

# “WE’VE GOT TO GO BACK TO BASICS”

• *Interview with Maina Kiai* •

By Oliver Hudson

*Maina Kiai forged a career as a human rights lawyer and activist in his native Kenya, from where he spoke to the Sur International Journal on Human Rights about the global crackdown on civic space. The interview took place shortly after the rerun of the Kenyan presidential elections in October 2017. Kiai has been working relentlessly to ensure international attention has been focussed on the delicate situation in the country, including the challenges that Kenyan civil society has been facing during the period.*

*There are few people – if anyone – more qualified to speak on how this global phenomenon has taken hold. An activist first and foremost, Kiai spent more than 20 years advocating for human rights in Kenya, founding the unofficial Kenya Human Rights Commission, and then serving as Chairman of Kenya’s National Human Rights Commission (2003-2008).*

*He went on to hold various international positions, including at the International Human Rights Law Group, Amnesty International and the International Council on Human Rights Policy before serving as the United Nations (UN) Special Rapporteur on the rights to freedom of peaceful assembly and of association from 2011 to April 2017. As Special Rapporteur he was committed to facilitating activist access to the UN, including through his [freeassembly.net](http://freeassembly.net) website.*

*His experience has given him a unique insight about the phenomenon of closing civic space, both from the local and global perspective. Here he talks about the root causes of the phenomenon, including the role of the private sector, the strategies which actors are using to counter both state and non-state forces and how, by going back to basics, we can guarantee the survival of civil society.*

**Conectas Human Rights** • During your time as Special Rapporteur, what did you observe to be some of the key drivers fuelling this global crackdown? Did you see any cross-fertilisation of ideas, coordination and collusion between countries or actors that are shrinking civic space?

**Maina Kiai** • Firstly, I prefer the term "closing" civic space, as opposed to "shrinking" because "closing" is a conscious act. In the mandate we used "closing civic spaces".

The key driver, firstly, is that leadership does not like dissent. States and authorities do not want people to dissent. When states can't answer the questions, reports, advocacy and campaigns that civil society raises, they think the best bet is to close down or reduce the impact of civil society.

Secondly, over the last 40 years, civil society has become very strong and has become a location for activity, for people to engage and organise against the worst excesses of the state. Before this, attacks were focussed on individuals, or attacks on political opposition. But now, many political authorities have realised that civil society is the great organiser. This crackdown is a reaction to the success of civil society of being a great organiser, which has created movements that are able to cut across different sectors.

A third driver is that over the last 10-15 years – since 9/11 – things that were previously unspeakable, things that were shameful, things that were hidden, came out and became normalised, such as torture in the US, for example. Other countries began to think, "ok, so if they can do that, we can do other things". The weakening of the US and the West as beacons for democratic values has resulted in further closing of civic space.

Is there cross-fertilisation? Absolutely. You see governments learning from each other, "if they can get away with that, then so can we". The most significant example of this is states using restrictions on foreign funding as a tool to close down civic space. That started off in Ethiopia, went on to Russia and is now present in many parts of the world, including Hungary, Poland, Israel, and beckoning in the UK, USA and Australia. What states don't understand is that with or without foreign funding, true activists, true believers in democratic values will still find a way to work.

Is there coordination? I think that's a bit harder. In the former Soviet countries, yes, you find coordination – in former Soviet spaces, Kyrgyzstan literally copied Russian laws but they were defeated, and Cambodia seems to be copying Chinese laws to restrict civic space. In Africa, Ethiopia's neighbours – with Kenya and South Sudan as the best examples - are trying to do the same thing as Ethiopia has done because Ethiopia has got away with it. Roughly half of Ethiopia's budget comes from foreign donors – but whatever Ethiopia's government does to human rights, civic space, democratic values, it gets away with, yet donors still come in. Foreign investment is also coming in to the country at very high levels. So countries are beginning to learn that as long as you can

look as though you care about investment, as long as you can play a role in the global war on terror, then you will get away with closing civic space.

**Conectas** • You briefly mentioned the US and the West, but how is the discussion of the Global North and Global South relevant in relation to the crackdown on civil society?

**M.K.** • I think it is massively relevant. What goes on in the Global North certainly affects countries in the South in this debate. The Global North is now so inward looking; Trump’s “America First” foreign policy is just one example of that. The South sees that the Global North no longer has any commitment to the values they espouse – and in some cases they aren’t even espousing them anymore. Countries in the North don’t want refugees. Countries in the North are in alliance with corporates to extract as much as possible, as cheaply as possible, without protections for workers, to the benefit of a few elites, even inside their own countries. The South – including certain countries in the North such as Poland, Hungary and others - are seeing that these countries are just hypocrites, whose entreaties about human rights are more rhetorical than real. Because these countries want to legitimise torture as the US did; they attack peaceful protests harshly and using excessive force; and they want to spy on everyone everywhere as in the UK and USA.

**Conectas** • Certain movements, for example the LGBTI movement, would argue that for their constituents, civic space has never been fully open. Why then, has this issue become so hotly discussed in the past few years?

**M.K.** • Because the issue of closing civic space has now spread so widely and so rapidly. The number of people that are affected, interested and raising concerns about the trend has increased. It is no longer a one-issue matter. It’s not “just” about LGBTI. It’s no longer “just” about unions or environmental groups, both of which could make the same argument as the LGBTI movement. It’s now cross cutting.

I hope that the LGBTI community doesn’t see that this recent interest delegitimises their issue. If anything, it legitimises and shows that they were right in raising this issue and trying to counter it a long time ago. The LGBTI movement is one of the most successful movements in the last 15 years. Even though there continue to be restraints and restrictions on the LGBTI community, even the most conservative regions are now talking about LGBTI issues. We are now seeing Uruguay, Argentina and Chile pushing for LGBTI rights at the international level – something that was absolutely unforeseeable in the 1990s. Today, at least 60 per cent of populations in the Global North support gay marriage – something that was unthinkable just five years ago. Wider civil society needs to learn from the LGBTI movement how it was able to successfully change the narrative. We should celebrate and learn from these successes.

**Conectas** • The private sector is increasingly involved in crackdowns on activists. What specific challenges does this pose for activists when resisting this corporate crackdown

(as opposed to resistance to state driven crackdowns) and how do you see the role of the private sector developing around the issue of closing civic space?

**M.K.** • One of the most important issues for us in the next five, ten, fifteen years is dealing with the private sector and its abuses.

The vast numbers of environmental defenders being disappeared or killed these days shows how bad things are. So much so that the Guardian newspaper has devoted a special section on this issue.<sup>1</sup> Most of these crimes aren't solved, likely because the private actors are acting in collusion with the state.

Then there's the whole "why" of state-business collusion. Sometimes it's raw corruption and kickbacks, sometimes it's the state wanting to promote the economy at all costs and sometimes it's a certain sector owning politicians through "softer" corruption (campaign donations). And even in less visibly corrupt places, you're still going to face the apparatus of the state (police, maybe military, legal system stacked in their favour, etc.) defending business interests.

The challenge is that from a human rights paradigm, the private sector does not carry the same level of responsibility as the state does in terms of protection for human rights. Nevertheless, what you are increasingly seeing is that state and the private sector are one and the same thing. One can argue that Donald Trump's rise to power in the US epitomises the marriage between the private sector and the state.

This is why I am very much in favour of a binding treaty at the international level that will bind the corporate sector into respecting rights – because it is the most powerful sector in the world. We have to find a way in which we can manage and control the big corporates - and one way is an international binding treaty.

There also has to be work highlighting the negative role of the private sector in the area of human rights. This is very difficult because every country in the world has opened its doors to the private sector. I did a report where I looked at enabling environments for corporate versus civil society and it's like night and day.<sup>2</sup> The state is open and it is almost as though they want the private sector to run the state. So we're in a difficult situation where the work to be done – and it's got to be done bottom up and top down – has to be a critical assessment of the private sector.

Although there are some companies that take their responsibilities seriously, the vast majority are driven by the profit motivation – what I call "market fundamentalism". The whole illusion of market fundamentalism is making things so difficult that there really has to be change.<sup>3</sup> And change won't happen from polite discussions between people and the private sector. The same level of pressure put on states to protect rights and protect human dignity has to be put on the private sector. Including making them hurt where it counts – in the pocket – maybe then we'll start seeing changes.

**Conectas** • The complexity of factors and actors driving or enabling the crackdown (including organised crime, religious fundamentalists, the neoliberal market model, and so on) has exposed the shortcomings of our established strategies in the current climate. What do we need to do to understand power and use that for more effective strategies?

**M.K.** • These new non-state actors are powerful – it is really an issue of concern for all of us if we want to resolve some of the shortcomings and weaknesses of our established order, as I set out in my report to the thirty-second session of the Human Rights Council.<sup>4</sup>

We have deal with these power elements for what they are, as opposed to being a potential ally. Part of the weaknesses of the business and human rights paradigm is that it treats business as a potential ally.

And the inequality issue has to be tackled. We need to examine the issues of workers' rights, fair pay, good conditions and then work with labour unions and workers – and understand how we can organise against this power. We have to ask ourselves “how do we harness the power of the powerless for them to be able to combat and stand up against this power”. Unless we come together with all those people who are suffering from organised crime, survivors of religious fundamentalists, survivors of market fundamentalism we can't make any serious changes.

**Conectas** • What are the most effective strategies that you have seen activists use in responding to the closing down of civic space?

**M.K.** • I am a big fan of freedom of assembly and the role of protests and demonstrations as a way forward. That is what is most effective. For example, in Kenya with the attempts to restrict civic space legally was a coalition emerging between all sorts of different civil society organisations to fight it. Briefly, the state wanted to enact laws that would essentially starve off critical CSOs by limiting foreign funding, and also creating a state body that would determine which CSO could work where and with what resources. But because the draft law was very broad, the human rights NGOs that were the targets got the development CSOs to take the lead and show how much damage the law would create for humanitarian work and for development work.

I'm also a big fan of alliances, coalitions and reaching outside your comfort zone. The South Koreans are really good at this, bringing trade unions, student movements, NGOs, teachers and other sectors to work together for common goals. Malaysia is also doing well on this, linking up students, NGOs, lawyers, opposition politicians and some religious groups to fight for electoral reforms. The silos that we have in our work are wrong and this is weakening us. We need to move very quickly from seeing human rights as projects that compete against each other to get funding and seeing it more holistically as a struggle. We've got to start cooperating better.

**Conectas** • On the international level, what is the most strategic use of the UN system an activist can make in defending civic space?

**M.K.** • You have to be a bit realistic about what can happen in the UN system. It cannot be the most important strategy. The UN works purely at a moral level to push, to act as an amplifier of what is going on on the ground. And that's the most important part of the UN system.

Finding special procedures [also known as Special Rapporteurs, Special Representatives, Working Groups, Independent Experts] that can help is crucial. They can act as a megaphone on the issue. Sometimes, their country missions can have an impact, but I think that we have to be realistic and always remember that struggles come first and foremost at the national level, and then we can see how we can use the UN. I believe my mission in Georgia for example contributed to the reversal of a law that would have restricted the activities of CSOs. Eventually the CSOs' work contributed to the first ever peaceful transfer of power in the post Soviet space. And in South Korea, my visit helped challenge the narrative that unions were bad and helped reinforce the need for alliances. And in the UK my support for a public, judge-led inquiry on undercover policing of CSOs helped tilt the balance into actually forming one.

**Conectas** • And with that cautionary note, can the international system be doing more to protect activists operating to reclaim civic space and if so, what?

**M.K.** • What it can do more is speak out more, although the High Commission for Human Rights speaks out a lot around protecting activists. What the UN has not done well enough is get the UN as a body to care more about rights. What I learnt from my time within the UN is that the Geneva site is so small within the wider UN system, it's easy to get lost in it. It has to be the Secretary General of the UN who says, "this is our priority and whether you are working in UN Habitat, Peacekeeping, or at UN women – your job has to be protecting human rights".

**Conectas** • Are funders responding adequately to the demands that restrictive environments are putting on activists? What are the key strategies that funders should be implementing to ensure they are supporting activists in the best way?

**M.K.** • We've got to get away from the funding system that we have now, which is competitive. All these calls for proposals, which make people compete, actually advantage those groups who have got the capacity and the people with the fine education who can write a fantastic proposal, as opposed to activists on the ground.

Funders have to get away from project funding and recognise that the only way to fight this crackdown is if activists are funded in a way that they are free to do what they need to do. This means moving away from all the demands that they currently make.

Accountability should be maintained, of course, but with less emphasis – a recent report<sup>5</sup> showed that the accounting departments of major civil society organisations are larger than the accounting departments of major businesses.

In this restrictive environment funders should be creative and should be motivated by international law, rather than domestic law, as they did in the cold war era! If they need to pass money through another agency, another place, do so, just keep at it. When NGOs and civil society are under attack by a particular country, funders should upscale and engage with those organisations who are being attacked. This will send a message to the repressive governments or authorities that “you can do whatever you please, but we are not stopping. In fact, we’re going to support the activists even more.”

**Conectas** • How can activists on the one hand work to reclaim democratic spaces and protect the fundamental freedoms of expression, association and assembly, but also fight the dissemination of hate speech and non-rights based values? How can activists respond to the criticism that such a position is contradictory?

**M.K.** • Americans are the ones who say hate speech is alright as long as it doesn’t lead to violence. We need to counter that – first intellectually, but also in practice. We have a duty to defend values. When values are not human rights based and values do not contribute to human dignity and tolerance, then they are values we must take a stand against, and that includes hate speech. I don’t think that is contradictory. I don’t think that the right to expression and the right to association should mean that everything goes. Human rights are not about anarchy, they about values.

We’ve got to be creative in the way we work. We’ve got to be brave about how we do it and stand up to it. We have to be thoughtful about how we do it.

There must be a bottom up approach as well in the way we work with all people. One of the things that has struck me over the years is how few organisations have organisers and mobilisers on their staff. They have professionals, lawyers, accountants and yet they don’t have mobilisers and organisers. I think this is somewhere we have to go. It’s got to be that we spend more time with people than we do with a laptop. It’s got to be that.

**Conectas** • You’ve touched on how we move forward, but with so many negative stories in the press, what hope or what future do you see for the protection of civic space? How do we reclaim the narrative and foster public support around civil society?

**M.K.** • We’ve got to go back to basics. We have to start talking about the good things that we do. But let’s be careful. The narrative can’t only be positive and it’s not just about public relations. I’ve talked to some groups and they say, “All we need to do is to hire a public relation expert.” We do need public relations within the human rights movement because we’re not so good at this. But we also need to know that public relations cannot drive us.

We've got to do the hard work of going door-to-door, home-to-home, village-to-village. I think as activists, we've got comfortable with our successes. With the rise of populism and the right wing, we've got to ask, engage and find out why people are so frustrated and angry. We thought that the path was only going forward without imagining that there could be obstacles. I think that's hurt us to a large extent. So, let's go back to the basics. Let's work with the people on the ground – let's work with villagers, with the neighbourhoods, with the workers, with everybody.

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*Interview conducted by Oliver Hudson  
(Conectas Human Rights).*

## NOTES

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1 • "The Defenders - 185 Environmental Defenders Have Been Killed So Far in 2017," The Guardian, December 15, 2017, accessed December 18, 2017, <https://www.theguardian.com/environment/ng-interactive/2017/jul/13/the-defenders-tracker>.

2 • "Comparing States' Treatment Of Businesses And Associations Worldwide," Free Assembly, October 2015, accessed December 18, 2017, <http://freeassembly.net/reports/sectoral-equity/>.

3 • "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association," Free Assembly, A/HRC/32/36, 2016, accessed December 18, 2017, [http://freeassembly.net/wp-content/uploads/2016/05/A.HRC\\_32.36\\_E.pdf](http://freeassembly.net/wp-content/uploads/2016/05/A.HRC_32.36_E.pdf).

4 • *Ibid.*

5 • Jeri Eckhart Queenan, "Global NGOs Spend More on Accounting Than Multinationals," Harvard Business Review, April 23, 2013, accessed December 18, 2017, <https://hbr.org/2013/04/the-efficiency-trap-of-global/>.