Programme Module

Topic: Balancing National Security and Human Rights

Number of Participants: 20 – 30

Participant Level: Superior Court Judges or other relevant judicial officers

Teaching Level: A high level so that the judges are
• Sensitized to the complex issues of national security and human rights principles at stake
• Given the tools to allow them to balance those issues in their decision-making.

Leader/Panel: A high profile presenter; a Superior Court Judge; an expert on International Law

Objectives: At the end of this session, participants will be able to:

1. Define what is encompassed by National Security

2. List and explore ways in which new National security legislation and government policy affect existing constitutional/statutory/common law Human Rights

3. Identify the principles of International Law and list the ways in which national security measures may infringe basic human rights

4. Identify and apply the principles of International Law which are relevant in domestic cases involving National Security

5. Identify the role of the judge and the factors relevant to balancing National Security and Human Rights generally with particular reference to:
   (a) separation of powers
   (b) judicial activism
   (c) scope of remedies.

Measurable Self Evaluation Form:

Please use a number between 1 and 5 to rate the extent to which this objective was met
5 – Excellent; 4 – Very Good; 3 – Good; 2 – Average; 1 – Poor

1 See http://cjei.org/publications/Programme%20Modules/Environmental%20Law.doc.
# Teaching Plan – Timing for one day

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
<th>Content</th>
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</thead>
<tbody>
<tr>
<td>9.00- 9.15</td>
<td>Introduction to the session</td>
<td>Icebreaker and Introduction</td>
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<tr>
<td>9.15 – 9.45</td>
<td>The Role of a Supreme Court in a Democracy and the Fight against Terrorism</td>
<td>Feature interactive lecture by a presenter such as Barak J to cover not only the role of a judge but also the balancing of national security and human rights issues.</td>
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<tr>
<td>9.45 – 10.15</td>
<td>Plenary Discussion</td>
<td>General discussion including question and answer with presenter.</td>
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<tr>
<td>10.15 – 10.30</td>
<td>Break</td>
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| 10.30 – 10.45 | What is meant by national security?           | A short film illustrating the situations giving rise to National security concerns-  
• Political insurgency  
• Gang/Organised crime  
• Union activism/Labour Strikes |
| 10.45 -11.45  | What is the domestic law on national security? | Domestic law to be substantially elicited from the group by superior court judge.  
Content to cover  
• new legislation;  
• current law (Constitution, existing legislation, common law human rights) and  
• government policy on National Security.  
In particular to:  
• Identify the national security issues covered by the new legislation  
• list of the effects of the |
• identify whether there is any conflict, uncertainty, ambiguity arising from the new legislation

Facilitator to use flip charts

<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
<th>Details</th>
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</table>
| 11.45 – 12.45 | What are the international instruments and norms relevant to national security? | Presentation by Facilitator/Expert in International Law for 15 minutes, using powerpoint  
Content to cover the Fundamental Freedoms such as:  
• Freedom of Speech  
• Freedom of Association  
• Right to Life and Security  
• Right to Privacy  
• Right to a Fair and Expeditious Trial  
• Minimum Standards of Prisoner Rights  
• Due Process of Law  
Followed by a half an hour group discussion with two hypothetical cases which raises the application of Bangalore Principles eg  
• lacuna or gap,  
• uncertainty or ambiguity  
15 minutes report back in plenary |
| 12.45 – 1.45 | Lunch |                                                                                                                                              |
| 1.45 – 2.00   | Procedural concerns which may arise in circumstances involving National Security. Issues | A film about a hypothetical man who is exposed to procedures which include for example  
• wiretapping  
• arrest  
• interrogation |
- extended custody without charge (“preventative detention”)
- no lawyer
- no communication with family
- subsequently charged but 2 years later still no trial

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<tr>
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<th>Description</th>
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<tr>
<td>2.00 – 2.30</td>
<td>Group discussion</td>
<td>Discussion about the content of the film in order to</td>
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<td>identify the human rights issues involved</td>
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<td>and list them with reference to the international instruments</td>
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<td>2.30 - 2.45</td>
<td>Plenary discussion</td>
<td>The Groups reports back with facilitation of the judge</td>
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<tr>
<td>2.45 – 3.30</td>
<td>Plenary Session</td>
<td>Additional discussion on the hypothetical film with facilitation by the judge</td>
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<td>to elicit responses on the following</td>
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<td>- to what extent should the judiciary be involved in the issues raised</td>
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<td></td>
<td></td>
<td>(judicial activism)</td>
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<td>- how can the judge balance the rights of stakeholders</td>
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<td>- what is the scope of the remedies</td>
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<td>Use of flip charts</td>
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<tr>
<td>3.30 – 3.45</td>
<td>Break</td>
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3.45 – 4.30
Wrap-Up

- Has the program covered the named objectives?
- Has the program covered your individual objectives?
- Evaluation sheets

**Teaching Tools**

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<thead>
<tr>
<th>Icebreaker</th>
<th>Flip Chart</th>
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<tbody>
<tr>
<td>Group discussions</td>
<td>Film of hypothetical procedure</td>
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<tr>
<td>Lecture</td>
<td>Hypotheticals for group discussion</td>
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<tr>
<td>Short lecturette</td>
<td>Short film</td>
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<tr>
<td>Facilitated general discussion</td>
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**Background Material**

National Legislation (eg)
- Constitution
- New Legislation on National Security
- Existing Legislation related to National Security

International Instruments
- The Declaration on Fundamental Human Rights
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social, and Cultural Rights
- The Convention on the Elimination of all forms of racial Discrimination
- The Vienna Convention on the Laws of Treaties(Articles 26 and 27)
- Bangalore Principles
- International Labour Organization Convention 87 Freedom of Association and Protection of the Rights to Organize.

Articles
- *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*
  Aharon Barrack – University of Miami Law Review
  October, 2003
- *Human Rights in a Global Village: Challenges of Privacy and National Security*
  A. Wayne Mackay – National Journal of Constitutional Law
  June 2006.
- *Balancing State Security and Protection of Constitutional and Human Rights*
  Hon. Justice J.N. Mulenga – Remarks from CJEI Biennial Meeting
  March, 2010
- *Balancing Human Rights and National Security Concerns: A Reality Check*
  Hon. Justice Simon Noel – Speech
  January, 2006
• Canada’s Supreme Court Rules on Human Rights v. Security
  Samuel G. McTyre – Immigration News
  January, 2002

• Security: An Inventory of Agency Considerations – Executive Summary
  Canadian Human Rights Commission
  June, 2008


“Can a terrorist get a fair trial?” “Ondelette” Sunday August 2, 2009 5:59 pm

“Human Rights, Terrorism and Counter-terrorism” by Office of the United Nations, High Commissioner for Human Rights mainly

“The Right to Fair Trial and Ajmal Kasab” by Nandita Haksar.

“Is it really necessary to sacrifice fair trial standards to prosecute terrorism?” by David Weissbrodt Professor of Law, University of Minnesota

“A Legal Framework for Detaining Terrorists: Enact a Law to End the Clash over Rights” by Benjamin Wittes and Mark Gitenstein.

“Terrorism Pre-Charge Detention Comparative Law Study” by Jago Russell

Bibliography of Cases Attached
ATTACHMENT

BIBLIOGRAPHY OF CASES

National Security Cases

- People’s Union of Civil Liberties (PUCL) vs. Union of India (UOI) and Anr. AIR1997SC568, December 18, 2006
- Canada (Prime Minister) vs. Khadr 2010 SCC 3, January 29, 2010
- Permanent Secretary Ministry of Fine Affairs, Patrick Manning, Prime Minister of the Republic of Trinidad and Tobago vs. Feroza Ramjohn Civil Appeal No. 71 of 2007 Republic of Trinidad and Tobago Court of Appeal July 8, 2009
- Kartar Singh v. State of Punjab 1994 (3) SCC 569
- State of Maharashtra v Mohd. Ajmal Amir Kasab Session case no. 175/2009
- Peoples Union for Civil Liberties and Anr. v Union of India AIR 2004 SC 456
- Modi Ram & Lala v State of M.P AIR 1972 SC 2438
- State v Mohd. Afzal 2003 VII AD (Delhi) I
- State v Mohd. Arif Criminal Appeal No. 273 & 504
- D.K. Basu Vs. State of West Bengal AIR 1997 SC 610
- Machhi Singh Vs. State of Punjab 1983 AIR 957
- Bachaan Singh vs State of Punjab 1971 AIR 2164
- Totani and Another v State of South Australia (2009) SASR 245
- K-Generation Pty Ltd. Liquor Licensing Court and Another 237 CLR 501

Application of International Law in Domestic Law

- Minister for Immigration and Ethnic Affairs v. Teoh (1994) 128 ALR 353
- Tavita v Minister of Immigration [1994] 2 NZLR 257
- Baker v The Minister of Citizenship and Immigration [1999] 2 SCR 817
- Van Gorkman v Attorney General and Another [1977] 1 NZLR 353
- Australia Qantas Airways Limited v Christie [1998] HCA18 (ambiguity)
- Sarah Diau v Botswana Building Society 19 December 2003 No.IC 50/2003 (gap)
- Vishaka & Others v The State of Rajasthan & Others 13 August 1997 (gap)