The Principle of Non-Refoulement

– By Quincy Kiptoo

Just before we all become stereotypic (not out of our own wish but internal ignorance and religiously believing of what leaders can say about National Security, Refugees and Audio Visual context displayed by most media platforms) – be pleased to attain invaluable knowledge from one Mr. Quincy Kiptoo as he discusses The Principle of Non-Refoulement. Herein, there other articles rich of knowledge: Kenyan Legal proffers you the rostrum.

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The Act is meant to streamline the criminal justice system in Kenya. The noticeable criminal activity dealt with by the act being that of terrorism, hence the nick name ‘Terror Law’.

The Security Laws (Amendment) bill 2014 contains 109 provisions and amends about 21 Acts of Parliament. The bill was passed to law in December 18th 2014 amidst a chaotic sitting in the National Assembly presided over by the speaker Justin Muturi, with a section of the members of Parliament having a dissenting opinion on whether the bill should be passed to law as it was without amendments being made to it. The president, Uhuru Kenyatta signed the bill to law the following day and the Act took effect upon publication in the Kenyan Gazette.

While the bill was still in the second reading, there were some complaints that the bill went against fundamental principles of the constitution. The constitution Implementation Commission together with the Solicitor General held a meeting in state house to discuss possible amendments to the bill. Among the amendments that were proposed by the commission headed by Simeon Nyachae was to have an accountability forum for the National Security Service. A provision should be added for the National Intelligence Service to have authority of the court and account for evidence or information obtained through eavesdropping.¹

The passing of the Security Laws (Amendment) bill to law evoked some mixed reactions from different stakeholders both locally and internationally.

The Coalition for Reform & Democracy and the Kenya National Commission on Human Rights petitioned to the High court² of Kenya to have the whole Act declared unconstitutional. The

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¹ (Ngirachu, 2014)
² (Coalition for Reform and Democracy & KNCHR VS. Republic of Kenya & AG, 2014)
petitioners were in the view that the amendment act took Kenya back to the dark days of gagging the media, dictatorship and torture. However, Justice George Odunga the sitting Judge suspended the application of 8 sections of the controversial Security Laws (Amendment) Act.  

How has the Security Laws (Amendment) Act 2014 eroded the constitution?

Article 238 of the constitution of Kenya 2010 requires that National Security shall be promoted and guaranteed subject to the authority of the constitution…. The national Security shall be pursued in compliance with the law and utmost respect of Rule of Law, Democracy Human Rights and Fundamental freedom as an absolute requirement and not subject to discretion.

1. PROCESS

The civil society was not involved in the making of the bill for scrutiny and comment, as is required in Article 118 (b) of the constitution of Kenya 2010.

Referendum is required before a new law that limits rights protected by chapter four of the constitution can be adopted. It was the petitioner’s claim that all state organs must bow to the will of the people, stating that, “sovereignty of the country rests with the people and arms of government only exercise delegated authority.”

2. HUMAN RIGHTS – Chapter 4 constitution of Kenya.

- Right to privacy

Section 56 of the Security amendment Act repeals section 42 of National Intelligence Service Act to give the National Intelligence Service authority to undertake concealed operations. The National Intelligence Service Director General with approval by the council may give a written approval for his agents to enter any place, search for any information, monitor communication, install, maintain and remove anything within the law to preserve national security.

Section 69 of the Security amendment Act amends the Prevention of Terrorism Act by inserting a new section 36A. National Security Organs may intercept communication for the purpose of detecting, determining & disrupting terror activities in accordance with procedures prescribed by the cabinet secretary.

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3 Sections 12,15,26,29,48,56,58 and 64 of The Security Laws (Amendment) Act 2014
The Act has failed to provide clear guidelines as to safeguard and ensure that individual rights to privacy are respected.

- **Freedom of expression and right of access to information**

Section 12 inserts a new section 66A in the Penal Code Cap 63 Laws of Kenya. It criminalizes publication or distribution of insulting, threatening or inciting material or images of dead or injured persons likely to cause alarm to the general public. The offence can attract a fine of Kenya shillings five million, imprisonment not exceeding 3 years or both. The harsh penalties give a distressing effect making individuals refrain from exercising their freedom of expression (article 33 Constitution of Kenya 2010) and so the public may not receive or impart some information.

Section 64 of the Act introduces a new section 30A Prevention of Terrorism Act that criminalizes anyone who publishes or utters a statement that is likely to be understood directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism. The element of intent on the part of the maker is not included in the section.

- **Rights of accused persons**

Section 16 of the Security amendment Act, amends Criminal Procedure Code by inserting a anew section 42A. Prosecution may withhold evidence from suspects accused of terrorism, drug & human trafficking and organized Crime until immediately before hearing, but with leave of court. This in contravention with article 50(2) of the Kenyan Constitution that gives the arrested person right to be informed of the evidence the prosecution wishes to rely on beforehand.

Police with leave of court, can extend the detention period up to 90 days with leave of court. The required detention period is 24 hours.

- **Freedom of Media**

Article 34(2) of the Constitution of Kenya, provides that state shall not interfere or have no control over any person engaged in Broadcasting or the dissemination of information to the public. The state shall also not penalize any person for any of their opinion in the broadcast or publication.

Section 64 of the Security amendment Act introduces a new section 30F to the prevention of Terrorist Act prohibits any broadcasting of any information that undermines investigation of any terrorist acts without
consent of the National Police Service and broadcasting images of victims without the consent of the victim and the National police service. These provisions give a leeway for unjustified interferences in journalist activity contrary to article 34 of the constitution of Kenya. It will also prevent critics in the way authorities handle terrorist attacks.

- **Freedom of Association and Assembly**

*Article 36(1) of the constitution of Kenya.* Right to form, join or participate in the activities of an association of any kind.

*Article 37 of constitution of Kenya,* which provides for every person’s right to peacefully assemble, demonstrate and present petitions to public authorities.

*Security Law Amendment Act amends the Public Order Act* by giving new powers to the cabinet secretary to designate areas and time for public meetings, gathering or public processions. The act is not clear on what basis the Cabinet secretary may impose this restriction on public meetings. This new power limits the freedom of association, and assembly.

*Section 96 of the Security Law Amendment Act inserts a new section 4A,B&C to Public Benefits Organizations Act* gives full discretion to authority responsible for registration of a public benefit organization to classify the organization, and in consultation with Cabinet Secretary from time to time review the classification.

Despite the hostile response, The Act is not in its entirety ‘bad’ law.

The president has defended the Act saying that it was an emergency result, and that it will help boost his government’s fight against terror and criminal activities such as cross border trafficking and poaching. Also in reply to the criticism by the United States of America, he added that, “In the United States, the FBI and intelligence officers have a carte blanche in the fight against terrorism and biological warfare. But our law has provided checks by courts of law. What more, Kenya has no Guantanamo Bay.”

The new law sets a new National Counter Terrorism Centre that is going to co-ordinate responses to terror attacks across the country.

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5 (Peter Leftie, 2014, Dec 21)
The law has provided a system of checks and balances by the court and national assembly. Extension of the detention period for example, has to be done by authorization from the courts of law. Interception of communication needs approval from the national assembly.

The act also introduces a new section 74(3) to the National Intelligence Service Act that provides for the duty of every state organ, agency or public entity that receives any intelligence from the service to act on or to utilize the intelligence. This will ensure that there is sharing of information and that the entities have a duty to safeguard the lives and wellbeing of Kenyans.

The Act also prohibits public stripping by adding section 66A to the Penal Code. This will bring to an end the brutal stripping of women in public, for allegedly dressing in an indecent manner.

In my view, the enactment of the bill shows how committed the Government of Kenya is in trying to improve the deteriorating security that poses a threat to the safety of its citizens. However in doing this, the government should ensure that the correct procedures of introducing new law are followed and that the laws are not in violation to the supreme law of the land, The Constitution. More to that, legislation should have more defined terms and clear guidelines. The broad terms in the Act may lead to use of unnecessary power by the authorities given the power. For example, The National Intelligence Service given power to take measures and efforts aimed at neutralizing threats against national security. There should be guidelines as to what measures the National Intelligence Service should take.