Crossing the Line?

Policy Exchange

The Attorney General and the Law/Politics Divide

Dr Conor Casey, John Larkin QC

Foreword by Sir Robert Buckland KBE QC MP

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Published by
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE

www.policyexchange.org.uk

ISBN: 978-1-913459-82-6

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The Law Officers of the Crown are sometimes described as the submarines of Government, working below the radar and surfacing only when there is a significant issue to be addressed. I agree with this characterisation, but I also think that lively discussion and debate about their role is beneficial, which is why this discussion paper by Conor Casey and John Larkin QC is so welcome. Policy Exchange are once again to be commended for making sure that the debate about constitutional affairs is not entirely one-way. Such a lack of debate led to the flawed Constitutional Reform Act 2005, for example. A lack of balance is also evident in recent criticism of the Attorney General's announcement that she is considering referring a point of law to the Court of Appeal in the wake of the Colston statue trial. Attacking this announcement as disgraceful political gamesmanship or even institutional racism, as some have, is clearly misconceived. However, it does usefully reveal the difficulty that some people have in thinking about the Attorney General's role, which this timely paper helps correct.

David Mallet, in his 1740 "Life of Francis Bacon", memorably described the offices of Attorney and Solicitor General as "rocks upon which many aspiring lawyers have made shipwreck of their virtue and human nature." JP Collier wrote in 1819 that "of all the offices in the gift of the Crown, that of Attorney General is perhaps the least to be coveted for… the person filling that place can scarcely avoid being the object of general dislike". There is no doubt that both the Law Officers of England and Wales endure some tough moments, but their constitutional value endures, despite change and evolution when it comes to their detailed functions. Having been a Law Officer myself for just short of five years, I can testify to the benefits of Law Officers being in the House of Commons, having to be directly accountable for the organisations they superintend and having the sort of direct political influence that appointed officials simply cannot possess.

One aspect of the work of the Law Officers that has not really changed is their involvement in some litigation, either conducting it directly in the Court of Appeal or other senior courts, or advising and being consulted on the course of major litigation where the Government is a party. It is implicit that, in a case involving the Government, its very own submissions reveal its view as to the merits of a case. To make explicit what is implicit by expressing an opinion about a case after its conclusion is not, and cannot

be, objectionable. What would be clearly objectionable, however, would be a refusal by the Government to abide by the judgment, which would demonstrate not mere disrespect for the court but complete disregard for the rule of law. Equally objectionable would be personalised comments and attacks on the integrity of judges, who are in no position to answer back. To suggest, however, that Law Officers should be wholly prevented from either disagreeing with or making positive comment about completed cases is to take things much too far.

Further, it should be entirely expected for a Law Officer to support the Government's policy on judicial review or other types of legal or constitutional reform, whilst maintaining scrupulous professional objectivity when conducting individual cases and determining the public interest. The Law Officers are not Ministers who have responsibility for the development of policy, but the making by them of measured contributions to legal debate should not be prohibited. Delivering such views in a legal conference seems to me to be a proper setting too. Although a recent Attorney made a speech at a Party Conference, I would hope and expect that very much to remain an exception, rather than become a rule.

Casey and Larkin's conclusions are the right ones. Law Officers and Ministers should feel confident about making measured and reasonable points without being subject to a barrage of unreasonable criticism that could stifle debate. I firmly believe that the Law Officer model used in England and Wales has worked, and will continue to work, well, and that those who serve in these offices will respect their constitutional boundaries whilst not having to maintain a sphinx-like silence!

I. Recent Controversy

On 19 October 2021, the Attorney General for England and Wales, Suella Braverman QC MP, delivered the keynote speech at the 2021 Public Law Project Conference. In her speech, the Attorney General defended the government's current proposals to reform aspects of judicial review procedure and, more broadly, the constitutional legitimacy of inviting Parliament to overturn jurisprudence it considers to be erroneous.[1]

The Attorney General accepted that there has long been debate over the "proper role of the Courts in interpreting Parliament's legislative supremacy" but suggested that several recent Supreme Court judgments represented a "radical departure from orthodox constitutional norms" which severely threatened the delicate balance of the UK Constitution. The AG cited *Adams*[2], *Miller I*[3] and *Miller II*[4] , *Evans*[5] / *UNISON*[6] and *Privacy International*[7], as examples of Supreme Court cases that "strained the principle of Parliamentary sovereignty and introduced uncertainty into the constitutional balance between Parliament, the Government, and the Courts."

After outlining the reasons behind her objections, the Attorney General welcomed signs of a shift by the current Supreme Court back to what she characterised as a more orthodox, traditional, approach to judicial review. She then proceeded to defend the government's recent proposal to reform judicial review and the constitutional propriety of the executive deciding that it is "worthwhile and important to invite Parliament to legislate to overturn" judicial decisions it thinks erroneous.

While emphasising the centrality of an independent, apolitical, judiciary to the UKs separation of powers, the Attorney General argued that failure to correct Supreme Court judgments which disturb constitutional orthodoxy and expand its remit into more starkly political issues, risked profound ramifications. Chief amongst them, said the Attorney General, would be the risk to the "legitimacy and reputation of our judiciary, which is inextricably linked to its political neutrality" which in turn could weaken the rule of law.

The Attorney General's speech was criticised by some legal commentators.[8] Given the nature of the subject matter, this was not unexpected. However, some critiques about the substance of the remarks also appeared to adopt an underlying but unstated premise that the Attorney General, in giving these remarks, had somehow overstepped her role by pushing at constitutional boundaries either by attacking the judiciary or inappropriately politicising her office. For example, Joshua Rozenberg QC (hon), one of the UKs most prominent legal commentators, argued that

1. Suella Braverman QC MP, 'Judicial Review Trends and Forecasts 2021: Accountability and the Constitution' *Public Law Project Conference* (19th October 2021).
2. [2020] UKSC 19.
3. [2017] UKSC 5.
4. [2019] UKSC 41.
5. [2015] UKSC 21.
6. [2017] UKSC 51.
7. [2019] UKSC 22.
8. Mark Elliot, 'Response to the Attorney-General's Public Law Project keynote speech' (October 20, 2021) *Public Law For Everyone*, https://publiclawforeveryone.com/2021/10/20/response-to-the-attorney-generals-public-law-project-keynote-speech/.

the Attorney General's remarks were "trumpeting a political message" that politicized her office and undermined the idea she can "act independently in the public interest while remaining the government's chief legal adviser."[9] The distinguished public lawyer, Professor Mark Elliot of the University of Cambridge, agreed with Rozenberg's critique. For Professor Elliot, the passage of Rozenberg's article which alleged the Attorney General was politicizing her office "nicely illustrates how readily the fabric of the constitution can begin to unravel when appropriate restraint, in any quarter, is not practised."[10] Shortly thereafter, *the Economist* ran articles that made reference to the Attorney General's remarks, suggesting that rather "than defending judicial independence, the attorney-general…has joined the attack"[11] and that the remarks were part of an "anti-judicial agenda… at odds with the separation of powers."[12]

In this short paper, we defend the legitimacy of the Attorney General's decision to offer public remarks on judicial review and reject the characterisation that they pushed impermissibly at the boundaries of her office. We begin by outlining the role and responsibilities of the Attorney General's office, highlighting the diverse portfolio of that office and how its work has long featured both political and legal dimensions. We then outline how Attorneys General navigate the tension between the political and legal aspects of their role, which provides the critical contextual lens for assessing the propriety of the Attorney General's recent remarks. We note that while the Attorney General is an inescapably political actor, it is vital for their constitutional role that political partisanship be avoided in the determinations of what the public interest requires. Finally, having outlined the multifaceted role of the office, and the careful balance it must strike between law and politics, we assess the propriety of the Attorney General's remarks. We suggest the natural reading of these is that the Attorney General's speech did not involve an inappropriate politicisation of the office but constituted political activity entirely consistent with the dual legal and political role of that office. We defend the position that advancing a good faith constitutional critique of important Supreme Court jurisprudence, and defending legislative intervention to correct them, is entirely consistent with the Attorney General's role.

9. Joshua Rosenberg QC (hon), 'Back in your box, attorney tells judges: Suella Braverman pushes the constitutional boundaries' *A Lawyer Writes* (21st October 2021), https://rozenberg.substack.com/p/back-in-your-box-attorney-tells-judges.
10. https://twitter.com/ProfMarkElliott/status/1451148309167493128.
11. 'Boris Johnson treats checks and balances with contempt' *The Economist* (6th November 2021).
12. 'Judicial independence is under threat in Britain' *The Economist* (4th November 2021).

II.The Attorney General's Office: Role and Responsibilities

"The painfullest taske in the realme"[13], "my idea of hell"[14], "if it were not so fascinating in scope, it would be oppressive in its demands"[15] - these are the colourful words past Attorneys General have used to describe the work of their office. A closer examination of the history and nature of the office and the duties it performs, provides a useful window into what might have motivated the dramatic choice of words of its previous incumbents.

The Attorney General of England and Wales is an office ancient in origin, with roots traceable to the 13th Century.[16]Initially the Attorney General was the King's lawyer, an eminent counsel who was expected to fiercely represent the sovereign's interests in legal proceedings and provide advice where requested. Today, the Attorney General of England and Wales is one of the UKs several "Law Officers", a group of legal advisors to the UK and devolved governments.[17] The Attorney General is by convention a minister of the UK government, either elected to the House of Commons or a peer appointed from the House of Lords. The functions of the modern Attorney General are truly daunting in their variety and volume:

- The main function remains to serve as legal advisor to the Crown via the Prime Minister and the Government. The Attorney General is, by convention, not a member of Cabinet[18] but attends its meetings on request as need for advice arises[19] and has increasingly attended meetings on a regular basis.[20] Most day-to-day legal questions facing civil servants and ministers are not dealt with by the Attorney General, but instead by lawyers from the Government Legal Service. Attorneys General instead tend to provide legal advice on questions of the greatest legal complexity or political sensitivity, or where there is legal disagreement between different departments.[21]
- They have an important role in the legislative drafting process, supervising bills to ensure they are Rule of Law compliant and consistent with the Human Rights Act 1998.[22]
- The Attorney General is, by convention, expected to be available to provide legal advice to Parliament in several instances, including the conduct of House proceedings, disciplining of members, and the effect of proposed legislation.[23]
- Through constitutional tradition built over several centuries, the

13. Attributed to Francis Bacon QC. Elwyn Jones QC, 'The Office of Attorney-General' 27 *Cambridge Law Journal* (1969) 43.
14. Attributed to Patrick Hastings QC. Id.
15. S.S.C. Silkin QC, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978) 58 *The Parliamentarian* 149, 158.
16. id., 149.
17. For an invaluable overview of the work of the Law Officers see Conor McCormick and Graeme Cowie, 'The Law Officers: A Constitutional and Functional Overview' HC Library Briefing Paper, No. 08919 (28 May 2020).
18. The Attorney General has not been a member of cabinet since 1928. JLJ Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) 310-318.
19. Jones, 'The Office of Attorney-General' (n15) 47; S S.C. Silkin, 'The Function and Position of the Attorney-General in the United Kingdom' (1978) 12 *Bracton Law Journal* 29, 34.
20. Justice Committee, Oral Evidence by the Rt Hon Jeremy Wright QC MP on the Work of the Attorney General, HC 409, 15 September 2015.
21. *See Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (Cabinet Office, London, 2001) para. 22; *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* (Cabinet Office, 2005) para. 6.22-6.44; *Ministerial Code* (Cabinet Office, 2018) para. 2.10-2.13.
22. McCormick and Cowie, (n20) 15.
23. Silkin, 'The Functions and Position of the Attorney-General in the United Kingdom' (n17) 154-155

Attorney General has accrued a diverse range of responsibilities under the broad heading of defending the public interest. Examples include power to prosecute for contempt of court or repeat initiation of vexatious litigation, to appeal criminal sentences considered 'unduly lenient', to appoint *amicus curiae* in certain important proceedings, and to intervene as a party in litigation concerning charity law.

- The Attorney General superintends the Crown Prosecution Service and Serious Fraud Office and has an important role in setting its priorities and broad policy objectives. But day to day operations and individual prosecutorial decisions are left to independent civil servants and the Director of Public Prosecutions.
- By tradition, the Attorney General is recognised as leader of the bar, having precedence before other counsel.[24]
- More generally, the Attorney General is a government minister and usually a member of a political party that adheres to the party line. He or she is typically a senior politician of the governing party drawn from the Commons or Lords and, as such, will share the political aims of that party. Thus, part of their workload, as with any minister, will be to help advance the policy goals of the government, which may well touch upon sensitive legal issues like human rights law, criminal justice, judicial review, and the correct balance of the Constitution.

24. Id., 155.

III. Negotiating the Law/Politics Boundary

The sheer volume of the Attorney General's portfolio may be part of what motivated the colorful comments of its previous incumbents in describing the challenges of their role. But aside from the workload and its wide remit, perhaps the most difficult - '*painfullest*' - aspect of the office is the tension its holder must deftly navigate between its legal and political aspects. Professor J.L.J Edwards, in his acclaimed study of the law officers, memorably emphasised how the Attorney General constantly walks a tightrope in the British constitutional order.[25] Professor Edwards noted that Attorneys General must always maintain a careful balance when simultaneously carrying out their role as legal advisor and guardian of the public interest/rule of law on the one hand, and their position as a highly political animal and member of government on the other. Successfully negotiating this institutional tension - being both an ideologically sympathetic political appointee and an impartial legal advisor and guardian of the public interest - is perhaps the most important and sensitive charge the Attorney General shoulders.

Some criticise the fact the Attorney General's role continues to have *any* kind of political dimension and unsuccessful calls to reform the office have intermittently emerged. In 2007, for example, the House of Commons Public Administration and Constitutional Affairs Committee strongly advocated reform of the office, on the basis it would be much preferable to have an unelected career civil servant perform the role of Government legal advisor as opposed to a political appointee.[26] But it should be noted the UK is not at all unusual in having an Attorney General with both legal and political dimensions. Apex legal advisors to the executive branch come in all manner of variations and differ significantly depending on the country concerned. To be sure, some legal systems - like Japan, India, and Israel - have opted for a non-elected official to discharge this role with very high levels of insulation from politics.[27] Other systems, like Ireland, have legal advisors appointed by the Prime Minister that attend cabinet meetings and are, broadly speaking, aligned with a governing party's political ethos, but who are typically not politicians and constitutionally forbidden to be members of government.[28] But in addition to the UK many other common law countries, including Australia, Canada, New Zealand and the United States, Attorneys General have long been an explicitly political appointees (a minister and member of the legislature in the case of the former three, and a member of the President's cabinet in the latter)

25. JLJ Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) ix; Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart 2016) 54.

26. House of Commons Public Administration & Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (July 2007) 22-24. The Committee concluded that 'On balance we have concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer and who is not a politician or a member of the Government. The Attorney General's ministerial functions should be exercised by a minister in the Ministry of Justice. Where Ministers instruct the independent head of the prosecution service on public interest grounds, whether national security or other grounds, the Secretary of State for Justice would be accountable to Parliament for the instruction'. Following the report, the Government engaged in a consultation process over reform to the Attorney General's office but ultimately decided not to proceed with any substantial reform.

27. Michael Asimow and Yoav Dotan, "Hired Guns And Ministers Of Justice: The Role Of Government Attorneys In The United States And Israel" (2016) 49 Israel Law Review 3, 12; David Kenny and Conor Casey, 'Shadow constitutional review: The dark side of pre-enactment political review in Ireland and Japan' (2020) 18 International Journal of Constitutional Law 51.

    Article 76 of the Constitution of India requires that anyone appointed as Attorney General must have the requisite qualifications to sit on the Supreme Court.

28. Conor Casey and David Kenny, 'A One-Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2020) 42 Dublin University Law Journal 90.

but nonetheless figures expected to perform certain important functions free from any party partisanship, especially when giving legal advice or making decisions concerning the public interest.

How do Attorneys General in these latter systems - those with a political dimension – meet this expectation and manage the tension between the different aspects of their role? An answer common across the systems above is that an Attorney General's capacity to "withstand political pressure savouring of party advantage"[29] is secured by a combination of dedication to constitutional norms of independence in respect of functions concerning the public interest and rule of law, adherence to legal professional ethics and expertise, and above all the personal integrity of the incumbent. These combine to help ensure an Attorney General's political sympathies do not obstruct their duty to strive for independence and detachment in their advice giving and public interest functions. Attorneys General whose role carries a political dimension therefore try and marry their political commitments and roles to the longstanding traditions of their constitutional office and to those of the independent legal profession in which they are trained, both of which embrace the values of legality and the rule of law.

In discharging their advice giving role, for instance, successive Attorneys General have consistently maintained that they try to offer impartial detached advice in the manner of a lawyer's advice to any client: to give an objective analysis of the law as they see it.[30] Attorneys General also seek to combine their professional detachment as trained lawyers with a desire to assist their ministerial colleagues in the common goal of implementing a government's policy agenda.[31]Defenders of the present status of the Attorney General argue these dimensions of the office are, in fact, complementary. The political aspect is said to provide the Attorney General with intimate knowledge of the policy goals and pressures on her ministerial colleagues, which in turn aids her legal task of offering constructive advice about both the constraints they are bound by, and any possible lawful and proper alternatives they can avail of.[32]

Successfully walking the constitutional tightrope described by Professor Edwards is by no means an easy task. For example, different lawyers will often reach very different conclusions on whether a particular legal opinion or decision taken in the name of the public interest represents "the best" or "most authoritative" account of what the law permits or requires, or what the public interest demands in a given scenario.[33] But all can agree that respecting the values of legality and the rule of law requires an Attorney General, at a minimum, to not allow partisan bias, party political concerns, or pressure from colleagues, to obscure good faith attempts to offer proper legal advice, or to taint a conclusion that a particular decision is in the public interest, or cause them to sign-off on the legality of government policies under flimsy and strained legal justification.

In the UK, an Attorney General who is perceived to have descended into partisan decision-making, or succumbed to political pressure, not only

29. Edwards, (n 28) 224.

30. Conor Casey, 'The Law Officers: The Relationship between Executive Lawyers and Executive Power in Ireland and the United Kingdom', in (Oran Doyle, Aileen McHarg, & Jo Murkens eds., 2021) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure*; Elwyn Jones, 'The Office of Attorney-General' (1969) 27 *Cambridge Law Journal* 43, 50; Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford University Press 1999) 297.

31. Edwards, *The Attorney-General, Politics and the Public Interest* (n) 185.

32. Ben Yong, 'Risk Management: Government Lawyers and the Provision of Legal Advice within Whitehall' (2013) *Constitution Unit/ Constitution Society* 61; Silken (n) 156-157.

33. Neil Walker, 'The Antinomies of the Law Officers' in (Maurice Sunkin and Sebastian Payne eds.) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press 1999).

risks breaching the constitutional and professional norms that underpin the work of the Office (and, more broadly, those that underpin the legal profession generally), but the public and parliamentary confidence and credibility on which the office depends.[34] In the instances where Attorneys General have previously been criticised for their advisory or public interest work, it was invariably based on the allegation they permitted partisan political pressure to influence their work. The seriousness of these kind of previous controversies is a measure of how entrenched the norms surrounding the Attorney General's office is in UK constitutional culture and how seriously they are taken.[35]

34. Casey, n (33).

35. For example, the allegation Attorney General Lord Goldsmith QC succumbed to political pressure to alter his initial advice over the legality of the UK's involvement in the Iraq War continues to generate controversy nearly two decades later. See Casey, (n33) 302; Robert Verkaik, 'Goldsmith under pressure from legal profession over impartiality' (29 April 2005) *The Independent*, https://www.independent.co.uk/news/uk/crime/goldsmith-under-pressure-from-legal-profession-over-impartiality-3903.html. Perhaps even more politically explosive in its day was the controversy that brought down the first Labour Government of Ramsay McDonald PM in 1926. A large factor in the Government's collapse was the allegation then Attorney General Patrick Hastings KC had acceded to political pressure from his Cabinet colleagues in deciding to discontinue a prosecution against a communist newspaper editor for incitement to mutiny. Jones, 'Office of Attorney General' (n15) 50.

IV. The Attorney General's Speech: Crossing the Line?

The purpose of this brief foray into the work of the Attorney General is to highlight that an appreciation of the multifaceted role of the office, and the careful balance it must continually strike between its legal and political dimensions, is the necessary contextual lens for assessing the propriety of the Attorney General's recent remarks.

With this context in mind, we can ask: do the Attorney General's remarks represent a good faith jurisprudential disagreement with the Supreme Court designed to explain and justify the political and legal legitimacy of the government's constitutional reform initiatives? Or, alternatively, are they an example of partisan party politics pressing the Attorney General to undermine judicial independence and the rule of law? The former would be an unobjectionable example of the Attorney General discharging their political role as minister and parliamentarian, but with due respect for constitutional fundamentals like the separation of powers and rule of law, which are critical to the public interest. The latter would be a breach of the norms of the office and likely the profession more broadly, and clearly unacceptable.

We suggest a close look at the text and subject matter of the speech shows that it comfortably falls on the side of the former. For a start, at several stages the Attorney General was careful to reiterate the critical role played by the judiciary in the Constitution. Judges, said the Attorney General, are "entitled to the greatest respect, and in our system are beyond reproach, and rightly so".[36] The Attorney General emphatically stated "I accept their decisions, even if I disagree with them."[37] The Attorney General also correctly stressed that "an independent, apolitical, judiciary is crucial to upholding the Rule of Law."[38] Moreover, the substance of the speech cannot reasonably be read as anything like an attack on the judiciary or its constitutional position; but instead reads as a reasoned explanation and justification - steeped in case law and public law scholarship – for the legitimacy of the executive inviting the legislature to intervene where it disagrees with the constitutional propriety of a line of jurisprudence.

The heart of the speech touched on several complex, often technical, legal topics central to the separation of powers framework of the UK, including: the appropriate scope of judicial review over prerogative powers like prorogation, the propriety of more intensive standards of judicial review like proportionality, the cogency of the Supreme Court's approach to statutory interpretation and ascertaining parliamentary intent,

36. Braverman QC MP, 'Judicial Review' (n1).
37. Id.
38. Id.

and where to draw the conceptual line between subject-matter properly subject to legal adjudication and that which is nonjusticiable due to its high-political nature. In assessing the propriety of the Attorney General's remarks, it is important to note that her critique of the Supreme Court on these issues, and her own proffered alternatives, are not eccentric or off the wall constitutional positions, but views shared by many in the judiciary, legal profession, and academy.

Of course, the fact many lawyers and scholars share certain beliefs about the foregoing issues clearly does not make them correct, nor a more reasonable or attractive understanding of the Constitution than those adopting the contrary position. But the fact of deep and wide disagreement on these questions does, however, support the view that what was advanced by the Attorney's speech was not political in the narrow, inappropriate, partisan sense of that term. Instead, the more natural reading is that it was only political speech in the richer sense of that word – concerning as it did philosophical disagreement about a contentious line of jurisprudence – of the kind it is entirely appropriate for a constitutional actor with both legal and political dimensions to engage in.

In the UK, the crucial fact to remember is that the Attorney General has never been considered an apolitical actor in *this* sense. Attorneys General must, of course, avoid political partisanship in their public interest determinations, and (of course) the kind of public remarks that would bring the judiciary and Rule of Law into contempt. But these are entirely distinct from advancing a good-faith constitutional rationale for policy reform mooted by the Government, or the legitimacy of the executive inviting Parliament to correct what it views as an erroneous and constitutionally heterodox line of Supreme Court jurisprudence.

It also cannot be overlooked that there are precedents for this kind of political engagement with the jurisprudence of the senior judiciary. Similar respectful, but firm, public remarks voicing concern and disagreement with jurisprudential trends were given during the tenures of the last several Attorneys General.[39] Attorneys General offering informed and robust critiques of jurisprudence they consider erroneous is also not unique to the UK, but a feature of other common law systems such as the United States[40] and New Zealand.[41]

In the UK, the principle that judgments and trends in judicial thinking are properly debateable has been, and should always remain, an important contribution to determining where the common good lies. Law officers, with their dual political and legal roles and ability to grapple with the minutiae of judicial doctrine and legal commentary, have a useful role to play in these debates. There is no good argument that we have seen, or can discern, for the proposition the Attorney General's engagement in robust but respectful intellectual critique of jurisprudential trends is beyond the constitutional pale.

To disagree, even vehemently, with an aspect (or all) of the Attorney General's remarks on recent case-law is one thing, (and entirely appropriate) but to suggest that this kind of engagement with Supreme

39. See Robert Wright and Jane Croft, 'UK attorney-general backs calls to curb judges' powers' (12 February 2020) *The Financial Times*. The *Financial Times* article is a report based on Geoffrey Cox QC MP's extended interview with the *Institute for Government* think-tank. The headline represents quite an unfair and lop-sided summary of what was an extensive and nuanced hour-long conversation. However, the then Attorney General did make the comments cited in the article about the appropriate balance of power between the Courts and Parliament and mentioned there were legitimate concerns that decisions where increasingly being taken by the former that ought to be reserved to the latter. The full interview is available here: https://www.youtube.com/watch?v=N5Tzd-jkGu2k. See also Jeremy Wright QC MP, 'The Attorney General on who should decide what the public interest is' (8 February, 2016), https://www.gov.uk/government/speeches/the-attorney-general-on-who-should-decide-what-the-public-interest-is; Dominic Grieve QC MP, 'European Convention on Human Rights: current challenges' (24th October 2011), https://www.gov.uk/government/speeches/european-convention-on-human-rights-current-challenges.

40. Such critique is a settled part of the constitutional landscape of the United States. Previous Attorneys General from across the political spectrum have critiqued the federal judiciary for concerns over judicial activism and departing from the Constitution's ostensible original meaning (see Edwin Meese II., *Law of the Constitution*, (1986-1987) 61 Tulane Law Review 979, citing foreign jurisprudence when engaging in constitutional interpretation, for invalidating landmark Healthcare and Civil Rights legislation, and the perception they were excessively hamstringing the powers and prerogatives of the executive branch.

41. In a series of high-profile interventions in the early 2000's, then Deputy Prime-Minister and Attorney General Michael Cullen expressed robust criticism of comments of the senior judiciary. Cullen strongly objected to judicial remarks which appeared to eroded the centrality of parliamentary sovereignty by suggesting its foundation in New Zealand law was 'precarious'. The Attorney General argued *inter alia* that the "challenging of parliamentary sovereignty in the courts would amount to constitutional change by stealth. It is for the public to grant the courts a larger constitutional mandate; not for the courts to build one upon an interpretation of constitutional history…Any perception that the courts are working to develop a common law jurisprudence which imposes new limits on the power of the Parliament and the legitimacy of the laws it enacts would threaten the credibility of both institutions." Michael Cullen, 'Parliament: Supremacy over fundamental norms' (2005) 3 New Zealand Journal of Public and International Law, 1, 4-5.

Court jurisprudence transcends the proper constitutional bounds of the office of Attorney General, is quite another. Even in those constitutional systems where apex legal advisors are not politicians a respectful critique of judicial reasoning is hardly problematic, but to advance that suggestion here simply ignores the history and nature of the office as one with *both* legal and political dimensions.

£10.00
ISBN: 978-1-913459-82-6

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