

Terrorism, security and human rights; the inherent tension¹

For almost three decades Kenya has been locked in a struggle against international and domestic terrorism. This manifests as violence perpetrated against the public in order to attain a political goal.

The killing on, 1st April 2014, of the fiery, radical Muslim preacher Abubakar Shariff, alias Makaburi, like that of Sheikh Aboud Rogo in August 2012 and Ibrahim Ali in October last year, reignites the debate on the proper balance between dictates of security and concerns of the human rights movement in the fight against terrorism. These killings are, rightly or wrongly, blamed on security agents. The deaths of these clerics may be contrasted with the 1998 Nairobi-American Embassy bombing, the recent Westgate attack and countless assaults on churches, restaurants and entertainment spots in the country.

Everybody acknowledges that terrorism is a violation of human rights. It is also accepted that the threat of terrorism does not provide licence for indiscriminate executive action that infringes on human rights. The photographs of baby Osanya, with the bullet that killed his mother lodged in his brain, and that of the body of Makaburi being loaded into a police van express the infamy of these situations.

Like many other democracies, we face a critical challenge- how to effectively deal with threats of terrorism and maintain a respect for human rights. This is important for two main reasons: First, the country must not drop into lawlessness because of the presence of elements of terror in our midst. We must not vacate our democratic ideals due to terrorism, for in doing so we shall hand the terrorists their most prized victory; the destruction of our normal way of life. Secondly, when we descend into a frenzied over-reaction, we drive terrorists further underground, generate sympathy for them and make them heroes. This in itself radicalizes the youth and dries up sources of crucial information from the community.

There is a need for a serious debate on the compatibility of human rights with present requirements of security. How do we balance individual rights and the need to maintain collective security? Discussions on this issue are often emotional and subjective. On the one hand are human rights purists who hold the view that rights must be respected whatever the situation. On the other are those who claim to be realists- those who welcome the need for tougher executive action in order to provide national security. The former are said to live in a pre-September 11, 2001 mindset and are accused of being terrorist sympathisers, while the latter claim to have a better view of the gravity of the present circumstances. A zealous support for either of these notions diminishes a comprehensive appreciation of the reality of the situation and prevents us from considering the truth of the circumstances.

Is it possible to integrate principles of human rights into our counter terrorism strategies? Sometimes it is thought that human rights principles are inflexible and rigid ideals, which constrain executive response and efforts to attain national security and are hostile to the needs of security. This notion fails to acknowledge that the human rights framework was built in the wake of devastating global conflict and contains a balance between security and rights, which are fundamental to being human. In many respects international human rights law allows states sufficient flexibility to take protective action but demands that whatever action is taken

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be necessary and proportionate to the exigency of the moment and the gravity of the threat. Against this standard I proffer the question: should the clerics have been killed without affording them a trial?

International human rights law envisages that human rights may be validly contravened in times of public emergency. But some rights – for example the right to life and the right not to be tortured- may not be suspended in any circumstances. Other rights-like association, liberty, assembly- may be subject to restriction ‘in times of emergency which threatens the life of the nation.’ Reading from the Boko Haram situation in Nigeria, Kenya may not be too far from considering terrorism as a ‘situation of emergency,’ for how far downstream do we want to go before we recognize the danger posed by terrorism in this country?

When a situation is accepted as constituting a public emergency international law permits certain departures from its core principles so long as the intrusions do not go beyond what is strictly required by the exigencies of the moment. Ultimately, therefor, the cardinal test for a human rights compatible counter terrorism measure is its proportionality to the situation, which it seeks to combat. In practical terms the question to be asked is: is the violation of human rights the least restrictive means of achieving the desired purpose?