of the Kenya police than the administration police; the administration police have been easier to deal with, but the Kenya police are very insular, they do not like criticism. They are not very open to public scrutiny. We do not have a police complaints commission or public oversight body of any type. So they really are a law to themselves.

**Interviewer 10:** Amnesty International interpreted the Standard Media raid as part of a trend, whereas the Kenyan National Commission on Human Rights presented it as a one off occurrence. How did you see it?

**Officer 10:** Yes, and that was a whole discussion in the donor group, whether it was a one off or part of a trend. I think it was a one off and I think the public reaction was

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so swift and so clear that it was not going to be tolerated that it was very unlikely that the government was going to try it again. Again, I think, thanks to the good civic education that has taken place citizens now recognize that a strong and independent media is very important for democracy. They recognize that without the media, we would never have known about the Anglo leasing scandals or all these huge corruption scandals and so they are quite willing to, I mean you have seen it while you have been here with all these recent discussions on the media role where the citizens came out quite clearly in support of the media and the president did not sign the law as he realized that clearly there were political losses to be incurred and something like that. So I think there is a good relationship between the media and the wider civil society and they are able to come together on issues.

**Interviewer 10.1: Okay, so in those terms, do you think that the ability to hold MPs and government accountable has improved?**

**Officer 10.1:** Certainly, they know that at the national level, the media is covering what goes on and they are always over Parliament; we know that there has not been a quorum in Parliament in a long time. They are simply not attending. And at the local level with the issues of the constituency development funds, you have civil society and community based organizations that are quite active. So they are being held to account; they just act like are not held to account! I mean, they know that they will not be reelected. I think a lot of them understand that it is going to be really, really difficult to get back to Parliament with the kind of record that they have.

**Interviewer 10.2: Do you think maybe that could have an influence on the next MPs then?**

**10.2:** Yes! Certainly, when we get the result and it is clear that very few have come back, I think that they should know that you are either in it for the long haul or for five years, depending on how you behave. Yes, I think it is changing the character of democracy and Parliament's role.

**Interviewer 11: Now, concerning the killing of the Luo university professor in August 2003 who was also very much engaged in the review process, could you try to describe what the reactions were like to this killing?**

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**Officer 11:** I think... It was hard to determine, it is not up to this day clear what the circumstances were. Fingers were pointed to one of his MP colleagues, but nothing was ever proven. There was a court case, where those who were sent to commit the crime rather than those who send them were tried and I think they were acquitted or the court case may still be ongoing, seeing that this is Kenya. But I believe they were acquitted and it takes you back to square one.

Certainly, he was seen as a very strong champion of the prime minister position, decentralization and devolution of power, so at that time it was seen as something that the NARC government had engineered in some way. I think the jury is still out on that one.

**Interviewer 11.1:** I remember that some Luo in that connection interpreted as a warning to Raila Odinga?

**Officer 11.1:** Yes, that was true at the time, there was high tension. But it quickly dissipated as it became harder to prove what had actually transpired and it was overtaken by other events as is often the case.

**Interviewer:** Okay... So, thank you, that was all, I have no further questions.

**Officer:** Okay, that was interesting.

**Interviewer:** Good! It was very nice talking to you and hearing about your lived experiences as opposed to all the reading that I have been doing.

**Officer:** So will you send me a copy of your dissertation when you are done? I would appreciate that.

**Interviewer:** Yes, sure!

## **Buruburu Focus Group**

The following is the summary of the focus group interview with residents of Buruburu, Nairobi. Present at the focus group interview at the Nairobi Pentecostal Church in the middle income area of Buruburu were the interviewer and 7 residents of the area (members of the church), of which 4 were women (2 young and 2 middle aged) and 3 were men (2 young and 1 middle aged), all of whom have an income of

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in between 50.000 – 100.000 kshs per month. The interview was of a duration of 0.53.37 hours.

#### **1. If you think about the constitutional review process from the last elections in 2002 and then until now, who do you think has taken the lead in the constitutional review process?**

First, the middle aged man ventured that basically there has been no change and one of the young men added that the opposition in his view has been the group fighting for change in the constitution and that the major issue has been that the president has too much power. Others concurred that the opposition has been the most active in trying bring the process forward, but that a significant problem is that before the last elections, the opposition was also the ones fighting for constitutional change, but after they took over power nothing changed. So it was felt that today when the opposition is still the one fighting for change, talking about changing the constitution and Raila Odinga says that as soon as he takes over power, he will reduce the powers of the president by changing the constitution, the interviewees did not know whether they could trust that the opposition will say the same thing if they come to take power. As the middle aged man said, Kibaki said before the elections in 2002 that he would change the constitution within 100 days and now 4 ½ years later, there is still no change. The basic assessment was that the current opposition led by Odinga and ODM had taken the lead, but that it might change if they come into power, like they have seen such things change before; it was felt that when people get into power in Kenya, they do not feel for the people of the issues they stood for anymore and instead want to gain more power.

#### **3. What has the role of Parliament been in the review process?**

It seemed to be the general view held by the interviewees that the MPs have been mostly concerned with their own interests and while the opposition should be doing something, they are seen as doing nothing or very little about issues that are important to the people. The example of MPs raising their salaries was mentioned in that when voting on that, many MPs were present, but when it comes to issues that matter to the

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people, they disappear. Several of the interviewees also expressed that they thought that MPs are too easily bought, and especially when it comes to important issues and that Parliament as a result of these issues have not held Kibaki's government accountable. As an example of this was given the September crossing of the former leader of the official opposition ODM-K's Uhuru Kenyatta to support Kibaki in the 2007 elections, resulting according to interviewees in nobody being left to stand in to fight for the people.

Furthermore, interviewees seemed to concur that to the extent that Parliament has raised issues or controlled government, it has mostly been in connection with issues that are in their own interests and not for the greater good. One of the young men elaborated on this by explaining that during the review process led by the constitutional review commission it had been clear that not everyone can like everything in the constitution and that it was therefore a matter of compromising and finding the key issues that Kenyans want to have in their constitution. However, he thought that the MPs had not been able to do that and that they only looked to what was good for themselves. Here Uhuru Kenyatt's move to support Kibaki was mentioned again was interpreted as Kenyatta thinking that if the present government gets back to power, in 2012 he himself will probably be the next person to be put in line to take over from Kibaki. Basically the sentiment was that the MPs, although when in opposition they may have said to care about the people, when they get the chance they are just trying to get themselves into strategic positions; not that everything they have done is bad, but mostly that is how they have behaved, according to the interviewees. An extra example was mentioned in the form of the press bill, which was seen as very important to the people, but which the MPs were not able to vote for and regarding which the government side was seen as being after cutting down the power of the press by making obligatory the revealing of sources of information; the president only chose not to pass the bill because the people took to the streets demonstrating on the side of the press. This was presented as yet another sign that basically the MPs have not been fighting for the rights of the people, that they do not represent the people, but only their own will. The interviewees also talked about the recent self approved golden hand shake for MPs while most Kenyans live



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for less than 1 dollar per day as an indication that none of the MPs are representing the interests of the poor, but that they just want to stay in their parliamentary positions; which the interviewees thought that they should not be allowed to because they are not doing their jobs as MPs in that they do not even show up in Parliament when there is a vote, unless it is connected directly to their interests.

### **6. There has been much talk about that the review process should be as participatory as possible. Have you participated in the review process in any ways yourselves?**

The interviewees expressed that there have been particular people earmarked to partake and especially speak at these talks and that ordinary people in their experience could not just walk in and be heard. If there was a session in Buruburu, e.g., once you got there, you would find that the ordinary people had been seated in the back to just listen, knowing that specific people were meant to talk and that would be it. According to the interviewees' experiences, this was the case both with regards to the constitutional review commission's efforts before the referendum and with the investigation into public opinion after the referendum by the committee of eminent persons.

### **7. In connection with participation in the review process, do you think that it has been possible for ordinary Kenyans to express their views freely?**

The basic understanding of the interviewees seemed to be that there have been both enabling and limiting factors with regards to the ability of people to express their views.

The interviewees seemed to think that there were certain positive aspects in this regard in the form of improved enlightenment on the issues relating to the proposed constitution via booklets handed out, issues taken up in newspapers daily, and that clauses were explained in the media; that better information was available and that allowed people to acquire knowledge and to allow for more informed participation than earlier, when many people have voted only based on what a leader has said they should vote, according to the interviewees. On the positive side, it was also aired that

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some politicians have been trying to educate the people on the implications of the proposed constitution and it was believed that many people voted no because they realized regarding the clauses on the executive that if the proposed constitution was accepted, they would be encouraging presidential dictatorship to occur again as under Moi's regime. It was also mentioned that before the review process, many did not know much about the constitution and that it is not something that had been touched upon through the educational system, but that people have now come to know about the parts of the constitution that really concern them, such as e.g. land issues in the rural areas.

Central to the views expressed by the interviewees was that it is difficult to express your views on issues that you do not understand and so limitations to the freedom of expression in connection with the review process were described. It was thus mentioned by several interviewees that issues were mostly raised and defined by politicians with ordinary citizens then following their lead as well as that politicians often presented issues subjectively or one-sidedly to influence voters, especially concerning specific issues close to the hearts of certain groups of voters. The impression was also presented that that many common people have voted with their leaders either because they think that the leaders have their best interests at heart, because they want to improve or maintain their tribe's position in the executive or legislative, or simply because they were bribed to vote yes or no. One of the young men present at the interview thus described how he had met with his friends after voting at the referendum and because he is from central province it was expected that he had voted yes, which most of his family had, while actually he had voted no because there were both things in the proposed constitution that he did not agree with and ones that he did not understand. There was a widespread sensation among the interviewees that people's abilities to express their preferences have been limited by their lack of knowledge of specific clauses (due e.g. to illiteracy, lack of access to TV programs, and not always effective character of civic education meetings) and issues and that the review had largely been controlled by the politicians; one of the women present also mentioned that she thought that the views of the people had been given during the Bomas conference, but that the politicians then had taken over the process.

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### **8. How would you describe the availability of information after the referendum, in connection with the debate on minimum reforms, for example?**

On this issue, the interviewees agreed that there has been much less information available than with regards to the comprehensive review process and that it has been something that ordinary citizens would only know about if they are keen on reading newspapers; and outside urban areas interviewees saw it as unlikely that people would know anything about the minimum reforms debate, but they knew about the constitution because there was education on it. The interviewees also shared the view that some people have forgotten about the review process, that people got on with their lives, and focus shifted to other things; especially as the debate on minimum reforms was kept at the political level and as such did not reach ordinary Kenyans.

### **10. Were you able to vote in the referendum?**

With the exception of two (one was away from his constituency on a professional assignment, the other was working as an official at a voting post) the interviewees all voted in the referendum.

### **7.1 With regard to expressing your views in public, whether it is informed or uninformed, have there been any changes in the possibilities for doing so after the elections in 2002 as compared to before?**

There was widespread agreement that there was a positive change in connection with this immediately after the elections so that Kenyans can now speak their minds without fearing repercussions; whereas before you could not stand up and criticize the president, for example, without risking imprisonment and torture.

### **12. Could you try to tell me about who you think has been controlling the agenda in relation to the constitutional review process?**

The view of the interviewees was that it has basically been the government vs. the opposition in seeking to control the agenda throughout the process and that both sides have tried to get the other to incur specific demands; the government has wanted

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more representation in the commissions in which negotiations have taken place and later the opposition has listed particular demands that they wanted to be fulfilled in order for them to accept any outcome of the process.

### **CEMIRIDE Interview**

The following is the transcription of the interview with Yobo Rutin (interviewee B), Deputy Executive Director of Centre for Minority Rights Development/CEMIRIDE ([www.CEMIRIDE.info](http://www.CEMIRIDE.info)) and Adam Hussein Adam, a governance program officer of CEMIRIDE (interviewee A). CEMIRIDE has as a CSO been actively involved in the constitutional review process in Kenya both prior to and after 2002 (cf. e.g. CEMIRIDE, 2005) as well as in connection with the GJLOS RP. The interview took place in the board room of the organization's head quarters in Nairobi on 11.09.07 and was of a duration of 1.46.52 hours. Present at the interview was only the interviewed and the interviewer.

**Interviewer 2: First, I am interested in how you as the organization have contributed to or taken part in the constitutional review process during its course?**

**Interviewee A2:** We will begin just immediately when the Kenya Constitutional Review Commission was set in 2001, by then we had already begun a process educating, writing articles and we had a Magazine, which we used to call the Marginalized, in which we would write on issues with regards to minority groups and the marginalized communities. So by the time the constitutional review process began of collecting the views of the people, which started in 2001, we were already in the process of, in the different communities that we had been in touch with, dispersing information and assisting them to mobilize and consolidating their issues. From our own end, what we ended up doing was to call on board, I think in 2001 in November, we gathered all the pastoralist communities in the country and the hunting and gathering communities as one major block of minority groups that we have in this country. So we formed what we call the pastoralist hunter and gatherer minority-

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something. It was actually a large network that brought together all the pastoralist communities wherever they were, the hunter and gatherers, and it was very instrumental in doing civic education and consolidating their views. –By which then we produced a position with regards to those communities and how they want to participate in governance and in democracy in the country, which we then presented to the review commission in 2002. Just before the Bomas conference, when all the views were collected. Once the views were clarified in a draft, a report was presented and it was on the basis of that draft report that the Bomas conference was to begin in October of 2002. But then the former president decided that it could not happen because by then it would have been the only legitimate group of people that would have been around, so some people that that it would have been like a coup; therefore, it was cancelled. Because Parliament was prorogued when the Bomas was to begin and then it was also cancelled and the whole thing was pushed until after the elections.

**Interviewee B2:** Yes, so I think the greatest debate was about members of Parliament having been sent home, waiting for elections, Kenyans faced to crucial issues: Reviewing the constitution at that particular moment and at the same time hold elections. Now, this was quite a risky moment, because there were a lot of activities going on at the same time. The previous regime was not very sure whether they would be able to get back to power, so that was the vacuum that might arise, and that vacuum is really quite important because a lot of events after moved out of that. What Moi did as the previous regime was to consolidate the national delegates who would come in at the constitutional conference of the Bomas, who happened to come more from KANU –there was that impression that most of the delegates were handpicked.

**Interviewee A2.1:** So in that kind of euphoria, the opposition actually took the advantage of saying that that government then was dictatorial in its approach; because actually, it woke up one day and declared that no Bomas conference would take place and to make sure there were a lot of security officers, more than 6000 actually, so for each delegate, there was a security officer to remove him from the facility and it made sure that nobody stepped on the grounds of Bomas. So when that happened, it became like a slap in the face of the public, which then reacted by teaming up with the

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opposition. Then, for us at that time we had already done our bit of consolidating the views of our people, submitting it to the review commission, and we were already seeing a process moving forward. So after the elections, the Bomas was called I think in April, and then again, we had to establish a team; a team that had several lawyers and a technical team, a journalistic team that was writing on issues with regards to the marginalized communities. This was the hub of the whole operation, we had the entire team here and from more than 60 other NGOs that worked within the minority communities. So together we now began our process, both influencing the delegates by writing two publications every week and also developing position papers with regard to different motions, which were given to the delegates coming from some of these regions so that their participation was facilitated and also we were going on trainings in terms of presentations; so it was really a massive operation towards that. As it went on towards the first and seconded phases, we were still working on it until the end of the Bomas in 2005 before the referendum. By the time the people left Bomas, the majority from the marginalized groups were pretty happy with the program, because there were certain things that were very close to heart of some of these people, issues to do with land, issues to do with management of resources in areas, and collective identity –although people refused to accept that one, it is so close to the hearts of some people, the collective identity of some people means a lot more than just even being in the nation, and therefore that one tied to land was coming out strong and the principle was set that the land in Kenya belongs to the people in Kenya and not the government; that one really settled a lot of nerves. So as Bomas came to the end, everything was set until the process went to Parliament and another product started coming in. While it was going to Parliament, there was civic education around the country and civic education raised a lot of heat because people from the marginalized communities were beginning to see that all the effort that they had put in selling their views, giving their ideas, accepting the product that came from the Bomas, was being trashed by the whole process at the end. For those of us who were in the field, watching civic education, we could see how bitter people were.

**Interviewer 2.1: There were also demonstrations at that time?**

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**Interviewee A2.1:** Yes, there were also demonstrations. Actually, the Maasai, you remember the issue of the land, it just happened that that was the time that most of the land which had been taken away from the Maasais, the lease of that was coming to an end. So it came at an opportune time, and the issue and debate of land in the constitution was taking place and therefore it really became heated and there were demonstrations taking place.

**Interviewer 2.2: So did CEMIRIDE take part in organizing demonstrations?**

**Interviewee A2.2:** No, what you will have to appreciate here is that as the constitution was taking place, and CEMIRIDE was taking the leadership of managing a team that was in charge of influencing Bomas, a lot of other organizations that also worked with these communities began to see that actually they can have a space within the minorities and therefore a lot more organizations which existed previously and never took issues to the national level now began to realize that actually, a platform has been created and therefore some of these would create some of these demonstrations and then they would ask us to organize media for them because CEMIRIDE has had a lot of good report with the mainstream media –and therefore they will organize their demonstration and request that we bring onboard the media and we mobilize to do that. But of course, there are other demonstrations... I do not think we have had any demonstrations that were done directly by CEMIRIDE, it has either been done by the communities or organizations that work for the communities and then uses CEMIRIDE for media advocacy.

**Interviewer 2.3: So how have you done this in practical terms?**

**Interviewee A2.3:** Yes, there are two ways we have done this. One is that we can write press releases prior to activities and then send them to the media, but at the same time we have friendly media within the mainstream groups and then we will call on them. We have also had the advantage that some of the people who have worked for CEMIRIDE have ended up in some of the mainstream media and therefore makes our work a little bit –

**Interviewee B2.3:** They were either interns here during the constitutional review process and some of them were actually part of the team producing the newsletter 'The Marginalized'. Because of lack of focus on marginalized groups in media

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reporting we have also in 2003 been able to put together Senior Media editors breakfast meetings and at the last one in 2003, in think there were about 25 senior media editors. They were curious when we invited them and we tried to tell them that they have a responsibility to focus also on human rights related issues outside of Nairobi and things started turning around; right now, we can even influence some of the products on some TV stations and refer programs like Newslane to people they should talk to. We also do research and documentation and supply this to media.

**Interviewer 2.4: Which conditions do you think have been most important in making it possible for you to participate in the constitutional review process?**

**Interviewee A2.4:** First of all, we were not given even a direct opportunity or whatever, we came through the backdoor and pushed ourselves in. We were never even invited for one meeting.

**Interviewer 2.5: So you have not taken part through the GJLOS program?**

**Interviewee A2.5:** In fact, the GJLOS was later on to what I am now referring to, but even prior to that, we were never invited to any meeting. But what we did was to take up a position of consolidating the voices and collecting the views of the people and we directly went to the chairman of the constitutional review commission and told him 'look, this is the situation, we have not been invited to this because of the status quo, we appreciate that, but this is our position'. And based on that, he actually appreciated that kind of direction, and we made sure that wherever they went in terms of collection of views, critical people and leaders from those areas, even if they were not invited, they had to go and present their case. And then, slowly a gap began to expand itself and when we had the delegates now; the delegates were not being invited because [inaudible words] but because they come from a particular district and the unfortunate thing then was that KANU was handpicking people and in some areas and it was the same list that went into the Bomas after the elections. So, the people who were being hand picked, they just happened to be coming from some of those regions and what we did for all those delegates who were invited was to take them through a training, very rapid training telling them 'these are the [inaudible word] of what is happening and what we have already collected in terms of the views which the majority of them have agreed with are stated this way'. So as much as



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possible, even as they went on into the different discussions, we kept on having technical papers being released, we kept the focus and we kept going. In fact, towards the end someone noted that ‘it seem like this constitution does not belong to Kenyans, it belongs to the minorities’, because a lot of people were getting overwhelmed by the presence of minorities because we strategized; we were not asked to go there, we were not given any space to go in, but whatever little that we had, we started pushing in.

**Interviewee B2.5:** -We built up a role of building the capacities of the communities; and the closeness of the issues to the minorities and the centrality in terms of the discussions in Bomas, when you talk about land for instance, it was the pastoralists which had more issues, pretty valid issues. So people with land, they want to discuss land without the pastoralists, when you are talking about private individual property rights versus collective community –because some of them are nomadic- they became highly charged issues; and you would realize later on that some of the contentious issues up to today are pretty much the bill of rights, for instance, devolution of power. –Because constituencies went directly for devolution of power, they said that Kenya has been categorized by high inequalities, disproportionate authoritarianism and stuff like that so the only way to secure our rights is to get the constitution to recognize devolution of power; because the executive, which is one of the most important issues, has always used land and some of these collective property issues to submerge the interests of the people on the ground. That is why you find the university professor in charge of the devolution committee ended up paying with his life. And these are the major issues, right now you look at the consolidation of the opposition, it is pretty much on the platform that we had at the Bomas, because they realized what we had what we were preaching out to other sheds of opinion, it became clear to the likes of Raila and others that there is a constituency; we influenced some of the procedural aspects in terms of who was the chair inside Bomas, for example one of our own became the Vice Chair and one pastoralist, former Foreign Minister was actually another Vice Chair. So we had built our own capacity in terms of looking at the procedures, lobbying, our people were taken through vigorous lobbying, and we invited experts just to come and discuss issues, including the commissioners

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themselves and the media, etc. An important factor in the whole process of the constitution making process, I think was that our ability to consolidate all these different groups, and we had a very clear paper of about 40 pages, a memorandum that was very impressive in terms of what we proposed and what needs to be done and the fact that we managed to stay together and constantly we are pushing ideas, every week the newsletter that we talked about highlights different issues and then we spread out into different communities at the same time; that was important. But we also have to accept that some of the conditions were that immediately after Moi, the new government did not have a good grasp of the situation, because they were just emerging from the previous regime so there were a lot of loose ends and ministers were talking left and right hand side; so they had not realized how dangerous the Bomas of Kenya –or how strong things were going to get to be. Because first there were so many reform processes that had been released, there was the national land reform policy that was quite known, but Bomas [inaudible words], there were so many things, also the GJLOS coming in –so there was a bit of confusion and lack of control so that gave us an opportunity to articulate some of our issues.

**Interviewer 2.6: Okay, so that was during the Bomas and up to the referendum. What then after the referendum?**

**Interviewee A2.6:** After the referendum, in terms the informal political angles things were taking different directions, but in terms of reform processes, there was now the major, huge GJLOS, the looking at the national human rights policy, and national action plan; processes that began then, after the referendum. There was the police reform process, which began prior to that and I think we were sitting in the community policing process, we actually became part of doing the policy on community policing. So a lot more things are taking the board room, in terms of we have civil societies based on their recognition of the constituencies they represent, you find that you are invited to participate in one or two of those; like the reform on the police, I think that we got in there because by then we were doing a project on conflict management and peace building which covers the northern part of Kenya and that part of Kenya was not having any representation in that process and yet it is one of the most afflicted areas when it comes to security. So we took part in the GJLOS

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processes, but in the national action plan and also in the police reform –and land reform too, which was also taking place at the same time.

**Interviewer 2.7: Okay, so it was not directly in connection with the thematic group on constitutional development in GJLOS?**

**Interviewee A2.7:** No, not on constitutional development.

**Interviewee B2.7:** After that it became increasingly difficult, with the Kilifi and all that, but we have been on it on and off, like the multisectoral forum, the debate that went with the minister the other day; after that... The momentum was not there. Many of us lost the [inaudible word] standard of even being there, all the other civil society organizations now started with different models of reclaiming the constitution making process immediately after the referendum and I think one major event that we did was a project on scenario building just before the referendum, just trying to visualize; suppose it was yes or no, what would happen. To look at the situation, if it was no, then some of us would have gained or lost –the Kilifi draft and all that. One of the key issues was that would have happened to us was that they managed to push in a clause that recognized marginalized groups and the principle of affirmative action, so for us to lose the Bomas draft, then we would have lost everything else that had been done, so we were worried about the drafts that were released thereafter, the Kilifi and whatever they call it.

**Interviewee A2.7.2:** Yes, even the gains that then were there were not neatly tied, like you could gain on issues on land and lose on issues on affirmative action.

**Interviewer 2.8: So the Bomas draft was watered down?**

**Interviewee A2.8:** Yes, it was actually watered down, removing certain principles from clauses: like when you say that the land of Kenya belongs to the people of Kenya straight away and even the issues of government owning larger stretches of land, yet in the other draft it said that the government will be custodial of the people, as it is now. You will find that the majority of the land in this country is owned by government, either through the county council –which of course are meant to be representatives of people, unfortunately the operation is such that they are not overseers but maybe the actual owners of the land.

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**Interviewer 2.9:** So after the referendum, the type of activities that you did changed in their focus a little bit from the constitutional review process to some of the other areas?

**Interviewee A2.9:** Yes. You should understand that although CEMIRIDE was much involved in the larger constitutional review process, because we had a network, we managed to push the network to operate one side of the –the organization kept dealing with it on the one side, but also managing the network on behalf of every other person and therefore we only had to actually designate two program officers into the network to actually deal with that while the organization kept on dealing with other things. That is why you find that we managed to secure three projects with USAID on conflict management and peace building; so the constitutional review process goes on while we deal with other things. But after the referendum therefore, it meant that every other person had to now focus a lot more on the different thematic areas and the GJLOS has a pretty large platform where there are many things to follow through, but the one on constitution, it became more of a skeptical [inaudible word] because people feared being involved because of the whole suspicion that it was a government process and maybe did not want to be labeled anything and therefore even the invitation to eat were being looked down upon. Until I think the multisectoral forum, that was when we started, when that was called it looked more of an outsider than the GJLOS and therefore a lot more -

**Interviewee B2.9:** -We substantively refused to get involved because we thought it did not represent –for us the Bomas draft was a good point, so we did not see as legitimate when the eminent club was put together because essentially nobody wanted any of the key issues that we wanted and we felt cheated after that and some of us did walk out. So we did not want to give our views again, we thought that we were repeating ourselves, we had given everything else and now they were asking us to give more in that thematic group; so we thought it was fruitless. And after that the multisectoral forum, we have been part of a number of organizations which have been trying to follow up, but there is nothing very substantive about it and I think one of the most clear things that we got out of this is that the procedural aspects of the constitution making process have been thoroughly confusing and nobody really

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knows where it is going because of vested interests, there are procedural matters, constitutional aspects and at the same time, you are trying to make a constitution, yet there is even a clause in the current constitution that says you can not... Questions of interpretation have been pretty... So you can only understand what really happened in the constitution making process by focusing also on those procedural aspects. Even the questions of legitimacy of the institutions involved, there was one time where the CKRC team's mandate was over, then you have another team of eminent persons, then you have delegates that nobody seems to recognize at the same time. And then you have civil society shifting left, right, and center; civil society has also been doing the multisectoral forum, the process there; occasionally there have been fights because people are pandering to different sides of the game so you still see the 'no-group' and the 'yes-group' within the civil society. So it can be very difficult to understand. The other day, when we were trying to get people to go to the multisectoral forum, you would find people were not thoroughly interested in the constitution making process being supported by the government to lead the process. Then there is the question of time and the elections coming and people sneaking in the minimum constitutional reforms maybe, then there were women issues later on and Martha Karua and stuff like that. We have been able to speak about some of these also, we have engaged for example the minister Martha Karua about three weeks ago, we had a three hour meeting at CEMIRIDE with her and she expressed her own confusion of what is happening. That is one of women trying to influence the process and particularly we wanted to see that pastoralist women get access to more leadership roles through nominations and special interest seats.

**Interviewer 6: So you have been working with advocacy. What about the several different commissions set up by the government including the opposition and at times also representatives of civil society: But who from civil society has been able to take part in those?**

**Interviewee A6:** Yes, who; it becomes very confusing and then you realize that the so-called civil society that is being invited there, it is maybe a few individuals, actually, not as organizations but specific individuals that work within civil society and then you find that the multisectoral forum was being given the mandate to

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nominate; and therefore it becomes more friends and friends ganging up. You will also find a lot of people complaining that the number of seats that were being offered were few; it is not representative of civil society.

**Interviewee B6:** You have mainstay civil society organizations that have been dealing primarily with constitutional matters and you will have maybe that three or four and find that three of them are pro yes; so basically we lacked the leadership, we lacked a post referendum agenda, substantively, as civil society. There were too many twists and turns and some of us could not prefigure where we were going.

**Interviewer 12: So civil society got fragmented?**

**Interviewee A12:** Completely, it was difficult to find out where to put the focus and those in the multisectoral forum were either being pushed by the government or were government friendly and that is why many of the civil society or community groups that have been keen on realizing this constitution were left out. Many of the civil society organizations that are participating in the multisectoral forum to a large extent have been elite groups in Nairobi. So some of us wanted to break in with the groups from outside, but we realized that the stakes were too high and of course, there was no clear agenda on what we really want.

**Interviewer 12.1: How were the stakes too high?**

**Interviewee A12.1:** In terms of power relations and misguided interests, for example somebody wants to be highly profiled more than the issues so because, this in an election year, many of the civil society organizations – representatives in those have already indicated that they want to run for elections, and so you want the limelight more than the issue. When you try to bring out issues like inclusion in the process, the diversity, a clear leadership agenda, then it becomes too difficult. So you realize what you agree on today here, next time there is a group that went and said that they are representing civil society and of course the government would encourage that.

**Interviewer 12.2: I am curious about which are these groups?**

**Interviewee A12.2:** Like we are telling you, most of who end up working within these commissions, they actually go there as individuals and not as representatives of their organizations. So you will find therefore an individual who keeps running after the leaders of the process, so far away from his or her organization that you will find

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that very little is mentioned about the organization, but of that particular individual. If you look therefore at the organizations which have the direct mandate of dealing with constitutional matters, you will find that there are few, only three or four, but only particular individuals within that organization that can even be seen as an institution in themselves.

**Interviewer 12.3: So who are these people?**

**Interviewee A 12.3:** Particularly sometimes we do not like to mention any names, for very good reasons because we collaborate with them in so many other respects. So sometimes we have ideological problems around it. They come from specific organizations, but they are more after themselves as individuals than as representatives of organizations and therefore even far more removed from the larger society of Kenya.

**Interviewer 12.4: So these people who have been put in the process as supposedly representatives of civil society are actually totally detached from it?**

**Interviewee A12.4:** Detached, to a [inaudible word] degree, yes. And again civil society is a substantive voice now that the parliamentary or ministerial process that has [inaudible word] the constitution has stalled; they are not there, nobody is talking because they do not represent anyone and therefore they do not have to report to anyone. So they have to catch on the next wave of [inaudible word] which is members of Parliament; which we all accept is a critical issue. But that agenda, that platform, sustaining that has been difficult and there are obvious reasons. Civil society operates more on donor support and if donors find the whole process quite unpredictable, people get tired: 'this constitutional review that does not come around for years, why do you want us to sponsor it?' But I think it is also because it is possible to do so many things on a voluntary basis if you have a clear agenda, leadership and clear review, monitoring assessment and all that. So it becomes an elitist thing, there is not feed back mechanisms to the people on the ground on the substantive issues that they raise and they want to have taken care of in the constitution at whatever time. But we are aware that a number of civil society organizations are trying to develop an alternative constitution making process currently and some of our colleagues are involved in it, though I have not been

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personally. But this is a very difficult process with the elections going on; we will have to wait until the elections come and then deal with the next government. We certainly know that the government would not be interested, when it is trying to dish out passes to districts, promising peace meal autonomy to people, give selective title deeds to you know; which is not a substantive way of dealing with the land issues, because land was one of the four major contentious issues along with the bill of rights, the executive and devolution.

**Interviewer 1: These issues are the ones that you see as the most important also?**

**Interviewee A1:** As most important, we need a framework to deal with that. You can not deal with poverty in Kenya without dealing with some of the substantive issues about devolution and access to resources, management of the same resources. So when you have peace meal reforms that depend on you dangling a gift or candy to some group of people then it does not work. You do not sort out land issues in Kenya, you will never deal with inequalities, you will never deal with poverty in it self, you will not deal with conflict. Many issues are substantively issues of poverty whether you like it or not and disenfranchise of many people, even from the same ethnic groups that are shooting down the devolution of power. You can find the paradox that the groups, the elites that have scattered this nation for quite a long time, pushed even their people to other people's areas, which is causing problems, so you force your own people now to come back to the city to become [inaudible word] extortionists and at the same time as this process, other people do not have a problem so much with land so there is a way in which you over sensitize even the issue of land in other areas, where people used to use it for no apparent reason. It is just an elite, and that is really the inequality; once you have captured the mode of production in your area, politically what you try to do is to create land somewhere else to transfer the problem to other people and that is why the issues of devolution are highly volatile issues; because people feel that with a federal system, with a devolved system, there are people who will get kicked out to come back to maybe central province. But we are saying there ought to be an amicable way of sorting out this and maintain a united Kenya, but with the inequalities we are having, an economic growth of 6 % is



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nothing, it will not help somebody in the slums; it will not help anybody in north eastern province where there are no roads and there will continue to be no roads.

Sometimes we look at these things as an internal affair, but the Bomas draft was also pretty radical in the sense that it colored things in a different light, even for a number of donors with foreign interests; if you talk about 60 % of land probably in pastoralist areas is owned by British interests, in terms of ranches etc, and then you say that the land belongs to the people of Kenya, then that is pretty radical and in fact it is an issue that the government tried to deal with just the other day. You can not change this country without touching land, without investing substantively in education; the only way people can bypass land is by being educated. If you are not doing it even through affirmative action for those other areas, then there is a problem. So the Bomas draft was pretty radical, not just for these people, but for other people. That the issue of collective identity had been raised, that some people in a certain area can determine themselves to be one people, almost a nation, because of their cultural background and all that. So the multi polar nature of the Kenyan politics has [inaudible word]; the inequalities and the advantages taken by certain dominant groups against younger or weaker groups is what is now causing problems and that is why any approach to politics from an ideological point of view, whoever comes in with the more popular sentiments will probably be supported the most. That is particular why ODM, you find the Maasais voting substantively for orange, for instance; the reason is that these people are saying with pro donor substantive interests in your land, like anybody else would have, poverty issues we are ready to tackle, they have an ideology of social democracy, which is closer to people. But previously KANU has been highly capitalistic at the expense of every body else –you only need to see the difference between Nairobi as the greater city, but if you go 30 km away from Nairobi, you begin to see...

**Interviewer B1:** And because we have been afraid of devolving powers and resources to the regions what we are now beginning to create is parties to the regions so that they almost become like kings, the elites are now being pushed towards becoming kings of their people in their area so that they can secure their interests. It is almost becoming like a small kingdom where you have where you have one

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representative from every region in Parliament representing themselves; because if you look at now the evolution of parties that are taking a regional dimension, or even they campaign –most parties for instance are now saying that they want to campaign for Kibaki but each one of them will not go to another district, but will want to stay put where they are. In other words, they almost become the saviors, you are creating many saviors for every community and later on, the saviors will sit together.

**Interviewer 9: So this is close to the issue of how ethnical ties play a role in Kenyan politics?**

**Interviewee A9:** Yes, exactly. Ethnic ties [inaudible words] there are bits of ideology; thorough capitalist ideological flight and it is not elaborated to people how they can benefit from it, so when somebody tries to push, if you want to mobilize interest now, you use the tribal card and you put your kin down there, from that community in that region telling people that you are their kin there. So his work to reap the interests of the community and when he leaves for the center, because of the class factor here, while the guy talks tribal politics down there, he is linked to the center class, cutthroat new capitalist kind of stuff.

**Interviewer 9.1: So what he does in his the local community is different from what he does at Parliament level.**

**Interviewee A9.1:** Yes, we have already heard that this whole wing which is supposed to be organizing the campaign for Kibaki, they have been told ‘we do not want to see you in our constituencies’, yet the same member of Parliament is campaigning for Kibaki, but what they say is ‘I do not want to see you’; because what they do at the ground is absolutely different from what is being visual.

**Interviewee B8:** Let us go back to GJLOS, I think it is an interesting process that after some time, quite a number of civil society organizations lost interest in it, because the ministry moving it has been at the center of lots of controversies like corruption, lack of transparency, lack of faith in the procedures and the vision. So you find that the lead organizations, for example when first we participated we realized some futility in it because you can not push an agenda, you can not redirect and say ‘this is what is happening: Our particular interest in these areas where we work indicates what is crucial and what we need to do’. You would find that the ‘Nairobi-

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thinking' is pushing the agenda. The ministry in itself is not very clear on what it wants. Even the players themselves, I remember the war we nearly had with the Kenya National Commission for Human Rights, where they gave somebody else to discuss minority issues and we are there, so we had constantly been doing shadow reports and we had a meeting with Martha Karua in Ghana and we had a big fight, because Kenya was making this fast reporting on its human rights status and CEMIRIDE presented a report to the African High Commission and it was substantively used; it was a big fight and we were being called out and they said 'why did you do this to your country, etc.' and our representatives were saying 'this is my work'.

**Interviewee A8:** But another thing about GJLOS is that it has been used to water down the voices of civil society. Because if you look at the technical people within the GJLOS, they have actually been fished out of civil society, [inaudible word] looking at targeting specific people with specific competences co-opting them into the ministry and then in the end, you actually have a very big civil society out there in two ways: some were taken into the judiciary and others now directly into the ministry. So when that happened, we remained without really a share of organization. Now, if we did not have a very strong base of networks of supporting NGOs, then you begin to see that the voices have just been curtailed.

**Interviewer 8.1:** Now within the GJLOS, I have been talking to some of the donors and they have been expressing that their hope initially was that this would be a way for government and civil society to work together and a way for civil society to stand united in contributing –but that this has not happened. They have said that now it is clear that civil society does not work in that way and that now they are trying to support civil society on the same issues, but outside the program. How can it be that civil society has acted this way?

**Interviewee A8.1:** First I want to mention to you that there was this co-opting of civil societies into the government and then straight away it weakened the framework of civil society outside and therefore even the contribution to the main whatever, to the GJLOS itself became weak, but as civil society started contributing, the GJLOS itself went down, went quiet in terms of for about one year or so, it was almost doing only

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paper work and it decided it was only doing meetings, no real tangible movement forward with regarding to issues. I think before the referendum, there was actually very little being done. By the time we were approaching the referendum, and the GJLOS was being asked whether it would support the NGOs in civil society to do civic education with relation to the review, then [inaudible word] realized that GJLOS had its own agenda. They instead gave the CKRC money and left out the civil society and therefore a rift began to emerge and at that time CEMIRIDE actually began to put up a fight and said ‘we were first of all not invited to the Bomas of Kenya and throughout the process, we have been pushing our selves just to get a space. Now we have come to the referendum, we know that we shall not be accommodated’; and a lot more in civil society expressed the same. So another kitty was created outside to be managed by UNDP and that is how the civil society now got money to go and do civic education. Otherwise, through the CKRC, they could not get any money, that money came from GJLOS.

**Interviewee B8.2:** When the donors initially put all the money in the hands of the government, and first you had lots of contentious issues happening, it becomes difficult even to call for transparency because you have funds put in the hands of the government –I remember a meeting we attended in order and the main question that donors were being told was that ‘if you are going to put all the money in the government’s hands, so that they direct the agenda, so we only get invited to sit and you know; they have already decided on the outputs etc and this is not, so we are being muscled left, right and center. So [inaudible words], we split the money or we have a basket where some civil society organizations can also help, getting joined in how it is handled and all that. And that particular moment was the height of the corruption issues, the same ministers who were running the [inaudible word] secretaries were the ones being implicated in twisting things and stuff like that. Obviously, you can not work very well in such an environment; there were too many issues in Kenya at the time. So the shift from working directly under GJLOS or working from outside started then by the time we were realizing the referendum was coming, it forced many civil society organizations to actually express their unwillingness to work with the government and since then it has been more on those

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ones who were invited to make a contribution, they go. But at the end of it all, they end up being representatives of themselves and not representatives of any body; and so that is where now the problem is. The political parties are perhaps even more effective in championing certain opinions of [inaudible word], having some civil societies being invited. Because how do you respond back? You know already that politicians do not have a lot of direct contact with the grassroots, but you will find that when it comes to even mobilization, they are able to mobilize far better than some civil societies in this country.

**Interviewer 8.3: So what you are saying is that some civil society organizations are almost more elitist than political parties?**

**Interviewee B8.3:** That is right. These political parties, they can gather 1000 people and they can speak about their agenda in a meeting [inaudible words] for two hours and whenever they call, people will go. Right now, I think for civil society to do a call for a major demonstration in town, nobody would attend.

**Interviewer 12.5: So civil society has been weakened in this respect?**

**Interviewee A12.5:** Weakened really seriously. We are asking why, particularly, we have done a good job, we had Kenya pastoralist week, which an annual multi stakeholder event and we can get 3000 people for that at the Kenyatta International Conference Center. We are having zonal campaigns happening on October 5<sup>th</sup> in every four regions in Northern Kenya, it is about 30-40 civil society organizations moving on. But I guess the agenda in clientele governance issues is difficult.

**Interviewer 5: Okay. So in connection with GJLOS, how has it been decided which members or organizations from civil society have been included?**

**Interviewee A5:** I think we have a few and from what I know, they are also not very consistent. There is 4Cs for example, they can attend once in a while, at least they have kept their stake there. You have The Kenya Human Rights Commission, sometimes they do appear. There is a legal aid organization... At least they are strongly involved in the national action plan for Human Rights and we have also been involved in some of these, at least on group rights in processes and collecting of views from the regions. But you see the tone of it, people do it for the sake. Then there is the whole network of Kenya Human Rights and all that. But substantively,

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you will find that issues being raised from... It is not strong, you realize that the ideological focus is not there anymore.

**Interviewer 5.1: So in terms of participating in GJLOS, it sounds like many CSOs have chosen not to do so anymore?**

**Interviewee A5.1:** Either not or they have not been invited, because I think at the end of it all, it might be being invited.

**Interviewer 5.2: So only some have been invited?**

**Interviewee A5.2:** Exactly, and essentially even what kind of mandate you have; if they recognize what you are doing, then perhaps you will get invited. Most participation in this area is through invitation.

**Interviewer 5.3: So how is it decided who is invited?**

**Interviewee A5.3:** Actually I do not think we have a clear criteria of decision of who and how we participate. But the majority is human rights organizations; for us, we get in on and off. We participate sometimes, but also we end up on different activities now, like there is the national action plan being developed, so in the collection of views and disseminating information in terms of where people can meet, etc; that is something we do.

**Interviewer 6: In connection with the constitutional reform process, how has it been decided which CSOs could participate in the various committees after the referendum?**

**Interviewee A6:** There was something in the news where the Vice President said that the opposition was to get 13 slots, the government 14 and then the civil society was given 12 slots and told to choose among themselves; without guidelines or anything, so you will find that those ones who have been actively involved are the ones who end up getting in. So, there has been no decision on what the mandate, limits and scope is of the participation. These things are not even stated, it is just numbers given and of course the meeting was called on board and civil society was not invited in the first meeting and when the opposition expressed that they wanted the civil society to also participate in the process, a number was given but without any details.

**Interviewer 6.1: Which CSOs then participated?**

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**Interviewee A6.1:** If I am not wrong, it was the multisectoral forum which was the ones permitted to come up with a list, whether it came out with a list or not I would not tell... But since then, nothing has really happened and people are just waiting. Because you can only see who is in and who is out by the participation, which is not taking place anymore and as far as we are concerned, we are not part of that.

**Interviewer 7:** Okay, so let us move on to a totally different area. Can you think of any situations in which you think that the present constitutional framework has influenced the course of the constitutional review process?

**Interviewee A7:** Yes, there is a lot there. For instance, the clause within the constitution that prohibits the setting up of the processes for changing the constitution. There are provisions within the constitution that outlines how the constitution should be changed and it allows for reforms, but not an entire comprehensive review; which is why we found ourselves at a quagmire at some point. The second one is the precedent that was set in court of the judiciary, where now we must have a referendum to actually complete the review of the constitution. So there are provisions within the constitution that have influenced how the review has taken place and there are court precedents, which have actually influenced even further. That is why part of the minimum reforms you hear of now is to entrench the review of the constitution within the constitution.

**Interviewer 7.1:** So in that way, the present constitutional framework has been a constraining factor.

**Interviewee A7.1:** A constraining factor, indeed.

**Interviewer 8:** Have there been any changes in the institutional environment which you feel have affected the ways in which you have been able to act in relation to the constitutional review process?

**Interviewee A8:** The mandate of an institution like CEMIRIDE and its participation in the constitutional review was limited to maybe offering support to delegates and comes from the fact that the grassroots mobilization has not really been accepted as work belonging to civil society. In fact, the representatives participating in the review through the Bomas of Kenya were largely people recommended or identified from the district; not necessarily working from civil society. Now, as an institution like

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CEMIRIDE, I was there, you had to sit back and see, to represent only technical support. In other words, that commissioned role of civil societies has meant directly that we have to work through the backdoor in that we now are forced to work directly with the delegates, informing them. It actually shaped the nature of how we could work, because we did not have accreditation saying that CEMIRIDE had to come in as an institution, we had to identify people who we could work with within the delegates and then began our process of educating them, sending them support material; we ended up technically doing support work, but not setting the agenda.

**Interviewer 8.1: So you have almost moved from advocacy work to service delivery?**

**Interviewee A8.1:** Yes, service delivery, within the constitutional review we actually ended up doing service delivery, because since we did not have an accreditation, we could not use our voices. Even in the GJLOS, because we ended up working not directly on setting up the agenda, but we are working more on activities. So what we end up doing is advising communities, informing them, which is also being done by the newspapers but because we have specific interests in certain areas we have to further inform them on when the views are going to be collected and things like that. So you are right, with regards to this issue of the constitution, we have ended up being a service deliverer than actually working with advocacy.

**Interviewer 8.2: How do you feel about that?**

**Interviewee A8.2:** It is demoralizing, but what can we do; it is the best we can do because it is the only opportunity there is, we do not have expressed recognition of what we do directly and therefore we can still do what we have to do through other means, by doing service delivery like that.

**Interviewer 11: So the you could say that the political space or opportunity structure-**

**Interviewee A11:** -Has still not changed dramatically, it has still remained as it were in 2001. In 2001 there was minimum recognition; now we have recognition of larger and larger parts of institutions, but when it comes to people like us, working for minority communities, we are only accepted in terms of the work we do, but not as people who can set an agenda. So we always find that the agenda has been set



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elsewhere, we just have then to do the delivery of services. The best example is the national action plan, we should have been there to seed with that the group rights issues are taken care of, but then you find that we were invited in to deliver services and not to set the agenda; in fact, someone else who as not worked on group rights issues was actually appointed, identified to become the co-convenor.

**Interviewer 11.1: You said that you find this frustrating and demoralizing. So how have you tried to respond to this?**

**Interviewee A11.1:** What we have done is that because of that, we maintain our advocacy in terms of we have begun now writing shadow reports for every report that the government writes. One reason is that because we are doing more service delivery, we want to maintain a pretty clear understanding that we have not been brought into the manifold, but we can still focus our attention on different things that the government is doing; so we write shadow reports. Two, where we have to do our service delivery, we do it with the best that we have so that our constituencies are not disadvantaged. And we also try to use the media, sometimes we have been able to out in one-page adverts elaborating certain issues.

**Interviewer 11.2: so your response to having been used mostly as service deliveries within the GJLOS has been to move your advocacy to other forums?**

**Interviewee A11.2:** Other forums and higher levels, yes.

**Interviewer 12.6: Have you experienced your possibilities for affecting the review of the constitution to have been affected by your access to resources?**

**Interviewee A12.6:** As far as influencing, I think that basically we could have had most of the resources we would have needed, in terms of labor. The funding could have been minimal, but still manageable. Because ultimately, the failure to influence the constitution has had more to do with the political will than the influence from outside. Believe you me, if there was any document that people in this country were so eagerly awaiting, it was this constitution, the constitutional document is what people have really talked about. From the first day they produced the draft in Swahili –many Kenyans have never read a document written by government officers- this was the first document published in Swahili and distributed in newspapers. My father, e.g., has never read anything, but I could show you, he has the first draft in his house.

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In terms of interest and influence that would have been influence enough to make it happen, but if that one did not happen I do not really know what could have made it. I look at the question of the will; the [inaudible word] political will to make it happen is what stalled it.

**Interviewee B12.6:** Yes, it is not so much financial support from our end, because we could easily integrate some of these activities with other programs, because we know what our people want, for instance, and whenever we had a major function or workshop or something like that, we would make sure that we had a cocktail function at the end of it to discuss, to get what the people are saying and we would integrate even from other projects, like resources and stuff like that. That was not substantively a major issue.

**Interviewer 12.7:** So you are saying that the major issue has been that the political will has not been there. But I am wondering if there had been greater unity from civil society, I mean you can see unity as a resource, could it not perhaps have possible to pressure political will?

**Interviewee A12.7:** Unity as a resource; that is wonderful. But as I was telling you, civil society ended up being much more of service deliverers than the real influencers of the agenda and the constitution itself flew out of that framework and began to tap into the mechanism that are at the ground level, like maybe representatives of women without having like neat unity like you are saying. Then there is also the folly that the strongest concentration of civil society organizations is always in Nairobi and not 'out there'; so whoever comes from out there, we do not look at them as members of civil society, but as maybe consumers. Because of that the technically equipped institutions ended up being service deliverers.

**Interviewee B12.7:** A key point is that if for example you are in Nairobi and you are an elite and the major problem is good will, then you probably need a sanctioning movement from behind you to push an idea, because we have exhausted pretty much all the models and you only need to force the government into a certain corner for example, or certain interest groups. Now, without that legitimacy of the greatest number of people, you are going nowhere even if [civil society in] Nairobi were given all the money.

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**Interviewer 12.8: So in that sense resources have been constraining.**

**Interviewee A12.8:** Yes, constraining. Also just the perceptive character of the Nairobi civil society thinking that things can only be done from Nairobi, their models of how to engage after the post memorandum referendum have been wanting.

**Interviewer 12.9: So it sounds like there have been problems with the types of strategies chosen?**

**Interviewee A12.9:** Yes, that is right. And in connection with resources, even the will to support the agenda of civil society, that in itself from the general public has been lacking and to me that is a much stronger mandate or resource than anything else. If the public were really to have faith in civil society and pushing for the agenda and actually allowed it, then you would have had civil society actually literally pushing both the politicians and government to one side. But the fact that there is no backing in terms of legitimacy from the ground means that civil society means are shared; you look at the other side you have the politicians also and at least they have at least the connectivity between themselves as individuals and their communities and they are able to get legitimacy from there.

**Interviewee B12.9:** Because the politicians supply the answers to the ground, [inaudible words]. So it is no intellectual debate, it is more populist and it is easy, they have the resources to do it. So even if the Nairobi teams are saying ‘let us work on this clause or that clause’, the agenda is being run by the minister of constitutional affairs, so...

**Interviewer 14: We have touched a little bit upon informal relationships along ethnic lines and corruption also. Can you think of any instances in which it has been suspected that Kibaki has been trying to gain the support of groups outside of government by means of horse trading?**

**Interviewee A14:** We can look at the private sector alliance, you find that it has been organized and mobilized around [inaudible words], now the chief campaigner for Kibaki’s next term just resigned from that sector alliance and moved to become the chief; and he has maintained a pretty good network.

**Interviewee B14:** So private interests, which have been pretty alienating for the masses for the communities, you will find issues of timing until the elections that is

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when you want to construct roads for instance. Two, when you start giving title deeds in a sporadic way without a clear policy around it, now you go to a certain community and give land title deeds for security in a campaign situation, I do not think it is really any president's responsibility to give out certificates, that is junior officers' or whatever. Thirdly, when you have banks, which are public, coming out and putting banners saying directly that 'we are for this government', then that tells you something. So my worry has been the private sector angle and in Kenya it is pretty easy to pin the private sector to a certain community; because the advantages, the loans, the corruption can be attributed very easily, it is not very inclusive, that is why you see that everybody is either for the government or outside it. You can see that it is highly polarized now into two, it is not an ideological debate at all. And linked to that, you pursue a highly market driven answer to Kenya's problems, fiercely market driven, is this CO campaigning for you, is this club, etc. When some of the issues are really policy different issues, they could be cultural issues and addressing that sense of confidence in nationhood demands to everybody else. You can not see, the economic social security of everybody is not there; it is the commercial energy that seems to be the ideology right now.

**Interviewer 14.1: So the decisions that are taken on an issue based level, in that connection the input mostly comes from the private sector.**

**Interviewee A14.1:** Yes, and I do not think the private sector can solve problems in the dry lands, for example. We have always said that that needs public funding, the private sector would not even discuss issues of that area; they will only discuss where we already have public funding. The private sector will never care about what is happening in the slums.

**Interviewer 14.2: But in terms of the ethnic groups playing a role in politics, this also entrenches the private sector, does it not?**

**Interviewee A14.2:** It does, certainly. Who gets appointed to lead major [inaudible word] for example, big government units, big cabinets; in fact one of the bigger questions in Kenya over the years, has been Kenyans have had a lot of hopes in terms of having an inclusive government and one of the critical failures of even the previous

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president was [inaudible words]. But you find that most employments today come from one region from an ethnic point of view.

Kenyans are now more polarized from ethnic lines than before and that is what some of us who do not come from dominant communities, we anticipate this because dominant communities are... If they are ready to tell it to your face, we will go nowhere.

**Interviewer 14.3: So ethnic ties play a bigger role now?**

**Interviewee A14.3:** You would be very naïve to assume it does not exist, this country has always assumed that the ethnic dimension has no place in defining the locus of people here, but everyday the more we refuse its existence, the more it comes out and demanding to be acknowledged. Now, you are even finding the political parties have been pushed technically to take ethnic dimensions, it becomes now the base of all mobilization.

**Interviewee B14.3:** And they will say ‘because we support you know, we want out Vice President’. So these things polarize the entire country, which for us is risky because that is when in the coming years, it is possible to have some of these communities gang up against a given community; so rather than dispel that tribal factor in an interesting way -sometimes it is coming a bit obviously- and you have seen people write about it, but it is worse than before.

**Interviewer 14.4: It seems that there is a paradox in this connection. On the one hand you have political parties that are very dependent on their own ethnic group when they need to be elected, but then on the other hand, when they are elected and they need to maintain their positions, they are not necessarily thinking about the people of their ethnic groups who voted them in?**

**Interviewee A14.4:** They think about their class, the center guys.

**Interviewer 14.5: So a Luo president would get voted in by the Luo people, but when he makes decisions, he will only be thinking about the highest percentage of the Luo?**

**Interviewee A14.5:** Yes, that is it. That is why the poverty will never change and that is why there is need for –it is not just about governance- we need a very defining ideology and commitment; for example, if you sort out the equality issue in Kenya,

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you have sorted out everything else. If resources were given down to the people through devolution, nobody would really care about ethnicity. There is a model there that we were trying, the so-called CDF [Community Development Funds], believe you me that thing it tries to operate on devolution principles, but the fact is that it lacks the power that comes with the resources; it is a model for devolution of funds, 2 % [of the GNP] that is being directed to the constituencies, to their members of parliament who superintend on it; and that is one of the challenges, because he creates his own kingdom and chooses whoever people are to sit in the committee and decide which projects to fund. It is being reviewed, but it is not being done very well. That is the best next thing that Kenya has done in terms of getting down there to the people and decentralizing.

Another thing that people have been writing about is that exclusion pushes people back to their communities; if you are excluded and have nowhere to belong, the best thing you can do is to go back to where you know best; so that is the culture of social security. But if we begin to look at everyone as part of the nation and therefore allow for free participation, without any condition, then you will begin seeing people evolving into a nation. For instance, the Luo for a long period of time it was almost sanctioned that they were people who would not be involved in development and for a long period of time, the Luo have just become an opposition community; everybody hates them. Most professors come from there, but in terms of development their areas are the poorest. In political they have contributed much, but it was just declared 'no development in this area' in 1964 up to now.

**Interviewer:** Okay, thank you; that was all I had, it has been great talking to you.

**Interviewee:** Okay, thank you, we hope it has been helpful.

## **CRADLE Interview**

The following is the transcription of the interview with Gilbert Onyango, Policy & Legislative Advocacy officer the CSO The CRADLE ([www.thecradle.or.ke](http://www.thecradle.or.ke)). CRADLE is the civil society focal point in the GJLOS RP and Mr. Onyango is one of

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two officers of the CSO managing CRADLE's engagement in GJLOS (BFD 3 Interview: 2). Present at the interview in the office of Mr. Onyango at the CRADLE head quarters in Nairobi on 17.09.07 were only the interviewer and the interviewed. The interview lasted 1.19.46 hours.

**Interviewer 2: So, first of all I am interested in how you have contributed to or taken part in the constitutional review process during its course?**

**Interviewee 2:** Okay, first of all I must point out that CRADLE was involved as a member of the constitutional making process in Kenya, our director was one of the people who were taking part in the constitutional process, she was one of the delegates at the Bomas. She was of course representing a constituency, and by this I mean the children. So that is why we were directly involved in that particular process although and basically we did out part in terms of providing a position, of coming up with a position with regards to our experience as relates to children's rights in Kenya.

**Interviewer 2.1: So that was how you started out.**

**Interviewee 2.1:** In the constitutional process directly, yes.

**Interviewer 2.2: So, in terms of more practical ways of trying to influence the process, how would you describe your role?**

**Interviewee 2.2:** In a practical way, at the Bomas constitutional review process, of course she was very deeply involved in the lobbying of delegates to be able to accept that the issues of children should not be part of the contentious issues, so to speak, because there is general consensus that children need more protection. It is not as contentious as the issues of political parties, as issues of women inheriting from their parents, and devolution; the more general issues. But with regard to the issues related to children, there was very general consensus that they are acceptable across the board. So, in my view, if those are non-contentious issues then they should at least pass.

**Interviewer 2.3: Okay, so you were part of the Bomas conferences, but what then after, when that ended and leading up to the referendum, and after that. Can you tell me about the ways in which you have engaged in the process later on?**

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**Interviewee 2.3:** It would be dangerous to use for us the referendum as a yardstick for whether or not the constitution was good or bad, because the referendum was held up in political intrigues and political infighting between government and opposition so that it was not about the content of the document, but went down to personalities. So in my personal assessment, the referendum process was not about the pros and cons of the constitution. With regards to issues relating to the gains that children made, I would have said that the Bomas draft was good, but of course so many other things were hidden in there that in my view, all those things that were hidden and everything lumped together meant that you either take the whole document or you do not take anything at all. If it had been in such a way that we said ‘let us vote for this portion, and we accept this portion, then let the contentious issues then be left out’, then that for me would have worked. But if you look at the referendum as a basis to say that the constitution was good or bad; that is very dangerous because again, it was about personalities, there was a government in power, there was a Raila-led process which again hijacked the whole thing.

**Interviewer 2.4:** Okay. But concerning how CRADLE has been involved in the process, have you tried different ways or strategies of seeking to affect the constitutional review process?

**Interviewee 2.4:** I will try and answer that at two levels. One, again, the document with regards to its merits was watered down by the politics. But CRADLE as an organization of course, if we look at the children’s issues alone, then we should as an organization have been pushing for the document, but of course the organization can not vote. It is the staff within the organization that went and voted. But what we have done as an organization is taking part in the GJLOS reform program and at thematic group 5, which essentially was put in place for constitutional development. Now, when the constitutional process was hijacked in Bomas by political considerations, what then came up was the desire to have review done in a different way, other than the constitution; since the constitution now was held up in other things and it has been held up until today. So now we are involved on the thematic group 5, which is reviewing all the laws of the country. Thematic group 5 of course is being convened by the Kenya Law Reform Commission. So we have looked at laws that deal with



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elections, with the CDF, issues of marriage; they are all under review and all those in a totality was divided into three groups: laws that had to be reviewed within the short term, which was from October last year to June this year; then laws in the medium term which was from July 1<sup>st</sup> going on; and then of course those that were not a matter of life and death. So now, it is a question of piecemeal reforms of the various laws within minor statutes as opposed to just lumping everything within the constitution. So to that extent, CRADLE has been involved in looking at those other laws and it is important for us to look at them separately and pick them out as to how they will contribute to the constitutional process. That is how we have been involved.

**Interviewer 2.5: So when a specific law is reviewed in thematic group 5, how does that work?**

**Interviewee 2.5:** As members of the thematic group, we take part in providing direction for the various departments, ministries and agencies that fall under the thematic group 5. Of course a department comes with its own review, laws that they want to have reviewed. So when providing directions as members of that thematic group, we go a next step and take part in the stakeholder meetings. One example is of course the issue of the children's act; the CRADLE was involved all through the review of the children's act, it is still ongoing, but we were involved in the process of collecting of – as stakeholders, because that is our area of specialization; So we went and gave our comments and participation. Then with regards to laws like the marriage laws, about a month ago, we gave our recommendations and suggestions with regards to the issues that we thought need to get addressed within the marriage laws or gender related bills. Then, with regards to for example the CDF amendment bill, which is being spearheaded by I think the Kenyan National Commission on Human Rights. There is also the freedom of information bill, which is being spearheaded the International Commission of Jurists. So we have been involved in different processes being spearheaded by different organizations. As an organization, we are spearheading the amendment of the –or coming up with a bill that will deal with the trafficking of persons in Kenya, so we have been involved at the thematic group level and also at the stakeholder meeting when people look at the nitty-gritties.

**Interviewer 2.6: So the stakeholder meetings are also within the program?**

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**Interviewee 2.6:** Yes. The thematic group funds the stakeholder meetings.

**Interviewer 2.7:** So when these different draft proposals are finished, are they the put before Parliament or is it something that is supposed to feed into the constitutional review process at some point?

**Interviewee 2.7:** What has happened is that these small amendments and review of laws, once that is done, the laws will be presented to the Attorney General, who will then push for their amendment within Parliament. Now, essentially what that then means is that whereas we are not able to get comprehensive review of the constitution, we can go ahead and do piecemeal amendments through the smaller laws. As to whether or not this will lead into the bigger constitutional process, your guess would be as good as mine because the constitutional process can go either way. I am not sure whether you will be able to get consensus on everything. One thing I know for sure is what the government in place was supporting during the review process. If it comes again with a new government next year, the ball game will change totally.

**Interviewer 2.8:** Okay. Which conditions do you think have been most important in making it possible for you to participate in the constitutional review process?

**Interviewee 2.8:** Most important is of course the democratic and peaceful atmosphere. As an organization we have been able to take part in the process because it has, though the political temperature has risen, it never gets very violent; we are seeing violent things happening in many places when it comes to that kind of processes. So that conducive atmosphere itself is something very positive, but the one thing that people need to realize is that the country is more important than individuals; individuals will come and go, but it is the institutions and the country that need to stay. It is unfortunate that in Kenya we are still not able to divorce the person from the institution. That is still a bit hazy, but if we were like the Americans who at the time were fighting for their independence, who were able to think and think far when drafting their constitution and I know very many western countries have managed to divorce the two, then I know we would be able to go far. But if we create positions for people who are there today, it is very myopic. Though despite all that, it

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has been peaceful and the government in my view have tried; but after all is said and done, they are all politicians, they are all politicians.

**Interviewer 2.9: Can you elaborate on that?**

**Interviewee 2.9:** They are all politicians. My personal view and I do not fear being criticized: I do not respect politicians, they are very dishonest people.

**Interviewer 2.10: You see the politicians as one group?**

**Interviewee 2.10:** I see politicians as one group. You can not survive in politics in Kenya if you are honest; there are very few honest and honorable people in that house today and one thing I always tell people is that our politicians are a reflection of our society in Kenya: We are gullible, we are a man-eat-man society, so that I can eat my neighbor alive, even the way we voted was just a reflection of our gullibility. We did not vote for persons, we voted in euphoria, so that what you are seeing in Parliament, what all these Parliamentarians are doing is but a reflection of the way we voted; because we did not vote in people of integrity. Our politicians are not people of integrity, they are not there to serve, they are there to serve themselves and that has permeated in all facets of our life in Kenya. We are a gullible people.

**Interviewer 11: You mentioned the more democratic and peaceful atmosphere. Has that been instrumental for CRADLE in order to make you willing to cooperate with the government in the GJLOS program?**

**Interviewee 11:** Our involvement in GJLOS was, we are the focal point for civil society organizations, as a result of a process where civil society organizations all met in 2003 and picked CRADLE to be the focal point; I think it was in March 2004. So when civil society met, they decided to pick CRADLE as a focal point and I think when people were getting involved in the GJLOS reform program, people did not know what to expect. At that time the political temperature may not have been as high, things were still a bit cool so that everyone trusted the government. You need to realize that after the elections, quite a number of civil society luminaries who were there in pre 2002 went and joined the government or went into Parliament so what that meant was that, and this is what people say, that once those luminaries went into government, the donors also seeing that decided to follow these people into government and decided to fund the government. So when you were getting involved,

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it was also like a euphoria where people were saying ‘oh, this is a government you can work with, so we need to change our style’ and people felt that probably there was no need for checks and balances against the government, because this was a government what was perceived to be pro the people. But again, as things changed, as time went by, the true face of people started coming out. Now was the civil society prepared to deal with the two faces of those people? I do not think so. We have seen scams, we have seen what the parliamentarians are doing and all those things, but are we able to deal with them? Probably we are not.

**Interviewer 2.11: It sounds like your role has changed since the beginning where you worked with the government?**

**Interviewee 2.11:** Yes, in the beginning we were straight bedfellows, so to speak, and we thought that we could work with the government in trying to improve everything for Kenyans and I think it is with that background that even civil society decided ‘yes, let us get ourselves involved in the GJLOS reform program’. But as to whether or not that is the reality today, it is another thing all together.

**Interviewer 2.12: So what is the situation like now?**

**Interviewee 2.12:** Civil society has gone back to reevaluate and one of the biggest questions that is bothering civil society now is what does GJLOS portend to civil society organization? What does our involvement in the GJLOS mean for the existence of civil society and for providing checks and balances to the government, to the executive, to the parliamentarians? So civil society has gone back, has taken a step back and is very cautious in its involvement with the GJLOS reform program and that is rather evident. One thing that everyone is quite wary of is the KJAS, which was signed with the western governments and the government of Kenya. Now everyone is quite suspicious of what that will mean; does it mean that civil society will be receiving its funds from government or through government: what does it portend? And I am speaking from what I hear from people, of course there was an article that was in the papers on Sunday with regard to the survival of civil society, in the Nation or the Standard, about NGOs and how they will relate to government. Everyone is being very cautious and unless that is clarified –because in that article the Danish ambassador said that the KJAS will not affect funding to the civil society –

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but you need to realize that immediately after the elections, funding moved from civil society to government. So of course, whether we like it or not, civil society at some point will have to be affected; but again, these are sentiments that are aired by people out there as members of the civil society and it is a major concern and that is why we are treading cautiously and unless that issue is addressed squarely, then the civil society involvement in GJLOS will be very cautious.

**Interviewer 2.13: So is CRADLE currently still involved in the thematic group 5?**

**Interviewee 2.13:** We are involved in the entire GJLOS reform program in all capacity. One would even think that we are probably a government agency because we are there right from the very top, at the TCC level, the only place where we do not sit is the inter ministerial or agency steering committee. But immediately after that, we are there as a civil society focal point we sit in the thematic groups, we sit as members of reference groups, and we have contributed as much in the entire reform program. Sometimes capacity may have been a challenge, but that has been overcome with time because even the MDAs were not very well aware of the GJLOS reform program, but we have enhanced our capacity to be able to take part in the GJLOS.

**Interviewer 2.14: I have heard that the participation of civil society, as you also mentioned, in the GJLOS has been wanting. Is that also reflected in CRADLE's support?**

**Interviewee 2.14:** I think with regard to CRADLE our participation has not gone down. I would put our involvement in the GJLOS reform program to the commitment by the MDAs to be part of the program. Because, and I am being very critical here, when the GJLOS came, the police thought it was about purchase of vehicles, the judiciary thought it was about purchase of computers, and some other people thought that it was about attending workshops. Now, that was under the STPPs, which was the initial stage. Now when the real content of reform, when the real reform was hitting the road with the mid-term strategy, all these people started taking a back seat, so that whoever was convening thematic group 3 does not do so anymore; that is the judiciary, we sit as members of thematic group 3, but it is almost a year and a half since we were called for a thematic group meeting. Does that mean that we are not

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interested in going? No, we are, we want to take part in thematic group 3, but we are not called. Nothing is going on. Does that mean that we have reduced our participation? No, we are not being called.

### **Interviewer 2.15: What about thematic group 5?**

**Interviewee 2.15:** Thematic group 5 is one of the best. They are serious about their work. It is ongoing and in thematic group 2 we are there. But again, it is questionable whether or not we have been asked for a meeting this year; maybe one or two and the question is as to what is happening there. In thematic group 6 it has about a year since we were called for a meeting. The other one, thematic group 4 it is almost also a year and that one is under the office of the president. So our involvement has been reduced because we are not being called for the thematic group meetings. However, even if we go for those thematic group meetings, which we try our best to attend, there is this feeling that sometimes, government tends to look at civil society as spoilers, because our role of course is to question some of those things; there was a time where we went to one of the meetings and these guys had lined up workshops for the whole year. Now, of course you ask ‘why do you want to line up work shops for the whole year?’ –Then somebody looks at you like ‘what, is this your business’. So people were not too comfortable; and even the program coordination office would tell you that they were questioning ‘how do you line work shops up for the whole year, at what time will you get to implement?’ So people thought that reform was about workshops, about purchase of cars, computers; but when we got to the real reform, everyone has taken a back seat. The police are not reforming, they have refused. They are not about to reform. The judiciary is not about to reform. And that you can get from anywhere. But our involvement in those thematic groups that are working: we are there. The other thing is that we are not given an opportunity to input into the work plans. You are brought a document and told that ‘okay, here we want the thematic group to pass this work plan for 2007/2008’ and you look at it and of course you can not question something there, because it is already there. The time to question was at the point where it was being drawn and there is no shortage of civil society organizations that can take part in a process when they are doing the work

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plans. So when you go to a thematic group stage meeting, you are expected to look at the work plan which is quite thick and you have probably just seen it there.

**Interviewer 2.16: So much of the decision making also in thematic group 5 actually takes place before meetings or outside?**

**Interviewee 2.16:** Actually, thematic group 5 has done a good job, I would not be too critical of thematic group 5, but generally much of the decision making is done elsewhere so that the thematic group is perceived to be the place where there would be that peer review process, there would be that process where people ask those difficult questions; but you are not given that time. So the person who plays that role is basically the program coordination office. But you see, that is what they do on a day to day; that is their work. But for me, it is something over and above from what I do, so my contribution, unless I do solely GJLOS work, will be very limited. Having said that, civil society involvement in GJLOS has been hampered also by the fact that we are not supported to do that work. There is what we have been dancing around, which is called the NSA facility, where civil society was supposed to be given money to get involved in the GJLOS reform program. But that has not taken off, it has been a waltzing Mathilda kind of thing; we are just dancing and blaming each other.

**Interviewer 12.1: So the actual funding for civil society around these issues has not kicked off?**

**Interviewee 12.1:** Direct funding for our involvement in is not there so that I know that I am a program officer in charge of GJLOS related issues, it is not there. So that we know that my activities are being funded specifically by GJLOS, it has not been there.

**Interviewer 12.2: But there is funding from donors to civil society for some of these issues?**

**Interviewee 12.2:** Yes, some do that; but it is not coming through the program. Very few, it is usually -like now, we are waiting for funds to undertake a work shop on trafficking of persons; that is coming from the program and that is why I say very few, because the amount of work we do is so much in terms of reform, because civil society is about reform and our argument is that the civil society reform agenda is a lot bigger than the GJLOS. But donors give money to civil society organizations to

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take part in the GJLOS reform program. Now, that was there, but I can not speak with certainty as to whether or not it is still going on, because of course I do not know what all the organizations are getting.

**Interviewer 2.17:** Okay. Have there been any specific principles or considerations that have guided you in engaging in the review process?

**Interviewee 2.17:** There are not any principles that have been developed consciously, nothing written. Of course other than of the usual role that civil society plays of providing checks and balances to government. With regard to GJLOS, I would not say that there is something very specific that has been put in place; other than the usual.

**Interviewer 1:** I am also interested in what you perceive to be the essence of the constitutional reform process in terms of the most central topics of reform from your point of view?

**Interviewee 1:** Of course, a new constitutional dispensation will supposedly deal with a lot of our problems and the importance of a new constitution can not be gainsaid; having said that, if at all constitution making would be divorced from the day to day politics of this country, then we would probably have one of the best constitutions in the world. But of course again, that is impossible. You can not say that we are going to develop a constitution that will take effect in 20 years time, so of course, the importance of a constitution is there, we have a constitution that was drafted in 1963 and probably has been amended once, twice or three times. But the realities of the day dictate that now, it is about time that it was looked at from a fresh. But our own selfish and myopic political interests have come in to put bade to some of those efforts. I am of the school of thought that certain provisions of the constitution can be staggered for it to make sense, let it be staggered and let us say 'okay, fine some of these things will take effect in 10-15 years after all these guys have gone'; because they will not be there in 15 years, very few.

**Interviewer 1.1:** So which more specific areas of the constitutional review do you see as the most important?

**Interviewee 1.1:** There is not single one that is more important than the other, they are all important. But I must point out that even in the zeal of having a wonderful



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document, too much was put in there. A constitution should just guide, let the other issues be dealt with in substantive law. A constitution should not be used to run my house, for example. There were so many things that were being put in there, that did not need to be there; too much detail. Some of them could very easily be dealt with by an act of Parliament and maybe that is where thematic group 5 now comes in: dealing with the issues through the act of Parliament, amending the laws through various acts of parliament. Then you leave the constitution to deal with very, very specific things that cut across the whole country.

**Interviewer 1.2: In this connection, how do you see the link between the GJLOS program in terms of its contribution to constitutional development and then the wider constitutional review process?**

**Interviewee 1.2:** The role of GJLOS is there; it is big, because GJLOS seeks to look at all the institutions within that particular sector, so it can not be downplayed. GJLOS of course, would provide more space for the Kenyans; it has tried, we are still not yet there. It will try to provide more space for Kenyans and push for better governance and accountability from our leaders. So the role of GJLOS is quite big and it is there; but again, you can not just reform the governance, justice, law and order sector and leave the others lagging behind, it is a wholesome reform agenda.

**Interviewer 1.3: Okay... I am wondering if your perception of the role of the GJLOS program in this connection has changed over the process? I read for example that the thematic group on constitutional development began at some point in 2005 to more proactively try to provide some progress.**

**Interviewee 1.3:** Yes, of course, thematic group 5 was for constitutional development, so when that failed, that is when it started now dealing with other laws. Because of course we were not going to just close it down; it had a role to play. However, sometimes the review of laws gets caught up in politics. I will give you another example: the amendments to the ECK bill or act get caught up in so much politics; the electoral boundaries, we want to review those things, but there is politics involved; amendments to criminalize hate speech, for example, which we were pushing for in thematic group 5 was thrown out in Parliament and in my view that is something very positive, we need to be able to hold someone who is spreading hatred

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to account; but the parliamentarians threw it out. So the role of thematic group 5 sometimes is held hostage by so many factors beyond its own control and that happens everywhere.

**Interviewer 1.4: So in that sense it has been very difficult for that thematic group to actually get to –**

**Interviewee 1.4:** Trust me, it is not easy and I really sympathize with the convener because sometimes the intention may be good, but the other people do not see the good intention.

**Interviewer 1.5: So the problems really occur when it feeds into the parliamentary system?**

**Interviewee 1.5:** Yes, parliamentary and political system. The politicians tend to hold everything hostage and they probably think they have a monopoly of knowledge and everything; they do not, they are a useless bunch of people in my view. I wish we could get better politicians. I have very strong views about them. You can not have out of 210 people only 9 people passing a law, that is [inaudible word]. I wish I could get an opportunity to tell them, but I guess they have heard it all and they do not care. But I think for once, this coming elections will not be euphoria and I like the way the politicians are saying ‘we will vote for this person as president, but for the member of Parliament, let us decide’; last time it was all euphoria, if you were voting Rainbow, it was Rainbow all the way down. But I do not think that will happen this time, which is good for democracy; because euphoria tends to bring in undesirable elements.

**Interviewer 3: Have there been any situations during the constitutional review in which you have reconsidered your support to or participation in the process?**

**Interviewee 3:** At personal levels, yes. On that I can only speak personally. Organization level, everything was working for us. But at personal levels of course you always have to reconsider... You must have a personal position despite everything.

**Interviewer 3.1: I could imagine for example that it could be very frustrating sitting, working in thematic group 5 and then when the draft is prepared, it does not get any further.**

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**Interviewee 3.1:** Yes, those are some of the realities and you need to realize that the role of thematic group 5 had to change very fast and move from constitutional development, because that was not practically achievable under thematic group 5. So the group had to reinvent itself almost immediately. The idea was good, but there was not good will.

**Interviewer 4:** Okay. I am also interested in how the participation of CRADLE in the constitutional reform process relates to the other activities of the organization?

**Interviewee 4:** As an organization our participation in the review process was to ensure that the issues of children take, not necessarily center stage, but are kept within the public domain and within the needs or requirements of what the delegates would otherwise consider important. So if our role was to ensure that we ascertained that children's issues remained key to agenda, then of course we achieved that; because today children's issues are not contentious, even as we speak right now.

I do not know whether it is possible, I do not know how it has been done in other countries, if at all we would have a referendum on the non-contentious issues first of all; that would be a very good step forward. Now, the issue is which are contentious issues and which are not, because people will haggle for a hundred years on that.

**Interviewer 5:** I have been reading the different reviews that are available on GJLOS, and I have been wondering how it has been decided which members or organizations from civil society that can participate in thematic group 5?

**Interviewee 5:** The entry into thematic groups is one of the biggest challenges because there is no specific person who works as a gate keeper, even we do not act as gate keepers. We do not stop anybody from entering in to the GJLOS reform program; if you want to, just walk in. The door is open. But one of the biggest challenges is capacity; as to whether or not people have the capacity to appreciate the import of the GJLOS RP, that is another thing all together. It takes time and consistent involvement in GJLOS for you to even start appreciating what it is all about and do not be cheated; it is a lot of work.

**Interviewer 12:** In that connection, I am interested in how your participation in the review process has been affected by your access to recourses?

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**Interviewee 12:** Well, I am a senior program officer here, and in essence I run at least two programs almost single-handedly with my colleague. Coordinating civil society within the GJLOS if everything was in full speed and full gear, that alone is bigger than this organization; just the sheer amount of work, doing what PCO is doing, but for civil society. It is a lot of work. Who pays me for the extra hours? Nobody. So I do it more as a question of charity; I contribute my time to the reform program.

**Interviewer 12.3:** So as it is now, as the program is not in full speed, as you say, it is barely possible but if it was in full speed it would not be?

**Interviewee 12.3:** If it was in full speed, it is a lot of work, a lot, a lot of work. Because you have to be aligned to what is going on everywhere and you have to be in touch with the program coordination office, you have to be in touch with civil society organizations also, arranging work shops, making sure that – I mean, in my head I have a rough idea of what I want civil society organizations to do when it comes to getting involved in the GJLOS RP. I fairly have a clear sense of where we should go. But as to whether or not we have been provided with the kind of support to be able to do that, unfortunately that has not been forthcoming. So now, what we have been reduced to doing is disseminating whatever information we get from the program coordination office and when we are attending the meetings. So whenever there is something that we need to communicate or deal with urgently, we do that. It comes to us and we bounce it off, because we have a mailing list; that we do and that is never a problem, organizing meetings for them. But sometimes, when they are fast and furious, it gets very, very difficult because we have to fit it within the other things that we are doing.

**Interviewer 7:** Okay, for something different. Can you think of any situations in which you think that the present constitutional framework has influenced the course of the constitutional review process?

**Interviewee 7:** Well, to tell you very honestly, no. I can not think of any from the top of my head.

**Interviewer 8:** Okay, let us move on. Have there been any changes in the institutional environment which you feel have affected the ways in which you have been able to engage in the constitutional review process?

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**Interviewee 8:** There has been greater openness, but that is probably as far as it goes and more cooperation between the agencies and for example our organization but maybe that is just as far as it goes. As to whether or not we can access –the greatest advantage is that sometimes now we are able to make policy recommendations at the very highest level and those are open to us and the ministries, the agencies, some of them are more receptive. But is just about as far as it goes; because government sometimes in its very nature is a bit slow to change, but slowly I guess it will happen, it will improve.

**Interviewer 8.1:** So in a sense you feel that GJLOS has improved your possibilities for advocacy work?

**Interviewee 8.1:** It has, I would lie if I said it did not. It has, because we are able to influence things and push for reform in the board room where everybody else is sitting.

**Interviewer 8.2:** Also in connection with the constitution?

**Interviewee 8.2:** Yes, we are able to do that and not just get things thrown at us like it will be thrown at the general public, so we are able to make out input there.

**Interviewer 8.3:** Is that in the thematic group or is that on a higher level?

**Interviewee 8.3:** All levels, I would say at all levels and I would say at all levels, because we sit at all levels. But again, the best place is during stakeholder meetings, we are able to input at stakeholder meetings and that is where now the actual work is done.

**Interviewer 8.4:** And the views that you present, are they taken in?

**Interviewee 8.4:** Yes, there are instances where they are taken in, but of course again even in government you have reformers, pro reform people and people who are anti reform. So, if you get somebody who is pro reform, then they will be very forward thinking in terms of accepting the recommendations that we put forward. Those that are anti reform will probably not even want to listen. There are people who do not even want to give us time and date, but there are also people who are very receptive.

**Interviewer 8.5:** Are there also such anti reformist people within the thematic group on constitutional development?

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**Interviewee 8.5:** There it is okay, as I said thematic group 5 is special. That is a very positive example. But thematic group 4 which deals with the office of the president and internal security and the police, I can not say as much.

**Interviewer 14:** Okay. Now, we have talked about Kenyan politicians. If you take for example Kibaki, can you think of any instances in which it has been suspected that he has been trying to gain the support of groups outside of government through means of horse trading?

**Interviewee 14:** Oh that happens. That has happened, yes. Immediately after the elections, he poached very many people from KANU and effectively killed the opposition so that it was just an opposition in paper. So that happens: that happens. Yesterday's announcement; it has never happened in the world that the leader of the official opposition supports the incumbent. That takes away the adversarial system for wanting a better world; that was wrong. But you need to also look at it in terms of the bigger picture and I get amused when one group calls the other tribalists; they are all tribalists, all of them. One says that the other is dividing the groups into tribal lines and the other group, they themselves are doing the same thing; both sides. So yes, it has been used to favor one particular group over the other and in my view, it is not proper.

**Interviewer 14.1:** So there are some specific links to different ethnic groups that play a big part?

**Interviewee 14.1:** Yes, it is about ethnic mathematics; if you look at the ODM nomination that picked Raila, it was about tribal math. Raila brings in this tribe, Ruto brings in this tribe, some of the others bring in other tribes, and then you have the Masaaais on the other side: 'This person is supposed to bring this group'. Yesterday it was the same thing, there was no difference and it is a shame that the initial group can call yesterday's group tribalists, and yesterday's group call the initial group tribalists; it does not make sense. They are dishonest, totally dishonest. Then ODM-K, you look at the setup, you realize that the people who were supporting him were basically people from his own backyard.

**Interviewer 9:** So in that sense informal relations play a big part.

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**Interviewee 9:** Yes, and I think –one thing that someone was telling me last week was that it is about time, we as the country started recognizing our tribal differences if we are to make it, because these things are there. Look at the American politics, for example. The Hispanics, they are recognized there, and of course it may not necessarily be tribal in our sense, but the Americans have deliberately recognized their diversity and that is the way to go. Indians, they have recognized their differences and their diversity, and they have accepted it. Maybe it is about time, that we do that; why do we hide behind all this? The argument may be that one tribe will be –that the small tribes will be overrun, that is neither here nor there. In India, the president always comes from a minority, those are the checks and balances.

**Interviewer 9.1:** **Is this also because people vote more along ethnic lines than based in issues, so when you vote in your representative, it is a way of trying to make sure that you will get something in return?**

**Interviewee 9.1:** For the longest time, Kenyans have voted based on tribe, but for once it is a mixture of issue and tribe. I do not think the 2002 elections were something that you would say would be a point of regard to Kenyan voting patterns, because that was a protest vote, so to speak, against Moi. But this coming elections, is mainly going to be about issues and also secondarily about tribe. Issue may be subsumed by tribe or vice versa, because if I have an issue that I am fronting for, then I will need the tribes to back me; but the tribes may not necessarily look at the issue, for them it will be the tribe first, ‘let us vote as a tribe, as a block’. The issue comes, and they have tried to make it an issue based elections, comes from the 6.2 % annual growth which we have received or we have seen in the last two years vis-à-vis the promise of 10 % growth from whichever side. So that ‘if you let me continue, I am going to give you 10 %’ and the other one says that ‘if you elect me, I am going to give you 10 %’, so for once I am seeing issue based politics is coming up; but you can not negate the tribal aspect of it and issue based politics is only at the top, because it is either Kibaki, Kalonzo or Raila. They are the ones that are talking issue. But they need tribal backing, so at the end of the day, there is a tribal element that also comes up.

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**Interviewer 9.2: So they may be talking issues, but the way that people vote is still tribalized?**

**Interviewee 9.2:** It is still tribal at the end of the day, it will still be tribal. Uhuru Kenyatta's decision to move is both tribal and because his party was about to die and he realized that if he stood against Kibaki, he probably would not have been reelected as a member of parliament. It was tribal to that extent and it was about survival.

**Interviewer 9.3: If these issues that these three are discussing are not really based upon what would be in the interest of the voters that they think will vote for them necessarily, you could imagine that they would be connected to some other interests?**

**Interviewee 9.3:** Of course, there are other interests connected to all this and one thing that people fail to realize is that even Moi's support, for example, to Kibaki; there is a lot more to it than meets the eye. Moi's support to Uhuru, there is a lot more to it that people do not know.

**Interviewer 9.4: Okay... Could you try to elaborate on that?**

**Interviewee 9.4:** I would say so because of course, after independence, there was a small clique of people that grabbed a lot of stuff in Kenya and this went on until about 1988, probably 1990, where people have [inaudible word] so much wealth in such a short span of time period. The Kenyatta family, it is an open secret, they own districts, land the size of districts. I do not have to be a rocket scientist to realize that I need to protect that property and how can I do it? I do it through manipulating things in Parliament. Of course, Moi did a good job of trying to protect Kenyatta's interests; they were the people who were awake during the time of independence, so when everybody else was sleeping, they were a bit sharper than all the rest of us. So when Moi comes in, he protects Kenyatta's interest and it seems it is time to give back, so he says 'let Kenyatta come in', because he does not trust anybody else; because if somebody else comes, it might mean that everything would go back to the state. So of course he needs someone to protect him and that is why he decides to support Kenyatta in 2002. But Kibaki comes in and Kibaki lamberts him, then all of a sudden they start having secret meetings; it is a small clique of people. Then at some point they decide 'okay what we do is that you protect me, and I will talk to Uhuru to



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support you'. It is all about that. Everybody knows that if someone else comes in, he will more or less order investigations into where Moi may have gotten his wealth. If you see the people who are fronting, even in Parliament the other day, the people who were fighting against the amendment of the Kenya Anticorruption Commission Law, there was one Gideon Moi, I do not have to be a rocket scientist to know what his interest was. There was Nicholas Biwote, I do not have to be a rocket scientist to be able to see through the smokescreen of why they do not want people to investigate crimes prior to 2003. These are guys who have been investigated for so many years. It is there for Kenyans to see.

**Interviewer 14.2: So the corruption that has been ongoing also under Kibaki is an indicator of what is going on?**

**Interviewee 14.2:** Precisely; and the fear is that if at all it goes unchecked, we will be fleeced naked from January next year unless something is done about these guys who are there. But having said that, it is not to say that Raila and his group or Kilonzo or his group is clean, they are not; all those guys are a bunch of thieves. It is just deals upon deals, upon deals.

**Interviewer: That was actually all I had hoped to discuss with you. Do you have anything else that you would like to add?**

**Interviewee:** I can not think of anything from the top of my head. But I honestly do not think that we will get a new constitutional dispensation.

**Interviewer 14.3: So when Martha Karua is saying that there might be small amendments before the elections like there was in 1997, you do not think it is likely to happen?**

**Interviewee 14.3:** Piecemeal amendments; that will happen, definitely. But piecemeal amendments, who do they suit? The 220 people who are in Parliament right now; it does not suit the ordinary Kenyan. It is about their own small clique of interest and their own boardroom deals. But otherwise, in terms of comprehensive reform, very unlikely; at least in this lifetime. We will go on like this for a very long time. What the politicians may want now, come tomorrow when the tables turn, they may not want it. I can not wait to see who will win the next elections to see how tables will turn.

**Interviewer 14.4:** Yes, that will be very interesting.

**Interviewee 14.4:** Yes, very interesting.

## **CREAW Interview**

The following is the transcription of the interview with Ann W. Njogu, Executive Director of the CSO Centre for Rights Education and Awareness (CREAW). The organization has been active in the constitutional reform movement both prior to and after 2002, while Njogu personally has been a delegate at Bomas as well as a participant in the IPCC of 2006. The interview took place at the interviewee's office at the organization's head quarter in Nairobi on 14.09.07 and present was only the interviewee and the interviewer; the interview was of a duration of 1.07.13 hours.

**Interviewer 1:** First of all, I am interested in how you have contributed to or taken part in the constitutional reform process in practice during its course?

**Officer 1:** Well, I have participated at different levels. On the very initial level, I was one of the delegates that attended the constitutional conference at Bomas. I was representing the professional categories, I am a board member of the Association of Professional Societies in East Africa (APSEA), and I was representing their interest as a profession –we had different categories, so there were the professionals, there were the women, the district delegates, the trade unions; there were different categories of delegates. So in Bomas, I was there representing the interests of the professionals.

**Interviewer 1.1:** Okay, so that was not as a representative of CREAW per se?

**Officer 1.1:** No, that was in the Bomas process, so even if I worked with CREAW, I had been nominated by APSEA. I am sure you know what happened to the Bomas process and it did not go because of the different dynamics that arose. Subsequently, there was the hijacking of the process by the –after the government walked out, there were various negotiations, and then where the draft was taken by a few cliques to Kilifi with the Attorney General and some of the provisions of Bomas where either violated or were...They tried to make various alterations to the Bomas draft. We all

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know what happened with that; when it came back to the referendum, where it was defeated. During the process leading up to the Bomas process, I was one of the professionals who went around the country giving civic awareness on the contents of the draft, and also bringing out the negative provisions. At a personal level, I was clearly against the draft because I felt that it was against the spirit of the people and a few people can not go and pretend to make a constitution for the people of Kenya and try to push it down their throats. On a more substantial level, there was the feeling that certain constitutional principles had not been adhered to and the Wako draft, as we called it, was fundamentally flawed. There were very many contradictions in the draft, there were very many claw back provisions so that certain rights had been given in one section and taken away in the other.

**Interviewer 1.2: -As it is in the current constitution?**

**Officer 1.2:** As it is in the current constitution; and clearly one of the reasons why Kenyans wanted a new constitution was so that they could remove all those claw back provisions and ensure that the supreme law of the land guaranteed the various rights and freedoms of Kenyans. Number two, there were certain provisions that I as a woman –I am a human rights advocate with a bias for women rights- thought would be very grave for the purposes of the interests of women. For example in the first chapter of ‘culture’, culture was given a very prominent role. I come from the school of thought that we must celebrate our culture, we must celebrate our diversity; culture is our identity and all that. However, I do recognize that culture is not static and that it keeps evolving. Hence, the cultural practices that are not adding any value to the lives of women should be done away with. So, I felt really strongly about some of the provisions in the Wako draft tended to give culture a more superior position, when it comes to the application of women rights. For example, when it came to inheritance, the draft constitution did indicate that both men and women had a right to inherit property. But because of the provision on culture, which recognized the coming into force of certain courts, like the traditional courts to determine certain issues emanating from cultural practices it meant that whereas I had a right to inherit property, if there was a dispute of whether I should inherit or not between me and my brother or anyone else who could be contesting, it meant that I would have to subject

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myself to a traditional court at the first instance. The traditional courts would be coming from the perspective in my culture, I come from the Kikuyu community, women are not supposed to inherit property because they are meant to get married and never mind that there might not be property, but as opposed to go and inherit the husbands property –and they may also remain unmarried. If I subject myself to a traditional court, immediately I lose my rights of inheritance as guaranteed in the constitution. –There were very many flaws, there were very many things that did not run; the architecture, the design, there was a lot of...There were many issues that stood out as points of weakness; in a constitutional process I think the weakest link can outdo the strongest parts and dismantle the entire chain. So, having defeated the draft at the referendum, the president appointed the committee of eminent persons which came up with a very good paper, I am sure that you have come across it, and in that paper they said that the President did hold the key to unlock the constitutional review process from the deadlock. Subsequently, through the minister of justice, he directed that there be the setting up of a multi sectoral forum for constitutional review. Now, at the multisectoral committee, it was tied at two levels, at the forum which was the bigger forum of about 80 people, and then there was the committee, which was sort of like the steering committee of about 40 people. I was nominated as a co-chair of that process and of course I was representing the civil society interest. There was Dalmas Otieno, the one I have asked you to talk to, and there was a minister as well as bishop representing the religious interests. At that process, we came up with the principles that were going to govern the process, as well as the take-home; there were those clamoring for minimum reforms, the government was pertaining that it was clamoring for comprehensive reform. But there were those who were saying that regardless of which camp you came from, there had to be some essential reforms to the current constitution to allow them the comprehensive reforms. So we came up with what we called the November package and that was basically taking on board both interests. It took care of the interests of those who wanted minimum reforms, for purposes of ensuring that we have a free and fair election this year. But it also entrenched a roadmap that would have seen us achieve a comprehensive constitutional review process by the end of September this year and

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we also provided for a referendum law that would have ensured that people would be given the opportunity to participate at a referendum to vote on any draft. Unfortunately, we also came up with the question of affirmative action for women, because in the disadvantaged groups, we felt that being an election year –that was last November- this year, it was important that we also dealt with that issue prior to the elections so that the women constituencies and the disadvantaged could have an opportunity to put together their constituencies for purposes of participating against the provisions. Unfortunately, the government has not had the political will to deliver a new constitution and that is why it has been playing games with the people in that the November package was negotiated, the government side came and said there was nothing like a negotiated package and threw the whole process into a disarray. That is how my fellow co-chairs and a section of political players walked out of the process, rendering that process to stall again. Yet, it would have been a process that would have delivered a new constitution for the people of this country by September this year. It was an ambitious roadmap, but it was doable. After that, in the beginning of this year...

**Interviewer 1.3: So you were there as a representative of civil society and also of CREAM?**

**Officer 1.3:** Yes, because it was through CREAM that I had gotten to participate in what we call the... We got together as a team of civil society groups in a team. We did not get invited, we actually had to push through for our participation because what happened is that when the government started that process, it said that it recognized that the people who were the biggest problem were the political players, but it was not completely honest because the politicians can not purport to make a constitution for the people of this country. We felt that it was just a way of the government and the political class –when it comes to interests in this country, when it comes to self interest, the political class is always united against the people of Kenya. Now, when it comes to a process like the constitutional review, you can imagine the political class –even if they be in government or in opposition- coming together and our country's history is afloat with examples of how the political class always cuts deals when it comes to negotiating issues of power. So, as the civil society, we felt

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that we could not allow that to happen and whereas the political class were recognizing the various political parties as key players, we felt that we needed to be involved as the civil society because we feel strongly that we represent the voice of the people in as much as the politicians will argue that they are the elected representatives of the people. But our history is fraught with...We have been able to demystify them, show them for what they really are; that as soon as they are elected to Parliament, they stop representing the interests of the people who elected them and start representing their own interest unlike civil society. So we formed what was known as the CCRC as a team that was negotiating for the civil society interest. Initially, we actually had to make our presentations to the minister of justice so that we could be included and we had to advocate and lobby, so we got in through that.

**Interviewer 1.4: So that was CREAM and who else?**

**Officer 1.4:** CREAM and NCC –about 46 civil society organizations came together under what we called the CCRC for constitutional change.

**Interviewer 1.5: So that was a way of changing your strategy to make sure that the process stayed on course?**

**Officer 1.5:** Yes. So when that process was thrown into disarray by the Government, coming again to sacrifice what had been negotiated at the narrow altar of self interest, civil society started having conversations at the beginning of the year: How can we bring back the process, back onto its feet? And a lobby group was formed that joined together members of the civil society and members of the opposition, because we felt that we shared a common interest with the opposition then, because it was the government that had pulled out of the process. But that did not mean that our interests had been fulfilled and we in coming together with the opposition, it was basically for purposes of getting the process back and that was how the lobby group bringing together civil society and members of the opposition. This group started having rallies across the country and subsequently merged with members of the multi-sectoral review committee to form what was known as the joint dialogue committee on constitutional reform, which again nominated me as co-chair of the process. This group then started having very serious deliberations, where we had various principles that were governing our conversations. Of course, we had the key constitutional

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principles that we wanted to have enshrined in the process: inclusiveness, issues of respect for the rule of law, issues of accountability –we set out all the principles. One of the key principles that had been very, very critical in the multi-sectoral review committee that had broad the different teams, those advocating for minimum reforms and comprehensive reforms, was what we called the concurrence principle. The concurrence principle meant that we would honor the interests of those clamoring for minimum reforms and at the same time honor the interests of those clamoring for comprehensive reforms. We would have the two in a concurrent process so this principle was very important for us; and we actually brought in the joint dialogue forum (which had the joint dialogue committee as the steering committee) we brought quite a number of the principles to the process because constitutional principles the world over are the same and we felt that it was important that our talks –considering that the political class has always taken civil society for a ride- from the beginning would have principles governing the process. Now, when the government side saw that we were gaining a lot of support from the members of civil society –the rest of the public, they decided that, the president decided to embrace dialogue. Again, taking the wind out of our sail, because it was because of the fact that they had said that they were not interested in dialoguing that we had formed the joint dialogue forum. Now, we were clear that the government was only indicating that it was interested in dialogue simply because it did not want to give the opposition any mileage; and we did advise members from the opposition not to fall for the trick, because government was not committed, it has been clear. However, unfortunately the members of the opposition in our joint dialogue committee were –as always- not guided by principle, but guided by self –they are always motivated by their own greed and for them -politicians in Kenya are ready to sacrifice the big picture for the small picture if the latter represents their immediate gratification at that moment. So when the government called for talks, we asked the opposition not to start the conversations until all the principles had been laid down. Unfortunately, and as expected, they proceeded to have conversations with government. The government said it was setting up a 13-member team to dialogue with the opposition; now, in our understanding, the government or the political class can not dialogue amongst

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themselves, the political class can not dialogue by itself about which kind of constitution to give to the Kenyans. And this is what we were telling the opposition members of our JDF: 'hold on. Before you start your talks, what are your principles?' Government clearly did not want civil society to be included because it knows that civil society is about holding it accountable and asking hard questions. And the government said 'let us talk first' –so now we were going back again to last year when the government was forming the multisectoral committee, when it said that 'first, let the political class come and talk together, then we will have the other people coming in'. We told the opposition: 'you can see clearly that we are going back one year, are you willing to be taken there? –They have come full circle, are you ready to start the second lap?' They indicated that 'we are not going to talk, we are just going to ask that you be included'. We said that 'we have a right to participate and we do not want to be included as a gimmick of tokenism. We do not want a token, you can not tell us that you are giving us our right, we have a right to participate.' Unfortunately, they went ahead and formed the committee that was chaired by the vice president on constitutional review and they asked the leader of the official opposition, Uhuru Kenyatta to be the co-chair of the process together with Moody Awori. Now, the government asked the opposition to bring, I think, 12 members so in total they had a 23-member team. Now that they had agreed on this, they decided to ask civil society to bring in six members, but if you bring six members in a team like that and you are talking about dialogue, and even if in dialogue we had agreed that one of the key rules that decisions would be arrived at after a lot of consensus building, not voting, if the political class number is 23 –because we know that in matters of self interest, we do not have an opposition, the political class is the same-then... One of the other principles we had agreed upon, the mutuality principle, was that you would have 23 representatives of civil society to include the larger civil society; the religious organizations, the trade unions, the civil society in governance and human rights –the whole umbrella of the other groups outside the political class. But they said no and that for the sake of dialogue and saving time, let us just have the conversations, just bring in your team, and we will continue the discussions. At that we said that we were disengaging in the process because one, the process lacked



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principles, which means that -even if we were to start dialoging- if 23 people say the same thing because they have sat outside and agreed, and six people are saying something else, you can only record the minority view, but the 23 have it even if there is no voting. So you will still end up in the same place –and we felt that we did not want to set ourselves up for failure and we moved out.

**Interviewer 1.6: So you did not want to rubber stamp that process?**

**Officer 1.6:** No, we did not want to be rubber stamps. Unfortunately, because of the various polarities in our country, there are two divides. There are those for reform and those against reform. Even in civil society, we have civil society for reform and civil society against reform. In the political class, we have those for reform and those against reform. Clearly, that is a divide that has emerged. Now, when our civil society had joined forces with the opposition, it was the civil society for reform. Government, on the other hand, started having conversations with the civil society against reform, where you even have the leader of the NGO Council and she is clearly totally compromised. The latter side of civil society decided that they still wanted to go to this committee that was set up by the government under the chair of the Vice President. Unfortunately, the talks collapsed because immediately that the civil society against reform got in, the opposition, which had clear issues that it wanted to push through, knew that they were outnumbered. That now that the government which had its initial 13 members, it had now brought in civil society who supported their case, thereby raising their number to 16.

**Interviewer 1.7: So the opposition that was in this committee was actually for reform?**

**Officer 1.7:** Not entirely, not entirely. But still, they had clear issues that they wanted to negotiate. But the government obviously had a bigger... You know. So, the talks collapsed because immediately that the government saw that the civil society for reform had pulled out, it also realized that there would be no more pressure on it. Because the only reason that it formed that committee was to remove the civil society pressure, the country's, the citizens' pressure for constitutional change and immediately that we pulled out, it also pulled out.

**Interviewer 1.8: So that was when the meetings stopped taking place?**

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**Officer 1.8:** Yes, they stopped taking place. So, that is where we are... The Muite parliamentary Committee on Constitutional Reform, they kind of limped towards some consensus of some bill, where they threw out issues such as affirmative action, issues that would... And basically came up with a draft which the Government to date has refused to bring to the floor of parliament for debate; because again, the commitment is not there. But we felt clearly that we did not want to be rubber stamps. If we had joined the process, we would just have been rubber stamps. Now, to date what we did, we did not jut pull out and go back and sit and cry and wait to die, no. We came out and formed what we called the people's constitutional conference, which basically brought back the power of constitutional making right to where it belongs: with the people, for the people, and about the people. Last week, we had the first meeting at which we set up the People's Constitutional Conference. Last week from 3<sup>rd</sup> of September to the 6<sup>th</sup>, we held what the called the People's Constitutional Conference at KCC. That brought about a 120 delegates from across the country, and we did not really exclude, but we felt that people must first and foremost decide what kind of constitutional draft that they wanted, then we can use it as a lobbying team. I mean, it tool for purposes of entrenching it into the law of this country, for purposes of bringing the whole infrastructure. So that is where we are at.

**Interviewer 1.9:** So you are not just basing your lobbying in the Bomas draft –I mean, you could also say that the Bomas draft had these different views from different groups across Kenya?

**Officer 1.9:** Yes, it did. In this people's conference, we were not disregarding the work that had been done in the past. In fact, we came up with this new draft constitution, adopted from the various processes: issues that were agreed upon in Bomas, issues that were agreed upon at the referendum in the Wako draft, and issues that were agreed on from the multi-sectoral committee. So this reflects cumulative work, we have not just come up with another draft. There was also a civil society process known as the national dialogue conference, which again had come up with its own draft. So this is a consolidation of all the agreed issues that have been agreed upon cumulatively. Yesterday, we were actually meeting to discuss, having looked at the draft various committees were set up, they give their critique and now, we are

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going to a retreat where we are going to find unity and clean it out. The feeling is that we must not come up with a huge document like this -we want a very, very thin, comprehensive constitution. The rest, the reason why it is so fat is that many people when they were giving their views of their history of their suffering, they were so insecure that they felt that everything must be put into the supreme law of the land. But we know that if the principles are guaranteed in the supreme law and the subsidiary legislation is put in place, their insecurities will no longer exist. But for now, we need to... -Kenyans also, before we went to Bomas and we were taking the views of the people, people were coming from a background of having really suffered under the hands of Moi and they felt that, because our draft had been amended I do not know how many times, they now wanted a new constitution that said in black and white what their rights were, even detail that are not supposed to find its way into the draft, found its way to the draft.

**Interviewer 1.10: So it got too detailed?**

**Officer 1.10:** Too detailed and when it is too detailed, then it gets many grey areas, because it is difficult... -if it is sharp, precise, concise and has a nice architecture, those rights will be secured and the subsidiary laws will operationalize those rights. So the draft that we are to come up, which is going to be the people's draft, is going to be a very thin document.

**Interviewer 2: Okay. Could you try to describe to me what you perceive to be the essence of the constitutional review process in terms of the most central topics of reform?**

**Officer 2:** For me, the most central aspects of reform ought to be, first, the recognition of the supremacy and sovereignty of the people of this country. Because in this country, we have a very warped idea: the people are said to be the servants of their leaders as opposed to the leaders being the servants of the people. But that is because we have not yet settled our constitutional question of how we want to be governed and for our leaders then to understand that that is how we want to be governed. So the critical issue that needs to be dealt with is the question of governance, what kind of governance do we want, what kind of government systems do we want. But before we even go the questions of governance, it is so important

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that we have a value system. I am not saying that we do not have one now, I am only saying that because we have never settled our value system in a document like the constitution, people do the things that they do without knowing what it is that they are infringing; that is where a public servant will steal from the public and when asked he says 'I did not steal our money, I only stole from the central kitty' –they think that the central kitty exists in a vacuum. Who has put that money in the central kitty? It is the human being who was taxed, but the public servant does not see that. He says 'Sebastian, I did not hold a knife over you and steal your wallet, so what is your problem?' So our value system of who we are as a people has never been settled. That is why it is so easy for the political class to exploit the differences in our diversity instead of celebrating our diversity in a positive way. But our ethnicity is exploited in a negative manner to really put down our various diversities and the only thing that stands up is that you are a Luo, I am a Kikuyu and that that means that we can not sit at the same table because you are an alien and I come from another world and your interests are not my interests. As opposed to having a constitutional order that recognizes that diversity as a strength to build the kind country we want to have. The other thing that must be dealt with centrally is the question of devolution, for as long as there will be inequalities in the distribution of this country's resources, it will be so easy to play out the tribal card on the tribal divide. Because when resources from the central revenue only go to enrich one tribe, then that only brings out the hatred and of the other communities and then it is very easy for someone to light the ethnicity fire and destroy the nation. Another core issue that must be settled in the constitution is the question of rights. Our current constitution has for many years taken away the very rights that it has sought to give –by claw-back provisions. Until the questions of rights are secured as one of the most critical issues in our constitution will still not be able to get out of the quagmire that we find ourselves in. Coming from recognizing that the people are the supreme power holders, to our value system, and then our rights to the question of how we will then want our government to be structured, to the questions of devolution, then the rest –issues of what kinds of structures we will be able to deliver those kinds issues. Without these issues we will not be able to go very far.

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**Interviewer 2.1: Which conditions do you see as the most important in making the constitutional review process possible in the first place?**

**Officer 2.1:** First and foremost, it was a question of resolving the process. The reason why we find ourselves in the quagmire that we are in is that we always put the kart before the donkey. So you find that people can say ‘let us first talk about contents’; but as long as the process is not secured, you will never deliver that content. So for me, we need to be able to secure the process, the road map; secure that in a timebound roadmap that has consequences if not met and that are mandatory for everyone. Having then dealt with the issue of the process, content is so easy to deal with because that can just be fitted within that process.

**Interviewer 2.2: Okay, so you are saying that this had not been the case up until now, instead the process has been dependent on different and questionable interests?**

**Officer 2.2:** Yes, that is it and the reason why we can not secure the process is due to the lack of political will. Because for us to secure the process, there must be political will to entrench that process in the current constitution. Like we did in the post 1997 process that let us up to the Bomas process; it had been secured in a structure that was time bound, unshakable and that had consequences.

**Interviewer 2.3: And it actually led to a referendum.**

**Officer 2.3:** Exactly. But having come out of that now we do not have that secured process, and we are going into an election; and in Kenya, the only time we can be put to seek accountability from our leaders is during the election process. So Parliament will be dissolved any time now, there is not any infrastructure that is going to secure the process in sight. So, Sebastian, you can come back to review your thesis in the year 2012 and you will find that, unless a miracle takes place and we have a change of government that is committed, us having this kind of conversation yet again. Our current government was elected on three key platforms: a platform of change, to deliver a new constitutional process, and to ensure zero tolerance to corruption and it has failed flat on in all three areas. We were supposed to have a new constitution within 100 days, now we are going into the elections in the fifth year without any new constitution. We had a platform of zero tolerance to corruption, and we are gong into

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an election where we have said all past cases of corruption should be forgotten. We had also talked about questions of change, we were fighting so hard to get Moi out; as we go into elections Moi is back right in. So change: zero!

**Interviewer 14.1: He is in how?**

**Officer 14.1:** He is in because he is supporting the incumbent; he has the official leader of the opposition through his party KANU. It has never happened anywhere in the world, but it has happened in Kenya: the official opposition leader had gone to endorse the incumbent, the former president Moi has endorsed the incumbent. People who were the faces of corruption are now again central in the regime. If Kibaki comes back to power, in 2008, we can forget a new constitutional dispensation, corruption is just going to be the order of the day, rule of law will go through the window, we will just go back to the... No change, no reforms, no constitutional order –we will just go back, the human rights violations will just come back!

**Interviewer 14: So if I understand you correctly, a lot of what Kibaki has been doing during his first term seems to be underlined by horse trading?**

**Officer 14:** Yes! We have broken down institutions of democracy, today the president does not have a party, unless today he is yet to announce which party he is going to run for. If you look for at the things we fought so hard for in this country, principles of multiparty democracy, he has been the chief architect of dismantling multipartyism in this country. He got into power through NARC, immediately after he got into power, he ditched NARC, and carried the formation of NARC Kenya because he did not want to be held accountable for various promises that he had made. Having then ditched NARC, he went on to poach members of opposition parties and co-opting what he has been calling the Government of National Unity. People who do not believe in the same things are the people that he sits with. People who believe in the same things that he said he believed in, are the people being thrown out.

**Interviewer 14.2: So it could seem that it is more a matter of sharing certain interests than actual political issues?**

**Officer 14.2:** Yes. It is about self interest. It is about narrow political interests; it has got nothing to do with the national political interests of this country.

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**Interviewer 4:** Okay. Can you tell me about how your participation in the constitutional reform process relates to your other activities?

**Officer 4:** CREAM's participation in the constitutional review process is guided by most of our work as a human rights organization. There are so many ills against women in this country because their rights are not enshrined in the supreme law of the land and whereas we have been lobbying for different laws to be put in place, we were key in the coming up of the sexual offenses act, we have been key in trying to get a domestic violence bill, we have been key in various subsidiary pieces of legislation into place. But the truth remains that until we secure our rights in constitution and have the subsidiary legislation operationalizing the principles of the constitution, we will just be doing 'fire fighting': different cases come up and you try get legislation into place to avoid repetition. As an organization we realized that we needed to first and foremost realize that the center was right; if the center is right, you will find that all these other things that we have been fighting will just disappear. So as an organization we know that we must have a new constitutional order and dispensation and that was how we felt that we needed to participate as an institution in the process; and that is what has been guiding our participation, we realized that no matter how much work we do on the periphery, if the center is not right, it will not matter much. So in a sense, our work in the constitutional process has not only created greater synergies into other works, but is actually seeking to anchor our various works in a central place.

**Interviewer 4.1:** Okay. Within the GJLOS Program, there is also the thematic group on constitutional development; is that a forum which you have been engaging in?

**Officer 4.1:** Yes. But I hope you know that there is nothing like the GJLOS in real practice. Because, as far as I am concerned, GJLOS is about reform in the public sector but without political will, GJLOS is going nowhere. A couple of months ago, I think it was, I together with members of civil society was protesting against what we called the excesses of Parliament because they were seeking to give themselves a gratuity as they leave Parliament; never mind that Parliament is actually the best paid in Africa and even in some of the developed countries, the Parliamentarians do not

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take home that kind of salary. Never mind that our parliamentarians work the least number of hours. They do not work on Monday, they work half a day on Tuesday, I think they work a full day on Wednesday, they work a half day on Thursday, and on Friday they do not work. Now, if you were to go through the handset and see the kind of people who turn up for any parliamentary process, the House is perpetually without quorum; perpetually without quorum. Some members of Parliament have been on record saying that they actually go in for one hour in a month or a week just to put in an appearance. So we felt that a gratuity would not be in order, because these people have a pension, and the question we were asking was 'can you have a pension as well as a gratuity?' So, we were protesting for moral, legal, and leadership reasons. A peaceful protest, but we got arrested. We were beaten. We were tear-gassed. We were taken to police custody. It was end of July, beginning of August. There was so much police intolerance.

### **Interview 4.2: So that is how far democracy has come?**

**Officer 4.2:** Thank you! –We have been thinking that we have expanded spaces. There is no expanded democratic space. In fact, all those games we have been thinking about, they do not exist. That experience exposed the myth that we have democratic space; that also exposed the myth that there have been reforms in the public service. Take for example the police, which is one of the key institutions of reform under the GJLOS. The police beat us, they intimidated us. One of my colleagues who identified the policeman who had boxed him in the stomach, he asked him at the police station: 'why did you beat me when I was not resisting arrest?' and the police man told him in front of all of us: 'next time, I will shoot you.' And you want to tell me there has been reform in the police? There has been none. When we went to the police cells, I was in a police cell, and they are shared. Previously, I used to receive comments from my clients who come to CREAM that they got raped in prison cells, and I have always asked 'how', because if you are a woman and you are arrested, you are supposed to go into a woman's cell and the other way around. But my experience is that prison cells are shared; I was in a cell where the male convicts kept coming to my cell, and I was alone. Anybody with the wrong kind of thoughts could have violated me sexually on that day. Even if I know that most of the



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violations are not from the inmates, but from the police men. It was clear to me, if there are reforms taking place –some of my colleagues were arrested together with young offenders, with women who were pregnant; actually one of the women where Cypren [NCC] had a miscarriage in the cell where they were all standing, there were children, women and men- it is not working. I think the Ministry of Justice has been thinking that the GJLOS is about buying vehicles to enable the police. You can not reform by the external infrastructure that you have set up, there has to be reform from within. If it is the Ministry of Justice that is in charge of GJLOS process and it is the Ministry of Justice that is in charge of the constitutional reform process, and it is the minister that through and through has been responsible for all the abortions of the constitutional reform, then clearly there is no GJLOS, neither is there commitment new constitutional order. Because the minister of justice, knowing that she has under the GJLOS Program one of the arms that is needed to bring in a new constitutional order, she should have been able to set up structures that would have –right now we are talking about deliverables; what did I do in the five years I was a minister, this is one of them because the constitution is critical for even the whole entire process.

**Interviewer 4.3: -It was also initially emphasized that creating a new constitution was the basis of all the other things in the GJLOS Program.**

**Officer 4.3:** Yes, thank you, thank you. But clearly because there has been no political will, and they know that if we talk constitution, we will also talk about sensitive issues like ‘how do you want to be governed’ and they do not want us to see the power that they have. Those in power see themselves of we, the people, as opposed to the other side, where we the people having seeded our power to a little clique to govern us, we still remain the masters and they are our servants. So because they know we will torpedo that delicate balance, they will never allow a new constitutional order. But again, the people’s power is supreme. I have no doubt that people will never stop clamoring; nobody can push it under the carpet, this country will get a new constitution. It may only take longer, but we will eventually get a new constitutional order.

**Interviewer 8.1: If I am hearing you right, one of the problems with the GJLOS is that it has strengthened the government by sort of creating a monopoly on**

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**behalf of the Ministry of Justice and Constitutional Affairs with regards to constitutional review?**

**Officer 8.1:** Yes. But... Instead of strengthening it to bring reform, it has strengthened it to fight reform.

**Interviewer 8.2:** **Something that has puzzled me as I have been reading the different program documents, is that in the beginning the contribution to the constitutional development was outlined as something very central and as fundamental to the rest of the program. But as the process went forward time wise, it seems that the focus on it seems to have been downscaled even in the official documents?**

**Officer 8.2:** Yes, and that is deliberate. It is again about political interest, narrow political interest.

**Interviewer 8.3:** **But I wonder why the donors have not...**

**Officer 8.3:** -As a matter of fact, we have been asking the same question, in as much as we know that the donors were very, very passionate about bringing reforms and funding reforms, why have the donors frustrated the capacity of civil society under the GJLOS Program to be able to hold the government accountable. We know, and the donors also know, that this process is going nowhere. In as much as it was a very big investment and so I can understand why they do not want to, just pull off before they have tried everything. One of the propositions that we had was that we would have a non-state actor program under which civil society would get funding to enable it to participate in amore meaningful and effective way, in the GJLOS and play its watchdog role and hold the government accountable under the GJLOS; but that has never seen the light of day.

**Interviewer 8.4:** **I talked to representatives from some of the basket donors, who mentioned that cooperation between government and civil society within the GJLOS Program was not working out, and that civil society was pulling out, and that they as a result were now trying to establish support to civil society on the same issues but outside the program?**

**Officer 8.4:** Yes, but I think the various donors must also in being held accountable by the various governments back home also answer the question of what have been

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the fruits of the GJLOS Program. How soon did they realize that it was going nowhere; if so, what have they done about that to date. Because they must also be held accountable, we must hold each other accountable: the donors must hold civil society accountable, civil society must hold donors accountable, the donors must hold government accountable; all of us must hold one another accountable. So, when we do not, it means that history will judge you very harshly; did you help in ensuring that –did you have real commitment to bringing change, or was it just lip service?

**Interviewer 8.5: So you can interpret the GJLOS program as a change in the institutional environment of civil society, which has affected its ability to act?**

**Officer 8.5:** I think so, and I am one of the biggest critics of the Paris Declaration on aid, because yes, it is important for donors to work with government; but I have not understood why it is important for donors to work with a government that does not deliver. So if for example we are talking about corruption, that corruption is an epidemic in the entire system. Why would a donor want to put its money in the same system? How can you justify the fact that you have a government that is abusing civil rights and human rights of its people, you have a government that is corrupt, you have a government that does not respect the rule of law, you have a government that does not recognize that democracy is not its prerequisite, it is a right of the people; if donors, too, have realized that all those things are at play, and they are still putting their money in there, as a Kenyan citizen, what is then the difference between my government and a donor that is funding my government to enhance its corrupt missions, to enhance its violation of human rights? Somebody has to answer a tough question because you are either for the people or against the people. Our government is not delivering, but our government that is not delivering is still being given support. And if then you thereby weaken civil society's role as a watchdog, then at the end of the day, I think it is difficult for you to say that you are not colluding with the government.

**Interviewer 12: As part of civil society, have you experienced your possibilities to influence the review of the constitution to have been affected by your access to resources?**

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**Officer 12:** Absolutely. This PCC Conference, we put it together on a shoestring budget that was donated by various actors here and there, because we have been unable to get resources that would give the kind of influence that this process ought to have been. For people to buy in a people's conference, they need to know what we are doing. If we do not have resources to sell our ideas to them, if we do not have the money that would enable us to robustly fight for this to be a central issue in this constitutional review process, we are not able to... The day we will decide on or resolve this question of the new constitution, even donors and other people will find that it will solve many of the issues that we have been seeking to talk about. So we have actually felt that our lack of resources has been a critical influence to the kind of process that we would have been able to put together.

**Interviewer 12.1:** Does this have to do with that this is not part of the actual activities of the GJLOS Program?

**Officer 12.1:** Under the GJLOS Program, first and foremost, there is not funding for civil society.

**Interviewer 12.2:** But I was told that donors are now trying to support civil society by focusing on organizations that are focusing on issues within the GJLOS Program?

**Officer 12.2:** I do not think that is true; because I have not seen a partnership that is seeking to promote this issue.

**Interviewer 12.3:** Okay. So it is not because they do not see this as part of it?

**Officer 12.3:** I do not know, I do not know. Many times we are told about donor priorities that keep changing and having funded the GJLOS, it is assumed that then... -Well, you see, the GJLOS is flawed because it is with the government that does not have a commitment to deliver, to commit on the various agreed outcomes and then you do not have direct funding to civil society that can pressurize the government to deliver on those promises. There is a tendency towards that things are just moving at a very slow pace. So, if indeed there would be more focus on finding those institutions that are promoting engagement in some of these key issues; this is a process that ought to be heavily funded so that it could have the kind of impact that

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would then galvanize the government into action to be able to say ‘yes, we will deliver it’.

**Interviewer:** Okay, thank you so much for your time. It has been very interesting for me!

**Officer:** Thank you so much, I look forward to reading your dissertation, and I hope it was useful.

**Interviewer:** It was, very useful.

## **Gatere Interview**

The following is the transcription of the interview with Ian Gatere that took place in a private corner of a Nairobi garden restaurant on 07.09.07; the interview was of a duration of 1.20.27 hours. Ian Gatere is a close observer of the political situation in Kenya and works with communication and journalism for a number of international NGOs (Udvikling NR: 01/2007: 17).

**Interviewer 1:** If you think about the constitutional review process in the period in between the last elections in 2002 and now, who do you think has taken the lead in the review process?

**Interviewee 1:** Well, I think for one, civil society has really, really come down. In the 90ies the civil society was at the forefront of the whole change of the constitution movement, but they lost a lot of the leadership to the political front because a lot of the leaders became appeased and those who came to fill the gap were not able to carry the same sort of momentum, for various reasons. Funding being part of it, some of it was just loss of institutional memory and leadership, part of it was that some of the leaders that went in [to government] were still trying to run civil society organizations from the left, from behind the scenes, interfering in decision making. But for part of, even for other reasons that I do not know, but one thing that is clear is that civil society lost the momentum that they had and the people who more or less took up the lead with decision was actually the political class. There was a time when the members of the political class were the ones that were dominating the debate on

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constitutional change. Unfortunately, they led it for quite a while, up until the referendum in 2005 but in my opinion, they do not seem to have really been leading this debate from a perspective of really wanting to change things. Why? Because, if that was the case, then it would still be the key issues they are talking about today – but it looks like they are trying to score political points. Because at that time, it was the key issue and everyone was talking about it, now there are more emotive issues that have come up and the political focus has changed to those issues. The important issues, like corruption, like ethnic favoritism or discrimination with appointments of senior civil servants, for example; but as someone put it, all these are symptoms of the lack of a good constitution so rather than keeping the focus on the mother, we are looking now at all the children. And maybe because that is more popular with the electorate right now, it is what the electorate sees and they are more moved by such issues –equitable distribution- they are more moved by such issues right now, so there are not that many politicians who are really putting the new constitution as the key and the most important thing that they want to bring in. Especially with the pro-government politicians, pro-government politicians are almost saying that if we have economic growth and improvements in good governance, really, constitutional change is not a priority. There is a subtext of that in a lot of what they are saying. Oppositional leaders are occasionally talking about constitutional review, but not anywhere near the same emphasis that they had –it is the third or fourth thing that they mention when they are giving their manifestos. And as one opposition politician put it in an article some time back, he said that he does not really think that his colleagues are interested in it, because all of them are pushing to be president and according to the draft that they are standing for, the president will not have any power or less power; so if they were really for that new constitution, then none of them should be running for president. All of them should be campaigning for the prime minister's post, which is of course non-existent now, but it is where all the power would be. So he was wondering 'are you guys really going to implement the draft that you say you are for once you come in or will we have a rehash of the whole setting; when you come into power, you start enjoying the fruits of that whole power and say why change, it is good as it is. Perhaps modify a few things, but basically, it is good'.

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And those who have taken the lead, definitely not civil society, they have lost the kind of leadership they had on it, it has been taken over by politicians, they put it up for a while, and when it was no longer having resonance with the electorate, they threw it aside, and demoted it and now look at what you have. There was some leadership that was provided quite well by the chairman of the whole Bomas Conference, Yash Pal Ghai, and his whole team, Patrice Lumumba at the time was also pretty well involved; these guys, at the time, were working more or less as civil servants. Well, they were part of a commission, I am not so sure of their positions, they were definitely not politicians and neither were they part of civil society; but they provided some good leadership on the issue. But their mandate only extended up and until the Bomas draft, so after that the politicians took over, whether rightly or wrongly, and that was the end of it. Yash Pal Ghai was asked who was the hero of a constitution movement by a newspaper shortly before he left for his work –I think somewhere in the far east- and he said that as far as he was concerned, there was no hero. He said that all those people are two-sexed. He said there are two people he had modified place for, one of whom was a politician, one of whom was a retired politician, who were seen as having some integrity, but all the rest...

### **Interviewer 1.1: Who were those two?**

**Interviewee 1.1:** One I remember was called Samuel Arab Niemi, he was a former deputy speaker and a former member of Parliament from Rift Valley and he said that that man showed integrity, but the rest of the people –opposition or government- he said there is no one you can call a hero of this process; and he was the chairman of the commissions.

### **Interviewer 1.2: So the role of the parliament as opposed to that of the government, how do you see that? –You said the political class like they more or less do the same thing?**

**Interviewee 1.2:** Yes, it is more or less the same. Part of the problem with Kenya, some analysts say, is that it has been dominated by one class of people who have more or less refused change, because the balance still benefits them disproportionately, so they are happy with that so why change anything. And in this class, some are in this section—it is not just government, it is government and a

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significant number of foes in the opposition. There is a guy who wrote an article about two years back, which was actually one of the articles of the year when the CNN held their competition, and it was about the 20 richest families in Kenya and the funny thing was that the 20 richest families are on both sides of the political class and they are business partners. You will find that somebody who is leading opposition figure, his number one closest business partner is the former president, who he was supposed to be fighting against. So they are like THAT [merging fingers]. So the political class, both within and outside government, has often shortchanged the change that was supposed to take place. So it goes, but never goes full circle, it just goes a little bit, there is a lot of public pressure, a little bit more, but comprehensive change... A fair amount of the current political class, even within the opposition, they are just populist –both within and outside government. But there is also a legal argument that took place. There was an argument about who should lead that process, should it be Parliament, which is a child of the constitution, or should it be the electorate and there was a section of civil society that was saying that if this thing goes to Parliament, they will kill it. Let us take this whole thing out of Parliament, and make it a nationwide debate. And let it be up to the nation to accept or reject the Bomas draft, for example, ask what the people think about the constitution, get the answer and go with that. But somehow or the other, the political class, perhaps more on the side of government, on that particular issue, made sure that did not happen.

**Interviewer 1.3: And they also had the power to change the draft?**

**Interviewee 1.3:** Yes, exactly. As of now, they have by and large not put the interest of the country above their own interests whether as in peers or even as individuals. Even when you look at the political class, when you look at the opposition, you find a lot of leading members of the opposition, regardless of which opposition party you look at, are former members of the Moi government who have detained corruption and who have been part of this whole mess. So you realize and start to wonder even if an opposition party came in, how much would it change without having in some of their old supporters?



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**Interviewer 1.4:** So it seems that you could say that it has been possible for parliament to contribute to the process, but they have not really showed an interest to do so?

**Interviewee 1.4:** No, they have not, because their interests have been –unfortunately, this particular parliament, it has really muddled its reputation when it comes to putting the national good above the personal interests. They really have shown themselves as much more interested in their personal good, like when it has now awarded itself with another handshake. They had a historical opportunity, both the president of 2002 and the parliament had a historical opportunity to make decisive change but the political will was not there.

**Interviewer 1.5:** So this participation of Parliament after the elections in the review process, how would you compare that to before the elections?

**Interviewee 1.5:** Well, it is slightly better only because we were in amore progressive kind of situation, so it is not better compared to how it ought to be, but compared to how bad it could be. Because before it was really bad, the Parliament before that had slightly more power than the Parliament before it, so it has improved only marginally. For example the Parliament bore that did not have the sort of numbers that could really force the government to compromise on an issue. This parliament could raise such numbers if it really wanted, but they did not really show the desire to really change fundamentally some of the government's positions on the issues. In fact, where they seem to have contributed most is the contributive output of parliament at Bomas, there they seem to have been a little bit more involved and wanting to contribute, but once the debate reached Parliament, it became mutated, and even now, it is all but forgotten. It is really not a hot issue, you are not hearing somebody raising it with singular focus. It is part of a package

**Interviewer 1.6:** I have heard some members of the parliamentary group that Paul Muite is chairing demanding again that there should be minimum reforms before the elections?

**Interviewee 1.6:** Yes, that parliamentary committee has tried to some extent and what they have been doing is almost a sign that they have given up on comprehensive reforms. Because when they are pushing for minimum reforms, it means that

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politically they have looked at what is likelihood of being pushed through and they have realized that a new constitution is not going to happen, so we might at least push a little; so it sounds like a compromise position, but maybe half a law is better than none. The problem is that those minimum reforms, I do not see them going through this, not with this parliament; we have run out of time, parliament has no quorum these days –when they held the public service week, the national assembly tent was completely empty so even there, they had no participation- and minimum reforms are going to affect too many players too significantly so they are not interested in pushing them; like the 51 % rule, there is no way, the current government is going to accept that.

**Interviewer 4: So, in connection with the Bomas, as we talked about, what is your assessment of the participatory aspects of those meetings?**

**Interviewee 4:** Well, you know Bomas is not young, Bomas actually started with the previous Parliament and was Bomas better than the other draft? I think so, I think it was better. But was it the kind of draft that Kenya needed? In my own personal opinion, I think not, I think it was to a certain extent a victim of the passions that moved society; them against us, it was based on elements of what you could call a retributive kind of approach. Short term issues, rather than long term and genuinely trying to find the answer to any one issue. Why? Because when you look at the Bomas draft, a lot of personal interests were snug in; there was the one on religion and the courts that were in Christian power and yet, according to some people involved in the process, it was not a demand given by the Muslims, but some people in there pushed it and now that it was in there, the Muslims demanded it. So it created a problem where before there was actually no problem. The current status of the courts were satisfactory to those they went around to receive the inputs from so there was a difference between the minutes and the report. The minutes say ‘this is what we want’, the report says ‘we want this –plus one’. So when you start seeing things like that, small things that have been added... There is the whole issue of separation of powers between the president and a prime minister, and that whole debate has not been largely driven by what would work best for Kenya, but by who was president. For example the current minister of internal security, before when he was a member

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of the opposition, he was very much for it, then he became part of government and he said publicly on TV that ‘the only reason we were pushing for that is that we never in our minds imagined Moi would ever walk, so all we wanted to do, was to share some of power so that he would not completely railroad us. But now that he is gone, we do not really need to change anything, it is okay’. So that was his approach.

### **Interviewer 4.1: ‘We are the good guys’?**

**Interviewee 4.1:** Yes, ‘we are the good guys, so the problem is now solved’. So that whole approach to issues has, I think, messed up the purity of some of these debates. Because it was an issue that was raised as far back as independence; this whole issue of prime minister is not that new, it was even there during the debate at Lancaster House when Kenya was getting its constitution for independence. And a fair amount of people have said that when you have that, you will end up having war in the country because Africa is a state comprising many other states and when you have division of power, you have polarized power and the chances of you experiencing divisions become quite high and I do not think this issue is satisfactorily addressed. Because it is one thing to say that you want accountable power, it is another thing to say that you want to divide the power between two blocks. So I think it was not satisfactorily addressed because people had personal interests in play: ‘if my ethnic chief is not president, then at least he has got to be prime minister’. That was the approach. Is it realistic? I do not know. Is it the best for Kenya? I do not think so. Personally, I would prefer that you have an accountable system, but either the prime minister or the president should be in charge, not two. You should have one person to blame when things go wrong, so you vote out that person. The last issue that has blinded or affected people, is the whole issue of federal government, because that was also a very strong and emotional issue at the time of independence. I think it is good that Kenya has a federal state, I think that if you take government closer to the people, if well managed it brings very positive change. There is also the good governance structures, such as the constituency development funds which have really effected positive change; so federal government is good. But there is a difference between federal government and ethnic balkanization and a lot of Kenyans understand federalism to mean ethnic balkanization and their leaders are not explaining what

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federalism actually means. What people understand federalism to mean is that ‘once we have that, then in this area, people of my ethnic origin will be the ones calling all the shots and if you are not from my ethnic group, you either tow my line or I will kick you out and even your property rights shall questioned’; there is that undercurrent. And when you look at proper federal states, such as Germany, the US property rights, human rights, civil rights are all circumvent no matter where you go. But here you get the feeling that this is what people here understand federalism to mean: ‘we in the Coast Province, we are now the ones calling the shots in the coast; those beach plots we are going to repossess them and kick you out and we take them back, because they are ours historically’. There is such an undercurrent that has not been adequately explained and the leaders are not taking responsibility of telling the people ‘federalism does not mean what you think it means’.

**Interviewer 4.2: Concerning the Bomas, I was wondering how it was decided who could participate?**

**Interviewee 4.2:** Now, we are going back to the previous regime, because the Bomas actually started under the previous regime and it was after there was a lot of clamor for change, and civil society was really at the forefront and they had really led the forefront and eventually the former president was forced to accept the issue and he even had to accept the choice of Yash Pal Ghai as a chairman who is actually well regarded generally speaking regarding this issue. Now, the fact that he was the incumbent –and at that time, the main opposition leader at that time was actually involved in a cooperation with the former president- meant that they called most of the shots when it came to inviting the –because there were delegates from all over the country and they had the right system of ensuring that women were involved and youth were involved etc. –so the structure was there. But there the way that structure is there, and then there is the way you interpret that structure and make that structure work for you. Since they were the ones who were in power, and at that time Kenya was still relatively oppressive, a fair number of the representatives were sympathetic to KANU and to what was then the National Democratic Party with Raila Odinga because at that time they had had a merger and he had become the secretary general of KANU. The opposition also had representation and was headed by the current

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president but not with the same weight and they were still that us versus them mentality and the current president when the opposition chief, stopped Moi from appointing certain persons to head the committee because he had gotten the signatures from everybody else, but Kibaki refused. So they had to accommodate him and accept someone who was more acceptable. But you see, it ended up being something like 60 – 40 in favor of KANU and NDP. And that was the way they debated up until the current government came into power and the government was headed by the former opposition chief; and when he came in, he felt no compulsion and he started to marginalize that Bomas because he was feeling that one, when he was in opposition, you never really used to listen to him at the Bomas and push him out and he felt that his issues and the issues of his constituency he represents were not being taken on board. But then, by a twist of fate, Raila had joined his government and then ended up being kicked out. So they went back and now really pushed the Bomas draft again and so the President lost the referendum.

**Interviewer 4.3: So the representation in the Bomas was the same after the elections as before?**

**Interviewee 4.3:** Yes, yes, because he could not change it once the process had started –and it had very many good elements in terms of how far it went – in fact the draft had some good chapters that everyone has agreed upon were fantastic chapters, but the chapters that were bringing issues were the ones of religion, Kenya being a fairly religious society, and the one on sharing of powers. One group was talking about having an executive prime minister and a fairly ceremonial head of state, and the other one was talking about having an executive president, but with a strengthened Parliament. So the Bomas draft was already tilted even before 2002, and that tilt was not changed after 2002, and the President lost a lot of political good will, because people felt that he was trying to shortchange that. Whatever merits his arguments may have had, because of the way he played it, they were lost.

**Interviewer 4.4: But he was also already outnumbered?**

**Interviewee 4.4:** Yes, he was already outnumbered, he tried to take it over, but he could not. So they left the Bomas process and tried to start their own process, which ended up with that draft which never worked.

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**Interviewer 5:** After the government lost the referendum, there was the investigation into public opinion, how do you see that as a participatory initiative, if you do?

**Interviewee 5:** I think we are still at the level of evolving the form and not the substance because like someone was saying we have the democratic expression, now you can talk and say whatever you want to, but your expression does not bring about change. You can shout as much as you like, but no one will listen. Nothing happens. Before, you could not even shout, you would whisper. So now, you have a form of freedom, but the essence of it is missing and that, in my view is also very much there when it comes to the participatory methodologies that we are adopting in our nation; be it from things like the constitution-making process all the way across to the budget. You have something like the budget and the whole poverty reduction agenda and one of the conditions is that it should be participatory, so they accept that and so they are going to the districts on these dates and on these dates citizens are invited to come and give their views. So, the government comes and they sit on the one side, and people come and they talk and then they tick: we were in this district and that district; but really, how many views have been taken on board?

**Interviewer 5.1:** So it was possible for people to come and present their views, but...

**Interviewee 5.1:** Yes, especially after the referendum. You see, up until the Bomas, there were quite a lot of views taken in, albeit in an obscure way. But after, hardly any was taken on, because the conclusion was that since the citizens rejected that draft, it means that they are satisfied with the constitution that exists. So: 'end of that debate, let us continue to development and fighting corruption'.

**Interviewer 5.2:** Then, concerning this investigation into public opinion, I think one of the things that they actually ended up concluding was actually that people wanted the Bomas draft and not the amended version?

**Interviewer 5.2:** Yes, I think that people by and large wanted the Bomas draft. What I struggle with is whether there has been sufficient education of the people. I still struggle with that issue, even with the Bomas draft. Because I suspect that the responsibilities of being part of a nation state have not been adequately explained to

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the citizens. And the citizens do not have a relationship of trust with the government, so they do not believe a fair number of people that come to speak to them have their good will at heart. Because even if you look at the example of justice from a religious angle, I am not very sure that Kenyans fully understand the religious implications of some of the things that were in the Bomas draft. Because if that draft passes as it is, it has certain implications, which are going to affect many people. But they only discover afterwards. Again, with the whole issue of prime minister vs. president, I do not think that people have really understood what it means to have cohabitation like they talk about in France. I think people want accountable leadership, which is very good, but having two centers of power, I do not think people have looked at other African countries that have gone that way and looked at where they are now. I am not sure the electorate is in touch with the issues and I do not think that it has been explained to them yet.

**Interviewer 8: So the availability of alternative information, what is your assessment of that?**

**Officer 8:** Ah yes, I think there are very few honest brokers, so who do you trust, everybody has an agenda. So there is nobody to come and say... Well, you can look at the whole issue of federalism, on what basis will it be done? If you look at our current district boundaries, a fair number of them are political. If you look at when South Africa was going federal in 1994, part of the people who were involved in that debate were sociologists, economists, etc. because a federal state has to make sense. Not only from a political perspective, but also from a sociological perspective -that these people have something in common -and even from an economical perspective - is this state self-sustaining? That debate has been totally lost. If you introduce federalism the way we are now, some federal parts of Kenya will be very, very wealthy, other parts will be extremely poor. That is the thinking that I am seeing. And there is still that whole balkanization issue that very, very few political leaders are willing to expose and so, someone from any ethnic group -it is sort of like when one leading political figure went to central province to a hotel and he got kicked out, a proper hotel and the manager told him to get out, that he was not supposed to be there so he should get out because he was the one campaigning against the president

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[Kibaki is from Central Province]. That kind of thinking, very few political leaders are willing to address that, to go back to their core and tell them that ‘you are wrong, you need to welcome every other Kenyan and if you are not prepared to do that, do not call yourself a Kenyan; do not be interested in free primary education, do not go to a Kenyan police man when you need help. Because if you want the good things from the state, you must also accept the responsibility of supporting that state’. So it is my hope that Bomas will still be discussed a little bit further and then, we will hopefully end up with a constitution that really works.

**Interviewer 6: These two initiatives, the Bomas conference and the investigation into public opinion, were they new types of initiatives in Kenya’s historical context?**

**Interviewee 6:** Oh yes, most definitely. Kenya has definitely changed and will continue to change. It was the first time that we had a referendum, I think for a very long time, I am told that there might have been one more or less around independence, but I am not too sure even if that was really a referendum. I think there was an issue, but not quite a referendum, so this was the first. So, within the space of around three years, we had two things that indicated us politically, one, we voted out a ruling party and voted in an opposition party; it is the first time we have done that in Kenya. And it is not that often in Africa, if you look at Tanzania with all their peace and all that, they have had one party all the way from independence. So to find an opposition party taking power, and the country continues, that was a big step for us, just to think that our citizens can change our government. Then, the government proposed a constitution that we did not like, and we rejected it! We have been used to a very oppressive government and that you have to do what the government says. I think it was around the same time, that there was a referendum in Congo, and a Congolese friend was telling us that in Congo they can not afford to vote against the constitutional referendum, because if the vote against it, they might end up going back to war. So he was actually saying that in Kenya, you can vote out and the president just says ‘okay, I lost, I go back to work tomorrow’. A Danish lady once told me that the difference between Danes and a fair number of Africans that she had met was that Danes believe power came from below, Africans believe power came



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from above; so it is one of those changes that you start seeing that people start believing that power comes from below. And there was also another issue of the referendum that was a little bit silent, but it is really good if it just becomes accepted, and that was that the referendum was free and fair, just like the previous election. But actually every election before that since 1968 had rigging; different sets of ballot papers, ballot boxes disappearing, they knew all the tricks in the book. But now, the Electoral Commission of Kenya is becoming more and more empowered, it is becoming better at its job; they are inviting citizens and political parties to come and check and they are going IT. So it is getting to a point where the electoral system will be almost foolproof; what you see is actually what people said. And that is one of the very fundamental things. Even America has not quite gotten there yet!

**Interviewer 7: You touched upon it earlier, but in connection with the review process, do you think that people have been able to express their view freely?**

**Officer 7:** Yes, to a certain extent, they have been. In terms of expression, I think that the Kenyan citizenry has tried, maybe they have not recognized their responsibility to be as involved in the political process as they ought in terms of joining parties, finding out what the policies of my party is; that engagement has not been as liberal as a democratic nation will require. In terms of expression, I think that the ordinary Kenyan citizen really tries to express himself even if he does get frustrated because you come and express this, and it goes from that and something happens, something with leadership, something is done and you do not get what you want. You are struggling for survival every day, you are a poor person, so for you to come and take part in a demonstration when you are on your daily wage, it means that that day you have not gotten 250 or 300 kshs and what do the children eat that evening? And especially in the 90ies and even still to some extent today, the police will come and break up the rallies; people have been shot, people have died; and we are talking about ordinary citizens. So people are very willing to express themselves but then, they may express a certain issue, what they want changed on 'a', but what comes out of the end is not 'a', it is 'ab' or 'bc'; it is not quite what they wanted. So, in terms of expression, I think that the Kenyan citizen has, given the option, -they have always hidden out, because they really want change and they recognize that their lives are not

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as fulfilled as they ought to be and they recognize that they can do better. And they recognize that part of what can make it better, is fixing our political system. But then, somehow we get shortchanged. So part of the reason for that is our leaders; we do not choose the right leaders, and our leaders also shortchange us, they put personal gain above national good. But part of the reason I also think rests with the electorate; we are not as involved with the issues as we ought to be. We ought to be reading up or listening to radio and having issue oriented debate far more than we are having right now. We have left ourselves open to lies, to whoever sounds persuasive enough.

**Interviewer 11: So the quality of debate, how do you see that in relation to the review?**

**Interviewee 11:** It is not as it should be. There are civil society groups that are now trying to address that, there is one called the Media Forum, I think, which approached MS at one point to do some joint work and they are trying to address that. There are some who are saying that the value of education is to enable the citizens to distinguish between eloquence and leadership. I do not think that we are yet at that level. That is why you can find the ordinary citizen saying that ‘my MP lied to me. He came and spoke so nicely, I voted him in and then he came out’. But you see, you ought to be able to catch that, you ought to be able to look at his record and know that this man is just a good talker. So we are not as educated as we ought to be; that with democracy comes responsibility.

**Interviewer 7.1: But when it comes to the freedom of expression -**

**Interviewee 7.1:** -Yes, that is there.

**Interviewer 7.2: People are not afraid that it may have repercussions if they speak their minds?**

**Interviewee 7.2:** There is a small level of fear, perhaps partly due to history more than anything else and partly due to... When you go to the rural areas, there is still also payback for having expressed an opinion and it just comes out in small things; there is still a lot of... We really need to get to grips with what democracy means. Democracy means... There is a guy who writes in the Sunday Nation, he is a doctor, naturalized Kenyan but originally from Pakistan, and he talks about when he first went to England just after the Second World War and he met this man who was

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standing on a soap box in Hyde Park saying horrible things about Winston Churchill. And he could not believe it, it was just after the Second World War, everybody is calling Churchill a hero and this guy is slanging him; so this guy left to find a police man and he called the police man and asked him: 'are you just going to stand here and let this guy talk like this?!' And the police man told him 'on the contrary, I am here to make sure you do not disturb him'. Now THAT is democracy. We are yet to get there as a people, especially in the rural areas, but even in Nairobi. I have a friend and a colleague who was telling me about an incident during the 2002 elections when they met someone who at the time was a sitting MP and they know that –they are family friends together for Christmas and he is there in his big government car and then his brother told him 'you know, by the way, you must be feeling very nice that you are in that big government car, us, we are just campaigning for the opposition on bicycle.' But it was really just a joke and it was okay. Then he drove away, entered his campaign place, the next thing a pick-up came up full of hooligans in the back; they were full of these guys 'on their bike', you know, the two brothers, and beat the living hell out of them. They almost killed the one brother. They were saved eventually, partly I think by that politician who came and he knows these guys and asks what is going on and to some extent, he might have helped and then also one of the brothers ran to a nearby shopping centre and called people who were from the other political camp and they came, roaring to fight so these other guys now took off. And we are talking about at local level, people know each other, they are from the same community, but they can not understand that you have a different political opinion and you have a right to that. That is a problem. That and the guy who was chased out from the hotel, he is a political leading figure and he himself is also victim of the same thing: if you go to his home area and say a word against him, you better be a fast runner, because the guys are going to settle you with blows. That is not democracy, so we have to understand at the personal level that even if I completely disagree with what this person is saying, I defend his right to say it.

**Interviewer 7.3: So, in that sense the freedom of expression is very limited?**

**Interviewee 7.3:** It is very, very limited. In Uhuru Park, you should not express certain things on certain areas.

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**Interviewer 7.4: So it is almost a geographically limited freedom of expression?**

**Interviewee 7.4:** Yes, to a certain extent it is true, urban areas have it much more because there is more media exposure, more debate, and when people do such things you will find that the law responds a little bit faster; but in rural areas with the level of policing and the police getting their petrol from the local politician who is also the richest guy in the area, so do not talk badly about him!

**Interviewer 7.5: If a Kenyan was to stand up on a box in Uhuru Park, would the police come and take him down or would they –**

**Interviewee 7.5:** No, largely, they would leave him, so long as he is not doing something that is very string against...

**Interviewer 7.6: -If he speaks against Kibaki?**

**Interviewee 7.6:** Nah, nobody would touch him. But the funny thing is that if he spoke against certain interests of the Kibaki government and certain interests globally, people would touch him. Because if you come there and start saying... For example, there was a time, in 1904 or 05 I think it was, one of the leaders of the Maasai signed a lease agreement with the British who would lease out the best of the Maasai land, huge parts of the best of the Maasai land to the British for 99 years. –It is a very corrupt deal in itself, how can you lease out land for 99 years and the Maasai leader did not know how to tread, so he signed with and x and there is the question whether he understood what he was doing. But anyway, that deal or whatever it was, was running out a few years ago and the Maasai gathered at Uhuru Park to demonstrate and to say ‘now the lease has run out, we want our land back, it belongs to us!’. But there is a problem with that because the local political elite is now living on that land because when the British left after independence, they sold the land to the political elites of the Kenyatta and Moi eras and then also foreign investors. So we are talking about the local elite and the global elite. And the Maasai demonstrated under their right and they were arrested! It was under the new government because it was around 2003/4. And of course the international community also kept quiet because some of their interests are presented there... You can call the president anything, as long as you are not doing libel, there are still some libel laws in the current

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constitution which are very, very poor. So as long as you are not doing libel, I do not think that anyone will stop you.

**Interviewer 7.7: So that is different from when Moi was president?**

**Interviewee 7.7:** Oh, you can not compare. The difference between Moi and Kibaki has for a big part to do with that people have been empowered, but it also had to do with the temperament of the leaders; Kibaki really does not care, he is much more relaxed and tempered than Moi was. Moi, if you spoke out against him, he would come down on you hard. The constitution has not been changed, but you could imagine that it had because people are growing in political consciousness, that is probably the larger thing, and then to a small extent also having someone with a different persona. Someone who literally goes on TV and says ‘say what you want, it is alright, you can insult me, it is okay’. Moi would say ‘whisper, and if your leader talks badly, your people will suffer’.

**Interviewer 8.1: How then do you think the availability of information is compared to before the 2002 elections?**

**Interviewee 8.1:** Oh, it has boomed, it has boomed. There are far more radio stations, TV stations, and they have all sorts of debates and all sorts of shows.

**Interviewer 8.2: So this has also played a role in the constitutional review?**

**Interviewee 8.2:** Oh, yes, and in fact, this started playing a role even before 2002; the media has been one of the key elements in the democratic change in Kenya and if you look at the people who were thrown in jail and the issues they were thrown in jail for, the role of the media has been very, very good. If you do scandals like the Goldenberg scandal, then it came out in the press and now that it was in the press, it had to be addressed; it came out largely through the Nation. The Anglo leasing, it came out largely through the Standard. The time there was a raid at the Standard Newspaper, it was covered in the press. So you can do some things, but because the press is so open, you can only go so far and then you run into problems. But availability of information is still an issue when it comes to the freedom of information act, one of the acts in a new constitution that really needs to be passed. There is one person puts it, the government has the possibility of stamping an issue ‘top secret’ which means that nobody knows it, and he asks, ‘top secret’ to whom?

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Because there are some issues which MUST be in the public domain and even if they are not going to be discussed by citizens, they should be discussed by the representatives of those citizens in Parliament. They should at least, even if it is national security, if you have got a committee in Parliament and swore them to secrecy, and their work is to find out whether that is top secret or not, at least then there is a control. But now, there is a lot of hot air on information in Government, and what government tells us is 'ask', they use words like 'we are moving to demand-driven', so you ask, and they will give you. –But it is the one who has the power that has the responsibility to go out. And the last bit is the quality, which to some extent is what was being debate on in relation to the media bill. There is a lot of what you may call 'gutter press' coming out, sensationalist press that degrades rather than informs. Part of what has been good about Kenya is that if you find the best selling newspaper, it is also largely the most serious newspaper or one of the most serious. If you go to Britain, it is not like that; the best selling newspapers are the tabloids. It would be very sad if we went that way, we do not want that, ideally. Even our FM stations, people are starting to complain about them because some of the things they are talking about are all about sex and money...

**Interviewer 8.3: So people are aware of those things?**

**Interviewee 8.3:** Yes, people are aware, they are talking about it –but it is concerning such things that you almost wish that there was... Enlightened semi-dictatorship; because if you are promoting a lifestyle that is harmful in the long run, then whether it is popular or not, as a country you need to address it. But at least this way, there is no abuse; if you have a censorship, those ones doing it start becoming a center of power, they are now oppressing others. But when you listen to some of those FM stations, you almost wish there was. I mean, you are there with your child right next to you; it can be a little difficult.

**Interviewer 9: Now, to move on to something else, have you observed any difficulties for people seeking to form associations or interests groups in connection with the reform process?**

**Interviewee 9:** What I hear from some of the organizations on the ground, this is now some time back when I was interviewing them on a story related to that, is that there

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is quiet but very civil looking pushing and stopping of people from these kinds of associations. One example is the Maasai organization that was set up to fight for among other issues their land rights and such issues –and that organization was basically deregistered. And the process that was used to deregister it was really trampling on the rights of the people who were actually setting up that association, it was not done through a legal process. But it almost did not appear in the media, perhaps once or twice, then disappeared. So it may look like we have freedom to form those associations, but you start to wonder, when you get a bit too close to certain interests, is that freedom affected? My suspicion is that it is. My suspicion, without having first hand information, is that if you start doing something that directly hits on the economic interests and even to a certain extent political interests of the local elite and the representatives of the global elite in Kenya, you will run into problems. Another example is the case of the Muslims being deported to Guantanamo Bay on midnight flights. These guys from the Kenyan police follow you and when they reach the conclusion that you must belong to an Al Qaeda cell, they just grab you here in Kenya, even Kenyan citizens, some of them. According to Kenyan law, within 48 hours, they should be taken to a court of law, but the fact is that they use other methods, they move you around repeatedly, your family does not know where you are and they send you to Cuba or Indonesia. It is taking place right now, they even have a list of the number of people, who have been kidnapped. So that is a serious human rights violation. It is one thing that they are doing it to Somalis, but when they are doing it to Kenyan citizens, it shows that our constitution is not protecting our rights, even if they are Al Qaeda they should still be taken to court; try them here, why take them to a country where it is likely that they will be tortured? So long as you are just talking within the allowed debate, it is okay.

**Interviewer 9.1: So the freedom has grown, but it is shallow?**

**Interviewee 9.1:** yes, it is shallow.

**Interviewer 13: I was wondering if there have been any groups that have been excluded from the constitutional review process?**

**Interviewee 13:** Well, someone has said that it was one of the most representative review processes seen in Africa because representation was even down to pastoralists

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and their women. But I still feel that there were some groups that were not involved, at the time there was some debate in Kenya because there were some communities that were not even recognized during the census, they did not exist among the least of communities that were counted, it is like they are 'non-people' almost. But what I would hope for is what you would call meaningful participation: not participation for the sake of numbers, but participation for the sake of contributing ideas, contributing to debate and then also discussion on the key issues; because there are some key issues that will not be solved without some genuine discussion. And personally, I do not know whether the climate has been poisoned too much. It is too much 'them against us' at different levels of our society for the debate to be honest. I am really hoping that –you know, diplomatic people, how they will come and say like with Palestinians and Israel right now, we are too polarized to talk, so before we talk, we have talks about talks. Then we go to Oslo, when we are away from all these issues that we are fighting over, then we look for an honest broker somewhere on this earth, someone who both of us agree is honest and has not got a personal interest. So to agree about if we were to talk, where would it be, how would it be, what would be the agenda; that would be step one. Then, step two we get an honest broker on a few of those key issues. Then step three, we discuss and discuss and once we agree, we take the responsibility, because everybody is going to lose some and everybody is going to win some. So we take the responsibility of explaining that right down to the grassroots. And it has to start with the political leaders; there was one political leader who, in an area where there was civil conflict, after one of the sessions of talks said that 'we as leaders have to agree whether we want votes or whether we want to tell people the truth'. What he was saying is very, very [inaudible word] because a lot of our leaders do not want to tell their own voters their truth so they say 'it is those people out there who are making life hard for us'. Now, that is only partly true, the other part is that there are things we are doing that are wrong and that we need to change; there is no endure. But which political leader is willing to say that? His political rivals will immediately say 'ah, you see, he sold out, you must vote him out'. So meaningful debate is a key issue.



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**Interviewer 14: Do you think that Kibaki is actively trying to affect the views of Kenyans in terms of seeing him as the preferable leader?**

**Interviewee 14:** Oh, yes, most definitely. He is very aware of that and his whole angle to development is to deliver.

**Interviewer 14.1: Is that a new thing in Kenyan politics? I mean, in other less democratic regimes, the incumbents are sometimes do not care much what the people think because they can keep them down.**

**Interviewee 14.1:** Yes, it is a bit new in the sense that now, we are getting new to competitive politics at the presidential level. We have had it to a fair extent at the MP level and parliament level, a lot of the MPs do not go back after more or less every election in Kenya. Competitive politics is a fact. How they compete and how ethical that competition is, that is another issue but they do compete. At the presidential level we are now starting to see that, people realizing that 'if I do not present myself in a persuasive manner, I will be out'. That is news, that is a new thinking that has now come in and Kibaki is definitely very aware of that. He is definitely working to ensure that he is seen as the preferred candidate.

**Interviewer 20: Okay, so the very last question. We have talked about it somewhat and according to many analysts, informal ties and institutions are pivotal in understanding African and Kenyan politics. Do you think that such ties and institutions, for example ethnic ties as we talked about, have played a role in the review process?**

**Interviewee 20:** Oh, yes. If you look at the whole issue of the splitting of the presidency and all of that is because of the ethnic groups; because only one person who is from a certain ethnic group can be in position at any given time and once he comes in, he is going to favor his own tribe, that is the assumption, which is often true. So, rather than having just one person, having two positions, so that this guy favoring his people, these other groups at least have a check against that –by favoring his people, perhaps. So that is part of the thinking. But also the pull or drive for the federal state has been colored by the feeling that some ethnic groups have had undue privilege, which has enabled them to move into other persons' country, buy up land, set up infrastructure and become the rich men or women of that area; whereas those

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who grew up in that area have been marginalized. So the reason that people are pushing for federalism is so that 'our ethnic group can be able to at least call the shots in our ethnic locale'. That is the assumption or thinking behind. So ethnic ties are definitely a big factor. But I think also there are informal business ties between the business elite –both sides of the elite; because these guys, they are business partners, they work together in a million of ways. They are competing here, working together here, competing there. Like those stories you hear of the oil companies; they are enemies here, friends here, partners there. That is how the political elite is and sometimes this one has the upper hand, this one has the other hand. But generally, when you meet them sitting and talking, you would be surprised by the way that they laugh and talk with each other; you would think 'I thought these guys were enemies' and you come to discover that they are much better friends with each other than perhaps you are with one of them. So, some of them, even their ties to each other and their own personal ties are greater than to their own ethnic community; and they always tend to use their ethnic community as a bargaining chip for personal gain: 'if you do not up my stakes, I will just go and talk to my guys and we will have a revolt. So, I appease your person; you give me something and I will go tell my guys not to worry and that we are working on it'. And so, whatever was the crisis passes. They will have forgotten what it was all about; whether it was a share in a company, whether it was a posting for someone who was a friend of mine.

**Interviewer 20.1: So the political elite strategically use their ethnic bases?**

**Interviewee 20.1:** Oh, yes. Oh, yes.

**Interviewer 20.2: But they are also dependent on them?**

**Interviewee 20.2:** Yes, there is a guy who writes letters for the Standard from America, he used to write a column called 'letters from America', a Kenyan journalist living and working in America. He once wrote that 'Kenyan politics is a zero sum game and it reminds me of an American game called Prison, where the leader goes and tells his ethnic group that 'I am a member of your ethnic group and I am running for presidency on your behalf'. Now, by that statement he has taken them as prisoners: 'if they do not support him, are they really Maasais? If they are true Maasais, they must support him'! If they do not support him, even some of their own

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will say ‘but you are a Maasai, how can you not support this man when he is a Maasai?’ And then, at the same time, he too is also taken prisoner of his ethnic group, because if he finds out, as politics are going on that it is more strategic and better value to support someone else, his [inaudible word] will say that ‘you are not acting like a Maasai, in fact, you are no longer a Maasai, you are now a Kikuyu’. They will even change your name to a Kikuyu name. So even if he personally believes that someone else is now a better leader, he can not say it, because if he does say it, he is taken as having left or deflected: ‘he is no longer our representative’. So now, it is a game where no one wins and everyone loses because you can not form meaningful coalitions. It is an issue that Kenya is really struggling with, but part of it goes back to the leaders themselves taking the easy option of hijacking their ethnic group and saying ‘it is our turn at the high seat, it is our time to eat’. Once you do that as a leader, you have almost determined your career, and you have to a certain extent also narrowed the vision that you and your people have. You have to be willing to say to people ‘vote for me for reasons a, b, c and even if you do not agree with them then it is better that I do not go to Parliament. But Parliamentarians get a lot of money.

**Interviewer 20.3: So once you are in a position of power, it will also be difficult for you to change anything because you have all these guys that you owe something?**

**Interviewee 20.3:** Yes, exactly, and all the other guys are the same. So it is ethnic positioning to get power in order to acquire wealth to reward yourself and your crew mates. And there are not many leaders who have been able to escape that, even some of the most principles leaders, when you dig a little bit further, you find that they are themselves also to certain extent captives. And they would want personally –you know when you sit with them, they are very reasonable and they so understand Kenya if not Africa as problems; they are well educated and they explain everything to you. And then when you see them on TV, you wonder if this is the same person you were at that cocktail with last evening? He is totally talking like a warlord. But you see, now, he is talking to a different audience. He is playing a role. So it is sad, but until enough political leaders take the courage to break away from that sort of thinking, we might find ourselves going around this; ethnic stroke informal, ethnic stroke business,

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and not making that significant step. But who knows, perhaps even if governance aspects improve and incomes improve, quality of life improves, then people might become educated to the point where they start seeing through their leaders. Already there is some indication that more and more professionals are getting into politics and are trying to take a different approach to it. So who knows, to a certain extent, it is a matter of time, but now we have free primary education, so who knows, perhaps we will have free secondary education before too long. And if somebody has reached secondary school and the majority get to that level and we have a good education system, then it will slowly also start changing the quality of leaders. What I do hope is that if we go two or three elections peacefully, then I think Kenya will have made some very fundamental changes.

**Interviewer:** Okay, so those were all the questions that I had.

**Interviewee:** Okay, that was not so painful!

## **Kabelo Interview**

The following is the transcription of the interview with Adan W Kabelo, Programme officer of MS Kenya. Mr. Kabelo observes the political system and the practical operation of democracy in Kenya through his daily work in the governance area and has followed the constitutional review process as an interested professional. The interview took place at the MS Kenya offices in Nairobi under presence of only the interviewee and the interviewer. The session lasted 1.21.08 hours.

**Interviewer 1:** If you think about the constitutional review process in the period between the general elections last time and now, who would you say has taken the lead in the constitutional review process?

**Officer 1:** Well, between the last election, that was in 2002, and now, I do not think that there has been any serious group that has taken the lead in constitution making. But the government has, because of the responsibilities that they have, attempted to do that. But I do not think that any serious effort has been put in my any group. I think I must say here that this constitutional reform has many undertones, things that

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are lying underneath that politicians do not want to bring to the surface. They have treated Kenyans in circles, both the opposition and the government. Because the constitution gives a lot of power to the presidency and when the current government was in the opposition, they were really fighting in the streets for the new constitution, but when they took power, nobody wants to cede power, so they took the other side. Now, the people who were on the other side at that time, not wanting the constitutional change, are now the side that says they want the constitutional change. So, at the end of the day, I think it is just a matter of games being played, I do not think that there is seriousness as such in any way with these politicians.

**Interviewer 1.1:** So, in terms of the role of Parliament compared to that of government, in connection with democratic checks and balances that is almost not relevant?

**Officer 1.1:** Yes, I do not think there is any seriousness in any side, so I think it is 'what serves me now, I stand for'. If I am in power, this constitution serves me now, if I am not in power, it does not serve me, so I should fight it. That is the bottom line. I do not think that Kenyans should be too ambitious in expecting a new constitution from the current crop of leadership.

**Interviewer 1.2:** If you look at how the process has developed, I think you could say that from beginning with a more general and comprehensive review it has moved on to some more specific issues in the form of minimum reforms. But you do not see that as progress?

**Officer 1.2:** Well... You see, when Kenyans were fighting for a change of the constitution, it was many years of suppression by the previous regime. It had reached a level where Kenyans were ready to die for this and actually, I think that some did. But then that anger of being suffocated by the constitution was released on Moi and that anger removed Moi from power and when Moi was removed from power, then people relaxed. They thought the whole problem –actually, some politicians said that the problem was not the constitution, the problem was Moi and Moi has gone, so why bother about the constitution anymore? But still, there were struggles because they had promised the Kenyan public that they would change the constitution so in order to lead to that promise, the discussions in Bomas continued until we reached the

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referendum. But whatever gains that were made during the Bomas discussions, was watered down. So the referendum was the loss of many years of struggle just because the government decided to mutilate the draft that was supposed to have been presented for the referendum from Bomas. That finished the whole process there. After that, after the defeat of the referendum, the president made attempts to form a committee of eminent persons, he called it. This committee went around and also had sessions with people who wanted to be heard. So many Kenyans went there to present their views. But my own belief is that that was just a gimmick of relevant, that 'we did not abandon you, we are still in the process'. Just buying time, that we have not lost the chance to make another constitution, we can still make it. You know, the government was trying to make some relevancy here, that they are still there, they want the constitution to be done. But if you look at the recommendations from that committee –I mean, there was nothing to form the committee for. Because the whole recommendation was that the president should take lead, the government should take lead in uniting Kenyans toward a new constitution. There was nothing spectacular about the revelations from the committee, this was what all Kenyans expected. But since then nothing moved. Now, just because we are now approaching elections, politicians now broad up something called a minimum reform. I do not think this should be linked in any way to the constitution. In my view, these are political changes, that the politicians want to make, because they are threatened themselves. So they want to make a level playing ground, they want to put in place some mechanism to ensure that the competition level is there for them. These are very small changes that would not replace or equate what the Kenyans have been struggling for, as a broader constitutional thing. And I think it is a way of...You know, politicians will always have what they want to have and this is part of the thing they want to have. This is not what Kenyans stood for, Kenyans stood for a complete constitutional change. Kenyans are yearning for a devolution of power, this has nothing to do with the minimum reforms. Minimum reforms are about the political balancing here and there for politicians, not for Kenyans.

**Interviewer 1.3: So in terms of parliamentary control of government in the review process, what would your comment on that be?**

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**Officer 1.3:** Parliaments control of government. It has been reverse. It is not the Parliament that has controlled government, it has been the government that has been controlling the Parliament. Because, what happened after the disagreements within the political parties that formed this government, what the president did was to invite the opposition to the government. When he did that, he had majority and so...

**Interviewer 1.4:** When was that? –sorry.

**Officer 1.4:** After the referendum in early 2006. After the defeat of the government-backed referendum, members of the political party that formed the government but had sided with the rejection of the draft constitution were removed from the government. They were actually in opposition already.

**Interviewer 1.5:** -Raila Odinga and...

**Officer 1.5:** Yes, Raila, Kalonzo and some cabinet ministers even then. So what the president did was to invite the opposition now to replace them and he eventually had a majority in the house. All the KANU that had been chased away from many years of running this country, were suddenly brought to the government benches as ministers. That disappointed Kenyans more. So, in that sense, by that move, the government became very strong. Kibaki promised a very lean, small cabinet. When that happened, when his political stability was threatened, he invited the opposition and increased the number of cabinets. Actually, we have the highest number of Cabinets in history in this country today, there are 33 or 34. This is the highest it has ever been. And then there were about 80 assistant ministers. So, that is more than half of parliament that is either a cabinet minister or an assistant minister or a chief [inaudible word] of parliament of the government party. So by that, the government got hold of the Parliament very strongly and so the parliament failed to control the government in that sense.

**Interviewer 5:** Now, we just talked about the committee of eminent persons, do you see that as a participatory initiative?

**Officer 5:** Yes and no. Yes in the way that they conducted their business. They were respectable people, they solicited views from all parts of the country, across the political divide.

**Interviewer 5.1:** And all groups were allowed in?

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**Officer 5.1:** Yes, yes. Very participatory in that sense. But considering that the constitution was not defeated when the people opposed it and government, which backed the constitutional draft, failed, what many Kenyans thought that in appointing even those people, the president would invite those who opposed it to sit in that committee so that there would be –they were the majority, those who opposed it and they sit on this committee and the government side also appoints its own committee so that we have a balanced committee. That did not happen. The eminent persons were Kibaki's appointees all of them. So in that sense, it was not participatory. But because of the caliber of people selected, while they did their job in public, but we do not know the contents, we are only speculating because the contents have not been released, I think, publicly. We do not know the details of the document, yet it is the taxpayers' money that was used to do that.

**Interviewer 5.2:** But some of the findings, according to the newspapers, were a bit surprising considering that they were Kibaki's appointees –I mean, they did conclude that what Kenyans wanted was of course the Bomas draft, the original one, so in a sense some of the views seem to have been heard?

**Officer 5.2:** Yes. In that sense, they heard it from everyone, there was nobody who was blocked from presenting their views, it was an open thing.

**Interviewer 5.3:** Although it did not really feed into the process after that.

**Officer 5.3:** Well, I think, did we have anything after that? I think that was the end of the thing. Then the minimum reform was a completely different thing. That was not related to the eminent persons report in my view.

**Interviewer 4:** Considering the Bomas conferences, seen also as a participatory initiative, how would you assess that?

**Officer 4:** The Bomas, in my own view, was the best that could have happened in terms of participatory dialogue. It invited people from all walks of life –the poor, the rich, the powerful, the powerless, the civil society, the state, politicians, religious people, the youth, the marginalized –I mean, there can not be a perfect situation in any way, but there was a big attempt to make it as widely consultative as possible.

**Interviewer 4.1:** How was it decided who could participate?



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**Officer 4.1:** It was not a very clear process. It was not a very clear process of how people decided to be so and so that should be representing that. Actually for sure I can not tell whether there was any process. I know some civil societies presented their case, political parties had appointed their persons, but I am not sure if there was a clear cut process. Nevertheless, I do not think that Kenyans had a serious problem with the people who were there. Of course there was a feeling that maybe at that time KANU, which was in power for 40 years, had used its structures to appoint people before the elections. But I do not think that was a big problem with Kenyans as such.

**Interviewer 4.2:** Okay, so once the Bomas were going, how would you describe the opportunities for the groups present to express their views and preferences?

**Officer 4.2:** I think that there was a wide space for each of the groups to express themselves because they were divided into many committees, into many sub themes, sub groups. There were so many of them that you would join whichever group you would like to join, discussing a particular theme and eventually these things were brought to the plenary and the discussions went back and forth from the sub groups to the plenary and there was a wide, wide room for consultation, for participation. There was enough space for that, for those who participated. There were observers who could see the process, there was live coverage on the tv sometimes, so the process was very consultative inside Bomas.

**Interviewer 4.3:** Then when it came to the reporting based on the Bomas, did all this actually feed into and inform the Bomas draft?

**Officer 4.3:** To a great extent it did. Whatever was agreed, and there was a voting for all clauses, and if there was a dispute, I even think there was a percentage of how large –that it could not go through if a certain number of people had not supported it. So whenever there was not support, it did not go through to the next stage. So it was subjected to an election process, each of the clauses, each of the parts. I was not a participant at Bomas, but I had many discussions and many, frequent interactions with the participants. It could not go through if it was not approved by a majority.

**Interviewer 6:** So the Bomas conferences and then the investigation into public opinion, where these new kinds of initiatives in the historical context of Kenya?

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**Officer 6:** Yes, it is. I think, not only in Kenya, in Africa a constitution making process of that nature is something very new. It would have made history. Because most of the constitutions are done during crises. It was not the crisis that we can talk of here; I think we lost an opportunity to make history in Africa.

**Interviewer 7:** So, a little different theme. In connection with the participation in the review process, is your assessment that people have been able to express their views freely?

**Officer 7:** Yes, it was a... The views were really expressed from all over this country, the people that went around actually visited every district of this country and collected views –and from different communities within the district also. Recorded, documented, and all the views were brought to Bomas from every part of this country. So the discussions within Bomas were supplied by the views that were presented from all the corners of this country. All three parts, and I remember I participated in two, where commissioners had a whole day getting views from the public –the women, the youth, the elders, leaders –everybody was accorded space to present their views. Those who had prepared some written materials, they were all submitted to the commission and I think there was thorough consultation on the ground.

**Interviewer 7.1:** So as such, there was little limitation as to the expressions?

**Officer: 7.1:** Yes, there was all –in fact I do not think that it is necessary to think about going back; if the process should start now, the views are all there.

**Interviewer 8:** Concerning the wider constitutional review process also after the referendum, how would you describe the availability of alternative information? –Alternative in the sense of not just what the government present, e.g.

**Officer 8:** No, I do not think that there was any alternative after that, I do not recall of any, because the committee of eminent persons was a government project. I do not think even serious...None of the groups that Government had made any arrangements for were alternatives that I am aware of.

**Interviewer 8.1:** What about concerning the time leading up to the referendum, specifically?

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**Officer 8.1:** Up to the referendum, there was a lot of civic education by civil society organizations. There was a lot of civic education by the electoral commission –no, by the constitutional review commission. The media –all medias were actually used by all sectors and entrusted to educate the public. So those who were opposing were prepared for what they said –actually, what some did was to bring the Wako draft and the Bomas draft before the referendum and compare the two clause by clause; ‘this is what the Bomas wanted, this is what the Wako draft wants’. So that people see the difference and can say ‘this is not’...-By an large, Kenyans wanted the Bomas draft, but you get different drafts with different contents, so that is why it was rejected; so there was a lot of information leading to the referendum.

**Interviewer 8.2:** So the amount and quality of information available was not a restriction?

**Officer 8.2:** No, it was good.

**Interviewer 9:** Have you observed any obstructions or difficulties for people to form associations or interest groups in connection with the constitutional review process?

**Officer 9:** No, I do not think that there were any restrictions as such. I think that there was a fair amount of freedom for people to associate and state their case and position in the media and in the public domain. There was not any restrictions that I am aware of.

**Interviewer 9.1:** I had a meeting with an observer of the process, Ian Gatere, last Friday and he mentioned that, not necessarily strictly in connection with the constitutional review process as such, but he had a feeling that when interest groups were formed too close to some economic interests... Well, he mentioned that some people have disappeared in that connection?

**Officer 9.1:** Well, if you talk about a broader sense of association, of course this government has widened the space for people forming associations and for demonstrating. But there are still restrictions. When you threaten especially powerful people, who are in the government, then you will not have all the freedom you want to do what ever you want to do in such connections. It has nothing to do with the constitution as such, for example, we have corruption issues in this country and

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corruption is one of the most dividing lines between the rich and the poor because the kind of corruption that is occurring in this country is on – a lot of it is at the high level in terms of resources that is taken away; we have scandals. Those who are in those scandals, if the public are going to demonstrate about it, and the people involved in the scandals are in the government, then the public has not been allowed free demonstration, to do whatever they want. Last month, we had demonstrations and people who were at that demonstration were arrested. They demonstrated because of two things: One, Parliament wanted to increase their salaries again, after they have increased it a number of times since they were elected, and two, there was the anglo leasing scandal. So when these things are brought to the streets, the police will be used to disperse these people. So, there are such restrictions of course.

**Interviewer 17.1: So you see a connection between the government's interests and the police here?**

**Officer 17.1:** Yes, the police is part of the government, it is a tool of the government.

**Interviewer 17.2: So there is no independency there?**

**Officer 17.2:** No..! No.

**Interviewer: Throughout the constitutional review process, there have been demonstrations and the police have in some cases responded rather hard handedly... You say that you see the police as a tool of government, but how have interpreted the response by the police in these cases?**

**Officer 9.2:** Yes, the police have always remained a tool of the government to use for whatever they want. I do not think that the police have ever been independent and well...the period leading to the constitutional review process of course saw a lot of police misuse of force. You know they used a lot of force. At the end of the day, Kenyans went to...In fact it is not only over the constitution, any changes that have happened in this country have always happened through fights with the government and the police. In 1991, Kenya was a single party state, there were so many people arrested, detained and killed in the struggle to make Kenya a multiparty state; eventually it became so. The struggle for constitutional review, for constitutional change, had its casualties. But after the government accepted it because of the overwhelming pressure by the public, the force could not contain them, so the

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government had to give in. So after they gave in, there was not serious confrontation as such. Now, after that, it was to go to Bomas.

**Interviewer 9.3: So you are talking about before the elections, when the process started?**

**Officer 9.3:** Yes. So the changes have always been very violent, in the terms of the government's reactions being very violent, but by and large, since we have had a change of government, I must say that it has not been as bad as before. It does not mean that it is not there; suppression is still there. But there is much more room for demonstration than before.

**Interviewer 9.4: So the type of demonstrations that have been taking place, they would have been stopped before?**

**Officer 9.4:** Yes.

**Interviewer 10: Concerning the referendum in 2005, were there any groups of people who were systematically not able to cast their votes?**

**Officer 10:** Actually, in this country, there are a number of people who would not vote; even if the constitution allows them. The constitution allows them, but for various reasons they do not vote. One is the youth, who are 18 years and are supposed to have national identity cards...I do not know the reason, but for many years this country has had problems with issuing identity cards. So those people who do not have identity cards and yet they have reached 18 years, are left out; those are millions of youth. Sometimes you can read that it is a deliberate thing because the government of the day thinks that the youth are always anti establishment; so if you give all of them identity cards, they will vote you out of power.

**Interviewer 10.1: It is not only technical restrictions then?**

**Officer 10.2:** No, it is not only a technical thing, it is a political thing as well. Then there is accessibility for people who actually vote. People in the rural areas who live far away from the main centers do not have access to the ballot boxes, because these are quite a distance away, particularly in the northern parts of this country, where the population is nomadic. There the voting has actually never been even 50 % of the registered voters. So a very low percentage of people there vote during elections and that happened during the referendum as well. Third, illiteracy is also a bigger factor in

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detering people from voting or to vote 'in the right way'. So, people who do not know...or can not read and write, for many of them, the votes are either spoiled although there are people there to help them –there are a lot of spoiled votes in every constituency.

**Interviewer 10.3: Even with the banana/orange system of the referendum?**

**Officer 10.3:** Yes, yes, I think there were a lot of problems with that because then education has not reached every part of this country for people to know the difference between the banana and the orange. So, people who are in the rural areas, sometimes they are misinformed depending on who informs them and so they are misinformed about the difference between the banana and the orange so that people can get them to their side. So those kinds of things have hindered people from voting.

**Interviewer 8.3: So in that sense, you could say that the availability of information has been very different in the rural areas compared to in Nairobi?**

**Officer 8.3:** Yes, there is quite a difference between urban centers and rural areas.

**Interviewer 12: This is very close to what we talked about in the beginning. Your perception as to who has been controlling the agenda of the constitutional review process, could you try to tell me about that?**

**Officer 12:** It is the government! Because they are the ones who are mandated by the Kenyan public to –particularly the president is the one Kenyans mandated to this and that was the platform on which he was elected. So still he controls, whether he has controlled it to the satisfaction of Kenyans that is a different matter that I think Kenyans are going to use during this election.

**Interviewer 12.1: So in this connection, has it been possible for political parties or interest groups to raise new issues, to pressure Kibaki?**

**Officer 12.1:** No. Well...Since the defeat of the draft, Kenyans... I mean, no serious attempts were made by anybody else to bring back the process, apart from the committee of eminent persons that the president formed. Even the political parties, they did not really march –until now that we are approaching the elections when they brought in the minimum reforms and tried to link that to the constitution. But this is for their own political survival that they are bringing it in now. So, we can not clearly

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say that this is a constitutional clearing thing, it did not have the constitutional mind, you know. It is a piece of...

**Interviewer 12.2: Part of strategy?**

**Officer:** Yes.

**Interviewer 12.3: What about the parliamentary committee on justice and constitutional affairs –the one led by Paul Muite- how do you see the role of that?**

**Officer 12.3:** Well, it has always been used by the government... You see, there is a technicality –I am not a lawyer, but section 47 of the constitution does not allow, unless it is changed, for a change of the constitution and I think that every side knows that that will not happen. So... The committee should actually have said that -led in changing the current constitution first so that you can actually amend or replace the constitution. But as it is, from what they are telling us, that section does not allow all this to happen. So the parliamentary committee should have actually led in repealing that section of the current constitution to allow for replacement of the second one. But it did not do that and I think it was deliberate and that they wanted to use it as –for example even if the draft, the constitution went through, it would still be used by other people to block constitutionally. So, the committees have always been controlled by the government, including the law and justice committee. The majority of members are in the government, MPs from the government side.

**Interviewer 12.4: That is a thing that I have been wondering about in connection with that committee, because Muite is member of the government but on many issues his statements have been very much opposed to what Kibaki has said, actually.**

**Officer 12.4:** Yes, he is not an insider of Kibaki as such, but the majority of the members in that committee are pro government, so I think... I mean, it is a rule that the chairs should not be government sided, but that the members are from both sides and you can not tell now who is on government side and who is not, because half of KANU is in government, the other half is on the opposition bench. So, when you say half of the people here should be from the government side or the opposition side, those MPs in government, when they sit in the committee, they sit there as opposition,

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but in true sense, they are in the government, so you can not tell which side is government and which side is opposition within KANU; FORD People is the same way.

**Interviewer 20: So in that sense there are informal ties that are difficult to outline?**

**Officer 20:** Yes, it is difficult to... I mean, MPs do not deflect from their parties, but they join the other side without formally deflecting. Today, you could hear Uhuru Kenyatta, who is the opposition leader is among the people sitting to campaign for Kibaki. So there is no clear cut... You can not understand. For an outsider it is very difficult to understand because political parties are not parties which have ideals, which have strategies, which have vision. It is a survival thing: 'I want to survive. If I get elected with this party, then good. If that party did not form government, I can jump to another party without defecting'. We do not have party ideals as such.

**Interviewer 16: Now, you mentioned corruption earlier. Do you think that also plays a part in this connection?**

**Officer 16:** Of course. It is corruption, because when you appoint Cabinet ministers from the opposition, they are given 200.000 kshs extra as salary every month. That is bribing them. You appoint 80 Assistant Ministers who do nothing; in fact, they have been complaining the other day on the media openly that their only business is to read answers in Parliament of questions which have been asked by so and so and then go and read newspapers –and they are paid a 100.000 kshs and there are 80 of them. That is bribing them. They are given cars, offices, and facilities from tax payers' money without any performance. That is corruption. You have corrupted them not to be loyal to the parties that elected them, to abandon the parties that elected them without formally defecting and they have accepted them to be... You know, KANU being in power today, and KANU has been in power for 40 years, and Kenyans were angered with KANU to remove them from power. But then, one person out of the 30 million Kenyans decides to say 'come back, KANU'.

**Interviewer 16.1: But Kibaki was also a member of the former government once?**



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**Officer 16.1:** Yes, all of them were. All of them, all the MPs were –almost all of the currently sitting.

**Interviewer 16.2:** So there a new headings of the parties, but the people sitting there are the same?

**Officer 16.2:** The people are the same, even the current opposition. They are all from KANU. It is true.

**Interviewer 13:** As we talked about regarding the pastoralists e.g., the people who have experienced difficulties in voting or do not vote, have they also been excluded in a broader sense from the reform process?

**Officer 13:** Yes. Governance in this country revolves around political power and political power is who has the voting power, who has the numbers. So those communities that have power of numbers control the distribution of resources, the decision making, the governance in this country is controlled by those people. So the pastoralists and the marginalized communities would not have the voting power, they have always been left behind. So they have never been included in the governance of this country as such. Even the political messages, for example we have a sessional paper that was done in 1965 and which laid down the road map for development in this country until 1986/7. This paper was the framework for the development of this country and it was all about agriculture; tea, coffee, etc. None of it was about livestock. So the development priorities in this country are for the powerful voters, people with numbers. It is not for those who are less.

**Interviewer 13.1:** So there is not much inclusion of minorities?

**Officer 13.1:** No! Very clearly no.

**Interviewer 14:** Concerning Kibaki's style of government, how aware do you think that he is with regards to affecting the views that Kenyans hold of him in terms of being the preferable leader of the country?

**Officer 14:** Yes, I think that Kibaki has performed to a great extent to the expectations of Kenyans. In some areas he has failed. But in many of the areas, like the economy, he has really improved. One thing that every Kenyan would praise Kibaki for, is for example the introduction of free primary education. Another thing is about the constituency development fund, huge amounts of funds are going to the

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rural constituencies that have never had that kind of allocation before; that people are now able to decide of their development projects with money availed from taxes. This is a big plus for Kibaki. But in some areas, he has also failed miserably. One area of course is the constitution. He has failed to bring Kenyans onboard together, to unite Kenyans and to deliver a new constitution as he said he would within 100 days –or even in much longer time. But we will not see him now making it anyway, of course, to deliver a new constitution before the end of his term in the next three months; so in that sense he has failed the Kenyan expectations. The other thing that he has failed to do is to create national unity. Kenyans are very much divided along tribal lines. When he was elected, Kenyans broke down those barriers and elected him. He failed to take that opportunity to build unity in this country. He went back to the system of tribalism that destroyed this country. He entrenched it further rather than breaking it.

**Interviewer 16.3: How do you mean so?**

**Officer 16.3:** When he was elected, for the first time Kenyans voted in unison, the communities that would otherwise never vote for each other, that time they voted for him. For example the Luos are never friendly to Kikuyus, but the Luos voted for him almost 100 % in the last election. Today, they have gone back to where they were and this he could have avoided if he did not brake the promise; because they promised Kenyans that they would remain as a team and there was a memorandum of understanding that was signed between them to make them remain as a team. He disregarded that and instead he went to reward his people.

**Interviewer 16.4: How so, reward?**

**Officer 16.4:** You know, in terms of appointments, cabinet appointments, appointments to government offices. So he went back to reward his people from central province and this angered these people who did not care about his background and voted for him. In that sense he failed to create national unity.

**Interviewer 20.1: How do you think it can be that he returned to earlier patterns along tribal lines?**

**Officer 20.1:** I think there was a lot of pressure on him. Because it is believed that when you are in power, you are in power on behalf of your community. So, when he took power, Moi had committed a lot of injustices to the people of central province.

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Because they were always in opposition to Moi, so Moi disregarded them. But when they came to power, he brought in those friends, like the people he knew from his years of politics from his home and he threw away the friends from other regions who supported him. He only brought some of these after his stability was threatened. People like the FORD people, they are brought in. But again, if you see clearly, these are token, sort of gifts. The key ministries that matter in this country, like the finance, the security, education –key ministries that have had huge budget control, have huge influence, are controlled almost from the top to the middle level by people from one culture.

**Interviewer 20.2: They are all Kikuyu?**

**Officer 20.2:** Yes. This is not a good thing of course. And then, if you see the corruption scandals that were mentioned in his government, it again involved people from this region. But that explains why there was no serious action taken against them. When the Kenyans put a pressure on them, they only stepped aside and all of them are back to the cabinet now. Kenyans see this as betrayal. There was no sincerity about fighting corruption and that is the other area in which he has failed this country. We thought that the new government would follow the past corrupt guys and reclaim back our money or punish them. But we see that those people who committed the crimes at that time are now very close with the government. So where is the will to fight corruption? This is a major disappointment in this country.

**Interviewer 15: A new topic: can you think of any changes in the conditions of the political environment which have affected the opportunities for e.g. civil society or even political parties to undertake collective action in relation to the constitutional review?**

**Officer 15:** Well, the political environment from now on will be very much around elections. – I mean, by the political parties and election euphoria. It is uncertain what to expect after this.

**Interviewer 15.1: But then since the last elections and up until now?**

**Officer 15.1:** In that period, I do not think that the political environment has been hostile as such in connection with the constitution or other areas; but clearly nobody focused on it. Because you see, the opposition does not want the constitution to be

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achieved. Even if they are the public condemning the government for not doing enough to realize the constitution, the truth is that they do not want the constitution. Because they want to use it as a tool in the next elections: 'this government failed to bring the constitutional change that we have been struggling for'. So they want to use it as a tool. So people, even the opposition, have just been silent about it and once in a while you hear them condemning the government and so forth and so forth. But there was nothing much, so there is not anything I can say about any political environment that could have created the room for dialogue on a new constitution. There is no commitment from either side on that.

### **Interviewer 15.2: What about civil society?**

**Officer 15.2:** Well, civil society more or less took after the political situation. Actually, after the 2002 elections, the civil society was in chaos. When this government came to power, the civil society almost died. Because one, civil society was united on the opposition to Moi.

### **Interviewer 15.3: That was *the* issue?**

**Officer 15.3:** Yes. Moi was the issue. When Moi was removed, they were trying to find out, what else they were going to do. Then, a lot of them were brought into government, to serve in the government; these were the key leaders of civil society formerly. Then, the umbrella organization that was supposed to be coordinating, etc, the NGO Council, the government... Whether it was the government or civil society failure to handle it... Well, the person who was put as the head completely killed the organization with poor management, extremely poor management. Now, you can not remove that person because of the legal issues. Then after a while, the politicians disagreed among themselves on the failed MOU and the divide was now between the two big groups. And civil society took that division as well. So, there is a part of civil society aligned to the government and there is one aligned with the opposition, you know, because of the ethnic background.

### **Interviewer 16.5: Okay, so the tribal ties that you talked about even plays a role in civil society?**

**Officer 16.5:** Yes, it has penetrated to civil society now.

### **Interviewer 16.6: But it was not like that in civil society before 2002?**

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**Officer 16.6:** No, before there were no tribal issues, there was Moi against the rest. There was one Kenya against one Moi.

**Interviewer 16.7: -In civil society?**

**Officer 16.7:** -In civil society, yes...So...

**Interviewer 16.8: So in a way, tribalism has actually expanded?**

**Officer 16.8:** Yes! Yes.

**Interviewer 18:** Now, we earlier talked about the connections between government and the police. There was the whole issue of the Standard Media Newsgroup raid in March 2006. How did you experience that?

**Officer 18:** Well, it was just another misuse of force by the state. By the powerful people within the government who whenever they are threatened, they will use the police to silence the voices. That is how the media standard group was raided – because they were running stories that were critical of the government; like on corruption, on people who came into this country, by then they had been exposed, but there were some mercenaries, two Armenians... But the whole thing is about corruption. The media were critical about corruption, and the media is quite strong in this country. So, the government was not happy with the coverage, of exposing corruption. So they had to be silenced.

**Interviewer 18.1: So corruption is a touchy issue for the government.**

**Officer 18.1:** Yes, it is; it is.

**Interviewer 18.2: But it is also, considering what you have been explaining, something that the government seems to rely a lot upon, informal ties... If corruption really was to be stopped, that would have consequences perhaps for their capacity to govern?**

**Officer 18.2:** Yes. It is not easy, the extent of corruption, to eradicate it is not that easy... What Kenyans wanted was to be shown the willingness by the state, for government to say ‘we are fighting it’; and not to befriend people who have been condemned in the public eyes and bring them along to the government. That does not show your willingness in any case, it shows support for that. So it is not that fighting corruption is easy, but no will has been shown. That is what is disappointing Kenyans.

**Interviewer 18.3:** As you said, Kibaki was under much social pressure; when you gain a position like the presidency, are there a lot of people expecting something?

**Officer 18.3:** Yes.

**Interviewer 19:** There was also the killing of the Luo university professor in the Bomas?

**Officer 19:** Yes. Already, a bad blood was developing between the communities, between the Luo and the Kikuyu, so these are the results of such hatred for each other.

**Interviewer 19.1:** So that was not a political...

**Officer 19.1:** -It was, it was. At least, Kenyans believe that; nobody knows for sure. But that is what people think, that it is a political matter.

**Interviewer 19.2:** I remember reading that some Luo interpreted it as a warning to Raila Odinga?

**Officer 19.2:** Yes... Yes. Yes. It is possible. Yes.

**Interviewer 20:** Okay. Well, my last question is on informal ties and institutions, but I think that we have already covered that –unless you have something that you would like to add? –What about, I mean, on the one hand you have these relations in politics along ethnic lines, and then there are the business elites... Are these embedded in tribalism, as part of that?

**Officer 20:** Well, the business elite also have their own stake –in a big way, actually. But again, there is no clear cut between them and tribalism; because the rich from this tribe will support somebody from their tribe and the others will support theirs. But there is a group that does not fall into any of these divides; like the Indians, for example. They are very big business people, very big investors in this country and they will support the government of the day. They will always support the government of the day with resources.

**Interviewer 20.3:** So that is also a way of getting their attention?

**Officer 20.3:** Yes, buying their loyalty. In the beginning of this month, there was supposed to have been a dinner for the president, where each person would pay a million kshs per plate and the people were invited and had accepted to come with a check for one million; business people from this town. And it is not that they... I

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mean, it is nothing else other than buying loyalty and two, it is buying future contracts: 'So when you win, I am giving you this million so that I can recover from you after you win the next elections'. You know, that sort of thing. Issues of contracts that are awarded to rich business people so that they are also giving back to the government as their own kickbacks.

**Interviewer 20.4:** So, there is both a business community in which tribal ties do not play a role, and then there are the Luo, Kikuyu, etc. business communities?

**Officer 20.14:** Yes.

**Interviewer 20.5:** I am curious, in this connection, of how you think that Kenyans perceive such informal relations and the way they work since Kibaki has become president –has there been any change?

**Officer 20.5:** Well, it has only increased. Because now, Kenyans believe that it is a 'friends government', so they think that those who went to a certain university, those who are playing golf, are the groups who are running this government today. In fact, at one time, I think the youth was so critical because the government was composed of people who are beyond retirement age and all the people you see in the news on TV are very grey haired people. Old people from Kenyatta times are back to government and there are many young, intelligent elites who have no job, are underemployed and they are not given such opportunities. So there was a time, when there was a lot of pressure and the government had to respond so they created the ministry of youth to show a few things can change here and there.

**Interviewer 16.9:** So was that a form of cooptation?

**Officer 16.9:** Yes, yes. But it is the social ties, the informal ties that brought in again these people back to government. You trust more people whom you know, so you bring them around.

**Interviewer 20.6:** Aha. Do you think that Kenyans are getting more aware of how this is a group of the same people that is still governing –as you say, this group of golfers?

**Officer 20.6:** Yes, that is everyday in the media. People are aware of that, it is not a secret.

**Interviewer 20.7:** Okay, so do you think it will change anything?

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**Officer 20.7:** Well... Because all voting is going to be on tribal lines, it is not going to change anything. –Unfortunately, when it comes to elections, those real issues stop being the focus and other smaller bits, like our tribes, become the focus. And that is what politicians are going to use to come back to power or to come to power. Because they know that that is where people’s hearts are; that at the end of the day, they want one of their own to be there. Or one of their own to be rewarded by so that ‘if you are going to be the president, you pick our “son” to be your running mate or as a vice president and then I will vote for you -even if you have disappointed me for the last five years’ because you have one of your own there. So, the focus shifts from the issues. Then, the next day after the elections, people start complaining over those issues.

**Interviewer 20.8:** So in a sense there is some issue based politics, but when people vote, it is still along ethnic lines?

**Officer 20.8:** Yes... Yes.

**Interviewer 20.9:** How can it be that people keep voting along these ethnic lines?

**Officer 20.9:** Well, I think it is a culture that has been created in this country of...The value that they attach to your wealth is quite high, it does not matter where you got this value or this wealth from. Even if you have stolen it, so long as you are wealthy, the community sees that as their wealth. Because they can come to you and they can complain to you, and you give them something small, but if the person is not from my place, I can not complain to him; you are not even from my home, I do not even see you. That is one thing. I think that that is sort of a way of social security; I am secure because one of my own is there. And even when a person is arrested, you can go to one of your own so that he can intervene for you. So you do not allow the legal process to go through because you have somebody powerful interfering. When you do not have someone in such a place, you will rot in that course, in that case. So there will be no justice for you unless you have somebody else. So this kind of security makes youth think about one of their own.

**Interviewer 20.10:** So is that because the formal social rights are not there or is it because the rights are there, but you do not trust them, whereas this man who is from your tribe, and so he will help you if you come to him?



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**Officer 20.10:** It is because the social justice system is not fair, the courts are not independent, the courts are heavily under the mercy of the government because the judges are appointed by the government, the judges are appointed by the president. So if the courts are not fair, the courts are not just, people stay in remand without their case being heard for seven years. For seven years. You have not been acquitted, you are still in remand, waiting for your case to be concluded; that is injustice.

**Interviewer 20.11: So these things still happen?**

**Officer 20.11:** Yes. So, if they want to intimidate you, if they want to –whatever they want to do, they can do it using the courts. So you are safer having somebody to intervene for you in the failed justice system.

**Interviewer 20.12: But also, social security does not really exist on a formal level in Kenya, does it?**

**Officer 20.12:** No. It does not.

**Interviewer 20.13: If it did, perhaps, tribalism would face harder conditions?**

**Officer 20.13:** Yes, sure.

**Interviewer:** Okay. Well, that was everything I had to ask you. Thank you for talking to me.

**Officer:** Okay. I hope it was useful!

## **Kariobangi Focus Group**

The following is a summary of the focus group interview with Residents of Kariobangi, Nairobi on 12.09.07, performed at the office in Kariobangi of a local organization working to improve security in the area. The interview was of a duration of 1.35.59 hours. Present at the focus group interview in the shanty town of Kariobangi in Nairobi were 8 residents of the area (5 women, 4 middle aged and 1 elderly, and 3 men, 2 young and 1 elderly) all with an income below US\$ 1 PPP, the interviewer and a facilitator/interpreter from the organization.

**To what extent have you followed the constitutional review process?**

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All the interviewees indicate that they have been interested in the process and followed its course, for example in the media.

### **1. If you think about the constitutional review process after the elections in 2002 and then until now, who do you think has taken the lead in this constitutional review process?**

One of the middle aged women utters that although she wants a new constitution, she thought that with three months until the elections, there would be corruption and that the process would not be fair and good, and so the process should be taken up again after the elections.

Another of the middle aged women said that there has been change so that the constitution can also be changed, but that it is too late to change it now before the elections.

One of the young men said that the process has not been properly formalized, and instead of being for the people, as he felt it should be, it has been controlled by the leaders. He also emphasized differences in the living conditions in Kenya for 'the people' and its leaders and stated that there are no human rights in Kenya, only for the leaders.

#### **1.1: So who are the people you think have been controlling the process? Is it the government of Kibaki, is it the MPs, the opposition; who do you think has taken the lead?**

A middle aged woman expressed that in her opinion, the government and the parliament are the same, because the people who are the ministers are the governors.

One of the young men mentions that there is a difference and that there was a committee on minimum reforms, there were the Bomas, Martha Karua is mentioned as central person, and Muite and the Parliamentary committee is mentioned; so there have been many different committees and it has been difficult to know who has been leading the process.

A middle aged woman joined in by saying that the President had just announced the Vice President to be the chairman of the committee on the constitution, to take the power to start communicating how he can now make a new constitution.

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The elderly man expressed the constitution that Kenya has now is good, because they have a good president that leads them and that he hoped Kibaki would get reelected.

One of the young men responds that that is typically for Kenyans, but what about the constitution if Raila or another president comes? He wanted another constitution so that he is protected if another president comes.

One of the young men expressed that he thought that the constitutional review should be led by the people, by public demand, and not by Parliament or government in itself; only if government and parliament respond to public demand.

One of the middle aged women added that 'we are the people, we have the power, we are the majority, they should do what we say'. She also said that Kibaki and his government have done them well and they are happy because before there were very many poor, people were unemployed, their children could not go to school but now that there has been economic progress, these things have improved.

### **3: Have the MPs represented the views of the people who elected them in the review process?**

A middle aged woman described how only people in the urban areas know what the constitution was and when the views of the people were collected they said that they wanted to decide for themselves, but right now with the present government, poverty has risen and the current government is for the Parliament, not for the people. Something she also thought was illustrated by Parliament's recent approval of 1.5 bn kshs worth of gratuity for MPs. The woman elaborated that people in rural areas are lacking roads, water and food and they are still demanding a new constitution, so the government is not there for their people on the grassroots level, the government does not care about the people. Several of the others expressed their agreements in this regard and one said further that the views of the people in the Bomas draft was taken to the dustbin instead of to Parliament, that it was another one that reached Parliament and that the process and judiciary has been taken over by the leaders as well as that the people has not had the power to ask questions because of the current constitution. There was widespread concurrence on these views among the interviewees.

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One of the women added that she thought that the government had tried a bit, but that because ‘every MP has a factory’ they have basically focused on their own interests and benefiting themselves instead of creating jobs for the people.

It was also mentioned that a new constitution was needed to improve the rights of people and pace of handling cases in the judiciary so that people can perhaps stay in remand in prisons for a couple of months instead of one year. Furthermore, discontent was expressed on the issue that the NARC government did not deliver on its promise to bring a new constitution within 100 days and after 5 years, there is still not a new constitution. The perceived importance of having a better constitution even though the present government may be good was also emphasized, since a government is only around for a few years, while the constitution is there for hundreds of years to come.

Several of the interviewees expressed that a good constitution is needed for the future, for the children and to improve the very bad security situation for the poor and that they themselves are suffering. It was described how the young men who have finished school can not get jobs had been involved in patrolling the streets of Kariobangi as part of the community based initiative to improve security in the area, because the police does not provide security in the area and they are corrupt in that they take bribes from criminals instead of arresting them. When the police found out that the young men were patrolling the streets, they have come to catch them and they call them thugs, although they are sacrificing themselves to secure the area and get some food for themselves, the police take the boys to jail or even kill them because they claim that they are thugs and criminals. If the boys are jailed, they may stay there for about two years under very bad conditions, and then will die there, because their parents live in slum, their houses are not permanent, so they do not have any money to bribe the police officers to let the boys free. However, a boy that comes from a family that has connections, if he for example has an uncle that is an MP, the police will leave alone and only take the other boys.

Several of the others add to this narration that there is a big difference, a gap, between the rich and the poor and one of the middle aged women says that ‘we as the people are very sad because of our government, but the president is good’. She elaborated

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that President Kibaki is very good, but the lower government, like the ones who Kibaki has appointed for Cabinet ministers and people in the departments are not trusted and not seen as caring for the poor people. One of the young men then added that that is why they need a new constitution, because the current one is very bad and does not protect their rights.

One of the women gave a narration to illustrate the mentioned conditions for people in Kariobangi: The police had come at night to one of the houses in the area to take away one of the young sons of the family while the parents were there. When the mother asked why they were taking her son, they beat her; however, she followed them to see where they were taking her son, first to the police station and then to another place, where she after the police had left found her son shot dead. The people who had witnessed the actions by the police in the case went to the streets to demonstrate with the dead body of the son, and they demonstrated outside the police station asking why the police officer had killed the boy. Shortly after, the police officer was promoted and they saw his picture in the newspaper, where he was celebrated for doing a good job for the police. According to the woman, the government does nothing about these things and the woman ended her narration by describing how they live in fear because of these things.

Some of the interviewees then expressed how they did not feel that the government has been caring for their interests in that while the economy is growing 6 %, they have to live for around 1 dollar a day, they have no jobs and the food prices are rising and too high for them to properly feed themselves and their families.

#### **4. Do you think that Kenyans who are not politicians have been able to participate in the constitutional review process?**

All the interviewees gave responses that expressed that they think that it has been possible for non-politicians to partake in the review process in one sense or another and five of them have taken part in public meetings on the review of the constitution and some of them in more than one meeting, where they could freely and without any fear express their views to politicians. It was the feeling of several of the interviewees that the politicians at those meetings had listened to what they had so say, but that

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they do not act on the things they hear and as such they did not feel that their politicians were representing them. Dissatisfaction was also aired in the form of the interviewees seeing the draft constitution that was up for the referendum as not being for them, as ‘the people’, but for the elites or politicians.

### **8. How would you describe the availability of information regarding the constitutional review process?**

A few of the interviewees mentioned that they have been able to access TV and radio programs on issues relating to the review process and that journalists in such medias to some extent have asked questions from people writing the shows to politicians live on air. However, one of the young men felt that the TV and radio stations are mostly pro government and that the politicians do not properly answer the questions posed by journalists and common Kenyans. The interviewees agreed that they are now free to say anything and ask any question, but politicians say one thing and do another, the politicians do not turn their own or the words of ordinary citizens into action and that the politicians do not represent them. However, it was also mentioned that there have been many attempts to educate the ordinary people of Kenya, there has been debate free to the people and the viewpoint that because they are the ones who elect the politicians, the ones who carry them to Parliament, the politicians should follow their wishes in their actions. Some of the women ventured that Kibaki is good, but that his Cabinet ministers are corrupt.

Many of the interviewees then described how disabled people are treated poorly by government authorities, not protected by rights in practice and often beaten by the police, for example.

### **9. Still in connection with the constitutional review process, have you heard about any obstructions or difficulties for people like yourselves trying to form an interest group or an association?**

The interviewees expressed that there are difficulties for them in that they live in the slum, as squatters and have done so since 1978 when they were moved to Kariobangi, but then last year the one person from the city council came with guards, they

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removed many of the houses and the member of the city council confiscated property of residents of Kariobangi for himself privately –and yet there is no reaction when the residents complained to the authorities or their local MP. So a middle aged woman explained that they do not think that people like them have human rights in practice in Kenya and corruption is still widespread even though Kibaki had promised to fight corruption; however, she did not blame Kibaki himself, but his cabinet ministers and other leaders.

### **10. Were you able to vote in the referendum on the proposed new constitution in 2005?**

Everyone answered that they had been able to vote, but they all voted ‘no’, because they saw it as not coming from the people nor was it for the people, but that the MPs wanted it for themselves.

### **12: Could you try to tell me about who you think has been controlling the agenda with regards to the review of the constitution?**

Some of the men presented the view that it was definitely the government that had controlled the agenda and that they are corrupt in connection with who comes into cabinet. Discontent was also aired with regards to who was being asked to come to public meetings to give their views in relation to the review and that it has not been possible for everyone to give their views.

Several of the interviewees thought that parliamentarians were not interested in having a new constitution in accordance with the demands of the people because of their interests related to their property and that they therefore wanted the constitution to be drained. It was furthermore widely felt that every time a good proposition is made, the Parliament votes it down and instead gives themselves a golden handshake of 1.5 million kshs while the residents of Kariobangi have nothing and are forced to be squatters –and they have not delivered a new constitution; so the interviewees felt that the members of parliament have been very selfish and they would not vote for them again. Most of the interviewees expressed that they wanted to vote for Kibaki again, but wanted other ministers and other MPs.

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**12.1: Now, it sounds like there is no doubt in your mind that Kibaki is pure hearted and you do not trust his ministers. But Kibaki is the one who appoints the ministers, they are there because of him?**

This caused much debate among the interviewees with some arguing that Kibaki was not to blame for the ministers who were perceived to be corrupt, because he merely appointed persons which had been elected by the people and therefore it was rather the citizens that were to blame because they had voted for bad leaders. However, others pointed out that the president appoints 10 of the members of Parliament and seemed to hold the view that Kibaki was responsible for his cabinet ministers since he is the one who has appointed them. All agreed though that Kenya needs more responsible, less self-interested, and more trustable leaders and with some saying that but for the present, they will vote for Kibaki.

### **Kina Interview**

The following is the transcription of the interview with Koitamet Ole Kina, ODM Deputy Director/ former Vice Chairman of the Bomas Constitutional Conference/ Former member of the CSO Katiba Watch Group. The interview was performed in a retired spot of a Nairobi restaurant on 22.09.07 and of a duration of 1.04.56 hours.

**Interviewer 2: First of all, I would like you to tell me about how you from ODM have participated in the constitutional review process during its course?**

**Interviewee 2:** First I would like you to know that ODM has been formed as a result of people who were agitating for the enactment of the Bomas draft constitution coming together. I could actually be found to be one of the founders of ODM in that respect because soon after the Bomas dispensation when we were not able to enact the Bomas draft, because as it happened, the delegates voted unanimously for the draft in Bomas, but some people in government were not comfortable with the draft, so during the voting process, they walked out. But the percentage that walked out was not enough to stop business from taking place, so delegates were able to still vote



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unanimously and they had the numbers to pass the draft; because they followed the rules that followed the conference, which required that at least 2/3 present and voting should be able to enact the draft, and they were able to do that. So the problems of the nation began then, because after the enactment, the government moved in speed to try and stop the process. They went to court to try and bring legal issues, which were not possible to enforce, because that had only been overtaken by events. So now, the Attorney General and the now government interfered with the process that had been agreed upon, the process that was guided by the rules that governed the entire constitutional dispensation. So, instead of taking the draft document to Parliament for enactment, and possibly isolating any issues that were not addressed at the conference for it to be taken to a referendum, they decided to go to Kilifi and try to adjust the draft –which was completely out of the process, so whatever they did, that particular incident made the entire process illegitimate and because of that some of us immediately took the position to reject the results of Kilifi and if that was going to be what was brought to Kenyans for consideration, we wanted to make sure that Kenyans rejected it. –Because the process of arriving at that had been interfered with and so we were saying that the result of an illegitimate process were going to be an illegitimate document, which was not going to bind Kenyans in anyway, because we thought that at one given time we would have people rejecting or questioning the process under which this document was arrived at. For this reason we said that if there was going to be a fraud against the people of Kenya, and some of us who had been seated or who were watchmen at that particular time working for the process, we said that ‘we can not sit back and allow this fraud be committed against the people of Kenya’. So for that reason, we formed a lobby group that we called Katiba Watch. That was formed by about 6-7 of us when it began, mainly delegates at Bomas and then members of the civil society also joined hands with us and we started lobbying Kenyans to demand for the enactment of the Bomas draft, because we said that this is the people’s draft, what has come from Kilifi is illegitimate and should not even be brought for consideration before Kenyans, because the process of arriving at that document was illegitimate; the Bomas draft was the legitimate document. So that was how we really started working together and we started conducting rallies, we had a

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first rally here in Nairobi, which was attended by a few people and then the second rally that we started building up was conducted in [inaudible word] and I hosted it because I come from there, so the members of Katiba Watch came and what we were doing was really was that we were going around the country distributing copies of the Bomas draft and later on when the copy of the Kilifi draft was brought, now we were going back to compare the two drafts and actually we conducted civic education and showing Kenyans why they should accept the Bomas one and why they should reject the Kilifi one. At that particular time, most of the Members of Parliament were nowhere, they were not with us because they were the ones who enacted the document. But the crowds were building wherever we went, whenever we talked about the constitution the crowds continued building and building politicians because of who they are, they are able to see where the Kenyans are going and they started jumping into the ship. So they actually started joining us after we had had several rallies; in fact most politicians came to us after a rally we had in Mombasa, which was attended by so many people and now they realized that really Kenyans have rejected this constitution. We came to Nairobi several times on our Katiba Watch rallies, most of the MPs now in ODM, like Ruto, became visible by attending the rallies that I was hosting. Like Ruto was tear gassed and got hurt in one rally that I had hosted at Uhuru Park but the government was talking us from attending that rally after it had given us a license and great numbers of people had come; so at the last minute it freaked and so it was trying to stop us from attending the rally and that caused a lot of havoc. There was a lot of agitation, several rallies were called, which the government was always trying to stop, but they built up and made people more resilient and at the end of it, the government had to allow the Katiba rallies to take place. That is the end of 2004 and now beginning of 2005. We were demanding that the constitution should be enacted by June 2005, but it was not enacted. That deadline of June was what we were giving as Katiba Watch and saying that if you do not enact this, then we as members of Katiba Watch will call a rally in Nairobi and declare the Bomas draft the new constitution. So this in itself was putting a lot of pressure on the government and they were trying all kinds of things, some were threatening us, some arresting us, trying to force us to go down; but the spirit was there and we continued.

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Then the Kilifi thing was tried, because they tried to push the Kilifi thing through Parliament and I think, but I am not sure, sometime in July 2005 they passed that in Parliament for consideration by the people on the ground. On that day that they voted for it, I was arrested with seven others for rejecting the draft, because we were demonstrating just outside the High Court and we were arrested there. We were taken in custody the whole night, the following day we were taken to court, they had nothing against us, we were singing and we never ate, but we were very strong in spirit and they were really surprised, because were still telling Kenyans that ‘we are on’ and so on. Of course, as part of intimidation, we were prosecuted despite of the fact that they knew that they had nothing against us, we came to court more than 42 times and I was driving from [inaudible word] but we eventually won the case and now we have actually instituted a case against the government, we are trying to sue the government for damages, we wasted our time, it was unlawful incarcerations, militias, the manner in which we were arresten and treated and so forth. But the point is that after that we continued with our rallies as Katiba Watch and as the rallies grew and the numbers of people came, we went to Western province so as we were at a rally in Kakamega, a Member of Parliament from [inaudible word] said that ‘okay, we want to transform the Katiba Watch into a national movement. Then the following day at the rally that we had at Moi stadium in Kisumu, is when the Orange Democratic Movement was launched; that was in October or November 2005. Then we continued with the rallies as ODM and then we went to the referendum, now as ODM and then won as ODM. Katiba watch was just delegates and civil society, but now members of Parliament had come in and many interest groups had come together. So, we needed an outfit that would be able to encompass everybody without anyone feeling left out, that is why we ended up with the movement. Also, we did not want something that was solid at that particular time, because it was possible that interests would become conflicting which would make it difficult for us to vie for the constitution that we wanted as a team. Because even as we were fighting as ODM at that time, among the delegates or the bigger group, there were conflicting interests; the Maasai were fighting because they did not want to lose their land; the Christians were saying ‘no, this is going to give Muslims a bigger hand in the governance of this

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country'; the Muslims were saying 'no, if we enact this constitution, we are not going to have our currently guaranteed Kadist courts and the manner we do our things. So, there were very, very many negatives that brought us together and all of us who were saying no were not united by one thing, but we were all rejecting certain things in the proposed constitution. But then, the bigger negatives that came then won.

**Interviewer 2.1: So not everyone there were actually for the Bomas draft?**

**Interviewee 2.1:** No, no. The majority was for the Bomas draft, a few from the churches joined us not because they were supporting the Bomas draft, but because then they thought that if that was enacted, then it was going to give the Muslims an upper hand. So it was a few negatives that brought the people together and so therefore it was difficult to predict what was going to happen after the draft was rejected. Because then it was not automatic that we were going to enact the Bomas draft because even among those who were saying no to the Kilifi, there were a few who would still have issues with the Bomas draft. But the biggest question and what we were asking people was that 'if you are saying that 80 or 90 % of the Bomas draft is okay, why do we not accept that 90 %, enact it and continue discussing the contentious issues?' That looked very easy at the surface, but the 5 or 10 % that they were rejecting were really the foundation of the constitution; because if you have not thrust out issues of governance, like whether Kenya was going to have a Parliamentary system of government or whether we were going to continue with the current system of government, which is really something that many Kenyans did not want because they are saying that it concentrates all powers in one person's hands and depending on whether that person is good or bad, the country is governed that way. We wanted more participation, we wanted devolution of power so that resources are devolved so that people from other parts of the country are able to enjoy the national cake. So those were really the core issues that we were fighting for as Katiba Watch. Leave little power and little resources there and let more of the resources go down to the people; that is what we want to do, we want to participate in governance and in sharing of the national cake. So that was the crust and those who bought that idea joined us in ODM and we continued fighting together and that is what still holds us together; the desire to have a parliamentary system of government, devolved power

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and then have more participation by the people of Kenya in governance, have a system that will allow all the parts of this country to enjoy the national cake, and those that were left behind have a fund that will allow them to mitigate against the time when they were not getting enough funds from government; so that if you give 10 billion to infrastructure in Nairobi, you give perhaps 50 billion to North Western. So that is where we were as ODM and that is what holds us together today.

### **Interviewer 2.2: But at this point ODM as a political party?**

**Interviewee 2.2:** Yes, after the referendum. You know, we had so many things that had brought us together just before the referendum and then when we won, now we realized that now we needed to take power; because the government had lost and so as far as we were concerned, it had no legitimacy to continue in government. However, it was clear to us that the question that was being addressed by the referendum was not the question of governance, it was the question of the constitution and that is why we did not necessarily want to interfere with Kibaki's government. However, he had a problem because the majority of members of Parliament had rejected the constitution and they were with us, members of his Cabinet resigned and joined the people. So in reconstituting his cabinet, we had hoped that as a wise leader he would call upon the members, even some of his cabinet ministers, who rejected the document; come and say 'now, what is the way forward now that we have rejected this document'. Yes, it was an issue of the constitution, but how do we move forward and maybe give them an opportunity also to come in and serve in government; that would have brought unity to the country. But we had about a month in which we did not have members of Parliament where he was ruling by decree as a president and then he constituted a cabinet in which he left all those who had voted against the draft and of course then that opened ranks, because he opened ranks, we had now to come together as a party, which was geared against the [inaudible word] that we had and we decided that we would stick together until we had removed his government from power and give people the constitution that they want. So ODM as a party really is brought together by the desire to give this country a new constitution and we still have the hope that the people of Kenya will get a new constitution. So through ODM, the spirit and the hope of a new constitution is still running in Kenya and if Kenyans

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want a new constitution, we believe they will support ODM because it is the only true sign that we may get a new constitution. Yes, people may say that every government may promise and then remit on the promises but we believe, because most of the people that we have now in ODM are the same people who have been fighting for change for a long time, so we believe that when they form government, sudden changes will be realized in this country and we are from the minority tribes in this country and those in the majority who feel that all Kenyans must be granted equal opportunity. Bringing these people together I think gives the opportunity to try and address the questions that have been forcing this country to tear apart.

**Interviewer 2.3: So then after the referendum there have been all these different committees set up by government. How have you contributed as a party in that respect?**

**Interviewee 2.3:** First of all, I continued being a member of Katiba Watch, because when we started the party, it was coming together as a coalition of parties and groups that were interested in writing a new constitution. So I got into the party as a member of Katiba Watch, because Katiba Watch was one of the founding organizations or groups of ODM. So I was there in my right as representative of Katiba Watch and not of LDP, KANU or LPK. But as we were going on, we continued discussing with individuals, with members of the civil society of how we were going to keep the spirit of a new constitution burning and how we would be able to maybe persuade government ourselves that it is really time that we looked at those issues that divided us during the referendum so that we are able to bring Kenyans a new constitution. But through this time we have realized that the government did not have the political will although there were immense resources that were put at its disposal through initiatives like the GJLOS and so on, which were really positive and you would see that people were hoping that the ministry under Karua would be able to try and address these issues to give Kenyans a new constitution. However, what people did not realize was that by Kibaki making Karua the Minister for Justice and Constitutional Affairs, he had actually killed the process. Because, Karua as a minister is more arrogant than Kiraitu, she is less sociable, she is not able to lobby, she is not cooperative, her word is the law and she has to get her way or no. So it was

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really difficult because the question of a constitution is discussion and discussion and discussion, giving and taking, but she has nothing to give and she wants to take everything. So that is really the problem and even as we have had all those committees, we think it was just a question of the government buying time. That they had decided that they were happy with the status quo, that they were not interested in changing anything, they would buy as much time as they could get so that their tenure of office is not interfered with, that they were not interested in giving Kenyans a constitution. I was involved in the minimum reform package group, which is this committee that was formed by the Vice President. At the formation, we came together as members of civil society and lobbied for equal representation in the committee with the members of Parliament; in fact we were asking for more, because we were saying that Members of Parliament represent only one sector, and that is Parliament, while we come from many other sectors that need to have representation in the constitutional talks. So if they had 27, we were asking about 40 slots; if not, at least 27 like them. They refused, we went to Parliament twice, actually the first day six of us tried to negotiate for the 27 positions, they said that they had allocated six positions to the civil society and we said that if that was their position, we were not going to take it. Because we had six principles we wanted observed; one, we would like to ensure that the process is inclusive and for this process to be inclusive it means that we are going to recognize all the sectors and we wanted to be included in the first meeting of those people who were going to make decisions on even the formation of the team itself and agreeing on numbers; that Members of Parliament can not sit by themselves and make those decisions, but those decisions had to be made in a meeting that involved us.

**Interviewer 2.4: So you argued that as a member of Katiba Watch?**

**Interviewee 2.4:** No, as a member of civil society, but at the same time even those members of ODM, who were in Parliament also had that position because there was no conflict between what most members of civil society are fighting for, and what ODM stands for. So in the question of equity and then participation by members of the public in governing and decision making, those were principles that we believed in as ODM, and so we were very quick to accept that position when it was fronted by

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members of the civil society. However, the government would always see anybody who was fighting the position that they are trying to front as the opposition and that you are actually working in cahoots with the opposition to defeat government; and sometimes it is not even that. It is just that certain interests become common between the members of the civil society and the opposition at some point but not in general. So, during that particular time of course, as members of civil society and of ODM, we rejected the talks and ODM walked out of those talks, during the multisectoral talks and of course they collapsed. After the collapse of those talks, then there was a renewed effort and the Members of Parliament in ODM, including Raila Odinga and others accepted to sit in a committee that was going to bring minimum reforms. That is the committee that we went in, not at ODM myself, but as part of civil society initiative that said give us equal opportunity; but then the subcommittee that was lead by Hon. Wetangula rejected our request because we said we wanted to see equity, fairness, we wanted the talks to take place outside Parliament and not within Parliament because then we were intimidated, we would never go to Parliament and then we realized that at the time they did not like the talks, they would kick us out; so we said the talks and results on the talks depend on where they are discussed, so we want a neutral ground where we can all come and meet as equals, not like when we come to Parliament and they can use their Parliamentary standing orders to kick us out. And we were also saying that since there were already bills that were before the house, they had to be withdrawn because those bills were made in bad taste, they were not meant to bring any understanding and if we had way the way we wanted to go ahead then withdraw those bills, then after we agree and whatever agreements that we may arrive at would be translated into a bill that could be taken to Parliament; but unless you do that, then we would be sitting in vain because you are already going ahead, you have already planned and made decisions, so you are going to use us as rubber stamps and we were saying that we were not going to be part of such a process. So those were some of the conditions that we were giving and saying 'if you really want us to proceed then these are the conditions under which we are going to proceed'. Of course there was also facilitators who were going to chair the talks and they had already made their decisions on who was going to chair and who were going



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to be secretaries and we said ‘no, we have to be part of that facilitation, because if we are not, then we are not here; you made position to give yourself a position of chair, then you also have to give us a position of chair so that we are part of the process and if you do not want to do that, then we are not part of it’.

### **Interviewer 2.5: What was the position of ODM in this connection?**

**Interviewee 2.5:** In this connection, ODM also recognized the importance and the role of civil society in the process and they supported the rights of them being part of the process and actually we were saying ‘why do you not given them these positions?’, but the government was adamant and then the government allocated itself 14 slots, then gave ODM and other members of the opposition 13, and members of the civil society 12. Then within that 12, they made sure that they appointed government friendly people who were supposed to sit in that committee without giving the civil society the right to chose their own representatives, so we said that this was not a serious meeting, that the government made. If the government decides who is to sit there from civil society, then what is the civil society doing at that meeting? As a result of that, some of us as civil society withdrew and we cast our doubt that there was going to be any success in the talks and we promised to support that if we get results that we think are arrived at through fairness, but we said that we were very sure that they were going to flop and we were proven right by time because as we talk now, they are nowhere. There is an attempt to revive them, but we know that this is just a gimmick that the government is trying to use to pretend that it is still committed to the constitutional dispensation, but it is not.

### **Interviewer 2.6: So ODM has been demanding later that minimum reforms would be in place before the general elections?**

**Interviewee 2.6:** Yes, because there were quite a number of issues that we wanted to address. One, if you look at the electoral commission, we had a spirit in 1992 and also 1997 just before the constitutional talks at Bomas and before the elections there were agreements of how the constitution of the review commission was going to be, the constitution of the electoral commission, how many each committee was going to contribute and so forth. But now the government has gone against that spirit; of course, it was not written into law, and so the government says that it is a prerogative

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of the president to make the appointments, but that was changed, and simply because it was not written into law does not mean that today you can go against that spirit which was meant to unite the nation and the people who were seated during those talks are still alive and they know what they agreed upon. So really, that is why we have to fight Kibaki as ODM, because he has remained on all the promises, he has cut the tread that was supposed to hold this nation together through the spirit of understanding, fairness, being gentlemen; when we agree on issues even if it is a political partout, can we actually respect that -just because we did not write a law, does not them give him the right to go against that. And because he is going against that spirit, we can not -the IPPG spirit is dead- and therefore we must agree on something that can make Kenyans feel that the elections will be free and fair. Because the way they are now, the members of the electoral commission are stewed, and we think they mean to maintain the status quo and if they attempt to do that, I assure you that the elections are going to be really, really terrible.

**Interviewer 2.7: There have also been all of a sudden the discussions on the creation of new constituencies. How do you see that?**

**Interviewee 2.7:** I know, I have gone myself to try to contest the creation of Narok South District, the case is now in court. It goes back to the issue of participation, because we are saying that the people have a right to make decisions on matters that are going to affect them entirely. Because when you decide today that Narok is going to be divided into two districts, you are making a decision for me on which district I will belong to and that decision may demand that I will have to travel 200 km for services that I have been getting maybe at 100 km, because now I have to go to my district head quarters for the same services. So we said 'you can not do that as a government, you must involve the people, there must be a process that is legal and under which we make this decision. And the constitution is very clear on how you change boundaries of districts and of constituencies and we are saying that that is not a presidential decree that he has so that whenever he goes to a rally and people ask then he can say 'okay, you have it'. Such a legal process is what we are lacking at the moment, and because we are lacking that, we can not allow this government to push

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us through an election when we think that it is trying to rig elections through making the ground favorable for itself.

**Interviewer 2.8: What about the affirmative action, these were both issues that were also being addressed in connection with the minimum reforms, and then all of a sudden, as I have read it, these issues sort of came in from the sideline, but without the other issues?**

**Interviewee 2.8:** I think, as I told you when you have Martha Karua as a minister, then you have nothing. Because, the women had the question of affirmative action, they had tried to bargain for 50/50, the country is not ready for that ratio and there had been discussions which had been going around and actually dealing with a number of additional seats for women and I thought that would have been the beginning of having incremental positions as we go on, rather than trying to have an ideal situation, which you do not get at all. Because if we had agreed to increase the number of women in Parliament even by a ratio of 20 only, but it is something that is agreed upon, then those women can one day when they are just the 20 women plus a few members of Parliament pass a law in Parliament, which would increase the positions of women; because you will have increased the numbers from what they are now and each of them will lobby to one member of parliament, then probably they will have the requisite number of votes to make decisions in parliament that would favor the women in this country. But when they say that you either give us 50 or nothing, it means that she was not sincere, she was pushing an agenda that she knew would fail in Parliament because they do not have 50 % women to pass it in the first place; and when you are telling men that you either give us 50 or nothing, you are telling them ‘surrender your 50 or we give you nothing’. As I said, these issues of the constitution are very sensitive, because when you are gaining, someone else is losing and you do not want to cause pain when the person is losing, you want that person to appreciate and understand and even if it does not matter whether he feels that he is sacrificing something that he has enjoyed all this time, but at least let there be a way of saying ‘yes, now we have grown as a country. We appreciate that we have for a long time taken advantage of women and as men of this country, we have surrendered willingly these seats back to the women so that we can come together’ –but not for a

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minister to come and force and try to show that she has the power to give that to women, while she knows that she would still require the support of the same men that she abusing in Parliament to vote for the position that she wants. She is a very poor lobbyist, she is arrogant, and because of her position, so many women are going to lose some of the goodies that they could have gotten now before the constitution. I blame Martha Karua for the debacle that we had in this issue of minimum reforms and especially affirmative action.

**Interviewer 3: Can you think of any situations during the review process in which ODM has reconsidered its support to or participation in the review process?**

**Interviewee 3:** Well, when I look at this, it is difficult to look at ODM as ODM during Bomas although the interests of the same people that have these interests now were either in LDP or KANU and they were agreeing on the issues, but they were not yet ODM. Because I remember when we had consensus meeting groups, the same people who are accepting certain positions now, or that lead to a successful writing of the draft constitution still stand with those positions today. Those who were against the draft constitution ended up being ‘banana-people’ and they are still ‘bananas’, so nothing has changed. I fear that even if ODM wins elections today, forms government, if it does not have the majority in Parliament, it will still be difficult to enact a constitution in Parliament unless it is done by decree. So the only way we can give this country a new constitution within six months is if first of all, we take most of the seats in this country as ODM and where we fail maybe have members of those parties working with government during the debates in Parliament and enact the constitution. Because if the current government is in the opposition and it has a [inaudible word] which it could use to block, they would still want to block to prove that even ODM would not be able to deliver the new constitution. And if we do that we will be using the issue of the constitution as a gimmick to always hold Kenyans at ransom and that would be really unfortunate for this country.

**Interviewer 2.10: So you do not see a compromise as a possible solution?**

**Interviewee 2.10:** Not at the moment; because people have hard line positions. I have seen that when we were discussing some of these issues up to 1 or 2 am trying to

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arrive at consensus late at night, but the following morning when delegates come, people have changed. So we have not had serious people as far as the new constitution is concerned, the only people that I have seen abide or truly stand by the words that they have uttered and tried to fight to see that they are achieved are people like the current ODM party leader who is the team captain [inaudible word] Raila. Whatever positions he took before the referendum in ODM as we were trying to negotiate, I saw him back down sometimes and accept certain positions for the sake of the process, but I have also seen him stick to the positions that were agreed upon, because once they were agreed upon by the people, he fought for them. So that is why I have hope that if, when he wins, it is not a question of if, when he wins and becomes the president, should he get the requisite support that he desires, he will be able to change the constitution for this country.

**Interviewer 6: Can you think of any situations in which you think that present constitutional framework has influenced the course of the review process?**

**Interviewee 6:** Yes, the present constitution really puts the powers to the government and the president, he appoints the minister for constitutional affairs, a minister who does not want the constitution to be changed. So that in itself of course is a negative influence in the process because the minister does not want it, she advises the president against certain things and the Attorney General is supposed to be really the person in charge of the constitutional process, but here we have a ministry of justice and constitutional affairs which in itself sometimes brings a conflict between the office of the Attorney General and the ministry of Justice because many times it was not clear who was to do what in terms of the review process. And then there is the question of shifting the blame from one office to the other and sometimes they are deliberately doing that so that people get lost in between; as a deliberate confusion. But I say the government in itself of course has taken advantage of the bad constitution that we have to deny people the rights.

**Interviewer 7: Have there been any changes in the institutional environment which you feel have affected the ways in which ODM has been able to act in the review process?**

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**Interviewee 7:** Well, if we look at the way the government has acted in the past, there were times when you could say that there was a genuine attempt, but this is only when it was horsed and threatened by the people; not because it was willing, not because it saw sense, but because they were threatened that unless they gave into people's wishes, then they were going to lose as government. That is why I am saying that the only way this country is going to get a new constitution is when this government is out of power. I guarantee you that if this government won the next elections, the people of Kenya will still not get a new constitution.

**Interviewer 10:** I am also curious about if you have experienced the possibilities of ODM to engage in the review process to have been influence by the access to resources?

**Interviewee 10:** Well, it is true that the government has all the resources, it has the police, it has money –because even during the referendum the Minister of Justice and Constitutional Affairs was on record saying that they were going to use all the money that they had to shake every corner of this country, every village and every house, to make sure that they would win the referendum. However, ODM has one resource that you can not take away and that is the people of Kenya and the truth that they have stood on –and because of that we have won. If we had the same amount of money that this government has, if we had the police, if we had all these other resources that they use against the people, we would have a new constitution today. But the government has used the police to harass, it has used the courts –like, I remember when some of us were incarcerated and they were using prosecution to delay the process, to punish our pockets to that we go up and down and probably give up, bur fortunately we were able to continue going and because of being relentless, we are here today and we are going on and we are saying there is what we are going to do until we are able to get a new constitution for this country.

**Interviewer 11:** So, a last question. There was the killing of the Luo university professor in August 2003. Could you describe the reactions to that to me?

**Interviewee 11:** Kenyans and especially from the Luo community felt that that was not the way to go, that when I reject or have strong feelings and is able to influence Kenyans, that what you are offering them is really not what they should be getting,

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and I have the power illustrate this and Kenyans buying my opinion, then you kill me. That was really a problem, but we thought that if that is [inaudible word] in this country then it will bring the country down. And there was a reaction, I can remember there were demonstrations against that and it is not just because it was him, a Luo, but because it was a question of a Kenyan who had shown education in the process, who was knowledgeable and who was adding knowledge and resources to the process, which should not have been locked away by killing that person; but which should have been given an opportunity to participate in the process. At the end of the day, I remember that as members of the Bomas said that we were going to use his blood as the ink to write a new constitution; so it made our resolve even stronger to have a new constitution. We said that if we had had a new constitution, some of these things would not have happened.

**Interviewer 11.1: I remember reading that some interpreted it as a warning to Raila Odinga. What is your interpretation in that connection?**

**Interviewee 11.1:** Well, yes, there was a feeling by sections of the government that Raila was influencing the reports and that he wanted to control the process. But I have always looked at these people with a lot of pity and mercy, because I was chairing a lot of those sessions and I can tell you what happened. Raila is a shrewd politician and he participated in the process, he would come and sit down and listen to Kenyans lobbying, listen to Kenyans so that he would understand the problems of Kenyans' world and he would look for accepting positions that the people wanted. The government ministers and MPs were never in the house so they did not understand what the Kenyans wanted and they did not understand how to handle the process, they would just come in and try to force their position through the paroles of Kenyans without trying to listen to them, without trying to understand them, and without even trying to bargain with them. For this reason, Raila always appeared to be with the people, because the positions he took were supported by the people and then they thought he was influencing the people. But his positions were informed by the various positions that the people were taking and he was a keen listener and a shrewd politician who also sees where the aspirations of Kenyans are going and so when he decides to make a decision, he would make one that he thinks will address the needs

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of Kenyans. And when he does that and Kenyans support him, then you want to say that he has bought the delegates; yes, the delegates bought his position, because he agreed with them as far as those positions were concerned. It had nothing to do with money or coercion, but it was a question of the meeting of ideas. He met their ideas and that made them meet his at one point. The government were absent in Bomas, they only came in last minute to vote and when they lost, they walked away. If Kibaki as the president of this country really was a serious person, he should have kicked out all of the members of his cabinet because they failed him. So the debacle of the constitution process was caused by poor attendance of the government or members of parliament from the government side, so they did not even understand what Kenyans were looking for, they came with ideas that Kenyans had rejected and they were trying to force them through. Even today, if we are going to have a government that is going to be insensitive to the needs of the people, then we are still going to have the positions that the government arrive at rejected.

**Interviewer 11.2:** Okay, so that was all that I had to ask you, we have been through all the topics that I had hoped that we could cover. -Unless you have something else that you would like to add?

**Interviewee 11.2:** Not in particular, I just hope that what I have said will be of value. And as much as I blame some of the delegates, I only blame them for having listened to the government instead of to the people who elected them to the conference, so they came and changed positions that the people who had delegated their voting power to them and started negotiating with the government for personal gains. If they had remained true to the spirit and instructions they had from the various parts that they came from before they came to Bomas, we would have a constitution today. Because whenever we had an impasse it was because the government would have woken up at night and have realized that there would be a vote tomorrow on this issue and then come to the position which is wants to force the people to adopt without having explained or negotiated with them for a time; they would just come at the last minute. And even today, look at the way that the government of this country governs, it is done at a last minute crisis meeting where people rush just to do something just before voting takes place in Parliament, you see members flying to do something,



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either those of the opposition or those in government. And unless we have a system in which we check what we do and then when we have issues that we do not agree upon, we look for a mechanism of discussing them openly and having the spirit of giving and taking; and when we do not agree on an issue looking for a system for pending that issue for now and readdressing it later. I remember that I came up with a sunset clause in Bomas for the issue of the type of government we would like to have in this country [inaudible words] at around 1 am and members were just going round and round, not agreeing on a position; Raila's group on the executive and the issue of the prime minister and then Kiraitu and this other group on the issues of a presidential system of government. So I said 'having listened to you throughout this evening, I want to make a proposition' and because everyone was tired and hungry they listened to me. I said 'it appears to me that we are not ready yet as a country to make a decision on what type of government we want and the safest way to go then would be to go with a hybrid position that we have in the draft at the moment for a given time. Give Kenyans a new constitution based on all the other agreements that we have, but we put in the constitution a sunset clause that for example in 2009 or 2010 before the next general elections, Kenyans will vote on the system of government that they think want. Because they will have tested the hybrid that they have continuously enjoyed, but now based on all the other new agreements that they have, then they would question themselves if this is the form of governance or government that will enable us achieve all the other agreements that we have or do we need to change –an if we want to change, to what form?'. So this would be the only question that would be addressed in that referendum and at least then we would have given Kenyans an opportunity to govern themselves and enact most of the agreements that we have made. Everybody said voila, maybe that is it! But the following morning, the members of the presidential camp put a date, 2012, and by putting 2012, they were actually saying that if we endorse that, we would have given automatically President Kibaki another five year term. So, of course, that was not the agreement and by putting in the date, I was blamed for having proposed something that I knew delegates would reject. But when I proposed it, I did not mention the date of 2012. It

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was taken out of context and used to destroy a position they knew would lead to us having a new constitution if it was taken in.

**Interviewer 11.3: Who exactly did that?**

**Interviewee 11.3:** That Kiraita Murungi and... Because that particular meeting we had Uhuru Kenyatta, Raila Odinga, Madoga, quite a number; but those who were in government were the ones who put in the date of 2012. Unfortunately, I was chairing the plenary, yet Professor Ghai was now chairing this smaller group, which had agreed on this in my presence, not in his presence, and so when they wrote in the issue of 2012, it was difficult for him to convince them, under the subcommittee not to put the date there and maybe have the delegates agree on the date. So from the time they came from that consensus, they had disagreed themselves and when they brought it to the delegates, of course everything that we had agreed on became issues.

**Interviewer: Okay... Well, thank you very much for your time, it has been very enlightening.**

## **KLRC Interview**

The following is the transcription of the interview with Kathurima M'inoti, Chairman of The Kenya Law Reform Commission that acts as the convener of the thematic group 5 on constitutional development of GJLOS (GJLOS, 2007a: 1). The interview was performed at the office of Chairman at the Kenya Law Reform Commission in Nairobi on 1.10.07. The interview lasted 0.43.15 hours and present was only the Chairman and the interviewer.

**Interviewer 2: First of all, I would like you to tell me about how the Law Reform Commission has contributed to the constitutional review process in practice during its course?**

**Officer: 2:** That is a very interesting question because first and foremost, we are quite aware that when the issue of review of the constitution of Kenya came about, that is a project that was not given to the Law Reform Commission. A specific, separate commission was set up to deal with that issue. It is very interesting because,

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like in Malawi, they are review their constitution –they obtained their constitution in the 90ies but they are reviewing it now- but it is being done by their law reform commission. So in our case, this is a process that all stakeholders decided needed to go to a separate commission, so really the Law Reform Commission has not been involved as a commission; although, I have participated in the review process in a different capacity.

**Interviewer 2.1: But what then about under the GJLOS program's thematic group 5?**

**Officer 2.1:** Under the GJLOS program, we convene thematic group number 5. It is very interesting because in 2003 during the short STPP process of the GJLOS, we had specific roles assigned to our thematic group on issues touching on the constitution, but all that was based on an assumption that we would have gotten a new constitution and therefore we were just going to be working on the laws that we presently had to make sure that that they were consistent with the constitution. But when it turned out that we did not get a new constitution, actually for that period during the first phase, we never were able to achieve anything because our work plan was based on the assumption that we would have a new constitution. So that did not happen and we said that what we would do, with or without a new constitution, we would identify some laws that we thought were very critical and [inaudible words] and then start working on them with the members of our thematic group. We did hold some workshops, we got some consultants to help us prioritize on the laws that we would be working on and we came out with a list of about 77 laws that we said that with or without a new constitution, we knew clearly what are the accepted international standards that in some of these laws. So we started working on things like a freedom of information law, those kinds of laws. So that is basically what we have been doing. The Ministry of Justice itself which participated in our thematic group has been trying to... undertake some projects toward constitutional review, facilitating the meetings of the multisectoral committee that met to agree on what was being called minimum or essential reforms. But I think that as a commission, we also participate in multisectoral group, trying to raise the issues, and actually our team was drafting the agreements that were being made there. But eventually, it never went anywhere

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because there was disagreement as to whether the country needs comprehensive reforms or minimum reforms. You could clearly see that one group wanted the minimum reforms, focusing only on the elections. You could see that another group did not want to go there, because they were saying that 'if we have got time to work on these so-called minimum reforms, we can as well work on the entire new constitution, the comprehensive reforms'. So at the end, there was disagreement, and nothing has really happened. So this looks like a project that you can not expect to be dealt with within this year. It is possibly an issue that will still have to be addressed by a new government after the elections.

**Interviewer 2.2: Do you think your role has changed during the process? I read somewhere in one of the review reports that at some point you changed from waiting as you say, to a more proactive approach?**

**Officer 2.2:** Yes, completely, completely. I think the way we have gone it has changed. We decided to not just sit down to wait for a new constitution because if our experience is anything to go by, it is likely to be a very long wait. So we decided that we do not have to wait for that framework, that we can actually have laws that we think are internationally acceptable. I do not think that there is anything in the constitution, which stops us from having, although the constitutional framework is dated, modern laws in many respects. So our role has really changed, we have been working proactively working three years on those 77 laws that we identified.

**Interviewer 2.3: So some of these laws have been put before Parliament?**

**Officer 2.3:** The political parties bill is one of them, it has just been passed last week, we are very because for once we can see our proposal has become law. The other one was the freedom of information law, which again the Ministry of Information was pursuing. What happened was that the Ministry offered its own bill, ourselves as a thematic group, we have a draft which we have adopted before the International Commission of Jurists, and there was a private member. So what we did was that we attended two work shops that were called by the Ministry of Information and gave our views about the freedom of information policy and the draft law. Now, the private member of Parliament moved his own bill in Parliament so we went there for the private bill and the government bill, and the government said that it did it because it

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agreed with most of the provisions in the private member's bill. So we also called another meeting where we sat with the representatives of the Ministry of Information and the private member of and other members of Parliament and agreed on a common bill. Again, that bill is in Parliament, but it has not moved very much since, I think it is in one of the stages in Parliament, we are hoping that possibly they will finish with it before they are dissolved. So that is another of the laws that have gone through. We have worked on quite a number of others which are a new arbitration law, we have done a law on small claims courts for people with small claims so that they do not have to go through the complicated legal structure of the [inaudible word] and the magistrate's court, so all those kinds of laws. The political parties bill has become law, the freedom of information bill is in Parliament. When the President opened the commonwealth law conference here in Nairobi, he also said that his government was going to pass the law on establishing small claims courts. So we have already done a draft and we have given that to the ministry, so this one is also moving.

**Interviewer 2.4: Which conditions to you see as most important in enabling you to partake in the review process in the beginning?**

**Officer 2.4:** It is the kinds of networks that we have managed to build. As a thematic group, we have been working with civil society organizations, which have been very, very useful in terms of ideas and in terms of moving the process forward, our ability also to work with these members of Parliament, but again also the Ministry has been facilitating actually what we have been doing. The most frustrating thing from a law reform point of view is, I think is that you may work on all these proposals, but unless and until they are passed by Parliament to become law, they just end up as proposals. So to me the most important issue has been that networking.

**Interviewer 2.5: Yes, I have heard that it have been difficulties with the link between the proposals passed in the thematic group and then the link to Parliament?**

**Officer 2.5:** That is a big problem because our Parliament is one of the worst in terms of performance; they pass very, very few laws compared to other Parliaments in the region. But even beyond that of course Parliament does not pass the laws, first of all when we do the proposals, they have to go through the Attorney General, the Ministry

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of Justice, the Cabinet and then they come to Parliament. That process. So if there is a hiccup anywhere along the way, they will not even reach Parliament. So there are two stages of the problem; first of all, how quickly they are acted on by the Attorney General, the Ministry of Justice, and then also when they go to Parliament. Now, the most frustrating thing about Parliament is that sometimes they also bring very, very fundamental changes to the laws that we propose, that they completely lose meaning. For example, the political parties, we had a very clear provisions that parties that would qualify to be funded by the state would have to obtain a certain ration of votes and would have to have a certain number of members in Parliament and they would also have to take into account the number of women MPs that the party has managed to get into Parliament. And then the Parliament itself changed all those provisions, the provision where we had been talking about taking into account the number of women MPs was changed to mean women who are officials of a political party, so you find that, which is really not very important compared to having a member of Parliament. The issue of taking into account the number of MPs that each party has was changed to parties that just have one Member of Parliament of 10 councilors in the local authorities to apply for state party funding; so a lot of changes, which unfortunately we are not in control of. It is a frustration that all law reform commissions have to live with.

**Interviewer 2.6: Have there been any specific principles or considerations that have guided you in engaging with the review process?**

**Officer 2.6:** One of the most important ones is that we as a commission want to be independent, we want to give views and suggestions that we think we can defend. We are not just going to give views because a proposal has come from the Ministry of Justice or from individual members of Parliament. What you will find is that for example in the process of making proposals, we can go around the entire country, we listen to people's views, sometimes we get written memoranda and it is as if some people expect us to take their views completely, so that when they see that you have made a proposal or draft law and they do not see their proposal there, they are very annoyed. 'You have ignored what I said'. We have been telling people that the purpose of consulting them is to take into account what they have said, it is not

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necessarily to agree with them. Another interesting thing is that, as normally happens in government, we find ourselves in a very difficult position, because the opposition sometimes think that the Law Reform Commission just does proposals that the government wants. The government on the other hand sometimes thinks that we do proposals that are just favorable to the opposition. So it is something that forces you to really have to be extremely, extremely independent in these ways in your proposals. When we did the initial draft of the political parties bill, our position was that registration of the political parties should be given to the electoral commission, first and foremost because it is an institution that is created by the constitution and under the constitution it is supposed to be independent and not subject to the direction or control of any other person or authority. And when we gave the proposals to the ministry, they changed them to create the office of registrar of political parties; and we were telling them that the reason why we were moving from that position was that presently, are registered by the registrar of societies and the registrar is just a civil servant. So sometimes they are under a lot of political pressure either to register or not register a political party and therefore we were thinking since we have agreed that political parties are very, very critical institutions in a democracy, it is better to have them dealt with by the electoral commission. That was our proposal and what we considered we thought to be very logical in justification; but when it went there, it was changed and we had no control over that. But to me, in terms of principles, we need to be accessible and to consult widely with people and then really in terms of the proposals we make, we have to be especially very, very independent. And even when we deal with our friends in civil society, you find that many civil society organizations are single issue organizations; you will find an organization that is there specifically to fight for the rights of women, or one that is there to fight specifically for the rights of children. So sometimes when they come –they will all have done their very good research- but they only emphasize their side. So as a commission you really must also hear some other side. So in terms of being able to engage, you have to be able to engage with everybody, but you must also be independent so that you are not captured by any one of these interest groups to make sure that your proposals are only leaning to one side.

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**Interviewer 1: Now, what do you perceive to be the essence of the constitutional review process in terms of the most central topics of reform?**

**Officer 1:** This country has been talking since the 80ies, 90ies, about a new constitution. Everybody agrees that the current constitution we have from 1963 really requires to be seriously redrafted. It reflects the thinking of the 60ies. It has quite some unacceptable limitations in terms of the bill of rights, which is not serious in terms of protection of the rights. It allows so many situations where interrogation from the rights is allowed. Then you see also that after independence the constitution was amended so many times to give a lot of powers to the executive. That has actually been a problem also. But it is very interesting because one of the arguments that people have been making is that you can have a constitution that creates a lot of powers in the executive but you can have an executive that does not use those powers. We had a situation before with the same powers, where the freedom of expression was seriously limited and people who would express themselves, actually found themselves being tortured. With the same power, you find leeway in a different administration of expression. Of course, that maybe true that one administration may be different from the other. But I think that in terms of the law, what you want to do is to ensure that you do not have laws that can be abused. So in terms therefore of the principles and issues that we need to address, the issue of executive power remains a serious issue, the issue about the bill of rights in our constitution remains a critical issue that we must address, the issue of representation of the people. This country in the 90ies there was a general feeling that the executive was the most dangerous institution –but I think also people ask the same question of whether the legislative itself, the Parliament, is not an equally dangerous institution –or even a worse one. What we have seen the 9<sup>th</sup> Parliament doing has gotten people asking serious questions: how do you control the executive because it looks like it is prepared to [inaudible words] over so many principles. So all these things I think can only be addressed in the framework of reforming the constitution.

**Interviewer 1.1: We touched a little bit upon this before, but I would like to know how you see the link between the GJLOS reform program with regards to constitutional development and then the wider constitutional reform process?**



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**Officer 1.1:** Within GJLOS we specifically in the thematic group, I think that we will still have a serious role to play if we get the constitutional review back on the tracks because our experience during the multisectoral committee was that they really relied on us, we were doing research on some principles that they wanted, we were doing research and drafting them for them. So, we were there to give them some technical assistance in terms of these things.

**Interviewer 1.2:** So it is a question of making sure that the politicians can make informed decisions?

**Officer 1.2:** Exactly. Because the fact of the matter is I think from the way we are going and from the experience of Kenya, the politicians will still have a lot of say in the constitution, but we still need to be there to give them some technical input on some of these things and the way we are trying to do some of the laws, it is possibly a way of going ahead so that by the time they are talking about these things, we still have these laws, possibly.

**Interviewer 1.3:** Has your perception of the constitutional reform process changed during the course of the process?

**Officer 1.3:** I have no doubt that it is still very necessary, but the problem has been that if you take the 10 years that we have waited, it is the politics, I think, that made it impossible for us to have a new constitution. Because concerning the principles, during the referendum for example of course there were disagreements about the issue of how power is shared, but because many people were focusing on that, they forgot so many other good provisions; like the bill of rights was very, very good, the issue of the rights of women –but you see all this was politicized and out there people were being led to believe that women would take over everything and this kind of thing. So in terms of the way you deal with it, it is still a big, big challenge; the members of the public are easily mislead. Although many copies of the draft were made available to the people, and the people themselves were undergoing intense civic education both during the process of collecting views and the process of discussing the drafts. Many people did not bother to read the document, they were happy to let the politicians read and interpret or misinterpret it for them. So I think

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there are really areas where we will have to change seriously if we have to get this constitution through the process itself.

### **Interviewer 1.4: So change, how?**

**Officer 1.4:** The way we did it put politicians completely in command and letting the technical people just behind makes it very difficult. The process itself, like during the national constitutional conference, the so-called Bomas conference, everybody was there trying to write and draft things they do not even know about, everybody wanted everything written in the constitution. So in terms of changing the process, I think they need to give more say to technical people; there are a lot of things of course in that draft constitution, which should not have been in a constitution, we could have a leaner constitution that is devoted to the key principles and then we have all the other laws raising all these details. But people want everything put in the constitution and I thought that was a consequence to the very critical role that was given to ordinary people –but powerful lobbyists who want to have their own sectors written in the constitution.

### **Interviewer 3: How do you see your participation in the constitutional reform process in relation to your other activities?**

**Officer 3:** Well, for us really it is supposed to be part and parcel for our work. The laws that we propose for enactment in Parliament, first of all they have to have a constitutional basis, so we have to be very clear that those provisions do not contradict the constitution at all, because they will not be passed and even if they are passed the court will strike them down. But as we do this, there are some provisions where you can see that the constitution itself is lacking. So you can still have progressive laws without necessarily contradicting the constitution in any way. So, there is a very close correlation between the work that we do in law reform and the constitutional reform itself. For us ideally, we would have been happier at this point to be doing laws when we have a new constitution. It would make our work very easy. But for now, since that has not proved to be the case, we thought that even without the new constitution, we can still make proposals to critical laws on the basis of accepted international principles.

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**Interviewer 3.1:** So you could say that you are working under the constraints of the old constitution.

**Officer 3.1:** Exactly. That is something that you really have to keep going back and forth to in order to see whether it is limiting the proposals that you are trying to make.

**Interviewer 4:** Last question. In connection with the GJLOS I am curious about how it has been decided which members or organizations from civil society that could participate in the meetings of the thematic group 5?

**Officer 4:** That is an interesting question that has also showed quite some controversy. If you talk to the civil society organizations, you will find some that feel like there are special NGOs that participate in GJLOS and the others are out. I think one needs to go to the history of GJLOS and the STPP in particular. You will find that many of the civil society organizations that were very active in particular issues ended up joining particular thematic groups. You will therefore find that for example the civil society organizations that were there for the civil society organizations that were active for example in anticorruption then to be members of the thematic group that was dealing with anticorruption. Ours on constitutional reform, we ended up attracting actually bodies like the International Commission of Jurists Kenya section, which deals with issues of democracy, issues of the rule of law, and the independence of the judiciary; they are represented in our thematic group. FIDA that is the Federation of Women Lawyers of Kenya, which deals with issues of empowerment of women and therefore they have been very useful in ensuring that the law reform proposals that we make address issues of gender equality. But what has happened is that, and I think that if you speak to the Programme Coordination Office, they have actually picked NGOs; there is one that coordinates all the other NGOs in terms of them deciding where they want to go and participate. So like, there is an NGO called the Legal Resources Foundation, which has been doing quite some work about access to justice by poor Kenyans, and when they heard that we were doing this small claims courts law, they wrote specifically to be around in our thematic group and we told to please join us. So basically that is how it has been, participation by the NGOs and the civil society organizations has been based on their interest, but there is an NGO that is responsible for informing all the NGOs that are interested in the areas where they can

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participate. But even in between them, they have had their own type of war, some feeling that they are excluded, that they are not as visible as others.

**Interviewer 4.1:** So has the government or the Program Coordination Office, as you mentioned, have they played a role in inviting different NGOs to the meetings?

**Officer 4.1:** What happened when the program was being devised –it has quite a long history because before this government came into power, we had something called the Legal Sector Reform Program where we actually also had NGOs participating. So really when we started on GJLOS, it was a carry over with the ones that were participating and then other NGOs that were interested. But the PCO has actually been in touch with these NGOs and there is also the Non-state Actor Facility that has not yet been set up –I think even among the NGOs they also have their own differences and disputes as to what should happen. The last meeting of the Technical Coordination Committee of the GJLOS, they were saying that it should be and then the civil society organizations themselves requested that they wait as they try to resolve their disputes. So it has not been said up yet.

**Interviewer 4.2:** Then what about in the multisectoral forum that you mentioned you took part in; I have also read that there has been some controversy as to civil society participation in that?

**Officer 4.2:** In fact, the initiative started as a consultation of only the political parties, they were the ones that were meeting only and when it became quite clear that people were talking about issues of reforms, the civil society organizations themselves came there themselves and asked to be represented. Initially, there was a short time of war in terms of representation because different groups wanted to be represented separately; the youth wanted to be represented separately, the non-parliamentary political parties, there were so many groups that wanted to be represented differently, so I think eventually they agreed on the representation and they came on board and one of the members of the civil society was actually a co-chair of the multisectoral committee, Ann Njogu.

**Interviewer 4.3:** But then later, there was some controversy again, and I think that civil society pulled out?

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**Officer 4.3:** There was one section I think which pulled out, one was left. So they were not of the same mind.

**Interviewer 4.4: Do you remember which organizations that stayed?**

**Officer 4.4:** I will possibly have to confirm that... I will have to check really, because I remember that some of the groups that were left behind were the non-parliamentary political parties, I would have to check from our records... But I know that there was that disagreement along the line. I think the recommendations of the multisectoral committee never reached anywhere because at the final meeting there was disagreement whether they were going for comprehensive reforms or only what were called minimum or necessary reforms.

**Interviewer 4.5: But did the proposal not end up making room for both minimum reforms and then a road map for comprehensive reforms?**

**Officer 4.5:** Yes, exactly that was agreed. But that whole clause has gone farther in disagreements in Parliament itself because there has been that committee that has been working on minimum reforms... There were some things that were refined like amending the constitution to ensure that the review process is anchored in the constitution, that is what has always been a sticking point where people are saying that you are trying to bring in a new constitution without amending the existing constitution to contemplate that kind of situation because the way it is now, it only talks about amendments. So there was that issue of amending the constitution to provide for its own replacement and then all these other issues. But then you see now I think the government side was just interested in ensuring that that amendment takes place and then there is also a clear road map there for starting the constitutional review process. We actually did that draft law ourselves. That of course was the comprehensive way of dealing with all the issues of constitutional reform but then there were these other people say that 'okay, we will pass those, but in addition to that, we will have other amendments to the constitution touching upon the composition of the electoral commission, the matter of appointing judges, the issue of dual citizenship, the issue of affirmative action for women in Parliament. Now, this group was more interested in these other amendments, not those constitutional reforms, but they would not have minded if it all went together. The government side

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was being seen as more interested in anchoring the constitutional reforms in the constitution and setting a clear road map for finalization of the review process. So those disagreements ensured actually that none of these things have happened as we speak.

**Interviewer 4.6: Very last thing: It has been difficult for me to gain an insight into what has actually been going on at the meetings of the thematic group and I was wondering about the role of the civil society organizations that are present there?**

**Officer 4.6:** To me, it has been very good the way they have been participating. As we speak now, one of the members of the civil society organization is out in South Africa with one of our members here and another one from the [inaudible words] on the invitation of the Open Society, an organization there that deals with these issues of availability of information to the public. They have been having meetings with media, with the ministry of justice on how to operationalize a freedom of information law. They have been extremely useful, so in terms of even a project that I can mention where the civil society has been very useful in drafting that freedom of information law, they have been very useful, particularly the International Commission of Jurists, who are represented in our thematic group. The Legal Resources Foundation has also been extremely useful in our project on the small claims courts. When we were doing the political parties bill, we worked with very many civil society organizations, which actually had their own separate programs on a law on political parties and particularly funding of political parties and therefore they were very happy when they found out that the Law Reform Commission had actually taken up that project because they linked with us, they teamed with us; particularly the Center for Governance and Democracy, CGD. So there have been quite some key –actually I can say that the NGOs that participate in our thematic group and specifically FIDA, the ICJ, the Legal Resources Foundation, the CRADLE, which deals with the rights of children, and then of course, although not an NGO, but the Kenya National Human Rights Commission. So in my view it has been very good and we have really benefited a lot from their input.

**Interviewer 4.7: And has that also been during the actual meetings?**

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**Officer 4.7:** Yes, during the meetings, we have our meetings in the thematic group here and they all come and raise the issues. We engage them in agreeing on the list of the laws that we work on. Once we agree on the laws, we set up what we call thematic law review groups and some of these groups are convened by civil society organizations where we all go to participate. So that is how it has been. I used to be in civil society myself before I joined the commission in 2003, I used to be the chairman of the ICJ and at that time it was very difficult to work with government institutions, there was a lot of hostility and secrecy. But it has changed... Things have changed very much –at least in our thematic group, we have been able to... We have not had any problems.

**Interviewer 4.8:** Yes, I have also heard that some CSOs have had a difficult time sitting with the government officials-

**Officer 4.8:** Exactly.

**Interviewer 4.9:** -and that some CSOs have actually more or less pulled out?

**Officer 4.9:** Yes, that is true, there have been some thematic groups that have had a lot of problems; like the human rights commission and the police, I have been told that their relationship has been so bad that the police no longer participate in their meetings. But in our meetings in our thematic group, actually we have not had that kind of problems. There are some government departments that are very difficult to work with in terms of the way they see things, in terms of openness, so will be a problem, and it will take time before they are very open; but I think for us at the commission with the kind of issues that we are dealing with and the issues that these CSOs deal with also on a daily basis, in terms of if we are working on a proposal to amend or change a law, they are really very useful and we are very happy because of the way they have been able even also to help us organize to meet members of the public to get their views.

**Interviewer:** Okay. So, that was all the issues. I am happy that you found time for me today, it has been very informative.

**Officer:** Oh, wonderful, it has been good talking to you.

## **KNCHR Interview**

The following is the transcription of the interview with Maina Kiai, Chairman of the Kenya National Commission on Human Rights/ KNCHR whom has observed the constitutional review process closely as well as participated in the thematic group on constitutional development of GJLOS. The interview was performed on 01.10.07 in the office of Mr. Kiai at the Kenya National Commission on Human Rights in Nairobi. Present at the interview was only the Chairman and the interviewer and the session was of a duration of 0.21.52 hours.

**Interviewer 2: First of all, I am interested in how you as the commission have taken part in or contributed to the constitutional review process during its course in period in between the last elections and now?**

**Officer 2:** We have members of the commission who were delegates at Bomas and so they would come back and feed us information about what was going on. We were also observers as the commission, we had observer status, meaning that you can not talk, you just meet people. But at the time we were coming on, because we were formed in August 2003, Bomas was actually on its way down, it was not that effective, it did not look like it was going to happen; there was all this politics going on. So we tried to focus our attention on human rights protection, even though we accept that the whole breadth of a constitution of has human rights considerations and human rights aspects. So that is really what we did, we tired to influence certain things, some things we lost –as you expect in an environment like that, you can not get everything you want, you have to debate. But we were not unhappy with the human rights provisions as was put out there. So that really was the major part that we did. Thereafter, Parliament and politicians took over the process entirely after the process was cracked and the government walked out, we kept away from that politics because it really was a political issue and essentially about political elite consensus, which they were trying to get but were not able to get. So we were not involved at all, we were a little bit involved in part of the Naivasha talks, trying to see if we could bridge the gap between the two; we actually were active in trying to urge the different sides to think broader than themselves, to think outside the narrow circumstances, to



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think of Kenyans. So we did urge them both privately and publicly on those issues to remember that this is not something to play around with; it is not about personal, it is not about political gamesmanship; but all that was not accepted. But eventually after that was the referendum where we decided that we were not taking a position on the draft as it was, we were not either for or against, but we wanted to use that campaigning experience as a way to try and push accountability on the political side. This country has had elections where there has been abuse of the law in terms of state resources, state personnel, hate speech, and incitement. So, basically incitement to violence, when people are campaigning, they tell others that 'if somebody comes here, beat them! Do not let those who are opposed to us come here!' Things like that. So, we began a serious campaign on that and we published a report on that in terms of the campaigning around the referendum for and against; so that is basically what we did. But our view and what we expressed even during the campaigning before the referendum itself was that this process was flawed. That it had been flawed first of all in my view by Bomas, the way the Bomas delegates were chosen, and even after it was put through by the government behaved in Bomas, by just not having any interest and bribery was going on -on every side delegates were bribed like you can not believe by everybody; and then the caucuses became ethnic so you would have all these caucuses at Bomas between the Kikuyu interests, they meet, the Luo interests, they meet. So all these things were driving us nuts, because that is not how you form a national constitution; that is how you form ethnic constitutions. So we kept hammering at that and said that the process was wrong and we were dissatisfied that we only had three months as a country to so-called 'read' the document -we went out and urged people to read as much as they could, but three months in a country with as much illiteracy as we have is not sufficient. And so, we were clear in a sense that the referendum was not going to be judged based upon the document, the constitution, the draft, but upon politics. So that was why we did our work in terms of monitoring the political class. And so immediately after it finished and the one side lost or the one side won, or everybody in this country lost, we urged the country to just take a time off: 'Take time off from this, emotions are too high, we are going to make mistakes, there is no winner, there is no victor'. We kept urging the president to remember that

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he is the president of both the yes and the no voters and not only on the first. But mostly for us, we cautioned the Orange side that the fact that the referendum had lost did not mean that they therefore had the mandate from Kenyans to take charge; 'this is still going to be a people driven kind of process'. Thereafter our work has mainly been to see from the margins how our work can expand the political space and expand the democratic space existing in the country.

**Interviewer 2.1: Okay, so how have you done that?**

**Officer 2.1:** We have just done that through bills, through working with government, commenting on bills that are coming up, giving input into bills, but basically our view was that: 'look, 80 % of this draft was' –everybody said that there was 80 % that they agreed upon and 20 % that they did not agree upon- so our view has been 'enact that 80 %, let us benefit as non-political Kenyans from the parts that have no conflict and then you guys can sort out your 20 % over time; it does not have to be sorted out today. But why should we suffer, as Kenyans, from the disagreements that you have at the elite level?' Of course it has not been –everybody wants to control it as a political tool, rather than anything else. So, we have been doing a lot of work on bills, on parliamentary bills, talking to politicians and other actors. For us it is not an either or situation, you can actually have constitutional reform and legal reform at one go. I do not think there is any one right or wrong answer, I think both are correct and we try to take both sides. Whichever one is going on, we engage in it and that is how we do it.

**Interviewer 2.2: So, how about your participation in the thematic group on constitutional development, how has that been?**

**Officer 2.2:** We participate in that, one of our members, whenever we are fully staffed and fully complemented, we are part of it. So we are involved in that and we try and push certain agendas; again, that thematic group works at parallel levels: it works both incrementally and on the whole. We are waiting to see where it all goes. I think that there is a bigger fundamental issue that we have to deal with in terms of GJLOS, rather than in the thematic group.

**Interviewer 2.3: Okay, what is that?**

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**Officer 2.3:** Whether GJLOS is indeed a reform engine or not. That question has got to be asked and my view is that it is not. I think that it is a public relations gimmick by the Ministry of Justice and I think also that it has become a modernization program as opposed to a reform program and it has also become a vehicle for the Ministry of Justice to try and run over other agencies in government and restrict independence. So, we come to GJLOS without any illusions that this is a vehicle that will lead to reform. I think there is a distinct lack of political will, not only within the MDAs, but especially within the Ministry of Justice. I do not think they understand what their role is and I think that they are trying to run over people. So we have a fundamental disagreement with the Ministry of Justice in terms of whether an agency or department or a ministry can lead reform when it itself is not reformist and has got no intention of reform. It is more interested in controlling than reforming and reform of course means diversification of power. You can not reform without diversifying power. But the Ministry of Justice wants to assemble and control power, so there is a contradiction there. So, we have a fundamental problem with GJLOS; not with the idea, particularly when it started, but more the implementation and then the ongoing process that seems to be one of control by the Ministry of Justice.

**Interviewer 2.4:** Okay. So which conditions to you think have been most important in making you willing to participate in the constitutional review process in the first place?

**Officer 2.4:** We thought that it was a chance of having real change in the country. In any assessment of democracy and development in this country, clearly there is a need for us to move to expand the political space, expand the fundamental structure between the governors and the governed. That is a fundamental issue, so you can do it either through constitutional reform and/or you can do it through a diversification of power and diversification of people making demands on leadership. But the fundamental issue for us in terms of human rights abuses in this country is the state; the way the state is formed, the way the state is structured, the way the state works and the attitudes of people within the state. Those are fundamental issues, so we do not have any illusions thinking that if we will have a new constitution tomorrow, these things will change, but it is a framework for us to begin a process of change. So

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it does help to have it, but again there must be significant work both from the top and from the bottom in changing attitudes of the governors especially. But the governed also need to change attitudes, we have a very meek society, we are very responsibility shy society, we do not want to take responsibility. We just want to follow and whenever we go around the country, people keep asking us ‘what will you do to help us here?’ and I say ‘No, no, no, that is not what I will do, we are not Messiahs, it is about what we call all do together and what we can do to make things better’. We have got to take responsibility as the people of this country. That is one part of it. The bigger part for me is the governors, it is those who are governing us, whose attitudes are completely archaic; it is still exceedingly colonial. Looking through all this GJLOS for example is the police and we still have a complete blanket of opacity and autocracy within in our police force and that is the agency most people know; when people talk about the state, they talk about the police and we have a terrible autocratic, archaic police force and they are refusing and have refused to change. So if we can not get the police to the table and where they are supposed to be in GJLOS and begin a process of attitudinal change, then we can not move. I personally was very involved in GJLOS early on and then I began pulling away and I am not as engaged as I used to be. Partly because when we went through the strategic thinking about GJLOS, issues that I thought were fundamental to the concept of reform were thrown out, they were rejected; and we were sitting there with government people who are scared when the minister comes into a room and partly when the minister sits in the room, no one wants to challenge except me; so I am all alone challenging the minister and talking like I am sitting there alone sometimes, although donors were also very useful in that sometimes. But it is just me and the donors, so I said I am not coming to these meetings anymore because they are going to say that I am a friend of the donors as opposed to be Kenyan. But the issue is that they will come and see me then at tea time and say ‘oh, keep on, keep on’ and I am the only one! But issues like –you can not have reform without changing attitudes- and I kept asking ‘what are the programs that change attitudes here?’ There were none. We can not have reform in this country without dealing with the question of corruption, what are the anticorruption mechanisms that we are dealing with? You can not have reform

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without us acknowledging our past and figuring out how do we move from this past? The door to the future is the past and if you do not acknowledge and do not discuss it, you can not move. So when they focus on hardware –‘we need hardware, we need internet, and we need computers’- and you can go to any senior public official’s office today, which is in the GJLOS, and they all have a computer. Ask them to turn it on –they do not know how! They have the hardware but not the software. So we have a big problem. Where people began seeing GJLOS as a mechanism for hardware and modernization, one of the big issues that arose, and I kept raising it is that, and I said ‘look, even as we are doing this GJLOS, getting donor money to do reform, how are we using our tax payer resources currently in the state?’ And this came up from an incident which happened with the prison’s department. The prisons wanted money from donors to be able to fuel vehicles to go around the country to every prison to identify which prisoners could benefit from amnesty from the president as a way to reduce conjecture. Excellent idea, I had no problem with that. They said they had no money, but the same week as they are making that request for 50.000 us dollars, they are out procuring for a Mercedes vehicle for the commissioner of prisons for 400.000 dollars! So I ask the question ‘how can you do this? How can you be procuring a vehicle for 400.000 dollars with my tax money and then going to donors begging for 50.000 dollars?’ And the commissioner of prisons already has a vehicle! Slash your budget for the vehicle by 50.000 dollars –if you have to buy one- you do not need the donors for that. So that whole attitude began bothering me and I began asking the question ‘how are you using our money’, because you would find the police coming to procure for a workshop –but where is the money that they get from the state? They are buying bulletproof vests, they are buying [inaudible word] gear. Stop intimidating and hurting us and rather help us with doing the process of reform. So there are all these issues which have not been dealt with and they do not get a hearing within the GJLOS.

**Interviewer 2.5: Have there been any specific principles or considerations that have guided you as an organization engaging in the review process?**

**Officer 2.5:** Absolutely, our human rights framework, essentially, and also being pro people. If you look at the values of this organization, they are very clear and

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important to us. So we are asking ‘what is the benefit from the majority of poor in this country of any activity that we do?’ and that is the motivation that we have in this institution: how does it help the poor in this country.

**Interviewer 1: You have touched upon it now, but what do you understand to be the essence of the constitutional review process in terms of the most central topics of reform?**

**Officer 1:** I think that the critical issue was the structure of the state and the structure of the relationship between the government and the governed and within that in any analysis one did, one sees the overarching power and influence of the executive over and above every institution in this country and that needing to be reformed. I actually think that if we could just do an executive reform, we would be 50 times better than we are today. The problem in this country is the executive: how do we then control it, what are the accountability mechanisms around it, how so we diversify its power. Once we deal with that even the legislator, which is becoming a problem now, we can deal with. The overriding problem is the executive and the reason why we got involved –and I got involve, I have been involved in the constitutional reform agenda from the very beginning-, the core analysis of everything that we have ever done is that the executive is too powerful, the presidency is too powerful. The president is a king, like a medieval king, a feudal king. His powers have got to be trimmed down and diversified; that is a central part of anything for us. The reason why we have and have had abuses is because the executive is unaccountable. The police do not care because their system is unaccountable. As long as the minister is happy with them, they are okay. The police to day are providing –we have been doing this for public enquiry and security, going around the country and we went to a place where one of the chiefs told us that in this location he had around 30-35.000 people and he has six police officers. The minister for security has 50 police officers to one person. How then can you move forward? It is ridiculous. And that is our country.

**Interviewer 1.1: How do you see the link, if you see any, between the GJLOS reform program in the form of its contribution to constitutional development and then the wider constitutional reform process?**

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**Officer 1.1:** The harder part is that because the GJLOS is seen as a Ministry of Justice program as opposed to being an independent sector wide program, GJLOS' involvement hurts rather than helps. If it was the Law Reform Commission which is seen probably as a little bit more independent it would be useful. The ministry of justice in this country has become the trigger for a lot of nasty things and it also becomes an executive driven approach to constitutional reform, which we rejected in the 1990ies and which we will continue to reject. We do not want this to be an executive driven approach. As we saw when these guys were in the opposition, they had different views than now that they are in the executive and that tell you a lot about the danger of having an executive driven approach and it is probably the same thing that will happen if Raila Odiga becomes president in December; you will probably notice that his views will change and try an keep the executive powerful. The Wako draft watered down a lot of provisions to reduce the powers of the presidency –I am not necessarily in favor of an executive prime minister and a non-executive president, I think that has got issues around it and I do not think the only way to reduce presidential powers is to have an executive prime minister- but that aside, they watered down the provisions and issues that we had put out to the Ghai commission in terms of weakening and reducing the powers of the presidency; and that is a fundamental issue, you can not move with that. I do not think that the Ministry of Justice is the right organ to promote constitutional reform because they will promote it in a manner that promotes the executive as opposed to anything else. So the only way then for GJLOS to be effective is if that rope between GJLOS and the Ministry of Justice is cut and the GJLOS becomes an independent institution or independent sector wide program as opposed to being what the Ministry of Justice wants it to be. The problem is the Ministry of Justice, otherwise it could actually run better, if it was not as involved, as key as they are right now. One more question, last question?

**Interviewer 4:** Yes... I would like to tell me about how your participation in the constitutional reform process relates to your wider activities?

**Officer 4:** Constitutional reform is an effort to move to a new society and that is what we are trying to do. I see, and we see this institution as one of the engines of reform

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and so the two must be tied together so that is one angle and we are trying different angles and we do not only focus on constitutional reform, we focus on a whole load of other efforts, but we see ourselves as an engine of reform, a pivot of reform. You do not have a human rights commission –if you are serious about it- and not expect it to be an engine for reform.

**Interviewer:** Okay, so thank you for your time.

**Officer:** Okay, thank you.

## **Kuria Interview**

Below is the transcription of the interview with Kamau Kuria, constitutional lawyer of Kiratu Advocates in Nairobi. While not officially affiliated with Kibaki's supporters in government, he has personal relations with MPs in the Government (see below) and is generally perceived as being pro-Kibaki and a supporter of his position in the constitutional review process (Namwaya, 2006: 4). The interview was performed at Mr. Kuria's office on 26.09.07 in Nairobi with only Kuria and the interviewer present; the session was of a duration of 1.23.50 hours.

**Interviewer 0:** Before we start, I would like you to tell me about your affiliation with the government side in the constitutional review process after the elections in 2002?

**Interviewee 0:** I did not support the government's position until the stage of the referendum because I took the view that the government approach was not what I would have supported. However, once a draft constitution had been agreed upon through democratic constitution, I reasoned that the proposed draft constitution was a great improvement on the existing constitution and though I would have wanted a better draft, certainly it was wrong to vote no, because a vote for no was a vote for the existing constitution whose replacement I have been seeking. So I supported the government after the draft constitution was agreed upon, yes. But regarding the process, what you might get confirmed by other people you talk to is that from the year 2000, there always was a process of isolating those who were strong in the



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reform process and get moderates. So that when the process began in the year 2000 it was the kind of people that were supposed to be moderate who had nothing to do with agitating for reform who were appointed members of the review commission. Even when this new government came, there was kind of no input from those who had been conceptualized as being active, so that is the picture; with that background I can answer your questions.

**Interviewer 0.1:** Okay, so as such you are not directly affiliated with the government?

**Officer 0.1:** I would say that the only affiliation is that when it has had some cases, I have as a lawyer been given a brief to represent the government, but I am a lawyer in a private practice. One of the areas I specialize in is constitutional law and virtually every other month, I have cases against the government. But the position that I have is really that of a professional in the market. This government has given me a few cases, but my action for the government is limited to the cases I am doing and I do not see myself as being inside the government. But I will say that in terms of preference, if I had to indicate, I would say that this government is better than the previous government and the other correct position would be that I am not in the opposition. But I am not in the political parties that are in the government either. I try to keep separate my professional work from political activity and I have friends in the government; in fact one of the things I have told my clients when they say ‘oh, you are friends with so and so, can you help us?’ I said ‘no’. I never approach my friends in connection with their work, because I do not want to get any call from the government asking me not to take up a case. So, similarly, I am not going to ask my friend to use his influence to assist my client but if you come to me, you choose whether you come me as a client and if you have come to me for political influence, I am not going to assist you.

**Interviewer 0.2:** So let me see if I get you right. You try to distinguish between your professional affiliation with the government, which is strictly on these cases, and then your personal political views.

**Interviewee:** Yes. The government can not ask me why I am acting for people in some cases against them, because the only relationship I have had is getting one kiss

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from them, but my practice is operating on ordinary commercial principles. But what you will see more and more is that I have seen the politics of the country change a lot after the last government and I have even seen civil society leaders abandoning idealism and using their office to advance the political goals of the opposition. And I have seen people in the civil society instead of pursuing constitutional reform as a project that the citizens are involved in to have a constitution that serves everybody, I have seen over the last few years a crop of people in civil society who are only pretenders; they are part and parcel of the opposition agenda and they give the wrong impression that they are involved in constitutional reform, but they are actually fronting the projects of the people in the opposition who are responsible for our not having a better constitution and in fact these people in opposition, are the very people we were against when they were in the government and we wanted a good constitution. All of them in the opposition were in the opposition when we were fighting for a better constitution. So the referendum was a vote for the status quo under the guise of fighting for change. So, what I am suggesting is that you will need to take a little care so that you are not given a notion of constitutional reform, which is in the political agenda, but a constitutional review. Myself, I reached the conclusion that constitutional reform is something I have been involved in since the 1980ies and I never campaigned for political office and I have taken the view that a kind of special politics is required for constitutional reform; which is different from the politics associated with power. But that has not happened with the constitutional reform, so I am therefore waiting for a chance where we shall return to serious constitutional reform debate.

**Interviewer 1: First of all, could you try to describe to me what you perceive to be the essence of the constitutional review process?**

**Interviewee 1:** The essence of the constitutional review always was to restore democratic governance because this nation started with a democratic constitution in 1963. Over a period it was dismantled and replaced by a one party dictatorship. So my entry into human rights practice was to curb the excesses of one-party dictatorship. But there were of course obvious theoretical limitations. The bill of rights goes with democratic institutions so that if you do not have democratic

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institutions, so that if you do not have democratic institutions, the bill of rights becomes incomplete. So there was therefore a fight first of all for the restoration of political pluralism and the victory came in 1991, when the part of the constitution that had turned the country into a one-party dictatorship was repealed. But that still left intact the institutions of one-party dictatorship. Therefore, constitutional reform was necessary now to restore democracy and of course the unfortunate thing is that that goal has not been restored; another unfortunate thing is that the people in opposition were never true constitutionalists. When we worked together in the removal of the administration, we took them at face value, that they too wanted democratic governance. Of course, what many people did not see is that they were supporting democracy because in the internal competition for power in the previous government they lost and they thought that they needed to campaign for power now outside the previous structure. So therefore, when they left the previous party, whether it is ODM-K or ODM, they never embraced democratic principles; their fixation has been with capturing power and that is why in 2005 in the campaign for the referendum, it was quite clear that a vote for no is a vote for the existing constitution; the very constitution that permitted oppression. So for me it was unthinkable that any person can wish to continue longer with the constitution that permits premeditation without a trial and other excesses. But the politicians who were benefiting from that order are not troubled because they did not have to be detained and they naively think that it is only other people that can be victims of that constitutional abuse of power; they are that narrow minded, it is only other people that can get into trouble. My sadness is therefore with the intellectual bankruptcy that exists in the opposition and without realization that this constitution can be a very good document for another dictator.

**Interviewer 1.1: That is actually one of the reasons why I am interested in the constitutional review process, I see Kenya as very vulnerable in the position that it is in now.**

**Interviewee 1.1:** It is, very much so and what will surprise you is the quality of articles in the media, because they do not really focus on that; the press is an excellent mouthpiece of sloppy thinking.

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**Interviewer 1.2: So you are saying that they are reporting too uncritically what the opposition is saying?**

**Interviewee 1.2:** Probably I am too severe, but I do not think that they understand power or the constitution the way you do. Because the democratic gains that have come is because this president is more democratic than the previous one. We just have to have a person who is a reactionary and the country returns to where we were. The press does not actually realize that that is how dangerous the situation is and for me who has been in exile and to jail, I know that returning to exile and returning to jail is a real prospect if you have a dictator in power using the existing constitution, because it is the existing constitution that permitted my detention without trial. It is the existing constitution that led to my being in exile. So for me, therefore, any person who does not see that danger, can not be seriously thinking, you just say that ‘we need to give them time to realize that they are playing with fire’.

**Interviewer 1.3: Okay. So, which conditions to you see as the most important in making the review process possible after the 2002 elections?**

**Interviewee 1.3:** Maybe before I answer that question, let me explain a related thing. For me, I had been supporting human rights and democratic change for about two decades, so for me, the regime change did not hold out the prospect of a big office in the government. For me, the regime change heralded a better opportunity for democratization of the country. For me, it also meant in a market place, I would be about to have a more lucrative practice because there would be less government control, and people would determine who to provide civil services on basic market conditions. From a personal point of view I therefore thought that now, with a government that is friendly to reform, we are now nearer our goal than ever before and I have no doubt in my mind that this administration provided that opportunity to the country. However, if you now ask politicians what the regime change in 2002 meant, for them there was a better opportunity for capturing power within the existing constitutional framework. Therefore, changing the constitution was really not a goal, it is to use whatever advantage there might be in presenting yourself as a reformer. So that is why for instance at the review process in Raila Odinga’s view was to create the office of prime minister, which he wanted. So it is like me wanting to see that there is

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an office of the chief of justice or Attorney General that fits my dreams. And related to that is that all people like me who have been in the forefront in conceptualization and bringing forward ideas on democratization, is that all of us were not needed to be near power, after the regime change we were not close to power in the form of advising or something like that. I myself was appointed to serve in a commission to enquire anticorruption, but that was kind of a technical job. What I would have thought was that the actual governmental and institutional design would be a project that would be better for me because the climate was better than it was before. But the new government, in which people in opposition were, did not find use for people like me who had been very active like me in its serious work.

**Interviewer 1.4: So people were handpicked?**

**Interviewee 1.4:** That is correct and perhaps intellectually we had posed a threat even to them in the way that by championing these constitutional values which we accepted, we were potentially antagonistic to them or to their goals; that is the way saw it. So, I am not just talking about myself, I am talking about those that have been very active, close to being radical, but we are just liberal, they were nowhere in the corridors of power. Then all the people who got power started fighting amongst themselves and that is where a constitutional reform became really like the English say that 'When the elephants fight, it is the grass which suffers'. So the constitutional reform was the grass which had to suffer, when the elephants are fighting and that is still the position where the constitutional reform is still the grass that continues to suffer.

**Interviewer 1.5: Okay. So has your perception of the reform process changed during its course?**

**Interviewee 1.5:** I would say that there has been one major gain during this period and it is the constitutional decision, the so-called Njoya case where the court said that firstly there is a limit to the power to alter a constitution, the Parliament as a representative of the temporary majority does not have power to effect basic changes in the constitution. That is a preserve of the people and consequently, if there is a new constitution to come, it has to go through a referendum. So that to me is a very major development because in constitutional reform, we were trying to articulate that view

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and because its absence permitted the turning of a constitutional democracy to a dictatorship. And it is the employment of that idea of the India Supreme Court that made it possible for India to avoid becoming a one-party dictatorship. So therefore, the Njoya case is important in that until such times where there is greater consensus then anyone attempting to be a dictator would be told 'no, you can only make minor amendments to the constitution, the major ones must be effected by the people'. So that has now effectively curtailed the power of Parliament and therefore Parliament has been called an elective despotism, so to the extent that Parliament can not do such things that to me is really a very important development for constitutional reform. This was decided in 2004. So what then happened is that before the 2002 change, the constitutional reform movement had succeeded in forcing the government to accept the principle of reviewing the constitution. Now, after 2002 this government accepted the principle of reviewing the constitution, but there was now another element that came in that for a part of the government, constitutional reform was really not an important project. For it, capturing power was the more important goal. So that is why the document that was rejected was a vastly great improvement from the existing constitution, but those who campaigned against it all happened to have served in the previous government as ministers who were –there were exceptions like the current secretary general of ODM who had not been in the government, but Raila himself was in the government, the other people were all in the government, Kalonzo was in the government- so they never were unhappy with one-party dictatorship. Another important thing is that for those campaigning for the no-vote, their perception was that a no-vote would resort immediately to a transfer of power from the current government to them. So for that reason, the issue was not the constitution, the issue was transfer of power. So if you therefore understand the position that way, there be a need now for the citizens to come again and say that it is not open to anybody to oppose certain constitutional changes because the country has settled for a constitution. So that is really the context in which we are because for a person like Raila who have been detained under the current constitution not to be bothered that it can happen again, there must be something wrong with his head. He is just a fool, because the constitution under which he was detained, under which he was charged

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with treason is still there. I would have thought that you want to have a sound sleep knowing that the same thing can not be repeated. So that is why I say that I have a very negative view of the opposition, because to me the important thing is to curtail power to reduce the power of the executive and of the Parliament and ensure through constitutional changes that you restore the power to the people. Like the rejected one was saying that there would be two types of constitutional changes: for minor changes, Parliament would be able to do it, but for bigger changes, there would always be a referendum.

**Interviewer 2: You have talked about how you have seen the role of the opposition in this. How do you think the government has contributed to the process, can you tell me about that?**

**Interviewee 2:** I would say that... the government has not contributed to the mess in which we are, because as a democrat I can say that the rejected draft constitution would have been more democratic than it was. Once a document had been agreed upon, I said 'is it better than the existing one?' But the difference between the government position and the position of the opposition have to be interrogated so that you can see who is to blame and my view is that the no-vote was talking about what was called the Bomas draft. But the Bomas conference was essentially undemocratic. The delegates were not elected on the basis of one person, one vote. The other thing is that the delegates who participated did not come from the 2002 elections, they were constituted from the order which was there around October 2002 when the national constitutional conference was constituted; because the Parliament was dissolved to prevent the constitutional conference from going on. Then of course, if you look at the Constitutional Review Commission, according to democratic theory and practice, it could only be like a committee of detail, let us say in the American Constitutional Convention they appointed a committee of detail to be reducing the resolutions that had been passed by the plenary session into a document; therefore, they could only serve as experts and to say that these were experts, we would have to be dishonest. The other interpretation would be to look at the constitutional review process in South Africa, they would be like the experts who were helping the various groups in again putting the document together. But the composition of the review commission had a

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great political element in that the commission was the institution which the former president Moi was to use in writing a constitution that takes care of his interests. Then of course, there was the review chairman, he was my teacher at the University of Dar es Salaam, about 40 years ago and I had a debate with him and I told him I can not have anything to do with this process because it is not really democratic. I had had great respect for him as a scholar, but I told him ‘professor, the time for you to help this country has not come, because this government is not committed to constitutionalism; so it can only want to use you’. Now, in about February or March when the review chairman Yash Pal Ghai left, he gave an interview to the Standard and he said that the review commissioners were impossible to deal with because they were taking directions from politicians. So the chairman of the commission talks about the lack of integrity on the part of the review commissioners. So I am therefore saying that then of course the review act was the one which was interpreted in the Njoya case, so I am therefore saying that... There is another important point, there was a book which was written in 2003 and it gives the constitutional background to the post of prime minister and what happened was that when Raila had joined Moi, he wanted to get power and one of the posts that he wanted to get power through was the post of prime minister and that is why the inclusion of the post of prime minister had origin in trying to nurse the basis of Raila and accommodating him. What I am saying is that professor Ghai ought not to have been surprised, to me if you have been playing with the devil, you should not complain that the devil has harmed you because you thought that you were going to outwit the devil and the devil twists it. The best thing is not to play a game at all. So what I am therefore saying is that if a political scientist or a constitutional scholar were to look at the Bomas document, both the content and the process that it produced were undemocratic and therefore, the real test of who to blame for not realizing a new constitution must be what is the democratic stand that you took, which the other parties rejected? Then of course, the other point is also a theoretical one in that I have James Madison’s journal which he kept during the making of the American Constitution and he sets out a moving speech done by Dr. Benjamin Franklin and what happened was that they had spent all this time, they had passed all the resolutions concerned, the committee of detail had come



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up with a draft constitution and as some people looked at it, none could see the realization of his dream, so Dr. Benjamin Franklin said ‘well, from my understanding of human nature, I have no way of saying that with the passing of time I will not support this document and we must guard us against the French lady who says the never goes wrong because she only listens to herself, we must guard against wanting to have only a document that reflects our own view because in constitution making it is a question of give and take’. So, therefore to me the issue that was in 2004 is that if it is politically impossible and theoretically even also unwise to go for the kind of constitution you want, it becomes necessary to ask yourself: ‘is the document on offer going to advance the constitutional review? If you were to ask me that about the constitution, I prefer the American presidential system, where the Cabinet members are outside the legislature, like the British system, so that the president nominates cabinet ministers and they are approved by Parliament. Now, the draft constitution was giving the president much more power than the American presidential system and there are other things that one could point out. But, the issue for the country was whether that document would advance the course of democracy for some time, because even in other countries, the constitution is developed through the interpretation and it is made a better document. But the sad situation about our own is that no document whatsoever came and the only way to now make more progress is to restart the constitutional reform process and get people to move beyond the stage we reached. But the constitutional reform agenda has been pushed quite back and it is going to stay there until maybe after the general election. If there was a change in the government, and a new person comes and tries to go their own way, maybe we will see the need then for constitutional reform. But because of the strong will of the current president, the incentive for pressurizing for change is not there, because the great oppression is not there. So, there has to be an incentive to continue pushing and therefore it is a very discouraging situation for constitutional reformers so we are waiting for a situation where an environment for rational debate comes back because for the media today, you are either in that camp or that camp. There is nothing like what is right, what democracy requires, or anything.

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**Interviewer 2.1: What about after the referendum, how did you see the role of the government in connection with the whole debate on minimum reforms?**

**Interviewee 2.1:** I would say that to me, the government's position was the whole concept of minimum reform is part and parcel dishonest because the rejected draft constitution contained more reform than were being articulated by the minimum reforms, so whoever was after talking about minimum reforms should have voted for the draft. So when you would have gotten bigger changes, you are asking for small changes, there is something wrong; it can only be opportunism. So what it again comes to is lack of principle about reform because to me, whoever wanted minimum reforms should have foreseen that, he should have voted yes. Then they would have had more than minimum reforms. It is also a concept that came in 1997 because if as the opposition had said, the rejected constitution was 80 % good, all that they should have done is to identify the 20 % that was bad in the rejected draft, the country goes for a referendum and we would not even now have minimum reform, but have a document of which 80 % meets the needs of the populace.

**Interviewer 2.2: So do you think that the government has then been against minimum reforms on grounds of the background you just gave me?**

**Interviewee 2.2:** No, I think your question proceeds on the assumption that there is a need for minimum reforms, but I am saying there is no need. So the government's position is really neither here nor there because the minimum reforms were included in the rejected document and therefore you must accept, like me I had a hard decision to accept that really 57 % of people can be against change. So to me the no-vote was an irrational vote, a vote for the status quo, which we have been fighting against for more than 25 years. Then of course, if someone is asking you to have minimum reforms and he or she opposed bigger reforms, then the call for minimum reforms is based on underrating the intelligence of Kenyans. I am therefore saying that the call for minimum reforms is a call for trying to create advantage during the campaign. It is not a means of improving on the governance.

**Interviewer 2.3; So what I was trying to get at was that do you think that the government because of the reasons that you have given me now, has –as you say-**

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**seen the minimum reforms proposed by the opposition as something not improving the governance but only improving the position of the opposition?**

**Interviewee 2.3:** Yes, because the government had accepting something that the opposition was saying was 80 % good that shows to me that the opposition needs these concessions to use them in its campaign, that the document was 80 % good. So if they were genuine, they should not have been asking for minimum reforms, they should have said that 'we disagreed on these 20 %' and to me, I would say that it would have been real easy: just go with a pair of scissors, cut out 20 % and then we have another referendum and then we have a good document.

**Interviewer 2.4: So that you would vote on the two different parts?**

**Interviewee 2.4:** ... No... To me... You would have an unusual situation because both the opposition and the government would campaign for the document.

**Interviewer 2.5: I mean, as you said, if you took out the 20 % that the opposition was not for and then voted on that later?**

**Interview 2.5:** You would be uniting the country because the country would be uniting on this document. So you ask yourself, why is there a call for minimum reforms and not for the 80 %? There must be something wrong.

**Interviewer 2.6: Okay, thank you. So, after the referendum then, do you think that the government has prioritized different issues or policies instead of constitutional reform?**

**Interviewee 2.6:** I would say that in a democracy, the government is obliged to act on the verdict of the people. I can give you the example of the of the European Union constitution. I thought it was a good document myself, but once it is rejected, you have to live with that reality. So similarly following the referendum, the government has to accept that 57 % of Kenyans are happy with the existing document. Therefore, you must now know that it is not a priority for the people. You know that it is a question of finding out how we are going to identify either the 80 % or improve on the position so that we might have a new constitution. But you must accept that 57 % of Kenyans thought that the document was okay and therefore it would have been unwise to invest much in constitutional review. First of all, I would say that the opposition should have supported the draft document because it was 80 % good, and

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then after that you can say let us now work on the 20 %. So the post referendum agenda for the opposition would have been let us now see how we can have a good constitution; but the agenda has been capturing power. So constitutional reform has been pushed to the back banner where it remains. What I also found worrying was that for the no-vote, violence was a very important campaign tool. For instance, in a number of places, the opposition arranged for the barring of copies of the proposed constitution. I know that in a place like Kisumu, the opposition led by Raila used violence to prevent a yes-vote rally in Kisumu. And then there were many violent episodes. So to me that is worrying from a lawyer's point of view because the no-vote should have been secured within the framework of the rule of law. Therefore, if the opposition captures power, the country will be a lawless state; Kenya will not be a democracy. We shall have to go back 20 years, like reinventing the wheel. That is how difficult I see the situation. But I am saying that that is a problem probably common to both the government and the opposition, that theorizing about governance is not something that is really popular; The politicians are keen not to give power without asking what principles they are using; and the issue of democratic governance were those that concerned people in the civil society as lawyers, church leaders and it is something that interested us when the political space was eliminated. Then the politicians had to come to us and they joined, then reform became important. But now when political space came, then they did not need these theories because it was about power, which is really what they were seeking. We are going through a phase where we might have a difficult situation to get people to focus on things, but politicians sometimes get involved in a cutthroat competition for power and that can be dangerous.

**Interviewer 2.7: A last question. You mentioned that Odinga had been engaged in preventing a yes-rally?**

**Interviewee 2.7:** Yes, he was really the leader of that group.

**Interviewer 2.8: Okay. How did they do that?**

**Interviewee 2.8:** He is a good campaigner, but Raila has got three or four careers behind him. The first career is as kind of a Marxist/communist activist who wanted to overthrow the government and therefore was charged with treason; that is really one

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trade and he has documented it in his book and you can not see him fully unless you see that aspect. Then, you come to his liberal phase or one where he gives the impression that he is a democrat campaigning for constitutional reform. That is after the detention, and the charges of treason were redrawn and he was released. Then he repackaged himself to be a liberal supporter of democracy and then the principle of pluralism came. Then his liberal phase wears out and in 1998 he joins the dictator's political party KANU and served as a minister until about September or October 2002. So this political party is the one that turned the party into a one-party dictatorship so the philosophy of joining that party is antagonistic to democracy and constitutionalism. Then he comes back as a liberal and democrat during the 2002 campaigns, but soon after he is in government he starts the campaign for power. Then of course when the referendum came that was done in a lawless manner; because of the violence. Now, if you look at the newspapers between September and November leading up to the referendum, this was a referendum to remove the government; it was not merely to reject the constitution and the talk was even irresponsible. So, as it were, Raila was the leader of that no-vote and even the idea of after that there was an attempt to use the structure that voted no to sort of vote in the same way and therefore remove the present government. So what I was therefore saying is that if you look at the entire opposition, there is not even a single one person who is convincing if you look at their history. If you look at the government side they of course have not had the kinds of liberals very prominent amongst them, but at least they are more democratic. But you do not see that democratic theory is as clear as it should be. Among other things, one does not see a good grasp of constitutional theory that informed the various reforms, but the draft the government supported is definitely many times more democratic than the existing constitution. And I can tell you that during the reform I was the chairman of the technical committee of the reform movement and therefore I was like a theoretician and we used to go to the streets and during most of these times, Raila together with another person called Matiba always had their own show. The main group would go for constitutional reform rallies, but they always had their own show. So that is really where I say that I do not see any democratization there –Kilonzo himself has never spoken a word about democracy

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until he left KANU in September. So when anybody talked about constitutional reform, you can see there is no correlation between theory and action.

**Interviewer: Okay. We have covered the different issues that I would like to hear your opinion about. So thank you very much for your time.**

**Interviewee:** Yes, you are welcome and I wish you a very good stay in Kenya and if you publish articles, I would like you to send me a copy.

## **Muchiri Interview**

Below is the transcription of the interview with Adolf Alsack Muchiri, Democratic Party (founded and led by Kibaki) Nairobi Branch Chairman and Member of Parliament. The interview was performed at the office of Mr. Muchiri in Nairobi on 18.09.07 and was of a duration of 0.58.07 hours. Present at the interview were apart from the interviewer and the interviewee also an assistant of Mr. Muchiri and a member of a local organization that had facilitated the meeting.

**Interviewer 2: First of all, I would like you to tell me about how you from the government side have contributed to the constitutional review process during its course?**

**Interviewee 2:** The government collected the views of the people for a long time per constituency and up to the ward level and locational level and then also the civil societies. So, literally everybody was involved. Then there was a form of a council, which met at the Bomas for several days to discuss the issues agreed upon and then there was given time when the constitution was to be finished and unfortunately some people went to court. When they did that, the court decided that the people would go for a referendum. When they went to the referendum, people rejected the constitution; the government accepted their verdict; that is all.

**Interviewer 2.1: Then after the referendum there was the commission of eminent persons and different committees?**

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**Interviewee 2.1:** The Eminent Persons brought their reports that have not been acted upon. When it was to be acted upon, I think there was no time, and there was no funding.

**Interviewer 2.2: So funding was a problem?**

**Interviewee 2.2:** The issue was not the funding, the issue was first of all why people rejected the constitution? To the best of my knowledge being under their ability, they just rejected it because they thought that it was a president affair. That was the best constitution I have ever seen, having been made by the people, among the best constitutions of the world. Some people said that 20 % was not good, the 80 % were good; but all the world's constitutions, none is a 100 % good. And what was the job of the members of parliament? It was to amend the parts they were thinking were not good. But they rejected it wholly.

**Interviewer 2.3: So do you see the fact that people voted no to the constitution as a bad thing?**

**Interviewee 2.3:** No! It was not a question of people thinking that the constitution was a bad thing. It was not just a question of some people trying to influence their tribes. In the African societies people move with their tribes. For example, we are now going into the elections and it is a three way divided: the Kikuyus vote wholeheartedly for Kibkai, Luos will vote for Raila and the Kambas will vote for Kalonzo. It is not a question of which issues are being debated. Even if you take the issues to the battlefield of politics, they will blast them aside.

**Interviewer 2.4: So you are saying that the referendum was basically along the same lines that the general elections are?**

**Interviewee 2.4:** No! You see, Great Britain does not have a written constitution, but they have been operating. This country has had a constitution since the day of independence based on the principles of the American constitution and Great Britain partly –and India. That does not mean that that is the best for Africa –it is not; because it is not an African made constitution. But at the end of the day, we have gone 40 years down the line with that constitution because it is not the constitution that rules, it is the individuals. Individuals change, but the constitution does not change.

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**Interviewer 2.5: But what you were saying was that the way that people voted in the referendum –**

**Interviewee 2.5:** No, people thought that it was Kibaki's constitution and it was going to favor Kibaki. I read that constitution, I have read almost all the democratic countries' constitutions and the communist countries' constitutions and comparing them to the one Kenyans made, it was one of the best constitutions of the world. Some people were rejecting it without even reading it, people were told in Nyanza 'Do not even read, I have read for you, do not sit to read it, it is a good thing. So I do not think that was the answer; the answer was, one, there was more to it than people were being told, two, the Muslim communities did not accept it. At the same time, the Christians were fighting across their which was talking about the [shift cards?], but looking at it I think that it was a question of ignorance; because we have had [shift cards] here for the last 40 or 50 years, even when the colonialists were here, we still had the shift card squad. It was a question of saying they do not want the shift card; I do not think that they were right. So it was a question of accepting this constitution or rejecting it. The option was only one, you vote for yes or for no. For no there were more, so we went to square one.

**Interviewer 2.6: So up until the referendum, the government had tried to bring the best possible constitution forward. But then, the people voted no and so what has the role of the government been after that?**

**Interviewee 2.6:** The role of the government is to move with the people's wish. It is the wish of the people of this country to have a new constitution, which I do not think is going to alter our position in any way; because that constitution was being forced, originally it was forced to the previous regime for it to be removed. Now that there is multipartyism, there is literally freedom of voice, freedom of association, I do not think people at all agree that way; it is history now.

**Interviewer 2.7: So you do not think that it is something that the people of Kenya –**

**Interviewee 2.7:** I do not think that Kenyans need that. Actually, what does a constitution help the individuals? I have told you Great Britain does not have a constitution and they have survived for centuries. There are things that you do that are



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wrong, and wherever you go it is wrong; the other is how do you coexist with one another, but that does not mean that those are the rules or laws to debate. In coexisting you are a human being, I am a human being, if I mistreat you, or you mistreat me, somebody was going to say that you are doing the wrong thing. So to the best of my knowledge, I do not think that a constitution change –for an example, India was divided by two lawyers who were fighting for a constitution into Indian and Pakistan and now they have dispute over Kashmir.

**Interviewer 2.8: So is it the position of the government now that these different issues can be solved without a new constitution?**

**Interviewee 2.8:** Yes, yes. The only issue I see being fought here is the issue of terrorism, which is bringing bad taste between the government and especially the Muslims, who thinks the government is fighting them and turning them to be terrorists. But that is not the case. A criminal is a criminal, where ever he is in the world and there seems to be a fight actually imposed on Kenyans because the was of terrorism in this country is not Kenyans' fight, it is the Americans' fight or Europeans' fight. It is the Muslims or Arabs that are fighting with the white, how do we come in? We are only coming in when they come to attack other countries, using our country as a stepping stone, or when they attack the investments of foreigners here, which have been put in this country. That is the only way we come in.

**Interviewer 2.9: So basically the whole issue of developing a new constitution has not been very much in focus on behalf of the government?**

**Interviewee 2.9:** No, it has not been and in any case it would not go through because it is the current Parliament which is almost being sold, you will find there is a separate and a part of the MPs who were supposed to be in the government have gone to the opposition side. Even if the government puts a motion forward, it is going to be shot down. You have seen how a number of motions have been shot down, which is simply because the people who wanted to be supporting the government have already gone, have already shifted their loyalty to the opposition. So they are opposition in Parliament, so the Government can not bring constitutional issues. There was the question of amending the constitution to increase the constituencies, you find that motion was shot down. For an example, in this constituency, we are about 170.000

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registered voters, the next one is 200.000; that is too large a number, we need about 5 constituencies on that side and about 3 on this side. Now we can not have them, ask yourself a question: How is one going to contest about these 174.000 registered voters, you never even listen to them?

**Interviewer 2.10: So you are saying that the opposition is not allowing any constitutional change?**

**Interviewee 2.10:** Yes, even in the previous regime, I was in the opposition the last time and the previous regime, they enact three members of Parliament to change the constitution; because people stood firmly, we wanted that regime to go and if you had given it an opportunity, it would not have gone. So the same case with this one, people are going to the opposition and think they are going to bring the changes and I see no change. The bottom line is that I am not seeing change. I am seeing us moving the same way, but people shifting the camps.

**Interviewer 2.11: But do you see the government as having tried to move the process forward?**

**Interviewee 2.11:** The government has always tried to move the process forward, but you have got different dissenting views within the political circles. There are some people here, who are more like paramount chiefs, what they say to their people, they believe. There are some other people in some other parts of this country who are enlightened, so when you go to talk to them, you must break up with whatever you are telling them because they have been under the civilization of the western world for the last 100 years. So they know what is happening in America and the rest of the world. There are some places where you have to travel about 300 miles before you even see a newspaper, lucky enough there are radio stations unlike in the old days, you could go for weeks without understanding what happened one week ago in Nairobi.

**Interviewer 2.12: Which conditions do you think have been most important in enabling the government to try to bring forward the constitutional review process?**

**Interviewee 2.12:** If you ask me, what is the need for a constitution, I have told you, the constitution is not going to change the rights of these people. Instead of putting

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that money in the constitution, we better have the old constitution, continue with it and invest that money in other areas. For example, we have got thousands of Kenyans dying here of HIV/AIDS, we have got thousands of young people who are jobless. Why not put that money into those areas, rather than go for a document that will never be approved by these people?

**Interviewer 2.13: But when the review process started, it must have been a priority for government to provide a new constitution?**

**Interviewee 2.13:** It was a priority for government, because it was part of their manifesto to have new constitution within six months, but somehow somewhere they failed to realize that some of the people who were pushing for that constitution, were pushing for that constitution to facilitate their own personal interests. I am telling you, I have read all the constitutions all over the world, that was the best constitution, what they have been fighting for was there; all what Kenyans have been saying, because views were collected right from the village level. But, people rejected it! Some people wanted federal states here, which can not work, because some of the places where they were preaching about federal states, there is nothing that comes from there; they depend on other areas. Others wanted to go away because they felt that there is more income for their whole areas; others wanted to put their own tribal kingdoms –surely we can not have tribal kingdoms in a modern world.

**Interviewer 2.14: So you are saying that were all too many different interests that were trying to influence the new constitution?**

**Interviewee 2.14:** Yes, yes. There were people who were interested in having the constitution, the majority of them were politicians, looking at that constitution it could have accommodated all the politicians in the country, it was talking about two parliamentary houses, the lower house and the upper house, the regional assemblies and the district assemblies and the locational assemblies. So all these politicians you see here wandering around, they would have been accommodated and they would have got a job and at the expenses of the tax payers. So all the politicians were interested in it but somehow, somewhere on the top cream, they disagreed and they thought that by fighting that constitution, they would come into power. You see, the opposition is hot, they misunderstood the whole game; they thought that if they

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defeated the constitution, then the government would collapse. But the stand of the government was very clear: we have a constitution here, we have the constitution of the day and if you accept the new one, we shall take the new one, and if you reject the proposed one, we will proceed with the old one. So there was no time that there was a vacuum.

**Interviewer 2.15: Have there been any specific principles or considerations that have guided the government in engaging with the review process?**

**Interviewee 2.15:** That one I will not answer, the person to answer that is the Minister for Constitutional Affairs.

**Interviewer 1: Yes, I am trying to get to talk to her. Could you describe to me what you understand to be the essence of the constitutional review process in terms of the most central topics of reform?**

**Interviewee 1:** The most central topics of reform were about the powers of the president, the judiciary and the executive; and I agree on some parts on the constitution. The president has got more powers, even in the proposed constitution, I think it was section 40, which had also empowered the president, given the president a lot of powers and at the end of the day, the chief executive of any organization must have the power. That is what they were fighting against. For an example, the president has the power to appoint judges, ambassadors, military commanders, commissioners without asking anybody. They wanted the Parliamentarians to share that part of the power, which to me I do not think is a reason because you fight to be the president to control the entire country, the entire investment and the entire population. There are some people that you can not work with, but they can be imposed on you, so I thought they were unreasonable.

**Interviewer 1.1: So that was not the right way to go?**

**Interviewee 1.1:** That was not the right way to go. I have told you Great Britain does not have a constitution, they have operated for centuries! Yes! They have got more than 600 house of lords members, you only call three, the queen calls three or four, they make a decision, and the decision is binding to the government of Great Britain. People may argue that Great Britain is a monarchy, I do not see the difference of

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whether it is a monarchy or whether it is a republican government because at the end of the day, it is a government of the people, for the people and by the people.

**Interviewer 1.2: Concerning the GJLOS Program –**

**Interviewee 1.2:** Who?

**Interviewer 1.3: The GJLOS Program?**

**Interviewee 1.3:** What is that?

**Interviewer 1.4: It is governance program supported by various donors to improve access to justice for poor people and also to feed into the constitutional review process, among other things.**

**Interviewee 1.4:** You are talking about the donors who sponsored about the constitution and the rest? I have heard about it, but I do not know what it means or what they do and I will tell you that to me, I have been thinking that the sponsors have interests as to why they sponsor particular subjects and by doing so, they try to influence their countrymen to follow their pass, which is wrong. People should be permitted to follow the way that they have decided. Why should this government sponsor the people of Denmark to follow their own course?

**Interviewer 1.5: So you see donors as self-interested.**

**Interviewee 1.5:** Me, I see donors as self-interested because you can not tell me that there are no poor people in Denmark and why should the government of Denmark get money to come and bring money to this country, leaving their people who are poor rather than assisting them? That is what has been happening within the African continent, I think the European countries have been misusing the Africa countries. They are telling them we are giving you donations and at the end of the day, they are taking that donation through the back door. So they are not assisting these people and they influence the running of these countries, at the end of the day, you find we are in chaos. I will give you an example, the government [inaudible word] to Moi was actually removed from power by donors. Every time they promised this, Moi was honest, next time they meet, the donors have shifted their goals, they have gone with the [inaudible word]. They only need Moi and his team in the field, the donors and the team, they have gone with the [inaudible word]. So the government collapsed, they were giving us donations on conditions. If you want to give me this tape

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recorder, you give it to me freely with no conditions, they do not do that, they give it on conditions. Why have conditions on donations? For example, the government of today is running this country without donations and we are happy, nobody is imposing conditions on us. We are running our country the way we should run it.

**Interviewer 1.6: So you are saying that if donors should give donations, they should do it totally without conditions and with full ownership for Kenya?**

**Interviewee 1.6:** Yes. There were thousands of people who were evicted by a Germany sponsorship there. They lost millions of shillings because the Germans had given conditions so that is what I am trying to say: give your donations freely, do not give them on conditions. If there are conditions, go away with it.

But I know that it was a conspiracy of a few people to put an agenda to remove KANU from power. Now that KANU is gone, I do not even see the necessity of a new constitution.

**Interviewer 3: During the constitutional review process, were there any situations in which the government side reconsidered whether the process was a good idea?**

**Interviewee 3:** No. Some people were trying to impose a situation where people would have believed that it was a government affair. But it was not a government affair. It was a people driven constitution. Either you accept it or you do not accept it. The government was there at the center, the president does not even at any time tell people to vote for yes or no, he only went to vote for yes. Even at some stage, there the question even arose of who was actually the owner of the constitution, who was actually carrying the constitution, spearheading it. What the government did, it they [inaudible word] the constitution and they threw it to the people: 'now, whatever you decide is what we accept'. Because the government had the old constitution and there was the new constitution and what the president said was very clear: There is the proposed, this is the constitution you have. If you vote for the proposed and you have the majority, we will change to this. If you do not vote for this, we still move with the current one. So the government was neither on this side nor on this side; that is why I am asking who the owner of this constitution was? Whose baby was it, beyond people who wanted to remove KANU from power?

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**Interviewer 3.1: And you are saying it is the people?**

**Interviewee 3.1:** No, it is the opposition, they were the owners.

**Interviewer 3.2: You do not even think that it was actually the people's constitution, it was the opposition's constitution?**

**Interviewee 3.2:** You can see it this way. The people who were in opposition they were the owner –during the KANU regime. They forced it, they came to power, KANU went away. When they came to power, the process was still in continuation. So even though it was in continuation, at some stage it was going to be completed. When it was to be completed, the questions arose of who is now carrying this baby on their shoulder? And because it had now reached a point where it was in the Attorney General's Chambers, some people went to court and the courts decided 'you must hold a referendum'. So we went to the referendum. The question has been asked: actually, who was carrying the constitution? Because the ball was thrown, it was the court that threw the ball to the electoral commission and the people threw the ball to the Attorney General's Chambers and the same people they are the people who forced the government to start the process of the constitutional review. So at the end of the day, whose child was it?

**Interviewer 3.3: Yes, you tell me, whose child was it?**

**Interviewee 3.3:** I am at a loss. I am telling you, right from day one, it is the opposition who start preaching about change of the constitution. They were demonstrating on the streets and they went every where. So the government realized that this movement has got very many people and it said 'okay, we will look into it'. The process was now started about the constitutional review. It went on and it gained momentum. Eventually, the people who were in opposition came to power, so the KANU regime went. The matter was now left hanging on the balance, so the new government has to continue with the process. Eventually, when we came to the referendum, the question has been asked about who was actually carrying this baby? Who was to see that the constitution has gone through? It was left to the people to decide and the people decided 'we do not want this proposed one, we want the existing one'. And we have been thinking the proposed constitution was rejected on tribal balancing. Simple game.

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**Interviewer 4:** Okay, thank you. Can you tell me about how you see the participation of government in the constitutional reform process in relation to its other activities?

**Interviewee 4:** The constitutional review is a process that continually travels every day. We have got two ways. Our private members motion can bring a review of particular sections of the constitution. The government can also bring. But the members of the public can not bring a review to Parliament for a particular section to be reviewed, they will have to see their member of Parliament to take it there; and the member of Parliament will have to convince 2/3 of the members of Parliament that this is a proper course to take; which is very difficult. At the same time, I am not seeing the constitutional review going through that process in the near future, because it would appear in the near future that government of this country will be in coalitions. So we are most likely to stay with the current constitution for ages. It may be that after our death it will be reviewed. How do you convince these several fragmented parties? It is very difficult.

**Interviewer 4.1:** So even though it was the intention of the government to bring this process forward, at some point it has become too difficult -

**Interviewee 4.1:** I do not think bring that into Parliament. Moi was a limbo, Kibaki has been a limbo, I do not think... The constitution of this country is so that for the constitution or a particular section of it to be reviewed, 2/3 of the members of Parliament must vote for it and what has been a problem is to get 2/3. I do not think they can do it. It is not a simple thing.

**Interviewer 4.2:** But it all comes down to that there is a lack of unity?

**Interviewee 4.2:** No, KANU would have done it, they were lacking only three. But this one was a limbo because they did not have the majority to get 2/3. I do not think that the future government, whoever it will be, will get it because of the fragmentation. Currently we are having about 300 registered political parties. We are likely to go to the elections with about 100 political parties. How do you convince 100 political parties to change a constitution? I do not know. The way I am seeing it, it can not happen. Unless the government comes with a registration first about the political parties, minimize the political parties so that you have at least two or three



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political parties. When you have about 300 political parties participating in the elections, I do not think there is a way that you can change that constitution.

**Interviewer 6: Have there been any situations in which you think that the present constitutional framework has influenced the course of the review process?**

**Interviewee 6:** No, I do not think. I have told you, The Kenyan constitution is based on the American, Indian and that of Great Britain and it is one of the best constitutions, even the proposed one was one of the best ones. The present one is one of the best constitutions, unless it is misused.

**Interviewer 7: Have there been any changes in the institutional environment that have affected the ways in which the government has been able to act in relation to the constitutional review?**

**Interviewee 7:** I have not seen any. You see, our government is organized like the government of Great Britain because the British were the rulers of this country for many years. If you look at some particular sections of the Kenyan Constitution, you will find that there was a decided case somewhere in Great Britain or it was a decision made by the House of Lords or a decision from the American constitution or from the Indian constitution. Now, looking at them in details, it is difficult to get what you are asking. I have told you it is a group of people who wanted to minimize the powers of the president. But people realize it is true, the president has a lot of powers, like the queen of Great Britain. He has a lot of powers, but he does not exercise them always. The President of Kenya is a very powerful person; from God, he is second. What I am saying is that there are mechanisms to check how the government is being run. If those mechanisms are not being abused, we have the best constitution. If they are abused then –like when we had a one-party state our problem was that we had a one-party state so the dissenting views could not be heard, they were oppressed. Now, that we have multi-partyism, with all this democracy practiced here, and the constitution rights here, I do not even see the danger. In the old days, you could not talk about the president here, we could only talk about the president when we were in the toilet. Now, here today, people are joking, even abusing the president, but the president are not bothered with it. You can see the difference. Courts did not have

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freedom. Now, courts can throw any case. Everybody has got freedom to do his job. So nobody is interfering with one another. So I do not think Kenya needs another constitution. What Kenya needs is to have institutions and for these institutions to have their own freedom. The universities here now, for example, the president does not interfere. In the old days, the president who was not even a graduate was the one who was awarding degrees. Now, things were horrible. But today, nobody goes about another one.

**Interviewer 7.1: So now that everything is working better, there is no need for a new constitution.**

**Interviewee 7.1:** I have told you. Me, I did government. I have read the constitutions of capitalist and communist countries and compared it with our constitution. We have a good constitution –unless the mechanisms are abused. With the proper mechanisms in place, we have the best constitution.

**Interviewer 7.2: And the mechanism that need to be in place, they are there?**

**Interviewee 7.2:** Yes, they are there; because, for example, you are now in university. You are aggravated by the university, you go you go to court, if the court overrules the university, you go back there; and people have accepted that. So what other mechanisms do we need? Here you can go to and we believe in the courts here; what the court has decided, that is what we follow. We believe in Parliament, even now you may be hearing shouting ‘Oh, MPs, they are dishonest, etc’. But that is not the position. The position is, and it is very clear, the terms and conditions for service of Kenyan Members of Parliament were the worst. Today, there is someone who is a former Member of Parliament and he is a nominated Member of Parliament, we went around in all countries looking at the structures and salaries of the members of parliament. There was a commission here which recommended what that parliament is implementing but somebody shout all the way and they tell the newspaper ‘you see these people are corrupt!’ The newspapers want to market their commodity and the put it in headlines.

**Interviewer 7.3: So you think that there is not any truth in it, but that they do it to sell newspapers?**

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**Interviewee 7.3:** Yes, so that they can sell newspapers. But the truth of the matter is the Kenyan Members of Parliament, their terms, they were the worst. I am not telling you there is no corruption, I am telling you there is corruption in Kenya, even today although this government came to power with a promise to fight the corrupts. But also, the corrupts fight back, they are fighting back and they have the money. It is not easy to fight these people back. You can only fight these people back if you arrest them, detain them and even execute them! But the whole world will bring and outcry, 'you have not taken these people to court'. Take these people to court they have the money to engage people like you who are going to try cases in court for four years. So that is the battle we have been having here. That is the problem. The western world is fighting this government that it is not fighting corruption; how do you fight rich people? We are unable to arrest Bush here, and Tony Blair. Is that not true? You can not fight these people. Even in your country it is difficult to fight rich people. If you take them to court, they hire the best lawyers, the best brains, they go to court, argue cases there for days, so what do you do? The best thing is, arrest them, execute them, as soon as possible and then it will be history. What example do I give you here, we have someone who dealt with billions of shillings for the Central Bank, the money got lost, now he has got a registered political party, he wants to contest, to go to Parliament, he is now a Bishop with a registered religion here, he is a preacher... Now, surely, where are we heading to? That is the type of democracy that is prevailing in this country. People here believe in taking people to court and there is nothing we can do! Even me, I have told you my way, but that is contrary to what the people wants.

**Interviewer 7.4:** So you are saying that within the limits that are put upon you, it is very difficult to fight corruption?

**Interviewee 7.4:** Yes, I am telling you it is very difficult. We have got cases here, where somebody was allocated rat, he sold the same rat to the government; that is part of corruption. The person who allocated the rat and also the person who sold the rat to the government, they are both corrupt individuals. You make a person a billionaire in a day; he has no worked, he has not contributed to this nation, because he was given a paper, he sold that paper the government or to a parricidal body. Surely, you would

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not call that man a good business man. But at the end of the day, to prove these types of cases in court is like climbing Mount Kenya barefoot. Because this man has the money to fight you, to fight back. People believe that in some countries there is not corruption, but I believe that everywhere in the world, there is corruption. Even in Britain, there is corruption at very high level, even in America, there is corruption at a very high level, but it is not actually publicized as we have been publicizing our way of living. They are oppressed by the country's concerns. But by the end of the day, we will have to continue with life; it is a question of this generation passing and another one comes.

**Interviewer:** Okay. Thank you very much for your time, it has been very interesting to hear your views.

**Interviewee:** Why?

**Interviewer:** Well, because these are different views than the other people I have been talking to so far have presented to me, and I think it is important to try to understand and take in different views.

**Interviewee:** I have told you a different story.

## **Muia Interview**

Below is the transcription of the interview with Dr. Daniel Muia of the Department of Sociology of Moi University who has observed the constitutional review process from the perspective of his expertise in participatory political processes. Present at the interview was Dr. Muia, the interviewer as well as a colleague of the former. The interview was of a duration of 0.50.21 hours and it took place at the office of the interviewee at Moi University outside Nairobi on 1.10.07.

**Interviewer 1:** If you think about the constitutional review process in the period in between the general elections in 2002 and now, I am interested in who you think has taken the lead in the constitutional review process?

**Interviewee 1:** By an large, the review process has been politically driven and as much as constitution making is about the interest of the general public and the

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citizens, in this case what has tended to happen is that the interests of the politicians really, married by partisan interests, are the ones that have dominated the process, so that ultimately it has not really been about getting a constitution in place, but securing individual interests within the constitution making process. And I believe this far that is why we still do not have a new constitution, because rather than looking to the broad interests of the country, people have been looking at how they can secure their positions as constitution making was being done and that of course brings in play the dominant political players in the country mostly. And the government to a large extent has tried to see that they could bring out a constitution by the mandate that they are given by the citizens and then the opposition decided, from my perspective, they said like 'fine, they could arguably bring about the new constitution, should they form the next government' and so they [inaudible word] the process when still the draft constitution had still very useful things for this country and a few contentious issues, which might have been sorted out over time. –Because some of them would never be sorted out any way, but the few that were remaining could have been sorted out and the country could have had a constitution. But then the politicians wanted to play games with the constitution and then of course, here we are still without a new constitution.

**Interviewer 3:** You mentioned it a little bit, but I would like you to elaborate on it: How do you see the role of parliament as opposed to government in the process? –Of course you can divide parliament into opposition and government and its supporters.

**Interviewee 3:** The current Parliament is dominated by the government, because then you take into account the people in government offices, they are quite a large portion of Parliament so that at any day, they can get through their motions. Of course, they do not make 2/3 of the Parliament as required to get through a constitutional amendment or any kind of a position. But as it is what has happened is that we have had very dominant interests in Parliament, some of them possibly even in government who have tried to dominate the process so that the government to a large extent has always been running behind the people in the other side. So to this extent, the government as much as it has tried to get things done, some larger interest groups in

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Parliament have outnumbered the government and that is why we do not have a constitution.

**Interviewer 3.1:** So you could say that in your view Parliament has to a relatively large extent controlled the government in this process?

**Interviewee 3.1:** Yes; to a very large extent. Because even now, the Parliament is supposed to be in recess according to the traditions of our Parliament, but they refused to go in recess because they felt there were still important issues to sort out before Parliament is prorogued so that we can go in to elections. So to a large extent, they are trying to drive the government forward and get their interests done *vis-à-vis* the interests of the government. So we have a really strong Parliament as it works, because [inaudible words] needs them and their interests are served and they really do not have to do anything.

**Interviewer 3.2:** So how do you see the position of Parliament now compared to before the 2002 elections?

**Officer 3.2:** I think the Parliament has done well, it has had a few problems but it is a strong parliament. By and large, they have come out strong on some of the issues that have been put to go to legislation and even in terms of just being there to hold the government to account in large nature they have done their best compared with those of the past.

**Interviewer 3.3:** But you also mentioned that they seem to be driven by personal interest?

**Interviewee 3.3:** Of course, they have a lot of personal interests that are embedded in it, but politics is about personal interest. You can talk about the larger common good, but at the end of the day the common good is aligned even to personal interests of politicians.

**Interviewer 3.4:** But when you talk about personal interests, you can make a distinction between your narrow personal interests and then a bit wider personal interest?

**Interviewee 3.4:** Well, personal and narrow in the sense that individuals act so to position themselves to their political advantage and so whatever maneuvering they do they want to secure their positions in the people who support them. And so to that

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extent you might find in some cases that they sacrifice the wider good for that kind of position. For instance, the draft constitution that we had, by and large, it is a better document with a lot of progressive provisions, [inaudible words] we could have said 'fine, this serves us very well, but there are issues that are still outstanding and which we debate, let them print them, we will get this portion of the constitution through and then we can debate the rest of the issues afterwards'. But there were individuals that were going to benefit from holding the process back because then they can hit back at the government; that is the power play. Because the government, they came in and had coalition arrangements where they had agreed to share positions which were to be in the new constitution. When the people in government decided that they were not very ambitious to get this document going through, the fellow decided that 'we might even lose everything, even the constitution, so that when eventually we come to elections now, then we can hit back and say this is what you did'. Which is kind of a vendetta in politics, because you say 'look, it was supposed to be put on the table, you did not put it, it is here and now we are going to put it in; now we can beat you in this, even in terms of the historical record that we backed a new constitution for this country'. That is how personal it is in terms of now dominance in populations, and you see now we talk about individual actors, we are talking about maybe one or two/three people who are controlling different blocks of people. So then automatically it wares down to [inaudible words], like right now the people in opposition and the people in government and that has been the fight all through. Kibaki, Raila and Kilonzo in groups and that has been the fight all through and it is still going to be the fight for quite some time.

**Interviewer 3.5: You talked about self interest, so in terms of representing the people who voted them in, what is your assessment of the ways that parliament and government have acted?**

**Interviewee 3.5:** Representation has also improved to a large extent because by and large there has been a lot of democratization and so the people are also much more aware of their rights, including how to hold their members of Parliament to account. So to that extent, the members of parliament have been to a large extent sensitive to the interests of the people. So actually they are better representatives of the people

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than in the past and considering that they have controlled this to devote funds to constituency development funds and other funds which in every other time the communities are asking 'what is being done with our money', and so every other time every member of parliament has to touch base with their people so that that way they can control the process and they will be held to account and if not, then be accused of neglecting the community. So to a large extent, they have been more in touch with the people than in the past. Whenever they came there to look for their own sources of funds [inaudible words], but now they are controlling some resources and then at least now, they are verged to being a lot more in touch with their people. In some constituencies, you find almost every other weekend the Member of Parliament has a function to touch base with the people and then they bring their issues to Parliament to at least put through questions to government.

**Interviewer 3.6: In connection with the review process, it could seem that as you say, they have been much focused on securing their own position and maybe less in securing the rights of the people?**

**Interviewee 3.6:** Yes, definitely. If we look at something like the affirmative action, that is something very progressive and interests of marginalized groups and groups at the risk of exclusion, including women, youth, the disabled and such, their interests can only be taken care of from an affirmative perspective. We are a very patrimonial community and wealth and opportunities are also controlled in a very patrimonial manner, so unless we seede deliberately power and positions to the disadvantaged groups, including women, there is no way women are going to stand on an equal footing and to make it to Parliament. The playing field is just completely uneven. That is something progressive but then some of them are saying 'we will allow this affirmative action' -some of them are in place, they are very strong women at the grassroots given just a fair chance even without affirmative action, they can come through but then now if they have not affirmative action that will be the end. And considering the majority of the people who come out to vote are women in this country, so again because they have a lot of influence and they have networks, they are very influential in the country, so you find that the MPs have to be very careful about it. So to a large extent, that is one issue. Then there is the issue of devolution. There



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has been the fight among the political establishment and the development establishment and the provincial administration. Devolution again is a fight because devolution if it is done effectively, even the provincial administration loses and the government loses, but then the functionaries and provisionaries are the ones who are used to secure certain interests so the politicians would not want to lose that kind of facilitation, which of course works to their advantage. So these are things which would have benefited the country as it were, but they did not let it come clear. Of course what they are interested in is actually just the executive, establishment of more positions but then in the process that would have made the government very top heavy. Because then you have too many people controlling a lot of power and also requiring a lot of finance to run those offices. But it has not benefit and personal glory, which they are trying to get; of course then they talk about the other five of first vice president, second vice president, I mean for a country like ours, then you have a prime minister, first, second, third, fourth prime minister. We can not afford it already. The government as it is is already too big, but this is what they want because everyone is saying 'I have come with this block of people, I want to be rewarded'. Basically what they are trying to do is to create positions, everybody whose office is important and they have a significant constituency that they represent then they also want a position created for them and you see us now, I do not know, maybe going back to traditional African society where we had the chieftains who were very powerful individuals, the head of a tribe, the head of a community and controlled all the resources and all the power and that mentality I believe is still with us to a large extent. And that is how many of our political leaders want to dominate their community and control the interests of their community and they become their spoke persons, they become the persons who go and get resources for them and opportunities for them. So the same now comes into play when they are forming government, it also becomes a [inaudible word] of communities rather than people who can make a difference running the affairs of the state on merit. So 'merit' does not so much apply when it comes to negotiation of political positions.

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**Interviewer 16:** So these informal relations that you are now talking about, have there been any instances in the review process where you have seen these in play?

**Interviewee 16:** Yes, it has always been like that because for instance when you talk about devolution, our independence constitution was a federal constitution, which was changed soon after independence in 1964 and the federal institution divided the country into regions each [inaudible word] the resources completely with the government. Now in the review process that is what some sections of Parliament wanted, for us to go back, because they are saying ‘we have been marginalized because of the current arrangement, so let us go back and let us put federalism into our constitution so that then the interests of our communities can be taken care of’. That is the platform for instance, the people on the coast has been arguing that ‘we have to operate on a federal basis, we in the coast control a lot of resources, much of the tourism income comes from the coast, but in terms of what goes back in the form of government investment, they do not see it as proportional’. So they argue that they can do better. Some of the pastoralist communities are also saying that they have been historically marginalized so with federalism then they can be able to mobilize resources to deal with their local issues. Then the people can control the power in their local base without having to be controlled from the center.

**Interviewer 4:** What is your assessment of the Bomas seen as a participatory initiative?

**Interviewee 4:** The Bomas ideally was fairly participatory, to a large extent. Of course, the nomination of who participated in the process depended also on political convictions, but at least we had a broad consultative process. The people who sat in Bomas might have been handpicked but then the constitutional review commission of Kenya went out and sought the opinion of the people across the country and when you look at their final report it is a very exhaustive document which has captured the voices of the Kenyans and even the recommendations of Kenyans and many of these had been put in their first draft report which they tabled in Bomas. So to that extent it was a very consultative process and all shades of opinion were represented. If you look at the report, it is convincing that Kenyans spoke and they knew exactly which

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kind of constitution they wanted. But then after that things changed, the Kenyans were no longer in control and even the constitutional review commission was not in control. Because after that there was Naivasha and they changed a bit, then they went to Kilifi and it was even changed a lot more and then now it was not acceptable to some sections of politicians. But at the end of the day, what was changed was not all that much, the amendments were not very significant. Because even after Naivasha and Kilifi, the same contentious issues, which were lighted in Bomas, they still remained contentious issues in Naivasha and in Kilifi, so at the end of the day it was more power play than constitution making. The changes were just around the executive. For us that is not significant and it was not even what Kenyans were so much interested in. Because what they wanted, at least they were very clear, they wanted the powers of the president reduced, but with regard to the mechanisms, the [inaudible word] was not very clear, even when you look at the report by the commission, but they wanted at least the powers reduced. They did not say they wanted an executive prime minister because that was a creation somewhere down the line, they did not even want all these other things; what they wanted was that power be devolved from the presidency and it was more in the light of let the presidency change so that he or she does not control Parliament and does not control the judiciary; but then the powers be reduced when the appointments later be subject to vetting by Parliament. -But not necessarily that we create an alternative strong position, which is now what became the bone of contention by some of the people who were against that constitution making is done by the government. Because at the end of it, what they had in mind was that some of these were to be the prime minister, was supposed to be the first vice president, the second, etc. So that was the fight. Devolution was a very useful thing, because we have tried it from 1992 with a district focus for rural development where now we are trying to decentralize the development planning into management with the districts. But then the politicians found that they were not effective, they lost power, they were losing control to the technical people and so they wanted now to eat it back and they wanted now to bring in devolution so that they can have governance there and run the process. So, by and large the constitution making was quite a consultative process and we could still have led that

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document through irrespective of the few changes that were made; it was not that fundamentally different from the other one. Whether the prime minister would be there or not, whether to be executive or not, whether to have an executive president or not; that was the bone of contention, everything else was just additions.

**Interviewer 5: Then of course after the referendum, there was the investigation into public opinion by the committee of eminent persons. Do you think that can be seen as a participatory initiative as well?**

**Interviewer 5:** No, not really. That one was not participatory to a large extent. Because as much as they invited opinion, the problem was that public opinion was already vided and the committee as they came to get the views from the public, there was already a lot of skepticism because already they were seen as government friendly and so whatever position they were going to take or recommend, it was taken that it was going to be a position that was favorable to the government and so they did not have a fair chance to get honest opinion from the Kenyans; whatever opinion they got, it was not based on a fair platform because that skepticism was already there: it is a government driven thing and it is the government trying now to take the process forward to serve their interest rather than the interests of the public. And constitution making has to be done in an atmosphere where people are honest and that initial skepticism watered down the validity of whatever they were going to come out with.

**Interviewer 5.1: But I thought that it was also interesting that the findings that they reported were also pretty much the same that had already been presented at the Bomas?**

**Interviewer 5.1:** Yes, definitely, the Kenyans had already spoken. Even if we go into the future and we still want to make our constitution, I still do not see any other contribution that anybody is going to make that has not been made. Possibly, what this country might need is just two or three people to sit down and correlate what has already been put together, just clean it up and then we can adopt it. All the opinions that could be given out have been given. It would be a matter of saying what are the issues that have arisen to date and the factoring those one in and then we can have our constitution. Anybody who could be consulted has been consulted and they are still

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around, any group that has been interested in constitution making had their opportunity to say their bit, so nothing or very little new could really be added.

**Interviewer 6: The Bomas conference seen in a historical perspective in Kenya and as a participatory initiative as we have talked about, was that a new kind of initiative?**

**Interviewer 6:** From a historical perspective, the Kenyan community has always been very consultative right from traditional societies, decision making has always been through processes of consultation and so it is just that this time, it has been done under very formal circumstances; because every Kenyan community has a council of elders and also other councils which consult and deliberate on issues of interest. So when it comes to the national front, these again were just trying to be an enactment of the process of consultation and so if fitted in with what is traditionally expected, but formalized as it were; but we have always had a process of consultation all through. And that is why it is never very difficult to get people to participate in [inaudible words].

**Interviewer 6.1: So it was drawing upon some existing traditions. But to have a process at this level is new?**

**Interviewee 6.1:** This is also the first time we were really significantly looking at our constitution since independence, because the other one was negotiated in Britain and of course a few people went to negotiate with the British government. So this was the first major opportunity because then other changes that have been done have been through Parliament and the first president was very strong, the second president was very strong. So they could always mobilize opinion and get Parliament to pass any constitutional amendment although it did not fit in and that is probably also the problem that we now came down to when we were now changing this constitution under the third president. Because what has happened is that of course the first constitution protects itself from replacement in section 47, it does not allow for the constitution to be replaced.

It only allows for it to be amended so because of lack of historical knowledge or experience, possibly somebody did not see that we needed to start by changing that part; even before putting in place the Kenya Constitutional Review Commission. That

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is where Parliament should have started as they put together the constitutional review act that is what they could have also changed in the constitution so that the process could be legal; because by and large what is happening is illegal because you can not plan and work out to replace a constitution when the constitution does not allow itself to be replaced. They were only realizing much later that this was a problem because after Bomas and even after Naivasha and Kilifi, there was still the dilemma of how do we then get the new constitution in place? -Because the old constitution has not provided a mechanism for its replacement or even traditional transition arrangements; they were not anticipated in the old constitution and so they had to recreate them in the new constitution. So that became quite a problem. So [inaudible words] I think this was the first major experience and I suppose now in the future if we have to drive this kind of process forward, I think this has been a learning experience; and to that extent it is also good that the constituencies were involved quite a bit of the way, even if not directly but at least through the process of consultation and also the mass media extension that has taken place. So there is a lot of awareness about constitution making.

**Interviewer 7: So in that connection, do you think that people have been able to freely express their view in the review process?**

**Interviewee 7:** Yes, certainly. That one there is no question about. People are very articulate, they know exactly what they want and they have said it.

**Interviewer 7.1: And it has been possible, there have not been any restrictions?**

**Interviewee 7.1:** No, there is no restriction whatsoever. Anybody who wants to say anything has said it through the possible media; through the press, you open people's columns where they make their contribution to the press, the information is there; on the television channels those who want to make representations they come, they have made their representations; we have the interactive FM stations, there is always a lot of exchange, very healthy debate; and people are able to say what they want to say. Even holding against the president, it is acceptable now which it of course was not a few years back, which somebody called the law of sedation that curtailed debate. There is a lot of freedom of expression now.

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**Interviewer 7.2:** So this freedom of expression is something that has come after the elections?

**Interviewee 7.2:** Yes, after the elections, but it actually started after 1997.

**Interviewer 8:** Also connected with this: How would you describe the availability of information regarding the constitutional review?

**Interviewee 8:** Well, to a large extent a lot of information was shared out by the constitutional review commission and also by civil society organizations because they made all the materials available and there was quite an extensive civic education that was given out all over the place with supporting resource material written in languages that the local communities could understand.

**Interviewer 8.1:** Okay, so it was not just in English?

**Interviewee 8.1:** No. And there were also discussions in all the FM stations, also in various languages, including having technical people, constitutional lawyers speaking in the local languages to the people; and so information was available. There is also a very strong culture of listening to the radio especially in this country.

**Interviewer 8.2:** So this level of availability of information, how do you see this compared to before the 2002 elections?

**Interviewee 8.2:** Oh, it has really escalated, we have come quite a long way; there is a lot more information and a lot more being shared in the present than in the past. Even information that could have been classified as being secret in the past you nowadays find in the public domain; so there is a lot of information.

**Interviewer 11:** So in that connection, how do you think the people of Kenya have been positioned with regards to opportunities for learning about the constitutional review process?

**Interviewee 11:** I believe they have quite greatly empowered, quite greatly empowered; because by and large every other time there is popular debate, you find that people are talking about their constitutional rights, something which was not there in the past. Every time it was always the government, the government, but now when you hear people they say 'there is the government, yes, but these are our rights' and they can even articulate them, they are all serious about their rights, both political and human rights. The people were quite well empowered as the constitution making

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went, and I think it is also good that it was contentious because then it provoked a lot of debate and then a lot of awareness was created among the people. Even about issues where people were not expected to have opinions, they now have an opinion about the constitution.

**Interviewer 11.1: You mentioned the debates, how do you see the quality of the debate that has been going on?**

**Interviewee 11.1:** It is very healthy, very healthy. And because again more sections of society are involved in it from the elite to the average person on the street or on the farm; they are discussing what needs to be done and even as now we are in the election mode, you find out that people are engaging and debating the future of this country and even now they are able to say ‘based on our interests and our rights, these are the candidates who are likely to secure our rights as Kenyans’. So by and large, the Kenyan people are quite empowered and the debate is very healthy.

**Interviewer 11.2: I remember reading that some criticized the debate leading up to the referendum specifically for ending up being not so much about issues, but more about Kinaki vs. Odinga?**

**Interviewee 11.2:** At the political level it is a fight between those two power positions, but you take those ones out, and then you are left with Kenyans who are empowered because at the end of the day, you come to a point, where Kenyans will still have to make their decision and as much as now it is about personalities, we are also increasingly getting to a point where we are saying even to individuals ‘okay, Kenya can not be just about you, it has to be about things that are important to us as Kenyans’ and this is where we are getting to; we are almost getting over that curve, where it is now very soon not going to be about personalities, but about the issues that these personalities stand for and if they do not have anything that they stand for, then they are thrown out. Before the referendum they were talking to people out in the rural areas, and then they were able to say ‘look, given our position’, these guys were saying -for instance there was a debate that the provincial administration was going to be removed, the provincial administration is the pillar of security and of community administration at the local level- and then people were saying ‘these people want the constitution not to come through, actually they are trying to create a situation where



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we are going to get into anarchy'; and so they were being discredited just on that basis because people said 'at least already we know how the government functions so let us stay with the constitution which already guarantees us continuity with institutions that are in place'. It is fatal now what Kibaki and Raila and the other groups will say, but [inaudible word] also had their position which is very important, more important than these individuals, because the individuals they are here for a very short lifespan but the communities will continue.

**Interviewer 11.3: So you see that there have been some improvements with regards to issue based politics?**

**Interviewee 11.3:** Yes, definitely, it has come a long way.

**Interviewer 11.4: But people still ended up voting relatively much along ethnic lines, did they not?**

**Interviewee 11.4:** Of course, at the end of the day; it is unfortunate. But we are still on the track, that is what is important; we have not come the full way but we are still on track to that point.

**Interviewer 11.5: So at least the issues were discussed even though people may have ended up –**

**Interviewee 11.5:** Yes, people ended up on a personality basis, but the issues came out; something which never used to be the issue in the past –like in the 1992 elections where anybody could be elected as long as you were in the right group, you could get elected irrespective of your qualities. You would get village artisans just getting through because they were in the right political party and when you had someone who is [inaudible word] enough to articulate particular issues, they were left out. And so, we had many people who could not articulate any issues in the local authority positions, councilors, and even in Parliament; largely because of their personalities. But now we have come to at least people are also discussing as much as they are voting on a personality, they also ask what it is [inaudible words], so that it is a combination of both.

**Interviewer 9: Have you observed any obstructions or difficulties for people seeking to form associations or interest groups in connection with the constitutional review process?**

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**Interviewee 9:** Today you can form any kind of group you want, so long as it is legal and you go through the security vetting, which is a standard procedure, you can form an association any time and that is how we have ended up with 300 political parties. Due to that kind of freedom of creating organizations; we also have several thousand churches in this country. It is very easy to form an association.

**Interviewer 10:** Concerning the referendum, I am curious about if there were any examples of peoples or groups who experienced difficulties concerning casting their votes?

**Interviewee 10:** ...No...

**Interviewer 10.1:** I could imagine that groups such as pastoralists might have had some difficulties?

**Interviewee 10.1:** No... Because pastoralists have their own mechanisms for doing things, in my experience with the pastoralist communities, they even have a better network of sharing information than the [inaudible word] communities; because information is very critical to their survival and so any bit of information that they come across is shared out very fast, they have all the ways they meet in the markets, shopping centers to replenish their stocks and so they discuss and share out this information very aggressively. So you find them just as informed as any person in the urban centers and when it comes to elections, they are able to organize themselves and move very easily; that has been my experience. Before I went there, I would have thought that it was difficult for them to do things, but then they have their ways of passing on information and of course when there were floods, they were forced to fly the voting materials to those places; but that was more a natural problem than a political or an administrative problem. But very effort was made to give them the opportunity to vote.

**Interviewer 10.2:** So it is your understanding that they have been able to come to the voting posts?

**Interviewee 10.2:** Yes, definitely and they do.

**Interviewer 13:** So, I have been wondering in connection with this if there have been any groups which have been excluded from participating in any ways, in a systematic manner, from the constitutional review process?

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**Interviewee 13:** I do not think anybody was excluded, so to speak. Because even the commission itself, the [inaudible words], people with disabilities were represented, they youth were represented, people from the marginal communities were represented, the religious communities were represented, so it was quite an inclusive process all through; through the commissions. And those individuals of course represented the different interest groups and then also the civil society networks also tried to mobilize all communities which could be at risk of exclusion and their views were also tapped and brought in as representations.

**Interviewer 12:** Okay, so a last question, sort of coming back to what we started out talking about. I am interested in your perception as to who you think has been controlling the agenda during the review process?

**Interviewee 12:** Yes, it is very interesting, because by and large, it was initiated from the opposition, they were agitating for constitutional change and then they wanted to create space for themselves to be able now to control state power. Coming from the position where the first president was very powerful and changed a lot of things in the constitution to give himself a lot of control and power and the second president continued the same. So when it came up to demanding for constitutional change, of course initially it was the people in the opposition who again teamed up with the civil society organizations and then to a large extent pushed the agenda. And it started during the time of the second president, so it was an agenda that was driven from the opposition side and to a large extent now even the energies that I would suppose have dissipated, because at some point in the current administration, the opposition and the government became one and the same. So at that time it was a question of 'okay, let us just get a constitution', but the people were so much [inaudible word], they were not as aggressive as it were; also because most of the issues related to the political space that they wanted has already been created and they can see that the way things are now, they can actually access political power even without necessarily having to go the constitutional road, even in the current constitution. So we find that we do not have as aggressive bodies already fighting because those that were fighting already, the space has been opened up and so a lot of wind has been taken from their sails by the kind of transformation that has come through and also the way the current

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president has exercised his power. He has created a situation where people do not feel like there is force from above that is pressing them so you find then that if you do not have any opposition, then of course you also can not put that much energy in it; that is the law of action and reaction.

**Interviewer 12.1: So perhaps in a way Kibaki has been controlling the agenda, by doing so?**

**Interviewee 12.1:** I do not know if it has been deliberate or by default, but to a large extent, the fact that now he has decided to exercise his power the way he had done in the current administration he has to a large extent created a situation where really there is not that much room to come out aggressively and fight him. The people who are fighting him are the people who are fighting him over very specific issues, not broad constitutional issues, but very specific issues; like now the positions which they had agreed to share out as they came into power, which were not shared out. But in terms of broad constitutional issues is nothing that is significant, which you can say that anybody can really [inaudible word] the government. Because when it comes, maybe like with affirmative action, it has been done in some way very constructively without even the constitution. There has been some deliberate sharing of positions or whatever token to women and other minority groups.

**Interviewer 12.3: So in some ways perhaps, it has almost become more difficult to be in the opposition now?**

**Interviewee 12.3:** Yes, actually it is a lot more difficult, it is a lot more difficult now, because you have to have something that can carry public opinion with you and we do not have that many issues that you can really mobilize the communities against. Because when you find that political space is in place, you find the economy is growing, the critical sectors of the economy are performing, then you find that you have very little to hold the government to account. So in that case you find that the opposition does not have a lot of things that they can pitch their campaign with because the performance of the government is quite acceptable to the people. Of course it can be better, but considering where we have come from, it is still quite acceptable. We were coming from negative growth rates to above 6 %; that is acceptable. Then you can see that all the sectors and industries are already on the path

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to recovery, so any opposition or rogue would have difficulties saying that they have serious problems.

**Interviewer 12.4: So the improvement in the economy and these different areas, you can see them as having added to the perceived legitimacy of Kibaki's rule?**

**Interviewee 12.4:** Yes, quite significantly, quite significantly. Because the government is there to serve the interests of the people and meet the interests of the people and the performance of this government is a testimony to that these have been met. So there is very little that you can fault the government on because by and large, they are delivering many of the things that they are supposed to do. Issues of food security, infrastructure, education, health are being addressed.

**Interviewer 12.5: Many of the most pressing issues?**

**Interviewee 12.5:** Yes, many of the most pressing things; many of the governance issues are being addressed, so there is actually very little that you can significantly pin the government against. It is only that now people are saying it is time for change, but okay, the economy is growing six percent and well, you can say that it can actually grow 10 %, but it came from negative 2 % to 6 %. So okay, it is 8 % accumulative, but it is also that if you are decelerating, you have generate enough power to stop and then generate enough to start and then start going up; so that requires a lot more effort than accelerating when you are already on a forward motion. So people in the opposition, before they start throwing stones, need to take into account that the country was actually coming to a stand still. The people's rights have not been secured, but at least things are developing.

**Interviewer: ...Okay, so we have been through all the issues that I had prepared.**

**Interviewee:** Okay, so I hope it was useful.

**Interviewer: It definitely was, thank you very much for your time and if you give me your email address, I will send you a copy of my dissertation.**

## **NBFP Interview**

Below is the transcription of the interview with a governance officer (who preferred to remain anonymous) of one of the major non basket fund donors of the GJLOS program, performed in a retired spot of a café in Nairobi. The interview was of a duration of 1.07.37 hours.

**Interviewer 0:** As you say, the [CENSORED] has not taken part in the GJLOS contribution to the constitutional review process as such,

**Officer 0:** Yes, because the [censored] is a donor in the GJLOS process is not a basket donor, it has to do with our internal [censored] regulations and we can not commingle funds, so we can not join baskets where the funds are mingled. We can join baskets if our funds remain distinct. So, for GJLOS, we identified particular institutions that we would work with and that turned out to be the department of public prosecutions, it initially was also the department of government and ethics, and it was going to be the advocates' complaints commission but after working with them for about a year and a half to get their proposals together, it turned out that what they wanted to work on was not really what we wanted to fund. It was still part of GJLOS, but we were only working on things that are in Thematic Group 1, which is Ethics, Integrity and Anticorruption. Our funding was tied to anti-corruption, we had gotten the money from Washington to work specifically on anticorruption issues, so that is why we are only supporting institutions that are actually having programs on anticorruption. The constitutional review was a different group, and it was not an anticorruption focus, so...

**Interviewer 3:** Okay. So, apart from that, if you were to describe the role of the [CENSORED] in this review process, how would you do that? I know that the embassy has been attending the Bomas conference, e.g., as an observer.

**Officer 3:** Yes, actually, I went to part of Bomas as an observer myself. I think it was much more interesting for my Kenyan counterparts who also work for [censored], being Kenyans they sort of understood the internal politics much more than me as an outsider coming here and trying to understand the internal politics. Yes, I attended

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part of Bomas and my colleagues attended, but again with observer status, so you are just sitting there and thinking what is happening, but we did not have input into any drafting.

**Interviewer 3.1: So what about after or prior to the Bomas, what was the role then?**

**Officer 3.1:** We are not really engaged in it.

**Interviewer 3.2: Not at all?**

**Officer 3.2:** No, and even for the actual referendum, I think that we fielded some local observers to just go to a few polling stations, but that was just the day of event.

**Interviewer 3.3: So it has not been part of the approach to promoting good governance in Kenya?**

**Officer 3.3:** Supporting the review process, no.

**Interviewer 2: In connection with the review process, I am interested in which topics you see as the most essential?**

**Officer 2:** What Kenya really would benefit from is a more clear system and definition for decentralization. They do not really have a central system for decentralization, either it is some local government –but not very much- or it is a deconcentrated executive branch, which has representatives on all different levels, but that is not really decentralized power, authority or decision making. So that was in one of the drafts, the framework for that. Deciding then how many levels of decentralization they would have was also in there and it was often debated, three levels, four levels. So, those are critical for Kenya to be moving forward to, also looking at decentralized funds, engagement in decision making over use of funds, and authority to raise revenue at local levels. That whole bundle of issues I think are critical to the reform process. Whether or not there is a prime minister positions and what are the powers of that position, that was so much tied to the last election and promises made. Whether or not Kenya needs a prime minister, I do not know. Changing or reducing the authorities of the executive, whether they go into a prime minister position or just into some other means of having more checks and balances on an executive, I think would be a good thing! There was also talk of having a two house legislator, creating a second house, I do not really think that Kenya really has

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the resources to do that effectively. I am not sure what benefit they would derive from it. What else, was women's representation in Parliament, was that in there? Increasing the seats or having a minimum number of seats for women representatives. Of course, it also depends on which draft, there is the Bomas draft, the Kilifi draft, and the Wako draft...

**Interviewer 2.1: Well, it does not necessarily have to have been in a draft.**

**Officer 2.1:** Just an issue for it to be... So much of it became... Before the 2002 elections, the need to have a new constitution was used by politicians as a rallying point, part of their political platform: 'look, we have to get rid of this Moi administration, and we need constitutional reform.' And people cared about it because they were told to care about it. When you ask citizens if they really care about constitutional reform, before I think there were answering that they did, because it was promoted to them by political candidates as something that they really need. Citizens are not now clamoring for constitutional reform. They might bring it up because it was a promise that was not kept by the Kibaki administration, to present them or give them a new constitution, but I think that common, average, everyday citizens are more concerned about service delivery, the state of the economy, unemployment, and corruption; although I think that they are really concerned about corruption if that means that state resources are not going towards service delivery, in just a theoretical sense do they care about corruption as impacting their daily lives, but I am not even sure.

**Interviewer 2.2: Not a lot of people make that connection?**

**Officer 2.2:** Right. So, now are they adding them to constitutional reform? I do not think so, not so much. They are if they remember that it was a campaign promise not kept, and maybe reducing the powers of the president; although a lot of people I do not think really understand what authorities the executive has and what might be reduced through –when people talk now about minimum reforms for the elections, those are not the same issues that people were upset about before. Now it is much more about, they are focused towards the elections, they are about political parties and political financing and maybe something about constituencies, because it also affects elections.



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**Interviewer 2.3:** How do you see the link between the GJLOS reform program in connection with constitutional development and then the constitutional reform process? –If you do see a link.

**Officer 2.3:** Well, there is that thematic group 5 on constitutional reform and actually leading that, Kathurima (M'minoti, Chairman of the Kenya Law Reform Commission) is one of the most sincere and public officials engaged in GJLOS and not just for his particular constitutional reform elements, but he volunteers to sit on all of these review panels and he is engaged in monitoring evaluation and just seems to actually understand that the whole purpose of the GJLOS is about reform and the is there for the constitutional reform aspect of it. But deeper than that, reform and promoting the reform agenda, and getting different levels of civil servants and different levels of political appointees to embrace the reform agenda; I think that he is really a positive force in that. So, since he happens to be attached to the constitutional reform element that is a big plus for GJLOS and its linkage. How much progress they have made, however; I do not think that they have made that much progress.

**Interviewer 2.4:** In the thematic group or when it comes to providing input?

**Officer 2.4:** Well, providing input, I guess they have made progress. But then it is not up to them where that leads. Some of it can get stuck with the attorney general, some of it can get stuck with Parliament and so... I would say that the Attorney General has not been a force for reform.

**Interviewer 2.5:** Has your perception of the constitutional reform process changed during the course of the process?

**Officer 2.5:** Well, let me answer from the perspective of not being so close to it. Leading up to Bomas, it was impressive that they were seeking citizen input. There was a lot of debate about how sincere that input was: although they were representatives from all over the country, were they actually representatives of community interests or were they almost handpicked but from all over the country? Regardless, there was a lot of citizen input and special interest input, people with disabilities were represented, ethnic minorities were represented from all over, different economic groups were represented, and women were represented. So

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leading up to Bomas and in Bomas, it was consultative and that was sort of a new thing for the people of Kenya; to be consulted on such a broad level and that was positive just because part of the legacy of that can be that citizens feel that 'we should be able to provide input into these decision making processes. Then after Bomas, the citizen part kind of faded because then it became 'Okay, MPs are going to go to the coast to work on it and the attorney general is going to work on it, and then citizens will get to vote on it in the end. When they ended up voting on it in the end, they did not vote on it so much about what are the particular clauses in there, but are you voting for Kibaki and his administration or are you voting against Kibaki and even the whole referendum turned into an endorsement or critique of the current administration regardless of the content of the draft. The other interesting thing about Bomas itself was that they had individual representatives/delegates there, but then they had lots of civil society representatives and civil society was so fractured around Bomas, they were not uniting around particular issues, but really representing a lot of individual interests, which made them quite ineffective, because they were arguing with each other. The only group or block of NGOs that kept united were women's organizations and pushing for more women's representation. But otherwise, all of the other special interest groups fell apart.

**Interviewer 3.4:** Now, I know that you have not engaged directly in the process, but I am wondering about something: I mean, you want to see progress with regards to governance and e.g. for a program like GJLOS, the enactment of a new constitution was seen as very fundamental for it to improve governance -

**Officer 3.4:** Yes, okay, they predicated a lot of things around that 'once we get a new constitution, we can do all these other things and then they did not get the new constitution... Yes, this is where the [censored] engagement in the GJLOS is a little bit different because since we are working with institutions, specifically with an institution, there was not really anything that got blocked in our progress because the constitution did not pass; at least I am not recalling anything that stopped because of that. GJLOS as a process, I think has plenty of other problems.

**Interviewer 3.5:** So in that sense, there was no need to put pressure on the process to bring the process forward?

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**Officer 3.5:** Well, the process happened –as the [censored] we would not be advocating for or against a new constitution because Kenya is a sovereign country and it was up to its citizens, so we could not endorse one way or the other to pass or not pass. It is not our role. Personally, there are certainly things that I think it would be good if the constitution had amendments and was changed so that certain powers, authorities changed. But ultimately, I think it is up to Kenyans to do that.

**Interviewer 3.6:** But from the point of view of [censored], this is seen as being outside your mandate?

**Officer 3.6:** We could support a reform process, and in fact in the past, we have supported civil society groups that might be advocating for something that they want to see changed in the constitution or they might contribute towards drafting peaces of a new constitution. We could support that, but not so much the content.

**Interviewer 3.7:** Okay, so you can support the process but not the content. I am trying to find out where the boundary goes, how political it can be.

**Officer 3.7:** Well, we can support political parties to develop platforms but we can not endorse any political parties, but we can encourage them to become stronger and stronger institutions. We can encourage them and support them to strengthen their internal governance structures, to regularize how party members become candidates, reduce blockages to individuals who maybe traditionally do not move up through party ranks, like women and youth. But then when it comes to who is getting elected, that is not our business.

**Interviewer 3.8:** This is close to what we have been talking about now, but can you tell me about if there have been any principles that have guided you in seeking to promote governance in relation to you not participating in the review process?

**Officer 3.8:** Well, generally the principle is that we can support processes but not content necessarily. I can give you another example. We work with Parliament committees, they are the ones that review or draft legislation, so new acts, new bills. There was recently the sexual offenses bill passed last year. So we worked both with the legal affairs and health committees who were reviewing the act, and we work with civil society organizations that were helping draft different versions of it and then

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advocating to members of parliament to adopt their positions. But we work with groups who are supporting opposing sides, so members of Parliament are getting sort of a full range of input. So in general in terms of any governance reform process, we can engage the process, we can support the process, but not to influence the content of it. But whether or not we get involved in the constitutional reform process also often depends on that we have a certain amount of money each year, we are currently working on certain things, we have comparative advantage because we are already engaged in certain things; like right now, we work a lot with Parliament, we are likely to continue working with Parliament. We are not working with the Judiciary, it does not mean that we do not like the idea of judicial reform, but we are not engaged with the judiciary and the World Bank is planning this new, big program, so as donors, we kind of talk to each other, who is doing what, what can you do, what do you have money for.

#### **Interviewer 3.9: So coordination.**

**Officer 3.9:** Right. So we have not been engaged previously in the constitutional reform process per se. It was actually also new for [censored] in Kenya to be working directly with government institutions. Prior to 2003, prior to this administration, we worked with Parliament, that started in 2000, and we worked with the electoral commission, otherwise we did not work with any executive branch institutions under the Moi administration, except for these two, and they were new. It was always deemed that 'we are going to work on the demand side of governance, we are going to work with civil society to continue to advocate for reforms, but we are not seeing executive branch institutions as reform minded and therefore not as good use of our resources.' So that changed in 2003, and we started to engage more with executive branch institutions, that is how we got in to GJLOS and to work with the department of public prosecutions, totally new for us. And the department of governance and ethics, since we had funding to simply work on anticorruption it made sense, that went well until John Githongo left and then that kind of all stopped. We work very little with the judiciary service commission, but it is kind of a pilot thing and I am not sure that is going anywhere. So, guiding principles on what we do; some of it is legacy, what have we been doing so we already have an entrée there, some of it is

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funding, some of it is what are the other donors doing. And then sometimes, it depends on, a donor might have, like Canada often -in Kenya a little bit and in other countries- works on Parliamentary reform as well because there is this international parliamentary center based in Canada, so Canada has expertise in that field. Norway and Finland often work on anticorruption, they have successful ombudsman setups so they can present that expertise and in the [CENSORED] we do not have an ombudsman so we probably would not work on that.

**Interviewer 3.10:** In this connection, has something like the Paris Declaration played a role for you?

**Officer 3.10:** It does. The Paris Declaration has been challenging over the last few years, and in Kenya everybody just signed this Kenya Joint Assistance Strategy last week and that is based largely in the Paris Declaration, the partnership principles there and things. It is a goal and the goals of moving toward budget support for Kenya is a goal that is not going to be realized any time soon and that is partially why we are working now on reforming the procurement system, because that is one of the big blockages. One does not really have confidence in the Kenya procurement system, so why would we move towards –and the financial management system- direct budget support? In terms of donor harmonization, I think definitely we spend a lot of time on that and we are committed to it. The challenges have been that for GJLOS, there are some indicators, but there are still no baseline or targets that are agreed upon and we are three years into a program. So, we have all pledged not to create extra reporting requirement for the Government of Kenya that duplicates efforts, we are all supporting this one joint program so the Government of Kenya should be able to report jointly to all of us. But now we can not wait anymore, we have waited three years with no indicators, we have no idea if they are really making any progress on the higher level goals of that program's objectives. What they are reporting on are outputs: 'we have trained this many or we built this many district offices'. Okay, but what does that lead to? How do you know that there is any impact? And they do not even know how to articulate the impact. So to get back to the Paris principles, we are moving away from that idea of that joint reporting because we need to have some sort of reporting monitoring and evaluation framework

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in place and if it is not coming in a joint framework then we have to create a separate one.

**Interviewer 3.11:** Now, you said that you are very far from being able to provide budget support, so alignment in that sense is too soon?

**Officer 3.11:** Yes.

**Interviewer 3.12:** So the principles of one the one hand wanting to improve governance and on the other hand wanting to rely on the structures in place for doing so, they are sort of contradicting ideals in the Paris Declaration, as I see it. What do you think?

**Officer 3.12:** Well, part of the Paris Declaration, I think, almost assumes that some of the governance structures are in place already and that is why I think that they are goals, but they are not necessarily reality yet. But it is all the more reason to work on improving the governance structures and at least that is happening here. There is GJLOS, but there is also the Public Financial Management Reform Program and that is what is really getting at the main blockages of moving towards things like budget support. There is also a Public Service Reform Program which is likely good governance as well, making sure that public servants are accountable, making sure that there are clear work objectives and that they have codes of conduct and ethics, that they have service contracts; so good governance is certainly not limited to GJLOS.

**Interviewer 3.13:** But could you say that it is a matter of getting the quality of governance to a certain level before it is a good idea to try to fulfill the alignment goal?

**Officer 3.13:** Yes, that there is a threshold to performance of good governance before you can rely on those structures and relying on those structures I guess is what constitutes adhering to the principles.

**Interviewer 5:** Okay. Can you tell me about how your support to GJLOS relates to your wider approach to good governance in Kenya in terms of the type of support?

**Officer 5:** Well, GJLOS right now for us is really limited to DPP (Department of Public Prosecutions), it was integrated more into our overall program when it also

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included the department of governance and ethics. Our [censored] assistance here is schematic on a supply and demand structure, so we work with civil society to increase their capacity to advocate for reforms, but also provide information and support to those governance institutions that are working on a reform agenda. So it is not necessarily adversarial, because when you say advocating for reform you tend to often think of people protesting but it can also mean working with government institutions; like I said, helping draft legislation and helping provide different points of view. And then we work with government institutions to help them get more effective, so we define governance institutions in that sense broadly, not just executive branch government, but including Parliament and autonomy agencies like the electoral commission. It used to be that we were working to create independence of government institutions, and we started with Parliament and now we have changed that to make them not just more independent, but also more effective, thinking that effective is a higher threshold than independent from the executive. GJLOS is at this point only a government program and support to civil society and non-state actors is parallel to GJLOS, but not fully integrated into it because there is no funding for them in it. The donors have gone round and round on creating this non-state actor support facility, or now it is broader as a governance facility for different non-state organizations, but I am still not quite sure what the incentive is for a local CSO to be engaged in GJLOS. Why would they attire themselves to the objectives of the GJLOS? They might choose to, and they might choose to engage in programs that are parallel, but I have never really understood why they would spend the energy to be directly engaged.

**Interviewer 5.1: So the objective of funding civil society on the same issues as focused on in GJLOS is not something that –**

**Officer 5.1:** Yes, we do not tie funding to civil society to topics only in GJLOS and in fact this week, we have just put out a call for proposals for a new round of grants and this time we are targeting civil society organizations that specifically want to work with parliamentary committees or to oversee the performance of parliamentary committees. In that respect, I think that [censored] is also often different from the other donors because we will do calls for proposals from civil society, often with

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restricted topics as opposed to saying '[censored] has a governance fund, we would like to support civil society working on good governance, give us your proposals. Sometimes when you do that you get great ideas and sometimes, you get ideas that are all over the place. And since we have only a certain pool of funding, we try to leverage it by tying it either to a part of our program, in this case our support to parliament, or we pick a theme thinking that if we can get four or five organizations working on similar topics, they might be able also to create a bit of a network or have more leverage for whatever it is they are working on.

**Interviewer 5.2: So within GJLOS, the support of [censored] is mostly tied to institutions. Could you say that that part of the program is more in line with a more narrow concept of good governance focusing mostly on managerial or technical issues compared to the wider approach in Kenya?**

**Officer 5.2:** No... I think it is just that [censored] has not been an ideal donor for GJLOS, partially because we are not in the basket. So we are taking a very parochial view of working with one institution to improve the overall goal of good governance in Kenya. For us, we are working specifically with the department of Public Prosecutions, to increase their capacity to be a stronger organization, we created a special anticorruption unit again with our funding being tied to an anticorruption kind of impact. Now, we are working with the whole DPP, not just the prosecution unit on corruption but an extra focus on that one. But I do not think that it is because we have a more narrow view of what good governance is, I think it is just because we are working on a smaller piece of it, knowing that it is part of a broader effort.

**Interviewer 5.3: Yes, I did not mean that it was an expression of a narrow use of the concept as such, but that this part of your wider understanding of good governance seems to focus on more technical issues, whereas your wider approach also supports the demand side.**

**Officer 5.3:** Right. But there really is not a demand side in GJLOS. It is lead by the ministry of justice –why would the ministry want a demand side –they want civil society to be engaged sometimes for service delivery when they know that their resources are stretched, so I think that they would welcome doing things like legal aid clinics and such things because that supplements what the government is doing. They



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say that they welcome oversight efforts, and I think that is largely because they know that they have to say that, they have to be open to critique, but I do not think that they would really want that. They are certainly not encouraging a demand side request for extra reform, it is not in the governments interest to do that and so it is not in the program, but it would not be, it is a Government of Kenya Program.

**Interviewer 5.4:** But it seems that initially within the program it was the hope that civil society would participate in the thematic groups as representing the demand side?

**Officer 5.4:** Yes, and this is part of where I am not sure where the incentive is for them. Because thematic groups, most of them, have not functioned quite the way we thought they would. It is a lot of time and effort and so civil society, they sometimes show up, but to do what? They are supposed to show up and then critique at these meetings once a month? And they get nothing out of it. It is time and resources for them to show up and be up on the issues, reading material and things, and then there is often not much of substance for them to be engaged in. I go to thematic group 1 and largely it is government departments reporting, they will look at their work plan and they will say ‘we have planned that by this day, we will have hosted a workshop and, well, we did not host it yet, but we are planning it and we have hired a consultant’. So, sitting in the room, what is civil society supposed to do? On a practical level I do not really get what their role would be there.

**Interviewer 5.5:** That also seems perhaps to be connected to the problem that the actual issues of reform have never really come around?

**Officer 5.5:** Exactly. Reform is not discussed in those meetings, right. Implementation and absorption rate is discussed at those meetings. But it is not even really being debated if the activities that are currently being undertaken, do they add up to anything, are these the right activities to promote the reform we want, what reform do we want? And most of the time, they say ‘we want good governance’. Okay, well what do you mean by good governance and what is your measure of it, how will you know if you have gotten better governance? And then they say that they are going to do a citizen survey or something. Well, okay, but you can get a positive reaction on a citizen survey just by doing more media, that people know things about

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your program, but are they happier with their service delivery? I do not know. These issues are raised, they are my standard interjection at every meeting: 'how do we know if we are making any progress towards better governance in this program?' And they do not really reply to that. So I am a little down on GJLOS.

**Interviewer 8: Okay. Let us move on to something a little different. In connection with Kibaki's style of governing, have you witnessed any instances in which you have suspected that Kibaki has been trying to gain support from groups outside of government by means such as horse trading?**

**Officer 8:** Kibaki himself? Certainly that happens within his administration. Kibaki himself keeps such a low profile that it is hard to know. Now, currently with the support of Moi, in terms of this election, I am sure that there is horse trading going on there, but I do not know; I can not pretend to understand all the internal politics. I am not a political insider, so I do not really know.

**Interviewer 10: In connection with the raid of the Standard Media Newsgroup in March 2006, how did you experience that?**

**Officer 10:** That was, in terms of GJLOS and the disruptions that that caused, the Government kept saying that the donors had breached the terms of the Joint Statement of Intent because this had nothing to do with GJLOS. I was of the opinion personally that the police are an institution that participates in GJLOS and they were clearly acting outside of Kenyan law even and this was not a good faith effort on behalf of the Kenyan Government institution that is actually integral to the program. So I felt that the Government had more to explain and account for and that their position that we were overreacting as donors was not valid. Donors have different points of view on that.

**Interviewer 10.1: So your reaction to that, did you withhold funds?**

**Officer 10.1:** No, at that point our only support was to the DPP, so it did not affect the DPP, once again, being outside the basket what it held up was that we cancelled this joint review meeting, postponing it and were things handled the way that they should have been between the Government of Kenya and the donors? Okay, maybe not and dialogue certainly broke down between the two and that just led to more

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misunderstanding and more tension. But we did not as the [censored] stop any funds or not do something that we were planning to do.

**Interviewer 10.2:** So your approach was more to try to communicate your position to the Government?

**Officer 10.2:** But through the GJLOS structure so we all got lumped together and ‘you bad donors’; this was the Government, and there were several weeks of not much communication. I am sure that you have talked to [CENSORED] bout this.

**Interviewer 11:** There was also the killing of the Luo university professor in 2003, he was leading the discussions of the reduction of the powers of the president at the Bomas. How did you experience that?

**Officer 11:** I do not remember that very well, I have not been here very long. Programmatically, it did not affect anything.

**Interviewer 9:** In connection with the many different demonstrations there have been in relation to the constitutional review process how have seen the response of the police to the demonstrations?

**Officer 9:** I do not know if this would factor in, and again this is my personal opinion, but we have UDAID and the embassy as separate similar to the British DFID and the High Commission, whereas most other development agencies are within their embassies and part of their embassies and I really take to heart my role of working on long term sustainable development as opposed to a politically oriented diplomat here who might react on a more micro basis to things. So unless something is particularly egregious and directly effects the longer implementation of a sustainable program that we are working on, I do not think that we should be changing course on longer term investment based on individual events. Like right now, with the Kenyan anticorruption commission, people are saying ‘maybe we should do this, maybe we should do that’. Well for our current programs I do not see why we should disrupt something because we as the [censored] should disrupt something because we might be displeased with the powers that may or may not be invested in the Kenya anticorruption commission. It does reflect on Kenya’s political will and commitment towards reform, but things change so much and so fast and when there is an election in a couple of months now –I mean all of this is politically driven, it has very little to

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do with the actual capacity of the KACC, but much more to do with who is afraid of what coming out and will it make the administration look bad or look good in terms of their fight against corruption. –But I do not think that we should be changing our longer term development agenda based on current events this week, next week, the week after.

**Interviewer 3.14:** Okay, so if pressure needs to be put on the government it would not be so on behalf of [censored] but from the embassy?

**Officer 3.14:** Well, yes from the pressure side we would not and for changing, shifting programming, either halting or changing orientation, it has to be in a much more analytical longer term perspective. Now, certainly after the elections, we will take a look at things, see who won, which platform do they have, what the administration looks like, what are the context of things, and then assess if we need to shift what we are working on; but not to shift all the time. Part of that is also just my philosophy, I do not think that external governments should be putting all that much pressure; again, when something is egregious, looking at e.g. Zimbabwe and Mugabe, then I think that there is a role for external actors voicing their opinion. But there are not extensive human rights abuses going on here, the media is relatively free, encouraging the media to be more free, to get more citizen input into these issues is great, but for us as external actors to be saying ‘you should be doing this, you should be doing that’; I do not think we should do that.

**Interviewer 3.15:** This is something, it would appear, that has been affected by the transition to democracy with the last elections?

**Officer 3.15:** There is certainly more space for debate and critique; actually, I have been a little surprised that there has not been a more vocal citizenry in terms of lack of progress on reforms... But, the economy has grown seven percent and when you get right down to it, people are going to be more enthused about having a job than they would be about not having to pay a bribe. They would rather have a job and pay a bribe than have no jobs but not pay bribes.

**Interviewer 9.1:** In connection with the police and the government of Kenya, Kenya has a history of political violence and the police playing a central part in

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**that. Is that still something that exists, the link between the Government and the police?**

**Officer 9.1:** Well, the police are always going to be linked to the government here because it is the national police under the office of the president and then office of the vice president. What has been impressive in Kenya is that the military has always stayed out of elections, they have always stayed in their barracks and that is kind of an anomaly to Africa because often, the military are part of the electoral process or if they do not like the electoral results they take over, but that has never happened here. But the police are an instrument of the executive branch here, so it is not surprising that they are engaged. Now, they are not perhaps as disciplined internally as they should be; there are certainly rogue elements in the police and there are certainly people who let things slide, they do not really stop improper practices. We do not work with the police. It is another restriction of ours, we are not allowed to work with the police. The [censored] can, but [censored], we have a restriction that we can not work with police forces anywhere in the world.

**Interviewer: Okay, that was everything I brought.**

**Officer:** That was it. Well I do not know how useful it was as we are not engaged in the constitutional review...

**Interviewer: Oh it was useful; I believe it is important for me also to get an insight into the views of a donor not part of the basket.**

## **NCEC Interview**

Below is the transcription of the interview with Cyprian O. Nyamwamu, Chief Executive Director of the CSO the National Convention Executive Council/NCEC, which has been a central civil society actor since the 1990s (cf. the appendix on background information). The interview took place at the organization's offices in Nairobi 19.09.07 in the presence of only the interviewee and the interviewer; the session lasted 0.54.58 hours.

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**Interviewer 2: I am first of all very curious about how you have been taking part in the constitutional review process during its course after 2002?**

**Officer 2:** As an individual I have been there as a mobilizer, as a thinker in terms of what kind of political system we want; as a mobilizer for popular apprising [inaudible word] and advocacy for a new constitutional order. My work, right from the days of college was to really mobilize, spend the long nights out; we used to sleep downstairs in this building on blankets, huge numbers of young people and students. Mobilize the whole of this city and the periphery urban areas, the surrounding districts. We used go to homes, distribute leaflets, encourage people to come. To encourage matatus, public transport to provide us to boycott activities; that was the only way that government was going to listen to our demand and our advocacy for a new constitutional order. I have also participated by doing research and taking positions that are theoretically sound: what systems of government do we require? There are those of us who ascribe to a parliamentary system, a parliamentary democracy; we think that it would work better in our country. Others think that it should be a presidential system. We have informed the debate on the constitution in terms of what kind of devolution system we should have because power is extremely centralized at the moment. We have been trying to inform on what kind of bill of rights would be good for Kenya, what kind of election system would be good for Kenya. But more importantly apart from the content of the constitution is what kind of constitution making process would be best suited for our country. To that we have dedicated a lot of resources as an organization and individually. We have been trying to call for a democratic principled review process, which meets three criteria: One, is that it must be a legitimate process of constitution making; Two, it has to be effective in the sense that legitimate as it is, it must also make sure the negotiations are effective and that you get a constitutional outcome; Three, it must be democratic and efficient in the sense that while people are participating and feeling involved, it must be efficient, provide results using the least amount of time and money. Those are the main ways that I have been participating in the process. Then of course, as we normally say every engagement does have what we call occupation hazards, which is how some of us have been to maximum security prisons, police cells, through the courts countless

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numbers of times. I think it is part of that process of saying that we must engage the state in every arena until it agrees that the people must move forward with the constitutional review.

**Interviewer 2.1:** So these different activities, like mobilizing, have you also engaged in that after the 2002 elections?

**Officer 2.1:** Sure, Massively. In 2005 for example when the draft constitution that the government made, before it was put out to the referendum, we mobilized the people to reject it. I was one of the leaders as the executive director of this organization. This is actually a constitutional reform body, as we call ourselves; we organized several civic education meetings in constituencies, outreach meetings, public forums and mass action activities like masses of people come to make a demand that we want, a constitution that we amend ourselves.

**Interviewer 2.2:** What then about after the referendum?

**Officer 2.2:** After the referendum, the organizing that we have been doing is on two particularly on the constitution, but it is about asking ourselves: ‘why is it that we are not making progress, why are we not breaking this resistance by reactionary forces in government, in the state?’ So we have been doing this study and saying it is because allow government e.g. to steal money through corrupt means, it uses that money to buy voters. So we can never make it accountable. So the accountability agenda after the referendum has been massive and we have been really participating in it, calling for mass participation and rallies, putting political pressure on government and last year, three ministers had to resign although they had been returned to Cabinet by this very corrupt president and this very corrupt government and administration. And we think that by weakening the sources of their money, by delegitimizing them in the eyes of the public, then we are going to build a space, where we can have our constitutional negotiations. So after the referendum, it has not been so much about direct confrontation with the state advocating that we want a constitution. Now it is agreed in this country that we definitely need a new constitutional order, what has remained is how to weaken the state in terms of its sting, its dictatorial sting, the anarchical way it has been doing things. Those are now in the focus after the referendum.

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### **Interviewer 2.3: Do you think that your role has changed during the process?**

**Officer 2.3:** The role has not changed, what has changed is that reality has informed an evaluation of the strategy. Now you no longer need demonstration in the street for example. You need to organize people, we have extended our reach, we have started to organize and we have reached 69 out of 210 constituency convention assemblies. The voice must come from the people now, no longer 200, 300, 1000 activists in Nairobi; this has to come from all the 210 constituencies, people demanding for a new constitution and saying ‘this is the kind of constitution that we want’. That is the political front. We have also proposed what kind of a process that we want and that we have pushed the government until they have put it in a bill there is waiting to be made law. But that one to be enacted, we do not think that they are interested, it is too late and the elections are coming now. But we have really put serious input into the kind of process that we want. Thirdly, apart from demanding for the process, we have moved one step forward to refining the constitution that came from Bomas, because it had several weaknesses, so that when we go out to the constituency convention assemblies, we will be yearning a draft constitution that secures the values of the people to the highest level possible.

### **Interviewer 2.4: Is this together with 4Cs?**

**Officer 2.4:** Yes, it is together with 4Cs. For example we had a people’s constitution conference two weeks ago, which lasted four days; about 150 delegates from all over the country sitting to negotiate and generate a new draft constitution, which in next month we will have published and then we can spread it out to the constituency assemblies and other fora when we need political lobbying and advocacy.

### **Interviewer 2.5: Which conditions do you think have been most important in making you able to participate in the constitutional review process from the beginning after the 2002 elections?**

**Officer 2.5:** I think that there is credibility, people believe in the civil society in this country, they think it is the only legitimate voice now after political parties turned out to be [inaudible word] vehicles for capturing state power, increasing the wealth of the members of Parliament. So civil society has a lot of credibility; that is one factor that has continued to be useful to us. Secondly, we have to say that the support that we get



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from various, serious donors has in a way facilitated, not sufficiently, activities; because the government has ensured that reformist organizations can not access money because by accessing money they would become a problem. Some of the other things that have been very encouraging, there is the support from other partners, other interested groups of the political process who are saying that unless we change the constitutional order, we will remain with that same society of inequality and all that. So that is the second thing; that we have been getting support from progressive organizations and even donor countries that supports the democratization process - mainly the Scandinavian/ Nordic countries.

**Interviewer 12: Do has your access to resources affected your ability to influence the review process?**

**Officer 12:** Massively, massively. Positively in the sense that without those resources that we get from these partners whether foreign or local, if we did not get that it was going to be very difficult to operate. It has affected us negatively in the sense that, number one, they are very limited and that is why the question has arisen as to why Kenyans should on taxpayers' money, from other people in other countries, to transform their country. There is an increasing call that we should now start using our own taxes to democratize our country. So that is something that has been going on, and I think that it has been very instructive as a factor that has influenced our participation. Thirdly, the government that came in in 2002 somehow, whether through propaganda or whatever, created an image that it was a government that would listen and that you could talk to. Now, that is dangerous in the sense that you do not want to mobilize people to go to the street because the politicians will say 'why are they demonstrating in the street instead of coming to my boardroom, I am available, I am open, this is the office, it is a public office: come and talk, why are you demonstrating?' So for the first two, three years, it was very difficult for non-state actors to like civil society to seriously convince the people that this was not a reformist government; that it was a criminal, neo-colonial government, which had nothing in the interest of the people. So that took a very long time for us, and now we are saying that we must move forward and the only way to do that is to detach

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ourselves from working within the arena or sphere of the state and mobilizing people in this state.

**Interviewer 1.1:** Now, you mentioned the donors. The government has the GJLOS program that is supported by donors and among others the Scandinavian countries in the basket fund. This program was supposed to also contribute to constitutional development. Do you see any connection between the program in that sense and then the wider constitutional reform process?

**Officer 1.1:** Yes, there is a connection. First of all, our organization refused to participate in the GJLOS from day one.

**Interviewer 1.2:** Okay, how can that be?

**Officer 1.2:** Our position is that GJLOS is a state project to review itself, to re-brand itself; in other words it is a mere exercise of modernizing evil. The same conditions in courts in which you can not access justice buy new Mercedes cars for judges, so you see that they are modernizing evil. You are not overhauling the structures of the judicial system in Kenya, which can only be done through a new constitution order. So our interpretation, which is right –all civil society organization have come back to that position we took in 2003, five years ago we told them that intellectually we thought that we were being lazy by imagining that a statist project of repackaging itself can for us be the other mule for transforming a society. Now, let me get to the point, which is that there are three approaches to democratization. The first approach is modernization, the second approach is reform, and the third approach is transformation. The latter proposes the reordering of the structure because it is unequal, it is unjust, it is inaccessible, so we say that we better go for a transformation approach to this discussion. That can only be done by establishing a new constitutional order that gives people rights, secures their economic and social rights, creates a judicial system that works, creates a government that does checks and balances, that is accountable, reduces corruption inherently because by so doing people are not corrupt, they are accountable. The reformist modernization approach is that if we reform a few things here and there, then it will work; if for example we increase the number of judges, which is the GJLOS approach, okay a reformist approach, to change a few laws, which are these very offending laws –affirmative

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action, bring in women, workers and youth, fine. But that does not go to the structure of the state, which is inherently criminal and unjust, they start a project which begins with the modernization approach which says that 'if you give us more money and new computers, we will reform, if you raise our salaries we will reform.' Now, the corruption studies in this country have shown for example that GJLOS buying so many new cars for the police, the police who used to control villages on foot and therefore would arrest four or five people a night and extort bribes from them, now they have four-wheel drive land cruisers which go deep into the villages and collect 60 or 70 people. So, there is a political economy to modernization of an evil and criminal state and Kenya for me is the best study in that arena; that you can not modernize a criminal state. If you want to modernize, you will be modernizing evil of that criminal state.

**Interviewer 1.3: Now, has your perception of the constitutional reform process changed during the course of it after the elections?**

**Officer 1.3:** Not quite. The reason why it has not changed is that to be honest, we operate a principled struggle, we are principled. We set out the principles from the first day in the sense that we knew what kind of the constitution we were looking for, what international standards it was meeting, how it was locally acceptable to the people, and then we also said that that kind of constitution must be met through this way in terms of the principles of a democratic, effective, and efficient process. So we have been very consistent and we have known always that it is the people who can be able to force the government to accept new constitutional reforms.

**Interviewer 1.4: And in terms of what was actually going on, has your perception of that changed?**

**Officer 1.4:** No, I think that what we have done is that we have been doing a reality check asking are our forces the same as were there before 2002 and the answer is no, we are much weaker now. Before 2002, before Kibaki was elected, three things were crucial. One, there was a national dislike of president Moi. Two, many people were being oppressed by Moi and therefore there were unity to survive. Three, there was massive support from all over the world to the reform and democratization movement in Kenya. Those three factors playing at the same time made the movement for

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reform seriously hastened, it was given a fast and accelerated development and therefore we had a very strong civil society, we had political parties that joined us etc. Now, the post Moi, meaning when Kibaki became president, then there was a real question of whether we seriously now need Kibaki out, do we vote him out? No. Some people are saying we should vote him out, others that 'now even if we vote him out, who should we elect'? So people started reducing the expectations and standards because Kibaki was a disappointment. So that has changed in the sense that strategy has to be refined now so that we can be able to achieve the same goals as to get a new democratic constitutional order in Kenya.

**Interviewer 11: So it has been a process of adapting to a new situation?**

**Officer 11:** Yes and that is not particularly peculiar because as [inaudible name] says in his writings, the state is the one that actually defines their realm of engagement. If you have an autocratic, authoritarian, unacceptable state, then society will respond in a certain way. But if you have a "benign dictatorship", which is anarchical, does not want order, or political parties to be allowed to settle and organize; so it is anarchy and that is what president Kibaki has perfected, the concept of anarchical rule to promote personal rule and interest. But those are the current questions that we are trying to deal with.

**Interviewer 4: Yes, okay. Can you tell me about how your participation in the review process relates to your other activities?**

**Officer 4:** Our other activities... Now, we are forming problematic areas... One is that we run a constitution reform, education and advocacy program that is our main stay, so we have field officers and our program officers here. And by so doing, we have kept the fire burning, the demand fire, we are mobilizing a lot of the people, we have trained them, and they have continued to perfectly participate in the democratization process through the demand for a new constitution. By so doing as a constitution reform, education and advocacy, we have also put in a civic education program under what we call the nationalist civic education program, which basically addresses two things: the rights and responsibilities of the people. So that citizenship really has to parts, there are the rights and the duties and responsibilities of the people. -That we do in about 40 districts across the country. Thirdly, as I was saying,

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we run a communication and outreach program, where we gather, develop and research materials and disseminate them to our CBOs and so on and so forth. All those three are targeted towards creating an environment where a democratic constitution can be negotiated and enacted. Lastly, we have the governance and human rights program, part of the things that we do there, for example demanding accountability, the anticorruption, the end to violation of rights by security officers, the end to all manifestations and forms of acts of contradictions of constitution making. So those are the four programs and there are many activities under them and there is a pool of volunteers all over the place who are doing bits and part in that demand and push for a new constitution. So I coordinate all of them from the head quarters.

### **Interviewer 4.1: So the fourth is like higher level advocacy?**

**Officer 4.1:** The governance and human rights program? No, advocacy on the constitution is done by the first program of constitutional reform, education and advocacy. But there is advocacy for social justice, governance and human rights so that is where we monitor the laws that the government is making, we monitor the corruption in government, we empower communities to audit their own town councils and their communities to monitor elected leaders like members of Parliament and all the administrators of funds etc. So, that is the governance and human rights program. There is a new idea, which I think is coming from Kenya, because I have had an opportunity to listen to a lot of human rights groups and the state bodies, commissions, councils, and committees on human rights. The Kenyan argument is this: we must be proactive so that if there is a leak here, through corruption then this money –and we lose about 5 billion kshs yearly, which is a wholesome amount of money- then there can not be money to build houses for people, provide for education, water, or security. Therefore, to be proactive is to seal the loopholes of corruption. Now, if police are killing people, shooting them to kill, then the people who can be shot may not be alive, so they do not have their right to life; those people do not have security, they can not invest, they can not do business, they are basically under state terrorism. So the idea is that you must zip and close any such tendencies that they go to promote human rights violations in any way and in so doing in fact we

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help democratization move forward faster and increase the human rights of our people. That is the human rights approach in Kenya. Those people keep asking, ‘you human rights activists, why are you in corruption?’ But I guess now you see the connection, because through corruption resources are stolen, which would have helped the lives of a lot of people.

**Interviewer 6:** There have been these different committees that the government has set up in connection with the review process and as I have been going through tons of newspaper articles on the process, I have been wondering who gets to participate in these committees as civil society representatives and how is it decided?

**Officer 6:** As I told you, right now, the process is not principled and that is why it has not succeeded to deliver the reforms. So as we take our position that we can only participate in a legitimate, democratic, effective and efficient process, so if one is not that democratic, it is not legitimate, it is not inclusive, if it does not allow for participation of the people, then we do our duty in my view and that is what we have been doing; to try to ensure that everyone participates in the process.

**Interviewer 6.1:** So you have not participated in these committees?

**Officer 6.1:** Oh, we have. We participated in the government committee of last year. When government refused to accede to the kind of principles that we demanded, we formed our own committee, or subcommittee or pressure group; and then again the government called opposition members of parliament to form a committee in parliament chaired by the vice president -which we rejected because that was going to be another state project of trying to inform us of what kind of constitution we want. So they have been meeting since May, but they have not managed to make a lot of progress. That is something that has been a feature of Kenya’s process when there is mark time, really, the state has a way of ensuring that no change happens.

**Interviewer 6.2:** There has also been, during the summer, I think civil society entered into the committee again, is that right?

**Officer 6.2:** No, there was a confusion there. Really what happened with what we did in April, May, June, civil society took a position, the joint dialogue committee of the civil society refused to refused to engage and politicians –but they of course hand

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picked six people and the six people they were bribed, they were given money, so there are many intrigues. They were not representing civil society, but representing themselves in those talks.

**Interviewer 6.3: So it is personalized?**

**Officer 6.3:** -It is a personalized thing. Civil society is institutionalized and it takes positions through a very consultative process and we did not agree to that kind of treatment to our position on constitutional reform.

**Interviewer 8: Let us proceed to something different. We have talked a little about this. Do you think that there have any changes in the institutional environment of the organizations which you feel have affected your ability to act in relation to the review process?**

**Officer 8:** Not significant, to be honest. Of course, the sudden challenge of finding yourself working with government officials, something we never used to do before, is positive in terms of institutional changes, I think. Plus, a lot of former civil society people moved to government and that created a serious credibility issue with many Kenyans thinking that those of us who are still in civil society, are also planning to do exactly what they have done. So, there has been institutional erosion of confidence in civil society.

**Interviewer 8.1: What about the GJLOS, for example?**

**Officer 8.1:** The GJLOS was going to work, if they accepted our request that a basket fund for monitoring, education, and capacity building be established outside the state that civil society can coordinate itself; because we do not want a situation, where we are going to government for money, at least not in Kenya. That means submission, it means control, it means stifling of organizations, so we say no. Unless donors agree – and you know donors are not exactly friends of democratization, their agenda is the liberal agenda of stability, as long as there is stability around and they can do business, it is fine. Other crazy things like we want democracy, we want an elected mayor, and so on, they are not interested in that.

**Interviewer 8.2: You do not think that is different from donor to donor?**

**Officer 8.2:** No, the same donor is schizophrenic. Everyone donor faced in this country has two identities, two personalities: The one which supports reforms when

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those reforms favor them and the one which does not favor reforms and therefore support different initiatives. So the donors are very calculating at the end of the day because the donor wants to see value for money. If I affirmed four billion to Kenya, then I want to see that some of my cars are being bought, at least we are doing business. So, that is why these very young and inexperienced actors join the process and the donors can not relate to them very well and they thought that they are radical and uncompromising, then donors shied away from supporting those kinds of initiatives. So it is a situation, where you have personalities that are split: do we support civil society or government? Then at one time they say let us support government to modernize and so on and so forth. When they realize that they are helping government to kill people and violate rights, then they say let us support civil society to then do advocacy again against government. So it is on and off.

**Interviewer 8.3: So how do you see the situation now that they are supporting both civil society and government at the same time?**

**Officer 8.3:** The situation has not been good, that was why GJLOS came by and we rejected that framework. But the whole idea is to try and look like you are doing something. But the truth of the matter is that by that thing you are doing, you are completely weakening civil society organizations in Kenya and in Africa generally. Secondly, not only are you weakening civil society organizations, you are actually forestalling reforms by giving money to government and not civil society, then government does not have the obligation to talk to you because they already have money. That is a real crisis that the GJLOS has presented to us.

**Interviewer 11: This is also something that we have touched upon, but I am interested in if you could describe the conditions in the political environment that have affected your opportunities to act with other civil society members -or even political parties as you have done- in the process after the 2002 elections?**

**Officer 11:** Let me say that the real challenge that I see us face as Kenyans is the Kenya Joint Assistance Strategy has now been launched and the general tendency is towards making civil society a very safe actor, not an actor who can be able to challenge the way power is exercised etc. So one of the ways to achieve that weakened form of civil society is to deny it money, then its good personalities will



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run away to the private sector and government; and you continue to weaken civil society in Kenya. That has been a problem. That has been a problem to all of us; we might be promoting other things, apart from democratization. So there are many challenges, but I am sure that somehow we are going to come to a regrouped civil society reform movement; that is the movement that will be able to really crack their part over this democratization process.

**Interviewer 11.1:** So if I am hearing you correctly, part of the problem has been that the focus has spread out on several issues instead of being focused on one?

**Officer 11:** Yes, partly. That is one of the things. The constitutional reform, for example, has not been a key focus for all civil society organizations like it was the case in the 1990s. But secondly, a weakened civil society in terms of resources can not be able to give a credible challenge to the state and advocate in a way that the state can be able to accept to negotiate with it; because you must be a factor for the state to negotiate with you. So that lack of resources has made mobilization for a political expression for the people's desire for a new constitution fairly difficult.

**Interviewer 12.1:** And resources also in the shape of popular support?

**Officer 12.1:** Correct, popular support follows without doubt.

**Interviewer 13:** Now, there have been the many different demonstrations in connection with the review process, especially before the referendum. How did you experience the response of the police to these demonstrations?

**Officer 13:** As usually, the police were going to be violent. Why were they going to be violent? Because this current constitution allows for corruption and therefore it is a constitution for the ruling class and they are not accountable. So, immediately you start pushing the constitutional reform agenda, you are basically turning tables on the political and business elite in this country and what they are doing is that they look for responses that are violent, harassment, subjection, and torture –and whatever it is that the police are able to put together. So the response has not been good at all, the police have not improved; just a few weeks ago, we were trying to secure one of our ministers who had been arrested because she came to see us in the hospital and in so doing ten more people were arrested. They were outside the gate of a police station and then that is very bad because you are disturbing their work so the thing is that the

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police and the state, the government has always responded very violently when it comes to constitutional reform.

**Interviewer 13.1: And you see a direct connection between what the police does and the government?**

**Officer 13.1:** Yes, the government uses the police as their dogs of war, that has not changed at all; the police are the same. Okay, they are paid better, they look clean, but they are the same ones; vicious and very violent to say the least. So that is a challenge really that we are grappling with now, how you achieve fundamental constitutional changes; because it is the only way that you can secure democratic institutions and democratization within.

**Interviewer 14: We have also been talking about corruption and the political elite and I was wondering if you can think of any concrete instances in connection to the review process where you have suspected that Kibaki has been trying to gain support of groups outside of government by means of horse trading?**

**Officer 14:** Now, how do I respond to that. The way we have been looking at it, corruption and other things that government continues to do; as I told you the strategic thing is to organize things that will create embarrassment for the government and by so doing you save resources that can be used for services etc. By so doing, people see the need for constitutional reform, and the need for democratization; there is a very strong correlation there in terms of that you advocate for social justice, good governance and accountability, and the whole thing about getting a new constitutional order enacted in the country.

**Interviewer 14.1: So you are very much aware of trying to show their connection?**

**Officer 14.1:** Very, very much. We need to fight corruption and demand for accountability, but the real medicine to this problem is a new constitutional order. That is the connection that we are making, which I think is important.

**Interviewer 14.2: But do you have any concrete examples of how Kibaki has been implicated in corruption or horse trading to gain support from other political actors in the review process?**

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**Officer 14.2:** That is a prominent feature of our political system in this country. There is no principle, there is no organizational framework, political parties are completely disdained; people do not respect political parties. Now, many things have been done, for example the latest is where the government has given a bribe to members of parliament: 1.5 million kshs each. So by that bribery, what the state is doing is... The idea is that the elite use this constitution to do intra elite deals: 'so, if these people want you out, I should be the one in, so that I can welcome you back. And if they vote me out, you should be the one in, so that you can welcome me back'. So, there is that intra class agenda of ensuring that the people never participate in governance at all and they do that through bribery. Corruption, Anglo leasing deals going to billions, signed by parliament secretaries and ministers. And then, they use that money to buy voters, to buy armed gangsters, to intimidate civil society and intimidate political opponents; especially those who are younger and who are trying to express their democratic demands in real sense. So I think it is very, very connected and related.

**Interviewer 14.3:** So at this level, there is very much the political elite which is basically helping each other out.

**Officer 14.3:** Yes, completely.

**Interviewer 14.3:** Are these ties along or across ethnic lines at this level?

**Officer 14.3:** Yes.

**Interviewer 14.4:** Both?

**Officer 14.4:** The way the political elite poses is that 'it is these ethnic communities that are ruining government, so vote for us so that we can get these ones out. So then the people vote enormously for these ethnic elite and once they are in, then they welcome the ones who were left out. Because that is the only way the political system then can be stabilized when every elite is in, otherwise there is an elite that will organize against the government, the ruling elite.

**Interviewer 14.5:** At the elite level, I am curious about the relations between the different ethnic groups.

**Officer 14.5:** It is across ethnic lines at that level.

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**Interviewer 14.6:** But in Kenyan politics when it comes to elections, for example, ethnic lines play a huge role?

**Officer 14.6:** Massively, yes. Many writers who have written on Kenya or East Africa generally, have demonstrated that ethnicity is a far more significant factor in determining the political process than class is.

**Interviewer 14.7:** Yes, sure.

**Officer 14.7:** And I think that is going to be so for several years to come until you develop an educated citizenry that is really aware of their interests, etc. And number two, when you establish political parties on the basis of ideology. At the moment it is really anarchical, as I said, and at the same time that anarchical situation is exploited to distort institutions and to uphold or ordain personalized rule. These last few weeks you have heard members of parliament, ministers saying that president Kibaki is the party: 'where he is, is where I will be'. They have already abandoned three political parties in three years: from NAK, the national coalition party, The National Rainbow Coalition, to NARC Kenya. They are looking for the president like the star in that Jesus history when the baby was born; wherever the star goes, they will go. So, the idea is to completely distort institutional frameworks and personal rule then emerges from that kind of a situation.

**Interviewer 14.8:** There seems to be a paradox, as I see it, between politicians appealing to their ethnic groups and communities and then, when they are voted in, these are not really the interests that they protect?

**Officer 14.8:** Yes. The masses are really illiterate of their interests and the elite are very careful and conscious of theirs. There is a concept in political science that we call the norm of the false class consciousness, where –this is a Kikuyu- as long as they are Kikuyu, they feel connected to the president simply because they speak the same language. This is false class consciousness, hoping that you belong together with the president, not seeing that actually he does business more easily with Kisi, Luya and other elites, because those are aware of their interests. So the problem in Kenya is that the political process is actually through propaganda, advertisements, positioning and so on and so forth falsify the democratic debate. The democratic debate is totally distorted, deemphasized and therefore the masses basically do not

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know what they vote for. They can not see that they are actually given access to state power and the resources, they see that 'our own is in'; but in doing what? In embracing himself. That is something that is yet to be solved and it can not be done until we have political parties that that are real political parties where people have membership right from the local level to the national office. And before this political party takes any policy decision it has to go back to the political party to explain its platform and strategy and its legal interventions. The lack of that kind of thing is what has pervaded what I call the false class consciousness, where masses of people actually think they share interests with the elites of those communities. It is a one way relationship.

**Interviewer 14.9:** But then in some respects, some districts in Kenya get a much bigger piece of the cake than others and they are the ones who are connected with the president?

**Officer 14.9:** Yes. The state construction in this country has been affected by various factors, actors, and influences. The first influence of state construction is colonialism or colonial rule. Colonial rule distorted the discourse again; the white went, but they brought in the black elite from certain communities, like the Kikuyu because they were near Nairobi and needed to be appeased. So for 45 years, this ethnic elite who were here at independence and they are still here, they refuse to go, like the current president; he has been here since independence. The idea is that, it is tribal lines, those ethnic communities that supported government got roads, got hospitals, got better schools, so in so doing they could access better education, better health care, and poverty went down. By so doing they got better education out there, they came back, they took over permanent offices in the bureaucracy, as secretaries to the cabinet, whatever, what ever.

**Interviewer 14.10:** So to a certain extent these informal relations go both ways, but they do not go all the way down.

**Officer 14.10:** It does not come all the way down. It keeps attracting –the same hot air rises. So once some elite has been processed and formed within the ethnic community, it goes up. They continue to exploit that vote, it goes up. Once it is up there, they share, renewing itself and circulate itself until a new set of them are then

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set up. That is how they think. So the faster ethnic communities throw up their elite by capturing central state instruments, political parties, also the president, the judiciary, parliament, etc. it continues to get that community advantage over the rest; for example, districts where there are fewer people, they are not valuable even in terms of votes. So they go for communities that are densely populated and they think can deliver huge votes and they take them back to power so that they do not slump. So that is my understanding of the current process that we are really involved in.

**Interviewer: Okay, thanks for our time.**

**Officer:** So I have your contact information?

**Interviewer: Yes, let me just give you my local phone number as well.**

## **Otieno Interview**

Below is the transcription of the interview with Hon. Dalmas Otieno, MP candidate of ODM, Rongo Constituency, Southern Nyanza; former KANU MP 1988-1997; former member of the Multisectoral Constitutional Review; Party Representative at the Bomas National Constitution Delegates Conference and Deputy Chair of the Technical Committee on the “Executive”. The interview was taken out at the office of the interviewee in Nairobi on 26.09.07 and only the interviewee and the interviewer were present. The interview took 0.27.12 hours.

**Interviewer 2: Could you try to tell me about how you have contributed to or taken part in the constitutional review process during its course?**

**Interviewee 2:** I was the representative of my party at the conference and I was a member of the Committee on the Executive during the constitutional conference for KANU.

**Interviewer 2.1: So how did you partake in practice in that?**

**Interviewee 2.1:** Well, the constitutional conference was really a debate on the different issues and a number of... I hope that you have got the Bomas draft. That gives you the outstanding issues, the controversial issues; so really contribution is in

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terms of debate with the view to resolving the differences and agreeing on provisions that are acceptable to the majority.

**Interviewer 2.2: So your role was as a facilitator of those discussions?**

**Interviewee 2.2:** I was Chairman of the multisectoral committee, but really to harmonize the views of the different parties, the different stakeholders on the issues that were outstanding.

**Interviewer 2.2: Concerning the executive?**

**Interviewee 2.2:** No, the whole constitution, actually, and if you go through those documents you will find the issues that are still outstanding; what are still controversial, which have not been resolved.

**Interviewer 2.3: So where there any specific principles that guided you in trying facilitate these discussions?**

**Interviewee 2.3:** First, we would need a system that would enhance democracy and raise productivity and participatory governance. Those more or less were the guiding principles: would it enhance democracy, would it increase stakeholder participation in governance, would it enhance economic productivity and growth.

**Interviewer 2.4: As an end goal or also, for example with regards to participatory governance as you say, with regards to the Bomas conference process?**

**Interviewee 2.4:** Under each sector of constitutional reform, there were guiding principles that we needed to apply in structuring and agreeing on the clauses. And it is on the basis of those guiding principles that when you have divergent views, as a chair, you should be able to bring the parties in consonance with the guiding principles when they are making decisions on the specific provisions.

**Interviewer 2.5: Yes. What I am trying to get to is how you employed these principles in practice?**

**Interviewee 2.5:** I will give you a difficult one, devolution, which has not been solved up to now. The questions would be how much of the resources should, first the structure of devolution, how many tiers of government, central government, regional government, local government. The principles would be, would that raise equity, would that enhance democracy, would it enhance productivity, would it use too much

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in terms of resources and so on. And on that basis, you can see we reduced the tires to three, then how much do we spend in the different administrations, at the center, at the region, at the local level? What output do we get? So the productivity principle would say that if you increase your administrative costs, or costs of representation too much, then you are losing out on economic productivity. Now, if you over centralize, then you are limiting participation in governance. Now, are you going to pick the representatives by election and what type of election and how much does it cost you in terms trying to be as democratic and as widely –so...

**Interviewer 2.6: So these principles have been difficult to balance.**

**Interviewee 2.6:** That is right. So you never quite agree with the people, but these principles should be used in a way that you get the people to agree. Now, we take the other difficult one, which again is still outstanding up to now. It is the national executive structure. Do we have a parliamentary system or do we have a presidential system, or do we have a hybrid system. Now, if we have a hybrid system, what will be the costs, if we have hybrid system, what are the democratic relations between the different executives at national level? And then the country or the ethnic structure of the country, is such that you are of 4-5 dominant large ethnic communities, and another 37 of smaller communities. How would this national executive structure allow for the participation of all these ethnic communities? How do you find the nation, is the nation composed of 42 ethnic communities or is it composed of 33 million people? Now, do you emphasize individual or do you recognize community of interest to what extent? Then looking at the regions, again you come back to the same principles: the extent of democracy, how do you enhance it, how do you increase participation by as many Kenyans as possible, how do you enhance economic productivity and share it out by resource allocation. Because in this country, we have a serious problem of inequalities, there are very wide income inequalities, there are very wide regional inequalities in terms of regional development, and there are still fairly wide gender inequalities. The structure that we design, the systems that we design must be such that in future, we should be able to deal with those inequalities and reduce the gaps between the regions. So what



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structure would provide for democratic governance, would increase participation in decision making, and at the same time would promote growth.

**Interviewer 2.7: Okay. Then after the referendum, as a member of ODM, how did you see the participation of-**

**Interviewee 2.7:** After the referendum, it became clear that the people in power want the status quo to continue. Why? Because they enjoy the excessive powers at the center, so they do not want any changes. So even after losing the referendum, the process of recommencing constitutional reform has been frustrated by government. Completely. Why? Because they are happy enough with the centralized control. The problem with centralized control is that you give large opportunities to those who have it; if you spread out by devolution, and if you spread out the national executive, then the concentration of power in the hands of the presidency will reduce. Those who go for over centralization are really the business fellows who benefit from that centralization; all tenders have done in Nairobi, the big contractors in Nairobi get all the jobs and so on. So as much as there may be growth, the benefits of the growth, the trickle down effect reduces pretty fast without quite reaching the grassroots. In the meantime, for every one billion shillings increase in gross national product, the percentage shared with the few is increasing every now and then. Now, from Denmark, you have some socialist principles, which you have applied to reduce the inequalities fairly successfully.

**Interviewer 2.8: Yes, inequality is relatively low in Denmark. Now, you mention that the Government has been frustrating the process after the referendum-**

**Interviewee 2.8:** Not government. The people in power. Because when you say government, you bring in the Judiciary, you bring in Parliament, the Executive, you bring in the civil servants, you bring in the armed forces. People in power. It is the executive.

**Interviewer 2.9: Okay, the executive has been frustrating the process. Can you elaborate on that, please?**

**Interviewee 2.9:** Nothing can pass through Parliament without the support of the Executive and the government that exists now is the Government of National Unity, which has brought in even opposition members of Parliament, incorporated them in

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that government. One of the reforms that we wanted is that if you are elected to Parliament on an opposition ticket, you are not allowed to go into government and become a minister, without resigning your seat and going back to the elections. That is illegal, but it still happens up to now. The President just appoints whoever he wants as long as he can negotiate with him personally regardless of the policies of his party, regardless of his party leadership, if he wants the job as a minister with the perks that come with it, he takes it!

**Interviewer 2.10: So cooptation of opposition is one of the-**

**Interviewee 2.10:** Yes, and then he has made a huge Cabinet, you see like the Bomas draft we adopted 15-20 ministers and 15-20 assistants; he now has 32 ministers and about 50 assistant ministers, giving you a government of more than 80. The target was that the moment you have more than 78, then that is more than 1/3 of Parliament, so you can not change the constitution if the ministers say no! So if you have 96 people who have a stake on the government, there is not constitutional change that can go through; because you need 2/3, you need 65 %. If 35 % are already in government, and they are getting allowances in government, privileges in government and powers of government, and so on, then you can not amend the constitution.

**Interviewer 2.11: So basically, what the executive has done is to expand the base that has an interest in-**

**Interviewee 2.11:** The executive is corrupting the system officially. They are officially corrupting the system through appointments.

**Interviewer 1: Okay. Could you describe to me what you perceive to be the essence of the constitutional review process in terms of the most important topics of reform?**

**Interviewee 1:** Now, again you would have to read the report, that is the best guidance which you will have.

**Interviewer 1.1: But I am interested in what you think is most important?**

**Interviewee 1.1:** No, because I can not go through the whole range from chapter 1 up to 20 something, because each of them has changes it was proposing to make and the report of the commission tells you why those changes were being made; section by section. In the section on representation, they tell you what exist and what should

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have been changed; on the executive they say; on the judiciary they say, we have given reasons why the Justice system is getting clogged, because it is controlled by the executive and sometimes the executive will even interfere with magistrates and judges in particular cases, where they have an interest and that interference goes both from criminal and civil cases. Regarding contracts you get cases in courts for 8 years, if your business was wrong or you have differences with your partners and it takes 8 years to solve, both of you are dead; or whoever wronged you is thriving and you who was wronged you collapsed, if you were two partners, for example. So every section there are reasons of what exists and what Kenyans say about what exists. If you are a serious student, that is the document, you should go through; the report of the commission and all debate was either to accept those recommendations or reject them or modify them in other particular way; and the modifications will be in the report again; in the final Bomas draft. That is what you should do.

**Interviewer 1.2: But what I am trying to do is to get the views of some of the participants instead of only relying on the formal information.**

**Interviewer 1.2:** The best way you would have done that is if you had gone through the report and you had listed issues under those reported that you wanted my views on, I would give you those very quickly. Like, I can tell you why that and that was not resolved, where is the bottleneck coming, which are the sectoral groups, if you go to the judiciary, I can tell you what the Muslims felt, what the Christians felt and what Government felt and what my Party felt. But then you have to list out the particular issues, which you want my opinion on.

**Interviewer 1.3: But as you say, it is a very comprehensive document-**

**Interviewee 1.3:** It is, so if you want to do a Master's thesis on the Kenyan constitutional reform you would not do justice to it, it would be very peripheral. Now, the next group has come and I will not have anymore time for you.

**Interviewer: Okay. Well, thank you for your time.**

## **Westlands Interview 1**

The following is a summary of an interview with citizens from the high income group from Westlands in Nairobi. Present at the interview session were two members of the Consolata Shrine catholic church (a young woman and a middle aged man) and the interviewer. Both were residents of the primarily high income area of Westlands, Nairobi, and had a total real income of above 250.000 kshs per month. The interview was performed in an office at the church on 23.09.07 and was of a duration of 0.32.14 hours.

### **7. In connection with the constitutional review process in between the last elections and now, do you think it has been possible for people to freely express their views?**

Both interviewees expressed that the democratic space has improved a lot compared to before the elections in 2002 and it was thought that Kibaki has given people the freedom to even go against what the government is saying so that now both media and citizens can say anything they want about anything. Before you could for example not safely criticize the government and so although there is still room for improvement, they felt that the democracy has come a long way in this respect. However, it was also mentioned that there are still tribal problems in connection with the freedom of expression in that there are practical limitations on what you can safely express publicly in different areas in the country, depending on which tribes are living there; acceptance of the right of others to have and express views differing from your own is thus still lacking, it was said. Another difficulty described in relation to the question of freedom of expression was that institutions still need to be developed further over time, as they are seen as somewhat unresponsive and because so-called anti-democratic people from former regimes are still there in government institutions.

### **1. In connection with the constitutional review process from the last elections and then until now, who would you say has taken the lead in the review process?**

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It was expressed that when the movement first started out, the churches and the wider civil society played a very active role, which led Moi's government to realize that something had to be done. However, then came the vested interests, the muslims, the women, civil society organizations funded from overseas, all with different things that they wanted. It was also aired that the interviewees saw the review process as having been sort of hijacked later on in the process and that arguably when it comes to accountability, the government has not kept its promises; although, as it was noted, that would probably be difficult for any government in Kenya due to so-called pressure from big business, both local and global, and corruption networks which were thought to play a big role mask many things also in relation to the review process. It was also thought that the constitutional review process has thus been characterized by cautious treading in order not to spark conflict among the many different vested interests, for example regarding to land; vested interests that are, it was elaborated, both in- and outside of government on both sides of the political divide because they as a whole are the political elite, they have done business, and they have made money through illegal means. Finally, the review process was portrayed not as a yes or no issue, but that some things can be improved legislation and better institutions. While there are major issues that need to be resolved in the constitution, according to the interviewees, Kenya could be a much better country democracy wise if the laws that are in place were actually enforced; as such, a new constitution is not the answer to the country's problems, it was opined.

### **3. In this connection, how would you describe the role of Parliament (members outside government) as opposed to the role of government in the review process?**

The interviewees described how the process in their opinion never was meant to belong to the government, but that people just wanted it to let the process take place and that it was supposed to be people driven, but that if the government comes out too strongly, people start pointing fingers and that if it does not 'act as required', the parliamentarians who have vested interests will introduce proposals that ought not to be implemented because they will not help common people. Basically, it was explained that the interviewees thought that both government and parliament have

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been serving their personal interests instead of the roles that they should be fulfilling according to the existing constitution. The parliamentarians are well educated and enlightened, but also very self-serving and it has shown great lacks in performance and even to be dictatorial to the extent that Kenya might be moving towards a new kind of parliamentary dictatorship, as Parliament had refused to pass progressive laws, such as the freedom of information bill, and the ones that they have passed they have changed to reduce the provisions that would force themselves to be accountable, such as in connection with refusing giving more power to the anti-corruption commission. It was even feared that a new constitution might add to the severity of these problems, as it would have to be passed by Parliament, as would the needed additional laws. The interviewees did not see Parliament as representing the people, or as caring what the public thinks, but rather as coming together on issues that favor them as a group.

### **4. Have Kenyans who are not politicians been able to participate in the review process in your view?**

According to the interviewees, the Bomas was not a good process because it was inherited from the previous government, which meant that the people picked as delegates were ones who had vested interests in different issues and were trying to get these through to the draft. Rather than representing the interests of common Kenyans, who wanted accountability of the president and in general, anti-corruption provisions, freedom of expression, and rights to services to be secured, the process lost focus in the eyes of the interviewees. It was also expressed that because there were so many interest groups with their own agendas represented, the draft became too big and detailed, thereby also making it impassable because it touched on too many issues and interests. With regards to later on in the process and the debate on minimum reforms (which were seen as sensible as they could provide for better conditions for democratic elections), common Kenyans were not seen as having been included – according to the interviewed basically because the government has not had an interest in anything that could curtail its powers, while the opposition has not had an interest in anything else than getting into power. Concerning the last part of the process, it

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was felt that the opposition had tried to push through the minimum reforms and as such perhaps partly to keep the process going, but the government has not wanted that, so now the feeling was mostly that the process did not seem to be on track anymore.

### **8. How would you describe the availability of information in relation to the constitutional review process?**

At the climax of the process leading up to the referendum, a lot of awareness work was done, there was a great effort to build capacity and the interviewed also took part in meetings at the church in that connection and there was also debate on the often subjective character of presentations; objective information was hard to come by, but there was a lot of awareness on the constitutional review process.

In the second phase after referendum, the process is now seen to be at the national political level, with the local man just receiving snippets of information from the mass media; there is not any effort to educate the people on the process, because it has become a political issue and a matter of power. It was the perception of the interviewed that the majority of Kenyans had now moved on, they rejected the proposed draft, they now want 'a government that delivers', as one of the interviewees put it, and there is no commitment to make it a continuing transparent process.

#### **8.1: I have read that leading up to the referendum, the debate became much focused on personalities. What do you think about that?**

The interviewed did not feel that this had been the case, but that people who had voted on had done so based in many different reasons, because there were so much detail with regards to different issues in the document. Although it was mentioned that tribal issues were also a factor, it was concluded that people voted no basically as result of a highly democratic process in which a high degree of civic awareness had been created; that people had grown generally in Kenya with regards to civic awareness compared to before 2002. One of the interviewees had been doing a media program at the time involving poor women in rural areas, and described how they had

told her that they would vote no because they did not fully understand all of the draft and did not want to approve it just because the government wanted them to.

## **Westlands Interview 2**

The following is a summary of Interview 2 with a citizen from the high income group. Present at the interview was an elderly man living in the high income area around Westlands in Nairobi and having a total real income of above 250.000 kshs per month, and the interviewer. The interview was performed in an office of the Consolata Shrine Catholic Church in Westlands, Nairobi, was of a duration of 0.30.01 hours.

### **1. If you think about the period from the last elections in 2002 and then until now, who do you think has taken the lead in the constitutional review process?**

The interviewee described how he felt that the government should take the lead, facilitate the review process, but that the people should be the primary participants, which they had been to some extent, aided by civic education by the KCRC and churches; however, it was also mentioned that the Bomas process was seen as flawed in the representatives there had been handpicked from various regions and communities by the former regime.

### **3. What do you think the role of Parliament has been in the review process as compared to the role of government?**

In the view of the interviewee, Parliament did not perform well in the review process, as parliamentarians were actually the ones who caused the divisions during the Bomas conference because the two different groups, although in government and in the cabinet together at the time, had different vested interests in the process. The cabinet was thus divided itself with Raila and Kilonzo being ministers and proponents of the Bomas draft, while the Minister of justice and Constitutional Affairs, and the VP among others wanted Bomas to be amended and supported the Naivasha, Kilifi



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drafts. In the opinion of the interviewee, these internal disagreements caused divisions throughout all of Kenyan society.

### **3.1 How do you think this type of participation of Parliament was compared to before the elections in 2002?**

According to the interviewee, although there have been mistakes, it is better now than before. People can talk together without fearing that the other one is special branch, they can say what they want. The participation of Parliament has been relatively good, they have developed an ‘ability to shout’ regarding corruption e.g. However, the MPs are still selfish and have therefore been condemned by the people, but they have still been able to exert some degree of control on governance, people have been more enlightened, Parliament has been the first democratic Parliament of Kenya, it has been vibrant, its committees have worked, produced materials, and it has challenged the government –but not to the degree that the interviewee wants.

### **8. What about the availability of information regarding the constitutional review process, do you think that has improved compared to before the elections in 2002?**

According to the interviewee, very touchy interests of people and tribes have been exploited to frighten people and that has meant that much opinion has been formed based on what politicians have said about the constitution rather than on people studying e.g. the draft constitution.

The interviewee expressed the view that information is available now, but that it is still required to create an interest within the people, which is something that churches, the government, CSOs and the KNCHR have worked on –and the situation is much better now with regards to information now than before 2002, for example with regards to awareness of human rights. However, it was also stressed that this is an ongoing process because it takes more than 5 years to educate people and that the information available still needs to be pushed to especially rural areas.

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### **11.1. The debate on issues relating to the constitutional review process, how do you think the quality of that has been?**

The interviewee focused on the time leading up to the referendum and explained that he did not see it as actual debating taking place, but rather campaigning where the two blocks were bashing the other, trying to look good themselves and so there was not much focus on actual issues, but rather people were told what the Bomas or the Wako draft would do in a subjective manner. It was thought that politicians were psyching people, especially along tribal lines, which meant that instead of being based on rational debate, voting largely took the form of block voting according to tribe.

### **7. In connection with the participation in the review process, do you think that people have been able to express their views freely?**

In the view of the interviewee, it is not absolute, but freedom of expression is there to some extent, although a lack of education is mentioned as a limitation. However, people can say what they want and political harassment does not take place any more; people are not jailed for disagreeing with the president. So the situation has improved with regards to the freedom of expression, although it was felt that sometimes it was even too free, that people are saying things that you can not say in the United States, for example. The interviewee compared the situation prior to the elections in 2002 to the dark ages or communist countries, such as East Germany. Now, the freedom of speech and freedom of press was seen as existing, the freedom of expression is generally there and you can demonstrate freely e.g. –‘within reason’-, and torture chambers have been turned into museums.

### **11. You mentioned that the level of enlightened understanding is still a limitation?**

The interviewee opined that in the rural areas especially, people suffer from a lack of deeper understanding of the issues relating to the constitution, something that is also connected to illiteracy. It was also mentioned that even the interviewee himself did not understand everything in the constitution. However, generally the levels of

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understanding of constitutional issues have improved much over the last 5 years, also because people have been able to say what they want, and even in the rural areas – although there may be things that people do not understand- everyone knows that the constitution is there.

### **Westlands Interview 3**

The following is a summary of interview 3 with a citizen from the high income group. Present at the interview was the interviewer and the interviewee, an elderly man living in the high income area around Westlands in Nairobi and having a total real income of above 250.000 kshs per month. The interview that was performed at the Consolata Shrine Catholic Church in Westlands, Nairobi on 27.09.07 lasted 0.17.22 hours.

#### **1. If you think about the constitutional review process in the period in between the last elections and then now, how do you see the role of Parliament compared to that of the Government in the constitutional review process?**

In the view of the interviewee, the government did well in contributing to bringing forward the Wako draft that came up for the referendum and which, according to the interviewee, would have been ideal for Kenya. Parliament was described as having been misplaced in the process in the sense that parliamentarians have been acting very selfishly and not as representing Kenyans in the process, but only their own narrow interests; and this to such a high extent that Parliament has been fragmented and therefore has not been able to function as one body. However, Parliament has been able to participate in the process and in a sense that is positive compared to before the elections in 2002 seeing that back then there was no participation by Parliament, but rather in practice Kenya worked as a one party state where the government had the final word in everything, according to the interviewee. So now, there is so much freedom that people, including parliamentarians are not used to; the effects of this point, were illustrated by the following analogy narrated by the interviewee:

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‘Previously it used to take about 8 hours to drive to Mombassa from Nairobi, and in an African context, if you came to visit me there you will not go empty handed; usually you would give me a chicken. Now, if you put that chicken in a box, because obviously 8 hours is not very short time, it sits tight as it is in the box so while you are driving or using public means, it still remains in a box. So when you get home to me after 8 hours and you remove the chicken from the box and put it outside, but because of the time the chicken has stayed in a box, it will just remain tight, sitting the way it was sitting in the box and even if you kick it, it will just put its wings out and then go back. So it will take a long time before it knows that there is freedom and what happens when suddenly it realizes that it is free is that it will run around the compound and maybe even disappear because of the freedom. That is the situation we are in now; there is so much freedom that we do not know that there are responsibilities to that freedom, freedom is not free. So because of that freedom, our parliamentarians have gone AWOL; they will say anything, they will insult anybody to the extent that they have made Kenyans not value what we are doing now; like me talking to you, that is freedom, that is value. These values, led by Parliamentarians, have been misused’.

### **6. Have you yourself participated in the constitutional review process in any way?**

The interviewee responded that he had participated in training sessions arranged by his church, although nobody asked him or any of the others of their views, but in the constituency they all participated in the meetings and listened to presentations of the CKRC and others.

### **7. You mentioned that there has been more freedom now. In connection with the review process, do you think that people have been able to express their views freely?**

The interviewee answered that they have been able to do so and that you can generally say whatever you want now, as well as that the country has come to a point

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where people can even share differences of opinion without ending up fighting as a result and so something good did come out of the review process.

### **8. How would you describe the availability of information, and also information alternative to what the government presents, in relation to the review process?**

In the opinion of the interviewee, it is possible to get any information you want now without any problems, all you have to know what you want and who to get it from; which is very different from before the 2002 elections and that this situation is basically the same as with the example of the chicken.

### **11.1 What about the debate in connection with the constitutional review process, have there been any limitations, how has the quality been?**

The interviewee explained that Kenyans have been used to being guided by leaders and that he thought that parliamentarians had been giving people wrong information at times and thus misguiding people during the review process by presenting their own views. By and large he thought that in his own experience, when the CKRC and churches had been involved, debate had been good and on pertinent issues and after having been informed about their rights, people had continued to discuss among themselves after meetings and in other forums. He also noted that for Kenyans to be asked for their preferences and educated on their rights was something totally new and that it took some getting used to.

### **12. Could you try to tell me about whom you think has been controlling the agenda with regards to which issues that have been discussed in the review process?**

In the view of the interviewee, prior to the referendum, the CKRC consisting of selected people controlled what was discussed in the review process, whereas after the referendum, the agenda on the review process has been controlled within the parliamentary committee discussing minimum reforms; which is one of the reasons why it has led to nothing.

## **Westlands Interview 4**

Below is a summary of interview 4 with a citizen from the high income group at the Catholic church Consolata Shrine in Westlands, Nairobi on 28.09.07, which lasted 0.24.57 hours. Present at the interview were the interviewer and the interviewee, a young female lawyer living in the high income area around Westlands in Nairobi with a total real income of 150.000 kshs per month, and with a wealthy (belonging to the defined high income group) family background.

### **12. Could you try to tell me about who you think has been controlling the agenda in connection with the constitutional review process in between the elections in 2002 and now?**

The interviewee generally saw the process to have been controlled by the politicians as a group, but that tables turned when the present government came into power, as they had been the ones pushing the agenda before the elections, but then took a backseat with the present opposition taking over the lead; something that the interviewee thought made the process confusing and made the clamor for a new constitution seem as an instrument employed to get support to get into government, but with no intention of really changing anything. Civil society was also seen as having played an important part in bringing the process forward by pushing on different issues, but that when the new government came into power, a lot of people from civil society also moved into government, which seemed to cause some fluctuation of a kind in that the key pushers were now on the other side of the fence and not really pushing the agenda any more. So it was felt that now, the opposition was the side pushing and with its own supporters in civil society. Furthermore, the interviewee thought that the issues were lost underway and that Kenyans lacked some clear guidelines as to what was needed in a constitution, which meant that the draft constitution ended up trying to cover everything, which made it unnecessarily detailed. However, it was also noted that this was the first time Kenyans had a chance to take part in such a process and that many of the differences of opinion may be partly due to that and a necessary part of the process that people might learn from in the future, if the process is taken up again.

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### **11. Do you think that people's understanding of these issues has improved?**

In the view of the interviewee people know that there is a constitution and what it is, they also know what they want in connection with it, they know what their grievances are. However, as to what the purpose of the constitution is in relation to other laws, the understanding seemed more lacking to the interviewee; in her view people appeared to see it as one big law and that if their concerns were not taken care of in that law, they would not be taken care of at all.

### **3. What do you think that the role of Parliament has been like in the review process? Has it for example been able to control government?**

The interviewee did not think that Parliament has been able to control government in the review process, despite the parliamentarians having a lot of influence, but that it has to some extent been a two-way process although the checks and balances between executive and legislator are not very clear cut. It was the view of the interviewee that not much had changed in this regard compared to before the elections, but that it was the same people in Parliament, just under new party names, and that because no regulations or rules had been changed, the structures and relations were the same; only had there been a switch in the sense that the government and opposition had switched roles, with some people also switching in between the two during the term, and that people very quickly adjusted to their new roles in the sense that it was now just different people doing the same things their predecessors had done.

### **6. Have you participated in the review process in some way yourself?**

Apart from following the debate, discussing issues at her interest, such as gender, with people of her acquaintance, and voting she did not participate actively in the review process in any way.

### **11.1 What do you think about the quality of debate related to the constitutional review process?**

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The interviewee's assessment was that many interesting things came up and that issues were raised as well as that different groups were able to raise issues, including marginalized groups and from all parts of the country. In the view of the interviewer, the debate was fine, but the politics in the process was not and she did not have any idea of exactly how the conclusions on the Wako draft were reached. However, the Bomas draft really tried to capture everyone, which to the interviewee was a step forward in itself.

### **7. In connection with the participation in the review process, do you think that it has been possible for people to freely express their views on the review of the constitution?**

It was thought that there was largely freedom of expression, but that some groups were unfortunately more dominant than others and that there had been a lack of tolerance for differing opinions. As an example of the latter was given the debate on whether Muslim courts should continue to exist as under the old constitution, a debate which the interviewee found to be intolerant because the majority of Kenyans are not Muslim and as a result of a general public opinion in Kenya that Christianity should be the number one religion; although the state is supposed to be secular, it did thus not appear as such. All in all, there have thus been difficulties for people from smaller religions.

### **8. How would you describe the availability of information regarding the constitutional review?**

The interviewee expressed the view that there was a lot of information available regarding the review in the sense that people knew what was going on in the process and were being informed by articles and news coverage and that basically all you ever heard was about the contentious issues, etc. However, as she mentioned, that was how it was in Nairobi and although there were radio shows, information might have been less available outside the capital. Furthermore, it was thought that though information was available to a certain extent in news form, if you wanted more in-depth information, she found it difficult; you could go to the commission which had



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information available, which she did, but getting the information was not that easy, and going there and acquiring information would not be easy for common Kenyans, according to the interviewee. In general, the information was assessed to be somehow shallow.

### **8.1 How would you describe this availability of information compared to before the 2002 elections in general?**

It was the perception of the interviewee that changes had taken place in the sense that some government institutions seemed to have been trying to open up and be more accessible to citizens; but it was more a feeling that this was going on in some of the institutions, not all, and she could not tell which ones were doing this exactly.

### **11.2 Have you experienced any conditions that have hindered public debate in any way?**

The interviewee was of the opinion that after the referendum, discussion on the constitution had been scarce, it seemed that there had been sort of a closure to the topic and that it had after that just been mentioned here and there; she was not sure whether anybody was trying to revamp the process.

There had been the discussions on minimum reforms, but after about three weeks it died out, as far as the interviewee was concerned and the issues of minimum reforms were interpreted as being too far from the concerns of most people's everyday worries of just getting food on the table, so a lot of people were not interested in that debate –there seemed to be a common feeling of 'you politicians talk so much' among common citizens. People do not really know what the constitution says, but when they were asked what they wanted in connection with the Bomas draft, they could relate to it; but with minimum reforms on the executive and separation of powers, people seemed to be thinking 'in plain English, what does this mean?'. So people were lacking a clear understanding of the minimum reforms, and even the interviewee, speaking from the point of view of being a lawyer, she did not feel she had a clear understanding of what they would implicate.

## **Westlands Interview 5**

The following is a summary of interview 5 with a citizen from the high income group, which was performed on 30.09.07 in a retired spot at a Nairobi restaurant and lasted 0.24.41 hours. Present at the interview was the interviewer and interviewee, a young male real estate agent and National Youth Parliament Member living in the high income area around Westlands in Nairobi, with a total real income of above 150.000 kshs per month, and with a wealthy (belonging to the defined high income group) family background and a parent involved in politics at the national level.

### **3. If you think about the period of the constitutional review process in between the last elections and now, how would you describe the role of parliament as opposed to that of government in the constitutional review process?**

The interviewee was of the opinion that the government in its capacity as the government must have the initiative and will to initiate the process and see it through as well as that the government had had the opportunity to do so, but that after the referendum in connection with the committee headed by the vice minister and Martha Karua, many MPs and primarily opposition MPs had begun advocating for minimum reforms because they needed to secure their own positions and therefore wanted reforms on issues such as the autonomy of Parliament and curtailment of the President's powers –issues that according to the interviewee do not really affect the general population. He thus thought that many opposition MPs had acted very selfishly and to serve their own interests, when the country needed leaders who had the people's interests at heart.

### **6. Have you participated in the review process in some way?**

Prior to the referendum, the youth parliament held workshops for its members and other youth groups, churches e.g., in its networks at which the ECK and CKRC gave presentations on the contentious issues of the different drafts and the youth was able to ask questions regarding for example the practical consequences of accepting the different drafts; so it went well as a civic education kind of initiative, in the view of the interviewee.

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### **7. Still in connection with the constitutional review process, do you think that it has been possible for people to express their views on the constitutional issues freely?**

The interviewee was of the opinion that this has to a great extent been possible and that the government has done well to open up the democratic space as well as to have the CKRC collect the views of the people on what needed to be done and that these efforts have been comprehensive, especially on behalf of the government. However, it was criticized that many Kenyan citizens are illiterate and did not understand the actual issues, but rather saw the referendum as a government vs. the opposition tussle, as well as that the information available was very limited, and that debate was minimal and very politicized. Furthermore, the interviewee also criticized the MPs' poor performance for being the reason why the costly comprehensive review process had been undertaken; had the MPs done their jobs over the years and presently by passing laws and refining them, there would not have been a need to change the whole constitution, but rather amendments could have been sufficient. The interviewee noted that the citizens of Kenya were to blame for this situation, as they are the ones who voted in the parliamentarians and that until people start voting based in issues, policies, and competences of politicians, Kenya will be in a fix. Yet, the interviewee did think that these things are changing slowly now for the better and that what the government has done is positive in opening up the democratic space with much more participation by citizens and groups and that the government has been listening; something that could never have happened pre 2002. The interviewee thus described a tremendous widening of space for expression since 2002 with people now saying things that no one would have dared to say before 2002 in fear of the repercussions.

### **8.1 How has the availability of information in connection with the review process been compared to before the 2002 elections generally?**

In the eyes of the interviewee, prior to the 2002 elections it was almost a totalitarian regime, so there was not much open discussion of issues of public or national interest

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or civic education on anything from the government; an open society was not in the interest of the previous regime. So that now, criticism is accepted, issues are discussed and fora for discussion have been created and these are positive steps compared to before 2002.

### **8.2 Have you experienced any conditions that have hindered debate or access to information of citizens?**

Illiteracy was mentioned as a significant barrier for people to receive information and gain an understanding of what is going on in politics in the country. However, apart from that the interviewee focused on that newspapers bring good analyses, access to public offices and government press has improved and that as such there have been no barriers to information, as far as the interviewee was concerned. So society has become much more open than before, perhaps also as a result of the different civil service reform efforts.

