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Reviewing the “jumble”: *Accountability and review in the counter-terrorist state* by Jessie Blackbourn, Fiona de Londras and Lydia Morgan (Bristol University Press, 2020)

Christos Boukalas

Accountability and review in the counter-terrorist state examines the mechanism that reviews UK counterterrorism policy — the first study to do so. It is a review of a review assemblage. By its very existence, this work points to a problem: the review of a key policy area with multifarious effects on anything from human rights to banking, has, for over 20 years, been ad hoc, fragmented, and scattered across official, quasi-official, and unofficial bodies —an assemblage of mechanisms that needs a dedicated study to fathom. A study that addresses this problem, that helps its reader navigate the mazy and haphazard compound that, somehow, dispatches a crucial constitutional function, is gratefully received for this reason alone. This work, however, offers more than a mapping of the counterterrorism review territory. It addresses the practices, relations and attitudes that define it. Crucially, it contextualises the place and importance of review in the juridico-political constellation, and evaluates its performance from a constitutional viewpoint. Essentially, this work highlights and addresses a constitutional mismatch: The UK has developed into a ‘counter-terrorist state’ —a form of state in which counterterrorism policy is preeminent, pervades many areas of political, legal and social practice, and implicates citizens’ rights and liberties. This counter-terrorist state is reviewed by an amorphous “jumble” of mechanisms (p.123) that lacks consistency and unity and has limited ability to influence counterterrorism policy or to even know it. This is a typical mismatch between a powerful, potentially draconian, state and a flimsy control apparatus. The authors conceptualise this mismatch in constitutional terms as an accountability deficit. The question then is whether the review mechanism can ameliorate this deficit or, conversely, provide a fig leaf serving to legitimise a state that is effectively beyond control.

To assess the constitutional potency of the review assemblage, the authors, first, need to find it. This is not easy. Apart from judicial review that applies, through its familiar processes and its familiarly limited results¹, the ‘jumble’ comprises a host of mechanisms that mushroom within the Executive, Parliament, and the judiciary; an Independent Reviewer of parts of counterterrorism legislation; and bodies that review agencies heavily involved in counterterrorism (e.g. the police), or are charged with monitoring the counterterrorism compliance of public institutions (e.g Office for Students). These entities emerge in different ways, address different aspects of counterterrorism, through different

¹ Fergal Davis and Fiona de Londras (eds), *Critical debates on counter-terrorist judicial review* (Cambridge UP, 2014)

methods, for different purposes. They lack unity —of structure or purpose— and their coverage of counterterrorism is replete with gaps and overlaps. With all their differences and overall randomness, they all pertain to the state that they review. To counter the state’s monopoly over review, the authors include civil society actors in the assemblage (e.g. Liberty, Human Rights Watch). This is a crucial decision, for the tension between internal and outsider review bodies will offer the study important insights into review processes. It also risks turning an already chaotic assemblage into an open-ended —indeed, an endless— one, as anything written about counterterrorism could be seen as a review element, and therefore as a datum for study. To prevent this, the authors include only civil society bodies that are specifically dedicated to counterterrorism review — a sensible move that, nonetheless, leaves out the press and its contributions. Harder to explain is the exclusion of supranational reviewing bodies (in EU, UN), which do not register in the authors’ radar. Also, the inclusion of regulatory mechanisms that monitor compliance is, possibly, problematic: these certainly are review mechanisms, but it is unclear how they relate to accountability. Indeed, the reader cannot help wondering whether the authors are identifying the assemblage or *creating* it. Whether, by conceptually connecting several institutions, bodies, and individuals, they turn an amorphous soup into an identifiable object which they call into being by naming it: *the counterterrorism review assemblage*. Pending on the reaction of state actors, review practitioners and researchers, on if and how they will focus their attentions to the newly defined object, this could be the most important legacy of this study.

It is, therefore, possible that the authors produce their object of study by studying it —which is sign of a pioneering work. Oddly, they do not seem aware of this possibility. This is indeed a rare lapse of self-awareness, a quality that marks the work and is its great collateral virtue. The authors, with delightful openness, clarity and reflectiveness, set out the object of their research; the hypotheses and questions they address to it; the multi-layered methods they employ to examine it; and the hesitations and limitations of their effort (pp.7-14). They constantly subject their research findings to reflective examination; and navigate their, more or less chaotic, object by organising it in meaningful ways (pp.53-78, 95-122). Their study is therefore coherent, consistent, transparent, and defined: the complete opposite to its object.

Having delimited their object of study, the authors set out to examine it. They, first, engage in detailed desk-top research on the review practices regarding two elements of counterterrorism policy: the, variously regulated, *Terrorism Prevention and Investigation Measures* (TPIMs); and the virtually unregulated *Prevent* programme. The review of Prevent is secluded in the Home Office. Its processes and outcomes are secret, and the bodies that undertake it are hard to identify. It is strictly instrumentalist, dedicated to promoting and fine-tuning the programme’s operation. Civil society review is crippled by this secrecy, and has to rely on circumstantial evidence. It too remains

instrumentalist: it does note that Prevent implicates rights, but conceptualises this as a factor that undermines counterterrorism effectiveness (pp.53-66).

By contrast, TPIMs review is profuse, undertaken in the Home Office, Parliament, the Independent Reviewer of Counterterrorism Legislation and the judiciary. As each of these processes addresses different aspects of TPIMs, through different methods, purposes and standards, the overall picture presents significant gaps equivalent to those resulting from review scarcity (pp.66-78). In both cases, review is undermined by secrecy, and done against “a remarkably narrow range of standards”: operational effectiveness and little else (p.78). If its purpose is the accountability of state actions, it is severely wanting.

The second stage of the research comprises interviews with an impressive cast of reviewers: former Home Secretaries and Independent Reviewers; high level parliamentarians, civil servants, representatives of regulation bodies and civil society organisations; lawyers and Special Advocates. The only notable omission are judges, who engage in judicial review and are involved in arcane rituals of intelligence authorisation and review.

The interviews provide a unique glimpse into the assemblage — the practices, relations, and attitudes that define its work, the self-perception of reviewers’ role, and the frustrations they face —and produce an incredibly rich tapestry. The key patterns that emerge are, first, that reviewers are technocrats who understand their work in an instrumentalist way. In fundamental agreement with counterterrorism policy, they seek to enhance its effectiveness. They evaluate policy, including law, against this standard. They value empirical evidence and their own expertise (on what exactly, remains unknown). If values like democracy are included in their considerations, they are understood in an undemocratic way, as the schooling of the public so that it can understand and support governmental initiatives. Second, reviewers share two frustrations in their relative inability to access crucial information about the thing they are reviewing; and their incapacity to grasp the review rhizome in its entirety, as it comprises mutually secluded cells and lacks institutional coherence and unity. Reviewers are, consequently, uncertain on the remit of their role, on how it relates to that of others, and what its expectations and purpose are. Third, they are tactical. They do not report all they see and think, but arrange their review to give it a chance to influence policy. They note the government’s intolerance to criticism, so they employ it as sparsely as possible, focus it on few, amendable points, and accompany it with abundant praise. Finally, there is an hierarchy of status among reviewing bodies, determined by their relative access to evidence and resonance with the government. At the top sit the intelligence agencies (understood by state actors as review mechanisms, and quite reasonably so, since the main purpose of review is to assess ‘effectiveness’), with parliamentarians at the bottom. This status differential becomes a chasm for civil society reviewers, who enjoy virtually no access to evidence and are treated with suspicion and hostility by

the government and by some insider reviewers (pp.95-122). Review is therefore an insider's job, set to benefit counterterrorism: to enhance and improve it, but not to question it.

The final stage of the study reflects on the research findings from the perspective of accountability. The authors identify four factors that undermine review's accountability function. The first is state secrecy. Drawing on Lydia Morgan's excellent work, they find secrecy to be a fundamental, all-pervading feature of counterterrorism. It grants it the speed and nimbleness its interventions need; it marks the *modus operandi* of the state apparatuses that lead it, especially intelligence agencies; and the whole effort is founded on, and defined by, the secluded knowledge of the terrorist threat. This secrecy undermines accountability-minded review: it leaves swathes of counterterrorism strategy and operations beyond its reach, and makes it in principle impossible to judge the necessity or proportionality of actions that come into its remit. Secrecy also permeates the review mechanisms whose operations, standards, purposes, and, at times, even their existence remain opaque (pp.133-141).

The second factor is the tight Executive control over review processes. The Executive, in its upper echelons, is the sole possessor of counterterrorism knowledge. This makes it the gatekeeper of relative access by reviewers, which, in turn, construes the insider/outsider cleavage that defines the assemblage. Moreover, the Executive defines the remit and mandate of review processes (hence their instrumentalist orientation), selects the reviewers, and determines whether review is to take place at all. Thus, for the Executive, review becomes predictable and exploitable. Finally, the Executive determines the fate of review. It publishes its outcomes and adopts its recommendations at will, tending to reduct, conceal, and ignore suggestions that would implicate governmental strategy or operationality (pp.141-146).

The third factor, correlated to the previous one, is the weak position of parliament. Members are, as such, excluded from knowing counterterrorism positions and operations. They have to rely on proxies to make relevant decisions. The issue is in part structural: Parliament is a public body whereas counterterrorism is arcane. Parliamentarians are largely satisfied with this arrangement. Their ingrained consensus to counterterrorism expands, it seems, to envelope their own institutional exclusion and impotence (pp.146-149).

The final factor is the lack of trust of the Executive towards review. Trust allows reviewers to access some of the esoteric knowledge that defines counterterrorism. It is granted by Executive fiat, on an interpersonal basis, on credentials of the reviewer's support of the counterterrorism effort. It therefore systemically undermines the potential for criticism, and excludes outsiders *a priori* (pp.149-152). This indicates that the review assemblage is toothless, dilettante, and the accountability it provides is necessarily of the policy-affirming kind.

Indeed, what jumps from the pages of the study, but is missed by the authors, is that the review assemblage is a *governance* mechanism, a type of decision making body that is loosely defined in shape and mandate; operates on the technocratic basis of improving the effectiveness of a policy, without considering its desirability or its compliance with legal or political principles; and whose participants are committed to the policy, and categorically exclude from participation those that could challenge it². This omission does not effect the empirical wealth and reflective power of the study. It is, however, a missed opportunity to relate a rather topical work to a broader field of research. And, as the authors identify the ‘counter-terrorist state’ as a novel state-form, it is a missed opportunity to pinpoint its key decision-making modality.

Similarly, at every turn, the authors are confronted with the role of intelligence. It is the sole possessor of (counter)terrorism knowledge; it leads the fight against the threat; it is acknowledged by politicians as the top ‘review’ mechanism; and its operationality dictates the secrecy that defines counterterrorism *and* its review. Yet, the authors do not discuss intelligence as the heart of the ‘counter-terrorist state’. They thus miss the opportunity to identify its dominant state apparatus —the mechanism that defines the state-form and makes it cohere.

Indeed, the ‘counter-terrorist state’, the object of review processes, is a problematic construal. The authors define this novel state-form as “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 ‘permanent’...in which non-state actors are responsabilised for counter-terrorism; and in which all persons are the subjects of counter-terrorism” (p.21, also p.5). This definition comprises a number of ingredients that do not form a conceptual unity. They are selected apparently at will —rather, they are a reiteration of some empirically observable features of UK counterterrorism (pp.22-31). Thus, the ‘counter-terrorist state’ is direct empiricism self-referentially doubling up as a concept. The definition is not conceptual or analytical, but descriptive and tautological. It seems to be premised on the difference between normality and exception: “permanence, pervasiveness, and persistent extraordinariness” (p.22). But, as the authors do not engage with any strand of relevant theorising in political jurisprudence³, constitutional theory⁴ or, more pertinently, on state-forms⁵, the definition remains a self-identifying circularity. For this, it can cause bewilderment: According to its criteria, Pakistan, Russia and others are ‘counterterrorism

² Wendy Brown, *Undoing the demos* (Zone, 2015): 115-150; Jonathan S. Davies, *Challenging governance theory* (Policy Press, 2011)

³ Giorgio Agamben, *State of exception* (University of Chicago Press, 2005)

⁴ Bruce Ackerman, *Before the next attack* (Yale University Press, 2006); Oren Gross, ‘Chaos and rules: should responses to violent crises always be constitutional?’ *Yale Law Journal* 112 (2003): 1011-1134

⁵ Nicos Poulantzas, *Fascism and Dictatorship* (Verso, 2019), 313-344; N. Poulantzas, *State, Power, Socialism* (Verso, 2014), 87-92, 203-241, 296-303; Bob Jessop, *The state: past, present, future* (Polity 2015), 211-237; Christos Boukalas, *Homeland security, its law and its state* (Routledge, 2014), 13-26, 206-221; C. Boukalas, ‘UK counterterrorism law, pre-emption and politics: toward “authoritarian legality”?’ *New Criminal Law Review* 20(3), 355-390 (2017)

states' too. Does this mean that the UK and these countries have acquired the same state-form? It can also be said that the UK is a public health state, a national security state, and so on. How many forms does the UK state take?

Finally, the authors define accountability, the key concern of their study, in strictly liberal terms, as the need for citizens to know what their government does so they can confirm the latter's legitimacy and "the commitment to give account to some forum...of and for one's actions to ensure government work is done with caution, delicacy, economy and modesty" (p.6). Markedly absent here is any notion of general will or interest towards which 'one' is accountable. There is no notion of sanction if the (accountable) government misbehaves. It seems that the only thing accountability can do is to confirm the state's legitimacy. This undemocratic understanding of accountability informs the review assemblage, which is hostile to interventions from society and is carried out by state mechanisms, making accountability a consensual relation internal to the state. The authors do not conceptualise as such the liberal, undemocratic character of counterterrorism review that reverberates throughout their study. But they certainly register it: in the exploitation of review for justifying policy and catechising the public; in its aim to improve counterterrorism operations; in the rapport between reviewers and the policy they review; in its concern with redressing power imbalances within the state, rather than between the state and society; in its negligible impact over policy. They register, in other words, the tension between liberalism and democracy within their object of study, but do not recognise it for what it is or account for its political significance⁶. This deprives the study of an exiting perspective, that of political critique; and, possibly, of an index on which the research material could be conceptualised and organised.

Crucially, however, its theoretical and conceptual weakness affects the study only peripherally. The latter, rather modestly, aims to deliver an "empirically grounded understanding of counterterrorism review in the UK" (p.161). It does so with aplomb. Within its own robust and consistent analytical framework, the study develops an assured and extremely fruitful dynamic to produce the first comprehensive account of counterterrorism review. Its lack of engagement with political and constitutional theory do not affect it as such, but prevent it from developing an extra dimension, from being not only a critical assessment of its object, but a genuine critique thereof.

⁶ This tension is unceasingly registered in literature since Benjamin Constant, or even the Putney Debates. For its most recent and comprehensive treatment in legal theory, see: Christoph Menke, *Critique of rights* (Polity, 2020).