

PARLIAMENT OF KENYA



THE NATIONAL ASSEMBLY

THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON CONSIDERATION OF THE SECURITY LAWS (AMENDMENT) BILL, 2014

CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
DECEMBER, 2014

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1.0 PREFACE

On behalf of the Departmental Committee on Justice and Legal Affairs, it is my pleasure and duty to present to the House, the Report on the Security Laws (Amendment) Bill, 2014.

1.1 Committee Membership

The Committee on Justice and Legal Affairs was constituted by the House on Thursday 16th May, 2013 comprising of the following members:

1. Hon. Samuel Chepkong'a, M.P. – Chairperson
2. Hon. Priscilla Nyokabi, M.P. – Vice Chairperson
3. Hon. Njoroge Baiya, M.P.
4. Hon. Muriithi Waiganjo, M.P.
5. Hon. Ndirangu Waihenya, M.P.
6. Hon. Florence Kajuju, M.P.
7. Hon. Kang'ata Irungu, M.P.
8. Hon. Benson Mutura, M.P.
9. Hon. John Njoroge Chege, M.P.
10. Hon. William Cheptumo, M.P.
11. Hon. Mohamed Abdi Haji, M.P.
12. Hon. Kangongo Bowen, M.P.
13. Hon. Sammy Koech, M.P.
14. Hon. Moses Cheboi, M.P.
15. Hon. Paul Bii, M.P.
16. Hon. Charles Gimose, M.P.
17. Hon. Johanna Ng'eno, M.P.
18. Hon. Boniface Otsiula, M.P.
19. Hon. David Ouma, M.P.
20. Hon. Neto Agostinho, M.P.
21. Hon. Kaluma Peter, M.P.
22. Hon. Fatuma Ibrahim Ali, M.P.
23. Hon. Ben Momanyi Orari, M.P.
24. Hon. T. J. Kajwang', M.P.
25. Hon. (Bishop) Mutua Mutemi, M.P.
26. Hon. Olago Aluoch, M.P.
27. Hon. (Dr.) Christine Oduor Ombaka, M.P.
28. Hon. Munuve G. Mati, M.P.
29. Hon. Mwamkale William Kamoti, M.P.

1.2 Mandate of the Committee

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing Order No. 216(5) which defines functions of the Committee as being:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and enquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister; and
- f) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-

- Constitutional Affairs
- The administration of law and Justice
- The Judiciary
- Public Prosecutions
- Elections
- Ethics, Integrity and anti-corruption and
- Human Rights.

1.3 Departments under the committee

- a) Office of the Attorney General and Department of Justice
- b) Ethics and Anti-Corruption Commission (EACC)
- c) Independent Electoral and Boundaries Commission (IEBC)
- d) Commission for the Implementation of the Constitution (CIC)
- e) Kenya National Commission on Human Rights (KNCHR)
- f) Office of the Director of Public Prosecutions (ODPP)
- g) Registrar of Political Parties
- h) Witness Protection Agency (WPA)

- i) Commission On Administrative Justice (COAJ)
- j) The Judiciary

1.4 Committee Meetings

The Departmental Committee on Justice and Legal Affairs held a meeting on 17th December 2014 and made its recommendations.

1.5 Acknowledgement

The Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. The Committee also thanks the Departmental Committee on Administration and National Security and the Departmental Committee on Defence and Foreign Relations for the fruitful interaction during the deliberations of this Bill on the 17th of December 2014.

It is my pleasant duty and privilege, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and commend this report on the budget estimates for the 2014/2015 financial year, to the Budget Committee for adoption.

SIGNED

**Hon. Samuel Chepkong'a
(Chairperson)**

Dated this day of December 2014

2.0 COMMITTEE DELIBERATIONS ON THE BILL

The Departmental Committee on Justice and Legal Affairs considered those provisions of the Bill which directly touch on the mandate of the Committee as provided for in the National Assembly's Standing Orders. Below is a summary of the Committee deliberations:-

Clause 15: Amendment proposed.

Clause 16: Amendment proposed.

Clause 17: Amendment proposed.

Clause 18: Amendment proposed.

Clause 19: Amendment proposed.

Clause 20: Amendment proposed.

Clause 21: Deleted.

Clause 22: Deleted.

Clause 23: Amendment proposed.

Clause 24: Agreed to.

Clause 25: Amendment proposed.

Clause 26: Amendment proposed.

Clause 27: Amendment proposed.

Clause 28: Deleted.

Clause 32: Amendment proposed.

Clause 33: Agreed to.

Clause 34: Agreed to.

Clause 35: Amendment proposed.

Clause 36: Amendment proposed.

3.0 COMMITTEE AMENDMENTS

The Committee proposed the following amendments to the Bill: -

CLAUSE 15

Clause 15 of the Bill, which proposed to insert a new section 66A in Cap. 63, was amended by deleting the proposed clause 15 and replacing it with a new clause 15 as follows—

15. The Penal Code is amended by inserting the following new section immediately after section 66—

Prohibited
publications
and
broadcasts.

66A. (1) A person who publishes, broadcasts or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.

(2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or a imprisonment for a term not exceeding three years, or both.

(3) The freedom of expression and the freedom of the media under Articles 33 and 34 of the Constitution shall be limited as specified under this section for the purposes of limiting the publication or distribution of material likely to cause public alarm, incitement to violence or disturb public peace.

CLAUSE

16

Clause

16 of

the Bill, which sought to amend section 128 of the Penal Code, was amended by deleting the proposed new section 128A and substituting therefor the following—

Offences by
public officers.

128A. A public officer commits an offence and is liable, upon conviction, to imprisonment for a term of not less than fifteen years where in the course of his or her employment he or she—

- (a) aids or facilitates the commission of a felony;
- (b) facilitates the irregular entry of an alien or a criminal into Kenya;
- (c) conceals the whereabouts of a criminal; or
- (d) irregularly issues identification documents.

CLAUSE 17

Clause 17 of the Bill was amended by deleting the proposed new section 251A of Cap. 63 and substituting therefor the following —

Insulting
modesty by
forcible
stripping.

251A. A person who intentionally insults the modesty of any other person by forcibly stripping such person, commits an offence and is liable, upon conviction, to imprisonment for a term not less than ten years.

CLAUSE 18

Clause 18 proposed an amendment to the Criminal Procedure Code. The proposed amendment was amended by deleting it and replacing it with a new clause 18 to read as follows—

Insertion of
section 36A of
Cap. 75.

18. The Criminal Procedure Code is amended by inserting the following new sections immediately after section 36 —

Remand by court. **36A.** (1) Pursuant to Article 49(1) (f) and (g) of the Constitution, a police officer shall present a person who has been arrested in court within twenty-four hours after being arrested.

(2) Notwithstanding subsection (1), if a police officer has reasonable grounds to believe that the detention of a person arrested beyond the twenty-four hour period is necessary, the police officer shall—

- (a) produce the suspect before a court; and
- (b) apply in writing to the court for an extension of time for holding the suspect in custody.

(3) An application under subsection (2) shall be supported by an affidavit sworn by the police officer and shall specify —

- (a) the nature of the offence for which the suspect has been arrested;
- (b) the general nature of the evidence on which the suspect has been arrested;
- (c) the inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made by the police; and
- (d) the reasons necessitating the continued holding of the suspect in custody.

(4) In determining an application under subsection (2), the court shall consider any objection that the suspect may have in relation to the application and may—

- (a) release the suspect unconditionally;

(b) release the suspect subject to such conditions as the court may impose to ensure that the suspect—

(i) does not, while on release, commit an offence, interfere with witnesses or the investigations in relation to the offence for which the suspect has been arrested;

(ii) is available for the purpose of facilitating the conduct of investigations and the preparation of any report to be submitted to the court dealing with the matter in respect of which the suspect stands accused; and

(iii) appears at such a time and place as the court may specify for the purpose of conducting preliminary proceedings or the trial or for the purpose of assisting the police with their inquiries; or

(c) having regard to the circumstances specified under subsection (5), make an order for the remand of the suspect in custody.

(5) A court shall not make an order for the remand in custody of a suspect under subsection (4) (c) unless—

(a) there are compelling reasons for believing that the suspect shall not appear for trial, may interfere with witnesses or the conduct of investigations, or commit an offence while on release;

(b) it is necessary to keep the suspect in custody for his protection, or, where the suspect is a minor, for his welfare;

(c) the suspect is serving a custodial sentence; or

(d) the suspect, having been arrested in relation to the commission of an offence, has breached a condition for his release.

(6) The court may, for the purpose of ensuring the attendance of a suspect under subsection (4)(b)(ii) or (iii), require the suspect—

(a) to execute a bond for such reasonable amount as the court considers appropriate in the circumstances; and

- (b) to provide one or more suitable sureties for the bond.
- (7) Where a court makes an order for the remand of a suspect under subsection (4) (c), the period of remand shall not exceed thirty days.
- (8) A police officer who detains a suspect in respect of whom an order has been issued under subsection (4) (c) may, at any time before the expiry of the period of remand specified by the court, apply to the Court for an extension of that period.
- (9) The court shall not make an order for the extension of the time for remand under subsection (8) unless it is satisfied that having regard to the circumstances for which an order was issued under subsection (4) (c), it is necessary to grant the order.
- (10) Where the court grants an extension under subsection (9), such period shall not, together with the period for which the suspect was first remanded in custody, exceed ninety days.

CLAUSE 19

Clause 19 of the Bill was amended by deleting the proposed new section 42A immediately after section 42 of the Criminal Procedure Code and substituting it with the following—

Disclosure by
prosecution.

42A. (1) Pursuant to Article 50(2)(j) of the Constitution, the prosecution shall inform the accused person in advance of the evidence that the prosecution intends to rely on and ensure that the accused person has reasonable access to that evidence.

(2) In proceedings under the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act, the prosecution may, with leave of court, not disclose certain evidence on which it intends to rely until immediately before the hearing—

- (a) if the evidence may facilitate the commission of other offences;
- (b) if it is not in the public interest to disclose such evidence;
- (c) where there are grounds to believe that disclosing such evidence might lead to an attempt being improperly made to

persuade a witness to make a statement retracting his original statement, not to appear in court or otherwise to intimidate him.;

(3) Evidence shall be deemed to be in the public interest, if that evidence —

(a) touches on matters of national security;

(b) touches on the identity of an informant where there are good reasons for believing that disclosure of the informant's identity may place the family of the informant in danger;

(c) discloses the identity of a witness who might be in danger of assault or intimidation if his identity is known;

(d) contains details which, if they become known, might facilitate the commission of other offences or alert someone not in custody that the person was a suspect; or

(e) discloses some unusual form of surveillance or method of detecting crime.

(4) Disclosure of evidence to the Court and the accused person under this section shall be done in camera.

CLAUSE 20

Clause 20 of the Bill which sought to introduce a new section immediately after section 118 of the Criminal Procedure Code was amended by deleting the proposed new section 118A and substituting it with the following—

118A. An application for a search warrant under section 118 shall be made ex-parte to a magistrate.

CLAUSE 21

Clause 21 of the Bill was deleted.

CLAUSE 22

Clause 22 of the Bill was deleted.

CLAUSE 23

Clause 23 of the Bill was amended—

(a) by deleting the proposed new section 344 and substituting therefor the following—

Requirements
from persons
subject to police
supervision.

344. (1) A court may at any time direct that a person shall, whilst subject to police supervision under section 343 and at large in Kenya, comply with all or any of the following requirements, and may vary any such directions at any time—

- (a) to reside within the limits of a specified area;
- (b) not to transfer his or her residence to another area without the written consent of an authorised police officer in charge of that area;
- (c) not to leave the area in which the person resides without the written consent of the police officer in charge of that area;
- (d) at all times to keep the authorised police officer in charge of the area in which the person resides notified of the house or place in which he or she resides and provide his or her telephone and other contacts;
- (e) to present him or herself, whenever called upon by the authorised police officer in charge of the area in which the person resides, at any place in that area specified by that officer

(2) The freedom of movement and residence under Article 39 of the Constitution shall be limited as specified under this section for the purposes of limiting the movement of persons under a lawful police supervision order.

(3) The Cabinet Secretary may make regulations for carrying out the provisions of this section, and in particular prescribing the manner in which persons may be brought before a court for the purposes of this section.

(b) in the proposed new section 344A by deleting the proposed subsection (2) and substituting therefor the following—

“(2) A person who is subject to police supervision under this section shall, whilst he or she is so subject—

- (a) reside within the limits of such area as the Commissioner of Prisons shall, in each case, specify in writing to the Inspector General of Police upon the person’s release;

- (b) not transfer his or her residence to another area without the written consent of the police officer in charge of the specified area;
- (c) not leave the area in which he or she resides without the written consent of the police officer in charge of that area;
- (d) at all times keep the police officer in charge of the area in which he or she resides notified of the house or place in which he or she resides;
- (e) present him or herself, whenever called upon by the police officer in charge of the area in which he resides, at any place in that area specified by that officer.”;

(c) by inserting a new subsection immediately after the proposed subsection (2) as follows—

“(3) The freedom of movement and residence under Article 39 of the Constitution shall be limited as specified under this section for the purposes of limiting the movement of persons under a lawful police supervision order.”;

(d) in the proposed new section 345 by—

- (i) deleting the proposed subsection (1) and substituting therefor the following—

“(1) A person subject to police supervision who fails to comply with a requirement placed upon him or her by or by virtue of section 344 or 344A commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding six months and on a second or subsequent conviction for that offence to imprisonment for a term not exceeding twelve months.;

- (ii) inserting a new subsection immediately after the proposed subsection (1) as follows—

“(1A) Reasonable efforts made by a person to comply with a supervision order shall be a defence to the offences under subsection (1).”;

(e) by deleting the proposed new section 346.

CLAUSE 25

Clause 25 of the Bill which proposed to amend section 364 of the Criminal Procedure Code was amended by deleting the proposed new paragraph (c) and substituting therefor the following—

“(c) in proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court shall be stayed for a period not exceeding fourteen days pending the filing of the application for revision.”

CLAUSE 26

Clause 26 of the Bill was amended by deleting the proposed new section 379A and substituting therefor the following—

Appeal to the Court of Appeal on High Court's original jurisdiction.

379A. In proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act, where the High Court, in exercise of its original jurisdiction, has granted bail or bond to an accused person, the Director of Public Prosecution, may, as of right, appeal against that decision to the court of appeal and the order may be stayed for a period not exceeding fourteen days pending the filing of an appeal.

CLAUSE 28

Clause 28 of the Bill was deleted.

CLAUSE 32

Clause 32 of the Bill was amended in the proposed new section 20A by inserting the words “, by an officer of or above the rank of an Chief inspector or a magistrate,” immediately after the word “him” appearing in the proposed subsection (1);

CLAUSE 35

Clause 35 of the Bill which proposed an amendment to Evidence Act was amended in the proposed new section 59A—

(a) by inserting a marginal note as follows—

“Agreement on facts not in issue.”

- (b) in the proposed subsection (1) by deleting the word “or” appearing immediately after the words “notice to the accused person” and substituting therefor the word “and”;
- (c) in the proposed subsection (2) by deleting the word “or” appearing immediately after the words “handed to the accused” and substituting therefor the word “and”;
- (d) in the proposed subsection (3) by deleting the word “or” appearing immediately after the words “accused person” and substituting therefor the word “and”;
- (e) in the proposed subsection (5) by deleting the word “reaction” appearing immediately after the words “such fact and of the” and substituting therefor the word “response”;
- (f) in the proposed subsection (6) by deleting the word “initiative” appearing immediately after the words “on its own” and substituting therefor the word “motion”;

CLAUSE 36

Clause 36 of the Bill was amended in the proposed new section 63A by deleting the expression “(5)” appearing immediately before the words “The Chief Justice” and substituting therefor the expression “(2)”.

4.0 GENERAL OBSERVATIONS

The Committee is of the view that subject to these amendments as herein proposed, the Security Laws (Amendment) Bill, 2014 will go a long way in sealing loopholes that for a long time have been part of the legal shortcomings in dealing with various security challenges.

5.0 RECOMMENDATION

The Departmental Committee on Justice and Legal Affairs recommends to the House the adoption of this report and the amendments to the Security Laws (Amendment) Bill, 2014 as herein proposed.

Thank You.

HON. SAMUEL CHEPKONGA, M.P.,
Chairperson, Departmental Committee on Justice and Legal Affairs