

SOUTH AFRICA'S ANTI-TERROR LAW

Among the least restrictive?

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In the aftermath of the July bomb blasts in London, there has been renewed concern around the scope and success rate of global anti-terrorism measures. Opinion polls showed that an overwhelming majority of Britons (86 per cent of those questioned) would support tough new measures to reduce the threat of attacks after the London bombings. According to a *Guardian*/ICM poll, almost three quarters of the UK population are happy to give up civil liberties in order to make Great Britain safer from terrorist attacks. It is perhaps not surprising then that the London bombings led to the announcement by British Prime Minister Tony Blair of a series of new anti-terrorism measures, including deporting foreign nationals who claim that the use of 'violence to further a person's beliefs' is acceptable and authorising the denaturalisation of British citizens who engage in 'extremism'.

At the time of writing, government and opposition parties in Britain have forged a broad agreement on the political response to the London attacks. Three significant laws were agreed in principle. A new offence of 'acts preparatory to terrorism' will give law enforcement officials more scope in dealing with those they suspect of extremism. A law banning the provision or receipt of terrorist training is aimed at a key foundation of terror cells, foreign training camps. Perhaps the most controversial and dramatic law will be the prohibition on glorifying or inciting terrorism. Tougher anti-terror laws bring with them a surrender of certain basic

freedoms that citizens in liberal democratic states are accustomed to. These may include infringements on freedoms of association, religion, media and expression, and basic rights to privacy and a fair trial.

South Africa's anti-terror legislation, the Protection of Constitutional Democracy against Terrorism and Related Activities Act (Act 33 of 2004), came into operation on 20 May 2005. Throughout the drafting process concerns were raised from a number of civil society and faith organisations that aspects of the new law could detract from basic human rights and civil liberties. Opponents argue that many South Africans sacrificed their lives during the struggle in pursuit of freedom, equality and justice, ideals promulgated in the Freedom Charter of 1955 and enshrined in the country's modern constitution. This commentary aims to sketch a short history of the Act and provide a critique and an international perspective on the anti-terrorism legislation versus human rights debate.

The process of drafting and deliberating the South African anti-terror law has been a cumbersome and protracted one. The Act's roots can be traced back to the much-needed overhaul of apartheid security legislation in the mid-nineties. The idea was to bring South Africa's extensive collection of security legislation into line with the constitution. In 1998 a new official policy on terrorism was approved. At that time, and in terms of its policy on terrorism, the South African government

committed itself to:

- upholding the rule of law;
- never resorting to any form of general and indiscriminate repression;
- defending and upholding the freedom and security of all its citizens; and
- acknowledging and respecting its obligations to the international community.

Moreover, the South African government undertook to condemn all acts of terror, to take lawful measures to prevent acts of terror, and to bring to justice those who are involved in acts of terror. A South African Law Commission Project Committee on Security Legislation was appointed in October 1998. Its mandate was not only to undertake a wide-ranging review of security legislation, but to assess terrorism and sabotage legislation so that South Africa's obligations in respect of international terrorism were fulfilled. In 1998 close to 700 gang- or terror-related attacks – including pipe and petrol bombings and drive-by shootings – were perpetrated in the greater Cape Town area. As public pressure mounted to act against the perpetrators of acts of terror, governmental policymakers announced their intention to promulgate tough anti-terrorism legislation for South Africa. The South African Law Commission released a first draft Anti-Terrorism Bill in mid-2000.

Yet, getting a dedicated anti-terror law installed gained momentum only after the attacks on New York's Twin Towers. The events of the day catapulted the global fight against terrorism to the top of the international security agenda. Pursuant to 9/11, the United Nations Security Council adopted Resolution 1373. The mandatory character of the resolution obliges each member state to create the prescribed legal framework in its national laws and institutions and to cooperate fully with other states on a global scale. This included the criminalisation of the financing and other acts of support for terrorism, the freezing of bank accounts, the introduction of effective border controls and other measures to fast-track the exchange of intelligence information.

Thereafter, South Africa's Draft Bill went through a rigorous process of public and parliamentary scrutiny. During the public hearings of the National Assembly's Safety and

Security Portfolio Committee, then chairperson Muleleki George explained to those opposing the bill that the legislation was necessary to meet the country's legal obligations in terms of the ratified terrorism conventions. Nonetheless, most of the written submissions rejected the bill outright as a draconian measure reminiscent of laws promulgated by the apartheid regime. Human rights groups and faith organisations pointed out that the bill provided for detention without trial, a broad definition of terrorism and the indiscriminate banning of organisations. Senior legal practitioners labelled the bill unconstitutional.

Preceding the national elections in April 2004, trade unionist organisation COSATU was concerned with a clause that excluded lawful but not unlawful strike activity from the definition of terrorist activity. This left open the possibility that unlawful strike activity could fall within the definition of terrorism. Because of the elections, parliament was dissolved, and the bill lapsed. It had to be reintroduced to the new parliament.

While many restrictive clauses have been removed, including the one on strike activity, the legislation still contains controversial clauses. These include the obligation of citizens to report 'as soon as possible' the presence of people suspected of committing a terrorist act. Failing this, citizens are liable for an offence under the Act. The Act also creates a host of new offences and penalties as set out by twelve United Nations and African Union Conventions. It contains the infamous reverse onus concerning suspected terrorist property. Thus the notion that the accused is presumed innocent until proven guilty is reversed; the person suspected of aiding or funding terrorist activity has to disprove that he or she is doing so. It is hence not surprising that up to this day many civil society actors remain unhappy with the legislation.

Anti-terror laws throughout the world have been met with at least some degree of trepidation, if not outright opposition, from civil society and human rights activists; civil rights proponents worldwide lament the onset of an era in which the danger of detaining and punishing the innocent has become a ghastly reality. The current debate in the United States

and Britain queries the permissibility of torture in anti-terrorism interrogations. Proponents of such measures claim while they may diminish civil liberties, they ensure that terrorists are kept at bay.

What is more important to the person in the street: protection against potential terrorist attacks or a guarantee of his or her constitutionally enshrined civil rights and liberties? In the aftermath of the London bombings, it would seem that Britons are happy to surrender some of their rights in order to render the country safer from terrorist attacks. Balancing the fight against terrorism with basic considerations for human rights has become a challenging task to policy- and lawmakers around the world. Those in favour of tough anti-terror laws argue that in order to make a world relatively safe from terrorist attacks, we, the citizens, have to surrender at least some of our hard-won freedoms. This may include granting permission to intelligence agencies to tap into phonelines, mail accounts and mobile phone communication; wider powers of arrest and detention for investigating agencies; very strict bail conditions for terror suspects or people suspected of aiding terrorists; the banning of 'terrorist' organisations – the list of potential encroachments upon basic human rights and civil liberties enshrined in many a country's terror law is endless.

Yet most anti-terror laws are predominantly *ex post facto* in nature; in other words, strategies are developed and implemented after an act of terrorism has occurred. This may render anti-terror laws useful to law enforcement officials and prosecutors in the aftermath of terror attacks, but deterrence is not achieved. Bearing this in mind, scholarly debates around the usefulness of dedicated national anti-terror laws often query the deterrence factor of anti-terror laws. This links to the function of the law *per se*. Does it serve to deter potential terrorists from going about their business? Or, is it used during the investigation and prosecution process of alleged terrorists?

To return to South Africa, how great is the threat of terrorism in our sub-region? And this is where the trajectory falters because ter-

rorism signifies different meanings for different people. If our understanding of terrorism were to relate to the 9/11 type of international terrorism, then, with the exception of Kenya and Tanzania, it would seem that Southern Africa has little to worry about. Yet in a globalised world information and money cross continents in a matter of seconds. Africa, because of its porous borders, lax security, political instability, lack of state resources and capacities, impoverished populations and an abundance of weapons, is perceived to provide the perfect environment for the recruitment and 'breeding' of future terrorists.

Because of these perceptions, UN initiatives and the US 'war on terror', South Africa and its neighbours continue to be pressured to introduce anti-terror laws. Notably, Tanzania was one of the first states in Africa to implement stringent anti-terrorism laws. President Robert Mugabe has abused Zimbabwe's anti-terror laws to persecute his opponents. When comparing the Protection of Constitutional Democracy against Terrorism and Related Activities Act with others in Africa, Britain and the USA (the US Patriot Act) South Africa has by far the most liberal and least restrictive anti-terror law in place.

However, this should not detract from the fact that the new law may compromise certain basic human rights. Bearing in mind the injustices perpetrated by the apartheid regime, two inferences need to be drawn. First, after the end of apartheid, South Africa's security legislation certainly needed an overhaul. Whether the country needed a dedicated anti-terror law is the subject of a different debate. Second, mindful of the past, South Africans should strive to police and safeguard their hard-won freedoms to ensure that the gross human rights abuses of the past never occur again. While many of the controversial clauses from earlier draft bills have been omitted in the Act, South Africans should remain vigilant. As the earlier example of the tough new anti-terrorism measures in Britain shows, acts of terror not only cause fear and destruction, but they can also trigger a backlash against certain basic rights and liberties.

