

Course Plenary

Course Plenary: Lesson Plan

LEARNING OBJECTIVES:

- Understand that all people have human rights
- Understand broadly the potential conflict between measures designed to protect the public and individual human rights
- Understand why it is important to respect the rights of suspected criminals including suspected terrorists

LEARNING OUTCOMES:

- Be able to give examples of different scenarios where there is a potential conflict between measures to protect the public and individual rights, and be able to explain which rights are at risk of being infringed
- Be able to articulate arguments for and against particular public safety measures being used in different circumstances and be able to draw a reasoned conclusion on where the balance between implementing security measures and respecting personal liberties should lie
- Be able to explain the potential consequences of not respecting the rights of suspected criminals including suspected terrorists

SKILLS:

- Understanding unfamiliar points of view, debating conflicting points of view, constructing arguments, forming reasoned conclusions



5.1.1 Course Plenary - Instructions for teachers

bit.ly/evidenceandrights

Play the video on terrorism and human rights and ask students to take notes. After the video, lead a discussion on the themes explored in the interview. You may wish to give students the questions to think about while the video is playing, and you may need to play the video more than once depending on how advanced the class is. Questions are not simply factual and require students to form their own opinions and to be able to back these up with reasoning. Note that the background provided below, in answer to the questions, uses material from the video but also gives teachers wider background information around the subject so that discussion can be expanded beyond the video if appropriate to the class.



5.1.2 Course Plenary - Background for teachers

Using counter-terrorism measures in recent years as a backdrop, this activity deals with the potential conflict between government measures in trying to ensure public safety and preserving individual liberties to the greatest extent possible.

The government has a duty to ensure the security of its citizens, which includes taking measures that it considers necessary to protect the public from the threat of terrorism. In doing so, it may take measures that interfere with the rights of suspected or convicted terrorists.

Examples addressed in this activity include situations where aspects of fair trial rights, the right to privacy, and the right to physical liberty, among other rights, are at risk of being unduly compromised.

Questions and answers

In what circumstances might evidence be used against an individual in court that is not revealed to that individual? Which right is at risk of being infringed where an individual does not know the evidence that is being used against him/her?

In some particularly sensitive cases where a suspected terrorist is on trial in a civil case, the government has used evidence in the trial that the suspect is not made aware of, as to do so might mean revealing government secrets. This is called a Closed Material Procedure (CMP). The withheld information might include details of how the state has been observing a suspect, including what kinds of devices or surveillance agents they have been using. By failing to make evidence against an individual known to him or her, the right to a fair trial is at risk of being undermined.

This situation might not meet the requirements of an important fair trial principle, that of 'equality of arms'. This means that both parties to the proceedings enjoy an equal right to present their case. They should each know what case the other side is putting forward and what evidence is being used, in order that each side knows the nature of the case it will need to respond to. If the prosecution can make full use of certain evidence that the defence doesn't know about and therefore cannot prepare for, the circumstances of each side will not be equal.

It should be noted that the use of these CMPs is confined almost exclusively to civil cases, as it is recognised that in criminal trials, where ultimately the individual could be sentenced to jail, the protection of an individual's fair trial rights must be more robust.¹ However, this is not to say that consequences may not be serious in civil trials where the government may seek to deport the suspected terrorist or impose certain constraints on their movements.

In the video, David Anderson QC explains some of the mitigating measures that must be taken in situations where undisclosed evidence can be used against a suspected terrorist. Do you think these mitigating measures are sufficient to protect individual rights? What are the reasons for your answer?

The Justice and Security Act 2013 has extended the use of CMPs from the immigration and employment tribunals to civil cases on terrorism matters. CMPs are procedures where certain pieces of evidence being used against an individual are withheld from him or her.

Where CMPs are used, undisclosed evidence is presented to a security-cleared lawyer called a Special Advocate who represents the suspect and defends his or her interests. Critics question whether Special Advocates are able to defend the suspected terrorist's rights sufficiently, as they are not allowed to discuss the undisclosed evidence with the suspect, as a lawyer normally would. This means that the Special Advocate cannot ask the suspect questions that might yield information important to defending the case.

Parliament's Joint Committee on Human Rights has raised concern over the use of CMPs, arguing that such practice raises serious questions about the 'equality of arms' between the state and the individual accused. The Joint Committee has also highlighted the fact that there are often delays in disclosing the evidence to the Special Advocate, thus limiting the amount of time that the advocate can consider it. Where a defendant does not have adequate means to present his or her side of the case, not only do fair trial rights risk being breached, there is also the risk of serious errors taking place in court, leading to miscarriages of justice. These factors are unlikely to fulfil the procedural fairness demanded by Article 6 of the European Convention on Human Rights.

Do you think it is justifiable that individuals may be held without charge for a longer period where terrorism is suspected?

An individual suspected of a crime may be held in custody for up to 24 hours without being charged. When an individual is suspected of a serious crime, such as murder, the police may seek judicial approval to detain the individual for up to 36 or 96 hours. However, when an individual is suspected of terrorism, she/he can be held in detention for up to 14 days without being charged. Some consider that the justification behind detaining suspected terrorists for longer is that terrorism is a crime unlike any other and that the horror that terrorism evokes in a population is of a different order and magnitude to other violent crime. Others do not consider it to be unlike any other murder or violent crime where there is a different motive.

Those who feel that being held without charge for long periods is unjustifiable highlight the fact that most of the people detained are never charged. This means that a high proportion of individuals detained have been deprived of their physical liberty without having done anything wrong. The question is whether detaining these individuals is justifiable to find the few who may have committed a crime.

Which factors do you think police may and may not take into account when carrying out ordinary 'stop and search' operations on the street?

Under the current law, when exercising their powers of stop and search, the police must have good reasons for doing so. They must have reasonable grounds of suspicion that the person is in possession of prohibited objects or substances, such as guns or drugs. The suspicion has to be reasonable meaning that it usually has to be based on accurate and current information or intelligence. Such information or intelligence could be, for example, a phone call made to the police by someone reporting that an individual in a certain area is in possession of a gun.

Factors such as heritage, race or appearance cannot be taken into account in a decision whether to stop and search someone on the street. The law was recently changed to try to make sure that irrelevant factors do not play a part in a decision to stop and search, as statistics showed that ethnic minorities were being disproportionately targeted by the police.

When is surveillance used and what sorts of measures might be taken in carrying out surveillance? In what circumstances do you think the use of surveillance is acceptable and when is it not acceptable?

The police and intelligence agencies use surveillance to detect and prevent crime. It is principally used in very serious crimes such as terrorism, child sexual exploitation and kidnapping. Examples of surveillance could include attaching a recording device on the walls of houses, or placing wiretaps on telephones to monitor conversations. The Investigatory Powers Act 2016² allows the police and intelligence services to gather and share private data in bulk in certain circumstances, including, for example, communications data collected by telecommunication companies.

The stated aim behind these powers of bulk data collection is for the authorities to be able to keep up to date with the latest security threats posed by known individuals and so that new threats can be identified. Policy-makers behind the new legislation seek to reassure the public that the police and intelligence services are not given free rein by the Act and that data collection requires authorisation by the Judicial Commissioner.

Critics are concerned that a very large number of individuals could be targeted under the Act, of which only a very small number will turn out to be threats of the sort that these far-reaching powers were given to identify. If this is the case, bulk collection of data could seem disproportionate as a measure to respond to serious crime.

Why do you think it is important that the rule of law and human rights should be protected in dealing with issues of terrorism and security?

All people have human rights because they are human beings and should have those rights protected, including suspected and convicted terrorists.

The seriousness of the harm done in terrorism cases often shocks the public and it is easy to forget that suspected terrorists are still entitled to their human rights and that it is the responsibility of state actors such as the police and intelligence services to observe this in the part they play in the administration of justice.

The fact that suspected terrorists may not turn out to be the perpetrators of a terrorist act is all the more reason that they must have a fair trial. An unfair trial may ultimately lead to the wrong outcome. Miscarriages of justice can be very detrimental to the confidence that the public have in law enforcement agencies and the criminal justice system more generally. If an individual has been found guilty of a crime then this should have been after a trial where the correct procedures were followed and the rights of the defendant were respected. Only in this way can a fair and just result be ensured.

David Anderson QC says that it is important for the state to uphold its moral high ground. If the state violates individual rights for example by torturing suspects

or depriving them of a fair procedure in trial, then it undermines the principles of fairness and justice that the state should stand for. It would seem to undermine the state's credibility if in purporting to bring human rights abusers to justice it did not respect the rights of suspects.

The state risks alienating the public, or particular groups, if it targets individuals illegitimately and thus abuses its power. For example, if certain minorities are systematically targeted or perceived to be targeted by the police this may put the public or particular groups within it out of sympathy with the aims of the police. This reduces their credibility which can in turn have an impact on their efficiency as enforcers of the law.

The more far-reaching the powers given to authorities, the stronger the safeguards needed in order to ensure that an appropriate balance is reached between the interests of security and safety on the one hand, and individual rights on the other.

Footnotes:

¹ However, where the public interest to withhold prosecution evidence overcomes the interests of justice to disclose it, information relied on by the prosecution can be kept secret from a defendant in very rare circumstances in criminal cases.

² <http://www.legislation.gov.uk/ukpga/2016/25/part/1/crossheading/overview-and-general-privacy-duties/enacted>

Course Plenary: Glossary

Article 6 of the European Convention on Human Rights: the article in the main European human rights treaty concerned with fair trial rights

Civil case: in civil cases an individual or organisation (the claimant) takes legal action against (sues) another individual or organisation (the defendant) for causing harm or breaching a duty towards the claimant. The court may order the defendant to compensate the claimant or to put right what the defendant has done wrong, but cannot order a custodial sentence (imprisonment).

Counter-terrorism measures: legal and administrative steps pursued by governments to prevent terrorism and to deal with suspected and convicted terrorists

Criminal case: in criminal cases individuals are being accused of a crime. The state prosecutes the accused individual(s) (the defendant(s)) in court. The court may order a range of measures including imprisonment (in the most serious cases) if the defendant is found guilty.

Equality of arms: an element of the right to fair trial that requires both the prosecution and defence in a criminal case (or claimant and defendant in a civil case) to have equal opportunities to present their cases

Green Paper: a document outlining the government's proposals on a specific matter, often to launch a consultation on the issue. This may eventually result in law being passed by Parliament on the issue.

Human rights: rights possessed by each person by virtue of being human. To protect these rights, governments have both negative obligations (that is, not doing certain things that unduly restrict liberties) and positive obligations (that is, taking positive measures to ensure that individual liberties are being respected by others). The entitlement to enjoy some of these rights and the scope of the obligations on governments to protect these rights in different situations are disputed by some countries.

Individual liberties: the freedoms that individuals enjoy

Miscarriages of justice: situations where the justice system does not reach the correct conclusion, for example where an innocent defendant is convicted

Parliament's Joint Committee on Human Rights: a parliamentary committee that scrutinises legislation for compliance with human rights standards, ensures that the government responds to human rights-related court judgments, and conducts its own inquiries into the observance of human rights in the UK. The committee comprises members of both the House of Commons and the House of Lords.

Perpetrator of an offence: someone who has committed an offence

Settlement: a situation where the defendant agrees to compensate the claimant in a civil case resulting in the case being resolved without going through full trial procedure.

Stop and search powers: powers given to the police to stop individuals and search them where they have reasonable grounds of suspicion that the individual is carrying prohibited items such as illegal drugs, weapons, stolen property or something which could be used to commit a crime (for example a crowbar). In limited circumstances, higher ranking police officers may stop

and search individuals in a particular area, even if they do not have a reasonable suspicion that the individual is carrying a prohibited item, if for example they suspect that serious violence is about to occur (or if it has already occurred) in that particular area.

Terrorism: the use (or threat of the use) of violence, particularly against civilians, and usually in pursuit of a political, social or religious objective.

The right to fair trial: the right to procedural fairness (and fairness in the content of the law) in a trial process in order to achieve a just outcome. Examples include the right to know what one is being accused of, the right to adequate legal representation and having the opportunity to present one's case. (Although there is often a focus on procedural fairness, logically, the content of the law being considered in a case must also be fair to reach a just outcome.)

The right to physical liberty: the right of individuals not to be physically restrained or confined without a legitimate reason. (A legitimate reason would include being imprisoned having been found guilty of a crime.) Detention or restrictions upon freedom of movement without charge risk violating the right to physical liberty if the measures go beyond what is necessary to protect the public.