

Critical trust in the policing of the TOR-network

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critical trust

Most of us have neither the time nor the expertise to examine every decision or explore all the evidence. We rely on judgements about the values and behaviours of those in charge. For the individual, 'critical trust' may be the best frame of mind: neither outright scepticism nor uncritical acceptance.

M. Walport (quoting his 2014 report), *Annual Report of the Government Chief Scientific Adviser 2015: Forensic Science and Beyond: Authenticity, Provenance and Assurance, vol. 1* (Government Office for Science: London, 2015) p. 10.

Critical trust in the policing of the TOR-network – *possibly* 6 key questions:

1. Cybercrime: Is there a (a) significant threat and (b) does it require international criminal justice cooperation?
2. Is international cooperation symbolic or genuinely capable of enabling the criminal justice system to respond effectively to any significant threats?
3. *How do we know that the digital evidence used for TOR-network policing has been obtained in compliance with due process and meets scientific/technological validity standards?*
4. How should the repressive actions of the states' agents in policing the TOR-network be balanced by the enforcement of universal/human rights/fundamental rights?
5. Decision making about possible suspected offences, the approaches followed by investigators and the objectives for policing the TOR-network
6. Risk of cultural blind spots in criminal justice

Initial assumptions: threats and international cooperation

- Transnational offending –sometimes amounting to some of the ‘worst negative spillovers from globalisation’ have intensified the need for effective criminal justice cooperation because of modern travel volumes, e.g. in the UK (but excluding the common area with Ireland):
 - In 1970 the population exceeded by three times the total number of cross-border movements
 - Today the number of cross-border movements exceeds three times the size of the resident population.

Initial assumptions: threats and international cooperation

- Cybercrime represents an intensification of the threat from potentially international crime, for example:
 - In the UK, where internet usage corresponds to some 90% of the population, it has been estimated that by 2015 53% of all crime with UK targets had become either *cyber-dependent* or *cyber-enabled*.
- In addition the vulnerability of public services and the internet of things have increased the *securitisation* of criminal justice, even for policing the TOR-network
- Evidence for the transformative effect of cybercrime on politics can be found in the rapid and unequivocal UK acceptance of the current EU cyber-crime Directive (2013/40).

Symbolic or effective cooperation?

2001 COE Convention on 'cybercrime'

- Common definitions of template cyber offences
- Standard thresholds for maximum sanctions linked to those offences
- Improved inter-state cooperation, but in urgent cases the encouragement of direct access to judicial authorities or via Interpol

2013/40 – 'attacks on information systems'

- '... taking into account the content of the 2001 Council of Europe Convention on Cybercrime. That Convention is the legal framework of reference for combating cybercrime, including attacks against information systems. *This Directive builds on that Convention.*' (my emphasis)

Symbolic or effective cooperation?

2001 COE Convention on 'cybercrime'

- Intentional production, sale, procurement for use, import, distribution or otherwise making available tools/devices/information or data (e.g. access codes) for the purpose of cyber offences – (Art 6 of 2001 to Art 7 of 2013)
- Convention states to ensure such offences are 'punishable by effective, proportionate and dissuasive sanctions, which include deprivation of liberty'.

2013/40 'builds on that Convention' e.g.

- [Less/no] scope for (actions, agents & location) exemptions
- Tougher mandatory cooperation requirements on internet service providers
- Standard thresholds - subject to proportionality - for sanctions (e.g. 'a maximum term of at least three years', rising to 3 for multiple attacks or 5 in OCG context) for intentional production ...

Symbolic or effective cooperation?

... And what about fundamental rights

2013/40: part of the most advanced cooperation *system* globally e.g.

- A single national 24/7 contact point in each MS should deal with urgent requests for assistance within 8 hours of receipt, or within that time to indicate whether the request will be answered, and the form and estimated time for that action
- Implementation support /finance & enforcement by the Commission and the CJEU

Safeguards under 2013/40 e.g.

‘The protection of personal data is a fundamental right in accordance with Article 16(1) TFEU and Article 8 of the Charter on Fundamental Rights of the European Union. Therefore, any processing of personal data in the context of the implementation of this Directive should fully comply with the relevant Union law on data protection.’ [Balanced] by less scope for a *dual criminality* an [extradition/MLR surrender] bar.

Evidence and due process – bringing human rights/regulation centre stage

Hence, we envisage that our research will cover:

1. In England a good defence function can be to force examination of why someone was arrested/house searched/listening device installed etc. – legal justification - and that revolves around the intelligence aspect. The intelligence product must stand up to critical examination and, in the context of work where intelligence will be shared internationally.

Evidence and due process – bringing human rights/regulation centre stage

Hence, we envisage that our research will cover:

2. privacy, freedom of expression and guarantees to prevent police roaming unsupervised through people's internet traffic

As with the admissibility of evidence, a comparative legal perspective will be important in our research project.

Evidence and due process – bringing human rights/regulation centre stage

We suggest that the comparative legal perspective will need to cover:

- How the institutions and arrangements at law that we trust to guarantee rights during PDTOR investigations vary between our jurisdictions?
- How do fundamental ideas about policing differ?

Decisions and objectives for policing the TOR-network

- Goals of policing the Tor-network
- Legitimacy, Transparency, Accountability, Foreseeability?
 - Who decides how, what and when?
 - Authority at law?
 - Monitoring and control?
 - Criteria re probable cause/reasonable suspicion' data-retention and future use

Evidence and due process – bringing human rights/regulation centre stage

One problem is at what point the police have the authority to check (or break into) computers and what they can look for: is it OK for them simply to use crawlers and trawl through anything that comes up, or do they need some sort of probable cause. If the latter, who checks or supervises their actions?

Risk of cultural blind spots in criminal justice

- Points of critical trust in criminal justice are determined by legal culture
 - Continental European systems ('inquisitorial') rely on prosecutor to make quasi judicial decisions in pre-trial investigation and to monitor and control police action
 - Anglo-American systems ('adversarial') rely on defence at trial
 - But automatic reliance on such institutions (critical trust) can produce blind spots as to their effectiveness
 - How much will the prosecution service know about policing the web (and therefore be able to judge whether police action is legitimate)? The same applies to the defence. For both will be dependent on the police for information. And given the critical trust that the system places in these institutions, they may be inclined to give them priority in safeguarding web-policing.
 - Moreover, this only applies in case of prosecution

Information about this project and related research can be found at:

<http://whatworks.college.police.uk/Research/Research-Map/Pages/ResearchProject.aspx?projectid=636>

Available on the College of Policing English and Welsh police forces) website

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