

Terrorism, the ticking bomb, and criminal justice values

Lucia Zedner examines the 'ticking bomb' scenario as a way of restraining, rather than licensing, exceptional measures against terrorism.

The "ticking bomb" is a hypothetical scenario much loved by policy makers as a lever to introduce emergency powers against terrorist threat. It invites us to consider what measures we would be willing to condone if we knew that a bomb were ticking which, without intervention, would explode causing death and destruction. The supposed imminence and scale of the threat acts upon our emotions as a powerful inducement to contemplate radical actions that might otherwise be thought indefensible. As such the ticking bomb has been used most controversially to formulate arguments around the justification for torture of terrorist suspects (Dershowitz, 2002).

Post 9/11 the ticking bomb, or a more generalised reference to Al-Qaeda, has been deployed as the basis for the introduction of a growing array of emergency measures (Gross and Ní Aoláin, 2006). These measures, justified on precautionary grounds as essential to protect the public or even the life of the nation in the face of exceptional imminent harm, quickly come to be applied to lesser harms and integrated into everyday criminal justice policy. If we are to resist this outcome we need to think a little more clearly about what the ticking bomb does and does not allow.

The ticking bomb

The ticking bomb scenario has been criticized as a thought experiment that makes doubtful assumptions

about the existence, imminence, gravity, and difficulty of averting the threat. To allow the ticking bomb to determine anti-terrorism and criminal justice policy, it is said, is to launch ourselves down a slippery slope at the base of which the exception becomes the norm (Dyzenhaus, 2001). Instead of accepting the ticking bomb as a licence for extraordinary measures it can be seen instead as instituting a powerful set of checks upon politicians and policymakers. No doubt this sounds counterintuitive: so what would it mean to invoke the ticking bomb not as licence but as constraint?

Six restrictive requirements can be derived from the ticking bomb scenario.

First, a real threat requirement: the ticking bomb or other specific planned attack should actually be known to exist. In real life intelligence about future harms is often limited and even where some level of risk is calculable, its precise extent is commonly uncertain. Requiring that there be reliable intelligence of a bomb or other grave threat should mean that a vague or lesser threat will not suffice.

Secondly, an imminence requirement: the bomb must actually be ticking or the threat about to occur. We might then require policy makers to specify just how soon is imminent – in terms of hours, days, or weeks. Possible or distant future threats would not be sufficient reason for intrusive measures now. This requirement would act as a

powerful restraint upon the more widespread use of existing measures or proliferation of new instruments.

Thirdly, a gravity requirement: the threat must be sufficiently grave to justify the measure proposed. Or, to put it another way, the measure must be proportional to the putative harm. Given the risk of harm lies in the future that would require us to calculate both the gravity of the risk and the likelihood of it actually occurring. Tying the severity or intrusiveness of the measure to the gravity of a specified threat would prohibit the introduction of measures justified by a generalized fear or insecurity, or by reference to some unspecified threat. It would outlaw clearly disproportional measures too.

Fourthly, a firm evidence requirement: the evidence must be sufficiently good that those subject to the measure are in fact those who pose the threat. Whether this is set at the criminal standard of proof beyond all reasonable doubt or at a lesser level (perhaps balance of probabilities) would be dictated by the procedural channel in which the measure lies. But if the measure were penal in its effect then case law tells us that only the criminal standard of proof will do. Generalised suspicion or belonging to a suspect religious, ethnic, or other categorical group would not be sufficient grounds to subject an individual to an exceptional measure.

Fifthly, a no alternative requirement: if other, less intrusive, means of averting the risk are possible then these means must be tried and exhausted first. Only if the ticking bomb could not otherwise be silenced, and there is no other way to avert catastrophe, would the introduction of exceptional measures be justified. Where preventive or protective measures – such as surveillance, intelligence operations, policing, and, in extremis, evacuation – could serve to avert the threat entirely or at least substantially to limit its impact then these should be preferred over intrusive, liberty depriving measures.

Finally, an efficacy requirement: any proposed measure must be effective or at least sufficiently likely to bring about the specific end for

which it is ostensibly introduced. It would not suffice that a measure made the public feel safer or allowed politicians to claim that 'something was being done'. It must actually avert the particular risk at which it is aimed. However – and this is crucial – efficacy alone will not serve to justify a measure if it is in principle wrong. That is to say, moral arguments must trump consequentialist ones if individuals are not to be made the means to larger policy ends.

Reclaiming criminal justice values

And this is where criminal justice comes in. For despite the fact that anti-terrorism policy is increasingly developed outside the criminal justice realm, it is to criminal justice principles and values we need to turn if we are to subject the exceptional measures introduced in the name of combating terrorism to restraint (Thomas, 2003). Terrorist acts are exceptional both in their rarity and in the gravity of the harm they inflict. But this rarity should not be allowed to deflect attention from the need to ensure that offences meet the basic criteria of criminalization (Tadros, 2007), namely that they involve both culpability (and often a very high degree of premeditation) on the part of their perpetrators and clear wrong doing (commonly of the gravest sort). As the most serious of crimes (often entailing murder, grievous bodily harm, arson, and criminal damage) terrorist acts clearly merit prosecution. One only has to think of the case of murder to see that it cannot make sense to say that there are acts too serious to be prosecuted.

Once we think of terrorist suspects as criminal suspects several essential preconditions come into play. Criminal justice requires that we regard all defendants as innocent until proven guilty. Prosecution requires that suspects are charged with a substantive offence laid down in law and can only proceed if it meets the public interest test (easily met by most terrorist acts) and the sufficiency of evidence test (much less easily met in respect of future

risks). If the evidence is poor, illegally obtained, or otherwise inadmissible it ought not to found the basis of prosecution and we should let the suspect go (the ancient right of *habeas corpus*). Criminal justice requires an open trial in a judicial court, and that the defendant receives legal advice, legal aid, their choice of legal representation, and confidentiality in communication with their lawyers. It requires adherence to rules of evidence, the privilege against self-incrimination, and the right to confront witnesses. Punishment may only be imposed upon proof of guilt and must be proportional to the gravity of the offence. Criminal justice values require adherence to the rule of law and, amongst many others, adherence to the principles of fairness, maximum certainty, parsimony, non-discrimination, and equality of arms.

It follows that anti-terrorist measures that fail to abide by these safeguards and values are *prima facie* illegitimate. Representation by special advocates selected by the state and who cannot communicate with clients once they have seen the evidence against them is, at the very least, problematic. The imposition, without the benefit of trial, of Control Orders that inflict quasi-house arrest and severe restrictions upon communication, mobility, and association indefinitely (subject only to annual renewal) contravenes basic criminal justice values (Zedner, 2007). The structural and procedural safeguards of the criminal process are relinquished with disastrous consequences not only for the protection of the innocent but, if the guilty go free, for security too.

Conclusion

The ticking bomb that is contemporary terrorism risks leading us to accept ever more intrusive measures. The worst case scenario is readily invoked by politicians and policy makers to justify exceptional measures that result in widespread and systematic erosions of human rights (Ashworth, 2007). Instead of allowing a future hypothetical to become a ground for legislating

today, the ticking bomb might better be invoked to oblige us to identify the precise grounds upon which exceptional measures can be justified. Unless each and every one of those grounds exists, the measure is not warranted. Tolerating unjustified state actions like the introduction of special advocates or Control Orders (still worse preventive detention, extraordinary rendition, or torture) constitutes a victory of terrorism over the liberal, law-abiding state, all the more tragic because liberalism's defeat is partly self-inflicted. Recourse to criminal prosecution, with its powerful shield of due process protections and criminal justice values, is surely the better way to silence the ticking bomb and defend liberal legal values from the terrorist threat. ■

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