

Securing a Role for International Human Rights Law in Counter Terrorism: The Role of Judicial Review in the United Kingdom

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Abstract

In the aftermath of 9/11, the international community has been debating how to accommodate international human rights commitments within effective counter terrorism law-enforcement. Unfortunately, a dichotomous framework has often portrayed this challenge as a zero-sum game. This article addresses precisely the issue of de-conflicting human rights commitments and domestic anti-terrorism legislation by looking at the case of the United Kingdom. In particular, the article stresses the role of the British courts as checks on the executive branch and guarantors of international human rights standards. In achieving this result, the research highlights the importance of incorporating international human rights conventions within domestic legislative frameworks, making them justiciable and enforceable in courts.

Introduction

The objective of this article is to analyze the theoretical and practical implications of the ongoing debate about upholding human rights and fundamental freedoms while still dealing effectively with the global threat of terrorism in the world post September 11, 2001 (9/11). In particular, this study focuses on the tension

between the domestic enactment of human rights obligations assumed in the international arena and the need for reform of a criminal justice system to enable it to cope with new security challenges such as transnational terrorism and organized crime. The research uses the United Kingdom as a case study to evaluate mechanisms for accommodating these equally fundamental concerns of states, and ultimately makes concrete policy recommendations on how states might avoid the zero-sum trap that has often characterized both security as well as human rights discourses, especially in the aftermath of September 11, 2001.

Human Rights and Terrorism Post 9/11: Understanding the Debate

One of the most complex and controversial ongoing disputes among members of the international community concerns defining and understanding the relation between terrorist acts and human rights violations. States have so far failed to reach a consensus on central issues such as defining terrorism, establishing a correlation between human rights violations and terrorist acts, and determining which means are allowed in fighting this global and domestic threat. This last issue is especially controversial, as it impinges upon two of a state's classic attributes of sovereignty – the monopoly on the use of force, and the duty to protect its citizens.

Specifically, the idea that counter terrorism must be conducted in strict compliance with existing conventional and customary human rights provisions has been at the center of an extremely animated debate, especially in the aftermath of 9/11. At the core of this controversy lies the degree to which human rights standards can be effectively adapted to the current security environment without compromising their essence or hindering the efficacy of law enforcement tools. Those who adopt a “security perspective” stress the need to solve potential conflicts between national security and civil liberties in favor of the former. They rely on the theory of *salus populi suprema lex* (literally, “the well-being of the people is the supreme law”) – which builds upon the Lockean notion that the state's prime and most solemn duty is to protect the life and property of

its citizens (Donohue, 2001, 331). Accordingly, the state must concentrate on protecting these, which are at the top of every system's hierarchy of rights, and in order to do so it must be allowed sometimes to compromise or derogate from other, less basic rights. However, such an approach leaves a great deal of scope in determining which rights can be considered less basic and with what frequency they can be violated. The hierarchy of rights doctrine is often used in claiming a need for emergency regulations. A classic example of how this approach has been used to advocate the restriction of civil liberties and other "lesser rights" is the United Kingdom's stand in respect of Northern Ireland:

Where there is a terrorist situation in any country, the rights of the individual in the community have to be surrendered to a degree in order that his real rights might be defended and maintained . . . We have to surrender certain rights in Northern Ireland for the greater welfare of the whole community, so that the rights of the individual might be defended (Paisley, 1977, 344).

Similarly, the common-law doctrine of necessity can be construed to advocate that a state, in dealing with an emergency situation not created by the state itself, such as an imminent terrorist threat, can be allowed to commit a lesser harm—like restricting citizens' liberties—to prevent a greater one, such as the indiscriminate killing of civilians (Addicott, 2004, 219). Former U.S. Supreme Court Chief Justice William H. Rehnquist, applying a similar logic, observed that:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being (Rehnquist, 1988, 222).

These arguments are in line with John Rawls's principle of reconciliation—from his *Theory of Justice*—asserting that liberty can be restricted in any society for the sake of a greater liberty and when it appears clear that the consequences of not restricting existing liberties would be even more harmful for society as a whole (Joy, 2001,14).

This framework also supports the view that sporadic derogations from human rights standards should indeed be allowed in dealing with individuals charged with or suspected of terrorist-related crimes. Accordingly, the rights of terrorists themselves should and could be restricted and even violated if circumstances call for such measures. The commonly used utilitarian position is the “ticking time bomb” rationale, allowing for derogation from a terrorist’s rights so as to obtain information that would prevent a human tragedy (i.e. disclosing the location of a bomb placed in a public area) (Israeli Supreme Court, 1999, 12). The Israeli Supreme Court considered the legality of this rationale in its 1999 ruling on the interrogation methods used by the country’s General Security Services (GSS). Although the court upheld the illegality of employing coercive interrogation tactics, it nevertheless also allowed—as *obiter dicta*¹—the admissibility of the necessity defense² arising in instances of “ticking bombs,” as an *ex post facto* (literally “after the fact”) justification, for indicted GSS interrogators (Israeli Supreme Court, 1999, 31).

An additional example of this controversial stand, taken a step further, is the U.S. Department of Justice’s 2002 “torture memo,” which asserts that violations of the UN Convention Against Torture as incorporated in U.S. law can be permissible in the case of necessity or self-defense, eliminating criminal liability for those officers engaging in such conduct (United States Department of Justice, 2002). The memo uses both the hierarchy of rights doctrine as well as the necessity defense to advocate a discretionary power to violate existing human rights provisions to prevent a greater evil, such as a terrorist attack.

¹ *Obiter dicta* are comments made by the judge that, although included in the court’s opinion, are not necessary to reaching the final decision, and they constitute more non-binding side remarks.

² The “necessity defense” is a justification defense that argues that the defendant had no choice but to break the law. Among the core elements of this defense 1) the defendant sought to prevent significant harm; 2) such harm was greater than the damage caused by the defendant’s actions; 3) a degree of imminent danger existed; 4) no lawful means could have prevented the harm.

Interestingly, from the point of view of international human rights law, the main argument upon which the “security perspective” is articulated (the hierarchy of rights theme) is not *per se* incompatible with human rights law. Article 29 (2) of the Universal Declaration of Human Rights provides that the exercise of human rights can be limited within a democratic society to achieve security, public order, and general welfare:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Also, Article 4 of the International Covenant on Civil and Political Rights (ICCPR)³ specifically allows states to derogate from certain obligations set forth in the Covenant, given an internal emergency and provided that no discriminatory measure is instituted as a response of such a crisis. The ICCPR’s Human Rights Committee, in its comment on Article 4, further specifies that:

[M]easures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made (United Nations Human Rights Committee, 1981).

Moreover, this provision has to be read in conjunction with subsequent Paragraph 2, which refers to a set of rights from which no derogation shall ever

³ Article 4 (1): “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour [sic], sex, language, religion or social origin.”

be granted.⁴ Therefore, the idea that certain rights can be derogated from in emergencies, and that necessity might impose limitations on existing human rights guarantees, is not an unknown concept in international human rights law. However, there are several substantial differences between the hierarchy of rights doctrine, as advocated by the proponents of documents such as the “torture memo,” and the temporary restrictions allowed under international human rights law. The main difference between the two is that, according to the human rights framework, the executive and military branches are not accorded a blank check to operate regardless of domestic and international constraints.

Under the human rights framework, when a national emergency arises, it must be defined and limited by those in power in a transparent way, so that the temporary emergency does not become a permanent regime of human rights derogations. Moreover, this framework guarantees a core minimum standard that the state has the absolute duty to preserve, even in dealing with situations that could threaten the life of the nation. These provisions help prevent the instrumental use of national emergencies to impose indefinite restriction on civil liberties and disregard domestic limitations on the exercise of power (International Bar Association’s Task Force on Terrorism, 2003, 47-49).

This human rights approach criticizes the utilitarian principle at the core of the “security perspective” and uses a deontological approach to evaluate state actions. Addicott calls this “doing a right thing in a right way,” and explains: “The formula of doing a right thing in a right way is an essential ingredient for the establishment and development of a just and democratic society based on the rule of law. Conversely, deviations from the formula are destructive to the individual and the society” (2004, 223). As Israeli Supreme Court Justice Landau noted: “The interrogation practices of the police in a given regime are indicative

⁴ Such rights are: Articles 6 (right to life), 7 (prohibition of torture), 8 (I - prohibition of slavery, II - prohibition of servitude), 11 (prohibition of imprisonment for

of a regime's very character" (Israel Supreme Court, 1999, 21). In this sense, the human rights perspective also entails a utilitarian element, as it argues against compromising core principles and values in the name of security because this has a detrimental effect on the state's constitutive values and its society. However, despite the moral and even practical strength of the human rights perspective, accommodating both human rights compliance as well as effective counterterrorism measures represents one of the most difficult policy challenges decision makers face. The second part of this article examines the real-world implications of the "human rights v. counter terrorism" debate by looking at the accommodation mechanisms the United Kingdom has employed. Particular focus is placed upon assessing how in the United Kingdom domestically justiciable international human rights legislation has contributed to shaping and balancing internal counter terrorism legislation, and emphasizes the role of domestic courts in balancing human rights and counter terrorism.

Human Rights in the UK: The 1998 Human Rights Act and Its Implications

The United Kingdom is a party to most human rights conventions established within the framework of the United Nations (UN) and the European Union (EU) and is thus bound by those agreements internationally. In terms of the domestic enforcement of human rights provisions, the single most important piece of UK legislation passed is the Human Rights Act of 1998. This received the Royal Assent on November 9, 1998 and incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the convention) into UK domestic law (Leckie and Pickersgill, 1998). Previously, although the judiciary and Parliament were bound to observe and give effect to the convention as part of their obligations towards international treaties, this human rights agreement was nevertheless not considered part of UK domestic

insolvency), 15 (non-retroactivity), 16 (right to be a person before the law), and 18 (freedom of thought, conscience, religion).

law and thus was not enforceable in local courts (Leckie and Pickersgill, 1998). This is because international agreements are entered into by the Crown as part of the Royal Prerogative but are not self-executing; in order to be enforced domestically, such agreements must in fact be incorporated into domestic law by an act of Parliament (Betten, 1999, 58).

The adoption of the Human Rights Act served several important purposes. First, it gave effectiveness and recognition to a basic set of rights,⁵ enhancing the common-law system's capacity to protect individual human rights. It established that all "public authorities" had to act in a manner compatible with the convention, and that if convention rights were violated, citizens could seek relief or remedy in domestic courts. This addressed one of the main problems related to the previous non-justiciability in domestic courts, which forced British citizens to seek remedy in the European Court of Human Rights, an extremely time consuming and expensive procedure (UK Secretary Of State For The Home Department, 1997).

Second, the Human Rights Act provided that courts should—whenever possible—interpret an existing statute in harmony with the convention.⁶ The act did not automatically trump or invalidate pre-existing or subsequent legislation; it did, however, allow courts to construe legislation in a manner consistent with the convention, without being bound by their previous interpretations, and thus

⁵ These rights are: the right to life (Article 2); the prohibition of torture or inhuman or degrading treatment or punishment (Article 3); the right to liberty and security of person (Article 5); the right to fair trial (Article 6); protection against retrospective criminal laws (Article 7); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); and protection from discrimination in the enjoyment of these rights and freedoms (Article 14).

⁶ Section III (1): So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights. (2) This section - (a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate

being able to build a new corpus of case law consistent with the newly adopted human rights standards (UK Secretary Of State For The Home Department, 1997). This freedom of judicial interpretation also imposed a significant change on the United Kingdom's traditional "originalist-textualist" approach to judicial interpretation, suggesting the adoption of a more contextual and evolving interpretative principle (Betten, 1998, 63-85).⁷ Moreover, when courts find a law to be incompatible with provisions in the Human Rights Act, they now have the power to issue a "declaration of incompatibility" which, although not automatically overriding the incompatible act (unless the latter was an item of secondary legislation, in which case courts could declare it void), can have the effect of urging Parliament to change the law (Human Rights Acts, 1998). Finally, the Human Rights Act led to the creation of the Joint Committee on Human Rights, composed of members of both houses of Parliament and charged with the task of monitoring human rights compliance in the United Kingdom.

In sum, the Human Rights Act constituted a watershed in UK human rights standards, as it: allowed the country to align internal legislation with international human rights obligations; provided a mechanism to make convention rights enforceable in domestic courts; created a system of checks on the legislative and executive branches to improve their compliance with international human rights standards. The following sections discuss the effect of the act in rebalancing the UK system in favor of human rights compliance, stressing the pivotal role of courts as guarantors of convention rights.

legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

⁷ As with all international treaties, the convention is subject to the rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaty (1969). Article 31 (3) establishes that a treaty shall be interpreted according to the text of the treaty and considering its context, object, and purpose. At the other end of the spectrum, the convention provides for a "margin of appreciation," which leaves a discretionary power to states/domestic courts to enforce and enact convention provisions according to national context and circumstances.

Anti-Terrorism Laws: Northern Ireland to New Transnational Threats

Even prior to the 9/11 attacks, the United Kingdom had a vast body of legislation and case law regarding counter terrorism, mostly owing to the conflict in Northern Ireland. In dealing with the Irish Republican Army (IRA), the British government promulgated a series of Emergency Provisions Acts (1973–96) and Temporary Prevention of Terrorism Acts (1974–89) (Hadden, 2002, 115). One characteristic of these provisions was their entrenchment in the British legal system and the consequent permanent assumption of extraordinary powers to deal with political violence in Northern Ireland, sometimes in violation of international human rights obligations (Donohue, 2001, 354). Prior to the 1998 Human Rights Act and a domestic check on Parliament's compliance with international human rights standards, the European Court of Human Rights was the primary guarantor, ruling on several British counter terrorism laws. However, the wide discretion left to the state in determining the duration of emergencies and the number of derogations from the convention left the state with ample autonomy in dealing with Irish terrorism and political violence.

The situation changed dramatically following passage of the 1998 act and, most significantly, the achievement of a peace agreement in Northern Ireland. The changed security environment led the British government to shift from temporary orders to a more permanent body of counter terrorism legislation (Hadden, 2002, 119). As a result, the 2000 Terrorism Act (TA) passed into law, followed by the Regulation of Investigatory Powers Act the same year; the 2001 Anti-Terrorism, Crime and Security Act (ATCSA); the 2005 Prevention of Terrorism Acts (PTA); and the 2006 Terrorism Act. The TA set forth a range of measures to fight terrorism: it gave the Secretary of State the power to proscribe organizations involved in international terrorism; established measures to investigate and punish the financing of terrorism; it made changes to extradition and extraterritorial jurisdiction which allowed the United Kingdom to ratify the UN Convention for the Suppression of Terrorist Bombings and for the

Suppression of the Financing of Terrorism (Alexander and Brenner, 2003, 89-99). From a human rights perspective, the most significant improvement this act brought about was the extension of powers of judicial review in cases of proscription and detention (Hadden, 2003, 120).

The impact of human rights law and the Human Rights Act was significantly more important in the process of writing and implementing the ATCSA in 2001. Several examples show the influence of human rights legislation on the evolution of this act. For instance, the legislative plan included retrospective legislation on bomb hoaxes, a provision abrogated before the bill was published because of the incompatibility with Article 7 of the convention, prohibiting retroactive punishment (Gearty, 2005, 23). However, ATCSA's judicial review provisions provide the most concrete example of how the possibility of enforcing human rights in domestic courts has impacted the evolution of British counter terrorism legislation.

These provisions allowed the Secretary of State to certify a non-British national as a "suspect international terrorist" if the secretary deemed the person a threat to national security, or if that person could be classified as an international terrorist (Amnesty International, 2003). Once a person was certified as a terrorist, he or she could be detained, indefinitely. This provision allowed for the detention, as an alternative to removal, of foreign nationals who could not be deported, either because of previously-granted refugee status, or because deportation to their country of origin would lead to torture and/or cruel, inhuman, or degrading treatment (Anti-Terrorism, Crime and Security Act, 2001). The power to detain foreign nationals indefinitely and without trial was challenged in domestic courts because of the possibility provided by the Human Rights Act to enforce convention rights, domestically.

The Special Immigration Appeal Commission ruled in July 2002 that the provision was in violation of Article 5 (right to liberty and security) and 14

(prohibition of discrimination) of the Convention but upheld the state's derogation from article 5 based on Article 15(1), regulating human rights derogations in situations of "public emergency threatening the life of the nation."⁸ However, the court found that ATCSA provisions allowing for indefinite detention were discriminatory and incompatible with the convention (Amnesty International, 2003). This decision was reversed by the Court of Appeal in October 2002 (Alexander and Brenner, 2003, 769-80) and brought to the House of Lords in December 2004. On that occasion, the House of Lords ruled that the UK derogation was invalid and that the detention provisions in the ATCSA were incompatible with the convention (House of Lords, 2004).

This decision was the single most important act of the British courts in upholding convention rights, and it evidences the concrete effect of the Human Rights Act and the importance of rendering international human rights conventions domestically justiciable. This historic judgment also led Parliament to repeal and restructure ATCSA provisions, replacing them when drafting the PTA of 2005 (UK Home Office, 2006). The PTA replaced the provisions with a series of "control orders," *ad hoc measures to place terrorist suspects under strict police supervision, and to be applied with no discrimination to any suspect terrorist, regardless of nationality, and without needing to derogate from the convention.* Mostly used against terrorist suspects who cannot be prosecuted or deported, the control orders are imposed by the Home Secretary but are also subject to the approval of a court. Indeed, the judicial branch has been using its powers to review and scrutinize the "control orders regime" and to constrain the Home Secretary (UK Home Office, 2006). For example, in *Home Department v E*, the High Court ruled that a number of measures taken to restrict terror suspect *E*

⁸ Article 15(1) (derogation in time of emergency): "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

achieved the cumulative effect of depriving him of his liberty and thus – to be valid – should have been judicially imposed. As the PTA did not grant the Home Secretary the power to deprive persons of their liberty in the absence of judicial authorization, this control order ultimately was quashed (High Court, 2007).

A second check on the control order system requires Parliament to review and re-authorize the current legislative framework every twelve months. Since 2005, the regime has been renewed, every year but this reauthorization has been controversial and Parliament's Joint Committee on Human Rights has criticized the regime, asking the houses not to grant its approval (Joint Committee on Human Rights, 2006, 2007, 2008). The debate over PTA implementation and the control orders system is central to assessing the UK counter terrorism/human rights dynamic. In this context, it is important to underline, again, the impact of the incorporation of the convention into British legislation, which facilitated the enforcement of human rights without the need to outsource justice to the European system. In particular, the House of Lords' 2004 decision and subsequent reviews and limitations on the use of control orders demonstrate that the Human Rights Act has empowered courts and facilitated their role as checks on the executive branch. The convention has been particularly relevant since the July 2005 terrorist attacks in London, when the British government reacted with a range of measures to prevent and eradicate terrorism within the country. None of these provisions aimed at completely restructuring or repealing legislation already in place but rather to identify and correct the "loopholes" in it.

The main counter terrorism legislation approved in the aftermath of the July 7 terrorist attacks was the Terrorism Act (TA) of 2006. This codified new criminal offences and made several amendments to the existing legal framework, such as the expansion of police powers in performing stops and searches; the extension up to twenty-eight of the number of days a person can be detained before arrest; and the introduction of warrants to search property associated with

terrorist entities or individuals. The most significant part of the act, however, is the introduction of new criminal offenses, such as encouragement of terrorism, dissemination of terrorist publications, acts preparatory to terrorism, and terrorist training offenses. Under the TA, individuals can be held accountable regardless of whether the alleged offenses have been committed at home or abroad (Terrorism Act, 2006).

The introduction of these new criminal offences raises important questions about the compatibility of the PTA with the convention. However, according to the convention, freedom of thought, conscience, or religion are not an absolute rights, and can be restricted in accordance with principles of public order or for the protection of the rights and freedoms of others (Council of Europe, 1953). Moreover, the European Court of Human Rights' jurisprudence indicates a constant trend towards upholding states' limitations on freedom of speech, religion, or association by referring to the principle of the margin of appreciation, which grants states the power to decide how to enforce protected rights according to a specific context. This does not mean that the offences established by the Terrorism Act are therefore automatically compatible with the convention, but rather that there is a wide margin of autonomy given to British domestic courts to evaluate the compatibility of such provisions and to decide whether these norms would automatically lead to a violation of the convention, or whether the judicial system can effectively monitor the enforcement of such provisions to avoid abuses and arbitrary or discriminatory application of the law.

Finally, it is important to mention the convention's continuing influence upon the development of new anti-terrorism legislation. The most recent example of this is the parliamentary defeat of the Counter Terrorism Bill (CTB). Introduced in January 2008, the CTB had the stated goal of further enhancing the executive branch's powers to deal with the threat of homeland terrorism (Counter Terrorism Bill, 2008). The bill – approved by the House of Commons in June 2008 – was submitted to the House of Lords, where it was overwhelmingly

defeated. Among the main reasons that led to this rejection was the controversial provision that would have extended the pre-charge detention of terrorist suspects from twenty-eight to forty-two days (Counter Terrorism Bill, 2008).

At the national level, this provision was widely criticized for being both unconstitutional as well as against the country's international human rights commitments, including those assumed when signing the convention. Moreover, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe intervened in the ongoing debate by issuing a special report that stated that the 42-day provision would have violated the convention's articles on the right to liberty and security and to a fair trial (Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 2008).

It is difficult to prove that the bill's incompatibility with the convention was the main factor behind its defeat; (Watson, 2008) however, the convention's positive impact in shaping anti-terror legislation can still be appreciated. In fact, the convention provided a reasonable standard against which to judge the proposed counter terrorism measure, thus contributing to the striking of a balance between legitimate security needs and civil liberties.

Policy Recommendations: Does It Have to Be a Zero-Sum Game?

The relation between human rights and counter terrorism is often misrepresented as a zero-sum game where states are inevitably called upon to choose between guaranteeing the rights of a few wrongdoers or safeguarding the well-being and physical safety of the majority of their citizens. This false dichotomy has become popular particularly in the aftermath of 9/11 when the international community has been exposed to the magnitude and seriousness of terrorism's threat. However, complying with international human rights norms is necessary for a democratic society to uphold and preserve its constitutive values—ultimately critical to its own survival. However, this does not mean a

state must paralyze law enforcement efforts: the existing regime for protecting human rights allows for certain derogations in the face of emergencies threatening the life of a nation, while concepts such as the margin of appreciation within the European system allow states to be contextual in enforcing human rights provisions. Nevertheless, the determination of when an emergency arises and what specific derogations can be allowed in the context cannot be left exclusively to the executive or military branches of a government. In this sense, terrorism is not a blank check for those in power to disregard existing constraints on their exercise of that power.

The UK case study shows how the tension between the necessity of guaranteeing human rights on one side, and the doctrine of state sovereignty and the margin of appreciation principle on the other, can at times create conflicts and tensions within a domestic criminal justice system. In this sense, several important lessons on how to de-conflict these fundamental concerns can be extrapolated from the UK experience.

First, the article highlights the pivotal role that domestic courts can serve in mitigating conflict between these opposing needs and in balancing the system through judicial review. It is, therefore, crucial to empower courts and allow them to be guarantors of a country's international human rights commitments,

Second, the analysis of the impact of the Human Rights Act in the UK suggests that incorporating international human rights legislation into domestic law and making it justiciable can serve a uniquely important function in this context; by providing courts with both the Constitutional authority and the legislative tools to oversee the system and act as a balancing force between security needs and civil rights concerns.

Third, the research shows that, in order for such a system to function properly, all government branches must accept the rules of the game and consent to have the courts act to check and constrain their actions. This is a particularly important, yet controversial point. Even in the UK--and especially in the

aftermath of the 2005 terrorist attacks—the executive branch seems to have become increasingly dissatisfied with court “activism” in enforcing human rights provisions and sometimes “hindering” the endeavors of the law-enforcement agencies. For instance, in a 2006 national speech on the criminal-justice system, then-Prime Minister Tony Blair alluded to an “unbalanced” system and asserted that the argument is not “whether we respect civil liberties or not, but whose take priority. It is not about choosing hard-line policies over an individual’s human rights. It’s about which human rights prevail” (Blair, 2006). In his speech, Blair used the familiar hierarchy of rights argument but also expressed his frustration with the status of the criminal justice system for holding a bias in favor of the offender. This argument is particularly problematic because it indirectly tries to limit courts’ ability to perform what, in the end, is intended to be their role. Professor Loader, addressing the former prime minister, explained: “It often sounds as if you think the criminal justice system is a delivery arm of government. But it isn’t. I know this seems frustrating from where you sit, but courts are meant to function as checks and constraints both on government over-zealousness and on police forces who may too easily presume to know that they have got ‘the right person’” (Loader, 2006).

In fact, a healthy and functional democracy cannot afford to undermine the role of the judicial branch or to subjugate it to short term security needs. Compromising core principles and values in the name of security has a detrimental effect on the state’s constitutive values and its society, while questioning the judicial branch’s right to scrutinize the government’s actions could in the long term undermine one of the core institutions in any democratic state—the judiciary. At stake, as U.S. Supreme Court Justice Stevens wrote in the *Padilla* case, “is nothing less than the essence of a free society” (Justice Stevens, United States Supreme Court, 2004).

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