

Protest, Freedom and Order in Canada
Finding the Right Balance

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The subject of this meeting presents us with a very wide canvas indeed. However, these are issues which have had what I believe is an unprecedented airing in rooms such as this across the country, largely prompted by the government's legislative response to the horrifying events of September the 11th.

I take as my departure points the matter of finding the right balance between the freedoms of the individual and the security of the state, and that we are a nation of laws with a respect for the rule of law. Those laws, by creating powers and safeguarding rights and freedoms, try to find the balance as well. Clearly there is often a dynamic tension and sometimes quite anomalous behaviour, as we try to find our way through the maze to achieve the right kind of solution. Take for example the actions of Prime Minister Trudeau when he essentially enunciated in 1970 the right of the state to carry out its functions, in that case utilizing a decades-old blunt instrument of legislation, the *War Measures Act*. And yet this is the same Prime Minister some years later who championed and encouraged some of the best minds in the country to craft what has become the seminal Canadian legislation protecting an individual's rights – the Canadian Charter of Rights and Freedoms.

Clearly, legitimate advocacy, protest and dissent are fundamental to the health of our democracy. When does such advocacy, protest and dissent cross the line from legitimacy to violence and incitement to violence? Where should the lines be drawn where matters of state or international questions are being debated as we have seen in the protests and marches and criticisms in Seattle, in Quebec City and in Genoa? To have this work effectively there has to be an understanding on both sides of the fence, so to speak. Unfortunately, the dialogue needed to define this particular balance is largely absent. Absent in part because governments suspect that those with legitimate concerns or with relatively little understanding of the issues at play are stampeded by others advocating divisive and conceivably violent courses of action. The radicals, for their part, have no interest in dialogue and compromise.

We should then have a look at whether the anti-terrorism legislation brought forward by the government in the wake of September 11th has materially altered the balance

between the rights and freedoms of individuals to protest and to advocate and the safety and security of the nation and its population collectively. These issues have been debated extensively across the country. Views range from a ringing affirmative that this legislation does pose dangers to our democratic rights to advocate and protest and dissent to a rather muted call for improvements to the bill by restricting some of its more sweeping clauses, to some who say that parts of the bill do not go far enough. They represent a healthy spectrum of differing views, intellectually yet passionately argued. Significantly, there is a recurring concern that the new powers given to the police will not be effectively monitored and overseen to ensure that these provisions are rigorously restricted to matters which dwell directly on potential or actual terrorist activities or acts. In short there is uneasiness that, willfully, inadvertently or through inexperience, the police will deploy these new powers in areas simply of criminality or in human rights areas.

The question is not whether Canada needed additional legislative heft in its efforts to counteract terrorism. It did. The question is whether the hastily drafted legislation has accomplished its essential purposes without tipping the balance away from legitimate advocacy, protest and dissent and toward the security of the state and its inhabitants, thereby unacceptably chilling exercise of these rights.

Legitimacy of a Legal Framework in Response to Terrorism

Even in the absence of a state of war, in the strict legal sense there is no question that the U.S. and its allies have a right to respond to the recent attacks on American territory. This right is accepted under international law.

States have the inherent right in international law to take action individually and collectively to deal with terrorist attacks and to safeguard the peace and security of their populations. Article 51 of the UN Charter codifies this right. It says that nothing in the Charter “shall impair the *inherent right* of individual or collective self defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

In addition, supporting direct action by the United States and its allies is the legal doctrine of self-help in times of necessity, reflected in numerous decisions by the International Court of Justice and its predecessor, the Permanent Court of International Justice. That doctrine, part of the inherent right of state security, allows states to take actions to protect themselves, individually and collectively, in terms of immediate and grave threats to international peace and security and to their own safety.

That is not to say that self-help has not often been abused as a means of justifying aggressive behaviour. For example, of particular concern to Martin Friedland at the University of Toronto Law School is the fact that in the United States and the U.K. which both have, give or take, equivalent legislation, the police powers are much more carefully overseen and controlled by the central government, in the case of the United States the additional powers under their legislation are given to the FBI whereas in the U.K. policing is of course a centralized function with the responsibility lying ultimately with the Home Office. The point, of course, being that in our decentralized law enforcement system there is likely to be much less oversight and control over the potential misuse of these powers by police forces of widely differing size and experience across the country.

Ironically, by granting these increased powers to all police forces in Canada, and policing is, at the end of the day, designed to make an arrest and secure a conviction, zealous police forces may well be interfering with the preventive intelligence gathering process which is centred in the Canadian Security Intelligence Service

Financial Assets

The recent terrorist attacks raised serious questions about the adequacy of Canada's existing laws on economic sanctions and embargoes, as well as its laws permitting the freezing of financial and other assets belonging to or forming part of the activities of any international terrorist organization.

The Canadian regime was divided among at least three different statutes and separate enforcement regimes. Sanctions were enforced mainly through the provisions of the

United Nations Act and the *Export and Import Permits Act*. There are also limitations under the *United Nations Act*. The most critical limitation being that it can be used only to implement Canada's obligations under binding resolutions of the United Nations Security Council adopted under Article 41 of the UN Charter. There was no authority for the federal cabinet to make orders beyond the scope of such resolutions. Therefore if the Security Council did not act under Article 41, no cabinet orders could be issued under the *UN Act* whatever the crisis or whatever the urgency to protect Canada's vital interests.

With these limitations in view the federal government has filled the gaps by regulation and legislation. The initial regulations implemented UN Security Resolution 1373 of September 28 and for the first time included a list of terrorist organizations in addition to the Taliban and bin Laden and his circle. They make it an offence to knowingly raise funds for or deal in the assets of any such listed organizations. In addition, these regulations impose significant new reporting and disclosure obligations with the onus placed on Canadian financial institutions to determine "on a continuing basis" if they are in possession or control of terrorist property. I have no difficulty with these provisions on the surface but acknowledge that legitimate concerns arise whenever a "list" is created with coercive intent.

Bill C-36 has four objectives:

1. stop terrorists from getting into Canada and protect Canadians from terrorist acts;
2. bring forward tools to identify, prosecute, convict and punish terrorists;
3. prevent the Canada-US border from being held hostage by terrorists and impacting on the Canadian economy; and
4. work with the international community to bring terrorists to justice and address the root causes of such hatred.

Despite serious reservations from many quarters as to the breadth of Bill C-36, the *Anti-Terrorism Act*, it was pushed through Parliament by the government before Christmas because it was seen as part of the effort to counter Canada's allegedly soft image on terrorism. The Minister of Justice defended this legislation as constituting a balance

between the protection of society and the safeguarding of Canadian rights and freedoms. She said that it was necessary to give the justice system the tools it needs to shut down terrorism, first by identifying by definition the unique attributes of terrorist activity that distinguishes it from other forms of criminal activity. Second, the legislation purports to create a criminal law structure around the terrorist problem including creating distinct offences of facilitating, financing and otherwise participating in terrorist activity. This new legal framework, claims the Minister, is intended to benefit both police officers and prosecutors as well as defence counsel and all Canadians who want to understand clearly what Parliament intended regarding countering terrorists' acts, particularly inside Canada.

However, there are problems with Bill C-36. Conceptually, the new law diminishes due process protections as it seeks to introduce counter-terrorist measures, allegedly in conformity with the Canadian Charter of Rights and Freedoms. The specific problem with the bill is the very definition that it introduces. The definition of "terrorism" is so wide that it could easily catch behaviour that doesn't remotely resemble terrorism. Once the "terrorist" label is fastened on an individual, organization or suspect, then the rules of procedural justice are more easily suspended.

Bill C-36's definition of "terrorist activity" targets "political, religious or ideological beliefs." Granted, the Justice Minister brought in a last-minute interpretative amendment purporting to provide assurance that basic rights of the Charter would be respected. For greater clarity, the amendment says that an expression of political, religious or ideological belief is not *alone* a terrorist activity unless it is part of a *larger conduct* that meets the other requirements of the definition. Some legal experts have suggested the amended definition will still invite law enforcement authorities to engage in "ideological profiling" which can be just as invidious as racial profiling. In this sense Bill C-36 will permit individuals and organizations to be marked for the beliefs they hold and espouse, which is something quite inconsistent with traditional Canadian values. In fact, this approach was rejected as a result of Parliamentary debate over provisions of the *CSIS Act* in the early eighties. Bill C-36 also gives the Solicitor General the virtually unreviewable power to act on the advice of CSIS or the police in branding activities and

organizations as “terrorist.” It is no secret that the communities most vulnerable to being listed are those who are visibly identifiable as racial, ethnic or political minorities, often recently arrived in Canada as immigrants and refugees. Yet these are the communities most dependent on their organizations for language and relocation services as well as to that vital link to their homeland. The diminution of reviewability or due process in these situations is frankly worrying.

Much has been made about the provisions in Bill C-36 for preventative arrest and investigative hearings. The Minister of Justice at the last minute tried to soften the extreme nature of these powers by providing a sunset clause under which the bill would be reviewed after five years. In my view the sunset clause simply represents a failure to address the fact that these provisions, in an unprecedented way, override fundamental religious, expressive and associational freedoms that are at the core of section two of the Charter. Whether the government’s sunset clause is a compromise that meets the “demonstrably justifiable” test of the Charter is something ultimately the courts will decide.

During the debates in Parliament on Bill C-36, it was noted that both U.S. and Great Britain had anti-terrorist statutes in place before September 11th, and that Canada did not. Whether or not this created a desire to “catch-up,” Canada seems to have overshot the mark. Nowhere is this more evident in the definition of “terrorist activity” which is not nearly as clear, careful or restrained as it should be. Indeed this definition is in some respects broader than the wide definition of terrorism in the United Kingdom’s *Terrorism Act* of 2000, after which it was modeled. The British definition does not create new crimes of terrorism, and it does not define as terrorism disruptions of the essential public and private services. The U.S. legislation is also less broad and more precise than Bill C-36. Its definitions of terrorism and federal crimes of terrorism are all based on the commission of predicate offences already in the criminal law. Finally, one cannot help but hark back to the often-criticized definition of an “unlawful organization” that was enacted by the regulations of October 1970 under the *War Measures Act*. In some respects the definition of terrorism in Bill C-36 presents an even greater risk of catching legal dissent than the regime which existed under the *War Measures Act*.

One must never forget that existing criminal law in Canada already prohibits a broad range of terrorist activities, including agreements, attempts, assistance and counselling of crimes. But the Canadian government in its race to catch up went beyond the British and American legislation defining terrorist activities to include legal political, religious and ideological protests that intentionally disrupt essential services. This definition then becomes the linchpin for other new offences such as facilitating and instructing terrorist activities and participating in the activities of, or harbouring those who commit terrorist activities. The overall effect is to lengthen the long reach of the criminal law in a manner that is complex, unclear and unrestrained.

What are some examples of activities that would be caught under Bill C-36 definition of “terrorism” that don’t remotely resemble terrorism? Consider these, as recently enunciated by the Honourable Ron Atkey in a recent address:

Protest activities by Aboriginal people which disrupt an essential service or block a road as a protest against development activities on Aboriginal lands;

Workers involved in recent nurses’ or truckers’ strikes or the protestors of the Quebec City Summit or the APEC Conference in Vancouver;

Political activists who may have appeared as “terrorists” to those in power at a given time but who are ultimately remembered as champions of freedom such as Louis Riel or Nelson Mandela; and

Community groups who sponsor Muslim immigration into Canada where an immigrant is alleged to be involved in terrorists’ activities in the country of origin, even if this was sometime in the past.

At the end of the day, many of the misgivings lawyers and civil libertarians have about Bill C-36 will be addressed by the Supreme Court of Canada under the Charter. The court can and will act as an effective institutional brake on the inherent excess contained in the law as drafted. This will not in any way diminish Canada’s anti-terrorist efforts militarily or in terms of intelligence and policing measures, screening of entrants to Canada, border measures and air security.

The Minister of Justice claimed that Bill C-36 has been “Charter-proofed.” She also argued that the bill was necessary to bring Canada into compliance with its international obligations to fight terrorism, and that Canada is simply doing what other governments such as the U.S. and the U.K. have already done. But in my view, she did not show that the limits that this bill places on fundamental religious, expressive and associational freedoms guaranteed to Canadians by the Charter are demonstrably justifiable in a free and democratic society, really the ultimate test of constitutionality under our Charter.

Conclusions

The real test of our values as Canadians is in how they guide us in times of crisis, whether through military, intelligence, policing, administrative or legal responses. In the past, we did not always measure up, for example, when we interned Japanese-Canadians in the early forties or jailed hundreds of innocent Canadians in Quebec in 1970. But we have made progress. The 1988 *Emergencies Act*, which replaced the *War Measures Act* of 1914, is a good example of this. And since September 11th, our national government for the most part has been more sensitive to the need for balance, for a coordinated response reflecting modern realities, for effectiveness in terms of deploying government resources and ensuring that we continue to have a Charter of Rights and Freedoms against which legislative or administrative excess may be tested before a competent judiciary.

The fact that Canadians can and are willing to debate these issues remains an important part of our freedoms, part of the creative tension that exists in a free and democratic society.