

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

**Seminar Five: The Proper Role of Politicians
1 November 2006**

The role of civil society in the management of national security issues is of the very first importance to the health of our democratic culture. Anxieties about the vulnerability of the nation to attack are currently underpinning a redefinition of the relationship between the individual and the state, and this remodelling presently depends for its effectiveness, and therefore its legitimisation, on the cooperation of many elements within civil society. The aim of the seminar series is to consider the proper role, if any, of non-governmental personnel in the handling of national security issues within the state. The objective is to develop through the seminars a dialogue between government and non-governmental actors on the management of issues related to national security. The purpose of such a dialogue is to facilitate the forging of an approach to the subject which achieves a successful balance between officials and others on the one hand, and between principles (relating to security and to democratic and legal accountability for example) on the other. The fifth seminar, held on 1st November 2006, focused on the proper role of politicians in the management of national security. More than two dozen individuals including government officials, parliamentarians, former cabinet ministers, retired law lords, academics, those involved in charitable organisations and others considered the following issues.

The engagement of the legislative branch in national security

The paper tabled for the meeting dealt with this issue in the following way:

Part of the response to the threat of terrorism often involves new legislation. Sometimes such legislation is in direct reaction to a particular atrocity, either in Britain (e.g. the Prevention of Terrorism Act 1974), Northern Ireland (e.g. the Criminal Justice (Terrorism and Conspiracy) Act 1988), or further afield (e.g. the Anti-Terrorism Crime and Security Act 2001). On other occasions it is comprehensive in its approach (e.g. the Terrorism Act 2000). The motivation for such legislation can vary. Most conventionally, it is directed at equipping the authorities with new powers and new offences that are thought likely to assist in the conduct of anti-terrorism operations. But it might also be considered that new legislation is needed to signal the government's resolve at a time of acute anxiety, or to indicate to other friendly states (e.g. the Republic of Ireland, the United States) the seriousness of the authorities intent in an area of particular concern to that state. The circumstances of the introduction of legislation of this nature will vary; sometimes there is time for relatively careful scrutiny; sometimes fear of imminent attack demands an extremely expedited timetable.

A number of questions were then posed. Members of the panel discussed what motivated the government to rush legislation through parliament in the aftermath of an atrocity and whether at times the urgency is contrived to reduce the amount of critical attention the proposals receive. Several participants strongly expressed the opinion that this type of legislation is not rushed to avoid discussion. Instead it was generally agreed that the motivation was to be seen by the public as "doing something" in the aftermath of an atrocity. It was noted that a swift response had the effect of boosting morale and restoring public confidence.

Some panellists, including some members of parliament, expressed concerns about rushing through legislation for this reason. A member of the House of Lords noted that legislating on an expedited timetable might create a greater sense of public ease, but that the content of the legislation was likely to suffer from the consequent lack of scrutiny. This peer argued that anti-terrorism legislation should be debated in parliament in the same way ordinary legislation, a failure to do so “effectively sends the message to Parliament that there are certain types of legislation they do not have the right to scrutinise”. It was also said that far from creating a sense of public ease, a constant flurry of legislation could send the message to the public that the government is panicking.

When asked for a comparative viewpoint, an American academic observed that the United States government has also felt under pressure to be seen to be “doing something” in the aftermath of an atrocity. The Patriot Act was passed just six weeks after the events of 11th September 2001 and though two panels were called to discuss the implications of this legislation for civil liberties, they were called to testify the day *after* the House and Senate had already decided what would pass. It was further noted that despite sunset clauses being placed on certain provisions, four years later virtually the same provisions were passed again, the panellist adding that once legislation is passed it generally becomes permanent. An especial concern to one panellist was that these changes were being produced by the executive without the building of any real, informed consensus on the issues which it covered.

During this discussion particular attention was given to the government’s attempt to rush through legislation in November 2005 that would have allowed the police to detain suspected terrorists for up to 90 days without charge. When discussing the way these proposals were introduced, several participants were critical of the police. In particular, they were criticised for issuing a press release that amounted to a shopping list of new powers, including the 90 day detention proposals, before parliament had even been consulted. In response a representative from the police force said that he could see why it appeared that the list of powers had been “sprung on parliament.” He went on to explain that it is difficult to discuss publicly what new powers the police want because it is feared that the effect of the making public these discussions has an adverse effect on the Muslim community. When a list of proposals is suddenly produced in the aftermath of an atrocity the lack of such prior discussions understandably is cause for concern, he said. Another participant added that the police could not be fully blamed for seeking a shopping list of new powers as the government had invited the police to set out such a list.

Particularly strong criticism was voiced against the senior police officers that had counselled Labour Party ministers on the 90 day detention proposals. A member of a charitable organisation labelled this as “constitutionally inappropriate” and the representative from the police force agreed this had been a mistake. While the police should play an advisory role, he said, they should not do so in public.

The Role of Ministers

The panel discussed how ministers respond when presented with information from the police or security services on national security issues that they are unable to verify. A former member of the civil service strongly defended the role of ministers, stating “they do not simply yield when told by the security services that they must take certain action. They often respond by asking why?” They have also been ready to throw discussions out into the public arena to avoid such pressures, he said. Another participant pointed out that there are times when politicians have to accept the facts as are presented to them by the security services. They cannot pick and

choose what advice to listen to on every issue. The panellist continued by noting that if ministers are concerned about certain proposals they are free to express their opinions through informal channels. If enough people speak to the Home Secretary or the Chief Whip on certain matters, this will have an effect, he said.

The pressure that ministers face from their constituents was also discussed. It was said that while they listen to the concerns of academics, lawyers and civil liberties organisations, ministers have to face constituents everyday who ask "What are you doing to protect me?" One participant described this pressure as 'enormous' and another claimed that if his constituents had their way there would be far more than 15 control orders in place. In fact, he said, they would opt for far harsher measures when it came to terror suspects. A government representative agreed and added that a significant section of the public considers the judicial system to be absurd and in need of change. He noted "we have to listen and respond to that." A member of a Muslim organisation responded to these comments by arguing that if the public is in fear, the government should not take action that exacerbates that fear. He gave the example of the government's response to the recent alleged plot to blow up a number of aeroplanes using liquids taken aboard in hand luggage. The extremity of the government's response, he argued, likely created more mistrust and that will feed more alienation and that, in turn, will increase the chances of further acts of terrorism.

During this discussion, a significant number of participants expressed concerns about the noticeable changes in the style of governing under the present government. A member of the House of Lords commented that there has been a significant shift towards a presidential style system. When comparing the current government to the government under Margaret Thatcher the panellist noted, "they had a cabinet government then, now it is far more centralised". It was said that the decline of collective governing has been mirrored with a decline in respect for the legislature.

A considerable number of participants agreed that the current government has become too controlling. It was noted that if a backbencher had concerns about national security policies they would have to be very brave to speak out against the government. One participant put forward the view that "now it is the House of Lords protecting democracy." As a member of the House of Lords, he claimed that he was distinctly uncomfortable about discussing any reform as "we need the present House of Lords very much." This provoked a number of participants to respond that the House of Commons is not supine, noting that on many occasions it had gone against government wishes. Another member of the House of Lords claimed that "the House of Commons could be unpredictable and rebellious" and noted that the government can never be sure their proposals will not be overturned.

Offering a comparative perspective on the protection of democracy in the United States an academic commented "during World War I the government locked up anyone who spoke out against them, during World War II they interned the Japanese, and in the McCarthy era the Communists were targeted. Now there are civil liberties organisations and Muslim groups that organise and lead debates." The panellist argued that the United States government had been forced to retreat from some of its more extreme policies and that while this had been partly because of the courts, civil society had also played an important role.

The Role of Independent Reviewers

On the question of whether independent reviews of terrorism law made a valuable contribution to the oversight of this type of law, the panel was divided. A member of the House of Lords pointed out that the review generates public discussion about

terrorism laws and the simple fact that the public knows there is a terrorism watchdog offers protection. He noted that independent reviewers have the freedom to make public statements without government approval, which he argued is a sign of a strong democracy. The panellist acknowledged that the government cherry picks the suggestions they like from the review but added that it does so knowing if it oversteps the mark the independent reviewer will likely comment on this.

Other panellists felt the role of the independent reviewer was of less value and, in particular, offered a limited amount of protection. A member of a charitable organisation noted that "it was very possible that these are just bells and whistles to placate criticism" and added that the government often sent an independent reviewer to debate with their critics, rather than sending a senior official. Other concerns raised were that the independence of the reviewer will usually be doubtful and that even when good suggestions were made in a review the government often ignored these.

The panellists closely involved with the government responded by noting that it was all too easy to dismiss the role of the independent reviewer as ineffective and ignored. "You have to read between the lines" one panellist said, pointing out that there are currently no non-derogating control orders in place, nor any likely to come into existence in the near future. As this was clearly not what had been expected when the legislation had been enacted, critics would do well to inject a little trust, this panellist said. Another participant commented that while he is proud that the UK has some of the best civil liberties organisations in the world, such organisations did have to answer the question "what would you do?" bearing in mind that there is intelligence information they cannot see. Another government official said that the criticism of the government should be tempered to be effective. He noted that criticism that is moderate and fair, such as saying the government is "going too far" would be effective. However criticism which claims the government is trying to scare people so they will more readily give up their freedoms is too extreme and has the effect of making the government less likely listen, "We think, well, we'll just ignore them".

A representative from a civil liberties organisation responded by noting that the papers they issued in response to government proposals were often distilled into one or two sentences when reported in the press. This is misleading, this panellist said, as this organisation does not just criticise the government but also offers alternative solutions, suggesting proposals which fit into a human rights framework.

A representative from a Muslim organisation said that he did not feel reassured that the government carried out independent reviews of the terrorism legislation. The main problem is that the independent reviewer bases his assessment of the legislation on the same mistaken premises that the government does. Categorising all Muslims as the same makes people angry and then causes more problems than it solves, he asserted.

The panel then discussed whether it was appropriate for judges to carry out independent reviews for the government. A participant who had served in the senior civil service stated that he did have concerns about using judges to carry out this type of work but thought that from time to time in the right circumstances it could be appropriate and useful. However, the same panellist voiced strong opposition to the government using judges for inquiries. The panel largely agreed, one panellist commenting that it was ironic that at a time when the government is so impatient with judges they so readily use them for inquiries.

It was pointed out that in Australia there is a constitutional bar to using serving judges to carry out independent review of legislation because it is considered incompatible with the exercise of judicial power. Royal commissions are the only exception. However, retired judges are often called upon for these types of tasks. The use of independent and parliamentary committees for post enactment review of terrorism legislation had actually declined over the past few years. Consequently, there is now an interest in Australia in the creation of an independent reviewer based on the UK model to ensure ongoing monitoring of the operation of terrorism law. This is not intended to usurp the role of parliamentary committees, but rather to supplement the role of the Parliament with regular reporting on the issues.

The Results of the British Social Attitudes Survey

The panel was presented with the findings from the 2005 British Social Attitudes Survey. The survey, which has been conducted every year since 1983, uses a random probability sample and has as one of its aims the tracking of change in public attitudes. To do this it replicates old questions on topics wherever possible. The statistics showed that over the last twenty years there had been a significant decrease in the number of people adopting a libertarian viewpoint. Three theories had been put forward by those conducting the survey as to why this had occurred. Firstly, it was thought this might be due to the ageing population, as older members of society tend to be more authoritarian. The panel was told that this factor did appear to have had an effect with some questions. The second theory tested was that it was due to new fears relating to terrorism. There was also some evidence that this had played a part. Interviews were conducted before and after the London bombings on 7th July 2005 and, as expected, those interviewed afterwards took a less liberal stance in matters relating to terrorism. Finally, the theory that the change was related to the role of political parties and their influence was examined. The results of the survey showed that the Labour Party supporters in the 1980s and early 1990s took a more libertarian position but now the Conservative Party supporters took a more liberal stance than those supporting the Labour Party.

During the panel's discussion of these results a member of the House of Lords commented that politicians are right that being tough on terrorism appeals to the electorate. A representative from the government agreed and commented that there comes a point when the majority of the public has consistently held a view, such as wanting a strong response to the threat of terrorism, that the government should respond accordingly and represent that view. However a member of police force said firmly that whatever action the government wants to adopt with regard to suspected terrorists, the police should say "we stand for human rights". He argued that the role of the police is to facilitate people speaking their mind, so long as they do not break the law. The response of the panellists representing a civil liberties organisation was to note that while they were disappointed to see that majority felt that suspected terrorists should not be protected by human rights, it was positive to see that the majority did not agree with the use of torture. One participant commented that the figures suggest the public trust that politicians are giving a fair impression of the threat to national security, when in fact sometimes they do paint a misleading picture.