



---

## **A. Introduction**

1. The Kenya National Commission on Human Rights (KNCHR) is an independent national human rights institution (NHRI) established under Kenyan Constitution<sup>1</sup> and in line with the Paris Principles<sup>2</sup>. The National Commission's mandate is to promote the respect, protect and observe of human rights in the Republic of Kenya. In line with this mandate, KNCHR reviews legislation and policy to ensure its compliance with the Constitution of Kenya (CoK), 2010<sup>3</sup>, with regional and international human rights standards and principles<sup>4</sup>.
2. KNCHR has reviewed the Security Laws (Amendment) Bill, 2014 and on 15<sup>th</sup> December 2014 presented its views to the National Assembly through the Administration and National Security Committee. We make these observations and proposals in the public interest.

## **B. Constitutional philosophy**

---

<sup>1</sup>Article 59 of the Constitution of Kenya and the Kenya National Commission on Human Rights Act 2011

<sup>2</sup>GA Resolution 48/134 of 20 December 1993.

<sup>3</sup>Article 19

<sup>4</sup>Article 2 (6)

3. The Republic of Kenya is guided by this transformation theory; sovereignty of the people<sup>5</sup>, Constitutional supremacy<sup>6</sup> and the centrality of the Bill of Rights<sup>7</sup> and values and principles<sup>8</sup>. Chapter 14 has an elaborate security sector architecture which guides Kenya in the principles of rule of law.
4. KNCHR understands, appreciates and acknowledges that security and development are integral components of human rights and supports the government's efforts to addressing the spiraling insecurity. It is also evident that there is urgent need to prioritize security sector reforms as detailed in the Ransley Task Force Report<sup>9</sup>.

### **C. Laws amended**

5. The Bill seeks to amend 22 Laws of Kenya namely; Public Order Act (Cap 56), Extradition (continuous and foreign countries) Act (Cap 76), Penal Code (Cap 63), Criminal Procedure Code (Cap 75), Prevention of Terrorism Act (2012), Sexual Offenses Act (2006), Registration of Persons Act (Cap 107), Evidence Act (Cap 80), Prisons Act (Cap 90), Firearms Act (Cap 114), Radiation Protection Act (Cap 243), Rent Restriction Act (Cap 296), Kenya Airport Authority Act (Cap 395), Traffic Act (Cap 403), Investment Promotion Act (Cap 485), Labour Institutions Act (2012), National Transport Safety Authority Act (2012), Refugee Act (2006), National Intelligence Service Act (2012), Kenya Citizenship and Immigration Act (2011), National Police Service Act (2011) and Civil Aviation Act (2013), Public Benefits Organizations Act, 2013.
6. However, the proposed changes are neither minor nor miscellaneous and should have been amended through various Acts. They are momentous

---

<sup>5</sup> Article 1

<sup>6</sup> Article 2 (1)

<sup>7</sup> Article 18

<sup>8</sup> Article 10 (2)

<sup>9</sup> *'Are we under Siege: The State of Security in Kenya'*, KNCHR, December 2014

and seek to amend the Bill of Rights and fundamentally attach the principles of criminal justice. Accordingly, Article 255 states that any changes to the Bill of Rights require a referendum. This proposes impact on several other Acts of Parliament including the laws relating to the County Governments. This proposes also to erode the principles of separation of power by giving enormous powers to the executive.

**D. KEY CONCERNS**

**(i) Process:** KNCHR is concerned that contrary Article 118(b) Parliament has not facilitated meaningful and effective engagement of the public with the proposed Bill. The Bill was published on 10<sup>th</sup> December 2014 and was not made immediately accessible before it was debated. The tight timelines given by the Departmental Committee on the Administration and National Security for making submissions have limited effective public participation given the complexity of security issues.

**(ii) Unconstitutionality of a number of provisions:** KNCHR is concerned on a number of provisions that are in conflict with the Constitution or will upon implementation result in a limitation of the Bill of rights.

**(iii)** Article 238, provides that National Security shall be promoted and guaranteed subject to the authority of the Constitution and Parliament. Further, that the national security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms. This is an absolute requirement and not subject to the exercise of discretion.

**(iv)** The Constitution provides for separation of power between the executive, legislature and judiciary. The current proposals shift this balance by promoting a over powerful executive, removes the

oversight from Parliament with no other accountability to any other institution.

- a. ***Freedom of Assembly and Association: Clause 4, 5 and 7*** proposes to amend the Public Order Act so as to give powers to the Cabinet Secretary to designate areas where and times at which public gatherings or public processions may be held under Article 36. This contravenes Articles 10, 36,37 and 119. The Limitations have the effect of negating the essence of the right and gives unfettered powers to the Cabinet Secretary without any oversight from Parliament. The current law requires an individual to notify the authority give details of the purpose, date, duration, location and route of the procession are adequate. **Amend:** the CS should Gazette designated areas and times when public meetings should be held only after public participation, public review and approval by Parliament. This must contain a rationale. In respect to meetings, this can only be limited only in the interest of national security and order.
- b. ***Clause 107 and 108.*** It is not clear how the proposed amendment to the Public Benefit Organisations Act addresses the security challenges with the proposed classification. This is not even mentioned in the memorandum of the bill. This only signifies an attempt to maintain control over these organisations especially those dealing with human rights and governance. The Cabinet Secretary Gazetted a Multi stakeholder taskforce that is supposed to consider what changes needs to be put in place before the PBO Act is operationalised. **Amend:** delete.
- c. ***Clauses 66, 75 and 80.*** The general international standards on freedom of assembly require that unnecessary restrictions be avoided. There is a presumption in favour of holding peaceful

assembly without restrictions under Article 37. Any restrictions to this freedom must be based on clear evidence, must be comprehensive, purposeful and in keeping with international human rights law. The restrictions if any, should be proportional and the authorities should prefer the least intrusive means to achieve the legitimate objective they pursue. The focus should be on the stated intentions of the organizers of an assembly rather than on the possibility of disorder. Therefore the authorities have the onus to ensure there is peaceful assembly rather than using the possibility of disorder to restrict or ban an assembly.

- d. ***Freedom of Expression and Information: Clause 15, 72 and 73*** amends the Penal Code to create the offence of publishing or causing to be published or distributed obscene, gory or offensive material likely to cause fear and alarm to the general public or disturb public peace. This impacts on Articles 34(2) and 35 which prohibits state control of the media and Parliamentary legislation which was done (Media Act 2013 and Kenya Information and Communication [Amendment] Act 2013). These Acts contain the legislation proposed in these amendments and have not been fully operationalised due to pending cases. Is Parliament legislating in vain? What is the meaning of 'facilitating of terrorist act' and 'publication of offending material' and 'prohibition from broadcasting'?
- e. Whereas the import of these provisions is clear when applied to communication by extremist and terrorist groups, the section does not seem to make exception for the role media and other actors play in sharing information and social commentaries on current issues. The existing media regulatory framework can adequately address the concerns of responsible journalism.

## ADVISORY ON THE SECURITY LAWS (AMENDMENT) BILL, 2014

- f. Restriction of the media has the overall effect of diminishing the freedom of expression and freedom of opinion in Kenya. The General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (ICCPR), these two freedoms are the corner stone for every free and democratic society. The General Comment mirrors the provisions of Article 24 of the Constitution on the limitation of rights. The limitation has to be proportionate to the nature of the offence and should be necessary in a free and democratic society. It also provides that other less restrictive means should be adopted rather than those that are severe in limiting the right or freedom. The proposed fines of 1million and 5 million are punitive and not proportional to the limitation intended by the amendment. **Amend** delete.
- g. ***Access to Justice:*** The principles of criminal justice in respect to equality before the law, rights of an arrested person, right to fair trial and innocent until proved guilty are eroded. ***Clause 18 (4) (c) and (10)*** makes it possible for persons to be held without charge for a period of up to 90 days. This provision allows for detention without trial as a person is merely produced in court but NOT charged. This violates Article 49 (g), 25 (a) and (c) which provides that the right to be charged, not to be subjected to torture, cruel, inhuman or degrading treatment or punishment; and the right to a fair trial. These rights are non-derogable. **Amend:** The Police must furnish the court with a charge sheet indicating the nature of the offence and the accused should be charged and allowed to take plea. The Amendment Bill should also provide a time frame within which the trial of the accused person should commence.
- h. ***Clause 19*** allows the prosecution to withhold information and witnesses from an accused person and forces the accused person to incriminate themselves by sharing their information and

witnesses. This violates Article 49 (d), (f), (i), (j),(l) and Article 50 on the right to a fair trial with a special focus on the principle to innocence until proved guilty. The accused person should be given all information that will enable him/ her prepare his or her defence. **Amend:** The accused should have reasonable access to information and also provide further information with minor alterations to assist the accused person prepare his/her defence.

- i. **Clause 77.** Removes the necessity of the police to inform the court why they are being held longer from 90 days to 360 days. This is an element of detention without trial and violates the Constitution.

**Amend:** delete

- j. ***Protection of Refugees and Asylum Seekers:*** A key principle of refugee protection is the principle of non-refoulement, which protects both asylum seekers and refugees from being returned to their places where their lives or freedoms could be threatened. **Clause 58** proposes to limit the number of Refugees and Asylum seekers permitted to stay in Kenya to 150,000 persons. UNHCR current statistics provide that total population of concern is close to 600,000 (539,938 Refugees, 52,285 asylum seekers and 20,000 stateless persons). International law and practice does not put a cap on the number of refugees or asylum seekers that can be accepted by a state this is dealt with in an administrative and political manner. The rationale is that it is not the sole responsibility of a host state to cater for the refugees since they are seen to be the responsibility of the international community. Thus, international bodies such as the UNHCR are involved in supporting refugees within the designated territory of UN member states.

**Amend:** delete this clause.

ADVISORY ON THE SECURITY LAWS (AMENDMENT) BILL, 2014

- k. **Clause 55 and 57.** The obligation to report to the Commissioner of Refugees immediately is important. However the grace period of 30 days is important to allow the asylum seeker time to be able to submit themselves within a certain period. The requirement also of reporting once exit from the camp is an administrative matter which is already happening through the Protection or Camp Officers. **Amend:** delete.
- l. **Right to Privacy: Clause 66** amends the National Intelligence Service Act by deleting the entire Part V of the Act and replacing it new Part V- Covert operations and allows the Director General 'to do anything' which is repeated four (4) times!. This part eliminates the need for the NIS to seek a warrant from court meaning that the officers are able to carry out their functions without due regard to the law and respect for human rights, contrary to Article 238. It also suspends the role of the judiciary to ensure protection of privacy. **Amend:** delete.
- m. Like the defunct Special Branch, the Bill seeks to give the NIS powers to arrest suspects. In essence the NIS is given powers and functions outside of its constitutional mandate and begins mixing the powers of policing and intelligence! It should be noted that there is no civilian oversight authority over the conduct of the NIS like the Independent Oversight Authority (IPOA) is to the National Police Service. The NIS should concentrate on their core constitutional mandate of gathering intelligence on criminal activity that assists the police into preventive action and if there is to be any amendment is to extent the civilian oversight of IPOA to NSIS. **Amend:** Build an accountability mechanism by expanding the IPOA powers to include NIS to enhance transparency.

- n. **Citizenship Rights: Clause 31** which proposes to amend the Registration of Person Act, Section 19. It gives broad powers to the Director of Registration to take away citizenship rights through withdrawal of identity cards. It expands the grounds provided for under the Constitution by including a vague and indefinable ground 'any other justifiable cause'. The criteria should be specific and not open ended to limit abuse of office and political manipulation. There should a mechanism to check the powers given to the Director. This would lead to discrimination especially of persons whose nationality is an issue or in question. The person whose identity card has been revoked by the Director has no recourse for redress and violates Article 47 to fair administrative action. **Amend:** The reason for withdrawal of an identity card should be provided in writing and a process of how administratively the individual can appeal the decision should be provided before they consider going to court.
- o. **Security of tenure and independence of the national security organs: Clauses 63, 64 and 98.** A key recommendation of the National Task force on Police Reforms (Ransley Task Force) was the need to ensure that appointments to the National Police Service and especially at the leadership level be through a transparent and competitive process. The removal of the security of tenure of the Director General of the National Intelligence Service and the Inspector General of the National Police Service reverts us to the position of the repealed Constitution thereby politicizing these positions! As framed the President would exercise unfettered discretion. The holder of the position would therefore be beholden to the appointing authority for all intents and purposes and will not be insulated from political and executive interference. The amendments also remove the fixed term of the Director General

and Inspector General and therefore they would serve for an indeterminate period. The Bill also takes away security of tenure of the Deputy Inspector Generals. The amendment violates Chapter 14 with the Executive suspending the powers of the people and Parliament that ensures accountability and oversight. **Amend:** delete.

## **E. CONCLUSION**

The passage of more legislation will not resolve the insecurity of the nation. It is evident that current legislation including the Constitution is not being implemented to the later especially by the Executive. The law must be clear and must ensure that the Constitutional balance of power is maintained with the Executive, Legislature and Judiciary for effective safeguard of the Constitution.

There is also urgent need for the political leadership through the Hon. President be guided by Articles 10(2), 131 (1) (c), (d) and (e) and (2) and 118 to ensure patriotism, security organs discipline, leadership in security sector reforms and public engagement.

We therefore recommend;

- 
- a) The immediate withdrawal of the Security Laws (Amendment) Bill, 2014 from further discussion in the National Assembly.
  - b) The subsequent Bill or Bills should therefore be made accessible immediately, simplified (drafted in simple language for Kenyans) with and reasonable timelines to allow quality public participation.
  - c) A clear separation of the substantive and minor amendments through respective Bills and Miscellaneous amendment Bill respectively.
  - d) All amendments MUST comply with the Bill of Rights and the Constitution in totality.