

Constitutionalism Across Borders in the Struggle Against Terrorism

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Contemporary terrorist attacks, have greatly influenced states' legal behaviours, which noticeably departed from the national legal order and expanded on a transnational legal dimension. Transnational responses to terrorism, common approaches and migration of solutions stem from the global character of the danger and the common value of what is threatened. This has posed 'comparable' challenges to 'democratic-constitutional' states, which struggle with securing efficiency of counter-terrorism policies and respect to basic constitutional principles and values. Effective protection of human rights is often seen as a value, which clashes with pleas to effective counter-terrorism policies. The struggle to find an equilibrium between protecting constitutionalism while battling terrorism is common across different states of the world, rendering it a struggle across borders. Especially, the fight against terror takes place to a major extent at supranational or international level, either through regional systems of cooperation such as the EU or at the UN level. At the same time, issues of extraterritoriality of human rights protection have strikingly increased in light of a common need to share intelligence and the states' inclination to confine the protection of human rights to the domestic legal order.

The book, with its several insightful chapters, contributes by offering a multidimensional while thorough perspective on the phenomenon, capturing its various aspects. It chronicles the emerging agreement on responding to terrorism threats through a constitutionalism across borders. The book accounts different ways transnational dynamics play a role in current legal affairs. It also demonstrates the special influential role of certain countries and finally the multi-layered dialogue between domestic, supranational and international frameworks regarding their interaction. It also highlights the gaps between UN and EU law and particularly with regard to human rights protection and offers original views on the substantive constitutionalism at an international level. Moreover, the varying views of the authors on reading cases and highlighting their effects create a mosaic of different perspectives revisited through the lenses of recent case law. The significance of the rule of law is a common thread in all the contributions. In particular, despite differing opinions, a core narrative of the book is the significance of law to set constraints on abusive power and tyranny. 'Black holes' where no law is present, are an anathema' according to the authors of the book. The book finally indicates future reflections and questions through a preliminary but substantial attempt to radically modify the way we see competing values in this field. It is argued that effective implementation of policy and law should not be perceived as the enemy of human rights. The one must not exclude the other. This is an optimistic way forward and offers food for thought on reconceptualising balancing and its counterparts.

The book is divided in four parts, which all discuss different aspects of constitutionalism in counter-terrorism law. The first part of the book, titled 'International constitutionalism and anti-terrorism finance measures' considers the increasing development of constitutionalism in the international legal order in light of anti-terrorism finance measures. The second part of the book, titled 'Counter terrorism and constitutional migrations' examines the migration of regulatory choices from one state to another. This stems from the cross border nature of the threat coupled with the common need of states to tackle a common problem. Contributions of this part grapple with challenges that transnational cooperation in data and intelligence gathering and sharing pose for the effective human rights protection. The third part of the book, titled 'Extraterritoriality, detention, and free speech' discusses the crucial matter of extension

of human rights protection beyond the national legal order when and where the national security forces take action to fight terrorism. Does the domestic standard of protection of rights to due process, freedom from unreasonable searches and seizures and free speech accompany the accountability of state action beyond its own borders? The fourth and last part of the book, comprised of three chapters and titled 'International criminal law, international humanitarian law, and terrorism' considers the perplexing interconnections of counter-terrorism law and policy with adjacent fields such as international criminal law, international humanitarian law and law of war. The part discusses the impact that terrorism has had on these fields with three critical contributions.

In particular, in the first part of the book, the example of anti-terrorism finance, as a unique point of observation leads to four distinct observations on the process of constitutionalism here. First, Martin Scheinin argues that it is about time that substantive constitutionalism is developed at the UN level, based on the UN Charter. Human rights protection, as an axiomatic principle of the UN law, should finally be substantially considered by counter-terrorism measures at the UN level. In the same vein, Erika de Wet welcomes regional 'judicial favouring' of human rights over UN Security Council sanctions and argues that this could actually urge the emergence of the substantive constitutionalism at the UN level. On the contrary, Karen Cooper and Clive Walker, setting a pessimistic tone, submit a rather critical reading of the same judgments of the Court of Justice of the EU. They point out that the judgments have produced ambiguous accounts of rights and that the litigation was really costly and time consuming for the applicants. However, instead of merely maintaining a critical and pessimistic tone, they consider alternatives to enhance the current regime and suggest the re-empowerment of domestic systems regarding listing procedures. Finally, in the fourth contribution of this first part of the book, Cian Murphy maps six dynamics of norm-production which all function beyond the state. The latter contribution, departs from evaluating the development and the future of constitutionalism in the area, which was usefully done by the previous three chapters, and submits a useful methodological evaluation of anti-terrorism finance laws.

Moreover, in the second chapter that considers the global phenomenon of constitutional migrations in the context of mass data gathering and sharing, Vicki Jackson focuses on the US constitutional law and observes the dynamic and multi-vocal character of it. She considers the evolving jurisprudence of the US Supreme constitutional court on considering electronic eavesdropping first as beyond and later as within the scope of the protection against unreasonable searches and seizures. Then, Akiko Ejima in her chapter, moves our focus to Japan and the recently adopted Japanese law on state secrets. She observes the compliance of Japanese law with a US template as this reflects on the need to facilitate intelligence sharing with international partners. She is wary if not critical of the migration of the specific constitutional model as she is sceptical on whether sufficient mechanisms of human rights protection are in place. In the same cautionary vein about intelligence agencies, Kim Lane Scheppele argues that new constitutional protection should be carefully established to regulate and control the operation of these agencies in light of the radical changes that the counter-terrorism law has introduced. Finally, similar to the previous chapters, David Cole and Federico Fabbrini highlight the limits of domestic constitutional protection of privacy both in EU and US law, as they can share intelligence with each other without being constitutionally constrained by their own domestic mechanism of protection of privacy. Thus, any privacy protection is doomed to be futile, unless a transatlantic data privacy agreement is adopted for the reciprocal extension of constitutional protection of privacy rights.

In the third part of the book, Jennifer Daskal, explores the conflicting US case law on the extraterritorial application of the US Constitution regarding unreasonable seizures of persons. Articulating a new approach, she argues that the latter should be prohibited and that persons should enjoy basic due process rights. Brice Dickson, focusing on the context of EU member states, explores, *inter alia*, issues of human rights protection of alleged terrorists in cases of asylum claims, deportation or extradition when the transfer would entail abuses of human rights. He observes that despite the promising character of European human rights law, the application of the law suffers from many limits, which further challenge the universality of human rights. The third chapter of the part focuses on detention of terrorist suspects at the sea in international waters which, according to the US Government, escapes constitutional protection. Jonathan Hafetz disagrees with this and instead suggests that extension of constitutional and international rights protection to international waters is also consistent with the *Boumediene* ruling of the US Supreme Court. Finally, in a similar liberal tone, Anna Su argues that free speech under the First Amendment of the US Constitution could be invoked by both US and non US citizens within and beyond US borders as long as it operates as defence against governmental actions.

In the fourth part of the book, Or Bassok criticises first the involvement of lawyers in authorising military operations and second the use of unarmed military mediums like drones. These effectively result to increasing the execution of unlawful or immoral orders, that would have potentially been judged differently by the combatant. On the other hand, Stephen Ellmann argues that the ‘war on terror’ should qualify as a war and international humanitarian law should therefore apply. In conclusion, Lech Garlicki synthesises various ideas of the books offering a critical overview of the various dimensions on constitutionalism in the fight against terrorism, examined by the authors of the book.

The book has chosen to focus on what it calls ‘democratic-constitutional states’ and this is interesting and justified by a methodological need for a certain degree of comparability. However, it could be even more intriguing to examine the struggles of the so-called by the book non-democratic and non-constitutional states in their fight against terrorism. This would be even more revealing for the aspects of extraterritoriality and migration of constitutional principles and particularly in developing states. Perhaps such a holistic approach could be eye-opening for the whole impact that the fight against terrorism has brought upon constitutionalism across the world.

Nevertheless, the international outlook of the book coupled with domestic matters of constitutionalism is attention-grabbing. It offers a unique contribution to the challenges that the protection of human rights is facing due to the pressing battle against terrorism. The book borrows the lenses of different jurisdictions and offers a fascinating outlook which is not tied to a geographical legal order but instead to common issues of a comparable constitutionalism. This reveals the transnational dynamic of the legal developments and highlights the need for a transnational approach to it. Furthermore, the final remarks on the common approach of the two European courts on protecting due process rights despite the pressure of combatting terrorism offer a positive yet pragmatic tone. They highlight a persistent constitutional commitment to human rights despite the numerous challenges.

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October 2016
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