

Constitution as an Instrument of Change

Why and How Katiba Institute came into being



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The Katiba Institute: Constitutionalism as an Instrument of Social Change

Why and How Katiba Institute came into being

Yash Pal Ghai (co-founder of the Institute) writes:

I was a teacher at the University of Hong Kong on sabbatical at the University of Wisconsin Madison - still an exile from Kenya for thirty years - when I received an invitation, indeed almost a command, in late 2000, from the late President Daniel Moi through the then Attorney-General Amos Wako (a former student of mine in University of Dar es Salaam), to come home and chair a process (through the Constitution of Kenya Review Commission (CKRC)) to develop a new Constitution. After a good deal of heart-searching and consultation with friends, I agreed.

The task was challenging and interesting, and who could resist the challenge to do for one's own country what one had been doing for others? However, I had been away for so long that I was not sure that I understood the situation in Kenya well enough to take on a task requiring considerable knowledge and understanding of the background, particularly the politics and the nature of society.

Needless to say, I took the position. In the next three-plus years back in Nairobi, apart from various other lessons about Kenyan society, not all of them happy ones, I learnt not to trust politicians who had no integrity but were in powerful positions, which they used to disregard or amend laws that did not suit them. I realised that it was not enough to rely on a majority popular vote to ensure not only the adoption of the draft constitution but also its implementation. Former President Mwai Kibaki, for example, changed from being the most ardent campaigner against the 'Imperial Presidency'



Jill Cottrell Ghai (second co-founder of Katiba Institute)

- and thus a strong advocate of a parliamentary system - to its supporter. He ultimately engineered the takeover of the process by politicians which led to the mutilation of the Bomas draft (adopted by the National Constitutional Conference in 2004) into a much weaker draft that, in 2004, was christened 'the Wako draft'. It was really the politicians' draft and was soundly rejected by the people in the 2005 referendum. Even before this, the idea had been mooted of setting up a civil society institution to support the Constitution once adopted, for it was clear that the political elite at least would fight, or scheme, to resist or undermine any aspects of a constitution they did not like. And it was with this in mind that I returned to Hong Kong in 2004 - shortly thereafter to resign from the CKRC because I believed it had finished its assigned task.

From here on the story is a joint one (by Yash and Jill Cottrell Ghai (second co-founder of the Institute):

From the University of Wisconsin at Madison in the United States of America, the same place as Amos Wako came to convey President Moi's invitation, we wrote a series of 16 articles, carried in the *Standard*, about the 'Wako Draft'. By the end, we felt sufficiently convinced to advise strongly, 'vote against it'.

Depressing as the events of 2004 to 2005 (after the politicians' coup of the Bomas draft) were, we still anticipated returning to Kenya but got side-tracked to Nepal to work on moves towards a constitutional process there.



Yash Pal Ghai (co-founder of Katiba Institute)

While we were there, there was the post-election crisis in Kenya. From Kathmandu, we watched with horror the unfolding of the violence, especially because a young Kenyan who worked in our UNDP office kept us informed about developments on the ground. After the intervention of the then recently retired United Nations Secretary Kofi Annan, and other six eminent African politicians (including the recently deceased Benjamin Mkapa), a process towards a new constitution began again.

We left Nepal after it had elected its first Constituent Assembly and came to Kenya in late 2008. We were in time to watch – and get a bit involved in, from within civil society – the Committee of Experts’ process.

Though that process had begun with previous draft constitutions, particularly the Bomas draft, in its closing stages it was again taken over by politicians, this time the Parliamentary Select Committee. As always, their concerns were with power (especially how to get it, not how to use it responsibly), not values, and with their own positions and prospects, not the people’s. There are, of course, honourable exceptions.

And, in the run-up to the referendum, we wrote, for the Kenya Asian Forum, a booklet on the proposed Constitution, explaining clearly that the choice was between that and the existing Constitution. Called, *‘The People’s Choice’*, it appeared as a pull-out in the *Star*. Though we were unhappy that this was not the wonderful Bomas draft, especially regretting the change to a presidential system of government and some aspects of the devolution provisions, by the time we finished writing the booklet, we were convinced enough to say, ‘vote for it’.

This process revived the conviction that Yash had developed six years earlier: that the Constitution would face stiff resistance from vested interests. Those interests were not just from elected politicians, but from the landed classes, influential business interests, the public service, religious groups, etc. Some of these interests made great efforts to defeat the draft in the referendum – remember not just the reds (against) the greens (for) but the watermelons (green on the outside, red on the inside)? Yash recalls ‘I do have great regard for Christianity and Islam, but the tension among religions over the constitution, among other factors, made me decide to not only protect but promote the Constitution.’

We were also prompted to go ahead when we realised that forces in favour of the Constitution had relatively little clout – and certainly were in no way able to challenge politicians who might not be too enamoured of the rights, values and accountability aspects of the Constitution, not to mention the ‘sovereignty of the people’. We worried that, unless there was some consistent and effective institution to protect the Constitution, it might be constantly flouted.



Birth of Katiba Institute (KI)

‘There is this man,’ said Dr Willy Mutunga, then Ford Foundation Representative in East Africa. ‘He has been in exile since the days of resistance to President Moi when he was unable to finish his university education here. He went to Canada, qualified as a lawyer and has been practising there, but he wants to come home. His name is Waikwa Wanyoike’ (third co-founder of KI).

As it happened, Yash was invited to a conference at the University of Toronto late in 2010. Waikwa met us for lunch at a downtown restaurant. We lingered on long after other lunchers had left. By the end, we had sketched out a plan for Katiba Institute (the Ghais are unsure at what stage the name appeared).

The Ford Foundation provided our initial funding (with the addition of some Ghai savings), and we were, from March 2011, ‘incubated’ (like a premature baby or a chicken’s egg) by Akiba Uhaki Foundation (AUF). KI for three years, until December 2013, and with a staff of three people, operated as a project of AUF, which assisted KI to become an independent entity by mentoring it in financial and administrative matters. However, KI was still responsible for its programmatic work. That said, the baby survived, or the egg hatched, due above all to Waikwa, who was superb as our initial Executive Director.

Also vital to our success has been our Board of Directors, (Abdullah Bujra for some years and whose Institute’s office we took over (in August 2012), Father Gabriel Dolan, John Sibi-Okumu, Retired Chief Justice of Tanzania Barnabas Samatta, Dr Linda Musumba and, most recently, retired Chief Justice Dr Willy Mutunga). Not to mention the great staff we have been fortunate to recruit. KI was in June 2012 formally registered as a company limited by guarantee.

The Vision

‘Protect and promote the Constitution’ – but how?

It was hard to forget how bad the judiciary had been in the past – corrupt, inefficient and subservient to government. While we hoped that measures – like vetting all sitting judges – would produce a stronger judiciary, as indeed they have, we were aware that both judges and lawyers would not be experienced in the demands of the new Constitution. Judges can only decide the cases brought before them.

And they can only decide based on the arguments put before them. So, bringing cases to protect rights under the Constitution, and enforce duties, particularly of government, is crucial. We hoped to set high standards for preparation and conduct of litigation. And we envisaged being involved in training of the judiciary and the legal profession.

We believed that the Constitution should become the central focus and guiding light of politics, policies and implementation. We had the ambition of preventing the Constitution from being just a piece of paper, to bring its values, principles and procedures alive. So we hoped to create awareness among the people of Kenya of its potential, by helping them understand their rights and how they can be protected, including by the use of litigation, mechanisms like independent commissions, and by taking advantage of rights to present petitions, ask for information and demonstrate. We wanted our work on this to extend to small town and villages, not to be Nairobi – Kisumu - Mombasa only.

We also envisaged working with universities and encouraging them to train their students - not just the law students – thoroughly on the Constitution. We wanted to collaborate with them on quality research on constitutional matters. And we planned to carry out good research ourselves, making Katiba Institute a true centre of constitutional scholarship. We expected to contribute to the debate on new laws and policies to implement the Constitution.

We anticipated working with the media so that they understand what the Constitution means, can report accurately what is going on, constitutionally speaking, and can play a major role in making the Constitution a tool for politics. Here we mean not politics in the Kenyan sense of individual politicians struggling for their own advantage, but politics in the true sense of the word: how the resources of society are developed, shared and used for the benefit of the people.

Finally, we hoped to have an East Africa-wide perspective, collaborating with like-minded organisations throughout the region.

How far we have achieved our vision, perhaps these pages will help you decide.

Our work

Christine Nkonge (Executive Director), Ben Nyabira (Programmes Manager) and Christopher Kerkering (PIL Manager) write:

Our staff increased from the initial three to, now, eighteen employees with varied skill sets, including lawyers, political scientists, communications and journalism, research and writing, monitoring and evaluation, administration, finance and human resource. We operate within three departments, Public Interest Litigation, Programmes and Finance and Administration. We apply a ‘hands-on’ approach to all our



Christine Nkonge (Executive Director Katiba Institute)

work, meaning that most of it is done internally and we rarely engage consultants, save for occasional short-term engagements with individuals with specialized skills not within the organization. We mentor young professionals from Kenya and internationally through our internship programme, and through this process, we have provided practical learning on human rights issues to over 50 persons who now work in private and public sectors, academia, and civil society.

Programmatic work

We have adopted several approaches to promoting constitutionalism in Kenya. We believe that if a culture of constitutionalism is developed and sustained, the social, political and economic gains promised under the 2010 Constitution will be realized. Our various activities in pursuit of this vision have included research and publication, capacity building, legislative review, civic engagement, and training. A snapshot of these activities follows.

Research and Publication

We conduct research to build knowledge and understanding of various constitutional themes and provisions and to understand and provide solutions to social problems in Kenya and the region. The research is either published and distributed to target audiences, or used for training, advancing scholarly work, civic engagement, or developing and sustaining public interest litigation.

Our research so far has touched on, as examples, policing; fair administrative action; participation of ethnic minorities and marginalized communities in political and other governance processes; access to information; public participation in the extractive sector; the role of women in politics and why there are so few of them; how to represent



Yash Pal Ghai (left) and former Chief Justice Willy Mutunga (second left) after the launch of a KI publication “101 Things You Wanted To Know About The Police But Were Too Afraid To Ask”

oneself in court; public finance management; devolution; and pluralism. Publications include:

- Policing - ‘101 Things You Wanted to Know About the Police but Were Too Afraid to Ask’ – This publication (developed together with Commonwealth Human Rights Initiative) aims to improve the understanding between the police and the public. It uses plain language, accessible language and is illustrated with cartoons. It was converted to a mobile application that is available for free to Android users as **Kenyapolice101**.
- Access to information – ‘Handbook on Access to Information Act, 2016’ – The handbook explains in simple, easy to read language, what the right to access information means and how one can access information. It also provides sample templates that people can use to make access to information requests.
- Fair Administrative Action – ‘Fair Administrative Action under Article 47 of the Constitution’ - the book seeks to assist public servants to understand their obligations and how to ensure that their decision-making processes, and administrative actions, comply with Article 47 of the Constitution. It also informs the public about what to expect from administrators and how to lodge complaints. KI is currently working with the Kenya School of Government (KSG) to incorporate the publication into its curriculum.
- Participation in political and other governance

processes - KI has conducted field research in 50 areas in 16 counties in Kenya. The research, published as ‘Participation of Ethnic Minorities and Marginalized Communities in Political and other Governance Processes: Realities and Approaches’, sought to understand ethnic minorities and marginalized communities’ claims in politics and governance, how they were participating in these processes, and available platforms to increase their participation in political and other governance processes.

- Women in political office - We have also done research in Isiolo County focussing on challenges that women face when running for political positions and how those challenges can be addressed. This led to a publication entitled, ‘Women Representatives in Kenya: Why There Are Not More of Them, What Their Role Is, And How to Get More of Them’.
- Public participation as part of sustainable development – Our work in this area has led to ‘A Guide on the Basics of Environmental Impact Assessments in Kenya’ and the second, ‘General Principles for Ensuring Access to Information and Public Participation in the Extractive Sector’. The first publication targets, mainly, members of the public or non-governmental organizations who wish to know the process for and content of Environmental Impact Assessments. The second book is intended to facilitate access to information in the extractive sector for policymakers,



Prof. Yash Pal Ghai officially opens the Makadara Social Justice and Information Center in 2019

state officers and the general public.

- Devolution – We have done two major publications on devolution: ‘*Understanding Devolution*’ and ‘*Kenyan-South African Dialogue on Devolution*’. Both books seek to promote an understanding of Kenya’s devolved system of government. The latter included chapters from South Africa and Kenya, mainly designed for Kenya to learn from South Africa and its longer experience. KI also partnered with the Judiciary Training Institute and the International Development Law Organisation to develop a book titled, ‘*Animating Devolution in Kenya: The role of the Judiciary*’.

Our research has led us to become a small publishing house. In addition to the works listed above, KI’s other publications (some developed in collaboration with other organizations) include:

- a) Kenya’s Constitution: An Instrument of Change (second edition about to appear).
- b) A Guide to Public Interest Litigation in Kenya (jointly published with Kenyans for Peace with Truth and Justice, and Africa Centre for Open Governance).
- c) Katiba 2010: Achievements and Challenges – (An audit of the 2010 Constitution of Kenya). Independent Candidates and the Constitution.
- d) Ethnicity, Nationhood and Pluralism: Kenyan Perspectives.
- e) National Values and Principles of the Constitution.
- f) Several papers published on the Katiba Institute website on the status of pluralism in Kenya.
- g) Defending Our Future: Overcoming the Challenge of Returning the Ogiek Home (developed together with

Ogiek Peoples Development Program and Minority Rights Group International).

Legislative review

We often provide comments on bills and government policies to promote their compliance with the Constitution. In that regards, KI has been allowed or requested to make submissions before various Parliamentary committees, government ministries, institutions and departments. In all of these fora, we have sought to promote separation of powers, open governance, prudent use of public finances, redress of historical injustices, and promotion of housing and sanitation for persons living in informal settlements. More recently, Katiba Institute submitted comments on the Referendum Bill which was published by the National Assembly in May 2020.

Civic engagement

Without the active involvement of the people, the Constitution – any constitution - remains a piece of paper. Katiba Institute’s civic engagement has included bringing people in a dozen or more counties together to discuss how popular participation can be effective. ‘Participation’ is a keyword in the Constitution, but what does it mean –how does one participate and in what do they participate? It is not just a question of being asked, ‘What is your opinion?’ ‘In what?’, it means that the citizens’ voice must be heard – and the courts have held that efforts must be made to ensure that these voices are heard in political and other government processes, public finance decision making, in the extractive sector, to take just a few. The methods the Constitution envisages for public participation include using the recall



Yash Pal Ghai and Jill Cottrell Ghai (in white T-shirts labeled "A Social Justice Advocate") with members of the social justice movement on Mashujaa Day 2019

provisions in the constitution to get rid of non-performing legislators, access to information, as well as public meetings on development planning. In Kisumu, KI partnered with Transform Empowerment for Action Initiative (TEAM), a community-based organisation, to hold discussions with community members and civil society on the recall provisions in the constitution. Following the discussions, KI and TEAM decided to file a public interest case to challenge the lawfulness of the recall provisions in the Elections Act of 2011, and the County Government Act of 2012. The Court agreed with us, declaring the recall provisions unconstitutional. The court invited parliament to enact new and effective laws on the issue and recognized that even if it did not do so, civil society could rely on the Constitution as the basis for recall petitions.

Training/ capacity building

Kenya has no shortage of skilled and dedicated public servants. Unfortunately, during past regimes, those individuals were often shunted to the side, punished for presenting quality work, and discouraged from engaging

in innovative thinking. KI saw social transformation as an opportunity to reinvigorate the public sector and provide deserving Kenyans, an opportunity to serve as civil servants at their highest level.

Many other civil society organizations, academics, and members of the private sector shared our vision. We have partnered with these civic-oriented organisations and individuals to enhance their capacity, encourage their engagement, and demonstrate how the Constitution could, and should, inform their work. Over the years, we have collaborated on capacity enhancement with the judiciary – including court researchers, judges, and magistrates – state counsels, staff Members of County Assemblies, and County Executive Committee members.



Katiba Institute team conducting a Focus Group Discussion in Turkana County.

But we also realized that many civil society organizations and community-based organizations required a core understanding of how the often complex (and certainly long) Constitution could be used as a vehicle to change their lives and work. Constitutional transformation only happens when the community demands it. Productive and effective demand requires an in-depth understanding of what the Constitution provides. We have worked with civil society organizations, community-based organizations, and community paralegals to ensure that their remarkable skills and commitment were complimented by a better understanding of the rights afforded to them, and the duties owed to them under the Constitution. Our first, and often most lasting, civics lessons are taught through the community. Ultimately, these individuals and organizations will be the best educators on the Constitution.

As noted, we have not done this alone. We have worked with amazing partners over the years and have learned much from them. Although the list of partners is too long to mention here, we are grateful to the Judicial Training Institute for its commitment to the training of the judiciary; KSG for the opportunity to train public officers; the Commission on Administrative Justice for partnering in research on fair administrative action and access to information, and the Media Council of Kenya for partnership in training journalists on the right to access information.

In partnerships with academia, KI in 2018 worked with Governance Pillar Organisation, the University of Nairobi School of Law's Debating Society and its Law Journal to conduct an inter-varsity debate on whether it was the right

time to discuss constitutional changes. In 2017, Katiba Institute undertook research together with Muungano wa Wanavijiji, Strathmore University, Akiba Mashinani Trust, University of Nairobi, Department of Urban and Regional Planning, IDRC Canada among others, on Mukuru informal settlements. This research led to the development of a situational analysis report which provided a baseline of living conditions in Mukuru and the findings of the research led to the Nairobi City County Government declaring a section of Mukuru a special planning area for purposes of developing a physical development plan.

Within the East Africa region, KI has, since 2013, been participating in the East Africa Zinduka Festivals, in which civil society organisations, academia and artists come together to promote greater integration of people within East Africa and to promote constitutionalism. Further, KI is currently partnering with Kituo Cha Katiba, based in Uganda, in implementing a project that seeks to promote control of executive power through respect for presidential term limits.

Public Interest Litigation (PIL)

KI may be best known for its PIL. Drawing on the South Africa Constitution, and the constitutional practice in India, Kenya's constitution invites citizen to use the courts as a vehicle for enforcing the Constitution. As a result, and rather more than was anticipated, PIL has become a key strategy in fulfilling KI's core objectives. Because Articles 22 and 258 of the Constitution provide near-universal access to the courts, judges can no longer rely on the overly-technical requirement of 'standing' to deny taxpayers and citizens



Katiba Institute Staff - 2019

access to the courts. Now, being part of the sovereign automatically gives people a legitimate interest in ensuring that the Constitution is fulfilled and enforced.

KI has cultivated a skilled and dedicated cadre of lawyers and staff who have often foregone higher-paying positions to dedicate themselves to our work. Their passion and dedication mean that KI can do all of its litigation work in-house. Our litigation has focused on protecting human rights and establishing transparency and accountability, good governance and rule of law. We have worked with partners to litigate cases to secure or defend the rights of minorities, marginalized and vulnerable groups. Deciding to litigate is never done lightly; there is usually intensive research, wide consultations with experts in the relevant sectors, and a series of strategy meetings with partners in civil society, and sometimes, the private and public sector, to ensure that litigation is warranted.

Cases come to us in many ways. Sometimes we focus on topical issues that have arisen in the country, collaborate with civil society organisations with a focused mandate, are invited to take over litigation that was started by others but needs more focused attention or expertise, or identify an area that has been an issue of concern but not been addressed. For example, we had concerns about how appointments to parastatals and state corporations were being done, identified the most pressing and compelling circumstance, and focused on that litigation to change the practice to ensure open, fair, and competitive recruitment.

We have also paid close attention to the overreach of power. Protecting the Constitution means ensuring that the limits it imposes on government authority are maintained. We place all of the cases through a systematic review to determine the extent of their constitutional significance and public impact. Often, due to limited resources, we are forced to turn compelling cases down, but we nonetheless identify different ways to resolve the conflicts or refer people to other organizations.

Public interest litigation in Kenya is expensive and time-consuming. Cases can last years, and pass through various stages. Cases filed in 2012 and 2013 are still active and still require our close attention. A case on post-election violence we are participating in, for example, has been active for 7 years but has yet to reach conclusion at the High Court. Some cases are much shorter; a case that questioned how elections were finalized went through multiple stages of litigation yet was resolved in about a month and a half. It is impossible to tell at the outset how long a case will take, and each time we file a case, we must expect that it will be with us for years to come. We have to consider our resources and ensure we do not contribute unnecessarily to the caseload judicial officers bear or misuse public funds by wasting judicial and state counsels' time.

Human rights litigation is challenging. It taxes one's mental energy. We all become invested in the issues and the people we represent and the causes we fight for. Victories are exulting and losses devastating. We have had community



members we advocate for injured at the hands of the government, experienced intimidation, and there is always the risk of impositions of costs against communities we advocate for. And because we focus on public interest issues and marginalized communities, we are in constant search of supporting partners. Wearing both hats—litigator and fundraiser—makes the process even more complex.

KI has filed or participated in over 150 cases before Kenyan courts and tribunals. We have participated as petitioners, interested parties, *amici curiae*, legal representatives, or as legal consultants. We have litigated before the Supreme Court, the Court of Appeal, the High Court and courts of equal status, the National Environment Tribunal, and the criminal section of the Magistrates’ Court, as advocates of human rights defenders who have been arrested in the course of their work. We believe our interventions on nearly every aspect of the Constitution have significantly helped frame Kenya’s jurisprudence on human rights and democracy and have had – and will continue to have – a lasting impact on the way our Constitution works. Although we believe all of our litigation has value, whether won or lost, here are a few highlights.

- *Protecting devolution* – Devolution represents one of the most significant structural changes under the Constitution. It has transferred functions and resources from the national level to county level of government, created new institutions, regulated the planning and spending powers, and democratized the oversight authority in how the government works.

Yet, the government has been slow, or unwilling, to transfer functions and powers, and establish enabling institutions. Our litigation has focused on ensuring that these hurdles are overcome. Because of the technical nature of budgeting and economic planning, we have had to rely on experts, such as The Institute for Social Accountability and International Budget Partnership Kenya, to provide evidence and information to support our claims. Two of our cases on devolution are described here. *Senate & 48 Others v Council of Governors & 54 Others [2019] eKLR Civil Appeal 200 of 2015* - Katiba Institute was amicus at the High Court and the Court of Appeal. Both courts found that the County Government (Amendment) Act that introduced the County Development Boards and allowed participation of Senators in planning for counties was unconstitutional. A case of similar tenor is the *Institute of Social Accountability & Another v National Assembly & 4 Others [2015] eKLR*, Petition 71 of 2013; it challenges the legality of the Constituency Development Fund, now National Government Constituency Development Fund, administered by Members of Parliament, for breach of the separation of powers and impairment of their oversight role over the use of public funds.

- *Right to a clean and healthy environment and protection of livelihoods* – The Constitution’s focus on the environment, and social and economic rights provides one of the most powerful mechanisms for advocating



Katiba Institute partners and members of staff pose for a group after a Diakonia inception meeting in 2019

on behalf of communities and individuals. These issues can change, and save, lives. But litigation on these issues is time intensive and complex. It involves the close interplay of science, policy, and human rights. At first, we were hesitant to participate in these cases; we were advocates, not scientists or sociologists, after all. But we also knew that these cases had a tremendous opportunity to change lives.

To expand and strengthen our knowledge, we turned to an array of experts. First and foremost were the experts on the ground, the members of the community whose lives, culture and livelihoods were under threat. But our scope expanded broadly: we sought expertise from scientists, environmentalists, and sociologists from Kenya and around the globe, including the United States, South Africa, China, and Australia. We even once consulted the geology department at the University of Nairobi to better understand the groundwater reservoirs in an area earmarked for coal mining in Kitui—we literally had to dig deep to conduct the litigation. These experts became our teachers, colleagues, and friends. These are local cases with global impact.

One of those cases is *Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal Net 196 of 2016 [2019] eKLR – KI offered legal representation to the petitioner, Save Lamu, a community-based organisation, in a petition challenging a licence issued by the National Environmental Management Authority to construct a coal-fired power plant in Lamu County. Another

different case, though with some related features, is *Mohamed Ali Baadi & Others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012 (challenging construction of a port at Lamu). These two cases set the standard on content and procedures for Environmental Impact Assessments for mega- infrastructural projects, especially in public participation.

- *Fair trial rights* – From colonial times, the denial of a right to a fair trial has been a centrepiece of government oppression and state-sponsored violence against Kenyans. Although the right to a fair trial is important for anyone facing charges, it is uniquely important for human rights defenders, who often find themselves saddled with trumped-up charges as a mechanism to silence or discourage them from speaking out, protesting, or calling the government to account. *Hussein Khalid & 16 Others v Attorney General & 2 Others*, S.Ct., Petition 21 of 2017 [2019] eKLR is a good example. We got involved in this case in an unusual way. Yash and Jill participated in a protest against self-serving efforts of MPs to raise their own salaries – one of their first political acts after entering office in 2013. The government responded in an all too familiar way: firing tear gas and spraying water cannon at the protestors and conducting indiscriminate arrests. Yash and Jill endured the teargas and water cannon but somehow avoided arrest. Others, including activist Boniface Mwangi, were not so lucky, they were arrested, taken to the Parliament Police Station, and held while officers puzzled over what to charge them with. KI offered legal representation to those who were arrested.



KI staff engaging with community members

As petitioners, these human rights defenders challenged the basis for their arrest (including, strangely enough, cruelty to animals) and the subsequent charges of violating the Public Order Act. The judgment by the Supreme Court had mixed results. The Supreme Court reemphasized the need for accused to be promptly informed of their arrest, distinguished between the rights of an arrested person and an accused person. However, the Supreme Court fell short of finding that sections of the penal code that were adopted before independence and have been used to suppress public dissent were unconstitutional. But the case had a broader impact; demonstrating solidarity among human rights organizations that, although they may have different mandates, they seek the same objectives.

- *Access to Information and transparency* – Katiba Institute has focused on the right to access to information for years. For democracy to thrive, people must know what their government is doing and why, and the government must know that they can no longer operate in darkness. The government is accountable to us and information is the starting point of accountability. Our landmark case on access to information came about unusually. While walking to work during the 2017 election campaign period, our then-Executive Director, Waikwa, noticed a billboard by the Presidential Delivery Unit — a public relations department within the Office of the President. ‘Jubilee

delivers’, it said. There were two problems with the advertisement; it suggested that all of the progress in the country could be attributed to one political party and it used public funds to promote a political party – and during an election campaign. Once in the office, Waikwa and the litigation team set to work to determine who was funding the advertisement. The government, however, flatly refused to provide us with the information the Constitution required them to provide. Katiba was forced to pursue the issue in court.

President Delivery Unit & 3 Others v Katiba Institute [2019] eKLR Civil Application 348 of 2018 – addressed the scope of the right to access to information under the Access to Information Act and Article 35 of the Constitution. The court held that the right to access to information was ‘inviolable’ and could neither be granted nor taken away by the State. It further held that under the Access to Information Act, a Kenyan body corporate (and not just an individual citizen) had the right to request information held by the State or, in some circumstances, by a private party.

- *Free and fair elections* – Free and fair elections are at the heart of any democracy and, unfortunately, have been the source of much violence and sorrow in Kenya. The Constitution, which was established following post-election violence, sought to guarantee free and fair elections. Before the 2017 elections, civil society organizations recognized that previous elections were rigged through the changing of vote tallies between the polling stations and the national tallying centre. Maina Kiai and other civil society members brought *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*, [2017] EKLRCivil Appeal 105 of 2017, to address the problem and protect the integrity of the election process.

KI participated as an amicus in this case, which addressed the capacity of the chairperson of the IEBC to confirm, vary or verify the results of a Presidential Election; or to clarify the stage at which the tallying of presidential votes becomes final. The court held that tallying of votes became final at the constituency stage. KI has also litigated a different case on the running of elections in Kenya, in *Katiba Institute & 3 Others v Attorney General & 2 Others*, 548 of 2017 [2018] eKLR.

- *Freedom from torture, inhumane and degrading punishment and the public policies of rehabilitation and reformation of prisoners* – Kenya’s mandatory death penalty had long been decried as inhuman, unfair, and unnecessary. Although no-one had been executed in Kenya since 1987, efforts to abolish capital punishment languished among the politicians. The rights and fundamental freedoms guaranteed under the Constitution revived the debate, however.

Two inmates who had been convicted of murder challenged the constitutionality of the mandatory death penalty and had worked through both the High Court and Court of Appeal before Katiba became involved. Once the case reached the Supreme Court, KI, in collaboration with the Death Penalty Project, participated as *amici*. The case, *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, Petition 15 & 16 of 2015, held that Kenya's mandatory death penalty violated the Constitution. It reaffirmed the independence of the judiciary in making sentencing decisions and established a framework for addressing sentencing in cases that previously attracted a mandatory imposition of the death penalty.

Our participation in *Muruatetu* was not welcomed by the government. Because the government challenged our ability to act as *amicus*, the Court had to issue a ruling that has developed the scope and understanding of the role of *amicus curiae* and interested parties in court proceedings. KI and other organizations have relied on this ruling to participate in other cases of public interest.

The case was also one of the few instances in which the Supreme Court used a structural interdict to remedy a constitutional violation. It also encouraged the opposing parties to work together to develop a mechanism for resentencing the nearly 9,000 people who were on death row. The resentencing process is ongoing.

- *Right to access housing and freedom from forced evictions* – Forced evictions and displacement lie at the heart of much of the suffering Kenyans faced during the colonial era and following independence. The Constitution provides important rights to prevent the displacement of individuals. Those rights, however, had not been fully tested until people from Muthurwa estate challenged their eviction in *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*. Yash became involved in the case as a petitioner and was represented by KI advocates. At the time Kenya did not have any legal provisions to guide lawful evictions and this case set the standard on the issue of forced evictions and the constitutional right to housing.
- *Oversight and transparency in security agencies* – KI's work in northern Kenya showed that law enforcement and intelligence services were often involved in serious human rights abuses. The victims of that abuse, who were already marginalized, had no recourse to challenge the conduct of these agencies, due in large part to the failure of the government to establish a statutorily required civilian oversight board. KI stepped in to advocate on the community's behalf. In *Katiba Institute v Attorney General & 3 Others; Kenya*

National Commission on Human Rights (Interested Party), Petition 7 of 2018 [2019] eKLR, the High Court held that failure of the Ministry of Interior and Coordination of National Government to institute and operationalize a civilian oversight body over the working of the National Intelligence Service was unconstitutional.

- *Advisory opinions* – The Constitution allows a state organ to seek an advisory opinion from the Supreme Court on disputes that concern county governments. These disputes have included the demarcation of roles between national ministries and independent commissions, and the sharing of revenue between national and county governments. KI has been involved in a number of these cases. Two of them are: *In the Matter of the National Land Commission, Advisory Opinion Reference 2 of 2014* [2015] eKLR, in which KI was an interested party. The Supreme Court held that the relationship between the mandates of the National Land Commission (NLC), and the Ministry of Land, Housing and Urban Development is that of cooperation and interdependence; but that there were distinct areas that were the sole jurisdictions of the NLC. The court then went on to define the decisional and financial independence of the NLC. In the recent case on division of revenue, *Council of Governors & 47 Others v Attorney General & 3 Others*, Reference 3 of 2019 [2020] eKLR, the Supreme Court issued an advisory opinion to resolve an impasse between the Senate and the National Assembly as to the share of revenue counties were entitled to; and if there was an impasse, what happened.
- *Independence of the Judiciary* – As Yash has noted, before the 2010 Constitution, the judiciary was almost wholly co-opted by different government interests. Even though there were excellent jurists among the bench, the decisions that came out were often the product of corruption or intimidation. KI understood early on that to protect the Constitution, we must protect judicial independence. There have been repeated efforts to undermine judicial independence, most obviously by the President's repeated and unjustified refusal to appoint individuals, nominated by Judicial Service Commission (JSC), to different positions in the judiciary. One of those individuals was Hon. Mohamed Warsame. In *Law Society of Kenya v Attorney General & another*, Petition 307 of 2018 [2019] eKLR, KI represented the Law Society of Kenya in its challenge to the President's refusal to appoint Hon. Warsame to the JSC. The High Court held that a member of JSC elected or appointed to serve a second term was exempt from retaking the oath of office. It further held that if the President refused to appoint Hon. Warsame within a specific time, he would be deemed appointed – a powerful



Katiba Institute was recognized as the Civil Society Legal Department of the Year in 2017

order that protects the independence of the judiciary and the authority of JSC.

- *Two-thirds gender rule* – One of the most controversial and much-litigated provisions of the Constitution involves the requirement that elected and appointed bodies not comprise more than two-thirds of a single-gender. Katiba has worked hard to inform and educate people on the requirement and on why it is so important. We have also litigated on the issue. In *Katiba Institute v Independent Electoral & Boundaries Commission*, Constitutional Petition 19 of 2017 [2017] eKLR, for example, the High Court held that the Independent Electoral and Boundaries Commission is mandated to enforce compliance of the two-third gender principle by political parties when presenting their nomination lists for elective seats. Similarly, KI has advocated for the President's compliance with the two-thirds gender requirements in the appointment of cabinet members.

Our litigation has taught us important things about the Constitution and social transformation. First, it has made us appreciate the importance of an independent and well-trained judiciary. Without a cadre of judicial officers who are properly skilled and free to exercise their positions in service of the Constitution and the country, public interest litigation will not succeed. We have also realized how important it is to collaborate closely with community members who have direct knowledge of the facts and remedies that would work best for them and with civil society organizations to pool skills and resources to sustain public interest litigation, and using a multidisciplinary approach – scientists, sociologists, psychologists, and other experts – to provide much-needed context and evidence to support public interest cases. We have learned that litigation is not just about issues; it is about people's lives. When we file a case, we do our best to not just speak to the courts but also to the people.

Public interest litigation cases have social and political costs and risks. Those who do public interest litigation need to adequately prepare for those risks. We do our best to create a safe, collaborative and supportive work environment for our team. We also closely review our cases to ensure that we have learned from both our successes and failures. These 'post-mortems' require us to turn our critical eye on ourselves and honestly assess how we can improve. It is a constant learning process – one we enjoy and take pride in.

In conclusion

We want to conclude by looking forward. Katiba Institute recently conducted an audit of the Constitution. We learned a great deal about what has been achieved and what more needs to be done. During the next phase of Kenya's constitutional transformation, we will improve upon the work we have already done while turning our attention to new and pressing issues. Although these issues may change and we are intent on being flexible, we believe that economically just and environmentally sustainable development will remain a priority. We are all well-aware of the devastating impacts of climate change, and we intend to advocate for both prevention and mitigation measures to protect Kenya and the world from the consequences of global warming. We intend to focus on public finance and financial accountability. Finally, we believe that the rights guaranteed to consumers under the Constitution need to be more fully understood and more widely enforced.

As we pursue these goals, we intend to deepen our relationships with community-based organizations and social justice centres. We recognize that the best voices for social transformation through the constitution are the people's voices. Our mandate—ensuring a culture of constitutionalism—means that the voices of Kenyans must be the ones that are heard. We look forward to working with all like-minded people and organizations to achieve these goals.

Notes

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10 years of promoting constitutionalism and the rule of law in Kenya

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