From the Rule of Law to the Rule of Lawyers?

The Problem with the Attorney General's New Legal Risk Guidelines

Dr Conor Casey and Dr Yuan Yi Zhu

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Policy Exchange

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Introduction

For several decades, the work of government lawyers has been structured by guidelines outlining how they should provide and convey legal advice to Ministers, including how to assess and present legal risk. In 2015, these guidelines were made public by the Government Legal Department and Treasury Solicitor. In 2022, these guidelines were replaced by the-then Attorney General, Suella Braverman KC MP.

In October 2024, the current Attorney General, Lord Hermer KC, delivered the Bingham Lecture on the Rule of Law. In his lecture, '*The Rule of Law in an Age of Populism*', the Attorney General outlined the Government's ostensible aim to restore "our reputation as a country that upholds the rule of law at every turn".[1] Part of this plan included a commitment on the Attorney General's part to issuing:

> *"amended guidance for assessing legal risk across government that will seek to raise the standards for calibrating legality that the thousands of brilliant lawyers working in every part of government activity apply…I want them to feel empowered to give their full and frank advice to me and others in government and to stand up for the rule of law."*[2]

The amended Attorney General's Guidance on Legal Risk were published in November 2024.[3] This research note outlines the significant and, we argue, negative ways in which they significantly depart from previous guidance. The guidelines will likely give government lawyers, and especially the Attorney General himself, more power and influence over policymaking, at the expense of ministers accountable to Parliament (and the people). The guidelines also represent an expansion of the Attorney General's role vis-à-vis Government and Parliament, an expansion in tension with constitutional fundamentals. Finally, the new guideline's treatment of international law represents an extraordinary change to the settled legal-constitutional position about international law and its relationship to Ministers and Parliament.

Notwithstanding the guidelines, Ministers should feel confident that it is entirely legitimate for them to proceed with a policy that has a tenable legal argument underpinning it, even if government lawyers and the Attorney General deem it inappropriate to do so. Ministers are free to reject suggestions from government lawyers about the appropriateness or otherwise of proceeding with a policy with a tenable legal basis. Moreover, it is important that Ministers and parliamentarians understand that these guidelines cannot work a permanent change to our constitutional arrangements, even if they cause confusion and needlessly

1. Attorney General Hermer KC, 'The Rule of Law in An Age of Populism', (Bingham Lecture, 2024), https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law.
2. Ibid.
3. Attorney General Hermer KC, 'Attorney General's Legal Risk Guidance' (November, 2024), https://www.gov.uk/government/publications/guidance-attorney-generals-guidance-on-legal-risk.

block policies in the short term. It remains open to the current, and any future government, to repeal these guidelines and replace them with guidelines more consistent with constitutional fundamentals.

The Relationship Between the Government Legal Department and Law Officers

The biggest provider of legal services to the Government are the lawyers working within the Government Legal Department (**GLD**). This non-ministerial Department, headed by the Treasury Solicitor, is responsible for coordinating the recruitment, training, and policies that govern the work of around 2,500 lawyers that provide legal advice and litigation support to government. The work of government lawyers is complemented by input from external counsel drawn from several panels and briefed by the Treasury Solicitor. Government lawyers are also assisted by First Treasury Counsel, typically a barrister of considerable expertise who assists with the government's most important public law issues.[4]

The Law Officers are the chief legal advisors to the government.[5] They tend not to handle routine legal questions, but the most important and controversial questions. They may, for example, be called on to resolve disagreement between other government lawyers. Legal advice from the Law Officer's takes primacy over other sources of legal opinion.[6]

Government lawyers are civil servants, but as professional lawyers they also remain subject to the same ethical codes of conduct and obligations that apply to qualified solicitors and barristers. While they are entitled to advance their client's interests fearlessly, they must always act within professional ethical boundaries. They can never, for instance, make a legal representation or submission they know is unfounded, or withhold relevant authorities from the court, nor mislead the courts in the administration of justice. In recent decades, these ethical and professional obligations have been complemented by guidelines, issued first by the Treasury Solicitor and more recently by the Attorney General, outlining how government lawyers should assess and present legal risk to Ministers.

4. Conor Casey, 'A Defence of the Dual Legal – Political Nature of the Attorney General for England and Wales', in (eds.) Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom (Hart: Bloomsbury 2023)*227-228; Conor Casey, 'Between Law and Politics: The Future of the Law Officers in England & Wales' (Policy Exchange, 2023) 9-10.
5. Conor McCormick and Graeme Cowie, 'The Law Officers: A Constitutional and Functional Overview', *House of Commons Library Briefing Paper* (May 2020); Conor McCormick, *The Constitutional Legitimacy of the Law Officers in the United Kingdom* (Hart Publishing, 2022).
6. Sir Stephen Laws KC (Hon), 'The Treasury Devil and the scandal that never was' (Policy Exchange, 20 June 2022) Policy Exchange - The Treasury Devil and the scandal that never was.

Previous Guidance on Legal Risk

1990s Guidance Note

In the 1990s, the GLD compiled an internal guidance note that was issued to new lawyers joining the civil service. The note stated that government lawyers have a professional obligation to "give impartial, objective, and frank advice."[7] As civil servants, government lawyers "owe their loyalty to the duly constituted Government and are accountable to the Minister" whose department they work within.[8] The note added that legal advice given by government lawyers should always be "given in the context of the duties and responsibilities of the Minister... they may have policy objectives to deliver for which the Government has a collective responsibility".[9] The note also said that where there was disagreement over legal advice, the difference should be resolved by consideration at a more senior level before that advice is conveyed to a Minister. Where disagreement cannot be resolved, the Minister should be informed of the difference of view before the Minister decides how to proceed. In such circumstances, the Law Officers may have to get involved.[10] While Law Officers do not handle routine legal questions, the note clarifies that there is a special relationship between the Law Officers and GLD lawyers, and that the latter are entitled to consult the former on any matter where they think it necessary to get their opinion.[11]

2015 Guidance Note on Legal Risk

In 2015 the GLD, then led by Treasury Solicitor Jonathan Jones (now Sir Jonathan Jones KCB KC (Hon)), publicly promulgated a "Guidance Note on Legal Risk"[12] that, like the earlier guidance note, would structure the legal advice-giving work of government lawyers. Sir Jonathan would later describe the purpose of the guidelines as twofold. First, they were designed to help address the perception that lawyers were "risk averse", along with the tendency to blame legal advice as a reason for not proceeding with policies. Second, the guidelines were designed to bring some consistency in the way that legal risk is described and conveyed to clients across different government departments.[13]

The 2015 note provided that all "legal advice should be risk-based and offer options for mitigating or avoiding risk" and stressed that it was "important that Ministers and officials have confidence that lawyers are acting in their interests and looking actively for ways to deliver policy objectives while identifying ways of minimizing risks."[14] The note also said it was "important that legal risks are fully integrated into policy

7. See Ben Yong, Risk Management: Government Lawyers and the Provision of Legal Advice Within Whitehall (Constitution Society, 2013) Appendix, 100-105.
8. Ibid., 102.
9. Ibid., 103.
10. Ibid.
11. Ibid.
12. Government Legal Department, 'Guidance Note on Legal Risk', (July 2015), https://assets.publishing.service.gov.uk/media/5b858a0eed915d7e1aa25744/Legal_Risk_Guidance_-_Amended_July_2015.pdf.
13. Sir Jonathan Jones KC (Hon), 'What does the new legal risk guidance for government lawyers', (Institute for Government, November 2024), https://www.instituteforgovernment.org.uk/article/comment/Hermer-new-legal-risk-guidance.
14. Supra n (12).

analysis" and "communicated accurately and clearly to senior decision makers and to Ministers".[15]

The 2015 guidance note introduced a table of percentage bands to help government lawyers present legal risk to decision makers in a clear and transparent way. A high legal risk was described as involving a 70% or above chance of a successful challenge being brought. A medium-high legal risk was where there was a 50-70% chance of a successful challenge. A medium-low risk was where there was a 30-50% chance. A low risk was where there was a 30% chance.

The 2015 note affirmed that a government lawyer could not advise that a policy had a lawful basis unless it could be supported by a "respectable legal argument". The note described a respectable legal argument as one that could be "put to the Court".[16] A respectable legal argument could, the note said, carry a high risk. The 2015 note stated that a Minister could "legitimately decide to proceed with a proposal even if it carries a high risk (70%+)".[17] In a situation where a government lawyer concludes "no respectable legal argument" exists, then they "will need to advise that the proposed action is unlawful".[18] However, the note suggests that such a situation "is likely to be highly exceptional" and, if it arises, must be referred to their line manager and Legal Director.[19]

2022 Attorney General's Legal Risk Guidance

In 2022 the then Attorney General Suella Braverman KC MP reissued the legal risk guidelines as the "Attorney General's Guidance".[20] In introducing the new guidelines, the Attorney said that their purpose was to help get away from an approach to the provision of legal advice where "government lawyers are too cautious in their advice" and hamper "ministerial policy objectives needlessly".[21] The most significant change in the 2022 guidelines was their encouragement for government lawyers to do more to reduce the perception "that because there is some legal risk in a proposed policy or course of action, that may prevent it from happening".[22] The note states that sometimes "the simple fact that you will advise there is *some* legal risk can lead to an assumption that a course of action or policy cannot be taken."[23] To tackle this risk, the 2022 recommended:

> *"starting your advice in a submission with clarity that there is a sufficient legal basis for a decision or course of action and going on to explain clearly that it carries legal risk, using the framework below, [which] helps to ensure legal risk doesn't become a perceived "block" to what a Minister wishes to achieve."*[24]

It also states, when presenting legal risk, that government lawyers must take "care to explain what solutions are available to the Minister, ensuring that legal risks are described appropriately in wider submissions."[25]

In addition to encouraging government lawyers to ensure their presentation of legal risk did not become a perceived "block", the 2022 guidelines also emphasised the duty of government lawyers to help Ministers in their "overarching duty to comply with the law", to act

15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
19. Ibid.
20. Suella Braverman KC MP, 'Attorney General's Guidance on Legal Risk' (2022).
21. https://www.civilserviceworld.com/news/article/government-lawyers-too-cautious-says-attorney-general.
22. Supra n (20), para 1.
23. Ibid, para 13.
24. Ibid.
25. Ibid.

"conscious of…[their] wider professional obligations",[26] and to use their "professional judgment to reassess and reconfirm or change" their "legal assessment over time" in response to relevant facts and evidence.[27]

Substantively, there was considerable continuity between the 2015 and 2022 guidelines. First, the 2022 guidance retained the percentage bands of legal risk in the 2015 note. Second, the 2022 guidance retained the threshold that only "if no respectable legal argument can be put to a court" should a government lawyer advise that a policy is "unlawful."[28] Third, both guidance notes stated that a respectable legal argument was one that could be properly made before a court. Fourth, both the 2015 and 2022 notes stated that it would be "exceptional"[29] and "rare"[30] for a government lawyer to conclude there is no respectable legal argument for a policy. Finally, both guidance notes require that where a government lawyer considers there is no respectable legal argument for a decision or policy, that the issue should be escalated to their line manager and Legal Director, who will consider consulting the Law Officers.

26. Ibid, para 2.
27. Ibid, para 14.
28. Ibid, para 2.
29. Supra n (12).
30. Supra n (20), para 2.

2024 Attorney General's Guidance on Legal Risk

Significant changes

On 6th November 2024, the current Attorney General Lord Hermer KC replaced the 2022 guidelines with new guidelines. The Attorney stated in his Bingham Lecture that the new guidelines are intended to raise the "standards for calibrating legality that the thousands of brilliant lawyers working in every part of government activity apply…I want them to feel empowered to give their full and frank advice to me and others in government and to stand up for the rule of law."[31] The 2024 guidance introduces several changes to the substance of the 2015 and 2022 guidelines.

The threshold of "no respectable argument" in the 2015 and 2022 guidelines has been replaced by a "no tenable legal argument that could be put to a court" standard.[32] A legal argument is "tenable if a lawyer representing the government could properly advance that argument before a court or other tribunal in accordance with their professional obligations."[33] At first glance, this change looks like a mere change in terminology rather than a serious change of substance. However, this change must be read in light of the new guidelines' serious shift in tone in respect of how government lawyers should present legal risk to Minister when that risk is high. The 2015 and 2022 guidance were both emphatic in affirming the basic constitutional position that while government lawyers should be clear and candid about the level of legal risk facing a policy, it is up to the Minister how to act in light of that risk, namely whether to run the risk and proceed to act. The 2022 guidance, in particular, clearly stated that where there is a respectable legal argument, there is a sufficient legal basis for a policy; and where there is a sufficient legal basis for a policy, it is the role of government lawyers to state clearly in their advice that there is a lawful, albeit possibly high risk, path a Minister can take.

The new guidelines continue to recognise, in principle, that "decisions are for Ministers, dependent on their risk appetite".[34] In a highly novel development, however, the Attorney General's new guidelines go on to say that government lawyers should inform Ministers they should be reluctant to proceed with a desired policy where there is only a tenable legal argument underpinning it. The new guidance says that reliance on a "legal basis which is underpinned only by a tenable legal argument" should be a "last resort and only pursued when all other options have been

31. Supra n (1).
32. supra n (3), para 8
33. Ibid.
34. Ibid., para 17.

considered and discounted."[35] More strikingly, the current guidance states that it "may not be appropriate in some cases" for a Minister to proceed with a policy underpinned by a tenable legal argument "for example, in situations where the fundamental rights of individuals are significantly undermined, particularly where the proposed policy or action is unlikely to be challenged before a court or otherwise subject to judicial scrutiny."[36] Nowhere in the guidelines does the Attorney General attempt to define "fundamental rights", relying presumably on the misconceived notion that one can know one when you see it, without needing to know its parameters. This is likely to cause serious confusion and ambiguity in practice.

All of this represents a dramatic shift from the earlier guidance. In our constitution, the role of government lawyers is to inform the decision-making of Ministers by appraising them fully and frankly of any relevant legal risks and offering constructive solutions about how to mitigate it. The role of government lawyers does not properly extend to instructing Ministers that it would be inappropriate to proceed with a legally high-risk policy save as a last resort, or that it is inappropriate to proceed with a legally risky policy where fundamental rights are engaged. These are political and policy decisions and, as such, are the preserve of accountable elected officials and not civil servant lawyers. These guidelines are constitutionally dubious because government lawyers are being enjoined to impress these policy positions on Ministers in the course of ostensibly giving legal advice.

The guideline's shift in tone about how government lawyers should present legal risk could significantly impact on the work of government. Constitutionally speaking, government lawyers play an important role but are advisors only. They are not a court and have no authority to issue binding directives to Ministers. These new guidelines, however, increase the risk government lawyers will exercise an unconstitutional block on policymaking. Government lawyers may end up overstepping their constitutional authority by feeling empowered, on the foot of these new guidelines, to withhold their "approval" for a government proposal, policy, or even a legislative initiative underpinned by a tenable legal argument, due to their concerns that "all other options" have not "been considered and discounted",[37] or that the "fundamental rights of individuals are significantly undermined".[38]At the least, these new guidelines will likely generate confusion amongst Ministers and government lawyers about the proper boundaries of the latter's role.

35. Ibid., para 20a.
36. Ibid., para 20b.
37. Ibid., para 20a.
38. Ibid., para 20b.

Table 1: Comparing 2022 and 2024 treatment of high legal risk policies

2022 guidance	2024 guidance
A policy is high risk, but there is a respectable legal argument	**A policy is high risk, but there is a tenable legal argument**
Start advice in a submission with clarity that there is a sufficient legal basis for a decision or course of action and go on to explain clearly that it carries legal risk.[39] Ensure legal risk doesn't become a perceived "block" to what a Minister wishes to achieve.[40]	Reliance on a legal basis which is underpinned only by a tenable legal argument should be a last resort and only pursued when all other options have been considered and discounted.[41] It may not be appropriate in some cases to proceed based on a tenable legal argument in situations where the fundamental rights of individuals are significantly undermined.[42]

Another novelty in the new guidelines is that they expand the circumstances when a legal issue must be escalated to a higher authority, including the Law Officers. The 2022 guidelines provide that any "situation where no respectable legal argument can or is likely to be found to justify a proposed decision or policy should be reported early to your line manager and Legal Director who may need to alert the AGO."[43] The 2024 guidelines, in contrast, provide that "the Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. Proposals to rely only on a tenable legal argument or where the legal risk is assessed as being otherwise high or medium-high should always be brought to the attention of your line manager or Legal Director, who will consider consulting the Law Officers."[44]

One foreseeable effect of this change may be that the Attorney General will be more personally engaged in the legal scrutiny of a wider range of government policies; those which are at, or above, the threshold of medium-high legal risk. If the Attorney General adheres to his own guidelines on presenting legal risk, he may end up wielding a de facto veto over a wide range of policy decisions where such decisions - despite having a tenable legal argument to support them - are nonetheless deemed by him inappropriate to proceed with because there might be less risky alternatives available, or because fundamental rights are implicated. This, of course, would be an unwarranted and unconstitutional development. For, not even the Law Officers themselves have any legal power to order the Government to do anything, or to block Ministers from taking decisions that they want to take. The function of the Law Officers (save in the rare cases where they are the primary decision makers) is to advise Ministers, but it is for Ministers to take decisions and to answer to Parliament for them. The situation is of course different where the Attorney General advises that a course of action is unlawful in domestic law, i.e., that it lacks a tenable legal argument. In such a case, the Government is by convention

39. Supra n (20), para 13.
40. supra n (3), para 20a.
41. Ibid.
42. Ibid., para 20b.
43. supra n (20) para 15.
44. supra n (3), para 22.

constitutionally required to avoid such a course of action. But, of course the Government can always propose legislation that would make the course of action lawful once the legislation comes into force.

The 2024 Guidance and International Law

A key area in which the 2024 guidance makes a dramatic break with its predecessors is in its heavy emphasis on international law. Whereas the 2015 and 2022 versions of the guidance each mention international law once, the 2024 version mentions international law a staggering 24 times. The 2024 guidance introduces several contentious rules concerning international law and legal risk which run against the United Kingdom's constitutional arrangements in dramatic ways.

Redefinition of legal risk in relation to international law

Insofar as the guidance is meant to be primarily concerned with legal risk, the 2024 version's strong emphasis on international law does not even make sense on its own terms. This is because, as both the 2015 and 2022 versions of the guidance had recognised, the very first factor that should be considered is the likelihood that a legal challenge will be brought.

But because international law rests on state consent, it is not possible to bring legal challenges in international courts against the United Kingdom unless the United Kingdom has consented to the court's jurisdiction. Hence, the legal risk involved is of an altogether different nature, and will usually be far smaller, than the legal risk associated with municipal law in domestic courts.

This reality is partially, though begrudgingly, recognised by the 2024 version of the guidance at paragraph 13(a), which acknowledges that "International law principally applies between states. It may not give rise to legally enforceable rights or duties in UK domestic law, which will usually depend on implementing legislation.".

However, the new guidance then goes to say that "Policies or actions which have little or no chance of being tested before a court and which are assessed as carrying a high risk under international law should be scrutinised very carefully by government lawyers".[45] Since the guidance is ostensibly about legal risk, the fact that a particular international obligation is not likely to be tested before a court is clearly of the highest relevance, as the first legal risk assessment factor of both the 2015 and 2022 versions of the guidance—"likelihood of a legal challenge being brought"—clearly indicate.

The 2024 guidance acknowledges this, but goes on to argue that a high-risk legal position on the international plane:

> *may incur significant consequences, be they legal, political, diplomatic and/or reputational. An assessment of the risks of a breach of international law will require legal and policy assessments of the reputational, diplomatic and Parliamentary impact to be put clearly to Ministers. It will also require an assessment of the likely response of the actors to which the UK owes the*

45. supra n (3), para 13(b).

> *international obligation, the likely response of the international community as a whole and any broader implications for the application and development of international law.*[46]

The 2024 guidance does not explain why Government lawyers should scrutinise "very carefully" policies or actions which will not be tested in front of a court, or why this has anything to do with legal risk at all. Instead, the guidance essentially calls upon government lawyers to act as self-appointed guardians of international law, even when there is no legal risk whatsoever. Moreover, nothing in the guidance explains why government lawyers are qualified to advise on considerations such as "the likely response of the international community as a whole" and "the likely response of the actors to which the UK owes the international obligation",[47] which are self-evidently matters of foreign policy and diplomacy over which Government lawyers, however skilled in legal issues, cannot be expected to offer particular insights.

As scholars and practitioners almost universally recognise, international law is different in nature from domestic law, owing to the nature of the international system, which recognises no overarching sovereign and in which enforcement of international legal obligations is usually done on a self-help basis, and animated much more heavily by political considerations than is customary, or acceptable, in domestic legal systems. But there is no evidence that the guidance has taken into account the fundamentally different nature of international law (including the inherent imprecision and uncertainty that is a common feature of much international law and often makes the assessment of the legal risk to which it gives rise so much more problematic) : instead, it appears to simply assume that international law is a higher form of domestic law.

International law, the rule of law, and ministers

The 2024 guidance also asserts a new and radical constitutional principle in relation to international law, by stating that:

> *the rule of law requires compliance by the state with its obligations in international law as in national law, even though they operate on different planes: the government and Ministers must act in good faith to comply with the law and in a way that seeks to align the UK's domestic law and international obligations, and fulfil the international obligations binding on the UK. To honour the UK's international obligations, the government should not invite Parliament to legislate contrary to those international obligations.*[48]

There are several problems with these remarks. Firstly, the United Kingdom is a dualist system, meaning that international law has no direct effect in the United Kingdom's domestic legal order unless incorporated into United Kingdom law. This is a basic constitutional principle and a necessary corollary of the foundational principle of Parliamentary sovereignty, designed to ensure the ultimate democratic oversight over the country's legal framework, and avoiding the real risk that Ministers could use their treaty-making powers to circumvent the parliamentary

46. Ibid., para 13c.
47. Ibid.
48. Ibid., para 9.

law-making process.

As Professor David Feldman explains, dualist arrangements of the sort adopted by the United Kingdom are animated by "the desire to uphold constitutional guarantees, including the Rule of Law, and keep in the hands of the nations the democratic control of and accountability for national law and policy, in order to maintain the legitimacy of politics and public law in the state."[49] The power to legislate contrary to international law is an affirmation of the rule of law, not its abnegation.

Because of the United Kingdom's dualist system, there is always the possibility that domestic law will enter into conflict with international law. This has long been recognised, and the country's courts have consistently recognised the primacy of the United Kingdom's domestic law over international legal obligations which have not been given effect in United Kingdom law.

This includes the possibility of Crown or Parliament deliberately breaking international law if it considers it appropriate to do so. As Lord Justice Diplock (as he then was) famously held,

> *"the Crown has a sovereign right, which the court cannot question, to change its policy, even if this involves breaking an international convention to which it is a party and which has come into force so recently as fifteen days before."*[50]

And as the late Lord Chief Justice of England and Wales, Lord Judge, put it,

> *although Parliament is expected to respect a Treaty obligation, it is not bound to do so, and legislative enactments are themselves of course subject to subsequent amendment or repeal by the same or later parliaments. For us this principle, embodied in a constitution which is partly written and partly unwritten, underpins the rule of law and represents the rule of law in operation.*[51]

Of course, this is not a power to be used lightly. In most situations, it will be beneficial for the United Kingdom to ensure that its international legal obligations and its domestic law are broadly in line with each other, to avoid such clashes. Conversely, if the United Kingdom Government is unwilling to be bound by a treaty obligation in domestic law, it should refrain from signing the relevant treaty, even for presentational or aspirational purposes.[52]

Yet the new guidance states boldly that the rule of law requires compliance with both domestic law and international law, running them together in saying that "the government and Ministers must act in good faith to comply with the law" and in adding that Ministers should not "invite Parliament to legislate contrary to these international obligations".[53] These are very radical statements.

Firstly, in suggesting that Ministers "should not "invite Parliament to legislate contrary to these international obligations", this Guidance which, it will be remembered, is ostensibly meant as a document for Government lawyers, is purporting to introduce a novel and extraordinary limitation on the powers of His Majesty's Ministers to proceed with legislation

49. David Feldman, "The Internationalization of Public Law and Its Impact on the UK", in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, 7th edition, 2011.

50. *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740.

51. Lord Judge, "A View from London" *Counsel*, October 2014, https://www.counselmagazine.co.uk/articles/viewlondon

52. As have arguably been the case with the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child, where Ministers took the view that the obligations they incurred under them were, in the words of Professor Feldman, "aspirational rather than immediate." In relation to the latter treaty, see Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, [2021] UKSC 42.

53. supra n (3), para 9.

which they believe to be in the national interest, and by the same token suggesting that Ministers' power to introduce legislation are subject to the consent of Civil Service lawyers.

This is an idea which is entirely at odds with the foundational principles of the British constitution, in which civil servants, including government lawyers, advise but in which decisions are ultimately taken by democratically accountable ministers. The risk is that the civil servant-minister relation, which is at the core of the United Kingdom's executive government, is remade through the transformation of the role of government lawyers.

Secondly, by purporting to lay down a new rule that Ministers should not seek to legislate contrary to international law (even though it is very doubtful, as a matter of constitutional practice, that the Attorney General has the power to lay down such a binding rule on other Ministers), the guidelines set aside centuries of constitutional practice, whereby Parliament could and did regularly legislate contrary to international law, in accordance with the basic principle of Parliamentary sovereignty, and justified on grounds of national interest.

An early example of the impact of the guidance on the current Government's future freedom to act in the national interest can be found in the recent extension of the United Kingdom's "steel safeguards", a series of quotas and tariffs designed to protect the British steel-making industry, safeguards which in the view of the United Kingdom "departs from our international legal obligations under the relevant WTO agreement" but which are justified on the basis of "national interest requires action to be taken".[54]

The decision to extend the safeguards, taken by the previous government during the pre-election purdah, were endorsed by the-then Labour opposition, and subsequently by Jonathan Reynolds MP, the new Business Secretary.[55] Had the rules made by Lord Hermer been in place then, it is an open question whether civil servants would have attempted to block the extension of the safeguards on the basis that they were contrary to international law, even though the safeguards are widely recognised as necessary to protect the UK's steel industry from extinction.

As another example, s. 19(1)(b) of the Human Rights Act 1998 expressly provides for the possibility that a Minister of the Crown may introduce a bill which they cannot guarantee is compliant with the European Convention on Human Rights; thus, this provides express statutory confirmation of Ministers' right to introduce legislation that is incompatible with international law. In the same vein, s. 10(2) and 10(3) of the HRA provides for the possibility that Ministers may not amend legislation that is incompatible with the ECHR, thus continuing a breach of international law.

It should also be observed that breaches of international law are common in the field of taxation, where Parliament regularly enacts taxation provisions which are incompatible with the UK's network of double taxation and other taxation treaties, which are binding in international

54. https://researchbriefings.files.parliament.uk/documents/CBP-9596/CBP-9596.pdf

55. https://hansard.parliament.uk/commons/2024-07-18/debates/24071828000013/UK-SteelSafeguardExtension

law. The practice is so normalised that they even have a name, "tax treaty overrides", and overrides are widely used not only by the UK, but by peer jurisdictions as well. Taking the 2024 guidance at face value, the United Kingdom will be debarred from enacting such legislation in the future, even though they are a common feature of both British and international tax law regimes.

What exactly is "international law" for the purposes of the guidelines?

Another serious issue with the guidance lies in its repeated use of "international law" as an undifferentiated concept, when in fact international law encompasses many different types of rules which, depending on their nature, have various degrees of bindingness upon the United Kingdom's government and domestic institutions. A simplified typology is as follows:

(a) Customary international law which is binding on the United Kingdom as a matter of international law
(b) Treaty obligations, which can be
    1. Incorporated into United Kingdom law by Act of Parliament, or
    2. Unincorporated into United Kingdom law, and therefore not part of UK law

Prima facie, "international law" as used in the guidance would include all of the above. But each of these categories has a distinct legal and constitutional status under United Kingdom law, which means that to lump them all in the same category because of their shared bindingness on the international plane, as the 2024 guidance does, is deeply unhelpful.

For example, customary international law (CIL) applicable to the UK has been traditionally said to be part of the common law as the "law of nations"; but this position has been heavily qualified, so that CIL can be imported only "whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration."[56]

Meanwhile, treaties incorporated into UK law presents few problems, as it is just like any other part of UK law. But "it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom",[57] so that they do not create rights and obligations enforceable in UK law by UK courts.

Indeed, when domestic law and unincorporated international obligations are in conflict, the rule of law and Parliament sovereignty will require British courts, Ministers, civil servants, and other actors to give effect to domestic law, even if doing so will breach international law. In these cases, to follow the guidance will be impossible; and if government

56. *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, para 150, https://www.supremecourt.uk/cases/docs/uksc-2014-0203-judgment.pdf

57. *R v Secretary of State for Work and Pensions* [2021] UKSC 26, para 77, https://www.supremecourt.uk/cases/docs/uksc-2019-0135-judgment.pdf

lawyers were to take the guidance at face value and treat international law as co-equal to domestic law, will lead Ministers and others into acting illegally. Hence, notwithstanding the 2024 guidance, the duty of Ministers to comply with the law will require them, in such cases, to comply with domestic law and not international law.

The guidance, by refusing to acknowledge the possibility of clashes between UK law and international law, by insisting that domestic law and international law form an unity and, and by claiming that the rule of law requires both to be equally followed, introduces considerable confusion within UK constitutional practice, based on what seems to be a clear misunderstanding of the relationship between domestic law and international law in the British constitution.

The Guidance and New Ministerial Code as Expanding Ministerial Law-Making Power

The foregoing analysis has mainly considered the impact of the guidance in constraining the Government's ability to develop legislation, policies, and to act in the interests in the United Kingdom.

But equally it is true that the problematic understanding of international law, as explained above, can enable Ministers to undemocratically bypass Parliament, by the simple expedient of entering into international legal obligations via treaty, and by then insisting that international law has to be observed at all costs, even at the expense of the decisions of Parliament.

This is particularly troubling since the mechanisms for parliamentary scrutiny of treaties, contained in the Constitutional Reform and Governance Act 2010, are "light touch"; indeed, they do not give the House of Lords a right to stop the ratification of a treaty at all, merely briefly to delay it—if the Government decides to provide parliamentary time for debates or votes on ratification. Not all treaties are covered by the provisions and, in "exceptional cases", Ministers may bypass the procedure in both Houses entirely in the case of a treaty that would otherwise be covered, as long as they do so before either House has voted to delay ratification.

A Government that wished to bypass Parliament could thus do so by making a treaty for that purpose, or by exercising existing treaty provisions which have not been incorporated into United Kingdom law, or by coordinating with international organisations or foreign countries which are part of a treaty to which the UK is a party. Then, the Government could invoke the tendentious proposition contained in the 2024 guidance to the effect that Parliament should not be invited to legislate contrary to international law in order to implement policies which do not command democratic support as expressed through Parliament.

Such a scenario is a worrying one, especially since it would be justified in the name of the "rule of law", even though the rule of law, properly understood, does not require condoning such an act. There are very good reasons why the United Kingdom has chosen to adopt a dualist approach to international law instead of a model where international

treaties have automatic effect in domestic law. Such a fundamental constitutional safeguard should not be thrown out, and especially not, without resort to primary legislation, through "guidance" to government lawyers administratively promulgated by Minister of the Crown without Parliamentary scrutiny.

Conclusion

We have highlighted the potentially negative impact of the Attorney General's new guidelines - how they may give government lawyers more power and influence over policymaking at the expense of Ministers accountable to Parliament and introduce serious changes to the settled legal-constitutional position about international law and its relationship to Ministers and Parliament.

Notwithstanding the guidelines, Ministers should feel confident that it is entirely legitimate for them to proceed with a policy that has a tenable legal argument underpinning it, even if government lawyers and the Attorney General deem it inappropriate to do so. Ministers are free to reject suggestions from government lawyers about the appropriateness or otherwise of proceeding with a policy with a tenable legal basis. Moreover, it is important that Ministers and parliamentarians understand that these guidelines cannot work a permanent change to our constitutional arrangements, even if they cause confusion and needlessly block policies in the short term. It remains open to the current, and any future government, to repeal these guidelines and replace them with guidelines more consistent with constitutional fundamentals.

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