

FOREIGN POLICY AND THE GOVERNMENT LEGAL ADVISER

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I would like to start by saying—and my remarks are going to be of an introductory nature, perhaps laying down the paving stones for this topic—that I feel that part of what I am going to say has already been covered by the first panel this morning, whose topic was the place of policy in international law. Obviously that is closely connected with our present topic. The heading for this item is “Foreign Policy and the Government Legal Adviser,” and I have, I confess, been a little troubled during the course of the day by finding in how many different ways policy has been defined. However, generally speaking, I am adopting the definition suggested by Dr. Schachter, namely that policy is the determination of a preferred outcome. For the purposes of what I am going to say, this definition of policy, out of the many that have been suggested today, is the one which I prefer.

The question which I propose to examine is basically this: What is the government legal adviser’s role in shaping foreign policy? When I speak of the government legal adviser, I am obviously, out of my own experience and background, mainly going to talk about the legal advisers to a Foreign Ministry.

On the basis that the legal adviser’s function is “to provide legal advice to the Foreign Minister and Departments of the Foreign Ministry on all legal matters which arise in the course of the Departments’ work” (that, incidentally, is a definition which has been given both in relation to the work of the legal advisers of the Foreign and Commonwealth Office in London and the legal advisers of the State Department), then unless such advice is consistently ignored (and of course in that case there would really not be much point in having legal advisers at all), it must inevitably have some impact on the country’s foreign policy.

Now, to say this is not necessarily to say that the legal adviser’s primary function is, or should be, that of a policy-maker. But I think it would involve a very restrictive and a very unrealistic view of a legal adviser’s functions to regard him simply as a person who is called upon from time to time to give academic advice of a legal nature in relation to a given situation, or to regard him as primarily a technician who advises on the correctness of legal processes. The problems with which

he is faced are not academic ones; they arise from actual situations, and these actual situations more often than not do not fall neatly into any of the textbook categories. They may involve circumstances in which the law is unclear or unsettled, or where no recognized rule is applicable. I submit that it is only by being very fully aware of the political background that the legal advisers can deal with such situations or contribute fruitfully to the creation of new rules or norms. It is therefore extremely important that the legal adviser should maintain close and informal contact with the political or functional departments which it is his duty to advise.

I think it is also clear that the personality of the legal adviser must play quite a big part in these close and informal contacts. This is true not only of the giving end but also of the receiving end. For instance, one may get a Foreign Minister (this has happened in this country) who is himself a lawyer and who is therefore interested in a legal approach to problems; one also may get a Foreign Minister who, perhaps by reason of some traumatic experience in early youth, does not really like lawyers and has an ingrained reluctance to accept legal advice.

But to emphasize the importance of the personality of the legal adviser, the informal contacts he makes, and above all, the importance of his being fully aware of the political background, is not of course to say that it is the duty of the legal adviser to provide some legal justification, however specious, for any action which his government or Foreign Minister may wish to take. But it is, I believe—and this belief is based on my own experience—the duty of the legal adviser to be aware of any political considerations which would rule out the adoption of a certain course of action which, on purely legal grounds, would be entirely justifiable. I also believe that it is his duty in such circumstances to suggest, if he possibly can do so, another course of action which is also legally justifiable, but which has the advantage of taking into account the political realities of a given situation. The legal adviser may also in certain circumstances be able to point out that a possibility which appears to involve immediate advantage may legally create an unfortunate precedent and therefore be undesirable in the long run. If he is able to do these things, the legal adviser's advice will be sought; if he cannot offer any constructive solutions, his advice will be less and less sought. But if he is able to offer positive solutions which are in accordance with what he believes to be the law, the legal adviser's role, far from being a purely passive one, may be both active and creative.

I think that the more experienced he is, the more likely the legal adviser will be to play a creative role. For this reason there is much to be said in favor of a separate cadre of legal advisers within a Foreign Service. In this country the legal advisers are part of the Diplomatic Service, although they cannot be posted abroad to any posts which do not involve a good deal of legal work: in other words, they are not, as in some countries, for example in Canada, interchangeable with diplomats. As I understand it, in the United States there is also a separate cadre of legal advisers in the State Department, although I believe they are in fact not members of the Foreign Service, but members of what we should call in this country the Home Civil Service. I think that the existence of a separate cadre provides an element of continuity and stability within the Foreign Service, which is in itself of value in shaping policy. The reverse side of the coin is, perhaps, the temptation to give political rather than the legal advice that this stability and continuity entail. Stability and continuity mean that the legal advisers are in some sense regarded as a racial memory, able to produce precedents out of a hat; at least that is the hope. Now, the fact that the legal adviser has this kind of long experience may, as I have already indicated, offer a temptation to the senior and experienced legal adviser to advise on policy rather than on law. As can be seen, I differ from some of the speakers today in believing that one can make this distinction between policy and law. I think the temptation that I have mentioned is particularly strong in fields where the existing law is not well defined and the dividing line between law and policy is somewhat blurred. Moreover, it is one to which a legal adviser at a post abroad will be particularly subject.

What I have just said does not mean that senior legal advisers should decline to proffer political advice if they are asked to do so, and there may well be circumstances in which they are asked to make their long experience available to their diplomatic colleagues. But nevertheless, the British tendency has been to emphasize both the professional and the technically legal role of the legal adviser. As I understand it, the American tradition has been rather different. I think, for instance, that you do have United States lawyers working with corporations or government agencies who are accustomed to act as policy-makers as well as legal advisers. I believe that the State Department legal advisers have in consequence been far less reluctant than their British counterparts to advise on policy.

I believe, however, that neither the Foreign Office nor the State De-

partment legal advisers would be prepared to endorse the dictum that I heard Vyshinsky, who was then a member of the Soviet delegation to the Danube Conference, pronounce at Belgrade in 1948. He said, "International Law is purely a matter of expediency." I do not think that this proposition would be accepted by either the Foreign Office or the State Department legal advisers. Both are concerned to maintain their professional independence and integrity, and both would therefore agree that if a course of action contemplated on political grounds clearly involves a breach of international law, it is the duty of the legal adviser to say so. His advice may, of course, be disregarded or overridden. His advice after all is only part of the advice that the Foreign Minister will be offered. The Foreign Minister will also be offered political advice, perhaps economic advice, and he will of course have to take all these factors into account before making a decision. But it is still for the legal adviser to point out the legal consequences of taking a certain course of action. Furthermore, as I have already indicated, I do not believe that it is his duty to evolve spurious legal arguments to defend a course of action which is legally indefensible, although, of course, once such action has been taken, he may properly give advice on legal remedies to mitigate the consequences.

That a legal adviser should not attempt to defend action which may be politically expedient but which has no legal basis seems to me to be important to any country whose general national policy involves respect for international law. But as I hope I have already indicated, something far more positive is required of him. Even whilst keeping very strictly within his own sphere, the legal adviser's opinion may be of very great importance in relation to a particular policy decision: for instance, whether to bring a dispute before the International Court of Justice, whether in certain circumstances the use of force can be justified, what (to mention one of the topics that have been discussed earlier today) is the proper reach of extraterritorial jurisdiction, and on what grounds can it be objected to in a particular case?

Furthermore, if more than lip service is to be paid to the principle of respect for international law, the legal adviser should be prepared to play a part in its progressive development not only in his own department in the Foreign and Commonwealth Office or the State Department, as the case may be, but outside his own office in discussions in the United Nations, at international conferences, and at international meetings of all kinds. It is obvious of course that the drafting, interpretation, and

negotiation of treaties may form the basis of new norms, and so may the establishment of new international practices; that is a point which has certainly already been made today.

In playing his part in shaping not only the policy of his own country, but also international legal policy, I think that the experienced legal adviser must be fully aware (and now I am quoting from an article that was written by my former colleague, Dick Bilder, then of the State Department) "that there is no easy solution to world problems through legal panaceas." This is something that every practitioner who finds himself a legal adviser in a Foreign Office must realize. He must also be prepared to accept that political differences between states slow down the development of new law. That has happened quite recently and in my own experience in relation to the development of the law of outer space. He must also be prepared to face the fact that international discussions on legal matters, as for instance improved machinery for the settlement of disputes, may be impeded or frustrated by the introduction of considerations which on any definition of the term "political" are purely political and not legal ones.

I think that paradoxically the more the legal adviser is aware of these difficulties and of the political factors which underlie them and which cause them, the more effective his role is likely to be in the shaping of foreign policy. I also think—and this is perhaps a thought that applies both to the Foreign Office and the State Department legal advisers—that if the legal adviser's common law training has made his approach a rather pragmatic one, there will be considerable advantage.

These are the thoughts that I leave with you, and I believe they will be developed by my fellow panelists.