Responding to Terrorism II

The robust but rushed debate about Bill C-36 is over. The new anti-terrorism Act was proclaimed in force just before Christmas. Many will be surprised to find just how much the new legislation will be embedded in their next annual copy of the Criminal Code. The Criminal Code from s. 2 to s. 811 is amended by close to 60 pages of new text.

It remains to be seen how frequently the provisions of Bill C-36 will be used. If the past is any indication (and it may not be), the new investigative powers will be used more than the new offences. The new investigative powers created during the October crisis were used in a dramatic way, but the actual terrorists were prosecuted under the ordinary criminal law. A conviction for murder or conspiracy to commit murder will likely carry more weight than one for facilitating or instructing a terrorist activity.

In response to criticisms about the unprecedented introduction of investigative hearings and preventive arrests, the government has placed a five-year sunset on those provisions and will require annual reports on the "number" of cases in which they are used. These are unlikely to be effective restraints on the use of extraordinary powers. Parliament can renew or extend them at any time and numerical annual reports have not proven to be an effective accountability mechanism on wiretaps. The respective federal and provincial ministers could, in their discretion, make the annual reports more fulsome, but they are required in s. 83.31(4)(d) not to disclose any information that would be "contrary to the public interest". Such a vague standard is insufficient under the Charter for the denial of bail, but it remains to be seen whether (if someone is granted standing to challenge it) it will be sufficient for the denial of information in the anti-terrorism context.

Perhaps the greatest danger with respect to the investigative powers is that they will be used to target people simply because they, like the September 11 terrorists, are of Arab descent or of the Muslim religion. The leaders of our law enforcement and security intelligence agencies have stated that they do not engage in racial profiling. Such practices would not only be discriminatory, they would also be a crude and ineffective law
enforcement technique. Yet stories continue to be reported, and nothing in Bill C-36 addresses the very real fears of racial profiling.

It is unfortunate that the government did not take a stand against racial profiling by following the recommendation of the Senate Special Committee and Member of Parliament Irwin Cotler or the precedent of the Emergencies Act to include a non-discrimination clause in the bill or, better still, an explicit ban on racial and ethnic profiling. Such an amendment, especially if accompanied by the creation of an effective review mechanism, would have been a strong statement that it will automatically be illegal to target people on racial grounds. Such an amendment would also have responded to concerns raised by inquiries in both Manitoba and Ontario about racial profiling.

As matters stand, people harassed by racial targeting will often be left with the difficult and costly process of Charter litigation. They will have to establish under s. 15 of the Charter that racial profiling was not based on a valid statistical generalization and that they are entitled to a remedy under s. 24(1), most likely nominal damages. The American Secret Service agent of Arab descent who was recently thrown off a commercial airliner is apparently contemplating legal action that may seek damages and extensive injunctive relief. In Canada, however, we do not have the same litigation tradition, and it will not be surprising if most innocent victims of racial profiling simply lump the injury they have suffered to their human dignity and sense of belonging. Once again, the minimum and difficult-to-prove standards of the Charter have become de facto maximum standards.

The many new offences in Bill C-36 should not be ignored. Some of the problems in the overbroad definition of terrorist activities have been addressed, but problems remain. Proof of a religious, ideological or political motive is still required. A threat to commit any terrorist activity in any part of the world is still a terrorist activity. The new s. 83.01(1.1), which is designed to ensure that the expression of political, religious or ideological thought is not caught will not exempt such expression if it also amounts to a threat to commit a terrorist activity.

The government's respect for principles of subjective mens rea that I applauded in the last editorial has been watered down in s. 83.19, which in one breath requires the knowing facilitation of a terrorist activity but in the next provides that it is not necessary that "any particular terrorist activity was forseen or planned at the time it was facilitated". It will be interesting to see if subsequent criminal law amendments pick up on the distinctive drafting style of Bill C-36 by defining offences to include fault only to qualify them by providing long lists of what the prosecutor does not have to establish in order to secure a conviction (see ss. 83.18(2), 83.19(2), 83.21(2), 83.22(2)); extending the actus reus (see s. 83.18(3)); and prescribing the relevance of evidence (s. 83.18(4)).

There are some other noteworthy changes to the substantive criminal law. In response to a horrific but hopefully atypical crime, first degree murder has once again been expanded to include deaths caused while committing or attempting to commit an indictable offence under the Code or other federal legislation that would also constitute a terrorist activity. Proof of motive is required not only for a terrorist activity, but for a new hate crime in s. 430(4.1) of mischief to religious property that is "motivated by bias, prejudice or hate based on religion, race, colour or national and ethnic origin".

Bill C-36 represents an extreme example of a contextual approach to criminal law. The contextual approach has its merits, but it also has produced habits of intellect and drafting that ignore the need for attention to general principles and clarity. The Criminal Code is becoming so contextualized it reads like an income tax act, expanding to plug loopholes. Your next annual Criminal Code will look even less like a Code than your last one. This is not simply an aesthetic point.

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