

# The Role of the Courts in Imposing Terrorism Prevention and Investigation Measures: Normative Duality and Legal Realism

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**Abstract** This article argues that the courts, not the Home Secretary, should be empowered to issue Terrorism Prevention and Investigation Measures (TPIMs). It explains that at the heart of the debate are three questions: whether measures like TPIMs should be viewed primarily from the perspective of security or liberty; how we should conceive the executive and the courts; and the empirical question of how these two arms of government answer these questions. The non-mechanistic nature of legal reasoning means that legal reasons may be constructed to fit one's normative viewpoint on each of the first two questions. Importantly, however, the case law on judicial scrutiny of control orders consistently demonstrates that the courts themselves regard TPIMs as being primarily a restriction on liberty, which require a fair hearing before an independent court. Whilst this does provide some protection of individual rights, the nature of law as an unfinished practice means that for stable protection of individual rights judicial independence must be promoted and nurtured in both the legal and political realms. The failure of the Terrorism Prevention and Investigation Measures Act 2011 to vest the power to issue TPIMs in the courts thus represents a missed opportunity to secure political endorsement of enhanced legal protection of individual liberty in cases involving national security.

**Keywords** TPIMs · Human rights · Liberty · Security · Legal realism · Normative duality

## Introduction

In the past decade political scandals have been a commonplace. In the UK recent years have seen the Leveson inquiry's examination of the relationship between politicians and the press, the parliamentary expenses scandal, the cash for influence and cash for honours scandals, the 2003 invasion of Iraq and accompanying Dodgy Dossier, the Hutton inquiry

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