THE CITIZEN AND THE STATE

Criminal Justice and Civil Liberties in Conflict

ANGUS NURSE

The Citizen and the State

Praise for *The Citizen and the State*

This is a timely, thought-provoking book which challenges us to re-evaluate our interpretations of justice, human rights, proportionality and the criminal justice system. Underpinned by critical thinking and rigorous scholarship throughout, this book is essential reading for anyone seeking a more nuanced understanding of the precarious balance between 'effective' justice policies and our civil liberties.

Neil Chakraborti, Professor in Criminology and Head of the School of Criminology, University of Leicester, UK

Angus Nurse provides an incredibly lucid and unswervingly critical analysis of the criminal justice system. Picking apart the underlying conflicts, inconsistencies and contradictions between the citizen and the state that emerge through the normal working practices of criminal justice processes, this book represents an important step toward understanding the complex intersection of human rights, justice and inequality. Through a range of assiduously selected examples, Nurse illustrates the power imbalances that characterise the legal landscape of contemporary society, in contexts as varied as the suppression of dissent, creative and sexual expression, and public enquiries. In a world where access to justice for the most vulnerable in society is becoming increasingly tenuous, *The Citizen and the State: Criminal Justice and Civil Liberties in Conflict* is essential reading for those interested in redefining *who* justice is for.

Oliver Smith, Associate Professor, School of Law, Criminology and Government, University of Plymouth, UK

Dr Angus Nurse has written extensively on a number of social issues such as human rights, environmental crime and green criminology. Prior to becoming an academic he had a professional background as an Ombudsman's Investigator and for a non-governmental organisation as a Wildlife Investigations Co-ordinator. He has brought this wide knowledge and experience together in a critical manuscript that deconstructs the questions of what and who the

criminal justice system is for? The work is accessible and is usefully underpinned with case examples. The conflict between civil liberties and criminal justice will deservedly appeal to a wide audience, beyond criminology and legal scholars.

Anthony Goodman, Professor of Criminology, Department of Criminology and Sociology, Middlesex University, UK

Dr Angus Nurse has written a concise, accessible and engaging introduction to the big ideas driving the debates around the criminal justice system. It is an exploration as to what we want and should expect from our justice system and the balance between upholding the rights of its citizens and delivering effective justice on the part of the state.

Jon Robins, Freelance Journalist, Lecturer and Editor of The Justice Gap and Proof, UK

A hallmark of Angus Nurse's scholarship has been discussing complex issues (such as animal harm and wildlife crime) in clear and accessible ways. In *The Citizen and the State*, Nurse tackles questions regarding the purpose and operation of criminal justice and the extent to which the balance between criminal justice and civil liberties is problematic. Nurse's elegant prose and thoughtful cases and examples – examined through the lenses of critical criminology and human rights – shed new light on the inherent conflict between the citizen and the state in a post-9/11 world. A timely and important book!

Avi Brisman, Associate Professor, School of Justice Studies, Eastern Kentucky University, USA

Angus Nurse is an outstanding socio-legal scholar, and this book crystallises his academic innovation and acumen with an inspiring and cutting-edge exegesis of the interrelated contradictions and complexities between state power, citizen freedoms and the administration of justice. The book is beautifully written, and it insightfully and lucidly unpacks key democratic concepts and relationships in an accessible and engaging way that makes a unique contribution to criminological discourses.

Reece Walters, Professor of Criminology, School of Humanities and Social Sciences, Deakin University, Australia

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Acronyms

CCRC	Criminal Cases Review Commission
CICA	Criminal Injuries Compensation Authority
CPS	Crown Prosecution Service
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOPC	Independent Office for Police Conduct
IPCC	Independent Police Complaints Commission
ILO	International Labour Organisation
NGO	Non-Governmental Organisation
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
VPS	Victim Personal Statement

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Preface

What (and more importantly, *who*) is criminal justice for? This question lies at the heart of this book which brings together a range of ideas from a more than decade-long of enquiry into the workings of criminal justice, criminal law, human rights law and the behaviour of actors and institutions that operate the 'criminal justice system'.

I say, 'criminal justice system' (in quotes) in part because this phrase is arguably open to interpretation and debate. The notion of there being an integrated 'system' that delivers effective justice is one that raises questions from a critical criminological perspective. The ideal for criminal justice is of a system that provides for, or at least facilitates, an objective enquiry into who has committed crime and then seeks to determine the facts of that crime and bring an offender to justice. Criminal justice arguably also serves the wider objectives of preventing crime, protecting the public and maintaining accepted, if not agreed upon, standards of law and order. Justice, carried out by the state on behalf of its citizens, should be fair and should be seen to be fair. It may be punitive in places, retributive in others but also at times be rehabilitative, considering the needs of victims of crime (in both narrow and wide perspective) and users of justice systems and participants in justice.

Dependent on political persuasion (and perhaps which newspapers one reads) an individual may believe that the 'rules' of criminal justice favour offenders who have too many rights within a system that prevents effective policing and prosecution. Alternatively, an individual may hold the view that alleged offenders have no rights within a system that has arguably eroded the right to silence, made the job of criminal defence lawyers harder and where policy and practice routinely interferes with the rights of individuals in a manner that raises concerns about civil liberties. At first glance this book may appear to sit firmly in the latter camp, but as you read through what follows in its various chapters I encourage all readers to look a little harder as the answer lies somewhere in between.

The objective in writing this book is to examine criminal justice through a human rights and critical criminology lens. While the core question of what criminal justice is for arguably has a simple answer, examining whether criminal justice is 'fair' or human rights compliant is considerably more complex. This is especially so in the post-9/11 world where various non-governmental organisations and commentators have raised questions about the extent to which justice has become increasingly retributive and civil liberties risk being undermined in order to pursue national security and policing objectives. Thus, human rights are sometimes

interfered with in order to pursue policing and national security goals leading to concerns over increased use of police powers and increased state surveillance of citizens, as well as concerns about the use of detention without trial which has been justified in some terrorism-related cases, some of which are discussed in this book. Elsewhere, state controls on and interference with freedom of expression and freedom of assembly identify that not only are citizens being increasingly policed where there are concerns about terrorism threats, the state arguably also seeks to exert greater controls over what citizens can say, which ideas they might be exposed to or wish to express, and over their rights to associate with others.

The majority of the intrusions in rights mentioned above are legal as long as they are carried out in accordance with the law and it can be demonstrated that they are *necessary* within a democratic society. Any action carried out must also be proportionate; that is, it represents the minimum interference necessary in our rights in order to provide for public protection, prevent crime or otherwise protect society's health or morals. Central to this book's discussion is an analysis of those issues of necessity and proportionality which are arguably becoming stretched as a result of the need to develop policing and criminal justice in response to contemporary terror threats.

As I say, these interferences with rights can be legal and frequently are. But the question this book raises is what happens when they are not. Research consistently shows that criminal justice processes are mainly targeted at marginalised and vulnerable groups including women, Black and Minority Ethnic (BME) and indigenous communities and those otherwise from the lower socio-economic strata of society. In addition to being the groups generally most likely to suffer from crime, they are also the groups most likely to suffer the effects of criminal justice policy and practice whilst also being least able to assert their rights and engage with redress mechanisms. As several of the examples in this book show, challenging the state's perspective is not easy. It requires tenacity, can engage detailed and complex discussions concerning how the law should apply, and in some cases can take years to achieve an outcome if indeed one can be achieved at all.

This book considers these issues from a critical criminological lens that argues for an alternative approach. Along the way, it examines a range of cases and examples that show how citizens wishing to challenge the state face an uphill battle although some successes have been achieved along the way. The examples and cases used in this book are primarily European ones, reflecting the reality that much of my work and the legal jurisdiction relevant to much of the cases and debates I engage with is one influenced by the European Convention on Human Rights (ECHR). The ECHR and the decisions of the European Court of Human Rights (ECtHR) provide a rich source of contemporary discussion on the interplay between criminal justice and human rights. Among other things, the ECHR provides a form of legal protection against state interferences with free speech and freedom of assembly, protection from inhuman and degrading treatment, state interference in private and family life and sets out a framework for fairness in criminal trials. All these issues (and some others) have been examined in cases where the state has allegedly overstepped the boundaries of its criminal justice powers and policies.

However, where possible I have also used cases and examples from other jurisdictions (frequently the US) that also illustrate some of the issues concerning state use of criminal justice powers and the might of the state brought to bear on individuals in a manner that infringes fundamental rights. Undoubtedly there are some omissions from the list of subjects, and I have no doubt that I have dealt with some subjects in more detail than others. This is not to suggest that some subjects are more important than others or that by omission I believe that some issues relating to rights are undeserving of consideration within this book. The selection of topics is a combination of choice and expediency and primarily reflects the cases and debates that have been brought to my attention and that have informed public policy discourse on human rights and criminal justice within the UK and Europe. Issues such as prisoner's rights, for example, have been hotly debated in the UK Parliament and the media as the UK government was repeatedly taken to court for its failure to reform what was originally a blanket ban on prisoners being allowed to vote. Accordingly, this is a subject of considerable interest in the UK and one that it would be difficult to ignore as I have developed this project. Other subjects reflect areas of personal interest and experience such as changing conceptions on freedom of expression and the way free speech has arguably been 'criminalised' in a post-9/11 world. While in one sense this may not seem to be a serious issue that directly affects most people's liberty, potentially this limits access to information and ideas for some of the most vulnerable and marginalised communities. Restrictions on free speech also have potential for suppressing dissent and alternative voices which is problematic from a variety of perspectives. The critical criminology focus of this book, therefore, almost demands inclusion of this topic as it is concerned with how one critiques the status quo and considers alternatives to the mainstream.

The selection of topics was also limited by space and inevitably I could not include everything I wanted to and made some harsh choices along the way. I have some personal favourite human rights texts that run to more than a 1000 pages and that are excellent course readers and research tools. But my aim (at least for this project) was to produce a reasonably accessible book rather than a detailed technical 'omnibus' text.

Angus Nurse
London, February 2020

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This book would not have been possible without the help, support and influence of several people to whom I owe a debt of thanks.

Firstly, Anne Dennett from the University of Lincoln whose administrative and public law module 'The Citizen and the State' helped inspired my long-running research enquiry into the interplay between administrative and structural conceptions on law and justice and on the relationship between citizens and state actors and institutions which ultimately influenced the title of this book. It was a pleasure to participate in this module. I would also like to thank Sam Poyser and Rebecca Milne, my collaborators in the miscarriages of justice project that has led to two books (so far). Sam and Rebecca's work on contemporary problems in criminal justice systems has influenced my thinking as we have worked through our analysis of systemic flaws in criminal justice processes and considered both how and why miscarriages of justice occur. We approach these issues from different perspectives, and it is always illuminating and educational to share comments and insights with two such excellent scholars. Thanks are also due to Jon Robbins, whose work with the Justice Gap and as an investigative journalist continues to shine a light on contemporary miscarriages of justice and reminds us that these are not confined to historical policing practices that have allegedly been resolved in the age of human rights. I also give thanks to the human rights and criminology students I have worked with at Birmingham City University, the University of Lincoln and at Middlesex University over the past 10 years. Many of the questions raised in our classroom discussions and in their excellent work have inspired the examination that has found its way into this book.

Last but by no means least, thanks are due to Jules Willan for her boundless enthusiasm for all things critical criminology and for encouraging me to write this book, something I had been mulling over for some time.

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Chapter 1

The Citizen and the State

The criminal justice system arguably represents an unprecedented exercise of state power upon its citizens. Within criminal justice processes, the state exercises powers to deprive citizens of their liberty, their possessions and in extreme cases their life (in those states that still retain a death penalty). The criminal justice apparatus also provides a mechanism through which the state can deploy powers of surveillance and intrusion into the lives of its citizens, impacting on private and family life sometimes with extreme consequences. Such powers are afforded to the state because arguably criminal justice is linked to the welfare state and notions of the state as provider and protector given that protecting citizens is one of the central roles of government. Breaking the (public) law infringes the social contract, causes social harm and thus invokes a state response. In truth, citizens expect (and at times demand) the state to punish offenders and to take action to ensure the safety and security of all citizens. Doing so may sometimes require interfering with individual liberties in the cause of the (greater) public good. Thus, criminal justice processes and imposing the punishment of the criminal law is considered necessary to censure those individuals who cause social harm and to provide punishment which both satisfies the public need for restitution and reassures the public of the state's ability to maintain law and order and provide for public protection. Criminal justice agencies acting on behalf of the state do this by prosecuting offenders and punishing them for their actions, usually through a system of fines and imprisonment (and in extreme cases, the death penalty) that reflect public disapproval of deviant behaviour. Thus, a criminal justice system exists that incorporates the police, the courts, the probation service, prisons and public prosecutors such as the Crown Prosecution Service [CPS], Procurator Fiscals (in England and Wales and Scotland respectively) and the network of district and state's attorneys in the US, as part of the criminal justice system. Supporting this is an entire apparatus of justice departments, such as the Home Office and Ministry of Justice in the UK and Department of Justice and local justice departments and federal law enforcement agencies in the US.

The key argument of this book is that there is an inherent conflict between the citizen and the state in respect of the operation of criminal justice. Zedner (2005) indicates the primary aspect of this conflict is in securing equilibrium between security and liberty, arguably indicating that a possible solution is a principled approach that 'relies upon the incorporation into domestic law of clearly

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enunciated rights, safeguarded through rules of procedure and evidence, and asserted where necessary by legal challenge through the courts' (2005: 508). In Zedner's view, structural and procedural safeguards against abuses of power exist through judicial oversight and defence of due process. However, a critical criminology viewpoint might contest the adequacy of these safeguards as legal challenge through the courts carries with it its own uncertainties. As this book argues, access to justice is not provided in a uniform manner to all citizens, and miscarriages of justice are arguably endemic to most justice systems (Cooper, 2014; Naughton, 2012; Poyser, Nurse, & Milne, 2018). Zedner (2005: 507) also recognises that 'post 9/11 the pursuit of security against international terrorism poses no small threat to the very liberties it purports to protect' and numerous other commentators acknowledge that the landscape of justice vs rights has changed remarkably since 9/11 and the renewed 'war on terror' (Ashworth, 2004; Moeckli, 2008; Wilson, 2005). Thus, reliance on procedural rights as a tool for protecting rights against unwarranted erosion is questionable if the intrusion on those rights targets not just those who are a tangible threat to liberty and security but also those from marginalised groups who are perceived as a threat and who may lack the tools and resources to deploy these legal challenges.

The manner in which the state exercises its criminal justice powers raises questions about the purpose of criminal justice and the extent to which justice processes are fair. International human rights mechanisms (such as the 'International Bill of Human Rights' discussed later in this chapter) generally set out the view that there should be no punitive sanction without due process. Specific provisions such as Article 6 of the European Convention on Human Rights (ECHR) set out detailed requirements for fairness (discussed later in this book) intended to ensure that a suspect in criminal proceedings is able to mount an *effective* defence. In principle, this would dictate that a suspect should not be disadvantaged through lack of resources and socio-legal status and that criminal procedural rules should so far as is possible create a level playing field between prosecution and defence. However, this chapter and the further discussions throughout the book identifies that rather than the object of the criminal justice system being to search for truth and justice; instead, criminal justice arguably represents the might of the state against the individual with the emphasis being on the suspect or defendant to disprove the state's case often against seemingly insurmountable odds. This introductory chapter sets up the core argument of the book that contemporary criminal justice systems arguably represent a problematic illustration of state power aimed toward vulnerable and disadvantaged members of society whilst doing little to address crimes of the powerful.

Constitutional Power and Criminal Justice

The basis of criminal justice powers lies in constitutional arrangements governing the exercise of punitive and sanctioning powers. Constitutional frameworks generally set out the structure and powers of government and the relationship between individuals and the State. In many states these are written into a codified

constitution that regulates the relations between the different parts of government and between the government and the people. Thus, the written constitution specifies the limits on executive power or at least defines the nature and scope of executive power such that reasonably clear rules can be ascertained from the constitutional documents. However, the unwritten nature of the UK's constitution means that state criminal justice powers derive not solely from statute but also from the legal prerogatives of the Crown, which the monarch possesses as an embodiment of the Crown[1]. Certain of these prerogative powers are, by convention, exercised on the advice of Her Ministers, for example the power to grant most honours, and *prerogative executive powers*, which are effectively devolved from the monarch to Her Ministers. The precise scope of the prerogative executive powers is uncertain: there is no authoritative list. Conventions exist on the exercise of prerogative executive powers but these remain uncodified. As a consequence of the unwritten nature of the constitution, it can sometimes be a matter of interpretation as to whether a particular power exists. One recent example of this concerns the UK's proposed exit from the European Union (EU) where a difference of opinion existed between the Executive and anti-Brexit campaigners as to whether the Prime Minister had legal power to take the UK out of the EU without the authorisation of Parliament. The matter was ultimately determined by the courts which sided with the anti-Brexit campaigners and concluded that Parliamentary approval was required.[2]

Stuntz (2006: 7) suggests that the constitutional approach to criminal justice 'is too punitive, discriminatory, and unconcerned with the interests of the criminal justice system's targets' and as a result, problems such as over-criminalisation, over-punishment, discriminatory policing and prosecution, overfunding of prison construction and underfunding of criminal justice institutions exist. The constitutional issues surrounding the exercise of criminal justice powers relate to discussions of Parliamentary sovereignty, the rule of law and the separation o powers (discussed

[1]The benefits of an unwritten constitution are that it is considered to be flexible and relatively easy to develop in the context of changed social circumstances. Barnett (2011: 13) suggests that 'the absence of a written constitution, allied to the doctrine of Parliamentary sovereignty, enables constitutional change to be brought about within the United Kingdom with the minimum of constitutional formality.' Accordingly, new legislation such as the UK's Human Rights Act 1998 can arguably amend the constitution and increase rights protection, whereas federal and unitary constitutions are arguably sovereign over government and legislature and restrict change. The UK's approach is broadly one of rights being provided for by legislation that develops within a constitution that develops in a pragmatic and gradual manner.

[2]*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC5. Anti-Brexit campaigners believed that changing the relationship between the UK and the EU via UK withdrawal from EU membership fundamentally changes the UK's constitution and would have the effect of nullifying various rights (such as free movement within the EU) that had been provided for by primary legislation. Arguably, by triggering Article 50 of the Lisbon Treaty and leaving the EU, the Government was changing law in contravention of the principle of Parliamentary sovereignty which states that only Parliament can make or unmake law.

further in Chapter 2). Dicey's three 'rules' of Parliamentary Sovereignty specify that: Parliament is competent to make any law; No Parliament may be bound by a predecessor or bind a successor; and No person or body is competent to override or set aside the legislation of Parliament (Dicey, 1982). Thus, implementing criminal justice policies into law is subject to gaining Parliamentary approval and Parliament has wide latitude to pass any criminal justice laws it sees fit, subject to the existing (and prevailing) constitutional principles. An independent judiciary, strengthened in the UK by the creation of the Supreme Court as a result of the Constitutional Reform Act 2005, is an essential part of scrutiny of criminal justice and of the state's exercise of its criminal justice powers. Similarly, in other states (e.g. the US) the courts can examine the lawfulness of government action, and where Supreme Courts exist these can impose far-reaching and binding decisions on the Executive. However, such scrutiny is dependent on the strength of the judiciary and their willingness to interpret the law in a manner that is rights compliant[3]. In a European context, the existence of the ECHR rights and its measures for protecting rights through national legislation enacting the ECHR serves as a mechanism for addressing the balance between human rights and the needs of criminal justice. However, as further discussion illustrates, a primary issue for consideration is the extent to which weighing conflicting priorities and perspectives can result in rights-compliant criminal justice processes.

Principles of Criminal Justice

Core aims of criminal justice are to provide security and public protection, to prevent crime and to bring offenders to justice. Assessing the administration of criminal justice arguably requires considering the extent to which there can be said to be a 'criminal justice system' as opposed to a range of disparate bodies that come together in the name of criminal justice. However, in one sense the term 'criminal justice system' is misleading, as it has become shorthand for a number of different elements within state justice practice, including the police and policing; the public prosecutors (e.g. the aforementioned district attorneys and prosecutors acting on behalf of the Crown); justice departments; courts and tribunals; the prison system and probation service; other elements.

Newburn describes the criminal justice system as 'that conglomeration of institutions and agencies which respond to – and on occasion attempt to prevent – crime' (1995: ix). In practice, the different elements operate as disparate, largely autonomous parts rather than as a co-ordinated system, although there is evidence that what happens in one part of the justice system can impact on another. For example, prison overcrowding may mean that judges are

[3]While Dicey comments specifically on the UK's constitutional arrangements, the notion that an elected law-making chamber should make the law rather than a President or the Executive is fundamental to the balance between citizen and the state and preventing abuses of power as discussed within this book. Dicey's conception also strongly supports the separation of powers concept and the necessity of a separate Executive, Legislature and Judicary with checks and balances built into the system.

encouraged not to send 'minor' offenders to prison but instead to use community sentences or fines. In addition, cuts in police or prison and probation service staff numbers may have an adverse effect on the way that these services are run, impacting negatively on, for example, the rehabilitative effects of prison and instead leading to a command and control approach to criminal justice that ultimately results in mass incarceration and the use of prisons primarily as holding facilities (Gottschalk, 2006; Simon, 2010, 2014). Changes to national law and order policies can also require the police to substantially alter their priorities and operational activities, in order to give effect to contemporary policy directives.

Arguably the overall purpose of criminal justice systems is to maintain public order through enforcing compliance with the law. This is achieved by detecting and prosecuting those who break the law and by bringing criminal offenders to justice through a system of penalties. Criminal law defines criminal offences as those actions that are dangerous or harmful to society as a whole; as such, prosecutions are brought by the state and generally not by an individual. To achieve this, a criminal justice system has been developed, which consists of:

- legislation which defines criminal activity via the public law;
- adjudication and enforcement by a range of policing and law enforcement bodies who detect crime and prosecute offenders;
- correction or punishment via the courts and other agencies.

The complexity of justice systems varies according to the jurisdiction and can be influenced by a range of practical, political and ideological considerations given that the administration of justice reflects the political culture of a nation (Dammer & Albanese, 2014: 6). However, Global North criminal justice is arguably influenced by the law enforcement perspective which relies heavily on detection, apprehension and punishment and which in practice is primarily about detection and punishment *after* crime has occurred rather than about crime prevention despite frequent political rhetoric to the contrary. Faulkner (2010) describes how Prime Minister Tony Blair saw the criminal justice system as being unfit for purpose, unable to protect the public, and in need of urgent reform. Collins (2010) also argues that:

> The criminal justice system in England and Wales is in crisis. The cost of the system has grown dramatically in recent years, yet prisons are dangerously overcrowded, the public's confidence in the system is low, and reoffending rates remain high. A fresh approach to criminal justice policy is long overdue. (2010:1)

Although the general aim of criminal justice policies may be to reduce crime and make society a safer place, individual criminal justice policies can have specific goals. Separate from the goal of punishing offenders for behaviour that society considers unacceptable, criminal justice policies employed in mainstream criminal justice may have, as a secondary aim, any of the following motives:

- repressing deviation from the accepted norms in society;
- protecting society from wrongdoers;
- providing restitution for the wronged (including the environment);
- rehabilitating offenders to protect society by preventing future offences;
- retribution, revenge and 'just desserts';
- general (as opposed to individual) deterrence to keep the bulk of society law-abiding.

An effective criminal justice policy may have to combine several of these intentions to effectively address crime problems in society and prevent offending and reoffending. Criminal justice policies therefore need to range from those that target the individual offender to those that deal with minimising the opportunities for offences to be committed and attack the conditions that cause crime. However, Naughton (2011: 42) has argued that in practical terms, the presumption of innocence and burden of proof on the prosecution to prove its case has rendered suspects in criminal trials passive. Naughton suggests that this 'places pressure on, and directs the bulk of the resources to, the police and prosecution to chip away at the presumed innocent status and construct cases from only incriminating evidence that might obtain a conviction, rendering innocent victims vulnerable to wrongful convictions' (2011: 42). Arguably, the defence then becomes 'ineffectual' due to limitations in resources (Merchant, 2012; Naughton, 2011), and thus an important safeguard against miscarriages of justice (i.e. the robust defence) is neutralised when defence lawyers rely primarily on evidence and materials made available by the police and prosecution rather than conducting a wholly independent investigation (Poyser et al., 2018). Moeckli (2008: 7) identifies 'the image of balance' as portraying 'security as a given and measurable concept that is in natural opposition to reality' but questions the reality of this notion, suggesting instead that security is not a fixed value but a concept whose meaning is in dispute and that is arguably subject to different interpretations. Thus, security can arguably be considered as a social construction that varies according to place and time and according to political realities. Accordingly, in a post 9/11 world, one conception of security is that relating to terrorism threats and how justice agencies such as the police should operate to fulfill their obligations within the 'War on Terror' that identifies counter-terrorism as a core responsibility of policing agencies. This contemporary paradigm has also arguably shifted national security from a counter-terrorism responsibility carried out primarily by the security services to a shared responsibility of police and security agencies, if not an actual core responsibility of mainstream policing.

The Conflict between Civil Liberties and Criminal Justice

At the heart of this book's discussion are questions concerning the purpose and operation of criminal justice and the extent to which the balance between criminal justice and civil liberties is problematic. A normative human rights view holds that public authorities such as the police, the courts and prison services are

required not just to observe or have regard to human rights but are also required to positively uphold rights (Stone, 2010). Fenwick (2007) notes that the exercise of police powers such as arrest and detention represents invasion of personal liberty that can only be tolerated where such access is necessary in the interests of prevention and detection of crime, or for other limited reasons (discussed later in this chapter). Accordingly, 'the interest in personal liberty requires that such powers should be strictly regulated' (Fenwick, 2007: 1101). Thus, human rights laws generally provide for interference with some human rights for specified reasons; the general concession is that some rights can be interfered with for selected legitimate purposes including protection of the public, the prevention of crime, for national security purposes or for the protection of public health or morals. Interferences are considered permissible if carried out for one of these purposes, in accordance with law, where the interference can be considered 'necessary' and so long as any interference is proportionate and represents minimal interference. Later chapters of this book will discuss these issues in more detail and will examine cases where state interference in human rights has been challenged.

The Universal Declaration of Human Rights was adopted by the United Nations (UN) on 10 December 1948 and contains 30 articles that set out fundamental human rights that apply to all. Whilst the Declaration's articles are not by themselves legally binding,[4] they have arguably become part of customary international law due to their acceptance by nations. The Declaration's principles also provide the basis for subsequent human rights instruments and form a framework through which international human rights standards have been developed. Several articles of the Declaration are relevant to discussions of the tension between human rights and criminal justice and deal with substantive issues of criminal justice. Table 1.1 sets out the key articles and their relevance for criminal justice discourse.

In addition to the articles contained in Table 1.1, articles 19 and 20 relate to freedom of expression and freedom of assembly, setting out the principles that

[4]For example, the US Supreme Court in *Sosa v. Alvarez-Machain* (03-339) 542 U.S. 692 (2004) stated that customary international law did not automatically provide a means for a claimant to bring suit against the Government. Alvarez-Machain claimed that he was detained against his will when brought to the United States by a bounty hunter (Sosa acting as a US agent) and argued that his apprehension amounted to 'arbitrary arrest' within the meaning of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) and thus contravened international law. The Supreme Court stated at 542 U.S. 728 of its opinion, that: *Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing*. Thus, the Supreme Court concluded that while the Covenant binds the US as a matter of international law, it was ratified by the US in a manner that meant it did not by itself create obligations that were enforceable in the federal courts.

Table 1.1. The Universal Declaration of Human Rights, Core Criminal Justice Provisions.

Article	Text	Criminal Justice Considerations
Article 3	Everyone has the right to life, liberty and security of person	Protects against arbitrary state interference with the right to life and liberty, thus requiring justification for any interference with these rights. Restrictions on liberty (e.g. imprisonment) cannot be arbitrary (See also Articles 9 and 11)
Article 5	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment	Prohibits state use of torture, also applies to conditions of imprisonment and the nature of punishment for criminal offences
Article 6	Everyone has the right to recognition everywhere as a person before the law	Provides for legal recognition and application of the law to all citizens (e.g. preventing discrimination or marginalisation of vulnerable groups)
Article 7	All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination	Prohibition on discrimination in criminal justice matters as well as providing for equal access to and protection of the law. Discriminatory criminal justice practices arguably require remedy (see Article 8)
Article 8	Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law	Provides for access to justice and the provision of a remedy where fundamental rights are violated. Linked to this are ideas that the remedy must be *effective*, i.e. capable of repairing the harm or achieving some form of redress