

A dilemma of the twenty-first century state: Questions on the balance between democracy and security

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Summary

Across the globe, states face acts of terrorism and violent crimes. The terror attacks upon the United States of America were a wakeup call to the modern world regarding the protection of its security and citizens. In response, many states have opted to enact anti-terrorism laws aimed at combating terrorism and protecting their people. These laws are controversial since they seem to limit widely accepted fundamental rights. Many regard them to be Orwellian in nature, compromising democratic progress and individual freedoms. However, states have specific duties and responsibilities towards their citizens, one being to protect and shield them from public and private violence. To achieve this, a state has to balance its tasks of providing security and ensuring democracy. Achieving such a balance is not easy, more often than not creating a dilemma for the twenty-first century state.

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1 Introduction

If the aim of life in an oligarchy¹ is to become as rich as possible, that insatiable craving would bring about the transition to democracy in this way: Since the power of the ruling class is due to its wealth, they will not want to have laws restraining prodigal young men from ruining themselves by extravagance: They will hope to lend these spendthrifts money on their property and buy it up, so as to become richer and more influential than ever. We can see at once that a society cannot hold wealth in honour and at the same time establish a proper self-control in its citizens. One or the other must be sacrificed. In an oligarchy, then, this neglect to curb riotous living sometimes reduces to poverty men of a not ungenerous nature. They settle down in idleness, some of them burdened with debt, some disfranchised, some both at once; and these drones are armed and can sting. Hating the men who have acquired their property and conspiring against them and the rest of society, they long for a revolution.²

The passage above, taken from Plato's *Republic*, resembles to a certain degree the ethos of many twenty-first century democracies. Notwithstanding the achievements of human evolution, the modern world finds itself in a state of turmoil and chaos. Almost all states are faced with increasing acts of terrorism and crime. This has resulted in the global use of the phrase 'the war on terror'.

Since the beginning of time, humans have been faced with crime, unlawful conduct and acts of violence. Human history consists of times of war and times of peace. The twentieth century and beginning of the twenty-first century may be classified as a time of war. During the twentieth century, the world witnessed two world wars, the Vietnam War, the Falklands War, the Gulf War, continuous hostilities between Israel and Palestine and also various other wars and acts of terrorism. These culminated in what will probably be remembered as the worst act of terrorism the world has seen to date. On 11 September 2001, four passenger planes were hijacked in the USA and were used as weapons against various targets, including the Pentagon and the World Trade Centre in New York.³

Since the 'September 11th' attacks, the world has experienced a noticeable upsurge in acts of violence and terror.⁴ From a legal perspective, this new hostile environment has created many legal questions and

¹ Meaning, a government by a small (elite) group of people, according to the *Collins Concise Dictionary* (2001).

² Words of the famous Greek philosopher and political thinker, Plato, in his work *The Republic*, as quoted in W Ebenstein *Great political thinkers: Plato to the present* (1969) 62.

³ It is hard to imagine a more devastating act of terror. Probably only a nuclear attack would surpass the attacks of 11 September 2001.

⁴ The most notable are the Bali bombing in 2001, the Madrid bombing in 2004, the Beslan school siege in Russia in 2004, and a continuous suicide bombing spree in Iraq and in Israel.

also caused a rethinking of accepted constitutional principles and values. The world over, countries have enacted or are in the process of enacting sweeping counter-terrorism laws. These laws often create tension between established legal rules and principles, on the one hand, and new measures created to prevent acts of terrorism, on the other.⁵ The question is often asked: How should states protect their citizens, on the one hand, and allow nationals the full entitlements of their human rights and the law, on the other? Put differently, how should states balance the basic democratic rights of their people but simultaneously maintain and ensure security for the people and the state itself? Should governments be allowed to restrict and limit fundamental rights in an effort to protect the public and curtail the escalating tendencies of violence? It is the purpose of this contribution to evaluate these questions and to add to the continuous debate regarding the search for a balance between democracy and security. A new South African Act, named the Protection of Constitutional Democracy Against Terrorism and Related Activities Act,⁶ will be briefly referred to in this context. It is also important to emphasise that the balance between democracy and security is not only relevant to the so-called first world countries, but that many third world countries, particularly those on the African continent, are similarly confronted with the need to find a compromise between state security and individual autonomy.⁷

It is a fundamental purpose of a state to protect the well-being of its citizens and to ensure a specific expression of freedom, while not harming other groups.⁸ Present-day South Africa is also confronted by the legal paradox mentioned above. How should the state ensure and protect the general public and itself against the onslaught of international terrorism, but still be flexible enough to ensure a true and democratic government in which various universally accepted human rights and freedoms are protected and promoted? Under its new constitutional dispensation, South Africa has created a democratic form of govern-

⁵ The most publicised anti-terror laws have been enacted in the USA and UK. See eg the Patriot Act of the USA. Many other countries have followed suit and have taken drastic measures to cope with the increase in public violence. There are also reports which state that, after the recent Beslan school siege, the Russian parliament is considering tight restrictions on travel rules, freedom of the press and restrictive visa requirements. Stricter punishment for acts of terror is also proposed. Some countries are even considering a lifting the moratorium on the death penalty and allowing the confiscation of property belonging to terrorists or their families. For more on this, see <http://www.guardian.co.uk/international/story> (accessed 29 September 2004). 33 of 2004.

⁶ 33 of 2004.

⁷ The African continent has also experienced serious incidents of terrorism. Examples of such incidents are the USA embassy bombings in Tanzania and Kenya during 1998, as well as a more recent bombing of a holiday resort in Egypt.

⁸ See DW Jordaan 'The open society' (2001) 64 *Journal of Contemporary Roman Dutch Law* 108 where he refers to Popper's 'The open society and its enemies' Vol I (1950) Pref IX fn 13.

ance which is often referred to as an 'open society'.⁹ This open society is under threat because of national and international acts of terrorism and violence. In 2000, the then Minister of Safety and Security of South Africa, Mr Steve Tshwete, suggested certain amendments to the Constitution in order to allow what many perceived to be draconian anti-terrorism laws. In essence, it was suggested that the proposed laws should permit certain state institutions, for example, the general law enforcement agencies, to ignore certain constitutional rights and safeguards in their fight against crime. It was also suggested that the Constitution should be amended so as to allow for the detention of terror suspects for more than 48 hours without access to legal representation.¹⁰ Opponents to the proposals stated that protection against terrorism should not be achieved through processes whereby human rights and accepted constitutional principles, such as the rule of law and democracy, are ignored. They argued that the restriction of human rights and founding constitutional principles may easily lead to other unlawful methods of state action, such as illegal interrogation practices and unreasonable limitations to personal freedom.¹¹ In order to achieve a balance between the two competing interests, that of the state and society against the fundamental rights of an accused terrorist, it is important to determine the basic rights and obligations of a state *per se*, and also to determine which lawful safeguards have been created to protect the individual against unreasonable state actions.

2 The general rights and obligations of a state

The duty on a state to protect its citizens is not a new concept and can be traced back to the origins of Germanic constitutional history.¹² During the first relationships between *liegemen* and landlords/*paterfamilias*, predating the Magna Carta, it was accepted that the *paterfamilias* had a duty to protect his *liegemen*. This was the time period of the allegiance relationship whereby people undertook an oath of allegiance and military support to the *paterfamilias* in a time of war and also to perform

⁹ The term 'open society' refers to a stage in the development of humanity whereby the world has created a global state/super state, which is inclusive of all people of the world. This global state is then based on religious notions such as love and dignity for all. A closed society, in contrast, is a society that includes only a segment of humanity and excludes all others. See also J White 'Open democracy: Has the window of opportunity closed?' (1998) 115 *South African Law Journal* 66.

¹⁰ These proposals are comparable to current practices in other countries in the world. Eg, the USA is detaining hundreds of people in Quantanoma Bay, Cuba, without trial or right to legal representation.

¹¹ See Editorial 'Terrorism, crime and the rule of law' (2000) March *De Rebus* 5.

¹² See G Carpenter *Introduction to South African constitutional law* (1987) 29.

certain duties in peacetime. In return for such favours and allegiance, the *paterfamilias* had to protect the members of the 'family' during times of war and peace.¹³ This relationship, which was the origin of the feudal system of government, also formed the basis for the development of the relationship between the king and his people. Under early British constitutional law, the Crown had to protect its people in return for their allegiance. Although the duty on the state to protect its citizens was initially weak, it became stronger as the constitutional relationship between the Crown and the *populus* developed. It was only during the nineteenth century when the first law enforcement agencies were formally created, specifically to fulfil the state's duty of protection towards its citizens.¹⁴ Today, the duty of the state to protect its people has developed into a generally accepted responsibility. Many constitutional systems have even opted to record such a responsibility formally in their distinctive constitutional legal systems.¹⁵ However, the state is not only required to protect the well-being of its people, but also to ensure other privileges such as a democratic government, the maintenance of law and order and the protection of the basic fundamental human rights of all people. However, this diversity in the duties and obligations of the state towards its citizens can create a situation where the protection and fulfilment of one duty lead to the limitation or curtailment of other rights or duties. This creates a dilemma for the state, as it is called upon to determine which right or duty should be preferred over another. In order for the state to make such a determination, it must weigh up all relevant factors and must balance the circumstances of each case to determine whether the protection of one right or duty over another is reasonable and justifiable. Such a balancing act requires both a consideration of the law as well as a determination of what the general public interest demands.

3 The protection of the right to freedom and security of the person and other basic fundamental rights under the South African Constitution of 1996

The Constitution of the Republic of South Africa protects the right of citizens to be protected by the state as well as many other constitutional principles and values and also many universally accepted fundamental

¹³ Carpenter (n 12 above) 28.

¹⁴ See G Carpenter 'The right to physical safety as a constitutionally protected human right' (1998) *Suprema lex: Essays on the Constitution presented to Marinus Wiechers* 141, where she makes reference to Sir Robert Peel's establishment of a permanent law enforcement agency the so-called Peelers or Bobbies in Britain.

¹⁵ See eg sec 12 of the Constitution, read together with sec 7.

rights.¹⁶ Under the founding provisions and the Preamble to the Constitution, it is stated, *inter alia*, that the Republic is one sovereign, democratic state, founded on the values of human dignity, equality and the advancement of human rights and freedoms. The Constitution also aims to lay the foundation for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by the law.¹⁷ The Constitution is proclaimed as the supreme law of the state and any law or conduct inconsistent with the Constitution is invalid. All obligations imposed by the Constitution must be fulfilled.¹⁸

The Constitution further incorporates an extensive Bill of Rights in which various rights and obligations are entrenched. The Bill of Rights confirms itself as a cornerstone of democracy and it enshrines the rights of all people in the country. The basic democratic values of human dignity, equality and freedom are again specifically affirmed. A significant provision in the Constitution pertaining to this contribution is the obligation set out in the Constitution that the state must respect, protect, promote and fulfil the rights set out in the Bill of Rights.¹⁹ However, rights are not absolute and are subject to limitations contained or referred to in the specific limitation clause or where so provided in the Bill of Rights.²⁰ Rights in the Bill of Rights apply to all law and bind the state in all branches. The rights also apply horizontally and bind a natural or a juristic person if applicable, and after taking into account the nature of the right and the nature of any duty imposed by the right.²¹ In respect of security issues, the Bill of Rights protects various important rights, such as the right to equality,²² the right to human dignity,²³ the right to freedom and security of the person,²⁴ privacy,²⁵ freedom of religion, belief and opinion,²⁶ freedom of expression, including, *inter alia*, the freedom of the press and other media,²⁷

¹⁶ See in general ch 2 of the Constitution.

¹⁷ Refer to sec 1 read in conjunction with the Preamble to the Constitution.

¹⁸ See sec 2 of the Constitution. There is thus a clear responsibility on the state to fulfil its constitutional obligations. This position is also confirmed under sec 7 of the Bill of Rights.

¹⁹ See sec 7(2) of the Constitution. There is thus a positive obligation on the state with regard to the fundamental rights set out in the Bill of Rights.

²⁰ See sec 7(3) together with sec 36 of the Constitution.

²¹ Secs 8(1) & (2) of the Constitution.

²² Sec 9.

²³ Sec 10.

²⁴ Sec 12.

²⁵ Sec 14.

²⁶ Sec 15.

²⁷ Sec 16. The right to freedom of expression, however, is internally modified in that the right does not extend to propaganda for war, incitement of imminent violence and the advocacy of hatred. See secs 16(2)(a)-(c).

freedom of association,²⁸ freedom of movement and residence,²⁹ freedom of property,³⁰ access to information,³¹ just administrative action,³² access to courts³³ and various entitlements relating to the capacity as an arrested, detained and accused person.³⁴

As was stated above, the rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom. The determination of reasonableness and justifiability is done by taking into account all relevant factors, including five specified criteria.³⁵ The Bill of Rights also provides that a state of emergency may be declared in terms of an Act of parliament and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and also when such a declaration is necessary to restore peace and order.³⁶ Finally, the Constitution confirms that, when the Bill of Rights is interpreted, a court, tribunal or forum must promote the values that underlie an open and democratic society, must consider international law and may consider foreign law.³⁷

Under the Constitution, it is the responsibility of the executive authority to implement legislation, to develop and implement policy and to prepare and initiate legislation.³⁸ The Constitution also lays down certain principles which govern national security in the Republic.³⁹ Various

²⁸ Sec 18.

²⁹ Sec 1.

³⁰ Sec 25.

³¹ Sec 32.

³² Sec 33.

³³ Sec 34.

³⁴ See sec 35 which, eg, affords to right to remain silent and to be brought before a court as soon as reasonably possible, but not later than 48 hours after an arrest. See secs 35(1)(b)(i) & (d)(i).

³⁵ Refer to secs 36(1)(a)-(e). The factors are: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose and finally if the limitation is the less restrictive means to achieve the purpose.

³⁶ See sec 37(1) of the Constitution. Various other procedural requirements are also laid down. See secs 37(2)-(8) of the Constitution. It should be noted that certain rights are non-derogable, even during a state of emergency. Refer to the table of non-derogable rights set out in sec 37 of the Constitution.

³⁷ See sec 39(1)(a)-(c) of the Constitution. When legislation is interpreted or when the common law or customary law is developed, then every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Sec 39(2).

³⁸ Sec 85(2) of the Constitution.

³⁹ See secs 198(a)-(d) of the Constitution. The principles include that any South African citizen is precluded from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation and also that national security must be pursued in compliance with the law, including international law.

security services are established, which must act in accordance with the law and international law.⁴⁰ The importance of international law in this regard should be emphasised. When legislation is interpreted, every court must prefer any reasonable interpretation that is consistent with international law.⁴¹ The Constitution concludes by determining that all constitutional obligations must be performed diligently and without delay.⁴²

In light of the constitutional obligations of the South African state to protect its citizens, sections 11 and 12 of the Bill of Rights are most relevant to this investigation and should be considered in more detail. Section 11 states that everyone has the right to life, while section 12 reads as follows:

- (1) Everyone has the right to freedom and security of the person, which includes the right —
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) ...
 - (c) to be free from all forms of violence from either public or private sources;⁴³
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right —
 - (a) ...
 - (b) to security in and control over their body; and
 - (c) ...

From the wording of the Constitution, there should be no doubt that the right to physical safety of a person is a constitutional fact. Apart from the fact that such a right is regarded as a long established right of impeccable provenance, the obligation to respect and ensure the safety of persons rests mainly on the state and to a limited extent on each individual. It thus has both vertical and horizontal operation.⁴⁴

The realisation of the right to physical safety seems further to require a positive action by the state.⁴⁵ In general, the enforcement of rights is dependent on the existence of a legal system and mechanisms for enforcement thereof. It would seem that the sub-sections under section 12 should be classified as civil and political rights and are directly

⁴⁰ See ch 11 of the Constitution.

⁴¹ Sec 233 of the Constitution.

⁴² Sec 237 of the Constitution.

⁴³ My emphasis.

⁴⁴ See Carpenter (n 14 above) 142.

⁴⁵ For support of this position, see M Pieterse 'The right to be free from public or private violence after Carmichele' (2002) 119 *South African Law Journal* 29. According to Pieterse, sec 12(1)(c) seems to create positive duties which are enforceable directly against both the state and private individuals. The extent of such duties is at the very least an obligation to refrain from violent behaviour.

enforceable.⁴⁶ Such a claim could also be possible in instances where the state or one of its agencies have not prosecuted a criminal or has allowed a dangerous criminal to escape and cause further harm.⁴⁷ It is, however, obvious that the state and its organs cannot possibly be held liable for all harm that can befall members of the general public. Liability and responsibility should only be attributed if specific legal criteria have been met. Although an individual's right has been infringed, such an aggrieved party must still show that the state had a duty to act positively in order to protect such a right. One must also remember that individual rights are not absolute and that they are confined according to the law, including the Constitution, and other factors such as the rights of other persons or even the public in general.⁴⁸ A balancing of rights is thus often called for.⁴⁹

From the wording of section 12 it is suggested that section 12 requires both substantial and procedural guarantees. Substantive reasons are needed to justify a limitation of someone's freedom and procedural requirements must be met when a person's freedom is taken away.⁵⁰ Substantive reasons further require a rational connection between a deprivation of freedom and some objectively determinable purpose.⁵¹ It is evident from section 12(1)(c) that there is a duty on the

⁴⁶ This view is supported by Carpenter (n 14 above) 144. The writer mentions that the right is couched in very specific and positive terms and would thus entail more than just a negative protection thereof. She also argues that the extent of the right goes further than the common law right to physical integrity, and that it should be possible under the right to sue the state in cases where the state failed to protect an individual against violent deeds of burglars, criminals and terrorists. See also the case of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC). In the *Rail Commuters* case, the Constitutional Court held that both Metrorail and the Commuter Corporation bore a positive obligation in terms of the South African Transport Services Act 9 of 1989 and the Constitution to ensure that reasonable measures were in place to provide for the security of rail commuters. See paras 84C-D 403.

⁴⁷ A case in point is eg the case of *Carmichelle v Minister of Safety and Security* 2001 4 SA 938 (CC). See also *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) and *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA). According to the *Carmichele* judgment, it was confirmed by the Court that sec 12(1)(c) entails an obligation to refrain from violence and that reasonable steps should be taken to prevent a violation of the right.

⁴⁸ It is a generally accepted rule that the government is to act in the interest of the public at large. The public interest should always be at the centre of state actions.

⁴⁹ See Carpenter (n 14 above) 144.

⁵⁰ Refer to the cases of *S v Coetzee* 1997 3 SA 527 (CC) and also *De Lange v Smuts NO* 1998 3 SA 785 (CC).

⁵¹ An example of such a rational connection is police investigations or 'stop and search' operations. In such instances, there should be a balance between a restriction of a right and also the deprivation of a right. If the threshold balance is too high, then people are unprotected against arbitrary police action, but if it is too low then it creates a situation of ineffective law enforcement. For more details, see De Waal *et al The Bill of Rights handbook* (2001) 252. Compare also Chaskalson *et al Constitutional law of South Africa* (1999) Revision Service No 5 ch 39-31.

state to protect people against state violence and private violence. Such protection may even be achieved through violent means, where necessary, to quell or discourage violent conduct. Since the South African Constitution supports the principle of non-excessiveness, a proportional balance must be struck between the use of force and the harm at hand. The least violent means must be employed.⁵²

In essence, there seems to be two mechanisms whereby the state potentially may be held accountable for a failure to protect an individual's right to physical safety. The first mechanism is obtaining a mandamus against the state, requiring it to act. A mandamus is a remedy whereby a public authority may be forced to perform a duty that rests on it. The remedy of a mandamus is, however, somewhat flawed, as the authority cannot be told exactly how to perform its duties or responsibilities. The exercise of public functions falls within the realm of policy and under executive authority. For another branch of government authority, such as a judicial body, to tell the state how to act, may be contrary to the principle of separation of powers.⁵³ The second mechanism is holding the state liable for individual harm through delictual liability. Traditionally, such liability was dependent on the existence of a duty of care on the state.⁵⁴ The state must always act reasonably. It is not always easy to establish when it is reasonable to act, and this should be determined in light of the facts of the matter as well as in what the public regards as reasonable. Under South African law, both sections 12(1)(c) and 205(3) strongly indicate that there rests a positive duty on the state to act.⁵⁵

In accordance with the general principles of the law of delict, and in order to establish liability for failure to protect a constitutional and

⁵² See sec 36 of the Constitution and also sec 13 of the South African Police Service Act 68 of 1995.

⁵³ According to South African law, the principle of separation of powers is constitutionally recognised and protected. Refer also to the cases of *Soobramoney v Minister of Health, KZN* 1998 1 SA 765 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Pharmaceutical Manufacturers of SA In re: Ex parte the President of the RSA* 2000 2 SA 674 (CC) and also *SAAPIL v Heath* 2001 1 SA 883 (CC).

⁵⁴ For more on this, see the case of *Minister of Justice v Ewels* 1975 3 SA 590 (A). See also J Neethling *et al The law of delict* (2002) ch 3 for a comprehensive discussion of state liability under the South African private law.

⁵⁵ This view is also shared by other commentators. See Carpenter (n 14 above) 151, where she confirms that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and also to uphold and enforce the law. She further states that the ideas that the police are bound only to protect the public at large and that individuals have a claim to protection only in specific circumstances, do not seem to be consistent with the constitutional provisions. Even protection under the equality clause could provide strong constitutionally required action on the state to act. State action should protect all and may not discriminate between citizens. Unequal protection by security services would be unconstitutional and thus invalid. See secs 2 & 9 of the Constitution.

common law right to security, the plaintiff must prove all the elements of such delictual liability.⁵⁶ Of these elements, proving a breach of the duty and showing causation will be the most difficult to accomplish. The trick in every case seems to be to determine what is reasonable in the circumstances.⁵⁷ Reasonableness is not only required under the common law, but also under the new constitutional order. Section 36 of the Constitution provides that the rights entrenched in the Bill of Rights may only be limited in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of equality, freedom and human dignity.

Various factors are used to determine the test of reasonableness and justifiability.⁵⁸ Under the Constitution, it is the burden of the applicant to show that he or she has indeed a right and that such a right has been encroached upon. The other party or respondent, usually the state, then has to show that the limitation was reasonable and justifiable.⁵⁹ Under the common law, it is the burden of proof of the plaintiff to show that all the delictual requirements have been met. There is thus a significant difference between a legal action based upon delict, and one based upon the Constitution. Under the Constitution, the burden of proof is on the state to show that a limitation of the right to security was reasonable and justifiable. This reversal of the burden of proof of reasonableness and justifiability is of significant benefit to an applicant and thus requires special attention when a prospective litigant is deciding on which legal basis to establish his or her case.⁶⁰ On the issue of *mens rea*, it is suggested that the state should justify its actions or inactions, depending on the circumstances of the matter. In this respect, it must be said that there can never be exact predetermined rules that prescribe what must be done in every possible circumstance.⁶¹

A further important aspect is the fact that the state is normally vicariously liable for the actions of its officials. However, legal requirements

⁵⁶ The elements are the existence of the right, the existence of a duty to protect, the breach of that duty, causation, fault and finally damage or injury.

⁵⁷ Carpenter (n 14 above) 153.

⁵⁸ See secs 36(1)(a)-(e) of the Constitution.

⁵⁹ For more on this, see De Waal *et al* (n 51 above) 29-30.

⁶⁰ See Carpenter (n 14 above) 155 who also supports this view. In rebuttal, the state could then argue factors such as lack of knowledge of danger, the measure of foreseeability, feasibility and practical and financial capabilities. Refer also to Pieterse (n 45 above) 37.

⁶¹ Political decision making and policy directives are mostly decisive in such instances. The government is often called upon to make value judgments in order to balance the various interests that could be at hand. Carpenter refers to a paradox in such circumstances, as a decision to make an arrest, for example, is subject to judicial scrutiny and review, while a decision not to arrest or not to act may often go unnoticed. Under-enforcement could also easily lead to selective enforcement.

to establish vicarious liability are not as simple as they often seem, and strict requirements must be met before such liability is confirmed.⁶²

A court will usually not substitute its opinion for that of the repository of a discretionary power. If a discretion was exercised lawfully, thus also reasonably, regardless of whether the end result was right, a court should not tamper with such a decision.⁶³

In light of the abovementioned factors, there should be little doubt that all states share a significant responsibility to ensure and protect the well-being of their citizens. In an effort to fulfil such a responsibility, many states have opted to enact detailed laws to regulate and control public violence and various forms of terrorism. South Africa is a good example of such a state, where recently, specific new legislative requirements have been enacted into law.

4 New legal measures in South Africa directed at ensuring proactive protection of the right against violence and terrorism

In 2000, South Africa started with an initiative to review statutory laws and common law relating to security and the criminalising conduct constituting terrorism and related activities. Since the existing offence of terrorism contained in section 54(1) of the Internal Security Act⁶⁴ related only to terrorism in respect of the South African government or population, it was deemed to be inadequate. The threat of international terrorism was often found to be directed at foreign targets such as embassies or foreign citizens. There was also a worldwide trend to create specific legislation directed at terrorism, based on international instruments relating to terrorism. Although existing laws could be amended, the government decided to enact a new omnibus Act addressing the issues of terrorism and international violence on a broader basis. This new Act is known as the Protection of Constitutional Democracy Against Terrorism and Related Activities Act.⁶⁵

The new Act aims at providing measures to prevent and combat terrorist and related activities, to provide an offence of terrorism and

⁶² For recent confirmation of the requirements of vicarious liability, see the cases of *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 2 SA 34 (CC); *Bezuidenhout NO v Eskom* 2003 3 SA 83 (SCA) and also *K v Minister of Safety and Security* 2005 3 SA 179 (SCA).

⁶³ Refer also to the case of *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC), where the Constitutional Court concluded that [even] the Constitution does not protect litigants from wrong decisions. Reasonable minds could well differ on the correct outcome of similar or even identical cases.

⁶⁴ 15 of 1982.

⁶⁵ 33 of 2004. The Act came into effect in May 2005.

other offences associated or connected with terrorist activities, to give effect to international instruments dealing with terrorist and related activities and also to provide measures to prevent and combat the financing of terrorist and related activities.⁶⁶ The Act reiterates that the Republic of South Africa is a constitutional democracy in which various fundamental rights are protected and that terrorist and related activities undermine such rights and values. Furthermore, and since terrorism has become an international problem, the government of the Republic of South Africa committed itself to prevent and combat terrorist and other related activities. Such actions are in fulfilment of the state's national and also international legal obligations.⁶⁷

The Act creates a new terrorism offence. Any person who engages in a terrorist activity is guilty of the offence terrorism.⁶⁸ According to the definitions in the Act, the engagement in a terrorist activity includes the commission, performance, carrying out, facilitation of, participation or assistance in, the contribution to or even the planning of a terrorist activity. Terrorist activity is subsequently defined as, *inter alia*, any act committed in or outside the Republic which involves the use of violence by any means or method, the release into the environment or exposing the public to dangerous, harmful organisms, toxic chemicals or even biological agents that endanger life, could cause risk to the health and safety of the public, damage to property or the disruption of essential services.⁶⁹ According to section 3, various offences associated or connected with terrorist activities are established. The Act also provides for so-called convention offences. Such offences refer to offences created in the fulfilment of the Republic's international obligations dealing with terrorism in general, and also offences referred to in section 56(1)(h) of the Nuclear Energy Act,⁷⁰ referred to in sections 2(1) and (2) of the Civil Aviation Offences Act.⁷¹ Other convention offences include (a) offences associated or connected with financing specified offences; (b) offences relating to explosive or other lethal devices; (c) offences relating to hijacking, destroying or endangering the safety of a fixed platform; (d) offences relating to the taking of a hostage; (e) offences relating to the causing of harm to internationally protected persons; (f) the hijacking of aircraft; and (g) the hijacking of a ship or the endangering

⁶⁶ Refer to the long title of the Act to confirm the overall aims of the Act.

⁶⁷ Such obligations include the state's regional or international instruments, such as the Convention on the Prevention and Combating of Terrorism, adopted by the African Union in 1999, to which the Republic of South Africa has become a party by ratification on 7 November 2002.

⁶⁸ See sec 2 of the Act.

⁶⁹ Refer to the complete definition of terrorist activity set out in sec 1 of the Act.

⁷⁰ 46 of 1999.

⁷¹ 10 of 1972.

of the safety of maritime navigation.⁷² Finally, the Act provides for so-called other offences, such as the harbouring or concealment of persons that have committed specified offences; the failure to report the presence of persons suspected of intending to commit or having committed any related terrorist activity; offences relating to hoaxes or even the threat, attempt, conspiracy or inducement of another person to commit a terrorist-related offence.⁷³

It should be of interest to note that, not only are individual terrorist activities prohibited, but that an entity under the Act also includes members of a syndicate, gang or even organisation or association. Since the aim of the Act is to protect civil society and proper law enforcement, it falls under the ambit of the Minister responsible for safety and security. Not only are positive terrorist activities regulated, but also failures or omissions. The Act also determines that a political, philosophical, ideological, racial, ethnic, religious or any other similar motive shall not be considered as a justifiable defence of any terrorist activity.⁷⁴

According to section 15 of the Act, the jurisdiction of the South African courts was broadened in respect of terrorist offences. Particular provisions of the Criminal Procedure Act⁷⁵ and the Extradition Act⁷⁶ are applicable to the prosecution of terrorist activities under the Act. No prosecution under chapter 2 of the Act may, however, be instituted without the written authority of the National Director of Public Prosecutions.⁷⁷ Severe penalties are prescribed for persons who are convicted of offences mentioned in the Act. Penalties differ from life imprisonment to fines up to R100 million.⁷⁸ The Act also provides for the forfeiture of property to the state when such property has been used in the commission of an offence.⁷⁹

In conclusion, the Act provides for specific investigating powers and freezing orders.⁸⁰ A judge may, with a view to preventing a terrorist or related activity on written request and under oath by a police official of, or above, the rank of director, issue a warrant for the cordoning off and stopping and searching of vehicles and persons. This provision does not

⁷² See secs 4-10 of the Act respectively.

⁷³ See secs 11-14 of the Act respectively.

⁷⁴ See sec 1 definitions.

⁷⁵ 51 of 1977.

⁷⁶ 67 of 1962.

⁷⁷ Refer to sec 16 of the Act.

⁷⁸ See secs 18(a)-(f) of the Act. A court can also order a person to reimburse another party for expenses incurred incidental to the relevant activity. Offenders are furthermore jointly and severally liable for expenses incidental to any terrorist activity. See secs 18(2)(a)-(c) of the Act.

⁷⁹ Secs 19(1)(a)-(b) of the Act.

⁸⁰ See secs 22-23 of the Act.

affect the rights of police officials or other law enforcement officers to use any other power in any other law in respect of the cordoning off or search or seizure of persons or property.⁸¹

Generally, the new South African Act provides a powerful tool to the state in its obligation to combat terrorism and to protect the well-being of South African citizens and their property. Although various safeguards have been included in the Act, it is submitted that some measures surpass certain rights protected under the Constitution and the Bill of Rights in particular. Although the scope of this research does not allow for an in-depth and comprehensive discussion of all possible conflicts of interest between the new security law and the South African Constitution, possible conflicts are highlighted as follows:

- (a) Arrested, detained or accused persons under the new Terrorism Act could potentially find themselves in a situation where they are treated differently from others within the territory of South Africa, and could possibly argue that their rights to equal treatment before the law and equal protection and benefit of the law are limited.⁸²
- (b) People accused of terrorism may also argue that their dignity and right to freedom and security of their persons are encroached upon if they are deprived of their freedom arbitrarily or on unjust grounds.⁸³
- (c) Many limitations on the right to privacy are possible.⁸⁴
- (d) Members of specific communities who express themselves on religious grounds and who belong to certain organisations may claim that their rights to religion, belief and opinion, freedom of expression, assembly and association are limited or threatened.⁸⁵

⁸¹ See secs 24(1)-(5) of the Act.

⁸² See sec 9(1) of the Constitution.

⁸³ See to secs 10 & 12 of the Constitution. Detention without trial is also prohibited under sec 12(1)(b) read with sec 35 of the Constitution.

⁸⁴ See secs 14(a)-(d) of the Constitution. Private home searches, seizure of property or infringement of private communications are possible examples of privacy infringements.

⁸⁵ See secs 15, 16, 17 & 18 of the Constitution. In England, new proposals have been tabled in July to August 2005 to restrict certain religious speeches and to ban people from belonging to certain prohibited organisations. Note again that the South African Act specifically states that religious or other motivations shall not be regarded as a justifiable defence for any defined terrorism activity. See n 74 above. It should also be noted that any expression to promote propaganda for war or the incitement of imminent violence is an internal limitation on a persons right to freedom of expression. See secs 16(2)(a)-(c) of the Constitution.

- (e) Aspects concerning the right to citizenship, freedom of movement and residence and freedom of trade and occupation may also be relevant.⁸⁶
- (f) The deprivation of property and the freezing and confiscation of bank accounts are also possible confrontational aspects.⁸⁷
- (g) Finally, various legal disputes may occur, based on the rights of access to information, just administrative action, access to courts and the rights of an arrested, detained and accused persons.⁸⁸

Whether such measures will survive constitutional scrutiny will depend on the circumstances of each case and whether such measures are regarded as reasonable and justifiable limitations of one or more rights protected under the Bill of Rights.⁸⁹

5 Conclusion

It is a well-known fact that many democratic systems in the world are under siege and threat of international terrorism and violence. There seems to be no exceptions to who is targeted and affected. Many supporters of acts of terror try to justify their actions by social, religious and also economic reasons. Terrorism is often supported because of the progress of first world economies, while many other second and third world countries are becoming poorer and poorer. It must, however, be stated that acts of terrorism will not bring about positive change for any country, but will lead to more restrictions and more suffering to those who can afford it the least. Violence creates violence.⁹⁰

In order to cope with the ever-escalating circle of violence and terror, many states are implementing drastic and often invasive plans of action to protect their own existence as well as the safety and well-being of their citizens. Often, the measures undertaken by such states are seen to be over excessive and unnecessary.⁹¹ The counterargument to this is that many societies will take the law into their own hands if their states do not take action to protect their rights and freedoms. In this regard,

⁸⁶ See secs 20, 21 & 22 of the Constitution. Possible unreasonable deportations of foreign nationals or restrictions on movement or residence can easily occur.

⁸⁷ See sec 25 of the Constitution.

⁸⁸ Secs 32, 33, 34 & 35 of the Constitution. Denying someone the right to be brought before a court of law within 48 hours after an arrest is an obvious example. See sec 35(1)(d)(i) of the Constitution.

⁸⁹ Refer to the limitation procedures set out in sec 36 of the Bill of Rights.

⁹⁰ Evaluate again the passages quoted from Plato's *Republic* in Ebenstein (n 2 above) 62.

⁹¹ See eg the following reports: 'Tougher anti-terror laws proposed in Britain' http://news.bbc.co.uk/2/hi/uk_news/ (accessed 9 December 2004); 'House arrest without trial to be rushed through' <http://www.telegraph.co.uk> (accessed 28 February 2005); and 'Judge warns of Orwellian terrorism laws' *Sydney Morning Herald Online* <http://www.smh.com.au/news/anti-terror-watch> (accessed 11 December 2004).

there is a perception in the world today that the rights of law-abiding citizens are ignored, while the rights of criminals enjoy more primacy. This situation is often referred to as a crisis of social order.⁹² Many citizens feel that the protection of fundamental rights is only of value in a civilised state and not in a country where crime and terror are rampant and where human life is cheap. People depend on their rights and the protection of the law, not because of principle but because of self-interest. In this regard, it was said jokingly in the past that a conservative is a liberal who has just been mugged, while a liberal is a conservative who has just been arrested.⁹³

From the above, it is evident that the modern state finds itself in a serious dilemma. On the one hand, the state has a clear obligation and duty to protect the safety and well-being of its citizens. On the other, the state must also protect and safeguard core principles such as the rule of law, the protection of fundamental rights and a genuine democratic order. A balance of these two interests is often difficult to achieve. When stricter laws are implemented to deter and address terrorism, for example, many other fundamental rights are limited or even taken away. The modern state thus find itself in a position where the state is 'damned if it takes action, and it is damned if it doesn't'.⁹⁴ From a legal point of view, this situation can create significant challenges. Notwithstanding the consequences, the modern state cannot adopt a casual or even cavalier attitude towards its duty to ensure public and personal safety. It is submitted that the state owes a duty to its citizens who, through the system of a democratic order, have put the state in existence. It is therefore argued that the state must take the necessary action in order to protect itself and its people.⁹⁵ Every state should seek a balance between security and democracy. Although security is of paramount importance, it should not be achieved through excessive and undemocratic mechanisms. Basic legal and constitutional principles, such as the rule of law, the protection of fundamental rights and a truly democratic order should be maintained. In respect of democracy, it should be emphasised that democracy does not only mean majority decision making, but indeed such decision making within a system where other pre-determined safeguards and limitations

⁹² See Carpenter (n 14 above) 139 where she refers to the address given by Justice E Cameron at the Alan Paton award ceremony in 1997 in South Africa, as was reported in *The Sunday Times* 8 June 1997 21.

⁹³ Carpenter (n 14 above) 139. The reference clearly illustrates the view that victims of crime feel that the law only protects the baddies, while the baddies are again aggrieved that the government is bullying them and that the law and legal system are only accessible to the rich and powerful.

⁹⁴ Carpenter (n 14 above) 159.

⁹⁵ Democracy ultimately does not only refer to the protection of individual rights but, more so, the principle itself will not suffice in a world if it is made redundant through the acts of terrorism and criminal intentions.

have been set. In this respect, democracy encapsulates more than just public and personal safety. It also includes aspects such as the protection of generally accepted fundamental rights, free political expression, freedom of the press and information, due process of the law and an independent judiciary.

In order to deal effectively with terrorism, special state action is required. The higher the threat is, the higher the level is of pro-active state actions required. In such instances, it would seem to be part of the democratic order to take all necessary actions, even to limit other legal entitlements, in order to protect a state's own existence and the well-being of its civil society. The state is called upon to make a value judgment, in light of all the relevant and prevailing circumstances, in order to determine the right course of action. However, there are limits to what a state may do in the name of combating terrorism.⁹⁶ A democratic state should always remind itself that it does not have a *carte blanche* mandate to act as it sees fit.⁹⁷ The state must ensure action that is reasonable and justifiable in the relevant circumstances in order to fulfil its duties and responsibilities, but it should guard strongly against creating a system of governance, where the state itself, under the cover of combating crime and terrorism, is ultimately breaking down the very pillars of a democratic society.

Finally, it is submitted that the legal requirements, as are set out in the new South African Protection of Constitutional Democracy Against Terrorist and Related Activities Act, do indeed take significant steps towards protecting the South African public against attacks of terrorism and public violence. However, the extent to which the new Act, together with the Constitution, will balance the competing interests of security and democracy will ultimately depend on political insight, judicial oversight and the relevant circumstances of each particular situation.⁹⁸ Let us hope that such circumstances will be limited to only a few instances, if any at all.

⁹⁶ Limitations on the right to freedom of movement, search and seizure procedures, visa control and identification confirmation are acceptable examples in this regard.

⁹⁷ Entitlements, such as the right to a fair trial, access to courts, legal representation and the protection against cruel and inhuman treatment should not be encroached upon.

⁹⁸ It has been suggested that extraordinary steps and powers are required in extraordinary situations. The bigger the scale and threat of security breaches, the more extensive counter measures seem to be permissible.