

The inalienable right to take the law into our own hands and the faltering state

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1 *The problem*

The Constitution of the Republic of South Africa provides for or – in the rather sanguine terms of our constitutional discourse – *guarantees* the right “to be free from all forms of violence from either public or private sources”.¹ As will be indicated in this discussion, the very basis of the modern state has in these words been captured in the bill of rights. Precisely how significant is this constitutional right? This question elicits a number of crucial constitutional problems, including:

- (a) What obligations does the right impose on government?
- (b) What are the (judicial) remedies if government fails to discharge these obligations?
- (c) Are there legal implications, aside from remedies, if government defaults on the said obligations?
- (d) If the right in question were not explicitly stated in the constitution, would government still be obliged to provide safeguards, and if so, what would the nature and extent of the obligation be in this regard, and what would the recourse be if it failed to meet the obligation?

The right to life,² like the right to freedom from violence, not only forbids the state itself from taking life and from committing (unlawful) acts of violence against its inhabitants, but also imposes the duty on the state to ensure that others do not violate these rights. An unlawful homicide obviously constitutes the ultimate invasion of the right to freedom from violence. Therefore the right to life may be construed as an aspect of the right to freedom from violence. Consequently, the answers to the problems stated concerning the right to freedom from violence are equally applicable to the right to life.³ The main focus will be on the third question, the legal implications, aside from remedies, if government fails to meet its obligations to safeguard the right to freedom from violence.

2 *Constitutional provisions*

There are a number of constitutional provisions relevant to the stated problems which have been taken into consideration by the courts and which contribute (or may contribute) towards addressing at least some of these problems.

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¹ s 12(1)(c) of the constitution of 1996. The relevant portion of this section of the bill of rights reads: “Everyone has the right to freedom and security of the person, which includes the right – (c) to be free from all forms of violence from either public or private sources.”

² The right to life is defined in categorical terms in s 11 of the constitution as: “Everyone has the right to life.”

³ Following this argumentation the answers may also apply to a number of other constitutional rights such as the right to human dignity, the right not to be subjected to slavery, servitude and forced labour, the right to privacy, freedom of expression, freedom of association, movement, assembly, demonstration etc.

Section 7(2) is relevant because of the unequivocal obligation it imposes upon the state to uphold the rights defined in the bill of rights. It provides: “The state must respect, protect, promote and fulfill the rights in the bill of rights.” Section 237 also pertains to the state’s constitutional obligations. It is wider in scope than section 7(2), its counterpart, in that it encompasses *all* constitutional obligations, while section 7(2) only bears on obligations arising from chapter 2 (the bill of rights). However, it is formulated in equally unambiguous terms: “All constitutional obligations must be performed diligently and without delay.”

Section 41(1) likewise implies an injunction to uphold the rights to freedom from violence in that it enjoins government to preserve the peace and to govern effectively, which obviously includes the effective protection of constitutional rights. The section reads:

- “All spheres of government and all organs of state within each sphere of government must
- (a) *preserve the peace*, national unity and the indivisibility of the Republic;
 - (b) secure the well-being of the people of the Republic;
 - (c) *provide effective*, transparent, accountable and coherent *government* for the Republic as a whole.”⁴

Particularly important with respect to protection of the right to freedom from violence are the constitutional provisions that regulate the policing function. Critical among these is section 205(2) which provides: “National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities *effectively*, taking into account the requirement of the provinces” (italics added). To this should be added section 205(3): “The objects of the police service are to protect, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

Finally, a number of constitutional provisions enjoin accountability as a foundational constitutional value, as well as a value and principle of government and public administration. Section 1(d) provides:

- “The Republic of South Africa is one sovereign, democratic State founded on the following values:– ...
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, *to secure accountability*, responsiveness and openness” (italics added).

Section 41(1)(c) enjoins accountability as one of the principles of government that applies to all spheres of government and all organs of state, and in terms of section 195(1)(f) the public administration must be specifically accountable.

3 *Judgments and commentary*

The import and consequences of the constitutional right to freedom from violence read in conjunction with the above constitutional provisions have been the subject of a number of judgments and academic comments. The relevant observations and judicial decisions (and *dicta*) lend prominence to the constitution’s strong emphasis on the government’s obligation to take positive legislative and other action to ensure due compliance with the obligations inherent in upholding this right. Such

⁴ italics added. The three spheres of government are the national, provincial and local spheres of government (see s 40(1) of the constitution). *Organ of state* is defined in s 239 of the constitution.

positive action is not limited to remedial measures after violations of the said right, but includes preventive measures. Furthermore, the constitution has expanded the ambit of the delictual liability of the state in the event of its failure to provide adequate measures to protect the right.

3.1 Positive (including preventive) obligations

In *S v Makwanyane*⁵ it is stated that: “[t]he State is clearly entitled, indeed obliged, to take action to protect human life against violation by others”.⁶ In *S v Baloyi*,⁷ a matter in which the constitutionality of aspects of the Family Violence Act⁸ was dealt with, the constitutional court observed on the positive obligations upon the state to give effect to the right to freedom from violence:

“Read with section 7(2), section 12(1) has to be understood as obliging the State directly to protect the right of everyone to be free from private violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the right of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.”⁹

The observations of the court in *Christian Education South Africa v Minister of Education* were in the same vein:¹⁰ “The State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation.”¹¹ In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*¹² the court asserted the same positive obligations on the state to uphold the rights to life, human dignity, freedom and security of the person and bodily and psychological security. It stated: “In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.”¹³

The question of the possibility of positive obligations upon Transnet Ltd (a public company with share capital in which the state is the only shareholder and operating under the South African Transport Services Act¹⁴) and on the South African Police Service to protect the safety and security of commuters using the services of one of Transnet’s business units was also discussed by the constitutional court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*.¹⁵ The court ruled that Metrorail bears the positive obligation arising from the provisions of Act 9 of 1989 read with the provisions of the constitution to ensure that reasonable measures are in place to provide for the security of rail commuters when it provides rail com-

⁵ 1995 6 BCLR 665 (CC).

⁶ (n 5) 713H.

⁷ 2000 1 BCLR 86 (CC).

⁸ 113 of 1991.

⁹ (n 7) 93C-F.

¹⁰ 2000 10 BCLR 1051 (CC).

¹¹ (n 10) 1070 E-F. The court made similar observations at 1074 specifically with reference to s 12(1)(c) and s 7(2) of the constitution.

¹² 2001 10 BCLR 995 (CC).

¹³ (n 12) 1009F-G.

¹⁴ 9 of 1989.

¹⁵ 2005 4 BCLR 301 (CC).

muter services under the act.¹⁶ The constitutional provisions that led significantly to this conclusion were those that have a bearing on the constitutional value of the state's accountability for securing constitutional rights, including the constitutional rights to life, dignity and freedom from violence, as well as section 7(2) and also sections 1(d), 41(1)(c) and 195(1)(f), all of which relate to the value and principle of the accountability of the state.

It should be pointed out, however, that notwithstanding the significant contribution of the aforementioned constitutional provisions to the court's conclusion, the specific constitutional question, namely whether sections 10, 11 and 12 of the constitution impose positive obligations upon Metrorail, was not decided because the case made out by the applicants related primarily to Metrorail's obligations under Act 9 of 1989.¹⁷ Since the emphasis was on the *statutory* duty of Metrorail, the *constitutional* duties of the police to safeguard constitutional rights, though referred to in passing, were also not the primary focus of the case.

These judicial *dicta* serve as the backdrop for the observation that section 12(1)(c) seems to create positive duties that are directly enforceable against the state (and individuals) as well as the obligation to perform these duties by enacting appropriate legislation and by enlisting the services of law enforcement agencies such as the police and the prosecuting authorities within the criminal justice system.¹⁸ Currie and De Waal support this view by observing that the state is required to take positive action to comply with section 12(1)(c) by protecting individuals, both negatively in the sense of refraining from such violations on its own account, and positively by restraining and deterring private individuals from committing such invasions. At the same time the right to freedom from private violence imposes an obligation on the state to use violent means where necessary to quell or discourage violent acts by individuals who threaten specifically the physical security of others: "Section 12(1)(c) also imposes positive duties on the state to protect individuals against violations of their physical integrity by others." (Such duties are also imposed by the right to dignity and life.)¹⁹

In the *Carmichele* case it was made plain that performance of the duty to secure the right to freedom from violence quite obviously also includes preventive measures. This is particularly clear from the express endorsement by the court of the following *dictum* from the European human rights court in *Osman v United Kingdom* relating to the state's obligation to protect the individual right to life as defined in article 2 of the European Convention on the Protection of Human Rights and Fundamental Freedoms:

"It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breach of such provisions. It is thus accepted by those appearing before the Court that article 2 of the Convention may also imply in certain well-defined circumstances a

¹⁶ (n 15) 336B.

¹⁷ (n 15) 322C-D.

¹⁸ Pieterse "The right to be free from public or private violence after *Carmichele*" 2002 *SALJ* 29.

¹⁹ Currie and De Waal *The Bill of Rights Handbook* (2005) 304.

positive obligation upon the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.²⁰

3.2 Broader scope for the delictual liability of the state

The jurisprudence of the constitutional court and the supreme court of appeal in which the state's duties to secure the safety of the public were considered were all cast in the mould of possible delictual liability of the state (particularly the minister of police) for failure to take reasonably appropriate action to provide for the physical safety of individual citizens. To the extent that constitutional rights and other constitutional provisions were referred to in these judgments, they played their role within the context of the question whether or not the state organ in question should be held delictually liable or otherwise accountable to act positively to secure the right to personal safety.²¹ The grounds for holding the state delictually liable for its failure to render sufficient protection for the individual citizen have not changed and still obtain as they did before the constitution entered into force. As before, the state can be held liable only once it is found to have acted unreasonably (and therefore unlawfully). However, the constitutional provisions referred to have effectively widened the net of delictual liability so that the state, owing to the effect of the constitution, is now more readily subject to delictual liability than before.²²

4 Personal enforcement of rights

The possible expansion of the state's obligations in fulfilment of the right to freedom from violence and a broader scope of delictual liability for failure to discharge these obligations do not exhaust the legal implications of this constitutional right (and various other rights, such as the right to life and human dignity). A more crucial legal consequence of a particularly constitutional nature arises from the state's failure or inability to keep the peace and safeguard its citizens' right to freedom from violence, namely, to the extent that the state does not or cannot effectively discharge this obligation, those whose right to freedom from violence is threatened as a result of such failure or inability are thereby summarily entitled to do individually and / or in cooperation with others, whatever is reasonably necessary in the circumstances, to restore and keep the peace and to effectively protect themselves against violence.²³ The perilous disorder that may result from people enforcing their rights personally and directly should be acknowledged immediately. However, this does not detract from the principle that each individual has a primordial right to

²⁰ *Carmichele* (n 12) 1010B-D. See also *Pieterse* (n 18) 34 and *Currie and De Waal* (n 19) 305.

²¹ See *Carmichele* (n12); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); the *Rail Commuters* case; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security (Women's League Centre Trust as amicus curiae)* 2003 1 SA 389 (SCA).

²² See *Currie and De Waal* (n 19) 305; *Pieterse* (n 18) 37; *Neethling et al Deliktereg* (2006) 55, 65-66, 69-70.

²³ As *Snyman Criminal Law* (2002) 102 quite correctly states in this regard: "The rules relating to private defence presuppose that the police authorities, whose task it is to protect the citizens from unlawful attack, function reasonably adequately. What is the position if the functioning of the police and other state security services in a given state has deteriorated to such an extent that their capacity to protect citizens adequately from unlawful attack from criminals is seriously reduced? It is submitted that in such an event the field of application of private defence should be broadened, affording private citizens greater scope to protect themselves from unlawful attack compared to the scope of the rules which apply in a society in which police protection of its citizens is up to standard."

personally protect his/her right to freedom from violence. As the argumentation *infra* shows, the state as effective keeper of the peace and safeguard against violence merely enforces this right on behalf of the citizen. This not only benefits each individual but secures public peace and social order. However, individual citizens never finally and categorically part with their right to personal enforcement of their right to freedom from violence since only the capacity to personally enforce this right is ceded to the state on the assumption and to the extent that it is effectively enforced by the state. The moment the state is unwilling or unable to effectively discharge its obligations, the right to personal enforcement summarily reverts to the individual citizen who again personally assumes responsibility for the effective enforcement of his/her rights.

The above thesis of the legal position is the foundational premise of the modern territorial state,²⁴ a premise that was comprehensively expounded by Thomas Hobbes (1588-1679) towards the middle of the seventeenth century. Hobbes provides a rationally designed and universally applicable theory explaining the origin of the state and the essential purpose and functions of government as well as the nature of the right to freedom from violence and the state's obligations in virtue of this right within the context of the state. His theory is not limited to the England of his time, which is the immediate backdrop of his intellectual endeavour, but offers a comprehensive perspective, explaining the basic characteristics of the territorial state of recent date at that stage.²⁵ The centrality of Hobbes's views has yet to be challenged. For Hobbes the state results from the dire need of individuals to secure peace and stability within a situation of lawlessness and consistent fear of violence and death.²⁶

Hobbes was profoundly influenced by the traumatic conditions of his times, during which the reality of community and the sense of it making way for growing individualism and for "the independent, enterprising man out to seek his intellectual and material fortune and the individual human soul [being] responsible for his own destiny..."²⁷ Moreover, Hobbes's thinking was formed in the midst of the English civil war,²⁸ which was his most immediate concern,²⁹ and in a larger sense the devastating Thirty Years War (1618-1648) with its traumatic consequences, particularly for central Europe.

Hobbes's philosophy marks a drastic departure from the Aristotelian conviction that man is essentially a social being.³⁰ He began all three his political works:

²⁴ The term *territorial state*, rather than *nation state*, is preferred because the term *nation state* incorrectly suggests that populations with distinctive cultural, linguistic, etc characteristics live in each state and that states therefore distinguish themselves through the uniqueness of the people living in each. What really distinguishes states are the differently defined territories over which their governments exercise jurisdiction. This preference corresponds to that of various legal and political science scholars. See in this regard n 1 of my article "n Kritiese oorweging van die *politiek* van hoogverraad" 2003 *THRHR* 571.

²⁵ As Ebenstein *Great Political Thinkers: Plato to Present* (1969) 364 puts it: "The Leviathan is not an apology for the Stuart monarchy, nor a grammar of despotic government, but the first general theory of politics in the English language."

²⁶ Böckenförde *State, Society and Liberty* (translation into English by Underwood) (1981) 39-40.

²⁷ Oakeshott *Rationalism in Politics and Other Essays* (1962) 251.

²⁸ Vincent *The Theory of the State* (1987) 52; Sabine *History of Political Theory* (1971) 436.

²⁹ Macpherson *Introduction to Thomas Hobbes' Leviathan* (1985) 9. Hobbes's views were not caused by the war but he was profoundly influenced by the war. His thinking was also influenced by the Western discovery of the Americas and the observed way of life of the American Indians, which was thought to have provided historical support for Hobbes's views on the state of nature – Ebenstein (n 25) 364.

³⁰ Tarlton "The creation and maintenance of government: a neglected dimension of Hobbes' Leviathan" 1978 *Political Studies* 311.

Elements of Law, De Cive and *Leviathan* with an exposition of human nature and the state of nature, depicting individuals as radically atomistic, mutually aloof and incapable of genuine community life.³¹ Each individual pursues his egoistic objectives on his own. Individuals are existentially detached from one another and hence incapable of true communication and therefore also not able to resolve conflicting claims. They live in an atmosphere of suspicion, antagonism and undeclared conflict. The only way to deal with this situation is to strive towards achieving maximum power so as to be more powerful than other individuals and thus to trump their competing and conflicting claims. Owing to the general urge for power in order to satisfy individual and mutually exclusive wants, the natural state in which individuals find themselves in the state of nature is a condition of general war:

“I put for a generall inclination of all mankind, a perpetuall and restlesse desire for Power after power, that ceaseth only in Death. And the cause of this is not always that a man hopes for a more intensive delight, than he has already attained to, or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.”³²

What makes the situation in the state of nature even more intolerable is the basic equality of all. People are not only equal in relation to their needs and expectations³³ but also in relation to their abilities: “For as to the strength of the body, the weakest has the strength enough to kill the strongest, either by secret machination, or by confederacy with them, that are in the same danger with himselfe.”³⁴

Had the natural situation (and the situation in the state of nature) been one of inequality instead of equality, there would have been order and stability, albeit a hierarchically structured order. The state of equality brings about precisely the impasse of incessant and undecided strife, which Hobbes describes as follows in the famous passage in *Leviathan*:

“In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, no use of the commodities that may be imported by Sea; no commodious Building, no instruments of moving, and removing such things that require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all continuall fear, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short.”³⁵

This portrayal of the state of nature is very gloomy but the escape from this dismal state is already immanent in the description itself: man’s incessant fear of death and physical violence in the state of nature compels him to use his rational qualities to escape to a better dispensation – the *commonwealth*, which is called into being through the social contract. Every person has certain natural rights, namely the right to life, limb and property and every person – and this is crucially important – also has the inalienable right to personally protect and defend these rights. In the precarious conditions in the state of nature with its war of all against all the only means of protecting these rights is for every individual to take the law into his own hands. But even though self-help is a natural right to fend off unlawful assaults against the natural rights of life, limb and property, it is a dangerous and inadequate

³¹ Missner “Skepticism and Hobbes’ political philosophy” 1983 *Journal of the History of Ideas* 407.

³² Hobbes *Leviathan* (1985 reprint) 161.

³³ (n 32) 184.

³⁴ (n 32) 185; see also Hobbes *The Elements of Law: Natural and Political* (1969) part I ch 14.1.2 70.

³⁵ Hobbes (n 32) 183; the depiction of the state of nature is similar in Hobbes (n 33) part I ch 14.12 73.

means and therefore provides no solution to the quest for the protection of people's natural rights. Hence, human rationality compels man to replace the state of nature with the commonwealth (the state) through entry into the social contract. With this contract all individuals (creating the state) agree to the establishment of the state. All parties to the contract incur the same duties whereby everyone renounces his/her natural right to personally defend his natural rights assuming all others do the same. In terms of the contract everyone transfers his natural right to personal self-protection to a single sovereign person or a single body of persons. Thereafter this sovereign person or body is obliged to effectively safeguard the natural rights of each contracting individual.³⁶ The establishment of the state (*commonwealth*) is exclusively aimed at protecting and stabilising the natural individual rights of each person.³⁷ The establishment of the commonwealth, or in the words of Hobbes, the *Mortall God*, marks the condensation of the multitude of divergent, mutually antagonist wills into a single (sovereign) will. This is the mighty will of the government of the state, the *Leviathan* or *Mortall God*, according to Hobbes: "Mortall God, to which we owe, under the Immortal God our peace and defence."³⁸

The legitimacy and the very existence of the state (and the government) depend ultimately on the effective protection by the state – the effective protector – of individual natural rights. This, after and above all, is the reason why it has come into existence. *Leviathan* must be effective in discharging its protective responsibilities and duties. (That, however, does not mean that *Leviathan* is a tyrant with a free hand to do whatever pleases it.) The rationale for the formation of the state is that it has to eliminate the constant threat and fear of, as well as the actual, violation of natural rights in the state of nature and instead establish an orderly dispensation of peace, security and the effective protection of basic rights. Government must effectively keep the peace in order to uphold the right to freedom from violence (to be guaranteed by the state).³⁹ The purpose of the sovereign powers conferred on government is to enable it to effectively keep the peace and thus discharge its essential responsibilities to its subjects. Hobbes does not want these powers to be subjected to control mechanisms since that could erode the capacity to discharge its obligations, and thereby undermine its integrity to the detriment of its subjects (citizens).⁴⁰ It is precisely for this reason that the obligations and responsibilities of government are not expressed in terms of rights vesting in the subjects. Government has the duty to effectively discharge its responsibilities and nothing must stand in its way. As Ebenstein puts it: "The Hobbesian Monarch cannot hide his ineffectiveness behind traditional authority. He must 'deliver the goods' if he has to retain its regal office."⁴¹ In sum, Hobbes's theory recognises no substantial human community, but merely a multitude of egoistic men living in a state of mutual distrust, suspicion, strife and an undeclared war in which they vie with each other for the satisfaction of mutually antagonistic individual wants. The duty of the state is not to create some form of community out of this but to achieve and effectively maintain a state of (formal) peace. All have the inherent right to life, bodily integrity and property and the right

³⁶ (n 32) 227.

³⁷ Nagel "Hobbes' concept of obligation" 1959 *The Philosophical Review* 69, 74, 91.

³⁸ Hobbes (n 32) 227.

³⁹ It is rather obvious that this basic responsibility should find expression in modern constitutions. It finds expression in emphatic terms in the South African constitution in s 12(1)(c), which provides for the right to freedom from violence, and s 42(1)(a), which, inter alia, enjoins government and all organs of state to *preserve the peace* of the Republic.

⁴⁰ Hobbes owes his absolutist notoriety precisely to these views.

⁴¹ Ebenstein (n 25) 369.

to personally defend and protect these rights. But since no orderly dispensation is possible where self-help holds unrestricted sway and everyone has an unchecked right to take the law into his own hands in order to protect these rights, the state through its various agencies intervenes to protect these rights on behalf of all and in the interest of a peaceful and orderly dispensation. Whenever it is incapable of effectively doing so, individuals whose rights are under threat are at liberty once again to resort to self-help. The citizen's renunciation of his natural right to fend for his own rights to life and bodily integrity is therefore neither absolute nor final. That right is merely suspended to the extent and as long as the state is capable of fully and effectively discharging its protective responsibilities towards its citizens. Once the state fails to fully discharge its responsibilities, the individual's dormant right to self-help revives to the extent of the lapse on the part of the state and until such time as the state is again factually capable of discharging its responsibilities, and thus of restoring and keeping the peace and securing freedom from violence.

Hobbes's theory of the state provides a forthright and rather blunt exposition of government's responsibilities, individuals' natural rights of freedom from violence and the natural right of each individual to protect these rights. For understandable reasons many will not agree with Hobbes's whole exposition, particularly not with his description of human nature, the state of nature and his perceived justification for state absolutism (the latter falling beyond the scope of the present discussion).

Of particular importance in Hobbes's exposition is the clear light it sheds on the delicately poised and highly volatile dynamic between government's role in meeting its responsibilities and the dormant, yet potentially active, right of everyone to protect and assert his or her right to freedom from violence in person. The conditionality of government's role in upholding people's right to freedom from violence lies at the very heart of the modern state.

It emanates from sources far removed from and predating Hobbes, and it resonates tacitly and explicitly in many facets of contemporary positive law. Carpenter, for example, reminds us that the state's duty to protect the individual can be traced back to the origins of constitutional history and that in terms of the relationship between the liege and the vassal, which predates even the *Magna Carta* (which is acknowledged to be the foundation of the rule of law), the crown had the duty to protect the people "in time of peace by the law and in time of war by the sword".⁴² Elsewhere she reminds us that a judicial system that is perceived to be ineffectual could result in members of the public taking the law into their own hands.⁴³ Most significant, however, is the following statement, in rather strong Hobbesian terms some would say, in *S v Makwanyane*:

"I refer to the fact that in a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their right only because the State, in the constitutional state compact, assumes the obligation to protect these rights. If the state fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa."⁴⁴

The principles applying to private defence in criminal law and the law of delict are also relevant in the present circumstances. It is trite in all legal systems that everyone is entitled to act in defence of his or her own legal interests or in the inter-

⁴² Carpenter "The right to physical safety as a constitutionally protected human right" in *Suprema Lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 140.

⁴³ Carpenter "Public opinion, the judiciary and legitimacy" 1996 *SAPR/L* 113.

⁴⁴ (n 5) 731C-D.

est of a third party, and that in virtue of this right it is justifiable to do whatever is reasonably necessary to effectively fend off an unlawful attack on the rights of the victim.⁴⁵ Within the context of the state (bearing the responsibility to safeguard its citizens' freedom from violence), the right to act in private defence comes into play only once the state through its agencies is incapable of providing the necessary protection. Stated differently, exercising the right to private defence is held in abeyance on condition that, and as long as, the state effectively fulfils its responsibility to secure the safety of its citizens. The right to private defence need not be exercised when the state is present to secure safety and freedom from violence. The right is only exercised if and when the state is not present or is not sufficiently capable through its police services or prosecuting authority of rendering the necessary protection, and where ironically, taking the law into one's own hands is the only means of upholding the law.⁴⁶

It is therefore quite clear that it is certainly not necessary to be a devotee of Hobbes to appreciate the delicate balance between government's responsibilities to secure freedom from violence, and the dormant, but potentially active, right of individuals to resort to self-help, by acting personally in defence of the right to freedom from violence – and, moreover, that this right reverts automatically to the public once government cannot or will not effectively discharge its responsibilities to secure freedom from violence.

What the discussion thus far shows is that the right to freedom from violence embodies and expresses the very foundation of the state. The basic and foremost obligation of the state is to ensure the security of its citizenry. The state owes its (continued) existence and legitimacy to the effective fulfilment of this obligation. Hence the right to freedom from violence need not be expressly recognised (in a bill of rights) since the state's obligation to uphold the right is inherent in its very existence. Pursuing the same logic, it should be evident that the inability of the state to effectively protect this right has the effect of the state simultaneously failing on two fronts:

Firstly it is failing to protect the individual right to freedom from violence of its citizens.

Secondly, since this failure automatically activates the dormant right to self-help – the right to personally protect the right to freedom from violence – the state also radically undermines the grounds for its own existence. It forfeits its position as the holder of the monopoly to legitimate (and lawful) force and violence⁴⁷ by surrendering that position to individual victims and their supporters who commit lawful violence (against the unlawful acts of violators) and who take the precautionary and preventive measures, that in normal circumstances are the responsibility of the

⁴⁵ For the requirements for a lawful resort to private defence see for example Neethling *et al* (n 22) 76 *et seq* and Snyman (n 23) 103-110.

⁴⁶ As Neethling *et al* (n 22) 77 n 252 puts it: "Eeue lank reeds bied die reg aan 'n individu die bevoegdheid om in bepaalde omstandighede eierigting toe te pas, as't ware 'die reg in eie hande te neem', ten einde die reg te handhaaf. Dit is immers vir die staatsgesag onmoontlik om by elke (dreigende) aanval teenwoordig te wees om die benadeelde te beskerm. Daarom verleen die reg aan 'n mens die bevoegdheid om binne regtens omskrewe grense self op te tree ter beskerming van sy belange." See also Snyman (n 23).

⁴⁷ The state can be seen among other things as the institution in which is vested the monopoly of legitimate and lawful force and violence (*cf* Vincent (n 28) 21). It should be obvious from the discussion in this article that there is a very sound basis for this perspective on the state, which also resonates in South African positive law – for example in s 199(3) of the constitution, which provides: "Other than the security forces established in terms of the constitution, armed organisations or services may be established only in terms of national legislation."

state, and in so doing protect their right to freedom from violence, with the result that the stable state is increasingly destabilised, withering in the face of an expanding non-state terrain, where self-help is the only recourse.

5 *The nature of the state's obligations to ensure freedom from violence*

The essential characteristics of the obligations of the state to ensure freedom from violence are apparent from the above discussion. The obligation has four closely intertwined characteristics: immediacy, fullness, effectiveness and constancy, which means that the state must immediately, fully, effectively and constantly uphold the right, maintain the peace and, in doing so, maintain itself. These characteristics are explained in the concise discussion *infra* – among other things, by distinguishing this obligation from the state's obligation with regard to socio-economic rights and the requirements for avoiding delictual liability.

As the discussion has shown, the existence of the state hinges critically on its obligation to secure the peace by securing freedom from violence. If it reneges or defaults on discharging this obligation, the right to self-help in order to secure the peace reverts immediately, thus undermining the very grounds for the state's existence. By the same token, if the state cannot fully maintain the peace (to fully uphold the right to freedom from violence) at any stage of its existence, then the right to self-help automatically reactivates to fill the gap left by the state's inability, thus again undermining the grounds for the state's existence. This argumentation, apart from being firmly grounded in the constitutional theory outlined above, finds further support in the constitution itself, which in section 237 provides that all constitutional obligations must be performed diligently and without delay, and in section 7(2) that the state is obliged to respect, protect, promote and fulfil the rights in the bill of rights. These constitutional provisions emphasise the categorical nature of the state's obligations to ensure freedom from violence. The constitutional provisions relating to the state's obligations regarding socio-economic rights present further *ex contraria* support for this argumentation. Acknowledging that the state is not capable immediately and fully to fulfil the right to property, housing and the right to health care, food, water and social security, all three of these sections (in line with international and foreign counterparts⁴⁸) provide that the state must adopt reasonable and other measures, within its available resources, to achieve the *progressive realisation* of the rights in question.⁴⁹ The state is not obliged to fully comply with these rights on an immediate basis. This is expressly acknowledged in the provisions in question. In clear contrast to the position regarding these socio-economic rights, the right to freedom from violence has *no* qualification pertaining to progressive realisation, which logically means that the state, as argued thus far, is under the obligation of immediate, full and constant compliance.

It will have been noticed that while effective state action is cited as a key criterion of compliance with the obligation to ensure freedom from violence, no reference is made to reasonableness. Hence, the question may arise whether reasonableness is wholly immaterial in this context. Consider for example a situation in which the state has taken all reasonable steps to ensure the citizenry's freedom from violence, but these reasonable steps prove inadequate and therefore ineffective in securing the

⁴⁸ See eg s 2(1) of the International Covenant on Economic, Social and Cultural Rights.

⁴⁹ Reflected in the text is the wording of s 26(2) and 27(2) concerning housing and the right to health care, food, water and social security. S 25(5) concerning property rights is similarly phrased.

peace, will the charge that the state has defaulted on its obligations still be valid? Approached from the conceptual framework of delictual liability, the answer would be that reasonableness of state conduct (as presently also informed by the various relevant constitutional provisions) would mean that the state has not acted unlawfully and is therefore not susceptible to delictual liability. The delictual paradigm within which reasonableness is so crucially important, however, is not relevant in the constitutional paradigm. Carpenter observes:

“Should a decision taken by any of the law enforcement agencies of the state backfire and violent crime be the consequence, it is inevitable that the victims (and the community as a whole) will place the blame fairly and squarely on the shoulders of the agency that made the decision. The fact that the discretion may have been properly exercised and is therefore the ‘right’ one in the technical legal sense will cut no ice if it turns out to be ‘wrong’ in fact.”⁵⁰

The crucial point here, as demonstrated above, is that if the state’s efforts to secure the peace and safeguard the right to freedom from violence are ineffective, then the latent right of the citizen to personally secure freedom from violence is summarily activated. The reasonableness of the (ineffective) state action is immaterial in this case. If the reasonably, yet ineffectively acting, state does not ensure freedom from violence, then victims are not legally mandated (or doomed) to passivity and inaction. If the state fails to act effectively to protect the right to freedom from violence (regardless of the reasonableness of its action), then the victims and potential victims of violence and the supporting co-defenders are instantly entitled to do whatever is reasonably required to effectively restore and keep the peace and to ensure their freedom from violence. The decisive relevance of effectiveness, and not of reasonableness of state action towards ensuring this right, is borne out by relevant constitutional provisions, particularly section 205(2), in terms of which national legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities *effectively*, and again in terms of section 41(1)(c), which enjoins all three spheres of government to government effectively.

6 Conclusion

Infractions of the peace and violation of rights – also the right to freedom from violence – are not exclusive to failed or failing states. It stands to reason that they occur even in the most peaceful of states and societies. Self-help in order to fend off threats to the right to freedom from violence is also not the exclusive resort of violent societies. Even in the most peaceful of states with the least strained and most effective law enforcement agencies the state cannot be omnipresent and cannot in all instances effectively protect its citizens from invasions of the right to freedom from violence. Self-help – the re-activation of the right to fend off violence personally – therefore does not spell the end of the state in which the self-help occurs. Nor is this the burden of the present discussion. On the contrary, failure of the state to secure the peace and the resultant recourse to self-help have to assume considerable proportions before it can be said that the conditions that undergird the very existence of the state are under threat. It is also not the object of this discussion to pillory the state for all failures to prevent infractions of the right to freedom from violence: after all, even Leviathan cannot be compelled to achieve the impossible. The object

⁵⁰ Carpenter (n 42) 159.

of the discussion is also not to suggest that individual citizens need not take any precautions to secure their own safety. They certainly have such responsibilities and these responsibilities also mount in accordance with the increasing potential threat to their right to freedom from violence. Everyone knows this, and acts accordingly – as attested all too clearly by the huge amounts spent on private security in this country.

Instead, the aim of the above presentation is to draw attention to a matter of fundamental importance, but that nevertheless tends to be lost from sight in the reflection of people who live in a well-functioning and generally peaceful state, namely the premise upon which the citizenry suspend their inalienable entitlement to take the law into their own hands in protection of their right to freedom from violence by enlisting the state with the duty to secure the peace immediately, fully, effectively and constantly. This premise remains remotely and almost unnoticeably in the background as long as the incidence of violent crime and breaches of the peace are rare and such infractions can be termed exceptional. However, once the incidence reaches endemic proportions self-help will thrust itself evermore into the foreground and the foundational basis of the state will be increasingly endangered. It is then that we are acutely reminded of the inexorably juridical premise upon which the state is founded whereby the state is mandated to maintain the peacekeeping constitutional obligation as indicated (fully, effectively, immediately and constantly) to ensure its citizens' freedom from violence and to sustain its own viability.

DIE ONVERVREEMBARE REG OP EIERIGTING EN DIE FALENDE STAAT

Die artikel ondersoek die wisselwerking tussen die owerheid se verpligting tot die handhawing van vrede en die onvervreembare individuele reg om in die afwesigheid van doeltreffende owerheidsopptrede eierigting te gebruik ten einde daadwerklike of dreigende geweld teen lewe en liggaam af te weer. Die ondersoek begin met 'n bondige bespreking van a 12(1)(c) van die grondwet – die individuele reg op vryheid teen geweld van sowel 'n openbare as 'n private oorsprong en enkele ander tersaaklike grondwetlike bepalings. Die effek van hierdie reg, soos ook blyk uit gerapporteerde regspraak waar dit ter sprake was, is dat die trefwydte van deliktuele aanspreeklikheid verbreed is. Versuim van die owerheid om dié reg in stand te hou, het egter veel meer verreikende, spesifiek staatsregtelike, implikasies. Dit word duidelik teen die agtergrond van 'n uiteensetting van die totstandkoming van die staat deur 'n sosiale kontrak soos deur Thomas Hobbes (onder meer implisiet ondersteun in 'n *dictum* van regter Ackermann in die *Makwanyane*-saak) verduidelik. Daarvolgens dra elkeen sy onvervreembare reg om persoonlik sy fisiese integriteit teen onregmatige aanvalle te verdedig aan die owerheid oor met dien verstande dat die owerheid die beskermingsfunksie deurlopend doeltreffend namens elke individu sal behartig. Die oordrag is dus gekwalifiseerd en sodra die owerheid in die nakom van hierdie plig misluk, herleef die reg op eierigting summier. Wanneer die owerheid faal, misluk dit gelyktydig op twee fronte: eerstens faal dit in die instandhouding van die individuele reg op vryheid en beskerming teen geweld; tweedens, juis omdat die dormante reg op eierigting hierdeur geaktiveer word, ondermyn die owerheid tegelykertyd ook die grondslag van die staat se bestaan en verbeur die staat gevolglik sy monopolie op legitieme geweld. Terwyl die gevoelige wisselwerking tussen die owerheid se verpligting en die (aktiewe) reg op eierigting normaalweg buite berekening val, tree dié potensieel ontwrigtende verhouding in omstandighede van endemiese geweldsmisdaad helder op die voorgrond.