

Accountability and Review in the Counter-Terrorist State

SUMMARY

Counter-terrorism is now a permanent and sprawling part of the apparatus of the state, yet little is known about the law and practice of how it is reviewed, how effective the review mechanisms are, what impact they have, and how they interact with one another. Informed by interviews with policy makers, politicians, practitioners and civil society, our book presents the first comprehensive, critical analysis of counter-terrorism review in the United Kingdom.

KEY MESSAGES

- The UK can be characterised as a counter-terrorist state, that is, a state in which counter-terrorism has become a permanent and pervasive part of both the state's legal and policy landscape, and of the everyday lives of people in the UK.
- As counter-terrorism is now an ordinary state of affairs, the state can no longer appeal to 'the exception' in the attempt to exempt itself from ordinary constitutional expectations of accountability when taking steps to combat terrorism.
- Counter-terrorism review can play an accountability role in the counter-terrorist state.
- Counter-terrorism review actors consider themselves as playing an accountability role, and are committed to being independent, developing expertise including through independent evidence gathering, and listening to experiences of counter-terrorism.
- To maximise accountability through counter-terrorism review structural challenges of executive control, excessive secrecy, limited parliamentary engagement with counter-terrorism review mechanisms, and an absence of trust must be addressed.

ACCOUNTABILITY
AND REVIEW IN
THE COUNTER-
TERRORIST STATE

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A NEW UNDERSTANDING OF COUNTER-TERRORISM REVIEW

Challenging the paradigmatic conception of counter-terrorism as the exception, we argue that the UK can be characterised as a counter-terrorist state – a state in which counter-terrorism law, policy discourse and operations are mainstreamed across the domains of law and government in forms that are conceptualised and designed as being ‘permanent’ in at least some cases. If counter-terrorism is the norm, not the exception, demands of accountability should be adjusted accordingly. We argue that counter-terrorism review can meet some of these demands.

Counter-terrorism review involves an assemblage of actors across the three branches of government (executive, legislature, judiciary), as well as civil society organisations, bespoke counter-terrorism review bodies, independent offices, complaints bodies, and industry and sector regulators. It involves the assessment of counter-terrorism activities, laws, and policies according to a range of legal, political, social and economic standards, and it is evaluative; it considers the merits of the matter under review, engages with ‘reality’ of counter-terrorism by being evidence-based, and has the capacity for action.

KEY FINDINGS

Counter-terrorism review actors conceptualise review as an accountability mechanism. Across the counter-terrorism review assemblage there is broad agreement that counter-terrorism review has the following purposes:

- assessing levels of terrorism threat and the adequacy of any response;
- scrutinising the justification, necessity, and proportionality of counter-terrorism law and policy;
- analysing the lawfulness of individual counter-terrorism decisions and actions;
- identifying and challenging flaws, discrimination, and procedural unfairness in practice;
- evaluating effectiveness, identifying areas for improvement, and informing Parliament.

Counter-terrorism review is undertaken by an assemblage of actors among which there is at times an informal division of labour. This creates competition as well as cooperation, with competition often driven by government recognition or engagement with some actors to the exclusion of others. Actors that are favoured by government often have access to sensitive security material and are thus considered to better understand the challenges of counter-terrorism. In some cases, those privileged reviewers including the Independent Reviewer of Terrorism Legislation, act deliberately to pluralise their evidence by engaging with both communities and other counter-terrorism review actors. In this way, more dominant counter-terrorism review actors can amplify marginalised voices and forms evidence, but whether this happens largely depends on the mindset and decisions of the reviewer in question.

However, **counter-terrorism review is not comprehensive.** Many areas of the UK’s counter-terrorism law, policy and practices remain under- or un-reviewed by the counter-terrorism review assemblage. Furthermore, whilst the various counter-terrorism review mechanisms within the assemblage can (or are mandated to) evaluate counter-terrorism against a variety of legal, political, social or economic standards, in practice reviews tend to evaluate counter-terrorism against a relatively narrow range of standards relating primarily to lawfulness and operational effectiveness. For most counter-terrorism review mechanisms, there is far less focus on qualitative questions of societal impact and unforeseen consequences.

The impact of a review can depend on a variety of factors. The perceived status and modes of operation of a review mechanism are important with mechanisms that government particularly values being most impactful. The form of review is also important: a judgment from a court is particularly strong as it must be complied with, for example, and may have broader policy and systemic impacts. Time and timing are important. If a review takes place too quickly after the introduction of a measure there may not be sufficient evidence for rigorous evaluation, whereas if the review takes place too

long after a measure has been introduced, it may have become so embedded that the practical challenges of revising or changing it seem almost insurmountable. Finally, pragmatism and pitch are important. Government tends to ignore reviews that call for wholesale change or challenge fundamental propositions.

Counter-terrorism review is susceptible to cynical deployment by government, with terms of reference, mandates, offices, and reviews being framed, established, accepted, ignored, published (or not), and acted upon (or not) largely only if and when the government considers it desirable to do so.

POLICY RECOMMENDATIONS

Although counter-terrorism review is quite effective as an accountability mechanism, structural challenges continue to limit its reach and impact. Maximising accountability through counter-terrorism review requires a fundamental dispositional shift in the counter-terrorist state.

The secret state endures. Counter-terrorism review takes place in a context of information asymmetry in which the state has the monopoly on much key information.

Recommendation

The state must continue to make all relevant information and actors available to review mechanisms such as the Independent Reviewer of Terrorism Legislation. Mechanisms should be developed by which the state must justify a claim to secrecy before it can suffice to keep information from other, non-security-cleared review actors.

The executive maintains control over the triggering, mandates, appointment, reception and implementation of many review mechanisms and, through its disposition towards reviewers, can create impactful hierarchies within the counter-terrorism review assemblage.

Recommendation

Review actors must be mandated to ask fundamental questions about, and make radical recommendations, in relation to, counter-terrorism. Engaging critically with seemingly-settled propositions of the counter-terrorist state should not undermine the credibility of review actors. The state should be dispositionally open to revision of such tenets.

Parliament does not maximise its accountability-enhancing role in the counter-terrorist state. It tends not to push back when reporting is statistical rather than evaluative, there is a notable hegemonic consensus across Parliament on the fundamental propositions of the counter-terrorist state, and opportunities for meaningful parliamentary review are often poorly attended, insufficiently rigorous, and lacking in evaluative content.

Recommendation

The hegemonic consensus that underpins the counter-terrorist state must be disrupted to reduce the political costs of long-term thinking in counter-terrorism, of changing tack, and of demonstrating reflexivity in response to counter-terrorism review.

There is an absence of trust between the state and much of the counter-terrorism review assemblage, so that meaningful evaluation may be received as subversive and threatening rather than a critical component of accountability in the counter-terrorist state.

Recommendation

Key counter-terrorism actors must embrace pluralism. Government should be willing to hear more voices and more perspectives, to recognise the importance of qualitative evidence to understanding the impact and potential effectiveness of counter-terrorism, and to acknowledge the expertise of civil society actors whose evidence base emanates from engagement in the everyday cultural and social life of counter-terrorism in our communities.

ABOUT THE BOOK

What is counter-terrorism review? Who conducts counter-terrorism review in the UK? How? Why? When? What and how much counter-terrorism is actually reviewed? What are the impacts of counter-terrorism review? How, if at all, does counter-terrorism review enhance accountability in the counter-terrorist state?

Accountability and Review in the Counter-Terrorist State addresses these questions. It presents the first comprehensive, critical analysis of counter-terrorism review in the UK, drawing on exclusive interviews with policy makers, politicians, practitioners and civil society as well as desk research into both the UK's counter-terrorism laws, practices and policies and a range of counter-terrorism review mechanisms.

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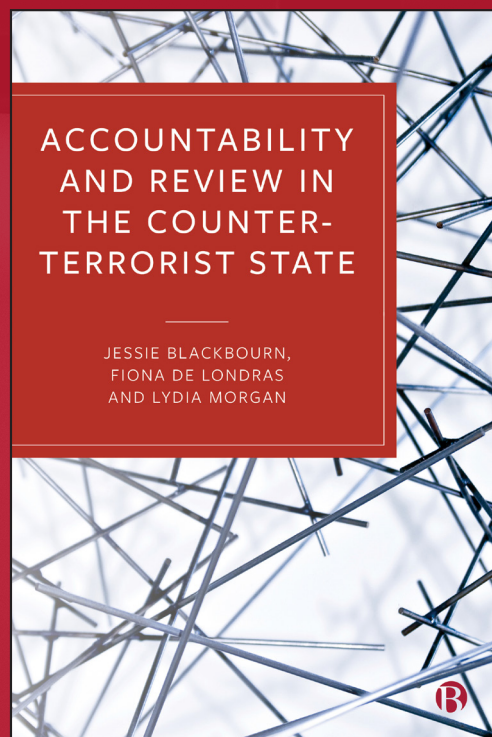
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