

because there is long-standing precedent for lowering evidentiary standards when dealing with matters that arise during wartime.

The 1992 Egyptian definition of terrorism that became the foundation for the definition used by the Arab League in its anti-terrorism Convention was harshly criticized by Amnesty International as being too broad and vague to be legal. (Under US law, e.g., if courts find a statute or regulation overbroad or vague, it is declared unconstitutional.) Civil libertarians levy the same charge against many of the other definitions currently in use.

Reactions to compliance: Pushback

It is not that the provisions considered repressive by those concerned about civil liberties have gone unresisted. In the UK, there has been pushback on evidentiary requirements because of concerns about fair trials. Canada still requires proof beyond a reasonable doubt that a prohibited act has actually taken place. In the US, some elements that deal with accomplice liability have been deemed unconstitutional because of vagueness. Over 150 municipalities in the US have decided that their policing units should not follow provisions of the US PATRIOT Act, which are believed to be unconstitutional by those city governments. Courts have had some successes in limiting the executive in Malaysia and Singapore. In India, the 2002 Prevention of Terrorism Act was repealed even before its sunset provisions were triggered. In countries around the world struggles over the acceptability of many provisions of post-9/11 anti-terrorism laws and the practices they protect continue. It is too early to tell either how these conflicts will be resolved or the extent to which those resolutions will vary from country to country.

Media and Communication Policy Effects of Anti-Terrorism Laws

The free speech consequences of anti-terrorism laws are the most apparent effects on media and communication policy of the developments discussed here, but numerous other areas of such

policy have also been affected. The greatest and most enduring impact is likely to be changes at the level of fundamental policy principles.

Free speech

Criminalization of content and of association, reductions in access to information, invasions of privacy, and abandonment of practices considered necessary for fair trials all affect free speech. The effects have been so widespread that Reporters Sans Frontières in 2002 described the impact on the Internet as "collateral damage" in the war against terror (Gomez 2004). Fear has chilled or disrupted communication altogether, particularly within Arab and Muslim communities (Stachel and Nagel 2008; McNamara 2009). Relatively little research to date has been done on the impact of anti-terrorism laws on organizations and media institutions. Pearson and Busst (2006), however, offer a daunting and detailed description of the effects of anti-terrorism laws on journalists in Australia, New Zealand, and the Pacific Islands that is a checklist for what those in the media – and citizens wishing to engage in public discourse about shared matters of public concern – are also experiencing elsewhere:

- Reporters are subjected to new detention and questioning programs.
- Journalists are under new types of surveillance.
- Journalists' confidential sources are being exposed, or threatened with exposure.
- Some court proceedings are being closed, making them unreportable.³⁹
- Some information about terrorism has been placed off-limits, exposing journalists to fines and jail if the information is reported.
- Restrictions are being placed on the movement of journalists in areas where news is breaking.
- Journalists are exposing themselves to the risk of being identified as terrorists simply because they associate or communicate with some sources.
- Criminal charges can be pressed against journalists if they publish statements deemed by the government to be inciting or encouraging terrorism.
- Limits on access to scientific, technical, and government information makes it impossible to pursue certain investigative stories.

Essentially, all restrictions on the ability of governments to engage in surveillance of their own citizens as well as foreign nationals have been lifted. Because terrorism has been designated a universal crime and terrorists may be located anywhere, the surveillance scope of national governments is now transnational as well. Just who accesses which information, and how that information is used, are now matters of ongoing audits. Different types of restrictions on the communicative activities of individuals, from restrictions on the use of certain communications technologies to the required use of monitoring tags, can be grouped together under the label "control orders." Familiar forms of content regulation in areas such as pornography, gambling, hate speech, and spam have been revised to cover online political content and communications with a mobilization potential. Data protection principles, an area in which the EU was providing global leadership, are being watered down in the name of anti-terrorism. The combined effects of identifying terrorists through alleged intention and a focus on accomplice liability have affected all types of prosocial (and often politically necessary) forms of association, including charities. Even postal law has been the subject of recommendations for anti-terrorism purposes.

Other communication law and policy issues

Within the first year after passage of the US PATRIOT Act, President George W. Bush admitted that its provisions were being used against many types of non-terrorist criminal activity, including matters as far away from terrorism as defrauding the elderly. The effects of anti-terrorism laws on media and communication policy beyond free speech issues derive not only from such "unintended" uses but also from explicit attention to cognate requirements. In an area worthy of chapter-length treatment in its own right, there are interventions into funding priorities for research and development, impediments to public discourse about the possible uses of the findings from scientific research and technological developments, and pre-publication review of scholarly research findings in the US. Anti-terrorism laws are accelerating the development of e-government. To put anti-terrorism laws into practice, governments around

the world as organizational forms are following the lead of private sector organizations to become more flat, focussing on long-term projects that cut across pre-existing bureaucratic boundaries. Fears that technologies may fall into the wrong hands have generated new laws and regulations in the areas of industrial espionage and technology transfer. (On the other hand, anti-terrorism has been a boon to technology manufacturers, vendors, and providers in some ways through increased liability protection when particular technologies are used for anti-terrorism purposes. Demand is also increasing not only directly, for security purposes, but also indirectly, as a result of the need to redesign international supply chains.) Two examples of the impact of anti-terrorism laws on areas of media and communication policy that, on the surface, seem quite distant may be useful.

In a fascinating example of the use of terrorism by stakeholders with other interests, the Motion Picture Association of America funded a RAND Corporation study on the link between film piracy and terrorism (Treverton et al. 2009). The researchers' in-depth analyses of 17 cases of film piracy included three in which there were, arguably, links to terrorism. Since film piracy is relatively high profit and low risk – and terrorist acts in themselves are not considered to be particularly expensive to fund – analysts argue that film piracy is being used to generate resources for terrorist groups. On the basis of this analysis, the entire arsenal of the US DHS has now been added to other weapons being used to protect the intellectual property rights and profits of film producers.

Two RAND Corporation reports include recommendations for telecommunication policy (Helmus et al. 2007; Libicki et al. 2007). This influential security think tank argues that promoting mobile phone use globally serves anti-terrorism efforts by making it easier to surveil and locate individuals and to analyze social networks. Interventions into the design of hardware and software are advised, along with price cap regulation and attention to network architecture. The US\$100 laptop presented to the public as an educational project is also viewed as a necessity from a security perspective. Jay Leno's 2009 joke that he had found an application for the iPhone that was difficult to use but available – making a voice phone call – appeared in an earlier version as the side comment

in the Libicki *et al.* (2007) report that it should also be possible to design cell phones in such a way that they could be used to talk about political matters.

Policy principles

The ambiguities, complexities, and impact on law-state-society relations wrought by anti-terrorism laws have generated what some refer to as a legal "black hole" (Roach 2005: 130). In order to put in place anti-terrorism laws that conform with the mandates of UN R 1373, new constitutional paradigms are appearing that affect the separation of powers, scope of rights, the procedures through which fundamental rights can be restricted, and the extent to which such restrictions can take place (Sajo 2006). The first move, driving all others, is strengthening the executive at the cost of legislative and judicial functions (Harvey 2005). Derogation from constitutional principles and international human rights law – whether *de facto* or *de jure* – is justified by the labeling of terrorism as a universal crime (Colangelo 2007) and by claims to a state of emergency (Roach 2008). These practice-driven changes undermine the epistemological and ontological foundations of policy-making and analysis (Witt and deHaven-Smith 2008). This change in legal culture is experienced by the ordinary citizen as a government expectation that one's neighbors, friends, and co-workers should be treated as potential enemies (Walker 2008).

The UN's R 1373, and the laws through which those mandates have been translated into national laws and implemented, received such an outcry from those concerned about civil liberties that the international organization felt a response was required. Resolution 1624 (R 1624), passed in 2006, specified that governments must continue to adhere to international human rights in their anti-terrorism efforts. The need to ensure continued civil liberties for communication was highlighted. As it had with R 1373, the UN demanded reports from Member States regarding compliance with R 1624; less than half had been submitted by December of 2007, when the Counter-Terrorism Committee's webpage that houses the reports was last updated.

A sampling of these reports provides a window into the impact of anti-terrorism laws on media and communication policy around the world at the

level of fundamental policy principles. Almost every report includes the statement that the issuing government continues to adhere to international human rights law. In a context within which the concept of terrorism itself is so overbroad, vague, and mutable that its use is highly discretionary, these reports then go on to discuss criminalization of inciting, advocating, encouraging, preaching, or engaging in political communication about terrorism; hate speech; disseminating or reproducing information about terrorism; using ICTs, or the Internet, or committing cybercrime in support of terrorism; and associating with, forming, or recruiting individuals for terrorist groups.

An examination of US law may be instructive for elucidating the constitutional ramifications of such developments. As is common across states, treason is criminalized in the US at the constitutional level. Draft resistance during World War I forced courts to consider when political speech crossed the line from acceptable critique of the government into unacceptable undermining of the government. Over time, a "clear and present danger" test developed as a means of determining whether or not any given instance of speech should be constitutionally protected. To meet the requirements of the test, positive answers must be given to all four of these questions:

** Did the communication advocate illegal violence?* This element of the test protects general discussions of theory and other political conversations that do not explicitly advocate immediate illegal action. Illegality is emphasized to distinguish legal military or police action from those activities being prohibited.

** Did the speaker intend to incite illegal violence?* The issue of intention is considered critical. Intention is evaluated, however, not in terms of motivation which is so much an issue with anti-terrorism law. Instead, investigation looks only at the intention to stimulate immediate participation in illegal violence.

** Was the illegal violence likely to actually occur?* Recognizing that the ability to convince others to engage in illegal violence requires a great deal of social capital and other types of capacity in addition to mere speech, US courts historically distinguished between those speakers whose leadership positions generated a reasonable expectation that action would follow speech, and those whose marginality and lack of resources did not. Now that it

has become clear that lone wolves can successfully disrupt large technological systems, it is likely that this element of the clear and present danger test would have been revisited by the courts whether or not the events of 9/11 had taken place.

** Is the illegal violence imminent?* Under the clear and present danger test, speech can be restricted only if the illegal violence being deliberately incited is likely to happen immediately. Calls for violent action "come the revolution" were not considered to be serious threats.

In the absence of new statutory activity, the clear and present danger test held its place as an interpretive guideline. Court-developed interpretations of the law frequently become the content of new statutes and regulations. In the case of the US PATRIOT Act, the deliberate exclusion of these evaluative elements was an explicit rejection of a century of legal thought regarding fundamental constitutional protections for free speech. In the case of the US, this particular rejection of judicial thought was accompanied by numerous other efforts to undermine the influence of lawyers and courts.

Here, several factors involved in transformations of law-state-society relations come together. A strengthened executive ignores the judiciary to put in place practice-derived laws. In the single area of protections for political speech, the US approach undermined constitutional principles in at least three ways: weakening the system of separation of powers, reinterpreting First Amendment speech protections in ways that run counter to the history of interpretation of those principles, and use of a legal concept – terrorism – that is so overbroad and vague as to be unconstitutional itself in the US legal system.

Conclusions

The legal globalization of anti-terrorism laws has been marked by several inversions. Globalization of specific information and communication systems has become the focus, and harmonization of the law has become a production input for this process. The flows of law now run from developing countries with fragile histories regarding the rule of law toward Western democracies; both Arab and non-Arab countries, for example, are well aware that practices long criticized for their

repression of human rights and civil liberties are now being actively promoted as global models. Practitioners dictate the content of statutes and regulations and demand reinterpretations of constitutional law to suit rather than evaluating proposed laws and practices from the perspective of fundamental legal principles.

In the realm of media and communication policy, anti-terrorism laws have altered the context for political speech and restricted the domain within which full speech freedoms can be exercised. Seemingly unrelated matters such as mobile phone pricing and copyright have been linked to terrorism in ways that not only intervene in laws and regulations but also serve numerous corporate manufacturers and vendors. The greatest danger to media and communication policy in the long run, however, lies in the distortion of fundamental legal principles and their replacement with practice-based decision-making irrespective of source.

Those who produce and consume the news, and all of those who participate in public discourse about shared matters of public concern, will enhance their efficacy and deepen their analyses by gaining a deeper understanding of these radical inversions of the basics of democratic legal systems. Because trends discussed here have so altered law-state-society relations, both political activists and researchers may find it useful to reevaluate the targets of their attempted interventions. The legal globalization of anti-terrorism laws discussed here, though, is not a decade old at the time of writing. Whether or not the extreme transformation of law-state-society relations put in play by anti-terrorism efforts will continue to their conclusion or, instead, be reversed is not yet known. Here, too, the actions of lone wolves, small groups, communities, and large social movements within civil society still have the opportunity to make a difference.

Notes

- 1 The word "policy" is defined quite differently in various parts of the world. Here it is used as an umbrella term for all types of laws and regulations, as well as the principles upon which those laws and regulations depend.
- 2 News consumers have become the subject of surveillance by intelligence agencies seeking library records and surveilling visits to particular web sites and even specific online news stories.

3. Communication is "chilled" when discussion of particular topics has not been made illegal but an environment has been created that makes participating in such discussion so uncomfortable and threatening that people fear to bring up certain topics. Such chilling took place in the US, for example, in response to repeated statements from the George W. Bush Administration that anyone concerned about civil liberties under terrorism laws and the homeland security programs was aiding and abetting terrorists.
4. Harmonization is said to be hauled when changes take place in one area of the law in order to effect desired convergence in another issue area (Margheritis and Maldonado 2007).
5. Preceding Zygmunt Bauman (2002) by two decades, Tran (1987) also described the entire world as a border zone by the early 1980s.
6. The letters in the acronym for this famous piece of legislation stand for the full name of the Act, which is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.
7. Country reports regarding compliance submitted through 2006 can be read online at <http://www.un.org/sc/ctc/countryreports/Creports.shtml> (accessed 24/01/2010).
8. A list of these Conventions with links to their full texts can be found at <http://www.un.org/sc/ctc/laws.html> (accessed 24/01/2010).
9. This interactive directory is found online at <http://www.un.org/sc/ctc/practices.html> (accessed 28/02/2010).
10. This is also happening in the US, where some court cases are even being removed from the dockets that document all trials taking place.
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