

MODERN STUDIES IN EUROPEAN LAW



EU COUNTER-TERRORISM LAW

PRE-EMPTION AND THE RULE OF LAW

EXPANDED EDITION

CIAN C MURPHY

B L O O M S B U R Y

EU COUNTER-TERRORISM LAW

This study of the EU response to the 11 September 2001 attacks demonstrates how European counter-terrorism law strengthens state powers of coercion and control and weakens the rule of law. In this expanded edition a new Afterword examines mass surveillance in Europe and the implications for data privacy, the increasing court scrutiny of counter-terrorist finance measures, and policies that aim to prevent combatants from taking part in terrorism overseas. It asks where the limits of legality lie—and whether courts and parliaments can safeguard political freedom in the face of ongoing efforts to combat terrorism.

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Pre-Emption and the Rule of Law

Expanded Paperback Edition

Cian C Murphy



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Preface

to the Expanded Paperback Edition

‘nothing resettles right’*

EU Counter-terrorism Law: Pre-emption and the Rule of Law made three broad claims about its subject. First, that the EU response to the attacks on 11 September 2001 was best understood as a form of pre-emptive action that was corrosive of the rule of law. Second, that legal process may offer a site of resistance to that action, and to that corrosion, but that there are significant limits on what legal process can achieve in the face of action by executives and legislatures that has the tacit support of the populace. Third, that the result is that the principal hope for opposition to excessive counter-terrorism action may lie in a public sphere with vigorous contestation of the use of political power.

The revelations that have come to light since the publication of the hardback edition three years ago largely support these three claims. The emergence of broad systems of covert data surveillance by the United States and United Kingdom intelligence agencies was not surprising for those familiar with the overt systems of data surveillance put in place over the past decade. Nevertheless, the names of Assange, Snowden, and Manning have become commonplace in discussions of state power over the past two years in large part because they made public that which was previously secret. The result has been an increase in public (and therefore political) scrutiny of counter-terrorism law and policy, although it remains to be seen whether there will be any significant changes to the operation of that law and policy.

I am grateful to all at Hart Publishing for the opportunity to add to this book for its paperback edition. Although there was, of course, a temptation to alter the original text to update and further develop the analysis, I have not done so. The text of the original eight chapters stands as it did in the hardback edition (as do the associated Tables and Index)—aside from the correction of some minor typographical errors. However, this paperback edition does contain an additional *Afterword*, which updates the analysis as of 1 June 2015. It has given me the opportunity to consider the *Kadi II* judgment of the EU Court of Justice, the Court’s ruling on EU data surveillance, and the deepening debate on the European Arrest Warrant in the aftermath of the Stockholm Programme. I thank Sinéad, Bill, and Tom at Hart Publishing for the opportunity to add the *Afterword* and for their patience in waiting for it.

* S Heaney, ‘Anything Can Happen: After Horace, Odes, I, 34’, *District and Circle* (London, Faber, 2006).

The three broad claims made in the hardback edition still stand. The emergence of a new threat to international peace and security in the Middle East, in the form of the insurgent group known as Islamic State (ISIS), has seen the adoption of new UN Security Council action. The EU institutions have new legislation under consideration—in particular after the murders at French satirical magazine *Charlie Hebdo* earlier this year. The discourse on counter-terrorism law after 11 September 2001 swings between claims as to continuity and change. The history remains too recent for any strong pronouncements to be made. It is clear, however, that on that day the capstones of our legal systems underwent a shift. And nothing has resettled right.

CM
London
1 June 2015

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‘... expertly analyses the principal strands of the EU’s response – criminalisation, measures against terrorist financing, targeted sanctions, data surveillance and European Warrants ... Unique in its range and its depth, this is the essential guide to EU counter-terrorism law’.

David Anderson QC, Independent Reviewer of Terrorism Legislation

‘... a comprehensive treatise on the European Union’s tightening net of legal instruments aiming to constrain terrorism ... presents the law within its political and philosophical context ...’.

Christina Eckes, Public Law

‘... impressively ahead of its time: coming before the Snowden revelations of quite how far counter-terrorism has been prepared to go, Murphy’s book both prepares us for shocks like this and suggests a way that Europe can (and should) react’.

Conor Gearty, Cambridge Law Journal

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