

ANALYSIS OF CONFLICT BETWEEN HUMAN RIGHTS AND ANTI-TERRORISM LAWS: A CRITICAL EXAMINATION UNDER INTERNATIONAL LAW

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ABSTRACT

Since 9/11, the number of anti-terrorism legislations globally has increased in a way that often sacrifices the protection of human rights. The paper critically analyzes the inherent tension between human rights and anti-terrorism laws under international law. Analyzing key legal instruments, case studies, and scholarly debates, this article argues that although states have a legitimate interest in combating terrorism, the erosion of human rights in the name of security is neither legally justifiable nor effective in the long term. It engages a multidisciplinary theoretical approach, from legal positivism, critical legal studies, and cosmopolitanism, to identify these nuances of tensions between security and liberty. The article concludes with recommendations as to how these competing interests will be reconciled by finding a balanced approach toward the rules of law and international human rights standards.

Keywords: Human Rights, Anti-Terrorism Laws, International Law, National Security, Proportionality and Necessity.

INTRODUCTION

Global terrorism has become the new wave of the post-9/11 era that has fundamentally changed the landscape of international security and human rights, forcing states across the globe to increasingly tighten and expand anti-terrorism measures. Although such measures have been ostensibly directed toward national and global security, they have frequently clashed with the well-established principles of international human rights law. The United Nations Security Council Resolution 1373 (2001), adopted in the immediate aftermath of the September 11 attacks, marked one of the pivotal moments in this shift of course, requiring states to adopt and implement comprehensive strategies against

terrorism, including the criminalization of terrorism financing, stronger border controls, and the adoption of domestic legal frameworks to counter terrorism (UNSC, 2001). However, most of these measures erode the most basic human rights, namely privacy, freedom of expression, and protection before the law. Most of these counter-terrorism measures lead to very critical questions on whether they are compatible with the principles of international human rights law. This article seeks to understand the legal and philosophical underpinning of this conflict so as to critically examine how anti-terrorism laws challenge the international human rights framework. This debate, hence, fundamentally

underpins its reasoning on a clear conflict of state obligation in this regard to the protection of civilians from terrorists while, at the same time, the duty obligation to uphold fundamental human rights obligations in international law, including international instruments like UDHR and the ICCPR. The article establishes the debate in discourses on the very nature of state sovereignty, evolving international law roles, and the precarious balance between individual rights and collective security. It is from an interdisciplinary analysis in legal theory, political philosophy, and international relations that this article attempts to imbue the discussion of how security imperatives and human rights protection intertwine with such richness.

Yet, one of the most poignant questions the article raises is to what extent states can infringe on human rights in the name of national security. Though international human rights law allows the derogation of some rights in a time of public emergency under Article 4 of ICCPR, the derogation of those rights must be strictly necessary, proportionate, and non-discriminatory (Nowak, 2005). However, in most cases, this application of antiterror measures often gets out of bounds and produces widespread abuses and violation of human rights. For example, the expansion of mass surveillance programs, particularly those sanctioned by the USA PATRIOT Act and the UK's Investigatory Powers Act, have seriously undermined the right to privacy and exerted a chilling effect on freedom of expression (Greenwald, 2014). Similar, the application of pre-trial indefinite detention is criticized for the violation of right to fair trial and prohibition against arbitrary detention according to international law (Sands, 2005).

This paper argues theoretically on the mediation role of international law between the conflict of human rights and measures against terrorism. Therefore, according to legal positivism, "sovereign states have the right to make law and execute them without regard to international standards" for human rights as stipulated by norms (Hart, 1961). Radical lawyers, however, note that anti-terrorism laws are usually constructed to reflect the prevailing status quo, which does not favor the underprivileged sector and therefore continues the trend of inequality (Kennedy, 1997). The "state of exception" concept by Giorgio Agamben spells out how states, in the

name of national security, suspend normal legal order and create space for systematic human rights violation (Agamben, 2005). Theoretical prism brings attention to the inherent risk of securing more than liberty, thus requiring a holistic mechanism of oversight and accountability.

In addition to a theoretical analysis, the article gives specific case studies to explain this conflict practically. For example, the UK Prevent Strategy that had been initiated as a way to counter radicalization has been blamed for being targeted at Muslims communities and for curbing freedom of speech (Kundnani, 2015). For instance, the growing global application of drone strikes in counter-terrorism operations has been a source of concern regarding the violation of international humanitarian law and the right to life (Alston, 2010). These case studies point out the need for a balanced approach respecting human rights but effectively addressing the threat of terrorism.

Ultimately, this paper therefore argues that the curtailment of human rights under the guise of fighting terrorism is neither legally justifiable nor viable in the long haul. The paper therefore advocates for a human rights approach to counter-terrorism within the tents of proportionality, necessity, and judicial oversight. When implemented, human rights incorporation within anti-terrorism policies will make nations stronger enough to cure the roots of terrorism while their obligations under international law are maintained intact. It is such an approach that not only makes counter-terrorism policies more legitimate and effective but also reaffirm the centrality of human rights in the global legal order. But going through this review, the piece builds on any existing scholarly or policy debate pertaining to what a future international law might look like in such a global terrorism-encompassed or heightened security concerns age.

2. Theoretical Framework: Human Rights vs. National Security

2.1 The Primacy of Human Rights in International Law

International human rights law, as enshrined in instruments such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, places human rights above everything else as a foundation of global governance (UN General Assembly, 1948; 1966). Article 4 of the ICCPR provides for derogations

from certain rights in times of public emergency but such derogations must be strictly necessary and proportionate (Nowak, 2005). The theoretical justification of this primacy is traceable to the social contract tradition, which argues that the legitimacy of state power has to be derived from its capability to protect individual rights (Locke, 1689). From a cosmopolitan perspective, human rights are seen as universal and indivisible, transcending state boundaries and imposing obligations on all states to protect individuals from abuses (Held, 2010).

2.2 Legitimacy of Anti-Terrorism Measures

According to the UN Charter of 1945, Article 51 recognizes that states have a right to self-defense. Self-defense allows countries to protect its citizens from terrorists. However, the implementation of anti-terrorism measures and operations cross the threshold and scope of proportionality and necessity, resulting in human rights abuses (Scheinin, 2009). Legal positivism therefore offers a lens through which one can understand the tension between such laws and existing power structures (Hart, 1961). However, critical legal studies argue that in most cases anti-terrorism laws have the effect of reflecting and preserving the status quo, thereby serving to further victimize the

weaker sections of society and perpetuating inequality (Kennedy, 1997).

2.3 The Mediating Role of International Law in Conflicts

International law acts as a mediator in the struggle between human rights law and anti-terrorism laws. The principle of proportionality, emanating from international humanitarian law, requires that, if a law is subjecting human rights to restrictions, it must be proportionate to some legitimate aim (Dinstein, 2016). This is found in the jurisprudence of international human rights bodies like the ECtHR and UN Human Rights Committee. However, to a large extent, this is what actually works to subvert the effectiveness of international law because enforcement mechanisms are often not in place as such and their reluctance to apply external scrutiny (Koskeniemi, 2005).

3. Key Areas of Conflict

3.1 Right to Privacy vs. Surveillance Laws

The mass surveillance programs of the USA PATRIOT Act and the UK's Investigatory Powers Act have brought about the issue of the loss of the right to privacy under Article 17 of the ICCPR (Greenwald, 2014). Table 1 summarizes the effects of surveillance laws on privacy rights in selected jurisdictions.

Table 1: Impact of Surveillance Laws on Privacy Rights

Jurisdiction	Legal Framework	Key Provisions	Human Rights Concerns
United States	USA PATRIOT Act	Bulk data collection	Violation of Fourth Amendment rights
United Kingdom	Investigatory Powers Act	Mass surveillance	Breach of Article 8, ECHR
Australia	Telecommunications Act	Data retention	Lack of judicial oversight

The implications in theory are deep. For example, this fits into the description of "biopower" that Foucault proposed in 1977 whereby power is exercised through collection and processing of personal information by the state. This involves the issue of balance between security and liberty and could also be abuse of power.

Freedom of Speech vs. Anti-Terrorism Speech Codes 3.2

Freedom of expression is chilled under Article 19 of the ICCPR as speeches are criminalized on account of advocating terrorism under the anti-terrorism laws (Amnesty International, 2015). For

instance, the Loi sur la Sécurité Intérieure of France has been seriously criticized over the overly broad definition of "apologie du terrorisme," or apology for terrorism to bar legitimate dissent (Human Rights Watch, 2016).

3.3 Due Process and Indefinite Detention

It can be considered to violate the right to a fair trial since there is indefinite detention without a trial, which occurs in the Guantanamo Bay case under Article 14 of the ICCPR (Sands, 2005). Judicial review as well as using military tribunals has undermined due process and the rule of law. The critical legal perspective conceives this

phenomenon of indefinite detention within a more sweeping tendency to the securitization of law where the dictates of security prevail over those of the normativity of the law (Agamben, 2005). It brings forward some serious issues in light of the position and function of the law during an exception that defers to suspending the normative legal order for reasons of national security.

4. Case Studies

4.1 The United States: Guantanamo Bay

Guantanamo Bay detention center is a site of conflict for anti-terrorism policy and human rights. The facility remains open; despite the multiple appeals from UN and human rights organizations, due to national security concerns (UNHRC, 2020). Guantanamo Bay detention center gives rise to severe legal and ethical consequences, directly opposing the foundations of international law and the principle of the rule of law.

4.2 United Kingdom: Prevent Strategy

Britain's Prevent Strategy for countering extremism has also come under scathing attack in view of the manner in which this policy was accused of discriminating against Muslims in the way in which its rules infringed freedoms of expression and opinion, casting doubt about what the role of the state in regulating thought should be as well as counter-terror initiatives reinforcing social segregation (Kundnani, 2015).

5. Reconciling Human Rights and Anti-Terrorism Laws

5.1 Proportionality and Necessity

One very basic principle of such harmonization, as envisioned under *A. and Others v. United Kingdom* of the European Court of Human Rights (2009), is the proportionality and necessity test. On such grounds, states have to ensure that any such interference with the human right will be strictly necessary and proportionate to the challenge posed by the impugned threat. Here, it will test the balancing of conflicting interests delicately toward achieving congruence with principles under international human rights law.

5.2 Strengthening Judicial Oversight

Judicial oversight may also provide the respect of international norms of human rights in activities to counter-terrorism. For instance, the CSIS Act

in Canada provides the grounds for review through the courts and other nations may take cue from this aspect (Roach, 2011). Judicial oversight is more or less within the meaning of having checks and balances on executive powers and having its operations directed at terrorists formulated in a structure of law to serve the role of accountability and scrutiny.

5.3 Advocate for a human rights-based approach to counter-terrorism

A human rights-based approach to counter-terrorism underpins the respect and protection of all internationally guaranteed human rights in every aspect of the counter-terrorism policy. This is based on the Vienna Declaration and Programme of Action in 1993, which enunciated the principles of the universality, indivisibility, and interdependence of human rights. The strengthening of human rights within counter-terrorism strategies will help states identify the root causes of terrorism and fulfill obligations under international law.

6. Conclusion

From the discussion herein, it becomes quite essential to appreciate that the tension between human rights and anti-terrorism laws captures best the issue of the nature of international law today. Considering that there's an extremely material interest that the state has in fighting terrorism does not mean that such can be allowed at the cost of fundamental human rights. Founding principles of proportionality, necessity, and judicial oversight should characterize a well-balanced approach so that human rights are protected in the rule of law context against terrorism. The paper established that the theoretical and practical problems for harmonizing such competing interests require a multi-disciplinary approach based on research work from legal, philosophical, and sociological scholarship. By engaging into such complexities scholars and policymakers shall formulate more realistic and rights-sustaining anti-terror policies.

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