Activity Report 2015 & 2016
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This is the second Report prepared by Katiba Institute on its key activities. It covers the period 2015 – 2016 and provides an overview of the activities undertaken during the two years under review. Because the first report did not cover the whole of 2014, a few 2014 activities have been included here. More detailed information is available from the Katiba Institute office and our social platforms including our website (www.katibainstitute.org). For current events and activities see the website and the twitter handle (@katibainstitute).

A glance at the Contents page will give an overview of our activities. The activities reported relate to Katiba Institute’s mandate of entrenching constitutionalism through research, litigation and promoting public participation in line with the Constitution of Kenya 2010 and our Strategic Plan 2015-2019. Katiba Institute takes pride in its staff capabilities and skills, being a “hands on” organisation most of the activities highlighted in this report are done by the staff and members of the Institute. We rarely “outsourcing”.

We must recognize the role of our Board, funders, collaborators, partners and supporters without whom we could not have successfully undertaken these assignments. We acknowledge all our development partners, Open Society Initiative for East Africa, Ford Foundation, Akiba Uhaki Foundation, American Jewish World Service, Canadian Fund For Local Initiatives, Canadian High Commission and Canada’s Department of Foreign Affairs, Trade and Development (DFATD), Danish Institute Against Torture (Dignity), Embassy of Sweden in Kenya coordinated by Diakonia, Global Centre for Pluralism in Ottawa, the Harvard School of Public Health, Juta publishers, ROLE (Rule of Law Expertise) UK Government, University of the Western Cape and various other partners who have contributed to various aspects of our work (for more details see Table in Part III).

We are grateful to our partners in the implementation process both international and local partners including at the national and county levels. These include the Judiciary Training Institute, Council of Governors, The Institute for Social Accountability (TISA), Africa Centre for Open Governance (AfriCOG), Mid Rift Human Rights Network, International Development Law Organisation (IDLO), Natural Justice, and organisations based in other countries such as Jukwaa la Katiba in Tanzania, the Open Society Justice Initiative, Commonwealth Human Rights Initiative, the Forest Peoples Programme and the Death Penalty Project.

This report is a product of the contribution and the hard work of each and every staff member, with special input from Jill Cottrell Ghai and Yash Pal Ghai, to all of whom we are grateful.

Waikwa Wanyoike
Executive Director
The Katiba Institute was set up five years ago, half a year after the adoption of Kenya’s current Constitution. The objective was to nurture the Constitution and protect it against forces opposed to its values, forces which were deeply entrenched in the state, particularly politicians and bureaucrats. A great deal has happened since then. The Constitution has been implemented in so far as the structure of the state is concerned: an executive presidency; a bicameral parliament; devolution transferring significant powers and resources to 47 counties throughout the country with the mandate to promote democratic and accountable exercise of power and to foster national unity by recognising diversity; a number of independent commissions and offices to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles, and promote constitutionalism; an independent and competent judiciary to do justice to all, above all by protecting the purpose and the principles of the Constitution; and an independent police force to uphold the rights of citizens, prevent corruption and promote and practice transparency and accountability.

Whether these institutions have been true to their duties and mission is another matter. The record is mixed. The national and county executives and legislatures have routinely disregarded their duties and abused their powers. The President has for the large part ignored his responsibilities, particularly as regards the protection of political, civil, economic and social rights, and has tried to bring the police under his control. The bureaucracy, under the control of the executive, has behaved no better. One result is the largest prevalence and highest levels of corruption ever in Kenya, increasing the affluence of the rich and the misery of the poor. Devolution has got off to a reasonable start, particularly in counties hitherto neglected. The optimism about devolution continues, though at its very birth it was infected by the national virus of corruption. The independent commissions likewise have a mixed record, several of them all too keen to please the government.

The electoral process continues to be fraught with violence, in disregard of the values and procedures prescribed in the Constitution—the theatre of corruption and ethnic conflict. The right of the people to participate in law and policy making has been effectively ignored by public authorities.

One bright feature was the judiciary—I say “was”, because the most corrupt and incompetent judges were removed, but not all, and the virus seems to have spread. Nevertheless, the judiciary remains the final, and increasingly the first, resort for the protection of human rights and other constitutional values. Some judges have worked conscientiously to develop jurisprudence consistent with the transformative objectives of the Constitution.

Ordinary Kenyans, despite all this, continue to have faith in the Constitution. But they find few allies. Civil society, which considers itself their allies, like Katiba Institute, has inadequate resources to fight all the necessary battles for the poor and the downtrodden. And it is under attack from the government even for the feeble efforts it is able to make. A vigorous civil society, with adequate resources, is necessary to keep the Constitution alive. Such as it is, there is need for better co-ordination between its elements. This is beginning to happen. The Constitution is rich enough in its values and principles as well as in the procedures of redress and remedies, even for the most marginalised, to endure the blows the Constitution has received from the government. But the period beyond the next election is critical. Whether the Constitution will atrophy further or revive depends on the new government—and to a lesser but important way, civil society, and most of all the people.

Over the coming years Katiba Institute must plan its strategy to promote the prospects of a vibrant Constitution. It is clear that public interest litigation, in which area we have established national and international reputation, must continue as a primary field of activity. We must also develop
our capacity in research, not only in relation to litigation, but specific areas of public policy. We will pay special attention to devolution, an area in which we have particular expertise. Devolution remains a critical aspect of the Constitution but county governments need assistance in policy making and execution, as do the people in their participation in county policy making. We also need to pay more attention to the promotion of human rights, though there are several other organisations specialising in it. We believe we have the historical and intellectual background in human rights to be able to make an important contribution to their understanding and implementation. We also plan to devote more attention to public administration, its capacity and accountability, and public access to it, building on our explorations of the subject last year, in conjunction with relevant state agencies. Another area which we have explored is the critical issue of Kenyan identity, citizenship, an exploration of its diversity, and how to build and promote national unity—the publication and dissemination of this project will be disseminated from June 2017. Judiciary and dispensation of justice will remain another key topic, focussing on policy issues which have received relatively little attention, such as the speeding up the time taken to deal with cases—the present system has alienated many people and institutions from the judicial process.

Another area is empowerment of the people: through disseminating knowledge of the Constitution, its values and procedure, and training of leadership of grassroots organisations. We have a whole page, every week, for a column in the newspaper "Katiba Corner"), in the Star, written by members of the Katiba Institute and others, devoted to constitutional issues. The columns are also placed on our website, where they are read by a significant number of people, and leads to interesting debate among them. Our website has probably the best collection of the materials on the making of Kenya’s constitution.

A source of the strength of the Katiba Institute is its partnerships with several local and overseas institutions. We intend to strengthen these partnerships as well as to explore new forms of co-operation. Already we have received inquiries from other organisations for co-operation, in fields such as finance and taxation, gender, land, access to information, access to justice and environmental justice.

The progress that the Katiba Institute has made is due to the skills and dedication of its staff. The great progress that we have made in a relatively short period is almost entirely to their efforts, under the inspiring leadership of our Executive Director, Waikwa Wanyoike.

"The objective was to nurture the Constitution and protect it against forces opposed to its values, forces which were deeply entrenched in the state, particularly politicians and bureaucrats."
PART I: Who are Katiba Institute?

THE BOARD

Professor Abdalla Bujra, scholar and academic, from Lamu, Kenya, studied at the School of African and Asian Studies, University of London, from which he obtained a PhD in Social Anthropology. Prof. Bujra has taught in various universities around the world. He has written or edited several books and is the author of many articles.

He is a founder of the Dakar based Council for the Development for Social Sciences in Africa (CODESRIA). He was its first fulltime Executive Secretary from 1975 to 1988. He has also participated in and managed several major high level Pan-African Panels and Committees linked to the African Union (AU) as well as Pan-African Independent Research Organisations.

Father Gabriel Dolan is a Catholic missionary who has, in the last 33 years, worked across the country, including in Mombasa, where he is currently based. A great champion of the Constitution, he is a leading light in civil society. He was formerly on the Board of the Independent Medico-Legal Unit and is now a Director of Haki Yetu. He is a regular Daily Nation columnist. He is particularly active in fighting against land grabbing and unjust evictions and has been arrested numerous times for protesting against injustice. He believes that the struggle for freedom is a lifelong project—a struggle to which he is fully committed.
Dr. Linda Musumba is a senior lecturer at the School of Law, Kenyatta University and was the founding dean of the school. She holds a PhD from the University of Birmingham and an LLM from the University of Warwick. She earned her LLB from the University of Nairobi. Her main interests are constitutional law, rights-based discourse and legal theory. She is active in civil society and has given numerous lectures to legal and non-legal audiences. She also has her own legal consultancy firm.

Justice (ret’d) Barnabas Samatta, retired from the Tanzanian Bench in 2007 after a long and distinguished legal career. He was a State Attorney, and then Director of Public Prosecutions. He served on the High Court bench, then on the Court of Appeal, and then served as Chief Justice for seven years. A judge of impeccable integrity, Justice Samatta’s decisions touched on key areas of the rule of law and the constitution. He emphasised that the constitution crystallises a consensus among citizens as to the nature and character of their polity and governance. He believes that the doors to justice should be opened to all regardless of their station in life or economic position. He was a member of the Kenyan Judges and Magistrates Vetting Board from 2012 to 2016. He is now the Chancellor of Mzumbe University in Tanzania.

John Sibi-Okumu taught French for nearly 30 years. He is an accomplished actor, writer, journalist and television presenter. He has acted in films including Born Free (1975), and The Constant Gardener. Over the years Sibi-Okumu has appeared in some 40 lead roles on stage, including Sophocles’ King Oedipus; and Shakespeare’s Romeo, Oberon and Shylock. Sibi-Okumu himself has written various plays, including In Search of the Drum Major on the American Civil Rights Movement, Minister Karibu! Elements, Role Play, Meetings, and Kaggia. His is also a distinguished director (the musical Mo Faya) a journalist and TV personality. He also writes regularly for AWAAZ - Voices of the South Asian Diaspora.
THE FOUNDING DIRECTORS

Jill Cottrell Ghai taught law at universities in Nigeria, the UK and Hong Kong for over 40 years, having studied law at the London School of Economics and the Yale Law School. Towards the end of that career she was particularly involved in teaching economic social and cultural rights. She has acted as advisor on the constitution making processes of several countries: including East Timor, Nepal, Maldives, Iraq and Somalia. She and Yash Ghai authored the first book on the Constitution (*Kenya’s Constitution: An Instrument for Change*).

Yash Pal Ghai studied law at the University of Oxford and Harvard Law School. He taught at the then University of East Africa, in Dar es Salaam, and was its first African national Dean. He later taught at Yale, and the Universities of Uppsala, Warwick and Hong Kong as well as being visiting professor at several other universities. He has been involved in various capacities in the making of over 20 constitutions, from Papua New Guinea (1975). He chaired the 2000-2004 phase of constitution making in Kenya. He was co-author of the book still read by Kenyan law students (Ghai & McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press, 1970). He and Jill Cottrell Ghai spend a good deal of their time working for Katiba Institute on a pro bono basis.

Waikwa Wanyoike is the Executive Director of KI. He is an Advocate of the High Court of Kenya and a Barrister and Solicitor with the Law Society of Upper Canada. He appears regularly at the High Court, Court of Appeal and the Supreme Court of Kenya as a public interest litigator on groundbreaking constitutional matters. He has advised government and non-governmental agencies on constitutional implementation and policy reforms. He also appears regularly as a resource person during training programmes organized for Judges and Magistrates by the Judiciary Training Institute. He studied at Kenyatta University and York University (Canada). He has taught Advocacy (Refugee and Immigration law) at Osgoode Hall Law School of York University. He has authored numerous book chapters on the constitution.
STAFF LIST

CHAIR OF THE BOARD OF KATIBA INSTITUTE

Below is a list of everyone who is currently or has been part of Katiba Institute during the period covered by this Report. The names of those who had left by the end of 2016 are in italics:

Conrad Bosire, Special Projects Advisor (Devolution)
Misha Desai Legal Intern
Sandra Gaballa, Legal Intern from Canada
Eileen Imboso, Litigation Intern
Lulu Kavoi, Administrative Assistant
Jackson Kiberenge, Finance assistant
Victoria Kimanzi, Programme Intern
Ayesa Makatiani, Finance and Administration Officer
Edward Maroncho, Litigation Intern
Matthew Milne, Legal Intern from Canada
Livingstone Mukosi, Intern, Finance and Administration
Michael Munguti, Legal Assistant
Douglas Mutai, Office Assistant
Christine Njeru-Kuria, Programmes Manager
Christine Nkonge, Litigation Counsel
Ben Nyabira, Public Liaison and Partnership Programme Officer
Elisha Ouma, Office Assistant
Felix Ouma, Office Assistant
Waikwa Wanyoike, Executive Director
Faith Rotich, Research and Litigation Associate
Loland Shihaji, Office Assistant
Tiffany Smith, Legal Intern from Canada
Vincent Lempaa Suyianka, Litigation Counsel
James Wanjeri, Legal Intern
Liz Alden Wily, Land Specialist, Expert Associate
Sabrina Witting, Legal Intern from Germany

KI has a partnership agreement with Global Affairs Canada for a Young Lawyers International Program.
“I joined Katiba Institute in February 2016 primarily to do new media work as a Communications Intern. New media refers to a means of mass communication using digital technologies such as the Internet. The work primarily touched on social media and website management, content creation, online campaigns etc. I was attracted to Katiba primarily because of its Public Interest Litigation work. Having just completed my training at the Kenya School of Law I was drawn to the constitutional and human rights work that Katiba Institute was actively involved in. I have truly enjoyed working at Katiba and being part of the team. All staff were very helpful and encouraging. It was a great period of learning and career development. In that period, we have seen the profile of the organisation rise and this has been a collaborative effort. The internship broadened my horizons and allowed me an opportunity to pursue my passion. I am glad that my legal education has been undertaken in part at Katiba Institute.

Katiba Institute is a great organisation and I would advise anyone interested in constitutional law, devolution, human rights and rule of law litigation and publication to apply.”

James Wanjeri served as a communications and legal intern with KI in 2016

““The interns also make a valuable contribution to our work.”

Sandra Gaballa comes from Canada and began a 6-month internship at Katiba Institute in partnership with the Canadian Bar Associations’ Young Lawyers International Program in 2016

“To say that my internship at Katiba has been an invaluable learning experience would be an understatement. The public interest litigation team has made a concerted effort to involve me in all the different kinds of work they do – from protests to pleading before the Supreme Court to all the research and drafting in between. I especially enjoyed the opportunity to sit in on and participate in strategy meetings with such an outstanding group of litigators in constitutional law. The litigation team has welcomed me with open arms and valued my contributions. The patience and professionalism of everyone in the Katiba office is also something I have learned from and hope to emulate. My only complaint is that my internship is ending soon!”

Katiba Institute strives to give opportunities for practical learning to young individuals seeking to develop a career in an area relevant to its work, through its vibrant internship programme. The interns also make a valuable contribution to our work. Interns have been both local and from South Africa, Canada, USA and Germany. The opportunities depend on the availability of suitable learning positions and organisational needs at any given time.

Four of our recent interns have contributed their comments on their experiences.

The interns also make a valuable contribution to our work.”
Victoria Kimanzi was the first ever Programmes Intern at Katiba Institute, from 2016 - 2017.

“My internship at Katiba Institute was the most enlightening phase of my career as a lawyer. I came in with a student mindset and came out an advocate.

KI gave me perspective on what I want my legal career to look like in the future and cultivated genuine passion and the skill set I need to make it in life and the courtroom.

The staff at KI is humble, cheerful and ready to help; elements that made for a wonderful experience and invaluable mentorship.

I am forever grateful for the opportunity.”

Eileen Imbosa served as a legal intern between 2015 and 2016.

“The best thing about my internship has been the nature of the work and the great, versatile, and diverse employees that I have gotten to know. As an intern, there has been a more relaxed nature to the work and the working environment. I have been able to use this to my advantage; I have communicated with my colleagues effectively without having to worry about normal business jargon. Although it is not so formal, it has still been a learning curve to try to work along-side people from different cultures.

My skills and knowledge were greatly impacted by the many avenues of growth that the institution provided. I have thus far had my best experience at Katiba Institute.”

For more information on the Internship Programme forward your Curriculum Vitae (CV) and Cover Letter to info@katibainstitute.org
1. Overview
In 2014 KI published an initial report on its activities between 2011 (the year of its establishment) and 2014. (The report is accessible on KI’s website, www.katibainstitute.org). This second report covers the years 2015 and 2016, with an occasional reference to issues in 2014 that were not covered in the previous report. Generally this follows the approach of the previous report, but details of specific cases now appear in an Appendix (I).

The divisions of the report are based on the types of activity, particularly litigating; research, writing and publishing; lobbying parliament and in other ways contributing to law making; training and civic education. Research is at the core of KI’s objectives and contributes to our publications and preparation of submissions for litigation. In conducting research, KI seeks to improve knowledge of the Constitution, among government agencies, the private sector and the public and to ensure that our own work is based on sound understanding of the constitutional and other issues. A new focus, and type of activity, from the previous report is on using the possibilities under the Constitution and legislation to seek information from public bodies (see p. 13). Scattered throughout are references to attending and organising meetings of various types. Occasionally, we might be described as “agitating”, when we participate in activities that fulfil the rights under Article 37 to assemble and to demonstrate.

What this approach does not clearly bring out is the specific focuses of our work in terms of substance, or the sections of Kenyan society in whose interests we work. Everything is connected to the Constitution, but we have written about, litigated about, educated about and argued about many different aspects of the Constitution.

A major focus is devolution. We have made submissions on policy issues, written newspaper articles, published books, organised seminars and training programmes for Judges, local politicians and civil society organisation, and litigated in support of devolution. Finance is a particularly complex, and, of course, important aspect of devolution. Working with International Budget Partnership we have held local seminars on financial issues, and participated in Equity Week that focussed on financing counties. We have represented The Institute for Social Accountability (TISA) and the Centre for Enhancing Democracy and Good Governance (CEDGG) in cases questioning the Constituency Development Fund (CDF) and other initiatives that seemed to undermine the system of devolution.

Democracy and good governance is another important area. Again, a major focus of our writing—especially of the Katiba Corner weekly articles in the Star—is on democracy, integrity, and accountability. We litigate about democracy, with cases on women’s representation, on where votes in presidential elections are to be tallied, on recall of members of parliament and county assemblies. We have been involved in challenging the use of the presidential power to return Bills to Parliament, and to double taxation agreements without parliamentary approval. We are involved in cases about good governance, including on the Constituency Development Fund (one issue being how can MPs be both spenders, and supervisors of the spending, of public money), and to the appointment of heads and members of parastatal boards.

Indeed, most of our work is about good governance. The thrust of it all is: the Constitution must be respected; if it says something must be done, or done in a particular way, that is what must happen. That is an aspect of “the rule of law”, stressed in the Preamble and the national values, and the responsibilities of the President and the AttorneyxGeneral. If those in power or authority ignore the Constitution—any provisions of it—when it suits them, the Constitution will become meaningless.

Two important aspects of, or safeguards for, good governance are transparency and participation: both national values. Transparency is backed up by the right of access to information (Article 35). KI
was heavily involved in assisting with the drafting of the Bill that became the Access to Information Act 2016. We have used Article 35 and the Act to seek information on important issues, like the criteria used in shortlisting candidates for Chief Justice, and sometimes the information supplied, or the refusal to supply information, has formed the basis for litigation.

Much of our work—particularly making submissions on policy and law—is an expression of the right to participate in governance (not expressed in the Constitution as such, but as a national value that is approaching a right). We have also litigated in support of public participation in legislation, and in development projects, such as mining and the LAPSSET Project.

In writing, publishing, making submissions, educating, and litigating, human rights are often a key issue. The rights on which we have focussed include both “civil and political rights” such as of expression, assembly and association, as well as equality and dignity and freedom from violence, and also “economic social and cultural rights” such as to housing, health and education. We have, for example, relied on human rights in making suggestions for the amendment of Bills before Parliament—particularly the Security Laws Amendment Bill at the end of 2014. We have challenged, through litigation, police reactions to demonstrations. We brought one of the first right to housing cases (Sotrose Ayuma—Case no. 2 in the Appendix), which may not have ended its course. We have contributed to the development of literature on the right to health, and to the development of the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill sponsored by Senator Hassan Omar.

Earlier we pointed to our access to information activities. Another newly recognised right in our constitution is that to fair administrative action. We contributed to discussions on the Fair Administrative Action Bill (now Act), we have litigated a number of cases that rely on this right, and we are engaged on a project to produce a practical Guide for the public service on what this right means. We have made various contributions to the improvement of the justice system. We have been privileged to be involved in judicial training through collaboration with the Judiciary Training Institute. We were involved in successful cases about the recruitment of new judges to the Supreme Court: both in protecting the work of the Judicial Service Commission from political influence and keeping the Commission itself within the bounds of its prescribed procedure.

Specifically in connection with criminal justice, we have produced literature to educate the public (and even the police) about the powers and responsibilities of the police and the public. We have resisted the exercise of police powers in violation of human rights, and the extension of those powers in violation of the Constitution. We are contributing to the production of a “Bench Book”—a practical guide for the sitting judge or magistrate about the criminal trial process—by the judiciary. We have made submissions on the production of a Sentencing Policy, and on the Death Penalty. Also on this last question, we have been involved in a major case before the Supreme Court challenging the compulsory imposition of the death sentence for certain sorts of cases, leaving no discretion to the courts. We anticipate continuing to work with the Death Penalty Project based in the UK.

Land and the environment are two areas that have been affected by the Constitution. We have contributed to discussions on land laws, especially the Community Land Act. Various KI cases involve land issues especially for marginalised communities, and litigation on the impact of the LAPSSET project involves issues of environmental law.

For whom do we work? It is our view that everything we do is of benefit to Kenyans generally: because it is in their interests to have the Constitution respected and work properly. We can also say that much of our work is specifically sought by, motivated by and relevant to the needs of marginalised or disadvantaged communities or sections of society in Kenya. We have worked hard, in discussion, litigation and writing for the realisation of the “two-thirds gender rule”: that no more than two-thirds of any elected or appointed public body should be of
the same gender. We have discussed strategies and roles with prospective women legislators. We have litigated to protect children, and refugees. We have litigated, and written about, the Nubians, forest dwellers, gay persons and the rights of persons with disability and dwellers in informal settlements.

**Finally: where do we work?** As a small organisation we do not manage to do as much outside Nairobi as we would wish. However, we have held seminars in Nakuru and Isiolo. And we are involved in cases affecting communities outside Nairobi, and that are being heard outside the capital, especially the Sengwer of Embobut Forest, and the people of Lamu. The case about the recall mechanism for elected legislators was begun in Kisumu with a local organisation, but moved to Nairobi at the request of the respondent.

### 2. Contribution to Law and Policy Making

Since the Constitution was adopted, the government

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<th>Article 10</th>
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<td>(2) <strong>The national values and principles of governance include participation of the people</strong></td>
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<th>Article 118</th>
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<td>(1) <strong>Parliament shall — facilitate public participation and involvement in the legislative and other business of Parliament and its committees.</strong></td>
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at the national level, Parliament, and, after 2013, the new county governments have engaged in a great deal of policy and law making as required by the Constitution. New policies are required to implement devolution and many other innovations in the Constitution. Sometimes we have complained about the enactment of legislation without the existence of policies to guide the law.

We have sometimes worked with one or other of two bodies that played a particularly important role in developing new laws: the Commission on the Implementation of the Constitution (wound up at the end of 2015) and the Kenya Law Reform Commission. Occasionally KI members have been involved with different institutions developing a policy or law before the initiative is in the public domain. It is KI’s experience that it is more productive to be involved in the earlier stage of policy or legislative drafting. However, sometimes we have been in the same position as the public at large, noticing that a committee of the National Assembly or the Senate is about to discuss a Bill and having just a few days to review the bill and prepare comments. Keeping track of what Parliament is doing is a serious challenge and even where we manage to prepare a submission to the relevant committee in time, there is little guarantee that it will influence the ultimate content of the law. Committees feel under pressure to finish their work, and do not seem inclined to propose radical changes.

The Constitution recognizes that it is not only the government that can propose new laws, and since its enactment there has been an upsurge in the preparation of Bills by individual members of Parliament, often with the help of civil society. We have been involved in several of these initiatives with individual members.

**Laws**

Katiba Institute partnered with Article 19, International Commission of Jurists- Kenya Chapter (ICJ-K) and Transparency International, and Priscilla Nyokabi MP (the mover of the bill), in preparing the Access to Information Bill 2015. KI made detailed proposals for consideration in the drafting of the Bill and organized two of the four meetings that KI and partners held with Members of Parliament to brief them on the content and to share technical and comparative knowledge about access to information laws. The bill was passed in 2016 and came into effect in September. KI is strategizing on follow-up activities to ensure effective implementation of the law.

Katiba Institute also participated in various meetings organised by Senator Hassan Omar when preparing his Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill-not yet passed. KI collaborated with other institutions including
the Commission on Administrative Justice on the Fair Administrative Action Bill (March 2015) and wrote memoranda to the relevant parliamentary committees on several other bills including the Public Audit Bill (February 2015); Political Parties (Amendment) Bill (March 2015); Community Land Bill and the Land (Amendment) Bill. KI also attended meetings to give oral comments on the Statutory Tribunals, High Court and Magistrates administration Bills. In 2014, after the publication of our first report, we commented on the Mining Bill (May 2014, with the assistance of Anthony Regan of the Australian National University) and the Parliamentary Powers and Privileges Bill (October 2014).

Right at the end of 2014, KI worked with other organisations to engage, in various ways, with the Security Laws (Amendment) Bill published, with no warning, the day before an advertisement in the media inviting public submissions with a deadline of five days later. We appeared with others, including the Kenyan National Commission on Human Rights, before the parliamentary committee on that deadline day. Some amendments were made to the Bill, but they did not meet all our objections, which centred on violations of rights of suspects, rights to fair trial, and of expression and privacy, as well as rights of refugees. (For the next phase of the story see the litigation section below).

In June 2016, we submitted comments to the Judiciary on the then draft Code of Judicial Conduct.

**Contributions to Policies**

KI also contributed to policy development by giving views on the draft devolution policy developed by a taskforce formed by the Ministry of Devolution. KI focused on the need to have a simple well-structured policy that would be easy to understand and follow. It also emphasized the need for participation of actors at both the national and county levels in the development of the policy, while also taking account of existing policies and frameworks relevant to key policy areas.

In February 2015, KI submitted a detailed paper to the Task Force on Sentencing Policy set up by the Judiciary. Later in the year we commented on the draft document prepared by the Task Force (the final document was published by the Judiciary in early 2016, and can be downloaded from http://www.judiciary.go.ke/portal/page/downloads). On a related topic: in November 2016 we submitted a paper on the death penalty to the Committee on the Power of Mercy that has been tasked with assessing public opinion on that question.

### Article 33

(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) ... and

(c) academic freedom and freedom of scientific research.

### Article 34

(1) Freedom and independence of electronic, print and all other types of media is guaranteed…

**3. KI Publications**

KI has a considerable published output of various kinds. Some comprises detailed analyses of the constitution, statute law and cases decided in the courts, directed mainly at lawyers, academics and students. Some of the publications are intended to demystify the Constitution and related matters for the ordinary citizen. Our publications are the product of solid research.

**Major books**

During the period under review KI was involved (in collaboration with others) in the production of two major books on devolution (for full details of contents see Appendix III of this Report). *Animating Devolution in Kenya: The Role of the Judiciary*, followed several forums on devolution conducted by Kibata Institute in partnership with the Judiciary Training Institute (JTI), and the International Development Law Organisation (IDLO). The book
addresses devolved governance and the emerging jurisprudence on devolution from the Kenyan courts while providing comparative material on South Africa and Canada. Staff of KI wrote 5 of the 16 chapters with Conrad Bosire of KI being one of the two editors. The publication was funded by the Danish aid agency, DANIDA.

In our 2011-2014 activity report, we highlighted a joint project between KI and the University of the Western Cape that compares devolution in South Africa and Kenya. The project resulted in a book entitled Kenyan-South African Dialogue on Devolution edited by Nico Steytler and Yash Ghai and published by Juta, at the end of 2015. The publication, which was funded by the US Institute of Peace, includes pairs of chapters (in each pair, one on South Africa and one on Kenya) covering the reasons for devolution; the levels, numbers, size and character of devolution units; their demarcation; political structures; powers and functions; finances; metropolitan governance; intergovernmental relations; marginalised groups; and transitional arrangements. Of the 20 chapters in the book, three were written by Conrad Bosire, two by Yash Pal Ghai and one by Jill Cottrell Ghai, and one jointly by Yash Pal Ghai and Nico Steytler of the University of Western Cape.

**Shorter books**

**A Guide to Public Interest Litigation in Kenya:** In 2014, Katiba Institute in partnership with Kenyans for Peace with Truth and Justice (KPTJ) and AfriCoG jointly developed this handbook. It seeks to contribute to the strengthening of the capacity of individual litigators, as well as organisations, to mount effective PIL actions in the Kenyan courts. The development of the handbook involved review of existing PIL resources developed by Kenyan legal aid actors and others around the world. The guide focuses among other themes on topics such as case selection; case identification; case preparation; funding and ideas on how to optimize the impact of PIL through coalition building and media strategies.

KI published two small books in April 2015: Understanding Devolution — edited by Conrad Bosire, Yash Pal Ghai and Jill Cottrell Ghai — and *National Values and Principles of the Constitution* — edited by Yash Pal Ghai and Jill Cottrell Ghai. They are based on the Katiba Corner articles in the Star newspaper edited by KI, but with a variety of contributors, and were published with the financial assistance of the Canadian High Commission. They are intended to explain aspects of the constitution or issues about the Constitution that have been in the news in a way that ordinary readers will understand. The aim is to increase public awareness on the constitution and to promote discussions and debate on the contents of the books. KI has used the books in its engagement with members of the county governments, and other civil society organisations have partnered with KI in dissemination of the books.

**101 Things You Wanted To Know About The Police But Were Too Afraid To Ask**

This is in a category all of its own! It is a 40 page guide for the citizen about their relationship with the police. It is, as its name indicates, in the form of 101 questions about police powers, citizen responsibilities, how to complain about the police, and community policing. It is illustrated with lively drawings. KI partnered with the Commonwealth Human Rights Initiative (CHRI) in Delhi which had produced the original version for India and has worked with other organisations to produce “101 Things” for Uganda, Tanzania and
Ghana. Uladzimir Dzenisevich was the main person at the Delhi end, who produced a complete first draft and has remained engaged in the project. The police have been very cooperative, and the simple and accessible, but accurate, information is intended to be helpful to the police as well. KI believes that increasing knowledge on police relations will improve understanding and contribute to the diminution of violence and injustice in society. The project was funded by the Danish Institute Against Torture (Dignity) and the booklet launched in May 2016.

There are some spin-offs from the 101 Project:  
**A mobile “App”:** This has been developed with the support of Dignity, and the technical expertise of KI and Strathmore University iLab Africa. It offers easy access to the same information in the booklet. It is available to download via the Google play store.

**Kiswahili Version:** The booklet has been translated into Kiswahili and will be available in 2017, to enhance accessibility of the information to a wider readership.

**Posters:** At the suggestion of Dignity, and with Jacaranda Designs that designed the booklet, KI is producing six posters covering most of the content of the booklet. The idea is that these will be put up in police stations and in other places with high-volume traffic of people.

### 4. Katiba Institute: Other writing

**KI in the press**

The Star Newspaper publishes a Katiba Corner piece almost every week in the Siasa section on Saturdays. At least 15 of the authors each year were non-KI members, some of whom wrote more than one article. By the end of 2015, most articles in a long series on implementation of the Constitution had been published. The intention of KI is that revised

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**B. Rights & Duties that you & the police have**

**Can police officers do just what they want?**

No, absolutely not. A police officer who does not act according to the law and the specific rules about the police should be disciplined or brought before the courts.

**So, what powers do the police have?**

The police have two special powers: to arrest people and to use force. They must, however, use these powers only when the law allows, and must strictly follow the procedures set by law.

**Do I have to obey every order from a police officer?**

If it is a lawful order that is related to his or her duties, it should be obeyed. It is always good to cooperate with the police, unless they order you to do something that is clearly wrong. You can complain afterwards about an order that later appears wrong.

**When can the police use guns?**

Using guns should be a last resort. Basically, they can be used to save life or prevent serious injury, or prevent a person who is charged with a serious offence escaping. A police officer who uses a gun must report the incident to superior officer. If death or serious injury occurs by gun or by any other means, the police must report to IPOA. The police can carry guns only when it is necessary for the duty they are going to perform.

**Do the police have any rights?**

Police officers have most of the same rights as everyone else. But they do not have all the rights of others. They do not have the right to strike or join a trade union, and their right to privacy, and their freedom of association and assembly are restricted. For other people any limit on these rights must be reasonable.

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**Part of one of the 101 Things posters**
versions of the articles will be consolidated into a book. In 2016 the topics were more varied. (For fuller details see Appendix II)

KI members, including Lempaa Suyianka, occasionally write for other newspapers.

**KI’s contributions about Kenya to non-KI publications:**

**County Assembly Handbook:** In 2015, the Commission on the Implementation of the Constitution finally published its handbook written by Jill Cottrell Ghai and titled *The County Assembly Member A Trustee for the People.*


In March 2015, The *World Bank Law Review* published a chapter written by Waikwa Wanyoike of KI together with Jane Weru and Adrian Di Giovanni titled “Confronting Complexity: Using Action-Research to Build Voice, Accountability, and Justice in Nairobi’s Mukuru Informal Settlements.” This is based on research being carried out in Mukuru informal settlements by KI, the University of Nairobi, Muungano wa Wanavijiji, Akiba Mashinani Trust, and Strathmore University and supported by the International Development Research Centre.


**5. Seeking Access to Information**

KI believes that Article 35 is very important at several levels. As a matter of principle it is important that the people should know what government is doing—essentially with their money. Practically, knowledge is necessary for accountability and it is crucial for that specific type of accountability in which KI has special interest and expertise: litigation. We have therefore resolved to make full use of the opportunities presented by this Article, and its enabling legislation: the Access to Information Act, 2016.

Some of the uses to which we have put this strategy are:

- Seeking information from the Judicial Service Commission on why certain applicants for the position of Chief Justice were short-listed and others were not (we then went to court on the failure to supply the information and the substantive issue of the criteria). (see Case No. 34 in Appendix I)

- Seeking information from the Independent Election and Boundaries Commission (IEBC) about the OKOA Kenya referendum initiative under Article 257 of the Constitution (the Commission supplied us with information, but ultimately the initiative withered, because the IEBC found that not enough valid signatures were appended. (See the Katiba Corner article for April 9 2016—“The real problem with Okoa Kenya bid to change the law” Jill Cottrell and

**Article 35**

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
Yash Pal Ghai—to understand some of the concerns).

- On December 15, 2016 Katiba Institute wrote to the IEBC inquiring whether it would impose a requirement that political parties provide two-thirds gender compliant lists of candidates for elective parliamentary positions, (National Assembly constituencies and Governors’ seats in Senate) during the 2017 general elections. It further asked IEBC whether it would impose sanctions on parties that did not provide lists of prospective candidates that were two-thirds gender compliant. IEBC was yet to respond by the end of December 2016.

6. KI in the Courts
The Constitution gives the judiciary a very important place in the process of constitutional implementation. The idea is that judges decide cases without having any personal axe to grind. Their interest in a case is simply their professional commitment to apply the law and the constitution. They do not have to worry about being re-elected and in all sorts of ways their independence is protected.

It is on this basis that KI chooses to expend a lot of its efforts on litigation, especially Public Interest Litigation (in which the motive of the person bringing the case is to protect the interests of the public or sections of the public needing protection). KI is encouraged to continue in this direction by the many good rulings that the courts have delivered. They really have proved to be “guardians of the constitution”.

The cases
KI often appears as *amicus curiae* (friend of the court) or as interested party (not an original party to the case but supporting one or the other side). Less often it is advocate for petitioners, or occasionally for parties to ordinary civil or criminal cases. The demand for KI’s involvement or assistance increases all the time. We have been approached by, or partnered with, numerous organisations, in litigation work including the Nubian Human Rights Forum; the Institute for Social Accountability (TISA); Kenya National Commission on Human Rights (KNCHR); Commission for the Implementation of the Constitution (CIC); Muslims for Human Rights (MUHURI); Haki Afrika; Refugee Consortium of Kenya (RCK); Centre for Enhancing Democracy and Good Governance (CEDGG); Transform Empowerment Action Movement (TEAM); Centre for Rights Education and Awareness (CREAW); International Justice Mission (IJM); Public International Law and Policy Group (PILPG); Forest Peoples’ Programme (FPP); the Sengwer community of Embobut Forest; Save Lamu and the Coalition on Violence Against Women (COVAW).

KI has a particular commitment to the provisions of the Constitution that emphasise equality, prohibit discrimination, and demand special treatment when

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**Article (22)**

(1) *Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

(3) ...(e) *an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

**Article (159)**

(1) *Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

(3) *In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

(d) *the purpose and principles of this Constitution shall be protected and promoted.*
needed for minorities, marginalised and vulnerable groups. That sometimes means that we represent, or argue in support of, sections of society that may be unpopular, not just with the government, which is a natural consequence of trying to uphold the Constitution—the main function of which is to guide and if necessary constrain government—but even with society more generally.

The cases all relate to the Constitution, and although they can be divided into several different categories, they all share the same characteristic that their objective is to ensure that the Constitution is respected and works as it was intended.

There is a full list of cases concluded, commenced or ongoing during the period under review in Appendix I with an indication of how far they had proceeded by the end of 2016. (The cases each have a number in that Table, and occasionally we refer to that number in this section.) Some have been about rights particularly the right to housing, including one of the pioneer cases on this right—*Satrose Ayuma* (Case No. 2)—in which the courts held that, even if people are to be evicted, certain standards must be observed. At the time there was no law on eviction procedures and the court held that the United Nations Standards must be applied. Interestingly, the Court of Appeal disagreed on this point in a separate case which KI is assisting to bring on further appeal to the Supreme Court.¹

Another group of cases involves rights relating to freedom of association and assembly, as well as the connected right of free speech. Public bodies making decisions restricting the rights of people sometimes fail to observe proper processes, so the right to fair administrative action comes into play. KI, together with two human rights bodies — Muslims for Human Rights (MUHURI) and Haki Africa — was involved in a case challenging attempts to interfere with the activities of the Mombasa Republican Council that argues that “Pwani si Kenya” (Case No. 1). Later, Muhuri and Haki Africa were themselves the subject of unfair government treatment, and KI was involved on their behalf (Case No. 5). In a separate case, when a gay rights group wanted to register using a name that indicated its focus of interest, the NGO Coordination Board refused; the High Court held this violated the group’s rights of association and equality (“LGBTIQ case”) (Case No. 6).

Equality is also an issue (along with dignity, privacy, and health) in another case in which KI is involved in which the law that penalises homosexual activity is being challenged (Case No. 7).

Rights have been a central theme in cases we have listed under other headings within this report, including the case on the death penalty (Case No. 21) and a case on Security Laws Amendment Bill, where the freedoms of expression and the media were the bases for declaring some legislative changes unconstitutional (Case No. 22).

A second group of cases concerns the protection of devolution under the Constitution. One case was intended to clarify the extent of the health services responsibility of the counties (Case No. 9). The case is headed to the Supreme Court. Another group of cases challenged various efforts by Parliament to shift power to itself from the counties. Two cases related to the Constituency Development Fund—this has been on the basis that this money has involved national funds, through a national body (the National Assembly) being spent on activities that fall within the functions of counties (Case No. 10). To the extent that MPs are involved, this scheme violates the separation of powers between the executive (that spends money) and the legislature (that votes and oversees public expenditure). Another case concerned the somewhat similar fund for county women representatives (Case No. 12). A fourth case successfully challenged a scheme designed to give parliamentarians a say in the development plans of counties (Case No. 13).

Another group of cases relates to respect for the important constitutional value of public participation. One case concerns participation in the major development focussing initially on Lamu: LAPSSET (Cases No. 14). Another was about public participation in coal mining development in Kitui County (Case No. 15).

Several other cases concern issues of criminal

justice, including whether a magistrate’s court ought to be prepared to listen to arguments based on the Constitution (Case No. 19). An important focus of these cases is whether the police have behaved properly in enforcing the criminal law. Another aspect is whether the law giving the police and other authorities power complies with the Constitution on matters such as the rights of those who are arrested and those who are undergoing trial (Cases No. 19 and 20). One particularly striking case was the Security Laws Amendment Bill case, which led to eight changes in the law being declared unconstitutional including on the basis of the right to silence, the right to bail, and the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on (Case No. 22).

This followed our only partially successful efforts, with other organisations, to persuade the National Assembly to modify the Bill.

KI has also been involved in a case challenging the mandatory death penalty: it queries whether the provisions that those found guilty of murder (and by extension other offences attracting capital punishment such as robbery with violence) must be sentenced to death without the court being able to hear any plea in mitigation are constitutional (Case No. 20).

Several cases have involved vulnerable groups in society: forest dwelling communities, particularly the Sengwer, whose way of life is threatened (Case No. 25), and a pastoral community threatened with eviction (Case No. 27), refugees (Case No. 30), the Nubian community of Kibra (Kibera) whose land is being whittled away in various ways including by a road under construction (Case No. 28), and the victims of the 2007/8 post-election violence, particularly sexual violence (Case No. 29). Two cases specifically concern the rights of children: the question in one case was whether it was right to publish pictures of children accused of crime (Case No. 42), and in the other about the rights of a child in court to have a lawyer (Case No. 41).

Several other cases can be categorised as concerning the proper working of government, including whether the Cabinet is constitutional if it has less than one-third women (Case No. 37), how far the powers of the President go when he rejects a Bill passed by Parliament, how appointments should be made to statutory corporations (Case No. 3), whether a double taxation agreement requires parliamentary approval (Case No. 33), the correct procedures for the appointment of judges (Cases No. 34 and 35) and the respective powers and responsibilities of the National Land Commission and the Ministry of Lands (Case No. 31).

Two other cases were about the democratic process: whether the statutory procedures for exercising the right of recall of legislators are in accordance with the Constitution (Case No. 38) and the procedure for counting votes in the presidential elections (Case No. 39).

There is a saying, “You win some, you lose some”. We would claim that we have won considerably more than we have lost. In many cases we have been amicus curiae, not arguing for one side or the other. In such a case there may be victory even if the issue that we most cared about is technically lost, because the law is clarified, or there is a partial victory.

We end this section with a few notable quotations from cases in which we were involved. In the Mombasa Republican Council case, the court said,

“It is not unconstitutional for a community to agitate for secession in a constitutional and peaceful manner. On the other hand, it is a violation of the Constitution for the government to use force or proscribe an organisation… for pursuing an agenda of secession.”

In the case on the attempt to shut down MUHURI and Haki Africa, the Judge said,

“In these orders, I am merely emphasizing that the citizens of Kenya, such as the Petitioners, the ruled, those governed, and the rulers or governors, such as the Respondents are subject to the Constitution and the rule of law, that the fight against terrorism must be conducted in strict adherence to the letter and spirit of the Constitution, and the law, that is the rule of law, for the law was made for man, and not man for law.”

Finally, in the LGBTIQ case:
“There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation and call it say, the Cattle Dip Promotion Society, but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups.”

Our litigation work would be impossible without the existence of a judiciary able to appreciate the true issues, sympathetic to the Constitution and the people of Kenya and with the courage and commitment to apply their understanding to the resolution of the cases, independently, and in fulfilment of the promise that “justice shall be done to all, irrespective of status” (Art. 159 (2) (a).

PIL Related activities

In March 2015, KI organised, with the Open Society Justice Initiative, a retreat for leading PIL lawyers in Mombasa. 30 to 40 people attended, and some prominent lawyers in the field spoke. Waikwa spoke about “PIL in Kenya – Issues of Focus & Emerging Strategies”. Other people gave presentations on various topics, and Jill Ghai on Internet Research.

Over a two day period in June 2016 KI participated in a workshop on “Strategic Litigation Impacts Study: Indigenous Peoples’ Land Rights”. It was attended by the Director of the Open Society Justice Initiative (OSJI), James Goldston, among other senior OSJI representatives, and speakers from Kenya, Paraguay and Malaysia shared experiences. On day 3, KI led a session on PIL in Kenya more broadly, though with some focus on land issues. Many local organisations participated.

KI participated in various legal caucuses and strategy meetings convened by other organisations with which it has been working including National Gay and Lesbian Human Rights Commission, Save Lamu, Centre for Reproductive Rights (CRR), Power of Mercy Committee, Kituo Cha Sheria, United Nations High Commissioner for Refugees (UNHCR), Kenyans for Peace Truth and Justice (KPTJ).

KI’s advocates attended international trainings and seminars organized by partners such as the training on refugee and statelessness issues organized by UNHCR in South Africa and Nairobi; and the one on freedom of expression and the media organized by Media Legal Defense Initiative in Uganda in August 2016.

7. KI Developing and Sharing Knowledge

KI has a considerable accumulation of knowledge and experience, drawing on both its members’ past experiences, on our experience of litigation and on the research that we carry out, including for that litigation. One of KI’s programmes involves sharing that knowledge and experience in various ways.

Working with the Judiciary (including the Judiciary Training Institute (JTI))
The JTI is the agency for carrying out this

Article 172
(1) The Judicial Service Commission….
(d) shall….prepare and implement programmes for the continuing education and training of judges and judicial officers.

“...the fight against terrorism must be conducted in strict adherence to the letter and spirit of the Constitution, and the law....”
responsibility of the JSC and has been playing a major role in the whole judicial transformation process and Katiba Institute has been delighted, and honoured, to be able to contribute to this. KI has sometimes taken a lead role in organising seminars, while KI members have frequently spoken at JTI seminars organised by the Institute or others.

In partnership with the JTI, KI held a seminar in September 2015 in Nairobi on "Strategies in adjudicating and resolving disputes on devolution; and comparative lessons from Canada and South Africa on resolving inter-governmental relations (devolved governance) disputes." The objective of the seminar was to lay the basis for conversations between the judiciary and other stakeholders on the contributions that judges can make towards the realisation of the implementation of devolved governance. The presentations at this and an earlier seminar held in 2014 led to the development of the publication: Animating Devolution in Kenya: The Role of the Judiciary described above. Also in September 2015 there was a JTI and KI seminar in Kilifi for judges “Emerging Issues in Devolution Jurisprudence in Kenya”.

Other collaborative seminars have included one for judges of the Employment and Labour Relations Court held in September 2015, aimed at reflecting on whether the jurisprudence emerging from their court is in consonance with the Constitution, its values and the lived realities of the people of Kenya.

In February 2015, KI partnered with the JTI and a number of civil society organisations to host a training seminar on “Human Rights Adjudication and the Role of International Law and National Constitutions: the Journey to the Realisation of the Protocol on the Rights of Women in Africa.” Our board member, Dr. Linda Musumba, was one of the key speakers.

In May 2015 Katiba Institute partnered with Centre on Law and Social Transformation, Chr. Michelsen Institute, Harvard University’s FXB Center for Health and Human Rights, the Salud Derecho (World Bank), NORAD and the Judiciary Training Institute to organize a Global Judicial Colloquium on the Right to health. The colloquium brought together judges and adjudicators from different jurisdictions in recognition of the role of courts in contributing to the advancement and understanding of the right to health and health rights adjudication.

Within the review period, KI staff and Board members also participated and made presentations at numerous JTI training events on different thematic issues, including public interest litigation, the death penalty and alternatives, fair trial, equality and non-discrimination, socio-economic rights, devolution
and a number of judges, magistrates and law clerks induction meetings.

Jill Cottrell Ghai is a member of a Judiciary Committee tasked with preparing a Bench Book for the Judiciary on Criminal Trial, especially in the light of the Constitution of Kenya 2010. This, like *101 Things you wanted to know about the Police but were too afraid to ask*, began with the Commonwealth Human Rights Initiative, which has prepared a Fair Trial Manual for India, but it eventually became a judiciary project. The Bench Book will be published in 2017.

**Devolution related events**

In addition to the various seminars for the judiciary just described, KI has been involved in a number of other activities related to devolution.

*Forum on devolved governance with CECs, MCAs and Nakuru based civil society*

KI, in partnership with other civil society groups in Nakuru conducted a two day forum in May 2015 on devolution for the Members of the County Assembly (MCAs) and the County Executive Committee (CEC) members. The forum focused on a range of issues including the coordination of intergovernmental relations; powers and functions of county governments; public participation at the county government affairs; human rights responsibilities of county governments; county legislative relations and development and the oversight role of the county assembly.

The forum elicited various issues including complaints about the lack of adequate public involvement in county plans and activities; the involvement of MCAs in the implementation of projects; the weakness of the Senate, which lacks powers to protect the counties adequately; the involvement of the MPs through the constituency development fund, some of whom spend the money as their own; and the lack of knowledge among constituents about many aspects of devolution.

*Role of Non-State Actors in Implementation of Devolution*

KI in partnership with the Devolution Forum, The Institute for Social Accountability (TISA) and The Africa Centre for Open Governance (AfriCOG) organised a two day conference in Nairobi in April 2015, on the role of non-state actors in the implementation of devolved governance in Kenya. It was aimed at providing civil society, the private sector and other stakeholders with an opportunity to review the progress so far in the two years of implementation of the devolved system of government.

The forum also focused on the processes of allocation of county resources, county public finance management and intergovernmental fiscal relations; and how independent Constitutional Commissions had performed on constitution implementation. A particular focus was the role that various non-state actors are playing in the implementation of devolution and the challenges and opportunities in ensuring effective implementation.

The Council of Governors organises a major National Devolution Conference annually and KI made presentations on accountability at the 2016 Conference. KI also spoke to county executive members on the right to housing, in a meeting organized by the Council of Governors in Kericho, as a pre-activity to the 2017 annual National Devolution Conference.

Katiba Institute (KI) partnered with International Budget Partnership (IBP) in a workshop in Isiolo on oversight and accountability in management of county finances. The workshop took place on 9 August 2016. The presenter from the IBP made an analysis of the Budget Making Process and the Development of the Annual Development Plan (ADP) and other Related Documents.

*Equity Week*

With International Budget Partnership, the Society for International Development, and the Youth Congress, KI hosted “Equity Week” in September 2016 intended to stimulate a national conversation
Prof. Yash Pal Ghai speaking during the launch of Democracy and Human Rights Programme

about the promise of more equitable development enshrined in the 2010 constitution. KI’s Conrad Bosire was very involved in the organisation, and spoke on court decisions on equity, and Waikwa Wanyoike on the Constitution and equity, while Yash Pal Ghai gave the keynote address. Most of the events were well attended and the discussions were lively.

Other seminars and workshops

Alone or in collaboration with other organisations, KI has been involved in a variety of essentially educational activities on the constitution, targeting various sectors of the community, professional, governmental, non-governmental and the broader public.

Forum on the best-practices on appointment of judges

KI in partnership with Strathmore University hosted a forum, in Nairobi in November 2015, on international best-practices that guide judicial appointments. It was building on the recently produced report, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research undertaken by Bingham Centre for the Rule of Law by J. van Zyl Smit). The speakers included Professors Hugh Corder from South Africa and Charles Sampford from Australia.

Earlier in 2015 Yash Pal Ghai and Jill Ghai attended a conference at the University of Cape Town in connection with the judicial appointments project. Yash Ghai spoke to a paper on judicial appointments in Kenya authored by Linette du Toit, Maxwel Miyawa and himself.

Speaking at other meetings at home and abroad

*Democracy and Human Rights Programme*: The Democracy and Human Rights programme is a 3 year programme funded by the Swedish Embassy in Kenya and coordinated by Diakonia. The programme is aimed at strengthening governance institutions to be more accountable and advocate for stronger democratic culture and increased accountability. Prof Yash Pal Ghai spoke about the Democracy and Human Rights Programme, on behalf of the 11 partner organisations, during the launch of the programme on 30 October 2015 in Nairobi.

A second annual conference was held in December 2016 at which Waikwa Wanyoike of KI presented on “Realizing the Constitution’s objectives through litigation” under the broad theme of ‘Successes, challenges, and experiences in implementation of the constitution programme over the last one year’.

*The Constituency Development Fund*
This is a topic closely related to devolution, as noted in the section on litigation. KI’s involvement in that litigation has led to invitations to speak at some meetings. Ben Nyabira (of KI) and Rachael Gichuki of The Institute for Social Accountability (TISA) jointly wrote a paper based on the court ruling that declared the Constituency Development Fund unconstitutional, and looking at global trends on social fund and local governance. The paper considered whether the National Government Constituency Development Fund Act, 2015 aligns with constitutional principles of separation of powers and functions, the principle of subsidiarity and of prudent use of resources and proposed viable options to be considered while structuring social funds in Kenya.

Secondly, Waikwa Wanyoike and Ben Nyabira (both KI staff) participated in a strategy conference for civil society and other stakeholders on the Constituency Development Fund, on 16 June, 2015 at the Desmond Tutu Conference Centre. Waikwa was one of the panellists. He elaborated upon the ruling, and its implications, in a case in which KI represented TISA as noted above in the section "KI in Court"

Right to Health

In November 2015, Jill Cottrell Ghai participated in a meeting organised by KELIN on their draft Training Guide for Civil Society on Monitoring the Implementation of the Right to Health under the Constitution of Kenya, and also submitted written comments.

In April 2016, Jill Cottrell Ghai and intern Tiffany Smith attended a major conference organised by KELIN on “The Role of Civil Society and Communities in realising Universal Health Coverage in the East African Community using a Rights Based Approach”. The principal speaker was Alicia Ely Yamin, a leading authority on the right to health.

Academia and the Constitution

In April 2015 the now defunct Commission on the Implementation of the Constitution (CIC) held a conference in Kisumu on “Deepening Constitutionalism in Kenya: Engagement of the Academia”, aimed at among other purposes, encouraging the involvement of academics in implementation of the constitution, especially since the CIC anticipated, accurately, that it would not have its term renewed when it expired at the end of 2015. Yash Ghai gave the keynote speech.

Advocates’ Colloquium on Contemporary PIL Issues

This colloquium was held at Mombasa from 26th- 27th February 2015. Topics covered were interpretation of the Constitution, enforcing the Constitution through PIL, economic and social rights litigation, litigating devolution, and research methodology for PIL. Presenters were experienced lawyers and academics from outside Katiba Institute, as well as five KI members.

Other meetings

Jill Cottrell Ghai spoke on “Women’s Representation” at a seminar on Electoral Integrity at Strathmore University in January 2015. In January 2016, Yash Ghai spoke—on the Kenyan and Indian Constitutions—at an Indian Republic Day celebration in Nairobi, hosted by the Indian High Commission. Yash also spoke at a meeting of the Kenya Museum Society in November 2016 on “Kenya’s Constitution: Origins, Objectives and Impact”. He gave the Julius Osego Memorial Lecture in Nairobi in July 2016. This lecture is in honour of a Ugandan police officer serving with the UN who was killed in Sudan, and is organised by the University of Pretoria and the other universities (including the University of Nairobi) that collaborate in the International Human Rights LL.M. of the former.

Civic education

As a small organisation, KI is unable to do as much as it would like in terms of grassroots engagement on the Constitution. This is something we believe is essential for the constitution to take root in the community, especially as public enthusiasm for the constitution is greater than that of government, but the public needs more knowledge about the constitution and how to claim their rights and
fulfil their responsibilities under it. KI publications are used by other organisations in their own civic engagement programmes. KI has been actively involved in or participated in organising some civic education activities.

**International Human Rights Day:** KI, KNCHR and various other organisations held several events at Uhuru Park to commemorate the International Human Rights Day on 10th December, 2015. KI conducted public education on the Constitution by disseminating publications and responding to constitutional issues raised by members of the public. The theme of the event was “Kenya: Our Rights, Our freedoms, Always”. The event was graced by the Attorney General.

**Isiolo workshops:** On 28th and 29th November 2016, KI held two workshops in Isiolo involving participants from various groups in Isiolo including their women Members of the County Assembly, women aspirants, local civil society organisations that advocate for the rights of women and the girl child, and other key opinion leaders in the county. It covered the history of women’s representation in Kenya, the roles of women representatives, and the successes, challenges and opportunities for the women representatives in Isiolo County. This event was part of a project funded by the Canadian Embassy under the Canadian Fund for Local Initiatives programme, on enhancing inclusive and accountable governance through the participation of Women and Girls in Isiolo County.

**Zinduka Festivals:** KI convened the ‘Constitutionalism in East Africa’ forum during the 2015 Zinduka Festival held in Arusha between 23 - 28 November 2015. KI partnered with Jukwaa La Katiba (JUKATA), a civil society organisation in Tanzania working in the area of constitutional education. They organised forums discussing the state of constitutions, constitution making and constitutionalism in the region; the role of civil societies in constitution making and constitutionalism; public participation in constitution making and setting constitutional standards within the region. KI also participated in the November 2016 Zinduka Festival in Kampala themed “African rising? Change from below” and focusing on integration within East Africa while looking into the unique challenges facing East Africans.

**The KI Website**

The website is an important tool for sharing information and research. Most Katiba Corner pieces are posted there soon after they have appeared in print (you can also find them on The Star website). In the Research and Publications section there are several publications of book length or working paper size that can be downloaded.

A click on “Resource Centre” at the top of the page can take you to “Archives”: a large collection of material on the constitutional history of Kenya, and on the constitution making process. It comprises brief introductory accounts, and many original documents, from the Constitution of Kenya Review Commission process, through the Bomas National Constitutional Conference, the “Wako Draft” and the 2005 referendum, the National Accord after the post-election violence of 2007-8, the Committee of Experts’ process to the 2010 referendum and the promulgation of the new Constitution. An invaluable resource for the historian, the student and the interested citizen. This was a joint project with the Kenya National Library Service and British Institute of Eastern Africa.
Overseas presence

It is very gratifying to realise that KI’s contribution to the development of constitutionalism in Kenya is recognised outside the country, which has led to invitations to participate in overseas events.

A Regional Forum, “The role of assemblies in fostering social cohesion and peaceful political transformations in Arab States”, held in Tunisia in September 2016 was organized by the United Nations Development Programme, The Global Centre for Pluralism and The International Institute for Democracy and Electoral Assistance (IDEA). Waikwa Wanyoike and Ben Nyabira attended and Waikwa made a presentation on “How to support inclusive and efficient institutions to ensure peaceful transition and social cohesion”.

Monitoring & Learning Processes for Responsible Land Governance: The German Institute for Human Rights, Think Tank for Sustainability and the Institute for Advanced Sustainable Studies (IASS) organized a forum on October 19th, 2016 in Rome, Italy, on monitoring and learning process for responsible land governance. Christine Njeru-Kuria of KI presented at a meeting of the donor working group on land as a partner organisation to IASS in a project where the IASS seeks to roll out a programme in 6 African countries on “human rights monitoring and learning processes for responsible land governance”. A further meeting was held in Kenya on 28th November and 1st December 2016 at which Katiba Institute presented on the role of civil society in promoting effective land governance.

Appendix IV lists a few other overseas or international events at which KI members were present.

Scholarly Forums

Interpretation Conference

Our last Report did not cover a major scholarly event: a two day international conference on Interpretation of Transformative Constitutions, supported also by the Kenya Human Rights Commission (KHRC) and the British Institute of Eastern Africa (BIEA). This was held in June 2014 in Nairobi. Speakers came from South Africa (Retired Justice of the Constitutional Court, Albie Sachs), Canada (Justice Robert Sharpe and Professor Kent Roach), Hong Kong (Justice Syed Kemal Bokhary), India (Professor MP Singh), Germany (Dr Matthias Hartwig), and the UK (Professor Jeffrey Jowell). The Chief Justice of Kenya, Dr Willy Mutunga, gave the opening address. The event was very well attended, by academics, activists and judges from Kenya and other East African countries. On the first evening, the Alliance Française screened the film
“Soft Vengeance of a Freedom Fighter (Albie Sachs and the New South Africa)” which was followed by an interesting discussion. The main conference ended with a panel discussion facilitated by our board member, and television personality, John Sibi-Okumu. On the third day, there was a session at the BIEA particularly on East African issues and involving young researchers from the region. Hon. Joseph Warioba, former Prime Minister of Tanzania and Chair of its Constitution Commission 2013 spoke on “Tanzania’s Quest for a New Constitution: Process and Substance”, and Prof. Jeffrey Jowell on “Creative Tension? Administrative Justice vs. Freedom to Govern in the UK”. In between, half a dozen younger scholars spoke about their research.

**Lecture on Disability Law:** KI jointly sponsored a lecture on Disability Law with, and at, the Riara Law School on 27 October 2015. The guest lecturer was the District Judge Robert Gettleman of Illinois, USA. Jill Cottrell Ghai presented on the Kenyan dimension on behalf of KI.

**Maccabean Lecture:** The Maccabean Lectures a organized and hosted by the British Academy and the first lecture was delivered in 1956. In 2015, Prof. Ghai was selected to deliver the Lecture at the British Academy in London. His topic was “State, Economy and Society: Reflections on Constitutions in Africa”. Due to the relevance of his lecture to Kenya, KI requested Prof. Ghai to deliver the Lecture in Nairobi, which he did on 5 November 2015 at the British Institute in Eastern Africa (BIEA). Prof. Ghai used social science concepts of state, economy and society, to explain the causes of the failure of constitutionalism in most African countries.

**University of Nairobi Research Fair:** KI participated in the Research Fair held in October 2015 at the University of Nairobi, School of Law. During the event, Ben Nyabira spoke to the students about constitutional research and the role KI is playing in constitutional implementation.

**Article 47: Guide for the Public Service.** In 2016 KI held the first event in an ongoing project on Article 47 of the Constitution which provides in 47(1): “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” The ultimate objective is to produce a Guide for Kenyan public servants on ensuring this right is respected. The event was a workshop held at the Kenya School of Government (KSG) on the way forward on this project.

The speakers included Professor Cora Hoexter on the South African experience on their provision which was the model for Kenya, Professor Migai Akech on Kenya, Steven Bramley, UK Government Legal Department lawyer on the UK experience with their Guide known as The Judge Over Your Shoulder (JOYS for short) which is the model for the Kenyan project. Others were Jan van Zyl Smit, of the Bingham Centre for the Rule of Law, London on JOYS overseas, Yash Pal Ghai on the Constitutional Perspectives on Article 47 and Judicial Review, Jill Cottrell Ghai of KI on Kenyan cases on Article 47.

Partnering organisations were, first, the Commission on Administrative Justice (Ombudsman) who spoke on the nature of and mode of response to complaints received by them. Second, the Public Service Commission raised the need to ensure that the efforts of KI should fill a gap in the training material as opposed to replicating existing material. And the KSG emphasized its role in training; consultancy and advice giving to both the National and County Governments, the private sector as well as non-governmental Organisations (NGOs). They emphasized the need for drafters of the manual to look at it from the perspective of the actors, i.e. how to protect the implementers of those decisions. The speakers made valuable contributions on the work of their institutions and the Attorney General, Dr Githu Muigai gave the keynote address. The event was funded from our Diakonia grant and by the UK government project ROLE-Rule of Law Expertise.

**Book launches**

The major publications that KI has produced were formally launched. These events serve the purpose of recognising the work of the authors, introducing the new publication to interested individuals and groups, and obtaining media publicity for KI’s work, and thus spreading the word a little wider. The launches took various forms.

The two books: “National Values and Principles
Launch of the Kenyan-South African Dialogue on Devolution, from left: Professor Peter Wanyande Commissioner CIC; Jill Cottrell Ghai; Prof. Yash Pal Ghai; Prof. Nico Steytler University of Western Cape; Dr. Conrad Bosire and Waikwa Wanyoike

of the Constitution” and “Understanding Devolution” based on Katiba Corner pieces in the Star were launched at an event at the Canadian High Commission, kindly hosted by the High Commissioner, H.E. David Angell. Dr. Willy Mutunga, The Chief Justice of the Republic of Kenya graciously launched the publications.

Animating Devolution in Kenya: The Role of the Judiciary, published by the Judiciary Training Institute in collaboration with Katiba Institute and the International Development Law Organisation (IDLO) was launched (along with the Case Digest on Devolution published by the Council of Governors and IDLO) at a very different type of event at the Serena Hotel in December 2015 at which the Chief Justice spoke.

Another devolution book Kenyan-South African Dialogue on Devolution had its launch in KI’s own garden one evening in March 2016. It was a great pleasure to have Professor Nico Steytler, the South African editor, present. He was in Nairobi to speak to a gathering of high ranking Somali politicians and officials at a training workshop organised by the Ministry of Interior and Federal Affairs of the Federal Government of Somalia and the Forum of Federations on intergovernmental relations and cooperative government. All the 40 participants had received a copy of the book, and at the launch the
former Somali Minister of Interior and Federal Affairs, Abdullahi Godah Barre, spoke about the value for his country of comparative experiences with devolution as his country seeks to rebuild the state along federal lines.\textsuperscript{4}

The \textit{Teens Guide to the Constitution of Kenya} written by Sandra Ochola, was launched at State House Girls High School, with an audience of girls of the school and other guests including the High Commissioner for South Africa HE Ms KA Mqulwana and Justice Martha Koome of the Court of Appeal.

Finally, \textit{101 Things You Wanted To Know About The Police But Were Too Afraid To Ask} was launched on 17 May 2016. The Chief Justice gave the keynote speech, and the Inspector General of Police sent a representative who gave remarks on his behalf.

8. Other activities and events

\textbf{Accountability forums under the Diakonia projects:}\KI held a half day meeting at Amnesty International Offices on 10 September 2015 that brought together all the partners in the Democracy and Human Rights Programme and other stakeholders in the projects in which KI is involved in. The meeting explained the projects that KI is involved in under the Democracy and Human Rights Programme. KI held a similar accountability forum in Isiolo County in July 2016.

\textbf{Internal Review of the Democracy and Human Rights Programme:}\The meeting took place in Nyeri between 17th and 19th December 2015. It focused mainly on reviewing KI’s implementation of the D&HRs programme but also other programmes and planning the way forward. Several recommendations that would help improve the operations of KI were made. A follow up mid-year review was held in July 2016 in Nairobi.

KI also participated in meetings held by its different donors including Diakonia and the Canadian High Commission to review the status of implementation of activities as well as the audit of the funding strategy in the case of the latter.

KI has an activist side, and has participated in various civil society activities including participating in protests about the murder of the International Justice Mission lawyer Willie Kimani, his client and a taxi driver, and in a march in support of claims for citizenship of the Makonde people.

\textsuperscript{4}We have drawn on the account on the website of Prof. Steytler’s home institution, the Dullah Omar Institute, University of the Western Cape.
We have a link with the Mathare Social Justice Centre in one of Nairobi’s informal settlements. Yash and Jill Ghai have attended several of their events including joining them in distributing copies of *101 Things You Always Wanted To Know About The Police But Were Too Afraid To Ask*, in Mathare.

The ‘Organisation for Inter-cultural Education Kenya’ (AFS) visited KI’s offices on 24 November 2015 as part of their “Sawasawa program” which is about creating a meaningful way to build relationships and strengthen collaboration in the region. The group was composed of 20 delegates including from their partner organisations in Egypt, Ghana, South Africa and Kenya. Prof. Yash Pal Ghai who spoke on behalf of KI elaborated upon the role KI is playing on “Katiba Development in Kenya; Challenges and Achievements so far”.

**Visitors to the office have included** a delegation from the Bomet County Government where a number of issues were discussed including the Intergovernmental Relations (IGR) process. In August 2016 the former Kenya Chief Justice Dr. Willy Mutunga visited. He was instrumental in the setting up of KI: as Director of the Ford Foundation in Nairobi he awarded us the original grant that enabled the fulfilment of an idea he had supported for several years, and over the years he has been very supportive, as is clear from the number of times he has "launched" our publications.
PART III: Administrative Matters, Challenges and Future Plans

One of KI’s achievements is the completion of the transition to an independent body from the initial hosting of Akiba Uhaki. The Board of Directors also regularized its annual board meetings and provided policy direction including adoption of the Strategic Plan. Among the future plans of the board is the adoption of institutional operational procedures, board manual and other organisational documents that will push the institution forward.

We also developed our Strategic Plan 2015-2019, developed at a time when KI has developed greater clarity on its vision, understands the contextual factors affecting its work and is able to assess and appreciate the interventions likely to have the most impact in realizing its goals. KI has also been able to establish its visibility and credibility as an authoritative organisation in engaging in and advising on constitutional implementation matters. KI also continues to strengthen its management systems and programme work. The plan sets out KI’s institutional goals as well as its objectives, vision, mission and slogan. The Strategic Plan underscores KI’s core vision of social transformation through constitutionalism, as well as KI’s theory of change which is hinged on implementation of the Constitution and establishment of a culture of constitutionalism.

1. Ongoing projects and future plans

At the end of 2016 a number of projects were ongoing and future outputs and outcomes were anticipated. The project on Article 47 (fair administrative justice) has proceeded more slowly than we had anticipated, but the intention is first to produce a small book from the papers from the initial workshop described in this report. This will be followed by the planned Manual on the Right to Fair Administrative Action. Once this is finalized, it is anticipated that KI will work with the Public Service Commission and the Kenya School of Government to conduct trainings. Following on from the 2013 book, Ethnicity, Nationhood and Pluralism: Kenyan Perspectives, we have been working on another project supported by the Global Centre for Pluralism in Ottawa: “National unity, identity and pluralism in the implementation of the 2010 Constitution”. This has also been moving slowly, but several draft chapters are available and our plan is to publish these as occasional papers, especially on our website, and eventually in the form of a book.

At the end of 2016, KI was involved in the development of a pamphlet for women representatives in the county assembly and for members of the public to understand the role of women representatives and hence where to participate in enhancing inclusive and accountable governance. This is linked to the larger project targeting Isiolo county, some activities of which are described in this report. Some of the experience will be included in the pamphlet.

The regular weekly Katiba Corner column continues, and we anticipate producing some other books out of these articles.

Litigation work will continue to form a central part of our activities. Many of the cases dealt with in this report have not been completed, and others are being discussed internally and with other organisations.

“KI’s theory of change is hinged on implementation of the Constitution and the establishment of a culture of constitutionalism”

- KI’s Strategic Plan 2015 -2019
2. Financial support from development partners

In 2015 and 2016 KI’s work was supported by a number of donors. They included:

<table>
<thead>
<tr>
<th>DONORS</th>
<th>PURPOSE</th>
<th>USD</th>
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</thead>
<tbody>
<tr>
<td>Akiba Uhaki Foundation</td>
<td>Publication of the <em>Teen's Guide to the Constitution</em></td>
<td>4,350</td>
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<tr>
<td>American Jewish World Service (AJWS)</td>
<td>Litigation support for LAPSSET, Aweer Community &amp; Lekamario cases</td>
<td>49,000</td>
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<tr>
<td>Canadian Fund For Local Initiative (CFLI)</td>
<td>Publications &amp; Enhancing Inclusive &amp; Accountable Governance</td>
<td>44,813</td>
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<tr>
<td>Canadian High Commission</td>
<td>Budget support for Devolution &amp; Protection of Minorities book launch</td>
<td>800</td>
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<tr>
<td>Canadian High Commission (DFATD)</td>
<td>Publications on Devolution &amp; Constitutional Values</td>
<td>37,072</td>
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<tr>
<td>Danish Institute Against Torture (Dignity)</td>
<td>Publication of the 101 <em>Things…. About the Police</em> &amp; Development of an App and Posters</td>
<td>35,536</td>
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<td>Embassy of Sweden through Diakonia</td>
<td>Governance and Human Rights Programme</td>
<td>185,616</td>
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<tr>
<td>Ford Foundation</td>
<td>Project support</td>
<td>50,000</td>
</tr>
<tr>
<td>Global Centre for Pluralism (GCP)</td>
<td>Research project on the Implementation of the 2010 Constitution (focus on pluralism)</td>
<td>28,335</td>
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<td>Harvard School of Public Health</td>
<td>Budget Support for Global Judicial colloquium on Public Health</td>
<td>65,000</td>
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<td>International Development Research Centre (IDRC) Akiba Mashinani Trust</td>
<td>Research on Land Issues &amp; Unlocking the Poverty Penalty</td>
<td>17,168</td>
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<tr>
<td>JUTA</td>
<td>Book Launch: <em>Kenya-SA Dialogue on Devolution</em></td>
<td>1,636</td>
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<td>Open Society Initiative Eastern Africa (OSIEA) (2015-2016)</td>
<td>Core Funding towards Promoting Constitutional Gains Through Public Interest</td>
<td>237,000</td>
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<td>ROLE UK</td>
<td>Budget Support for the Article 47 Workshop</td>
<td>1636</td>
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<td>Swedish International Development Cooperation Agency (SIDA)</td>
<td>Short term bridge funding</td>
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<td>United States Institute of Peace</td>
<td>Publication of the <em>Kenya-SA Dialogue on Devolution</em></td>
<td>10,000</td>
</tr>
<tr>
<td>Others</td>
<td>Contributions towards KI’s programmatic work</td>
<td>74,559</td>
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<tr>
<td>TOTAL</td>
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<td>904,266</td>
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</table>
## APPENDIX I: Katiba Institute in Court: Summary of Cases

<table>
<thead>
<tr>
<th>Number in this Table; Case name, number and reference; Katiba Institute’s role</th>
<th>Major facts and constitutional issues</th>
<th>What had happened by end 2016?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Protecting Rights</strong></td>
<td></td>
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</tr>
<tr>
<td>1. Ruwa v. Internal Security Minister Civil Appeal No. 275 of 2012. KI was <em>amicus curiae</em> in the High Court but represented the respondents in the Court of Appeal</td>
<td>The Government declared the Mombasa Republican Council (MRC) to be an organized criminal group and banned it. Issues: right to fair administrative action; freedoms of expression and assembly.</td>
<td>The Court of Appeal gave judgment on 8th July 2016—upholding the High Court decision that the banning of the MRC was unconstitutional.¹</td>
</tr>
<tr>
<td>2. Satrose Ayuma v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme Petition 65 of 2010, High Court at Nairobi</td>
<td>Residents (pensioners of the Railways and tenants) who had lived for many years in the Muthurwa Railways quarters were given notice to quit, in order that an estate for far wealthier people, and a shopping mall, could be built. Main issue: Right to housing</td>
<td>The High Court gave judgment in 2013.² It directed the government to apply UN guidelines on evictions;³ that parties should meet to settle the terms of eviction; the Attorney-General to report on plans to fulfil the rights to housing and water. After an application by the Kenya Railway to the court to interpret its judgment, the court ordered the residents to vacate by 30th April 2016.⁴ The Court of Appeal declined to order a stay of execution of the judgment that the petitioners should leave.⁵ No definite date was given by which the people should leave.</td>
</tr>
<tr>
<td>3. Justus Mathumbi and others v. Attorney General and others, Petition 584 of 2014</td>
<td>The petitioners challenged notices issued by the Ministry of Land, Housing and Urban Development evicting them from housing for public employees at Shauri Moyo.</td>
<td>The Court gave temporary orders restraining the government from evicting the Petitioners and the hearing for the substantive case was pending.</td>
</tr>
<tr>
<td>4. Muungano wa Wanavijiji v. Attorney General Petition 288 of 2012</td>
<td>The case sought to block illegal evictions of squatters living in informal settlement of Mukuru kwa Njenga, Mukuru kwa Reuben. The Petitioners also ask for revocation of titles to land in Mukuru because of non-compliance with the terms of ownership (namely to establish light industries within 2 years of issue of the title). The case focuses on the right to housing.</td>
<td>The case was yet to be heard.</td>
</tr>
</tbody>
</table>

³See also Justice Musinga in his interlocutory ruling at [http://kenyalaw.org/caselaw/cases/view/74154/](http://kenyalaw.org/caselaw/cases/view/74154/).
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<tr>
<td>5. Muslims for Human Rights (MUHURI) and Haki Africa v Inspector General of Police and others, Petition 19 of 2015, High Court at Mombasa KI participated as amicus curiae.</td>
<td>A Gazette Notice was issued saying that the Inspector-General of Police intended to recommend to the Cabinet Secretary for Interior and Coordination that MUHURI and Haki Afrika be declared “specified entities” under the Prevention of Terrorism Act. Issues: whether there was a violation of the POTA and Articles 40 (right to property) and 47 (on fair administrative action).</td>
<td>In November 2015, the court held that the publication of the Gazette Notice was a violation of the petitioners’ rights to fair administrative action and their right to own property, as well as beyond the powers under the Act, and ordered the unfreezing of their bank accounts.6</td>
</tr>
<tr>
<td>6. Eric Gitari v Non-Governmental Organisations Coordination Board, Attorney General and others, Petition No. 440 of 2013 KI was amicus curiae. The respondents have filed an appeal.</td>
<td>The NGO Coordination Board refused to register an LGBTIQ organisation (the National Gay and Lesbian Human Rights Commission), on the basis that the names proposed were unacceptable because they contained the words gay and lesbian. Issues: freedoms of association, expression and equality.</td>
<td>Judgment was delivered in 2015: the High Court held that the respondents had violated the petitioner's right to association and directed the Board to comply with its constitutional duty under Articles 27 (equality) and 36 (freedom of association), and the Non-Governmental Organisations Co-ordination Act.7 Attorney General's appeal yet to be heard</td>
</tr>
<tr>
<td>7. John Matitenge v Attorney General and Another Petition 234 of 2016 &amp; Eric Gitari v. Attorney General Petition 150 of 2016 Katiba is amicus curiae in the case.</td>
<td>These petitions challenge the constitutionality of laws in the Penal Code that criminalize “carnal knowledge against the order of nature” on the basis that it is used to criminalize sexual relations in same sex relationships. The law is challenged on the basis that it violates rights to dignity, privacy, equality and health.</td>
<td>The case had not been heard.</td>
</tr>
<tr>
<td>8. Boniface Mwangi v Attorney General Petition 544 of 2015 KI advocates acted for the petitioner.</td>
<td>The petitioner organised a protest against corruption to be staged at the entrance (Gate A) of State House and police declined to allow a protest at that venue. Issues: Whether the right to protest (Article 37) includes the right to choose the venue of the protest. Whether there was a breach of Art. 47 (fair administrative action).</td>
<td>The matter was heard and judgment was pending. [But in 2017 the High Court decided there was a breach of Article 47, by failure to give reasons for refusal, and because the Officer Commanding (OCPD) Kilimani exceeded his powers, but Article 37 was validly limited (but it did say the arguments about whether the law limiting the right was unconstitutional had not really been made).8</td>
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**Protecting devolution**

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<tr>
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<tr>
<td>9. Okiya Omtatah Okoiti &amp; another v Attorney General &amp; 6 others, Petition 593 of 2013 KI was amicus curiae at the High Court, as in the appeal before the Court of Appeal. - Okiya Omtatah and Another v Attorney General and Others Civil Appeal No.362 of 2014</td>
<td>The extent to which health services are devolved to counties under the Constitution.</td>
<td>The High Court held that the petitioners had not established that there was any violation of the Constitution in relation to how health facilities have been classified and assigned between national and county governments. The appeal was yet to be heard by the end of the reporting period following several court adjournments.</td>
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</tr>
</thead>
<tbody>
<tr>
<td>10. The Institute for Social Accountability and the Centre for Enhancing Democracy and Good Governance v. The Constituency Development Fund et al, Petition No. 71 of 2013; Civil Appeal No. 92 &amp; 97 of 2015 KI represented the petitioners.</td>
<td>Whether the Constituency Development Fund Act (CDF) is unconstitutional on the basis that it violates the constitutional principles of public finance, separation of powers, public participation, good governance, accountability and that it is inconsistent with devolution.</td>
<td>A three judge High Court bench agreed with KI and declared the Act unconstitutional. It suspended the effect of the order of unconstitutionality for twelve months to allow the national government to remedy the defect. The Court of Appeal refused to stay the High Court's order. A new law was passed – which is now being challenged.</td>
</tr>
<tr>
<td>11. A. Wanjiru Gikonyo v National Assembly Petition 178 of 2016</td>
<td>This case challenges the new National Government Constituency Development Fund Act (NGCDF legislation):</td>
<td>A bench had been constituted by end of 2016 but the case was yet to be heard. The substantive petition is yet to be heard though in 2016 the High Court stopped the disbursement of ten billion of the thirty five billion assigned to the fund.</td>
</tr>
<tr>
<td>12. Wanjiru Gikonyo v National Assembly Petition 453 of 2015 KI acted for the petitioners.</td>
<td>The issue: the constitutionality of the Affirmative Action Social Development Fund which was established by the Cabinet Secretary for Finance which according to the Regulations is to “complement the CDF Act”.</td>
<td>When the matter came up for hearing in 2016, the government had just changed the regulations setting up the scheme and removing most material that the petitioners had objected to. As a result the Judge was compelled to find there was no longer an issue to be tried.</td>
</tr>
<tr>
<td>13. Council of County Governors v Senate Petition 381 of 2014; Civil Appeal No. 200 of 2015 KI was amicus curiae.</td>
<td>Parliament passed an Act creating County Development Boards which would be involved in county development but which Senators would chair. Issue: did this conflict with the principles of devolution and separation of powers?</td>
<td>In 2015, the High Court declared the Act unconstitutional. The Senate's appeal is yet to be heard.</td>
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**Protecting the people's right to participate**

<p>| 14. Save Lamu (Mohammed Ali Badi and others v. The Attorney General), Petition No. 6 of 2012, KI is acting for the petitioners and identified a number of experts who have filed expert evidence with the Court. | This case challenging the government's failure to involve the people of Lamu in decision making on matters relating to LAPSSET (the Lamu Port Southern Sudan-Ethiopia Transport project), including about their relocation and compensation and environmental and social impact of the project. | The Chief Justice appointed a five-judge bench to hear the matter. No actual hearing had taken place by the end of 2016. |</p>
<table>
<thead>
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</tr>
</thead>
<tbody>
<tr>
<td>15. Eric Mutua v Principal Secretary, Ministry of Energy and Petroleum, Petition 305 of 2012, consolidated with Petition No. 12 of 2014 (Formerly Nairobi Constitutional Petition No. 43 of 2014) High Court at Machakos</td>
<td>The case concerned plans to mine coal in Kitui. The issue is whether the process of contracting the mining companies was transparent and whether the government had engaged in meaningful public participation in violation of Article 10. Also: did Article 71 require parliamentary approval of the contract?</td>
<td>The case was heard in July 2014 and judgment delivered in September 2015. The petition was dismissed, including on the basis that Art. 71 was not yet in force, but the court ordered the respondents, the Attorney General, and Fenxi Mining Industry Company Limited to engage with the community giving reasonable opportunities for public participation during preparation of an Environmental Impact Assessment and the process of resettlement. The Court had earlier not allowed the case to be withdrawn because of its public importance.</td>
</tr>
<tr>
<td>KI was joined in the case as amicus curiae.</td>
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Proper functioning of the justice system

| 16. Trusted Society of Human Rights Alliance v Mumo Matemu & Others, Petition No. 12 of 2013 Supreme Court; and Katiba Institute/Intended Amicus Curiae, Trusted Society for Human Rights Alliance v Mumo Matemu & 3 others Civil Appeal No. 29 of 2014 | The original case was about whether the head of the Ethics and Anti-Corruption Commission was properly appointed (in view of aspects of his past record that cast doubts on his integrity). Now the issue is whether KI should have been permitted to appear as amicus curiae before the Supreme Court. | The main case was withdrawn. No date for hearing KI’s application on the question of amicus has been fixed. |
| We filed an application to vary/review the ruling by a two judge bench of the Supreme Court dismissing KI’s application to be amicus curiae. | | |

| 17. Judicial Service Commission v Speaker of National Assembly Petition 518 of 2013(High Court); Civil Appeal No. 343 of 2014 | This case concerned the oversight role played by Parliament and its implications for independent commissions. Currently the issue is whether it was right to refuse KI’s application to be amicus curiae. | The appeal was part-heard in 2016. |
| KI made, unsuccessfully, an application to be amicus curiae. We filed an appeal challenging this refusal. | | |

| 18. Katiba Institute v. The Attorney General | In 2014 KI applied to be amicus curiae in a High Court case interrogating when Parliament can recommend removal of Judicial Service Commission members. The Court accepted the AG’s objection to our participation on the basis that KI was partisan since two KI Directors had published newspaper articles which explained some constitutional requirement of the process. KI appealed against this ruling. | The hearing of the appeal started in November 2016 but was yet to be concluded. |

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9 http://kenyalaw.org/caselaw/cases/view/117704/  
10 http://kenyalaw.org/caselaw/cases/view/95572/  
11 http://kenyalaw.org/caselaw/cases/view/110554/  
12 Judicial Service Commission v Speaker of the National Assembly & 8 others (2014) eKLR Petition 518 of 2013 http://kenyalaw.org/caselaw/cases/view/96884/
<table>
<thead>
<tr>
<th>Number in this Table; Case name, number and reference; Katiba Institute’s role</th>
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<tr>
<td>19. Hussein Khalid and 16 others v Attorney General &amp; 2 others, Civil Appeal No.1 of 2015</td>
<td>Seventeen activists (in the “Occupy Parliament” demonstration) were charged with cruelty to animals, conduct likely to cause a breach of peace, and riot during a protest against parliamentarians. Issues: did the police violate the constitution in the way they arrested and held the accused without giving reasons for 6 hours. Are the charges themselves constitutional? Was the magistrate right to refuse to hear constitutional arguments?</td>
<td>The challenge was unsuccessful before the High Court. The appeal to the Court of Appeal had not been heard.</td>
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<tr>
<td>KI is among the lawyers for the accused, in an application by the accused in the High Court. The criminal trial was stopped until the High Court case was decided. Is now on appeal to the Court of Appeal from the High Court judgment.</td>
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<td>20. Wilfred Olal and others v Attorney General High Court Petition No. 91 of 2014</td>
<td>A number of human rights activists were arrested by the police as they protested against corruption and impunity in the government. Issue is: whether the legislation under which the activists were charged is unconstitutional, for violation of the rights to assembly, association and expression.</td>
<td>Parties have filed submissions but the case could not proceed for hearing due to promotion of Justice Lenaola to the Supreme Court. Hearing at the High Court is pending.</td>
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<tr>
<td>KI was admitted in the case as amicus curiae.</td>
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<tr>
<td>21. Thirimbu Mwangi and Anor v. Attorney General High Court Petition No. 9 of 2014, Supreme Court</td>
<td>Whether the mandatory death penalty (MDP) is unconstitutional. This sentence must be imposed on anyone found guilty of murder, robbery with violence and a few other offences. There have been inconsistent decisions of earlier courts.</td>
<td>The hearing before the Supreme Court, in which KI participated, took place in December 2016 and the Court reserved judgment.</td>
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<td>This is a Petition brought by two persons convicted of murder and sentenced to death. KI was admitted as amicus curiae before the Supreme Court.</td>
<td>In December 2014, the National Assembly hurriedly published a Security Laws (Amendment) Bill 2014 in which it sought to amend 22 different pieces of legislation on the basis that those amendments were needed to support security operations. KI was one of the parties arguing that there was inadequate public participation, and that many specific provisions were unconstitutional on the basis of violation of rights including of expression, media, to bail, of an accused person to silence, and to be given notice of the prosecution’s case.</td>
<td>The judgment by a five-judge bench was given in February 2015. The court declared several sections of the Act unconstitutional, on the grounds mentioned in the previous column, and one section conflicted with the powers of the National Police Service Commission under the Constitution. But it held there had been sufficient public participation so the Act as a whole was not unconstitutional. KI’s appeal to the Court of Appeal had not been heard due to several adjournments.</td>
</tr>
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<td>22. Coalition for Reform and Democracy v Attorney General Petition 628 &amp; 630 of 2014; Civil Appeal No. 188 of 2015</td>
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<td>KI was admitted as an interested party and is now the lead party at appeal.</td>
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14 See the Court of Appeal’s grant of leave to appeal to the Supreme Court in this case [http://kenyalaw.org/caselaw/cases/view/118228/](http://kenyalaw.org/caselaw/cases/view/118228/). The decision on the appeal of the appellants in the Court of Appeal is at [http://kenyalaw.org/caselaw/cases/view/75428/](http://kenyalaw.org/caselaw/cases/view/75428/).


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<tr>
<td>23. Kenya Human Rights Commission, International Commission of Jurists and others v Attorney General, Uhuru Kenyatta, William Samoei Ruto and others, Petition No. 554, 573 and 579 of 2012</td>
<td>The issue now is whether the petitioners—who had failed in their public interest petition arguing that Uhuru Kenyatta and William Ruto were unfit to stand in the 2013 elections—should pay the costs of the respondents, as the court had ordered. These organisations have filed an appeal on the issue of costs.</td>
<td>The appeal on costs is pending, though in 2015 the Court of Appeal issued interim orders restraining the Respondents from enforcing the High Court decision on costs.</td>
</tr>
<tr>
<td>24. Karen Kandie v Allassane Ba and Shelter Afrique Petition 20/2013</td>
<td>This case alleged contravention of protection of the law and dignity by a woman who was physically assaulted by an employee of an inter-governmental organisation. KI wished to raise the constitutionality of law giving immunity to the employees of inter-governmental organisations.17</td>
<td>KI withdrew its application following strict rules established by the Supreme Court (the Trusted Society case, above) regarding the admission of amicus curiae.</td>
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<tr>
<td>25. David Kiptur Yator and others v Attorney General, ELC Petition No.6 of 2013</td>
<td>The petitioners (Sengwer people) challenge their forceful eviction from the Embobut forest and the recognition of their rights as forest dwellers depending on the forest for their livelihood.</td>
<td>The case was yet to be heard.</td>
</tr>
<tr>
<td>26. Joseph Lekamario and 248 others v African Wildlife Foundation, Kenya Wildlife Service and the former president Daniel Arap Moi, Civil Case No.154 of 2009, High Court in Nyeri; Civil Appeal No. 38 of 2016</td>
<td>The case concerns a large area of land in Laikipia that is occupied by a Samburu community. The plaintiffs challenged their forceful eviction from the land and are pursuing an adverse possession claim on the basis that they had lived on the land for a long time. In 2016, the petitioners applied for a site visit which the Court granted but required the petitioners to pay for the cost of the visit, including those of the Court - by helicopter.</td>
<td>The petitioners’ appealed against the helicopter ruling. Meanwhile the main case was concluded in November 2016 and judgment was pending.</td>
</tr>
<tr>
<td>27. James Masenge and Others v Attorney General and Others Petition 29 of 2016</td>
<td>This case involves ownership of land in Enoosupukia, in Narok County. It is about a parcel of land whose original allottees were evicted during the 1993 post-election violence. They seek to have the National Land Commission direct the Registrar of Lands to revoke the title deeds issued after 1993 and titles bequeathed to the original allottees.</td>
<td>The case is yet to be heard.</td>
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17 For the Court of Appeal decision see http://kenyalaw.org/caselaw/cases/view/107722/
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<td>28. <strong>Abdul Majid Ramadhan &amp; Others v KURA &amp; Others</strong> Petition 974 of 2016</td>
<td>This case seeks to stop construction of a road by the national government that passing through land that has been occupied by the Nubian Community in Kibra. The Community settled in Kenya over 100 years ago. The colonial government promised to award them land in Kibra as a gift for their help to the government during the First World War. The community has occupied Kibra ever since but they have not yet been given title to the land.</td>
<td>In 2016, the Court issued interim orders restraining Kenya Urban Roads Authority (KURA) from evicting those said to be on the road reserve.</td>
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<td>29. <strong>Coalition on Violence against Women (COV/AV) v Attorney General</strong> Petition 122 of 2013/PEV-SGBV case KI is amicus curiae.</td>
<td>Whether the Government and the Director of Public Prosecutions are liable for failure of the police to investigate and charge perpetrators of sexual violence during the post-election violence.</td>
<td>The case was partly heard in 2015 but the Judge was appointed to the Supreme Court. In November 2016 the case was sent to Justice Onguto for hearing.(^{18})</td>
</tr>
<tr>
<td>30. <strong>Kituo cha Sheria v Attorney General and others</strong> Petition 115 of 2013; Civil Appeal No. 108 of 2014 KI joined the case as amicus curiae.</td>
<td>In December, 2012, the Minister for Internal Security issued a Directive requiring all urban refugees to go and reside in refugee camps. Issue: whether Directive was constitutional</td>
<td>The High Court found the directive unconstitutional. The Attorney General appealed against the decision and appeal was heard in 2016 and judgment was pending.(^{19})</td>
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</table>

For the proper working of government under the Constitution

| 31. **National Land Commission v Ministry of Lands** Supreme Court Advisory Opinion No. 2 of 2014 KI was amicus in the case. | The National Land Commission requested the Supreme Court to clarify, in an advisory opinion, various aspects of the scope of the respective responsibilities of the NLC and the Ministry of Lands. | The Supreme Court gave its advice on independent constitutional commissions, the mandate and functions of the National Land Commission and commented extensively on public participation.\(^{20}\) |
| 32. **Katiba Institute & Another v. The Attorney General** Petition 331 of 2016 KI and AfriCOG are co-petitioners in the case. We also represent AfriCOG. | Whether over 200 appointments of chairs and members of various boards of state corporations by the President and Cabinet Secretaries are valid as made by the proper body when, under the constitution, the Public Service Commission through a competitive process should appoint. Appointments. Also whether at least 100 statutory provisions purporting to give powers to appoint to the President and Cabinet Secretaries are constitutional. | The case was filed towards the end of 2016. |
| 33. **Tax Justice Network v Cabinet Secretary Treasury** Petition 494 of 2014 KI advocates are part of the legal team representing Tax Justice Network. | Whether a double taxation agreement between Kenya and Mauritius requires parliamentary approval, and in any event whether it is an unconstitutionally imprudent agreement because it leads to avoidance of payment of Kenyan taxes by companies that trade in Kenya but are registered in Mauritius. | Argument was heard by the High Court in Nairobi in 2016 and judgment was pending. |

\(^{19}\) [http://kenyalaw.org/caselaw/cases/view/131951/](http://kenyalaw.org/caselaw/cases/view/131951/).  
| Number in this Table; Case name, number and reference; Katiba Institute's role | Major facts and constitutional issues | What had happened by end 2016?

| 34. Yash Pal Ghai & Another v Judicial Service Commission Petition 324 of 2016 | This case involved a claim for breach of the right to information held by the state under art. 35 of the Constitution. The information, requested by Yash Ghai and Samwel Mohochi of ICJ-Kenya, was about the criteria used to qualify candidates for the post of the Chief Justice, Deputy Chief Justice and Judge of the Supreme Court from the Judicial Service Commission. The case also involved a claim that the Commission had required more considerations than those required of the candidates by the constitution. | Judgment was given on 29th August 2016 with the Court ordering that JSC re-look at the shortlisting of those candidates who had not been shortlisted. The Commission appealed to the Court of Appeal. The appeal was yet to be heard. |

| 35. Law Society of Kenya v Attorney General and Another Petition 3 of 2016/Attorney General and the Law Society of Kenya Civil Application No.148 of 2016 | This case challenged the constitutionality of an amendment to the Judicial Service Act requiring the Commission to forward to the President names of three candidates for the post of the Chief Justice; the President would choose one to recommend to parliament for approval. | The High Court struck down the amendment on 26th May 2016. |

| 36. FIDA(K) v Cabinet Secretary, Ministry of Interior Security and Coordination & 2 Others Petition 385 of 2015 | Was the procedure used to dismiss Grace Kaindi, a Deputy Inspector General of Police, constitutional? This case was filed before the High Court. Grace Kaindi had also filed a case before the Industrial Court on the same issue. The High Court case was stayed pending the Industrial Court decision. | For fair gender representation |

| 37. Marilyn Kamuru, Daisy Amdany and Centre for Rights Education and Awareness (CREAW) v Attorney General and National Assembly, Petition 566 of 2012 | Is the cabinet unconstitutional because it has more than two-thirds of its members from one gender? | The judge ordered that any Cabinet he constituted in future must meet the two-thirds gender requirement. The judgment does not take effect until after the 2017 election. |

| 38. Katiba Institute & another v National Assembly & Another Petition 209 of 2016 | The case challenges the constitutionality of the laws that make provision for the recall of elected representatives; that is the Elections Act and the County Government Act. This is on the ground that the laws as passed do not facilitate the exercise of the right of recall as provided in article 104 of the Constitution. | Protecting democratic processes |

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21 http://kenyalaw.org/caselaw/cases/view/125135/.
22 http://kenyalaw.org/caselaw/cases/view/122379/.
23 http://kenyalaw.org/caselaw/cases/view/129670/.
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<tr>
<td>39. Maina Kiai v Independent Electoral and Boundaries Commission &amp; Another Petition 207 of 2016 KI joined as Amicus Curiae This case was filed by Maina Kiai, Khelef Khalifa and Tirop Kitur.</td>
<td>The petitioners argued that the law and regulations providing that the Chairperson of the IEBC is the returning officer for presidential elections is unconstitutional.</td>
<td>The case had not been heard by the end of 2016 [but judgment was given in favour of the petitioners in 201724].</td>
</tr>
<tr>
<td>40. Coalition for Reform and Democracy v. Attorney General, Pet. 476/2015 (High Court) KI filed an application for joinder as an interested party</td>
<td>Whether the power of the President to return Bills to Parliament is being misused because it enables him to be a legislator.</td>
<td>The application was yet to be heard.</td>
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**Protecting the rights of children**

| 41. Oscar Sang v Attorney General Petition 6 of 2015 KI is Amicus curiae in the case. | Whether the failure of the state to provide legal representation to children in conflict with the law is a violation of their human rights. Whether substantial injustice will occur if a child in conflict with the law is not provided with legal representation. | The case had not been heard due to several adjournments notwithstanding that parties had filed their submissions. |
| 42. Charles Maturi Macharia (Suing as the Next Friend of and on Behalf of Christine Wangare Maturi) v Standard Group and 4 Others Petition 56 of 2013 KI represented the petitioners. | The media published pictures of underage students from during court proceedings in which they had been charged with arson. Issue: whether this infringes the children’s right to privacy. | The case had been heard by the end of 2016 but awaits judgement. |

APPENDIX II: The Star Katiba Corner Articles 2015 and 2016

2015
January 10: “Judicial Interpretations of the Right to Human Dignity: Part II” Yash Pal Ghai
January 17 “Equity” Jill Cottrell Ghai
January 24 “Gassing helpless children: What happened to constitutional values?” Yash Pal Ghai and Jill Cottrell Ghai
January 31 “Values And Principles: Walking The Talk” Jill Cottrell Ghai and Yash Pal Ghai
February 7 “New IG of the National Police Service - What Civilians Expect” Tom Kagwe
February 14 “Election Dates – Again” Jill Cottrell Ghai
February 21 “Autonomy of counties: What the law says about intervention in and suspension of counties” Conrad Bosire, Jill Cottrell Ghai, Yash Pal Ghai
March 7 “CDF, Counties and the Court” Jill Cottrell Ghai
March 14 “Access to justice under the constitution - Part 1” Waikwa Wanyoike
March 21 “Access to justice and the constitution - Part 2” Waikwa Wanyoike
March 28 “Alternative justice system as framework for access to justice” Steve Ouma Akoth
April 4 “Negation of public consultation and participation” Yash Pal Ghai and Jill Cottrell Ghai
April 11 “Access to justice: The paralegal approach” Jedidah Wakonyo Waruhiu and John Justice Odhiambo Otieno
April 18 “Street children’s rights and the political economy of Kenya” Yash Pal Ghai
April 25 “Learning about public participation in South Africa” Yash Pal Ghai and Jill Cottrell
May 2 “Of Cattle Dip Promotion Society and the Rights of Lesbians and Gays to Associate” Waikwa Wanyoike
May 9 “Okoa Kenya, The Referendum And The Constitution” Jill Cottrell Ghai
May 16 “Is equality before the law a mirage for the poor despite the constitution? Fredrick Otieno
May 23 “Promoting The Representation of Marginalised Groups” Jill Cottrell Ghai
May 30 “Freedom of religion or freedom to persecute the weak and vulnerable?” Yash Pal Ghai
June 13 “Three years on: The six narratives stalking IPOA” Tom Kagwe
June 20 “Police accountability is an antidote to police brutality” Uladzimir Dzenisevich
June 27 “Do not fight terrorism with terrorist methods” Yash Pal Ghai
July 4 “Does Kenya need a ‘Devolution Policy’?” (A collective effort)
July 11 “Politics - Kenya Style” Yash Pal Ghai
July 18 “How The Conservative Government In The United Kingdom Intends To Revamp Human Rights Protection” Yash Pal Ghai
July 25 “Presidents and constitutions” Yash Pal Ghai and Jill Cottrell Ghai
August 1 “Why Governments Do Not Like Access To Information” Jill Cottrell Ghai
August 8 “Ali Mazrui and constitutionalism” Yash Pal Ghai
August 15 “After The Constitution” Yash Pal Ghai
August 22 “Role of the people in making the constitution work” Waikwa Wanyoike
August 29 “People United or Divided? The Challenge of Pluralism” Yash Pal Ghai
September 5 “Implementing the constitutional principle of inclusion, or not? Yash Ghai, Jill Cottrell Ghai and Ben Nyabira
September 12 “Implementing The Constitution For Women (Part 1)” Jill Cottrell Ghai
September 19 Women’s Rights and The Constitution” Jill Cottrell Ghai
September 26 “Implementing the Constitutional right to a clean and healthy environment” Faith Rotich and Waikwa Wanyoike
October 3 “Implementing National Security: Challenges And Resistance” Tom Kagwe
October 10 “Kenya civilian police oversight under threat” Tom Kagwe
October 17 “How The Constitution Makers Planned For Its Implementation” Yash Pal Ghai
October 24 “Role Of Civil Society In implementing Constitution: The Struggle Continues” Wanjiru Gikonyo
October 24 Retiring Judges? The Perils Of Bad Drafting and Loose Ends” Jill Cottrell Ghai
Yash Ghai
October 31 “The Constitution And Disability: The Good and The Not So Good” Jill Cottrell Ghai
November 7 “What does the constitution say about public finances and are we implementing it?” Jason Lakin
November 14 What Does The Constitution Say About Public Finance And Are We Implementing It? Part 2 Jason Lakin
November 21 “Waltz of The Flowers: From Naivasha To Amsterdam” Yash Tandon

2016

January 2: “Implementing the Right to Food Enshrined in Kenya’s Constitution” Diana Lee-Smith and Davinder Lamba
January 16 “Parliament is yet to unleash its potential” Jessica Musila and Gitungo Wamere
January 23 “Integrity and graft: The regime of darkness” John Githongo
January 30 “How political parties are failing Kenya yet again” A Correspondent Contributor
February 6 “The role of the judiciary under the constitution: Part I” Yash Pal Ghai
February 13 “Achievements and failings of the Judiciary Yash Ghai and Jill Cottrell Ghai
February 20 “Transition to county governance and implementation of devolution” Conrad Bosire and Waikwa Wanyoike
February 27 “The Presidency: Back to the future?” Jill Cottrell Ghai and Yash Pal Ghai
March 2 “Kenyans need to keep public service on its toes” Jill Cottrell Ghai
March 9 “All you need to know about independent commissions, offices” Yash Pal Ghai
March 19 “Judicial Service Commission: An enviable record, but for how long?” Yash Pal Ghai
March 26 “Auditor General: Powers and performance” Jason Lakin
March 29 “The State Is Less Powerful” Yash Ghai
March 31 “Shield Girls, be Fair to Men” Jill Cottrell Ghai
April 9 “The real problem with Okoa Kenya bid to change the law” Jill Cottrell and Yash Pal Ghai
April 20 “Have County Governments come of age?” Wanjiru Gikonyo
April 23 “Are we fighting against: ethnicity or greed, violence?” Yash Pal Ghai
April 30 “Kenya’s human rights record scrutinised - but did you know?” Jill Cottrell Ghai
May 7 “What system of government would be best for Kenya?” Yash Pal Ghai
May 14 “Democracy, Politics and Politicians: Kenya style” Yash Pal Ghai
May 21 “The Rationale for the Existence of Independent Constitutional Commissions” Waikwa Wanyoike
May 28 “Legal Aid: New Hope or False Dawn?” Jill Cottrell Ghai
June 4 “Understanding the Right to Information Bill” Jill Cottrell Ghai
June 11 “Why We Should All Be Concerned About The Appointments of The New CJ and Judges” Yash Pal Ghai
June 18 “Ethnicity and the Kenyan system of governance” Yash Ghai
June 25 “Reflecting on eight parliamentarians in a hole” Jill Cottrell Ghai
July 2 “Access to justice through a new type of court” Jill Cottrell Ghai
July 9 “On the struggle to reconcile our diversity with unity” Yash Pal Ghai
July 16 “The procedure for selecting a CJ – and other judges” Jill Cottrell Ghai
July 23 “Why does Uhuru encourage miraa growing and use? Yash Pal Ghai
July 30 “The law aims to give every Kenyan a sense
of belonging” Yash Pal Ghai
August 6 “Development, gender justice and compensation” Jill Cottrell Ghai
August 13 “What we need to understand about hate speech” Jill Cottrell Ghai
August 20 “Credible Kenyan elections hinge on a trustworthy IEBC” Dr. Seema Shah
August 27 “Tribalism: Heart of Kenya politics?” Yash Ghai
September 3 “Twenty Questions for Candidates Jill Cottrell Ghai” Jill Cottrell Ghai
September 10 “Nairobi Arboretum, green inequality and social justice” Ambreena Manji
September 17 “The Community Land Act: Now it’s up to communities” Liz Alden Wily
September 24 “Taking a Look at Kenya’s Democracy and Politics” Yash Pal Ghai
October 1 “Law Making and the President (and Governors)” Jill Cottrell Ghai
October 8 “IEBC golden handshake undeserved and mistaken” Yash Pal Ghai and Jill Cottrell
October 15 “Charting the way ahead for the regulation of films” Jill Cottrell Ghai
October 22 “Predicament of citizenship and the stateless” Yash Pal Ghai
October 29 “Contempt of court and freedom of speech explained” Jill Cottrell Ghai
November 5 “The vision of Chapter Six of the 2010 Constitution Yash Pal Ghai and Jill Cottrell Ghai
November 12 “In praise of Kenya’s Judges” Jill Cottrell Ghai
November 19 “Floor crossing of sitting MPs is now confusing” Jill Cottrell Ghai
November 26 “The inescapable challenge of Kenya’s political system” Yash Pal Ghai
December 3 “Traditional Knowledge and Culture Expressions Act 2016” John Harrington and Harriet Deacon
December 10 “Political challenges in the devolved land administration” Catherine Boone and Ambreena Manji
December 17 “State’s budget allocations do not meet the people’s wishes” Jason Lakin
December 24 “These Kenyan politicians are in constant breach of constitutional principles” Yash Pal Ghai
December 31 “The Constitution’s Chapter Six: Conflicts of Interest” Jill Cottrell Ghai
APPENDIX III: Contents of Major KI Publications

Note: an asterisk (*) indicates an author/editor is a past or present KI member, Board member or Associate

National Values and Principles of the Constitution
ed. by Yash Pal Ghai* and Jill Cottrell Ghai*

1. National Values and Principles: Roots of constitutionalism Yash Pal Ghai*
2. National Identity and Respect for Diversity: Foundations of the state Yash Pal Ghai*
3. Patriotism Chris Kerkering
4. Constitution and Culture: Being a Kenyan Mshai Mwangola
5. Secularism and Religion Gabriel Dolan*
6. Democracy: The primary constitutional value Yash Pal Ghai*
7. Public Participation: Engaging citizens in policy making Grace Wakesho Maingi
8. Separation of Powers, Checks and Balances, and the Rule of Law Yash Pal Ghai*
9. The Trial of Integrity in Kenya PLO Lumumba
10. Equality and Equity: Key constitutional values Heidi Evelyn
11. The Missing Link: Challenges in legislative accountability in Kenya Wanjiru Gikonyo
12. The Values of Money Jason Lakin
15. Judicial Interpretations of the Right to Human Dignity Yash Pal Ghai*
16. Sustainable Development – the Environment, the Future and the Vision Waikwa Wanyoike*

Understanding Devolution
eds., Conrad Bosire*, Yash Pal Ghai* and Jill Cottrell Ghai*

1. Context Yash Pal Ghai*
2. History, Objectives and Transition Yash Pal Ghai*
3. Powers and Functions of County Governments Conrad Bosire* and Yash Pal Ghai*
4. Political Structures and Politics of Devolved Units Conrad Bosire*
5. The Senate: The protector of county government autonomy Conrad Bosire* and Yash Pal Ghai*
6. Intervention in the Affairs of Counties Conrad Bosire, Yash Pal Ghai* and Jill Cottrell Ghai*
7. Intergovernmental Relations: Implementing, Building Consensus and Settling Disputes Yash Pal Ghai*
8. Public Participation and Devolution Yash Pal Ghai*
9. Human Rights and the Counties Jill Cottrell Ghai*
11. Devolution and Land: The two thorny issues crying out for attention Abraham Korir Sing’Oei*
12. Implementing Devolution: Lessons from South Africa Nico Steytler

Kenyan-South African Dialogue on Devolution
eds., Nico Steytler and Yash Pal Ghai* (Juta 2016)

2. Fudging Federalism: Devolution and Peace-making in South Africa’s Transition from Apartheid to a Constitutional Democratic State (1990-1996) - Derek Powell
3. Devolution in Kenya: Background and Objectives - Yash Pal Ghai*
4. Drawing Non-Racial, Non-Ethnic Boundaries in South Africa - Yonatan Fessha, Jaap de Visser
5. Number, Size and Character of Counties in Kenya - Abraham Rugo Muriu
6. Devolved Political Structures in South Africa: A Void Waiting to be Filled by Subnational Politics - Yonatan Fessha
7. Political Structures and Politics of Counties in Kenya - Conrad Mugoya Bosire*
8. The Functions and Powers of South Africa’s Provinces and Municipalities - Jaap de Visser, Annette May
9. Powers and Functions of County Governments in Kenya - Conrad Mugoya Bosire*
10. South Africa’s Intergovernmental Fiscal Relations System - Bongani Khumalo, Ghalieb Dawood, Jugal Mahabir
11. Financing Counties in Kenya - Njeru Kirira
12. Governing Metropolitan Areas in South Africa - Philip van Ryneveld
13. Governing Metropolitan and Urban Areas in Kenya - Jill Cottrell Ghai*
14. National Cohesion and Intergovernmental Relations in South Africa - Nico Steytler
15. National Cohesion and Intergovernmental Relations: The Framework and Emerging Practice in Kenya - Conrad Mugoya Bosire*
16. Inclusion of Marginalised Groups through Devolution in South Africa - Zemelak Ayele, Phindile Ntiliziywana
17. Real or Mirage? Devolution as Empowerment for Marginalised Groups in Kenya - Korir Sing’Oei*
18. Implementing Provincial and Local Government in Post-Apartheid South Africa - Derek Powell, Phindile Ntiliziywana
19. The Implementation of Kenya’s System of Devolved Government - Peter Wanyande

Animating Devolution in Kenya: The Role of the Judiciary

deds., Conrad M Bosire* and Wanjiru Gikonyo (Published by International Development Law Organisation (IDLO), Judicial Training Institute (JTI) and Katiba Institute, 2015) (Available online at http://www.idlo.int/publications/animating-devolution-kenya-role-judiciary)

1. Introduction - Wanjiru Gikonyo and Conrad M. Bosire*

Part I: General Context Setting
2. Comparative Theory and Kenya’s Devolution - Yash Ghai *
3. Devolution and Kenya’s Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law - Duncan Okello
4. Devolution, Politics and the Judiciary in Kenya - Peter Wanyande

Part II: Kenyan Systems and Structures of Devolved Governance
5. County Governance: Political and Institutional Structures and their Effectiveness - Valerie Nangidi
6. The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions - Conrad M. Bosire*
7. Emerging Issues in County Public Finance Management - John Mutua
9. The Bill of Rights and County Governments: Emerging Jurisprudence from the Courts - Jill Cottrell Ghai*

Part III: Comparative Perspectives
10. The Enforcement of Socio-Economic Rights against Local Governments in South Africa - Jaap de Visser
11. South Africa: The Role of the Constitutional Court in Defining Subnational Governments’ Powers and Functions - Nico Steytler
12. Interpreting Divided Sovereign Jurisdiction: Federalism in Canada - Robin K. Basu

Part IV: Supporting Processes for Devolved Governance
13. Kenya’s Emerging Judicial Interpretation of Public Participation under the Devolved System of Government - Ben Nyabira*
14. Safeguarding Devolution Through Public Interest Litigation - Waikwa Wanyoike*
15. The Role of Civil Society in Promoting Devolved Governance in Kenya - Wanjiru Gikonyo
16. Conclusion - Wanjiru Gikonyo and Conrad M. Bosire*
Appendix IV Participation in other foreign/international events

In March 2015 Jill Cottrell Ghai went to Tunis for a Workshop on Constitution Making in Libya organized by Benghazi University in collaboration with Leiden University; she was a commentator in a session on Rights and Freedoms.

In June 2015, Yash and Jill Ghai went to a symposium in Hanover, Germany, on “Constitutionalism, Religious Freedom and Human Rights: Constitutional Migration and Transjudicialism beyond the North Atlantic”. It was an inter-disciplinary event between lawyers and historians of ideas, and was exploring the idea that common ground might be developed between the religions through comparative experience on constitutional law and tolerance. Yash gave a paper on “Migration or home grown?: Religion and Constitution Making”.

Later in the year they went to the concluding conference of a project on “Dealing with Territorial Cleavages in Constitutional Transitions”. This was held in Brussels and was supported by International IDEA, and the EU. The project is leading to a book (due to appear in 2017) and Yash and Jill’s chapter is on Kenya: how the demands for devolution played out in the constitution making process.

In October 2015, Yash and Jill attended what was called a “High-Level Policy Dialogue on ‘Guarantees of Non-Recurrence’ - From Aspiration To Policy: Challenges & Lessons in Preventing Mass Violations”, under the Mandate of the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. It was held in Stockholm and was attended by various distinguished current or previous holders of diplomatic and human rights offices, including two current UN Special Rapporteurs on human rights (one being Farida Shaheed, on Cultural Rights). Yash was a member of a Panel that discussed “Institutional Reform as Prevention”.

In the same month, Yash gave a public lecture in London (at Senate House, University of London) under the auspices of the Commonwealth Human Rights Initiative on the recent announcement by the British Prime Minister of the intention to withdraw from the European Convention on Human Rights, and its possible implications in the Commonwealth.

In January 2016, Yash Pal Ghai and Jill Cottrell Ghai attended a day long Workshop at the World Bank in Nairobi as part of the development of the World Development Report 2017. Jill participated in a panel on “Fragility, conflict and violence in East Africa” and Yash in one on “Governance Reform in East Africa”.

In September 2016 the Ghais attended the Fourth Stellenbosch Annual Seminar on Constitutionalism in Africa on “Decentralisation and Constitutionalism in Africa”. Yash spoke on “Perspectives on constitutionalism and decentralisation in Africa”.

Also in September 2016, Yash Pal Ghai went to Zimbabwe at the invitation of the Wallenberg Institute (Lund University, Sweden) to speak on implementation of constitutions to an audience of legal practitioners, government lawyers and civil society.

In October 2016, Yash and Jill Ghai and our associate member Liz Alden Wiley attended an “International Seminar on Constitutional Order and Justice in Conflict-Affected Settings” in Copenhagen. Yash spoke on “Constitutional order and the route to more peaceful and democratic politics”, Liz on “Land rights, land reform and violent conflict” and Jill on the political situation in Kenya. The event was organised by the Danish Institute for Human Rights and the Centre for Resolution of International Conflicts, University of Copenhagen.

Also in October, the Ghais attended the Global Autonomy, Governance and Federalism Forum, in Makati, Philippines. Yash spoke on “Towards a Workable and Effective Structure of Autonomy and Federalism: Relations Between Autonomous Regions/Federal States and Central Governments” and Jill in a panel on Women, Indigenous Peoples and Children.