

Discrimination for terrorism offence suspects



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Title: " The case for discriminatory treatment of persons suspected of terrorism offences- a research study to test the adequacy of the current procedural safeguards that are in place in the UK to protect terror suspects from abuses of due process and breaches of human rights legislation.

Abstract:

This paper provides a literature review of the latest research which has been conducted in the UK on the due process rights of terror suspects, with a view to determining (i) how susceptible such suspects are, in practice, to abuse of their legal rights by the Police, Security Services and Criminal Justice System; and, (ii) to what extent it is justified to introduce a framework of enhanced procedural protection to mitigate their inherent vulnerabilities.

The Structure of the Paper:

In chapter 1 of this paper, the concept, legal basis and legal nature of ' due process' will be examined. In particular, the author will examine the historical development of the legal principle, its nature as a procedural safeguard and its legal basis as a constitutional and/or human right.

In chapter 2 of this paper, the author will examine the criminal justice mechanisms in place to deal with terror suspects, from initial arrest to criminal prosecution, with a view to determining the extent to which terror suspects are (potentially) more vulnerable to the risks of procedural undue process, within the criminal justice system, than non-terror suspects.

In chapter 3 of this paper, the author will identify those risk factors which are unavoidable, such as the national security and other requirements for

evidential opacity and those which are historically reported but which have no direct relationship with the nature of the crime being investigated.

In chapter 4 of this paper, the author will critically evaluate the adequacy of the existing procedural safeguards which are in place to protect terror suspects from abuse of due process.

In chapter 5 of this paper, the author will (tentatively) propose a framework of enhanced procedural safeguards specifically designed to protect terror suspects from abuses of due process.

Initial Terminology:

“ Terror suspect”- A person who has been arrested on suspicion of being guilty of a criminal offence which pertains to terrorist activity.

“ Non-terror suspect”- A person who has been arrested on suspicion of being guilty of a criminal offence, unrelated to terrorism.

“ Due process”- Due process of law.

“ Undue process”- This phrase refers to an instance where due process has not been adhered to, i. e. ‘ an abuse of due process’.

In this chapter, the concept, legal basis and legal nature of ‘ due process’ will be examined. In particular, answers to the following questions will be provided:

1. What are the origins of ‘ due process’ in England and Wales?
2. What is ‘ due process’?

3. What are the philosophical and/or theoretical justifications for the existence of ‘ due process’?
4. What is the legal basis for the existence of ‘ due process’?
5. Can ‘ due process’ be regarded as being constitutional, at law? Why is this question relevant to the current debate?

1. What are the origins of ‘ due process’ in England and Wales?

It is beyond the scope of this paper to engage in an in-depth historical analysis of the development of the concept of due process. However, it is important that we glean an understanding of the age of the concept, so that we can appropriately contextualize its importance within the debates of this paper. For this reason, and out of interest, the author will provide a (very) brief summary of the origins of due process in England:

In the United Kingdom, the concept of due process has its origins in Chapter 9 of the Magna Carta of 1215 ^[1], which stated: “ No free man shall be taken or imprisoned or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or by the law of the land.”

Analysts have focussed on varying elements of this passage from which to derive the concept of due process. Galligan (2006) p171 provides a useful summary of the main analyses: “ The important part is the exception, especially the words ‘ by the law of the land’ (legem terrae). On first reading

it might seem that the significant words are ‘ judgement of his peers’, since they suggest a foundation for trial by jury. Jury trials, however are a long way into the future and have different origins. The more likely meaning of the expression ‘ judgement of his peers’ is the right of a noble to be judged by his equals, which in turn carries some suggestion of a fair trial. This certainly has procedural connotations, but the search for a fuller sense of due process is usually directed at the words ‘ the law of the land’... That idea is vague enough to support different meanings, and certainly it is not improbable to suggest, as some have, that it contains at least the kernel of due process.”

It is interesting to note that the phrase ‘ due process’ or, more correctly stated, ‘ due process of law’, was not coined until 1354, in King Edward III of England’s statutory rendition of the Magna Carta ^[2], which stated: “ No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law. ^[3] ” Let us now turn to consider what is meant by due process of the law.

2. What is ‘ due process’?

In the United Kingdom, ‘ due process’ refers to the procedural concept that any person, who is in a position where one or more of his or her protected interests are being deprived ^[4], is entitled to be treated fairly by the procedure of the law to ensure that the deprivation in question is justified. There are six broad aspects of procedural due process which are often cited: (1) Notice; (2) Hearing; (3) Impartiality; (4) Counsel; (5) Evidence; and, (6) Decision. Let us discuss each of these procedural requirements in turn:

(1) Notice

Under procedural due process, an individual is entitled to be given adequate notice of any prospective criminal law proceedings in which he or she will be summoned as a defendant. This is to give the defendant sufficient time to seek advice in regard to his or her available legal options.

(2) Hearing

Under this aspect of procedural due fairness, before the property or the liberty of an individual is deprived from him or her, he or she is entitled to demand a hearing at which his or her case will be heard and a decision reached in regard to whether the prospective deprivation is justified.

Galligan (1996) p349-350 provides a succinct description of the main virtues of upholding the 'hearing principle': "[A] virtue of the hearing principle is that it contributes to better decisions and actions, better that is, in the sense that the facts are decided accurately, the law applied properly, and any discretionary judgements reasonably made. This is so for a number of reasons. One is that the person whose situation is under scrutiny, whose past actions or present circumstances are in issue, will often be able to provide information about the situation which is not otherwise easily available...

Another reason is that the person affected by a decision may be able to raise other considerations, apart from purely factual matters, which help to shape the decision and perhaps, in that way, contribute to a better outcome."

(3) Impartiality

This aspect of procedural due process states that the tribunal of decision-makers in a legal hearing must be made up of persons who are wholly impartial towards the defendant, i. e. they must not have any predispositions

towards the defendant. The purpose of this procedural requirement is to ensure that any decisions reached by a hearing tribunal are based upon the facts at hand rather than any extraneous and/or irrelevant considerations. Where for example, a decision-maker has had previous personal or business dealings with the defendant, then he or she should, in the interests of procedural due process, resign himself from the hearing of that defendant's case, as he cannot be considered impartial. There are many other examples of circumstances under which a decision-maker might not be deemed impartial, but the general rule is that the impartiality of a decision-maker who is pre-disposed towards a defendant prior to the criminal hearing being held must be considered compromised.

(4) Counsel

Under the doctrine of procedural due process, a defendant is entitled to be given free access to legal representation if he or she is unable to afford or unwilling to provide his or her own representation. The rationale for this aspect of procedural due process is self-evident: It would be grossly unfair to allow a defendant's property or liberty to be deprived from him or her without being able to present his or her defence in its best light and most effective legal form- without legal representation it is likely that a defendant will be unable to meet this requirement of fairness.

(5) Evidence

In order to ensure that a defendant is able to present the most effective case at a criminal hearing, it is not only imperative that he or she has access to all of the evidence that the prosecution will be seeking to rely upon but also imperative that he or she or his or her legal representatives are given an

opportunity to conduct their own investigations to acquire evidence which will assist the case for the defence. For one example, a defendant may wish to instruct the services of an expert witness to refute the accuracy of DNA tests which were conducted by the police on behalf of the prosecuting authority. An eloquent summary of this procedural requirement has been provided by the Pennsylvania General Assembly (2006) p45: “ Especially in cases where a decision rests on questions of fact, it may be necessary to provide an individual not only with the ability to confront and cross-examine adverse witnesses, but also the opportunity for discovery, i. e., investigation and accumulating evidence, in order to give him or her a chance to show that the facts upon which the proposed deprivation is based are untrue.”

(6) Decision

This aspect of procedural due process demands that upon reaching a decision which adversely affects a defendant, for example a decision depriving him or her of his or her property and/or liberty, the decision-making body must not only provide the reasoning for their decision (the *ratio descendi*) but must identify which pieces of evidence they relied upon to reach their final conclusions.

3. What are the philosophical and/or theoretical justifications for the existence of ‘ due process’?

The importance of the existence of consistent procedures to any legal system cannot be underestimated. As Galligan (1996) p5 notes: “ Without procedures, law and legal institutions would fail in their purposes. And since law is both necessary and desirable in achieving social goals, procedures are also necessary and must be seen as equal partners in that enterprise. For

whatever the context, whether the judicial trial, the administrative decision, or any other form of legal process, procedures are necessary to ensure that the issue is channelled to its right conclusion. Whether the object is to apply a legal standard to the facts, to exercise discretion according to the correct matters, or to settle a dispute by bringing the parties together, procedures have a vital part to play." Let us explore some of these contentions in more detail.

One of the fundamental theoretical bases for the insistence of maintaining due process within a legal system is the ' Rule of Law'. While it is beyond the scope of this paper to engage with the multitude of different definitions and propositions which have been promulgated under the umbrella of this phrase, it should be noted that one of the basic (and universal) tenets of the Rule of Law is that individual freedoms and liberties should be protected from the State's abuse of its constitutional powers. As Urabe (1990) p61 notes: "[T]he core of the Rule of Law, which has been supported consistently as a fundamental principle of the English and American constitutions, is that governmental power be bound strictly by law in order to protect individual freedom or liberty. The law exists to protect individual rights and liberties both in substance and procedure."

Lon Fuller's understanding of the Rule of Law provides some further insight into the theoretical justifications for due process. As Raitio (1003) p143 notes: " Fuller required that laws should be prospective in application, they should be published and they should comprise clear general rules, which are neither too individualized nor too general and vague. There should be reasonable constancy and consistency among laws, i. e. laws should not be

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changing all the time, they must not contradict each other and they must not require citizen's to do the impossible. The conduct of legal officials has to be congruent with the laws, as laid down, which in turn requires that the officials owe the same respect to the same laws as the citizens. ^[5] " On this basis, one of the fundamental justifications for the existence of due process is to ensure legal certainty in the way that the procedure of the law is applied and followed. By ensuring that procedure remains consistent, not only can individuals be more certain that they are receiving a fair trial, for example, but they will be more aware when their rights are being infringed, and can take the necessary remedial actions, accordingly.

Before we move on to examine the various legal bases for modern due process, a few words should be said about the concept of ' fairness' and why it is important to ensure that the law is applied via *fair* procedures. While the answer to this question cannot seem anything other than intuitive, it is nevertheless important to break the question down and answer it from a jurisprudential point of view- after all, if we cannot support this fundamental assumption through reason and logic, then it will be difficult later in this paper to support the introduction of a discriminatory framework of enhanced legal protection for terror suspects on the basis that the current regime is, in places, ' unfair'.

Embedded within the concept of fairness is the concept of justice. It is beyond the scope of this paper to engage with the full range of conceptualizations of ' justice' that have been promoted by the various authors in this field. However, it should be noted that present in every

conceptualization of justice are the concepts of ‘ guilty’ and ‘ not-guilty’, and it is with these concepts that this author would like now to engage.

As we have seen throughout this section, one of the main aims of due process is to ensure that an individual who’s property or liberty is under threat (as a result of legal action being brought against him), is able to have access to all the resources he requires to be able to present his defence to a fair and impartial tribunal, who will make a decision based upon the evidence presented and the relevant applicable laws. One might be forgiven for thinking that the only aim of due process in this context is to protect the individual. However, this is not the case: It is in the interests of society as a whole, and citizens as a collective, that justice be achieved in each and every case. If the law is seen as being applied within a forum which is unjust, then citizens (as a group) will lose respect for the law, and may engage in criminal activities which otherwise they may have desisted from.

In order to maintain the public respect for the law, it is important that public scandals involving abuses of due process are kept to a minimum, and the best way to avoid such scandals is to try and ensure that instances of such abuse are kept to a minimum ^[6]. In light of the fact that property and liberty are held as being of such high value within our society, it is also important to ensure that these are only taken away from a defendant where there is no reasonable doubt that the criminal justice system is justified in so depriving that person. As Sir William Blackstone famously stated in 1765: “ It is better to let ten guilty men go free than to punish one innocent man”. It is for this reason that the burden of proof in criminal law proceedings has been set so high, and also why the principle of *homo praesumitur bonus donec probetur*
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malus ^[7] has been referred to as the ‘golden thread’ of the criminal law: “Throughout the web of the English criminal law one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. ^[8]”

Stevens (2006) summarizes this debate and the benefits of the current position in the following terms: “Which is fairer, (a) a system of rules so strict that even a few innocent people get unfairly punished; or, (b) a system not so strict that even a few guilty people go unfairly unpunished? Due process of law holds that the second answer is more correct, for many reasons. On a practical level, there’s less of a danger to the whole legal system. If your system is convicting a few innocent, chances are it’s railroading many of the guilty, so you’ve got two problems on your hands — those who are falsely imprisoned and those who have a stronger habeas corpus claim. If your system is letting a few guilty slip through, chances are that those lucky evil-doers might change their ways, or in any case, law enforcement or informal methods of social control can pick up the slack.”

While this argument has instant intuitive appeal, it must be noted that the enquiries involved in reaching, for example, Blackstone’s ratio, require no investigation into the nature of the crimes that the ‘guilty’ have been unfairly acquitted of. If, for example, the 10 criminals are guilty of conspiracy to commit mass genocide and also possess deep faith-based motivations which are unlikely to be quashed by a ‘lucky escape’, then is it really justifiable to acquit these criminals in favour of protecting the property

and/or liberty of one innocent person? This debate strikes at the very heart of the matter with which this paper is primarily concerned; namely, whether or not it is fair to allow the due process rights of terror suspects to be abused and whether or not special measures ought to be introduced to protect these individuals, who (it must be remembered) have yet to be found guilty by a fair and impartial Court of law of any criminal law offences.

Let us reserve judgement on these difficult questions until later in this paper, when we have had a chance to fully examine the risks that terror suspects face at the hands of the State, and the risks that the State potentially faces at the hands of terror suspects.

4. What is the legal basis for the existence of ‘ due process’?

The legal sources for procedural due process are various. Some are specific, in that they prescribe a certain procedure to be applied within a certain set of circumstances ^[9]; and, some are general, in that they provide what might be described as broad yet fundamental human rights.

Let us commence with an examination of one of the most commonly cited legal sources for a general right to due process; namely, Article 6 of the European Convention on Human Rights, as enshrined into UK law by the Human Rights Act 1998.

Article 6 of the European Convention on Human Rights purports to provide the human right to a ‘ fair trial’. In order to understand the scope and limits of this right, let us commence with an examination of the wording of this Article. Article 6 states:

“ 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

The words and phrases which have been highlighted above represent those elements of Article 6 which provide a legal basis for one or more aspects of procedural due process. The majority of these have been discussed in detail earlier in this Chapter: For example, the right to notice ^[10], the right to a

hearing ^[11], the right to an impartial tribunal ^[12], the right to counsel ^[13], the right to examine the evidence against him and perform his own investigations ^[14], the right to hear the *ratio descendi* of the decision handed down against him ^[15] and the right to enjoy the benefits of the doctrine of *homo praesumitur bonus donec probetur malus* ^[16].

As we can see, Article 6 provides a general legal basis for each of the aspects of procedural due process which we have identified earlier in this paper. That having been said, this is not the only legal source which provides such a basis. For example, many provisions of the Police and Criminal Evidence Act 1984 provide similar rules of due process ^[17].

It should also be noted that there are common law sources for some of the rights of due process. For example, there is a common law right to silence which is derived from the principle of *homo praesumitur bonus donec probetur malus* – if a person is innocent until proven guilty and there is insufficient evidence to satisfy the criminal law burden of proof requirements, then it is unacceptable to insist that a defendant incriminates himself or faces a criminal law penalty. This right still exists in English common law, but has been somewhat compromised by the enactment of the Criminal Justice and Public Order Act 1994 which now allows prosecutors to infer meaning from a defendant's silence. This legal development has been heavily criticized by authors such as Hammerton (2001), who notes: “ An innocent defendant may fail to answer questions in custody or refuse to testify in court for all sorts of reasons. They may regard the police as corrupt and that answering the questions would give the police information that can

be used against them. They may believe that if they answer the questions, they or someone they care about might be put in danger from the people who did commit the crime. In short drawing inferences from a defendant's silence in custody or in court involves speculation on the motives behind their silence, not solid reasoning that their silence indicates guilt."

5. Can 'due process' be regarded as being constitutional, at law?

The reason that this enquiry has been included within this chapter is to determine to what extent it is legally valid to allow due process to be circumvented via legislation. After all, if it is possible to argue that due process is a fundamental constitutional right, then unless the legislation which provides the legal basis for that right is repealed or modified, then it may be possible to argue that any conflicting non-constitutional legislative provisions are unenforceable.

As we have seen in the preceding section of this chapter, one of the legal bases for the right for criminal suspects to enjoy 'due process' is Article 6 of the European Convention on Human Rights. This article has been incorporated into UK law by the Human Rights Act 1998.

Section 3(1) of this Act states: (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Therefore, where a piece of legislation purports to allow a criminal suspect/defendant's due process rights to be circumvented or abused, if a Court of law is able to reinterpret that legislation in a way which does not lead to the infringement

of that right, then it must do so ^[18]. However, where that legislation cannot be so reinterpreted, the only remedy available to a Court of Law is the ability to be able to issue a ‘ declaration of incompatibility’ under section 4 of the 1998 Act which states, inter alia: “(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility... (4) If the court is satisfied— (a) that the provision is incompatible with a Convention right, and (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility...”

However, this remedy is really a wolf in sheep’s clothing, because section 4(6) of the Human Rights Act 1998 makes it very clear that “...a declaration of incompatibility... (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.” This means that a criminal defendant who has had his due process rights abused by the state, in pursuance of legislation which purports to allow that particular abuse, has no form of redress in the domestic Courts, because even if a declaration of incompatibility is granted, it ‘...does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given [and, it]... is not binding on the parties to the proceedings in which it is made’.

Additionally, a declaration of incompatibility does not place any pressing duty on the Government to re-write the offending legislative provision, so such a declaration will not even ensure that the abuse in question is not repeated in regard to other criminal suspects/ defendants. That having been

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said the Legislative is usually prompt at remedying legislative provisions which have been declared incompatible. For example in the case of R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & The Secretary of the State for Health CA [March 2001] EWCA Civ 415 it was held that section 2 of the Mental Health Act 1983 is incompatible with Article 5(4) of the European Convention on Human Rights because it does not require a Mental Health Review Tribunal to discharge a patient where it could not be proven that the detainees mental health warranted detention. The offending provision was repealed in November of that same year by enacting the Mental Health Act 1983 (Remedial Order) 2001.

In regard to those legal sources discussed earlier which also provide for certain due process rights, because these sources are not contained within the Human Rights Act, but rather within the common law and primary non-constitutional legislation, these can be repealed or supplanted by the enactment of contrary primary legislation.

N. B. On a separate note: It will be remembered, the controversy which was caused in the United Kingdom when it was discovered that terror suspects were being held without charge in Belmarsh Prison for periods of up to 3 years ^[19]. The legal basis for holding prisoners in this way was provided by section 23 of the Anti-terrorism, Crime and Security Act 2001. However, in 2005 ^[20], this section of legislation was held to be incompatible with Article 5 of the Human Rights Act 1998 and the European Convention on Human Rights ^[21]. These prisoners were subsequently released, their detentions

being replaced with Control Orders. In light of the fact that terror suspects no longer face a significant threat from section 23 of the Anti-terrorism, Crime and Security Act 2001, the author of this paper has decided to exclude all further discussion of this source of abuse of due process. While there remains an argument that the imposition of Control Orders on terror suspects also infringe their Article 5 human rights, the author has chosen to exclude discussion of this debate from this paper as this paper is more concerned with abuses of due process suffered while being detained, both pre- and post-charge.

In this chapter, we will perform a structures literature review in order to glean a deeper insight into the way that terror suspects in the UK are actually treated by the criminal justice system. From our secondary analysis of case studies, interviews and anecdotal evidence, we will seek to provide an answer to the following question: To what extent are terror suspects more vulnerable to the risk of procedural undue process, within the criminal justice system, than non-terror suspects.

In this Chapter we will refrain from engaging with an analysis of the framework of provisions which have been introduced, primarily under the Terrorism Act 2000, to protect terror suspects from abuses of due process. While this analysis is very important, at this stage, such an analysis would only be able to reveal whether or not the current fram