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

Seminar One: The Proper Role of the Legal Profession
1 March 2005

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 sufficiently seeking 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 first seminar, held on 1 March 2005, focused on the Proper Role of the Legal Profession. More than two dozen individuals from various areas of the legal profession and other interested parties considered such issues as the professional response to proposed anti-terrorism legislation, the operation in UK law of the system of special advocates, and the right approach to take to evidence which may have been obtained by torture.

Position of the Professions

If the members of the legal professions are to work within the rule of law, they are bound to ask themselves to what extent they should express their views of such laws. The response to terrorism and other national security threats has often resulted in the creation of new laws or in legislation granting far-reaching powers to the authorities. Members of the panel debated to what extent the legal profession as a whole has a responsibility to respond to such legislation.

It was argued that the legal professions, through the Law Society, the Bar Council or other mechanisms, already make their views known to government. From the Law Society perspective, given that lawyers have a professional responsibility to maintain justice and the rule of law, it was considered necessary to issue a professional response to proposed anti-terrorism laws, laws that threatened to hinder these crucial societal values. Indeed, it was suggested that a failure to issue a press release or a statement opposing laws that curb human rights could be seen as constituting tacit approval for them. It was asserted that over time the Law Society had made headway in issuing

statements not so much of a political nature as of legal principle. Such statements have supported human rights principles from the perspective of law. The important question is not whether the profession should respond, but rather what is the basis for the comment. The answer to this comes from leaders and members of the professional associations keeping in touch with a range of opinions and being well informed. Reasonable input from professionals from all areas is vital to forming a coherent, legitimate opinion. Ultimately, the professions must be careful not to speak as if they were affiliated with a particular political party. While difficult questions concerning the practicalities of forming a coherent statement acceptable to all members are unavoidable, the need to respond, some insisted, was unquestionable. It was perceived by many that, as one participant put it, “Surely it is the duty of the professions to speak out on fundamental human rights principles.”

However, others among the panel disagreed, seeing complications with such a process: One contributor commented “I have a degree of nervousness about professional organizations making statements which purport to be made on behalf of the entirety of the organization where there isn’t some mechanism for consulting, except where you cross some sort of line.” Without a clear indication as to when it is appropriate to respond, such a move can make members of organizations uncomfortable. The overarching governing principle gleaned from Nuremberg was cited – that lawyers have a responsibility to individuals to whom they are providing legal advice. Professions are not homogenous bodies, individuals within organizations disagreeing about even the most basic ideas; lawyers are no exception.. It was therefore felt by some that statements by the legal profession were not necessary in most circumstances. In fact, in the words of one participant, such interventions “should be very much the exception, rather than the rule. There are plenty of other mechanisms and it’s only really [appropriate] when the organization makes a statement which goes to the professional activity of the individual.”

The panellists reflected both sides of the debate on the issue. However, all agreed that whatever the level of response, there needed to be clear rules and guidelines to ensure accountability within the organization.

Participation in the System

Moving beyond the legal profession as a whole taking an external stand, the next question that arose was a more specific, personal one.. Should the professions advise their members to refuse to participate in legal frameworks that involve the curbing of fundamental rights? For example, what of barristers taking up positions as special advocates, and thereby participating in a system that clearly places restrictions on detainee rights?

Theoretically, if the legal professions as a body decided to advise their members not to participate, it would have the right to do so. In some instances, it might even be necessary, e.g. concerning information obtained through torture overseas. The professional associations should take that authority to decide for its members. However, it was argued that to reach a position of encouraging non-participation would require going through the proper mechanisms. It would be difficult to reach a consensus that would permit such an action. But beyond the logistics of the situation and regardless of whether or not the profession as a whole took a stand, some argued that (as one put it) "Individually, we are obliged to take a strong principled stand against these practices. Lawyers have a duty to take a very strong stance to defend human rights and make it absolutely clear that they will not legitimise such draconian measures."

Individuals present who had taken such a stand were clear that their actions were a result of their acting out of conscience and were not intended as a criticism of those, particularly judges, who chose a different course of action,. In deciding to abstain from the system, legal professionals are faced with making what they describe as a difficult choice between on the one hand making some difference, however little, and on the other legitimising what they recognised was an odious infringement of human rights. At that stage, it was felt that it was, inevitably, a matter of personal choice.

Refusal to participate, however, should be combined with a collective public stand to inform government and the public of the issue. There is a role for lawyers to be critical and to take a stand against the state through cases and campaigns, even while taking a client's interest into consideration.

On the other hand, many members of the panel present were hesitant to encourage a system in which the legal profession abstained from offering help to those that particularly needed it. One panellist stated, "I would be very frightened if in some circumstances … there was no help available." The situation in Israel with regard to house demolitions was cited as a situation where lawyers participate in the system in order to assist individuals in the long run. Similarly, lawyers in South Africa did the same during apartheid. Lawyers and special advocates participating in the system in Britain pointed out that the individual client is better off with that representation than without, suggesting that they have a duty to pursue their work. Special advocates who took up their appointments in 1998 said that they took on these functions because they believed they had an important role to perform by giving legal representation to those that did not otherwise have it under the system then in place. It was better, some panellists argued, for lawyers to be engaged in the process than not.

Furthermore, a refusal by the legal profession as a whole to participate in certain systems had the effect of sending a message that government could act in such an unacceptable manner that professionals opted out. Some felt that this would inevitably lead to abuse by the government, disrupting any checks and balances that might exist.

As one panellist said, “Our job collectively as a professional body is to give shelter to the individuals to do their job as well as they can by being restrained and accurate and non-political, and [we] get authority from the idea that you cannot object to something without being drawn into it. We need to provide authority that others don’t have.” It was also argued that unelected lawyers had no right in a democracy to use their monopoly power to block the execution of policies adopted by the democratically-elected government and parliament, however strongly they might object to them: the proper remedy was through argument and political action, not what would amount to unilateral obstruction.

Ultimately, it was felt that the test in this situation was what was going to help the client. A client is very rarely better off without a lawyer. For judges, also, it is an all-or-nothing situation. Judges are there to apply the law, not to do what clients want. Thus, it was felt that for them to opt out is not legitimate either. With the exception of a small minority of participants, the general consensus was that the participation of the legal professional was vital to serving clients and keeping the legal tradition alive.

Ethical Issues

There was substantial discussion of the legal professions’ role in ethical issues. Many panellists were of the view that there was very rich scrutiny of the process of control orders and other proposed security measures (in the Prevention of Terrorism Act 2005, a bill that was going through Parliament at the time of the discussion). There was a vibrant democratic process underway that was allowing these types of discussions to take place. It was pointed out that these discussions were also occurring in government, but the public was not always privy to them.

The debate on the use of information obtained through torture raised numerous questions amongst the panellists. The commonest of these concerned which mechanisms to employ when confronted with such information. There is no way of knowing at the moment if information comes from torture or from other inhuman treatment. It is a difficult question to discuss openly because very little of the related information is allowed in the public domain. But if the information is known to come from torture, that raises further questions, reflected in one comment: “What is the moral choice? Do you, as the government, use it? Do you use it to prevent crime? That’s an easier problem. Do you use it to found the basis of a conviction? You can’t, because you can’t test [it]. What do you do with it?” Another panellist seemed to echo the overall consensus, “I’m not sure I can manage a general answer.”

To some individuals in the legal profession, however, the answer was clear cut. One panellist expressed surprise that so many procedural issues were being raised, “It is irrelevant if the torture was used by second party, third party… there is a line you don’t cross. The minute you legitimise something, you are on a slippery slope…any

discussion on this issue is to avoid the absolute prohibition [of torture].” However, others said that the issue was not whether torture was allowed but rather how to detect whether torture had been used. Is there a test? And what, if anything, can lawyers do to shine a light on this process?

It was pointed out that in Israel, a handful of individual activist lawyers took action on their own with the help of human rights NGOs. They filed petitions, bringing cases on behalf of Palestinians against torture. After a long drawn-out process, the Israeli Court began to understand the systemic nature of the use of torture and realized it could no longer avoid the issue. It finally issued a sweeping general decision against the use of torture in September 1999.

All panellists, while clear that torture is contrary to international law and evidence obtained by it is illegitimate, were far less clear about practical aspects of the situation. There were more questions raised than answered, particularly when it came to establishing tests to determine when torture had taken place and the role of the legal profession. It was also pointed out that quite apart from questions of ethics and legality, information got by torture was inherently unreliable (since most people would say anything to have the torture stop), so that it was anyway essential to ascertain whether torture had been used where this was an issue, in order to assess the reliability of the information.

The discussion ended with a panellist indicting the legal profession in the UK for staying silent on a host of issues related to security post-9/11 and to the Iraq war. . It was argued that the Attorney General had the critical obligation to investigate the actions of its citizens in killing and torturing individuals during the so-called “war on terror”. The legal profession had a duty to get out of its parochial role and take action.

Conclusion

No conclusion was reached on the proper role of the legal profession in the management of national security issues. Nor was this the intention. Rather, a discussion was begun wherein actors from various fields were able to talk at the margins of the event. 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 a dialogue can begin.