Global Economics and Finance Programme
Meeting Summary

The role of lawyers as ethical gatekeepers and related issues

Event date: 4 July 2024

Independent thinking since 1920

10 St James's Square, London SW1Y 4LE T +44 (0)20 7957 5700
contact@chathamhouse.org www.chathamhouse.org
Charity Registration Number: 208223

CHATHAM HOUSE

Introduction

On 4 July 2024, Chatham House hosted a round table discussion under the Chatham House Rule covering the role of lawyers as ethical gatekeepers and a number of related issues. The round table was organized in collaboration with the International Bar Association. Its aim was to explore the way lawyers have handled their professional responsibilities as legal advisers to, and representatives of, clients in the face of rapidly changing global challenges and growing ethical, social and political scrutiny and pressures from civil society, governments and the media. This includes the questioning, under certain circumstances, of long-established legal principles, such as the right to legal representation and confidentiality of exchanges between lawyers and their clients. A key concern raised by members of civil society and others is whether lawyers are achieving the right balance between serving the interests of their clients and the broader interests of society.

Participants in the round table included lawyers from common law and civil law jurisdictions, parliamentarians, academics, representatives of international organizations, civil society and corporate clients.

The discussion was wide ranging. It covered a number of criticisms faced by the legal profession and the extent to which these had merit; the role of soft law (non-binding agreements and principles); the benefits of self-regulation vs regulation by statute; the right to legal representation; legal professional privilege; and the nature of the advice that lawyers should provide to their clients. Participants also discussed a wide range of possible responses to the areas of concern identified.

This note summarizes the key themes that arose in the discussion. It describes areas where there appears to be an emerging consensus and sets out possible subjects for further work.

Key themes

Criticism of the legal profession

Several participants noted that the legal profession has experienced rising criticism by politicians, the media and civil society in recent years. This has focused on the way lawyers are seen to balance the interests of clients against those of wider society, the decision to represent some highly controversial clients, perceived abuses of legal professional privilege[1] and the 'weaponization' of law.

In some cases, the criticism is clearly unjustified, reflecting a fundamental misunderstanding of the critical role lawyers play in society. Lawyers have been attacked simply for doing their jobs in representing unpalatable clients. At the

[1] The right of a client to have certain communications between the client and lawyer kept confidential.

extreme, the criticism has threatened fundamental legal principles that underpin the rule of law, such as the right of an individual or business entity to legal defence.

But in other cases, the criticism reflected understandable public disquiet at the way some lawyers appeared to put the interests of their clients above those of wider society. Communications between lawyer and client had been granted special status, in the form of legal professional privilege, so that lawyers could play a role *vis-à-vis* their clients that served the interests of society as a whole. However, in certain situations, such as in relation to strategic lawsuits against public participation (SLAPPs),[2] lawyers were perceived by some to be facilitating actions which damaged society's interests.

A participant from civil society said they disagreed with those who seemed to be arguing that today's legal arrangements should never be questioned. They believed civil society saw law firms as essentially commercial organizations with many decisions being driven by commercial incentives. In addition, civil society was sceptical about the effectiveness of the current regulation of lawyers, noting the lack of enforcement cases. The participant highlighted the fact that civil society as a whole did not see why law firms providing such services as tax advice or company formations should be subject to a different level of regulatory oversight or penalties for non-compliance to other commercial organizations carrying out exactly the same activities. According to this participant, civil society thought that legal professional privilege[3] was being claimed too frequently and in situations where it was not appropriate. And, with the exception of criminal matters and some civil matters, it did not believe lawyers had a duty to accept any client who sought representation.

Another civil society participant noted that someone who drove a getaway car for a gang robbing a bank would clearly be seen as fully complicit in the robbery. Many would argue that a lawyer providing a complex corporate structure to mask a client's money laundering was involved in the same kind of role. A number of large, well-established law firms had supported the family of a central Asian political leader in building a portfolio of property investments in London. In many cases the lawyers concerned did not seem to be aware that the politician in question was a politically exposed person (PEP). The participant also described the experience of being confronted by lawyers acting on behalf of clients who simply wanted to suppress the analysis and research being undertaken by his organization. Sometimes, this involved threats of legal action, which were not followed through. But even where the risk linked to such threats was very low, it could still be highly disruptive and intimidatory to the work of small organizations.

[2] Solicitors Regulation Authority (2024), 'Strategic Lawsuits against Public Participation (SLAPPs)', https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/.
[3] The Law Society (2023), 'Legal professional privilege', https://www.lawsociety.org.uk/topics/civil-litigation/legal-professional-privilege-guide.

One participant noted that the public perception was that lawyers tended to act defensively to any criticism, rather than engaging with it. This undermined their credibility with the public and other stakeholders.

Another participant argued that lawyers had a significant role in society going beyond their professional responsibilities. They were often role models or leaders in their communities. This arguably led them to have a broader gatekeeping role in determining what is or is not ethical.

Key areas of concern

Participants agreed that the main ethical concerns arose in relation to advice lawyers provided with respect to future actions by their clients rather than the work done defending clients in relation to past actions. It was also argued that most concerns arose in relation to civil law rather than criminal law, although some criminal law situations were relevant as well, such as actions by lawyers that appear to support money laundering or tax evasion.

All participants agreed that it was completely wrong for a lawyer to assist a client in breaking the law and where this happened the lawyer concerned should be prosecuted and face the full sanction of the law. Bar Council Codes of Practice left no doubt that a lawyer should refuse knowingly to assist a client in committing a crime. A lawyer should make it clear to a client when a proposed course of action was illegal and if the client persisted the lawyer should withdraw their services.

However, it was felt by some participants that civil society wished to hold lawyers accountable for the future actions of their clients that were in some way harmful to society. This, it was argued, went too far.

One participant argued that the number of cases where lawyers were from the outset knowingly involved in breaking the law was small. However, there was a larger number of cases where a lawyer might gradually be drawn into legally questionable activity in support of a client through a series of small steps and a failure to understand the true nature of their responsibilities. Legal professional privilege could be deployed in these circumstances as a shield to protect the lawyer and/or the client. The Post Office scandal in the UK had highlighted a number of cases where lawyers acting for the Post Office clearly did not understand their ethical obligations. This arose from a lack of knowledge, but also a lack of challenge.

Participants agreed that professional education could play an important role in addressing this danger. For example, the Council of Bars and Law Societies of Europe (CCBE)[4] code of practice states that if a lawyer discovers a client is set on doing something illegal, they must warn the client that this is the case, and if the client persists, withdraw their services. But one participant asked what does

[4] Council of Bars and Law Societies of Europe (2021), *Model Code of Conduct for European Lawyers*, Brussels: Council of Bars and Law Societies of Europe, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf.

'discover' mean in this case? Should the lawyer be pro-active in asking questions? If so, what questions should they ask, and when? How should they respond if they find the answers provided are incomplete or in other ways inadequate?

Some participants argued that the idea of lawyers being 'ethical gatekeepers' was fundamentally problematic because there was no absolute standard for ethics. To take this approach one had to decide whose ethics one was talking about.

The role of soft law

There were a range of views on how to handle those situations where the activities of lawyers were not prohibited by law but might in certain circumstances be against the interests of society.

One view was that a lawyer should follow the law and their own conscience, but beyond that his/her prime duty was strictly to advise on the law and provide representation and in so doing to serve the interests of their client to the best of their ability. Requirements to report on client behaviour to the authorities were problematic as they encroached on the lawyer's independence and a client's right to representation.

According to this view, the response to any shortcomings should be to update the law rather than to impose additional ethical requirements on lawyers. Specifying additional requirements created a grey area and introduced uncertainty over exactly what lawyers were required to do, or not do.

A contrasting view was that there was in practice an important role for guidance on how to implement the law as well as soft law setting out additional norms, e.g. on finding the balance between the interests of the client and of society where these could be in conflict. While the best course of action might sometimes be to change the law, this often took time, and in the interim soft law could address pressing issues. In addition, lawyers typically had a better understanding of certain issues than parliamentarians, and therefore were better placed to devise appropriate guidance. A recent survey suggested that best practice guidance was favoured by the majority of lawyers. However, a representative of a major law firm noted that following the introduction of a new policy by their firm which required their legal staff to 'act responsibly' i.e. not just in the client's interest, but also in the wider public interest, some partners had left the firm.

It was noted that in England the ethical codes go beyond the strict parameters of the law. For example, under the English Bar code a barrister cannot continue to act for a client who refused to meet disclosure obligations, they cannot assert a positive case they knew to be untrue, advance an allegation of fraud without credible documentary evidence to support it, or make legal submissions unless they are properly arguable.

One participant argued that there was a strong case to give non-lawyers a bigger role in the development and oversight of legal codes of practice. This was put forward as a good way to ensure that the codes took account of broader concerns in society. The risks of such participation were, in this participant's experience, minimal.

Approaches to regulation

Most participants praised self-regulation[5] as being the best approach for the legal profession. Subject to scrutiny and oversight by governments, it was typically quicker and potentially better designed than externally imposed regulation. It was better suited to preserving the independence of lawyers in circumstances where lawyers were often required to act against governments and could provide a stronger defence against authoritarian governments that sought to undermine the rule of law by constraining lawyers through regulation. Governments and international organizations were typically also in favour of self-regulation as they recognized it could be more easily fine-tuned to address specific issues and involved lower costs.

But some civil society participants argued that while self-regulation could be effective in addressing abuse by members of the profession, there were too many situations in which it failed to do so. For example, self-regulation had not dealt effectively with the issue of SLAPPs and to address this it was now widely agreed that legislation was necessary. There were also cases where lawyers had left major firms because they were unhappy with the constraints imposed on the cases or clients they could take on and had moved to 'boutique' firms specializing in legal work that was within the law but was otherwise more questionable. According to these participants an effective response was needed to these situations.

One participant argued that it was important for self-regulatory bodies to calibrate better their response to infractions, i.e. punishment should not only be a case of disbarment. There should be interim penalties designed to improve behaviour. But even more important was to ensure effective enforcement of existing rules and laws.

Several participants commented that when the legal profession failed to deal with major issues, governments would eventually be forced to act under the pressure of public opinion. In these circumstances the legal profession would be better off taking pre-emptive action, even if they would prefer to leave things unchanged.

It was further noted that the framework of principles and international codes governing the behaviour of lawyers, particularly those working in large multinational law firms, had already changed fundamentally. The UN Guiding

[5] i.e. regulation by an independent professional body such as, in the UK, the Bar Council for Barristers and the Solicitors' Regulation Authority arm of the Law Society for solicitors.

Principles on Business and Human Rights,[6] which enshrined the principle of 'do no harm', and business codes and guidelines produced by the OECD and Financial Action Task Force (FATF) meant a new trade-off had to be reached between the public interest and serving the interests of clients.

One participant argued that the courts were the ultimate authority over the legal profession and were much better placed than lawyers to make ethical judgments on how to balance the interests of clients and society. In the US, lawyers were officers of the court. In the UK, barristers were ultimately responsible to the court, rather than their clients.

However, another participant noted that arbitration cases gave rise to particular concerns as there was no oversight from courts or the public in these instances. Litigation might not be a major area of concern when it took place with the oversight of courts. But where lawyers were involved in arbitration proceedings, there could be greater risks of being drawn into questionable behaviour.

One participant said that new legislation, and regulatory bodies, had a tendency to apply the same safeguards and rules to all lawyers, even though the abuse that needed to be addressed only applied to a small number of issues and a limited number of legal practitioners. It was critical to target interventions on those areas where there was a genuine risk and avoid taking steps across the board, which added to costs and could have unintended consequences for other areas of law. The range of areas where concerns arose was typically limited to privacy law, defamation, tax avoidance and non-disclosure agreements in employment law. Moreover, in the case of economic crime, lawyers were just one of many groups of actors involved, so it was important to know how big a contribution they were expected to make to address the concerns. Obligations needed to be clear, proportionate and transparent.

Several participants highlighted the wide range of jurisdictions that existed across the world with different legal structures, codes of practice and regulatory structures. While to some degree they shared common principles (and issues), national bar codes and the way they were implemented impacted on how lawyers behaved internationally, including when they were operating outside their national jurisdictions. There could be important differences in perception of the issues being discussed in developing countries as compared with Western countries.

There were also big differences between countries in the extent of regulation and enforcement. In some developing countries there was effectively no regulation or enforcement. According to one view, while the regulation of lawyers in advanced countries was not perfect, the bigger threat came from unregulated environments. Another view was that, given the centrality of US

[6] The UN Working Group on Business and Human Rights (2011), *The UN Guiding Principles on Business and Human Rights: An Introduction*, New York: Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

and English law in global trade and investment, weaknesses in either of these jurisdictions were likely to have the largest global impact.

The right to legal representation

Participants discussed the 'cab rank' rule under which a lawyer was required to take on any case that came to them. In England, the Bar Council followed this approach. However, one participant noted that to date there had been no known sanctions imposed on anyone for failing to comply with the rule, and there were many ways in which the rule could be avoided. One participant noted that in Europe there was no absolute right to legal representation in the case of civil law actions.

A recent rule adopted by the American Bar Association compelled a lawyer to avoid 'wilful ignorance'. This means that lawyers have to be aware of the facts and circumstances underlying a case before agreeing to represent a client.

A representative of a major law firm described how they had introduced a new policy under which any new proposed assignment was assessed for the impact it could have on the climate. This led them to decline certain cases (e.g. transactional work for new coal plants) where the negative impact was significant. By contrast they continued to defend any client for past actions with climate implications. The key distinction was between, on the one hand, defending someone who had done something reprehensible, where it was important to ensure the right to legal representation, and on the either hand, deciding whether or not to assist someone to do something that might be seen as reprehensible in future, where the same principle did not apply.

One participant highlighted the importance of human rights due diligence in assessing potential clients and areas of work. This was a growing area of activity critical to the reputation of law firms and their clients. Guidance on human rights due diligence was not enshrined in law, although undertaking it is now legally mandated in a number of jurisdictions. It was also much more concrete and practical than high-level commitments to act in line with one's conscience, or do no harm.

Another participant argued that lawyers should focus most of their due diligence on what they were being asked to do, rather than who the prospective client was. He argued that there were few situations in which a law firm would refuse to represent a client under all circumstances. However, there were a much broader range of activities that a client might want a lawyer to undertake, but which they would decline to do, or would only do with certain safeguards.

Legal professional privilege

All participants acknowledged the importance of legal professional privilege in many areas of legal work. However, several participants argued that it was important to keep its use under review and ensure that it remained fit for purpose from multiple perspectives, including those of clients, lawyers and wider society.

Areas that deserved investigation included the way lawyers might use privilege to protect themselves rather than their clients and how this could be to the detriment of society. Similarly, where exceptions to privilege had been introduced, it was important to understand how these had worked and whether the benefits to lawyers (e.g. in giving them appropriate options when faced with a client determined to act illegally) and to society had worked out as expected.

In this respect, the US 'crime-fraud' exception to attorney–client privilege states that communications between a client and their lawyer are not privileged if they are made with the intention of committing or covering up a crime or fraud. This was introduced to help lawyers do their jobs better. It was important to consider whether this worked in practice, and whether there were ways that the exemption might be strengthened.

One participant felt some lawyers seemed to believe that FATF guidelines – e.g. on knowing your customer or reporting suspicious transactions to the authorities – completely undermined legal professional privilege, arguing that, where implemented, it made it impossible for a lawyer to provide confidential advice and effectively denied access to legal representation.

But in practice the FATF rules only applied to a narrow range of issues and in a limited number of activities (notably real estate transactions, asset management, buying and selling companies and company formation). A majority of lawyers will never be involved in FATF issues and so were unaffected.

In addition, where FATF recommendations did have a significant impact on legal practices, this was only to ensure that there was a level playing field between the constraints placed on lawyers and those on other professional organizations conducting the same activities. To the extent that the impact on lawyers was felt to be unacceptable, it raised the question of whether lawyers should be involved in this kind of business in any case.

The nature of advice provided

Several participants argued that lawyers should ensure that the advice they provided to their clients went beyond strictly legal issues. For example, the American Bar Association had introduced a rule that compelled a lawyer to take into account political and social factors when giving advice to a client. Several participants said that it was important for lawyers to assess and advise their clients on the reputation risk of taking certain actions, such as SLAPPs, even if they were strictly within the law.

One participant highlighted the importance of lawyers maintaining sufficient independence from their clients, so that they were able to give objective advice, but also did not inadvertently get drawn into questionable behaviour. This was particularly important for in-house lawyers but applied more broadly as well. There were important lessons to be drawn from the US Sarbanes-Oxley Act[7] and

[7] Cornell Law School Legal Information Institute (2021), 'Sarbanes-Oxley Act', https://www.law.cornell.edu/wex/sarbanes-oxley_act.

the UK 'Senior Management Finance Regime', both of which indicated that certain kinds of direct accountability could be helpful in strengthening a lawyer's independence.

Areas of consensus and possible further work

Participants agreed that the round table had provided a useful exploration of a wide range of issues. These included questions around the role of lawyers as ethical gatekeepers, but also went beyond that into a number of related areas.

There was a broad consensus on the following points, including among lawyers from both civil law and common law jurisdictions:

- That the legal profession needed to listen to and engage actively with civil society, governments, the media and other stakeholders to understand their concerns and devise responses. Ignoring the criticism was not an option, both because there were some genuine issues of concern that needed to be addressed, but also because in the absence of an adequate response from the profession, governments were likely to act anyway. This could be much less effective than the profession making the necessary changes itself as well as being more damaging to its reputation.

- The issues of concern were often very different and were likely to require different approaches. It was also important to frame the response in light of the broader context, including evolving international frameworks (such as UN, OECD and FATF codes) and broader domestic frameworks for addressing specific problems (such as corruption, money laundering, or suppression of free speech) since lawyers were typically only one component in addressing an issue of concern. This would help in targeting possible interventions so as to reduce costs and unintended consequences for other areas of legal work. The approaches adopted by the legal profession could also be of broader applicability to other professional organizations.

- That the next step should be to look in a more granular manner at a number of specific areas of concern – both thematic and specific applications of law – where there was broad consensus that further work could be helpful. In so doing, it would be important to broaden the range of participants in the dialogue to include more representatives of clients and a wider range of participants from civil society. It was also important for these dialogues to be structured in a way that respected the role of national bar councils.

- Possible thematic areas for further dialogue included: Legal education and training (including helping lawyers implement bar council codes); best practice with respect to the internal ethical governance of law firms; the role of soft law; how to strengthen self-regulation; ensuring effective accountability for the legal profession through e.g. more effective enforcement of existing rules; and possible reform of legal professional privilege.

- Possible specific applications of law that might be looked at further include the legal, political and reputational aspects of SLAPPs; and ensuring effective human rights due diligence by lawyers on their clients.