

# Balance, scrutiny and identity cards in the UK

Cheryl A Edwardes, Ian Hosein and Edgar A Whitley contend that the government's argument that ID cards are for the 'greater good' needs to be scrutinized and balanced against the needs of the individual.

Our often bruising experiences researching the introduction of the UK Identity Cards Act (see Whitley *et al.* 2007) has provided a unique insight into ongoing debates about political theory and the legislative process. In particular, our research into the identity cards scheme raises important questions about the relationship between balance and scrutiny which we explore in this article.

Writing in 1690, the political philosopher John Locke suggested that 'in well-ordered common-wealths, where the good of the whole is so considered ... the legislative power is put into the hands of divers persons ... [who] have by themselves ... a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care, that they make them for the public good' (Locke 1690). He was arguing that when government acts in the interests of 'the public good', effective mechanisms for independent scrutiny should be put in place to ensure that its powers are used with caution and consideration.

Notable philosophers since Locke have echoed these sentiments. Jean-Jacques Rousseau envisaged a legislator with a 'great soul' proposing laws conducive to the common good and believed purity of motive was only guaranteed if the adoption of the proposed laws depended upon the approval of those to be bound by them (Rousseau 1762). John Stuart Mill, considering representative government in 1861, paired a small body of crown-appointed men legislating for the common good with 'skilled labour and special study and experience', with a body publicly elected to "watch and control the government [and] throw the light of publicity on its acts" (Mill 1861).

Almost a century later, Karl Popper advocated the establishment of a group of social engineers mandated by a universal 'agreement about existing evils and the means of combating them' to 'incrementally improve society'. These engineers would have no need for the use of 'passion and violence in executing' their social reforms (Popper 1945).

These thinkers agree that political actions should be motivated by the common good and agree upon the necessity of ensuring that actions taken in the

name of the common good are just that, typically by some form of independent scrutiny. All, however, define the common good differently. Locke believes it is safety and physical well-being, for Rousseau it is liberty, Mill thinks it is happiness and Popper the eradication of social ills. The diversity of these interpretations and definitions of the 'common good' emphasises that the common good is a notion that can be easily adopted by governments as they justify their own political or ideological aims'.

## Identity cards and the common good

The build up to the introduction of identity cards in the UK has been focused on the common good. Concerns about civil liberties and older notions of British values and culture were set aside by government ministers, as they advanced the concept of the common good. On the day the Identity Cards Bill was given its second reading in Parliament, the then new Home Secretary, Charles Clarke, wrote passionately in the Times, saying:

'I claim that the ID Cards Bill that I am introducing today is a profoundly civil libertarian measure because it promotes the most fundamental civil liberty in our society, which is the right to live free from crime and fear' (Clarke 2004).

This view relies heavily upon communitarian philosophy and implicitly moves the debate from scrutiny to one of balance. Its leading thinker is Amitai Etzioni who, in his influential book, *The Limits of Privacy* (1999) argued that we must heed the needs of the many instead of over-emphasising the interests of the few.

'Although we cherish privacy in a free society, we also value other goods. (...) To begin a new dialogue about privacy, I [ask] if you would like to know whether the person entrusted with your child care is a convicted child molester. I further ask: Would you want to know whether the staff of a nursing home in which your mother now lives has criminal records that include abusing the elderly? (...) Addressing such concerns raises the question of if and when we are justified in implementing measures that diminish privacy in the service of the common good.'

In calling for 'balance' and the 'common good' politicians believe that their ideas are firmly

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founded in political theory and that they also have the benefit of a monopoly on the legislative process. Although such a position might imply that balance is distinct from scrutiny, even Etzioni recognised that any balancing scheme must be carefully regulated. As a result he qualifies the ‘balancing act’ and demands that the need for intervention be properly documented, that non-infringing alternatives be considered, the effect of any intervention is minimised and that undesirable side effects are properly managed.

In the case of the Identity Cards Scheme the Government has shown little restraint in its policy and technology design. For instance, the purpose of the Scheme continually shifted as the government moved from preventing benefit fraud, to tackling terrorism, then to preventing identity fraud, without ever fully understanding the nature of these problems to begin with. Moreover, the most invasive design was chosen: under the Scheme, all UK residents and citizens will be fingerprinted, and these fingerprints will be available for comparison with those left at scenes of crime (Blair 2007).

### Balance and Scrutiny?

Whilst the arguments for balance and the ‘common good’ run throughout the Scheme, questions of scrutiny are less clear. Indeed a policy process that resulted in a scheme of this sort leads us to doubt whether Parliament was truly able to scrutinise it in the first place. Moreover, recent events associated with the UK Identity Cards Scheme suggest that while Government is happy for the Scheme to have a potentially large impact on the scrutiny of the actions of individuals, it is less open to the idea of scrutiny of the Scheme itself.

Since 2000, ‘Gateway Reviews’ undertaken by the Office of Government Commerce (OGC) have been set up to ensure that the procurement of large government IT projects deliver value for money. These independent reviews are intended to check that the plans for a project are sufficiently developed. In the case of the Identity Cards Scheme, the Government repeatedly asserted that the Scheme had passed its various Gateway Reviews but refused to disclose the contents of the reviews.

The Information Commissioner, who regulates the Freedom of Information Act (FoIA), disagreed with the Government and concluded that, especially in the case of such an important scheme, the Gateway Reviews should be made public. Rather than accepting this decision, the government took the case to an Information Tribunal. In May 2007 the Tribunal concurred with the Commissioner. However, at the time of writing, the OGC had still not disclosed the content of these reviews. On May 30 2007 the OGC announced that they would appeal the case to the High Court to prevent disclosure. Two days later *Computer Weekly*, one of the leading newspapers for the IT industry, uncovered orders to OGC staff to destroy internal reports ‘and all supporting documents’ (Collins 2007). The Tories and Liberal Democrats condemned this move as an attempt to further hide the details of the ID scheme, and other contentious IT projects.

The Government has argued that there were legitimate reasons behind their actions suggesting that the effectiveness of the Gateway Reviews would be diminished if participants knew that they might be made public at some later date. However, at the Information Tribunal, we learned that the Government briefed participants of the Gateway Reviews saying that there was ‘little risk of [Gateway Reviews] being disclosed under

FoIA or other means’, i.e. the normal expectation was that independent scrutiny of this aspect was unlikely to happen. This is despite the fact that Freedom of Information legislation is intended to provide a mechanism for such scrutiny to take place if required; instead the government insists on keeping the results hidden.

Perhaps we are seeing a massive shift in the view of decision-makers who not only believe that the balance in favour of the common good must be served, but that this must be done with minimal scrutiny. Such a trend appears not to be limited to the UK as the US Secretary of Homeland Security recently presented a similar view, when he tried to convince the European Parliament that it should stop interfering with US anti-terrorism policy and permit the US to accumulate travellers’ data from EU sources with limited oversight:

‘You must ask yourself this question—whether you would be satisfied to be constrained by slow-moving processes if the consequence would be to allow an attack to go forward that would kill thousands of people or perhaps millions of people, including one’s own children’.

The arguments made by authors from Locke onwards involve checks and balances; yes there is the common good that must be balanced against the rights of the individual but in addition, claims made on behalf of the common good must be subject to independent scrutiny. In the case of the ID Cards Scheme this appears not to be happening.

For more information about the LSE Identity Project, please visit our website <http://identityproject.lse.ac.uk>.

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