ESRC SEMINAR SERIES: The Role of Civil Society in the Management of National Security in a Democracy

Seminar Three: The Proper Role of the Judiciary
24 January 2006

The current national and even global environment of fear has given rise to serious concerns about national security within the United Kingdom. These anxieties create tension points between democracy, civil rights, human rights and the rule of law. As various sectors of civil society have responded to the issues raised, it has become clear that each sector is speaking with different interests and from particular perspectives. None of these sectors, whether it be government, the legal profession or NGOs, is seeking sufficiently to understand each other's perspectives. It is with this in mind that a six-part, ESRC-funded series on The Role of Civil Society in the Management of National Security in a Democracy has been established. The goal of these seminars is to facilitate a dialogue between Government and civil society. The third seminar, held on 24 January 2006, focused on the proper role of the judiciary in the management of national security in a democracy. More than two dozen individuals including members of the judiciary, and other interested parties considered various issues, including the extent to which the judiciary should have input into the legislative process in this field, the appropriateness of public expression of views by the judiciary upon legislative proposals, and the correct approach to the interpretation and application of the law.

1. The engagement of the judicial branch in public affairs;

a. Judicial involvement in formulation of counter-terrorism legislation

The response to terrorism and other national security issues frequently entails the introduction of new legislation. If members of the judiciary are to work within the rule of law, they are bound to consider the role that they should discharge during the legislative process. Members of the panel debated the extent to which it was appropriate for both existing and former members of the judiciary to seek to influence new legislation within this field, together with the potential impact that this might have.

Panel members confirmed that it is not current practice for the serving judiciary directly to adopt collective positions on legislative proposals in the counter-terrorism field, although it was acknowledged that informal discussions between the executive and the judiciary did occasionally take place. These discussions were confined to the workability and not the substantive merits of proposed legislation and policy. There had for example been some discussion between the executive and the judiciary during the early stages of policy formulation in relation to the Special Immigration Appeals Commission. Another

panel member suggested that although the direct involvement of the judiciary in policy and law formulation was limited, the judiciary indirectly exerted significant influence upon new legislation by transmitting a culture that fuses human rights and the Constitution, from the House of Lords, into society.

Those present agreed that there would be inherent practical difficulties in adopting common positions on proposed counter-terror measures given the existence of a diverse range of views amongst the judiciary itself. It was agreed that there are presently no appropriate mechanisms through which a collective view of the judiciary could be formed and communicated. The Judges' Council would be unsuitable for this task as it is undemocratic, hierarchical, and has no mandate to bind the judiciary as a whole. The possibility of the Judicial Office for England and Wales developing a policy function of this kind was briefly discussed. Panel members with experience on the government side stated that it was not envisaged that the Office should develop policy functions of this kind, and that they would be surprised if it were to move in this direction.

On the whole, panel members considered that it was both appropriate, and conducive to good law making, for the judiciary to have some input in relation to the introduction of 'process legislation' within this field, due to the unique expertise the judges possess by virtue of their situation within the legal system. Panel members with experience in government indicated that it was likely that colleagues in government would positively welcome greater dialogue with the judiciary on process legislation, but emphasized that this should be on a private basis only. Examples of potential matters on which involvement could be sought are on how currently inadmissible evidence, such as intercept evidence, or evidence withheld due to its sensitive nature, could be used in legal proceedings. It was acknowledged that there was presently no constitutional mechanism through which such dialogue could take place, and that it would be useful if one could be developed.

A sizeable number of panel members felt that expression of judicial views on substantive aspects of legislative proposals would be inappropriate, and could undermine the position of the judiciary as a whole. The role allotted to the judiciary under the Constitution, together that with the respect accorded to the democratic process, called for a non-interventionist approach, and also for the preservation of the judiciary's independence. A more interventionist approach could create problems of conflicts of interests in those cases where the expression of judicial opinion had taken place on legislative proposals in advance of court hearings and could also potentially violate Article 6 of the European Convention. One panel member considered that the need for judicial involvement of this kind was, in the past, required as a means of informing public debate. This need had subsided since the establishment of the Joint Parliamentary Committee on Human Rights, which now produced detailed and publicly accessible expert reports for this purpose. Another panel member felt that the position of the Constitution was presently fragile, and cautioned very strongly against extra judicial

activities altogether on the basis that such activities could lead to undesirable and permanent restructuring of the constitutional order.

In contrast to the above, other panel members felt that there may be some room for more extensive judicial involvement in the legislative process. An analogy was drawn by one panel member between the role of the judiciary and the police. The police force, like the judiciary, were once bound by similar rules and traditions. They had however been transformed into a major protagonist in the field of legislation within a relatively short period of time. Another panel member felt that there was scope for sporadic and carefully timed expression of judicial views upon legislation but failure to undertake such activities carefully could result in undermining the judiciary by exposing them to political attacks. It was acknowledged by another panel member that there was some public appetite for judicial discussion on legislative proposals as a means of informing public debate and that consideration needed to be given as to which areas could be isolated for this sort of input, and how, if at all, this could be achieved.

The public expression of views on legislative proposals by former, as opposed to existing members of the judiciary, was briefly commented upon by one member of the panel who expressed his uneasiness and embarrassment at such statements when they were expressed in a way that suggested that they were representative of the view of the judiciary as a whole. It was acknowledged however that former members of the judiciary are entitled to do this, and regardless of the merits of such action, little could be done to prevent its occurrence.

b. Judicial involvement in the design of counter-terror laws

Panel members identified the various functions that judicial involvement, both in the design and construction of counter-terrorism laws, could play – i.e. it could offer oversight and other essential safeguards by probing evidence and seeking justification of actions, but could also act a means through which to secure respectability and legitimacy to counter-terrorism proposals, thus facilitating the smoother passage of counter-terrorism legislation through parliament. One member identified the potential for process to be used to justify measures that could be at odds with civil libertarian principles, and suggested that the judiciary should, at the policy stage, consider the extent to which they would wish to be involved in such systems.

Panel members from Government departments accepted that judicial oversight enhanced the possibility of bills being passed by Parliament but also emphasized that such involvement was sought because of the confidence reposed in the judiciary to offer more effective oversight and accountability of Government action than other mechanisms might be able to achieve.

There was discussion as to whether it would be appropriate for the judiciary to involve itself in any new system of anti-terrorism law. The overwhelming view expressed by the panel was that the judiciary are under a legal and constitutional duty to apply the procedures enacted by parliament, and that it would be inappropriate to do anything other than apply rules and work within those systems enacted by parliament. A member of the judiciary confirmed that the extent to which the judiciary were able to refuse to participate in the system on grounds of principled objection was extremely limited, although it was always open to any member of the judiciary who felt strongly over the issue to resign.

Panel members spoke about special security clearance for judges to be able to undertake work in the national security field. Those who expressed views on this issue were overwhelmingly opposed to the idea, given the constitutional position that judges occupied. One panel member who had undertaken research into security-cleared judges dealing with surveillance warrant applications by the security services in Canada suggested that the system brought with it both advantages and disadvantages. The research demonstrated that applications sought by the security services had been granted on every occasion. It was also considered, however, that the security clearance measures seemed to have engendered discussion between judges that had begun to lead to the development of a common approach to such cases.

2. Detention and the House of Lords decision in *A v Secretary of State for the Home Department* [2004] UKHL 56, 16 December 2004. (the Belmarsh case)

The panel were split on the correctness of the ruling in the Belmarsh case, and on whether judicial authority had been exercised appropriately in that case.

Some panel members took the view that the Belmarsh judgment exemplified an inappropriate and counter-productive form of activism on the part of the judiciary. It was argued that the House of Lords judgment, in which their lordships found that Section 23 of the Anti-terrorism, Crime and Security Act 2001 (hereafter the 2001 Act) was disproportionate, discriminatory and a breach of the European Convention on Human Rights, had failed to recognise that Part IV of the 2001 Act was expressly enacted by Parliament as an exceptional, emergency measure designed to deal with exceptional circumstances. Furthermore, the ruling that powers of preventative detention were discriminatory against non-British nationals was criticised on the grounds that it failed to recognise that the whole constitutional order is founded upon exclusion, and that equal rights of citizens are the logical consequence of the denial of rights to other non-citizens. Another panel member expanded upon this critique, and expressed concern about the growing trend exemplified in this case for domestic courts to justify their decisions by reference to external international jurisprudence devoid of any democratic foundation.

More general criticisms focused on the counter-productivity of the 'activism' displayed by the judiciary. One panel member indicated that the judgment had led to the least desirable position whereby the Government had, in an attempt to comply with the judgment, normalised the exceptional measures contained in the 2001 Act, in the form of the Prevention of Terrorism Act 2005. This Act applies to a wider range of individuals than the 2001 Act, and contains within it a wider range of proportionate, graded penalties. Another panel member went on to caution against an activist approach by the judiciary, and called for the adoption of a more consequentialist approach. Without this, it was argued there was a risk that the whole system constructed under the Human Rights Act would be undermined, as the public would perceive the system as one which had no significance to them directly, but as a mechanism to protect the interest of less desirable elements in society only. Other panellists expressed concern at the manner in which questions of a political nature were increasingly being transmuted into legal questions under the Human Rights Act. Another panel member felt that this reflected parliament's circumstances, in that it no longer had the time to analyse, debate and consider such questions in detail, and for this reason sought, perhaps inadvertently, to delegate such tasks to the judiciary.

In response to the above critique, it was argued that the House of Lords judgment was a legally correct response to the issues that had been canvassed before it, and an entirely appropriate exercise of judicial authority and legal reasoning. It was pointed out that on the question of whether there was an emergency threatening the life of the nation, the majority of their lordships deferred to the view of parliament, as the view taken was that parliament was better placed to make the assessment. Although Lord Hoffman had held that there was no existing threat to the life of the nation, this was perfectly acceptable as he had simply defined the scope of the 'threat to the nation' under the relevant statute as entailing values of civil liberties as well as those on physical grounds. In relation to the discrimination point, it was highlighted by a panel member that the rights conferred under the European Convention are conferred to everyone within the jurisdiction, including non-nationals. Under the Convention if a non national is to be discriminated against and deprived of their of their liberty it must be established that that this is for a legitimate aim and that such action is proportionate under the Convention. In the Belmarsh case, the evidence before the judiciary established as a matter of fact, both at the time the legislation was enacted, and at the time that the matter came before the Court, that the threat from non-nationals was no greater than that arising from British nationals. It was on this basis that the House of Lords held that the measures were discriminatory, incompatible with the Human Rights Act and irrational. On the use of international law to justify domestic decisions, various panel members felt that it was both a positive and appropriate development that could be seen globally, and one that was likely to accelerate.

It was argued by various panellists that there was nothing constitutionally inappropriate about the Belmarsh judgment. Under the Human Rights Act the courts are expressly

empowered to decide the questions arising in this case, and to make declarations over the compatibility of measures with the Human Rights Act. The decision over what action, if any, should be taken to rectify the situation remained under the scheme of the Act a matter for Parliament. One panel member suggested that the declaration of incompatibility is tantamount to a strike down provision as the pressure on the Government to undertake action following a declaration of incompatibility was so great. Another panel member disagreed.

3. Torture and the case of *A v Secretary of State for the Home Department* (No. 2) [2005] UKHL 71 (hereafter A No.2)

Panel members expressing a view on the subject seemed to agree that the case of *A No. 2* was correct in principle, and endorsed the approach adopted by Lord Bingham which distinguished between the authorities taking action on the basis of torture evidence, and the authorities adducing torture evidence in court of law to justify compulsory intervention in peoples lives. Panel members briefly went on to discuss the use of diplomatic assurances. This is likely to come before the courts in the future. The panel agreed that the question of whether or not assurances could be deemed credible by the courts would ultimately turn on the evidence in each case, and on the effectiveness of the system in force to monitor such assurances.

4. Conclusion

No overall conclusion was reached on the proper role of the judiciary in the management of national security issues, nor was this the intention. Rather, a discussion was initiated in which actors from various fields were able to freely exchange views. Future seminars will focus on actors within other specific fields and their role in the current debate. The hope is that these seminars provide a forum where various points of views can be ventilated and in order that a dialogue can begin.