Constitutional Democracy: Balancing Security and Civil Liberties

Irwin COTLER*

I would agree here with what Errol said, that the world did not necessarily change on September 11; rather, I suspect that what happened is that we were exposed to a darker underside of evil that was always there. But it is clear that September 11 has had a tranformative impact on our psyches as well as on our politics, on our priorities as well on our purposes.

For example, and of direct relevance to our discussion here today is the following. While the threat of terrorism—let alone any legislative response to it—was not even on the parliamentary or political radar screen before September 11, it has dominated that parliamentary and political radar screen since September 11, just as it has dominated discussion in the public square, the media, academe, and the like.

If nothing else, and at the risk (and I acknowledge this) of extrapolating irony from this horrific tragedy, what has occurred is that September 11 has raised the level and quality of discussion in Parliament, if not also among academe, the professional bar, civil libertarians, and the like.

But while the discussion before our Parliamentary Standing Committee on Justice and Human Rights—and in the halls of academe and the public square—has been very enlightening and informing indeed, it has been beset by an understandable yet somewhat inadequate conventional wisdom, organized around the juridical optic or prism of the domestic criminal law due process model—a necessary model, but an insufficient one. What is needed is a more inclusive model in the form of

---

* Professor, Faculty of Law, Director of the Human Rights Program, Chair, InterAmicus, International Human Rights Advocacy Centre, McGill University, Ottawa, Ontario.

the international criminal justice model, similar to what underpinned the enactment of the *Crimes Against Humanity and War Crimes Act*,[1] in implementing the International Criminal Court Treaty[2] and its domestication here in Canada.

As well, the suggestion in some of the representations and discussion that what we are dealing with is a matter of "national security versus civil liberties" tends to be—however inadvertently—a misleading form of characterization; rather, a more appropriate approach would be that counter-terrorism ought to be seen as anchored in a generic principle of human security—the protection of both the security of democracy and civil liberties including, in particular, the most fundamental of rights—the right to life, liberty and security of the person.

Indeed, that is the organizing idiom that was used by the United Nations Security Council with respect to the adoption of its unprecedented and comprehensive resolution[3] in the matter of counter-terrorism, just as it is the optic around which our own human security agenda—and human rights foreign policy in Canada—is itself organized. I say this because the characterization of national security versus civil liberties may lead, however inadvertently, to yet another a disturbing inference that somehow those who are against *Bill C-36*,[4] or counter-terrorism legislation, are the only civil libertarians, while all those who are in favour of this legislation are somehow anti-civil libertarian.

I would like to suggest that there are good civil libertarians on both sides of the issue—just as there are good security-oriented people on both sides of the issue—and we ought to assess the arguments on their merits, rather than in terms of a configuration of national security versus civil liberties.

---

1 S.C. 2000, c. 24.

2 *Rome Statute of the International Criminal Court*, July 18, 1998, UN Doc. A/CONF.189/9th.

3 *Threats to International Peace and Security Caused by Terrorist Acts,* SC Res. 1373, UN SCOR, 2001, UN Doc. S/RES/1373 (2001) [hereinafter Resolution 1373], condemning the terrorist attacks of September 11.

4 *Anti-terrorism Act*, S.C. 2001, c. 41 [hereinafter *Bill C-36*].

With this in mind—and with this sort of pedagogical caveat in mind—I intend to organize my remarks in two parts: the first focuses on the foundational principles that underpin or underlie a counter-terrorism law and policy, using *Bill C-36* as a case study. The second discusses the civil libertarian concerns that flow from an analysis of *Bill C-36*.

Let me begin, in this first part of my paper, with the basic generic principle, namely, that of *human security*.

In a word, and as the United Nations put it,[5] the principle of human security underpins counter-terrorism legislation in that terrorism itself, and particularly this genre of transnational terrorism, has to be seen as an assault upon, and threat to, international peace and security, as well, it is an assault upon and threat to the most fundamental rights of the inhabitants of a democratic polity—as indicated earlier, the right to life, liberty and security of the person.

The second principle is the *civil libertarian principle*. Simply put, the human security principle does not obviate the fact that the pursuit and the protection of human security could give rise to civil libertarian concerns. And, indeed, I have identified in the second part of this paper some eleven categories of civil libertarian concerns.

The third principle is what might be called the *contextual principle*. By the contextual principle I am referring to the approach that was taken by the Supreme Court of Canada, which in its jurisprudence noted that *Charter*[6] rights, and any limits imposed on them, must be analysed not in the abstract, but in the factual context that gives rise to them.[7]

Accordingly, any counter-terrorism law policy, such as *Bill C-36*, must factor in the nature and dimensions of this transnational terrorist threat as part of adherence to this contextual principle. This would include the increasingly lethal face of terrorism as in the deliberate mass murder of civilians in public places, the growth and threat of destructive economic and cyber-terrorism, which seeks to paralyse the civilian infrastructure; the potential access to, if not prospective use of weapons of

---

5 See Resolution 1373, *supra* note 3.

6 *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

7 See Bertha Wilson J. in *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1325.

mass destruction; and, of particular relevance to us in this contextual approach, the increased vulnerability of open and technologically advanced democratic societies like Canada to this genre of terror.

Apart from appreciating this generic, transnational terrorist threat as part of this contextual approach, there is the specific character of the new transnational terrorist suicide bomber, one who benefits from modern communication and transportation, who has access to global sources of funding, is trained and anchored in transnational terrorist networks, enjoys base and sanctuary in rogue regimes, like the Taliban in Afghanistan, is educated and knowledgeable about modern explosives, and is more difficult to track down and apprehend than the members of the old established groups or those sponsored by state terrorism.

A fourth foundational principle that underpins antiterrorism legislation such as *Bill C-36* is the *International Criminal Justice Model*. In brief, we are not dealing with your ordinary or domestic criminal, but with the transnational super-terrorist as I have indicated; not with ordinary criminality, but with the genre of crimes against humanity; not with your conventional threat of criminal violence, but with an existential threat to the whole human family.

In a word, we are dealing with Nuremberg crimes and Nuremberg criminals, with *hostis humanis generis*, the enemies of humankind. In that sense, the domestic criminal law due process model, standing alone, is insufficient. As well, and underpinning the international criminal justice model of the antiterrorism legislation, is the domestic implementation of international legal undertakings, in particular the domestic implementation by Canada of the twelve international conventions that address specific terrorist acts—that Canada has both signed and ratified[8]—as well

---

[8] *Convention on Offences and Certain other Acts Committed on Board Aircraft*, September 14, 1963; *Convention for the Suppression of Unlawful Seizure of Aircraft*, December 16, 1970; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, September 23, 1971; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, December 14, 1973; *International Convention against the Taking of Hostages*, December 17, 1979; *Convention on the Physical Protection of Nuclear Material*, March 3, 1980; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*), February 24, 1988; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, March 10, 1988; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental shelf*, March 10, 1988;

as those undertakings mandated by the United Nations Security Council Resolutions.[9]

A fifth principle is the *prevention principle*. In essence, the *raison d'être* of the Canadian legislation, that of other countries and of the United Nations Security Council Resolution 1373, proceeds from a culture of prevention and pre-emption, as distinct from reactive, after-the-fact, law enforcement. This includes the range of international terrorist offences domesticated into *Bill C*-36—which seek to disable and dismantle the terrorist network itself—let alone the investigative and procedural mechanisms that seek to detect and deter, rather than just prosecute and punish.

This leads to a sixth principle and that is the *proportionality principle.*[10] As the Supreme Court of Canada instructed in *R* v. *Oakes,*[11] "there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right and the objective which has been identified as of sufficient importance." The Court proceeded to set out the three components of the said proportionality test as follows:

> "First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures

---

Convention on the Marking of Plastic Explosives for the Purpose of Identification, March 1, 1991; *International Convention for the Suppression of Terrorist Bombings*, December 15, 1997; *International Convention for the Suppression of the Financing of Terrorism*, December 9, 1999.

9 Resolution 1373, *supra* note 1; see also *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res. 1368, UN SCOR, 2001, UN Doc. S/RES/1368 (2001); *On the Situation in Afghanistan*, SC Res. 1363, UN SCOR, 2001, UN Doc. S/RES/1363 (2001); *On the Responsibility of the Security Council in the Maintenance of International Peace and Security*, SC Res. 1269, UN SCOR, 1999, UN Doc. S/RES/1269 (1999); *On the International Terrorism*, SC Res. 1189, UN SCOR, 1998, UN Doc. S/RES/1189 (1998); and *Libyan Arab Jamahiriya*, SC Res. 731, UN SCOR, 1992, UN Doc. S/RES/731 (1992).

10 Enunciated by the Supreme Court of Canada in *R.* v. *Oakes,* [1986] 1 S.C.R. 103.

11 *Ibid.*, at 139.

> which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."[12]

In brief, while we are dealing with extraordinary legislation, responding to an extraordinary threat, the legislation must still comport with the principle of proportionality—of just remedies serving just objectives. And here the principle of proportionality, as set forth in our jurisprudence, will come to the fore—that the remedies chosen must be reasonably connected to the objectives sought to be secured; that it must intrude on civil liberties as reasonably little as possible, otherwise known as the minimal impairment principle; and the cost in human and economic justice should not exceed the value intended.

Principle Seven is the *Charter of Rights principle*. It has been mentioned in this Conference on a number of occasions, that *Bill C-36* was pre-tested under the *Charter*. This does not mean—and certainly should not be intended to suggest—that therefore the legislation is *Charter*-proof—only that the legislation is *Charter* bound. In a word, the legislation is not immune from any *Charter* challenge and any limitation on a right under the *Charter* may be challenged. Accordingly, such limitations must respect the principles of criminal justice that Professor Garant spoke about,[13] thereby involving compliance with *Charter* requirements, including the basic values of a free and democratic society.

Principle Eight is the *comparativist principle.*[14] In a word, in determining the justificatory basis for the *Bill C-36*, Parliament had recourse to comparative antiterrorist legislation in other free and democratic societies, such as the U.K., the US, France, Germany, and the like.

---

[12] *Ibid.*

[13] P. Garant, "Prévention du terrorisme et principes de justice fondamentale", presentation notes for Panel Discussion Plenary VI, "Constitutional Democracy: Balancing Security and Civil Liberties", CIAJ Conference, *Terrorism, Law & Democracy: How Is Canada Changing Following September 11?*, Montreal, March 25-26, 2002.

[14] As per the Supreme Court of Canada in *R* v. *Keegstra,* [1990] 3 S.C.R. 692.

The importance of this, and the experience gained from it, was not only to appreciate what other free and democratic societies were doing, but to understand that all other free and democratic societies had enacted or were enacting antiterrorist legislation, and that the purpose these enactments—looking at their *travaux préparatoires*—was to protect those societies and allow them to remain free and democratic. This does not mean—nor should it to be inferred—that just because we look at other free and democratic societies—and our legislation may be preferable—that we do not have to conform to our own domestic principles and values—not at all.

I mention this fact only because it was part of the review process, and the Supreme Court of Canada has looked to the comparativist principle in terms of its appreciation of the constitutionality of legislation.[15]

This brings me to the ninth principle—and that is the notion, and importance of due process safeguards and the principles of fundamental justice. Again, these were elucidated in Professor Garant's paper[16] and I need not go into it. But while I have argued that an analysis of counter-terrorism legislation, such as *Bill C-36*, should proceed from a more inclusive, international criminal justice model, this does not mean that the domestic due process model is unimportant or irrelevant. On the contrary, it means that domestic due process model is a necessary model and safeguard, and one to be factored into our appreciation of the foundational underpinnings of the legislation, as an express, let alone civil libertarian safeguard.

Accordingly, the reference by my colleague, Don Stuart, to the effect that I had suggested that we jettison the domestic due process model, or that I was referring—and I am quoting him directly: "that the criminal lawyer should get out of here"—is as false as it is absurd.[17] Not only does it misrepresent what I have said—or what I have written—but as someone who has defended political prisoners in different parts of the

---

[15] As noted above. See *R* v. *Keegstra, ibid.*

[16] See Garant, *supra* note 13.

[17] D. Stuart, "The *Anti-terrorism Bill* (Bill C-36): An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System", presentation notes for Panel Discussion Plenary IV, "Terrorism and the Criminal", CIAJ Conference, *Terrorism, Law & Democracy: How Is Canada Changing Following September 11?*, Montreal, March 25-26, 2002.

world- many of whom have themselves been charged with sedition and acts of terrorism—I am not unmindful of the importance of due process and domestic safeguards. Indeed, in an earlier Conference—a Conference that Don Stuart attended—I identified some ten due process safeguards.[18] Again, I am not saying that domestic due process safeguards are not important; only that we need to enlarge the model to include the international criminal justice model.

Principle ten is the *minority rights principle*—in particular the protection of visible minorities, from being singled out for differential and discriminatory treatment in the enforcement and application of antiterrorist legislation. Accordingly, during the debate on *Bill C-36*, I recommended that a non-discrimination principle, prohibiting the arrest, investigation, detention and imprisonment of any person on any prohibited grounds of discrimination be expressly included in antiterrorism legislation as follows: that nothing in the Bill provide for the detention, imprisonment or internment of Canadian citizens or permanent residents, as defined in the *Immigration Act,*[19] on the basis of race, national or ethic origin, colour, religion, sex, age or mental or physical disability.

Principle eleven is the *anti-hate principle*—another variation of the minority rights principle—again to protect visible minorities from any hate on the Internet or in the technological ambiance, which can have the effect, not only of singling them out as targets of hatred, but also as targets of terrorist acts.

Indeed, this teaching of contempt, this demonizing of the other, this standing assault on human security, this is where it all begins. The recognition of the substantial harm—as the Supreme Court put it[20]—that is caused to the individual and to group targets of this assaultive speech, is imperative. For this assaultive speech isolates and ostracizes minorities, who are then left vulnerable to hate-motivated attacks. What is needed, therefore, is a culture of respect in place of a culture of contempt—a culture of human rights in place of a culture of hate—inspired by, and

---

[18] I. Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in R. J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) at 111.

[19] R.S.C. 1985, c. 1-2.

[20] See *R* v. *Keegstra, supra* note 14.

anchored in, a set of foundational principles as set forth in comparative and international human rights jurisprudence in general, and domesticated in Canadian legislation.

Thus, antiterrorism legislation includes important provisions that would allow the courts to order the deletion of publicly available hate propaganda from computer systems such as an Internet site.[21] As well, there are *Criminal Code* amendments that would create a new offence of mischief motivated by bias, prejudice or hate based on religion, race, colour or national or ethic origin, committed against a place of religious worship or associated religious property.[22]

In addition, there are amendments to the *Canadian Human Rights Act*[23] to make it clear that using telephone, Internet, or other communication tools for hatred purposes or discrimination is prohibited. This is particularly important in light of the Internet's ability to "extend the potential reach of hate messages to millions."[24]

Finally, there is an important *principle of oversight*, which finds expression in oversight mechanisms in the legislation to ensure both parliamentary and public accountability. I am referring to the application of the *Canadian Charter of Rights and Freedoms*; to the application of International Human Rights norms; the annual reports of the Minister of Justice and Solicitor General to Parliament and the counterpart reports to the provincial legislature; the importance of the Information and Privacy Commissioners' oversight, of which we will hear more later; the requisite authorization or consent by the Minister of Justice for prosecutorial purposes of terrorist offences; the enhanced judicial capacity regarding certain offences and investigative mechanisms under the Act; a mandatory three-year parliamentary review and a sunset clause for the provisions respecting preventative detention and investigatory hearings.

---

21 *Criminal Code*, R.S.C. 1985, c. C-46, s. 320, as am. by *Bill C-36*.

22 *Criminal Code*, s. 430, as am. by *Bill C-36*.

23 R.S.C. 1985, c. H-6, ss. 13(1) and 13(2), as am. by *Bill C-36.*

24 In the words of the Canadian Human Rights Commission in its testimony before the Standing Committee on Justice and Human Rights respecting *Bill C-36*.

None of these foundational principles, underpinning *Bill C-36*, is intended to in any way depreciate the civil libertarians concerns that this legislation has generated, which will be addressed in this second part of the paper.

Indeed, I rose in the House on October 16, one day after *Bill C-36* was introduced, to identify what I called nine areas of civil libertarian concern, that were subsequently reinforced, if not enlarged upon, by the witness testimony before our Parliamentary Justice and Human Rights Committee. For reasons of time, I am just going to list them—but they bear mention because some of them still invite our monitoring and vigilance.

1. The definition of what constitutes a terrorist activity in the first version of *Bill C-36* was vague, overbroad, and, frankly, constitutionally suspect. The definition has been somewhat narrowed but it still remains problematic even though it is now probably constitutional. For example, an original concern adduced before the above-mentioned Justice Committee, related to the arguable overbreadth of the definition of terrorist activity as set forth in section 83.01(2) of the Bill. As such, some groups—such as the Canadian Bar Association—argued that it might catch unlawful activity—such as a wildcat strike or demonstration—that is not terrorist conduct.

   The definition of a "terrorist activity" is clearly a crucial issue as it is determinative and dispositive of the terrorist offences, as set forth in the Act. Consequently, during the debate on the Bill, I recommended the following changes (*inter alia*):

   - That consideration be given to removing the motivational elements as requisite elements for the offence, while ensuring that they cannot serve as exculpatory grounds for the defence. This recommendation was not accepted.

   - That the word "lawful" in section 83.01(b)(ii)(E) be deleted as it may be stretched to characterize as "terrorist", activity which was never intended to be characterized as such—an amendment agreed to.

2. The requirement of *mens rea* for criminal liability to be applied throughout the legislation. This concern has been somewhat obviated by its inclusion now with respect to the offence of "facilitating".

3. The issuance of Attorney General "Security Certificates". In the initial draft of *Bill C- 36*, the Attorney General's powers were unfettered, unreviewable and secret. This alone was cause to oppose this Act. Some of the prospective abuse has been addressed, though there are still concerns that need to be monitored.

4. The non-discrimination principle to protect minorities, referred to above, could have been included in a more comprehensive manner.

5. The sunset clauses respecting the provisions relating to preventative arrest and investigative mechanisms are not in fact full sunset clauses. Parliament, by way of a simple resolution, can maintain these provisions. No parliamentary re-enactment is necessary. There is not, then, a full lapsing of the sunset clauses; also, they are limited only to the preventative arrest and investigative mechanisms provisions. In my view, they should have been extended to other provisions in the legislation.

6. The oversight mechanisms are crucial. It is important not only that the Ministers report annually to Parliament, but that their reports be subject to review by the Parliamentary Justice and Human Rights Committee.

7. In the matter of the singling out of minorities for differential and discriminatory treatment in the enforcement of the legislation, the prohibition in the legislation is not as explicit or as broad as it should be.

8. The listing of terrorist activities. While there was some modest amendment with regard to the tests required for the listing of a terrorist entity to begin with—and an enhanced capacity for judicial review—there is still insufficient prior notice and procedural fairness before the listing itself takes place.

9. There is no judicial authorization of the wiretap power.

May I state, parenthetically, that all the above critique and more were made by me in the course of Parliamentary debate. They are not just being voiced after the debate and the passage of the Bill.

One quick word about Bill C-42, the Public Safety Bill,[25] because reference has hardly been made to it in this Conference. I find this passing strange, in that there are two prongs to the antiterrorism legislation. There is *Bill C-36,* to which we have devoted rightly most of our time, and there is Bill C-42, the *Public Safety Act*, which, as I have said elsewhere, is very disturbing from a civil libertarian point of view. Frankly, it should either be amended in its major particulars or preferably withdrawn. My concerns may be summarized as follows:

a. That Bill disturbs the equilibrium between Parliament, the Executive and the Judiciary, in its undue allocation of power to the Executive, while diminishing therein the powers of Parliament and the Judiciary.

b. There is a lack of accountability safeguards and oversight criteria.

c. The Bill may not pass the "sniff test" of the *Charter* with respect to the undue allocation of power. I am referring in particular to the undue allocation of power given to the Minister of Defence: where he believes it is necessary to do so for reasons of international relations "in his opinion", he can designate any part of Canada to be a military security zone. The Bill lacks appropriate, objective criteria to ensure public, parliamentary and judicial accountability; as well, there is a second undue allocation of power to four Ministers to enact interim emergency legislation, again without the appropriate safeguards.

To conclude: I am not unmindful, even taking into account the foundational principles underpinning our antiterrorism law, of the civil libertarian concerns that still exist. But while I do not put much respite in sunset provisions, I do put a good deal of faith in a sunshine process; and by a sunshine process I am referring to the sunshine of a democratic arena (which I never had when I was representing political prisoners in non-democracies), and I am referring, in particular, to the engagement and the oversight that is exercised by the media, by the professional bar, by civil

---

[25] Now Bill C-55, *An Act to Amend Certain Acts of Canada, and to enact Measures for Implementing the Biological and Toxin Weapons Convention, in Order to Enhance Public Safety,* 1st sess., 37th Parl., 2002 (1st reading April 29, 2002). Bill C-42 was withdrawn in late April 2002.

liberties groups, by a civil society. It is that sunshine process, together with a vigilant Parliament and parliamentary oversight, that will ultimately be the best guarantee of civil liberties under the Bill.

Thank you.