Responding to Terrorism

Gauging the proper response to the horrific events of September 11, 2001 is a difficult business. Under-reaction may leave us vulnerable to further attacks and do little to quell the public alarm that continues to grow. Overreaction could threaten the very basis of our free and democratic society. Over-reliance on new legislation such as the omnibus bill may also make us less safe by providing an illusion that new crimes and legal powers and more severe punishment alone will stop terrorism.

The Minister of Justice overreacted when she quickly stated after the attacks that the extradition of suspected terrorists to face the death penalty may be an exception to the rule in United States of America v. Burns and Rafay (2001), 151 C.C.C. (3d) 97. The Court did not define exceptional circumstances in that case, but its concerns about the execution of the innocent cannot be said to be irrelevant in the terrorism context. Indeed, the extradition of a suspected terrorist to face a jury trial and the death penalty in the United States would run a risk of a wrongful conviction given the current climate of fear, emotion and stereotyping.

The Minister of Justice was correct to contend that Charter rights are not absolute and that concerns about national security and safety can alter the balance of interests. Since Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97, the Supreme Court has recognized that the protection of national security is a particularly compelling state objective and may affect the calculus for determining due process and reasonable limitations of rights. In an age of nuclear and biological weapons, terrorism can threaten not only the security but the survival of nations.

Nevertheless, we should not disparage the ability of the existing criminal law to respond to the dangers of terrorism. We punish not only completed offences, but conspiracies to commit offences, assisting offences both before and after they occur, counselling offences, threatening offences and attempting to commit offences. You can be guilty of an attempt even though you have not performed an act that is itself illegal; it may be impossible to commit the full offence; and it may take considerable time before the full offence could be completed. Existing law made
what the September 11 terrorists did illegal long before they boarded the doomed aircrafts.

The many new offences in the anti-terrorism bill will broaden the criminal law by making it illegal to participate, contribute, facilitate or instruct the activities of a terrorist group, to harbour or conceal terrorists, or to provide or deal in property for terrorists. These new offences expand the range of acts prohibited by the criminal law. To its credit, the government has required proof that the accused knew or intended that all these activities would be for the benefit of terrorists. To this extent, the new offences respect fundamental principles of criminal liability and the Charter. Nevertheless, the fault requirements of these new offences are shaped by the broad act requirements.

The new offences also require the consent of federal or provincial Attorneys General before prosecution, something that the Supreme Court has considered before as a limit on potentially overbroad offences. At the same time, the bill gives in to the current fad of requiring sentences to be served consecutively, something that may hinder the ability of judges to ensure that the total sentence is proportionate. This is not simply a theoretical concern. The broad definitions of terrorism may catch not only evil and murderous terrorists, but those who assisted terrorists without full recognition of the enormity of the planned crime and young people who have caused property damage or disrupted essential services in illegal attempts at protest.

The main problem with the anti-terrorism bill is its one-size-fits-all definition of terrorism. Extraordinary measures such as investigative detention and denial of the right to silence might be justified to prevent another September 11, but they are less easily justified to respond to much less serious activities caught by the broad definition of terrorist activities in s. 83.01. For example, terrorist activities include acts in or outside Canada committed for a political, religious or ideological cause that are intended to cause substantial property damage that is likely to endanger a person’s life or cause a serious risk to health and safety. The threat of a mailbox or a billboard being blown up in a public place is not trivial, but it is not the same as the threat of the mass terrorism we saw on September 11.

More problematic still is the convoluted reference to terrorist activities including serious interference with essential public or private services. There is an exemption for lawful protests or strikes, but apparently not when they are intended to cause a serious risk to public health and safety or endanger a person’s life. A politically motivated protest that blocks access to emergency services could conceivably fall within this provision. It is overkill to bring the heavy artillery of the anti-terrorism bill down on such activities and that part of the definition should be left on the cutting room floor.

Under s. 83.28 a person can be compelled by judicial order to provide information about an offence or a suspect on reasonable grounds to believe that a terrorism offence has or will be committed and that useful information is likely to be obtained. The Minister of Justice has drawn an analogy with American grand jury proceedings. The difference, however, is that the Canadian target could not take the Fifth and would have to provide answers even if they would result in self-incrimination. The authorities will benefit from this information, but may not use the answers themselves or evidence derived from them in criminal proceedings against the person compelled to answer. The Department of Justice has cleverly crafted this controversial provision. Its use of prior judicial authorization, use and derivative use of immunity and the right to counsel may make it “Charter-proof”. That does not, however, take away from the fact that it offends generations of respect for the right of silence during criminal investigations. Such extraordinary procedures could be justified to prevent imminent mass terrorism, but right now apply to too broad a range of crimes.

Another controversial provision is s. 83.3, which allows arrests and detention for up to 72 hours on the basis that a peace officer believes on reasonable grounds that a terrorist activity will be carried out and suspects on reasonable grounds that a recognition is necessary to prevent the carrying out of the terrorist activity. Section 83.3(8) then allows a provincial court judge to order a recognizance, again on the grounds of reasonable suspicion. If the person refuses to enter into such a recognizance — perhaps because they insist on engaging in illegal protests — the judge may commit the person to prison for up to a year. In other words, you can be sent to jail for a year on not the basis of proof beyond a reasonable doubt or even reasonable and probable grounds, but on the basis of reasonable suspicion. Alas, there is precedent for this approach in peace bond provisions already in the Criminal Code and even a recent reported case in which a person who refused to enter into a recognizance under s. 810.2 was sentenced to nine months’ imprisonment (R. v. Ferrier (2001), 155 C.C.C. (3d) 521). Nevertheless, such a heavy-handed preventive approach should be left to the most serious cases and should not apply to those who might refuse to enter into a recognizance not to engage in illegal protests that disrupt essential services.

The new anti-terrorism bill cannot be dismissed out of hand as clearly violating the Charter. Nevertheless it should be carefully examined in committee and the definition of terrorist activities should be narrowed. In particular, the reference to disrupting essential services should be dropped. The fact that the Act may be reviewed by a Parliamentary Committee in three years’ time or by the courts under the Charter (or even the now unlikely acceptance of sunset provisions) does not excuse us from missing our opportunity to try to persuade our elected representatives from stopping its excesses right now. Concerns for freedom and democracy must define our response to terrorists who oppose those cherished values.

K.R.