Politicisation, Law and Rights in the Transnational Counter-Terrorism Space: Indications from the Regulation of Foreign Terrorist Fighters

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Abstract: Since 2001 a transnational counter-terrorism space has emerged that is vast in its scale and ambition and which can be discerned at both ‘universal’ (i.e. United Nations) and regional (e.g. European Union) levels, as well as in other formal and informal international organisations (for example the G7 and the Global Counter-Terrorism Forum). This article explores the question of politicisation within that transnational counter-terrorism space, and the potential for meaningful politicisation in respect of initiatives and measures emanating from transnational processes. Taking the example of ‘foreign terrorist fighters’ it argues that a shift in arena to the transnational counter-terrorism space has fundamentally challenged the capacity for effective and meaningful politicisation; that the transnational counter-terrorism space can be depoliticised by design, that where this happens the domestic counter-terrorism space is depoliticised by implication, and that the legal benefits of politicisation may thus be lost to the detriment of rights, legality and accountability.

Keywords: Transnational counter-terrorism, foreign terrorist fighters, human rights, EU counter terrorism, UN Security Council

Introduction

Although “politicisation” is a term better known to political science and international relations than to law, what it captures – namely, “growing controversy, political activity, and [the involvement of] a range of actors” in debating contentious issues – is of clear relevance to questions about how law relating to security and counter-
terrorism is shaped, made, applied, and debated. Indeed, while the term may not be widely used in law, the kind of analysis that it prompts one to engage in is not unusual for lawyers. After all, it is in the fundamental nature of the legal and constitutional milieu that politics and law are difficult to separate and mutually reinforcing, and that processes of making law – and especially of who gets to be part of the process of law-making, and of how politics (formal and informal) determines those questions of in- and exclusion – are rightly questions to which we as lawyers ought to attend.

Furthermore, while politics and political will often pose clear challenges to law, they are also vital to ensuring lawfulness itself. Generally speaking, parliaments and executive branches recognise and take seriously their place and role in the constitutionalist ecosystem as the key entities engaged in identifying and remaining within the boundaries of lawfully permissible action. While the judicial role within that ecosystem receives plentiful scholarly attention, it is parliaments, executives and bureaucracies that are engaged in the everyday constitutional labour of contesting, determining, and maintaining constitutionalism.

Conventional wisdom across both law and political science suggests that this critical political engagement with questions of law and legality loses a significant part of its effectiveness in the context of highly contentious, politically anxious issues such as security and counter-terrorism. In these contexts executive and specialist will may coalesce with popular concern to demand the expansion of the state’s reach and a dilution on its limitations, at least in the relatively short-term aftermath of a critical event such as a terrorist attack. For lawyers, and especially for constitutional and human rights lawyers, the decline in contestation and debate in those circumstances, and the resultant decline in the quality of politicisation from a legal perspective, is a matter of grave concern. In particular, it raises questions about what happens to rights and the rights-based limitations on state power and security action when these spaces for repressive state action open up, commonly understood as a failure of ‘the political’ to ‘do its bit’ in maintaining ‘the legal’.

In recent years there have been indications of a political willingness to step in and ‘de-exceptionalise’ some of areas of security, or at least to expose them to discussion and perhaps to ex post facto political or independent review. However, repressive consensus in the field of counter-terrorism persists; as our recent study of successive Conservative and Labour governments in the UK shows, for example, core commitments such as prevention and human rights exceptionalism are shared.

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4 Fiona de Londras, “In Defence of Judicial Innovation and Constitutional Evolution” in Laura Cahillane, James Gallen & Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (2016; Manchester University Press), defining constitutional interpretation as “a knowledge ecosystem in which dynamism and evolution are fostered by inter-entity interaction, which in turn improves decision-making and enhances collaboration”.
5 de Londras, above n 2; Mark Tushnet, *Why the Constitution Matters* (2010; Yale University Press).
6 For a full articulation of this argument see Fiona de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 1.
7 This is not an uncontested approach; for a survey of the key positions on this see Fiona de Londras & Fergal F Davis, “Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight” (2010) 30(1) *Oxford Journal of Legal Studies* 19.
8 See for example the discussion in Andrew Neal, “Parliamentary Security Politics as Quantitative Politicization” in this issue.
across these parties in spite of their apparent political disagreement on the role and nature of state power in a general sense.10 From a lawyer’s perspective this raises serious questions about the impact of apparent re-politicisation on the material question of the quality of the law. Similarly, courts have at least sometimes appeared to push back against repressive counter-terrorism laws and powers, albeit often modestly and sometimes ineffectively.11

However, the story of de- and re-politicisation in security and counter-terrorism tends largely to focus on national contexts. This is understandable. Conventionally most counter-terrorism takes place at the national level; security is jealously guarded as a space of sovereign action, and even today international mechanisms have failed to reach a basic definitional consensus around ‘terrorism’ that is necessary before we can conclude any general, binding international legal instruments on terrorism.12

Over recent years, however, considerable parts of counter-terrorism law- and policy-making have moved out of the domestic sphere. A transnational counter-terrorism space has emerged that is vast in its scale and ambition and which can be discerned at both ‘universal’ (i.e. United Nations) and regional (e.g. European Union) levels, as well as in other formal and informal international organisations (for example the G7 and the Global Counter-Terrorism Forum). This article explores the question of politicisation within that transnational counter-terrorism space, and the potential for meaningful politicisation in respect of initiatives and measures emanating from transnational processes. Taking the example of ‘foreign terrorist fighters’ I will argue that the shift in arena to the transnational counter-terrorism space has fundamentally challenged the capacity for effective and meaningful politicisation; that the transnational counter-terrorism space can be depoliticised by design, that the domestic counter-terrorism space is depoliticised by implication, and that the legal benefits of politicisation may thus be lost, with detrimental impacts on rights, legality and accountability.

Importantly, my claim here is not that transnationalism in counter-terrorism will always or inevitably result in depoliticisation and a resultant negative impact on rights, legality and accountability. Certainly, one may be able to suggest areas where this was arguably not the case.13 However, what the example that I pursue here

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11 de Londras, above n 4; Helen Duffy, Strategic Human Rights Litigation (2018; Bloomsbury Publishing).
12 See generally Ben Saul, Defining Terrorism in International Law (2008; Oxford University Press); Stella Margariti, Defining International Terrorism: Between State Sovereignty and Cosmopolitanism (2017; Springer).
13 One might, for example, suggest that data retention was politicized, at least within the European space, and that the fact that the Court of Justice of the European Union struck down the Data Retention Directive (Directive 2006/24/EC) suggests rights-based contestation pursued through litigation (Digital Rights Ireland Joined Cases C-293/12 and C-594/12). One might further argue that this was the case in respect of counter-terrorism financing, on which the Court of Justice also had important things to say in the Kadi litigation (Kadi and Al Barakaat International Foundation v Council and Commission (2008) C-402/05). However, both of these examples are actually ones in which perceived crisis resulted in depoliticisation at the time of transnational law-making – resistance to data retention melted away in the wake of terrorist attacks in Europe (see Chris Jones & Ben Hayes, “The Data Retention Directive: A Case study in the legitimacy and effectiveness of EU counter-terrorism policy” (2014; SECILE)); the terrorism financing laws that were ultimately considered in Kadi emanated from Security Council Resolution 1373 passed very quickly after the 9/11 attacks. Data retention laws continue to operate in many European countries now, but based on national rather than EU law (e.g. in the UK: Data Retention and Investigatory Powers Act 2014). Terrorist financing continues to be regulated by deeply problematic Security Council resolutions. In both cases discourses of rights continue to be marginalized, notwithstanding the fact that the Court of Justice intervened to mitigate some of the most egregious rights implications of both.
does establish is that, through shifting counter-terrorism decision-, policy-, and law-
making activities into the transnational space, states have created for themselves the
capacity to depoliticise, to reduce contestation, to shut out rights-based perspectives,
and to evade accountability. If this is so, then transnational counter-terrorism
poses a serious and a clear challenge to the rule of law, not merely in substantive
terms (‘what does the law originated at transnational level do to legally protected
rights?’) but more importantly in conceptual and institutional terms (‘is this law
effectively limited by fundamental legal principles such as human rights, legality
and proportionality?’).

A manoeuvre that allows states to create and operate in a depoliticised zone of
law-making activity and, thus, to decide for themselves when and to what extent
they will limit their activities by reference to human rights law is a manoeuvre that
severely challenges the rule of law. States cannot pick and choose when the law will
limit their actions; to do so is to undermine the very idea of law itself. Transnational
counter-terrorism has the tendency to do precisely that.

Sketching the Transnational Counter-Terrorism Space

The international legal regime could be said only to have been marginally concerned
with countering terrorism prior to September 2001. There was no counter-terrorism
law at European Union level,14 and while there were a number of specialist
international law treaties on terrorism in particular contexts15 (e.g. the hijacking
of aircraft), no general international legal treaties or Chapter VII resolutions of the
Security Council imposing legal duties on states to introduce domestic counter-
terrorism laws states existed. Where states were confronted with terrorist violence it
was largely dealt with through domestic laws and policies. International institutions
such as the European Court of Human Rights occasionally found themselves dealing
with the international legal implications of counter-terrorism,16 but it was not a matter
of general international legal concern.17

The attacks of 11 September 2001 changed this. Not only did the United Nations (UN),18
the European Union (EU)19 and North Atlantic Treaty Organization

14 See generally Cian C Murphy, EU Counter-Terrorism Law: Pre-Emption and the Rule of Law (2012; Hart
Publishing).
15 For example the Convention on Offences and Certain Other Acts Committed on Board Aircraft 1970; Convention
for the Suppression of Unlawful Seizure of Aircraft 1971; Convention for the Suppression of Unlawful Acts
against the Safety of Civil Aviation 1971; Convention on the Prevention and Punishment of Crimes against
Internationally Protected Persons 1973; International Convention Against the Taking of Hostages 1979;
Convention on the Physical Protection of Nuclear Material 1979; Convention for the Suppression of Unlawful
16 For a comprehensive account see Ana Salinas de Frias, Counter-Terrorism and Human Rights in the Case Law
of the European Court of Human Rights (2013; Council of Europe).
17 For indications of the status quo ante in respect of terrorism and international law see, for example, Rosalyn
Higgins & Maurice Flory (eds), Terrorism and International Law (1997; Routledge).
18 In particular through the passage, on 28 September 2001, of UN Security Council Resolution 1373, discussed
further below.
19 In particular through the introduction, on 21 September 2001, of an EU Action Plan to Counter Terrorism
discussed below (Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21
September 2001, SN 140/01).