Government Lawyers, the Civil Service Code, and the Rule of Law

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Preface by Rt Hon Lord Maude of Horsham

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Policy Exchange

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Rt Hon Lord Maude of Horsham
Former Minister for the Cabinet Office

I am happy to welcome Policy Exchange's new paper as an important contribution to a crucial debate about the proper role of civil servants in our Constitution. In my recent Independent Review of Governance and Accountability in the Civil Service I said that "good governance requires authority and accountability to be aligned: that those charged with responsibilities should have sufficient authority to be able to discharge those responsibilities; and have a clear line of accountability for whether and how they are discharging them."

The function of the civil service is to give robust, well-informed and honest advice to ministers, and then diligently to implement their instructions, and of course the laws enacted by Parliament. If implementing those instructions and laws proves to be politically unpopular, then responsibility will lie flatly at the feet of the democratically elected politicians who gave them. This all helps promote accountable and responsive governance.

This accountable and responsive governance is threatened, however, if civil servants try to influence policy outcomes other than by the delivery of that robust, well-informed and honest advice to ministers. It is not unknown for ministers to be told things that turn out not to be true to endeavour to influence a decision with which officials may for whatever reason disagree. For this reason, the most commonly heard words in my ministerial office were: "Show me the chapter and verse".

A decision to introduce legislation that might be in tension with our international legal obligations is a serious one. It demands careful deliberation, truthful advice, and rigorous scrutiny. Anything else jeopardises the trust that is the essential underpinning for our system of a permanent politically impartial civil service.

Foreword

Lord Wolfson of Tredegar KC
Parliamentary Under-Secretary of State for Justice 2020-2022

Mrs Thatcher famously said "Advisers advise, and ministers decide". She might have added "and civil servants implement", but she probably didn't see any need to do so; it was so obvious that it did not to be stated.

However, as Professor Richard Ekins, Sir Stephen Laws and Dr Conor Casey explain in their new Policy Exchange paper, the time has perhaps come to make this clear. Civil servants are there to implement the instructions of ministers and the will of Parliament, unless those instructions are contrary to the law – which in this context must, necessarily, mean the domestic law of the land. It is no defence for a civil servant, faced with a lawful (in domestic terms) instruction of a minister, to protest that she cannot carry it out because it would involve a breach, or an arguable breach, of international law. Nor, as the authors demonstrate, is there anything in the Civil Service Code which does, or should, support such a refusal.

That is not to deny the importance of international law, or its relevance to governmental decision-making. Breaching international law in a particular instance might be remarkably stupid – although, no doubt extremely rarely, it might be obviously necessary. A breach is very likely to diminish the UK's place in the community of nations although – again, no doubt extremely rarely – that might be a price worth paying to safeguard a vital UK national interest. Any contemplated breach of international law ought to weigh heavily on ministers and Parliament, and the starting point, and almost always the ending point, is that international law ought to be honoured and treaty obligations ought to be kept. But none of this is a matter for the individual civil servant, whose important task it is to carry out the instructions of ministers and the will of Parliament.

A civil servant who believes that a government policy, lawful in domestic law, contravenes, or arguably contravenes, international law and for that reason should not be implemented, cannot decide to stay in post but yet not implement the policy. That would usurp the function of the civil service.

We live in a free country. It is the right of everyone involved in governmental decision-making – ministers, advisers and civil servants – to resign (as I did) when they believe a fundamental principle is at stake. But we also live in a parliamentary democracy. A civil servant who decides not to resign and stays in post, must implement the policy. For that, as Mrs Thatcher knew, is their function.

After the Supreme Court's judgment: Government lawyers and the Rwanda plan

1. On 15 November, the Supreme Court ruled that the Government's Rwanda plan was unlawful. Since then, the Government has been committed to forming proposals to salvage the core of the Rwanda plan and to make it possible to remove asylum seekers who entered the UK unlawfully to Rwanda to have their claims processed there, all with the objective of discouraging further channel crossings.
2. We do not yet have clear details of what the Government's ultimate proposal will look like, but reports suggest it is considering several different options. One option is to suspend those provisions of the Human Rights Act 1998 that might otherwise be invoked in litigation to prevent the removal of asylum seekers to a third country. Another proposal involves suspending provisions of the Human Rights Act *and* the European Convention on Human Rights – at least in the sense of making clear that Secretary of State and civil servants in the Home Office have a clear statutory duty to proceed with removals even if asylum-seekers successfully seek interim relief from the European Court of Human Rights to block their removal from the UK *and* seek a substantive ruling from the Strasbourg Court that Rwanda is unsafe, that asylum claims must be heard in the UK, or that each asylum-seeker is entitled to a separate judicial hearing about the merits of his or her removal.
3. According to *the Times*, some elements of these proposals are facing "a lot of push back" from government lawyers. On 4 December, *the Times* reported as follows:

> *"Government lawyers working on the emergency legislation are also refusing to approve the most hardline version that would opt out of the European Convention on Human Rights (ECHR), The Times has been told.*
>
> *They are said to be 'very, very reluctant' because it would breach the civil service code, which dictates that officials must not back an approach that does not comply with international law…*
>
> *Government source said: 'They [government lawyers in the Home Office and the Attorney General's Office} are very very reluctant. They're saying this is against the civil service code, that you have to abide by international law.*

> *They were always quite worried about that. They're part of the wider legal community — they're not going to push their future careers under the bus. There's a lot of pushback from the government legal department.'…*
>
> *Another official warned that no legislation can take away the right for an individual to challenge their deportation on the basis that Rwanda is unsafe for them on specific personal grounds."*

4. This report, and earlier ones like it, suggest a very worrying level of ignorance amongst some civil servants about some constitutional fundamentals, including about what the Civil Service Code actually provides, the relationship between international law and the rule of law in our legal system, and the proper role of the government lawyer.

The Civil Service Code, international law, and the rule of law

5. One of the reasons the report in *the Times* is a very disturbing report is because, if true (which we hope it is not), it means that serious breaches of the Civil Service Code have already occurred. Putting to one side the obligation to "ensure you have Ministerial authorisation for any contact with the media", it needs to be pointed out that there is no express reference at all to international law in the Civil Service Code, or indeed in the corresponding Diplomatic Service Code (which applies to the staff of the Foreign, Commonwealth and Development Office). There are, however, very clear obligations of "Honesty" in the following terms—

   "You must:

   - *set out the facts and relevant issues truthfully, and correct any errors as soon as possible*
   - *use resources only for the authorised public purposes for which they are provided*

   You must not:

   - *deceive or knowingly mislead ministers, Parliament or others*
   - *be influenced by improper pressures from others or the prospect of personal gain.*"

6. There is also an obligation always to act "in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings". That clearly includes the confidence of Ministers.
7. The constitutional and legal position in the United Kingdom, so far as international law is concerned, is quite clear. It has been repeatedly reaffirmed by the highest court in the UK (previously the Appellate Committee of the House of Lords and more recently the Supreme Court),[1] and indeed is also reinforced by things said in the Supreme Court judgment in the Rwanda case itself.[2] The UK is a dualist state. That means that international law has effect in the UK only so far as it is expressly incorporated into domestic law by

1. *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499; *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] UKSC 5; [2018] AC 61, paras 56, 167 and 244; para 78.
2. In *R (AAA) v Secretary for the Home Department* [2023] UKSC 42 paras 140-144 clearly reaffirm the supremacy of Parliament and its capacity, with clear and unambiguous words, to change the law.

or under an Act of Parliament; and, once incorporated, it is just as capable of being modified as any other domestic law and in the same way. Even if the Codes purported to impose a requirement on civil servants or diplomatic staff to secure that the UK complies with its obligations under international law, it would be ineffective. There is no conceivable way that the provisions under which the two codes were made (ss. 5 and 6 of the Constitutional Reform and Governance Act 2010) can be construed as conferring power on the Secretary of State, when publishing the codes, to use them to change the status of international law in the UK's constitutional arrangements, or to incorporate international obligations into UK law, still less to invest the ultimate function of enforcing those obligations in the Civil or Diplomatic Service.[3]

8. The obligations in the codes to "comply with the law and uphold the administration of justice" refer to the only law that has effect as such in the UK, UK domestic law, and to the administration of the justice which that law delivers. It would be manifestly absurd to suggest - although it appears that perhaps it has been – that "complying with the law and upholding the administration of justice" extends to refusing to collaborate with government proposals to change what has to be complied with and upheld. Nor do the codes allow the invention of principles which either limit, directly or indirectly, the capacity of an elected Parliament to change UK law if it so wishes, or prejudice the legitimacy of any request by government to Parliament for such a change. It is difficult to accept that civil servants who have spent their careers in the preparation of legislation – which always changes the law – have, since 2010 at least, all been in breach of the Civil Service Code.
9. Whatever the merits of the policy arguments for or against whatever the Government eventually decides to propose by way of legislation in response to the Supreme Court judgment on the Rwanda scheme, it is important that the debate about it is had openly and in Parliament, and is based on an honest assessment of what is possible legally. It is the duty of the Civil Service to ensure that that happens. It would be disreputable for anyone to try to close down the options available by pretending that international law provides a conclusive, incontestable argument against some of them. Not only is that dishonest, it is also unwise since it is very likely to foster even more damaging public disillusionment with the legal structures from which the supposed inhibitions are claimed to derive, and with the institutions that champion those inhibitions.
10. Of course, it is relevant to any proposal for domestic legislation that it would, or might, put the UK in breach of its international obligations. It is the duty of civil servants to point out any risk that that might be the case; and it is the duty of Ministers to weigh that advice seriously. But it is false to suggest that there is any rule that the UK government or Parliament must never act in breach of international law, or to

3. Maybe some will be tempted to argue that *R (on the application of Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855 must be understood as converting the requirement in the Civil Service and Diplomatic Service Codes to "comply with the law" into an obligation to secure that the United Kingdom behaves compatibly with its international obligations. But that would be to misunderstand the case, which it has to be said is not as clear as it might have been about what it was deciding, as a result, perhaps understandably, of its not seeking to resolve some of the lack of clarity, in government statements to which it refers, about the supposed extent to which international law imposes legal obligations on individuals. That case concerned the removal of an express reference to "international law" from the Ministerial Code and considered whether that modification made any difference to the legal obligations with which Ministers were enjoined to comply by the code. It decided that it did not. The clearest element of the reasoning (which was, in any event, about words used in a rather different context) is that neither the words used in the code nor any modifications to them could impose legal obligations on Ministers to which they were not already subject. That reasoning actually supports the argument in this paragraph that neither a code such as the Ministerial Code nor the Civil Service and Diplomatic Service Codes (the contents of those two being further constrained by the statutory powers under which they are made) can change the law so as to impose new legal obligations on individuals - or, it follows, change the UK's constitutional approach to international law. Public international law and treaties for the most part impose legal obligations on states, rather than on individuals. That is certainly true of the international obligations said to be relevant to the issues dealt with in this note. If a code cannot impose new legal obligations, it certainly cannot convert an international obligation on the state into a legal obligation on a Minister, civil servant or member of the diplomatic service to secure that the UK acts compatibly with its international obligations. It is clear that a person has to be already subject to a legal obligation before the codes can require them to comply with it. It is on that basis that the court in the *Gulf Centre* case concluded that adding or removing a reference to international law to a requirement to comply with the law cannot change what has to be complied with.

suggest that the risks to the United Kingdom inherent in such breach or potential breach must never be run.

11. It is the duty of Ministers, subject to accountability to Parliament – and Parliament alone – to determine the balance that needs to be struck between the risks involved in putting, or maybe even appearing to put, the UK in breach of its international obligations and the UK's compelling national interest.[4]
12. When striking that balance, Government must also have regard to the fact that international obligations, when compared to domestic legal rules, are often vaguer and more flexible, and so more "negotiable". This is partly because they are construed and construable by institutions that are not themselves subject to rules of binding precedent and are also, typically, responsive to the changing views and circumstances of the parties to whatever agreement created the obligations in the first place.
13. The basis on which the Human Rights Act 1998, for example, was passed was not only, that it was desirable to ensure that the UK was involved in, and lost, fewer cases in Strasbourg. It was also intended to establish a mechanism by which a "dialogue" could be had with the Strasbourg court about what a human rights regime for the UK needed to provide. No such dialogue is possible if we assume, falsely, that our response to the Strasbourg court must never disagree with what it has already said in judgments that the Court itself does not regard as binding in its own future cases. There is a case for making that more explicit in the 1998 Act but, in the meantime, the capacity of Parliament to take a different view from the Strasbourg Court is still clear enough.
14. With both the ECHR and international law generally, it also needs to be remembered that, in the current context, the obligations they impose on the UK are obligations that bite on individual cases and generally not on the exercise of legislative power, the slide from one to the other is often left unacknowledged. A similar elision takes place when the Supreme Court judgment is summarised as deciding that Rwanda is "not a safe country", when that is only shorthand for saying that the Court assessed that there was a real risk that the removal of persons subject to the new rules might result, in some cases, in their suffering ill-treatment by reason of refoulement. It is misleading to suggest that there is no difference between what someone thinks Parliament ought to do and what it can do. And it is misleading to suggest that the only issue around what the Government proposes in response to the Supreme Court judgement is whether there is a risk that an outcome from that legislation in one or more cases might involve the breach of an international obligation applying to the UK.
15. There is always a risk when legislating that some application of the resulting legislation in a particular case may be undesirable. That is an inherent consequence of the rule of law, under which laws need to be made by reference to classes of future cases rather than retrospectively,

4. Policy Exchange's Judicial Power Project has made this argument elsewhere. See Richard Ekins, *Protecting the Constitution* (Policy Exchange, 2019), 23.

"*in personam*" and case by case as they occur. But that is not an argument for never legislating at all. Moreover, there are other difficult factors and risks at play in the Rwanda case that also need to be assessed and balanced out, apart from any risk in a particular case of a breach of international law. These include both whether a policy that might be unobjectionable in a large number of cases should be capable of being frustrated by the exploitation of endless legal arguments and whether the UK can tolerate the damage to its international relations that might result from allowing the efficiency and good faith of friendly foreign states and the independence of their judiciaries to be litigated in UK domestic courts, where it would be unreasonable to expect those impugned states and judges to be obliged to defend themselves.

16. Ministers deserve impartial honest and confidential advice on all of this. It is worrying to hear that that may not be what they are getting.

Misunderstanding the role of the government lawyer

17. Another troubling feature of *the Times* report is that some government lawyers are said to be "very, very reluctant" to "approve" legislation giving effect to a policy that would involving suspension of the Convention's terms. This part of the report is troubling as it suggests some civil servants have an extremely poor grasp of the proper role of government lawyers.
18. Government lawyers fulfil an important role in the policymaking process. They offer legal advice to Ministers on policies that is supposed to both outline the relevant legal risks they might face, while at the same time offering constructive advice on ways to deliver them and mitigate any identifiable risks. Legal risk in this context includes an assessment of any "risk of a court, whether domestic or international, deciding that something is unlawful". Constitutionally speaking, however, Ministers clearly do not need approval from government lawyers to proceed with a legislative proposal, even if the proposal is found to be very legally risky, for example if the resulting legislation would be at risk of being declared incompatible with Convention rights. Government lawyers play an important role but are advisers only. They are not a court and have no authority to issue binding directives to Ministers.
19. Very occasionally, government lawyers may find themselves in the "exceptional" circumstance that there are "no respectable arguments" that can be made for a policy's legality. The Attorney General's 2022 *Guidance on Legal Risk* clearly outlines the obligations of government lawyers who find themselves in this situation; the guidance provides that their only role is to inform their line manager. Their line manager, in turn, can bring these concerns to the attention of the Law Officers – the Attorney General and Solicitor General – who can then offer their own legal assessment, which is then binding on all other departmental government lawyers. There is, therefore, no basis whatsoever to suggest government lawyers have any authority or role in "refusing to approve" a government proposal, policy, or legislative initiative due to concerns about its legality.
20. Indeed, not even the Law Officers themselves have any legal power to order the Government to do anything, or to block it from taking decisions it wants to take. It is helpful when considering the impact of Law Officers' advice on Government policy and decision-making to

carefully distinguish between several scenarios:

i. The Attorney General advises that course of action X is unlawful[5] in domestic law. In such a case the Government is by convention constitutionally required to avoid such a course of action. [6] But the Government can of course propose legislation that would make this course of action lawful once the legislation comes into force.

ii. The Attorney General advises that course of action X is supported by a respectable legal argument – but nonetheless carries very serious legal risks in domestic law. In such a scenario the Government is constitutionally entitled to proceed with the policy.

iii. The Attorney General advises that course of action X is fraught with international legal risk - in which case the Government can decide to run the risk, where the course of action might well consist in enacting and enforcing legislation that the findings of an international tribunal are likely to demonstrate to be incompatible with the UK's international obligations.

iv. The Attorney General advises that course of action X is unlawful in international law, in which case the Government is generally expected to accept the Attorney General's view of the international legal position in preference to those of other sources of legal advice,[7] but is nonetheless free to pursue the course of action, including where this course of action involves enacting and enforcing legislation that the Attorney General has said will be incompatible with the UK's international legal position.

21. From what we know so far about the Government's proposals, none would appear to involve a scenario like that outlined above at (i), where the Attorney General could plausibly advise in stark and unequivocal terms that there is no lawful way to proceed in domestic law. Rather, the Attorney General could properly advise that it is clearly lawful as a matter of domestic law for Parliament to exercise its sovereign law-making power to enact a statute suspending parts of the Convention and Human Rights Act, notwithstanding any risks posed to the UK's international law obligations. The Attorney General may well advise on the possible consequences of such a step and may strongly advise against taking it due to concerns about its impact on international law obligations, but ultimately the Prime Minister and Cabinet could decide to go the other way, a decision that would be entirely constitutionally proper.

22. Contrary to what is implied in *the Times* report then, there is no constitutional or legal basis for any government lawyer, even the Attorney General, to refuse to approve the introduction of legislation to Parliament seeking to change domestic law, even if this comes at the risk of creating tension with the UK's international law obligations. The Prime Minister does not need to 'overrule' the Attorney General

5. It's important to note that it is rare for legal advice to be framed by the Law Officers in such stark terms, especially when it comes to the kind of complex, sensitive, and nationally important questions they advise on. Their advice will instead tend to include an assessment of the different legal risks a policy might face, along with their constructive opinion on how these risks can be mitigated or surmounted, all framed by the critical constitutional fact that - uniquely in the field of legal advice - the 'client', ie the Government, is entitled to ask Parliament to change the law.

6. Conor Casey, *Between Law and Politics: The Future of the Law Officers in England & Wales* (Policy Exchange, 2023) 10; Conor Casey, 'A Defence of the Dual Legal-Political Nature of the Attorney General for England and Wales' in (ed) Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart, 2023) 238; Conor McCormick, *The Constitutional Legitimacy of the Law Officers in the United Kingdom* (Hart, 2022) JLIJ Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 185. This convention is linked to the need to protect what Professor Finnis correctly calls the "fundamental principle of our constitutional law, and so of the Rule of Law in this country", namely that "Ministers can neither claim any immunity, by virtue simply of their office, from the rules of common law, nor by any decree or order impose a legal duty (or relieve anyone of a legal duty), except to the extent that an Act of Parliament authorizes them to do so." John Finnis, "Ministers, International Law, and the Rule of Law" (Policy Exchange, 2015).

7. Including those expressed by departmental government lawyers. As one of us has written elsewhere: "The constitutional position so far as legal advice to government is concerned is clear. The government's only legal advisers are the Law Officers of the Crown...It is the Law Officers of the Crown who are responsible and politically accountable for all legal advice to government. All other legal advice (whether from civil service lawyers or from lawyers commissioned from "standing counsel" or private practice) is provided by them to government in their capacity as delegates of the Law Officers, or so far only as it is expressly or impliedly adopted by the Law Officers." See Sir Stephen Laws KCB QC (Hon), "The Treasury Devil and the scandal that never was" (Policy Exchange, 20 June 2022).

or any other lawyer in order to introduce the kind of legislation it is currently considering, as erroneously suggested in other reports several weeks ago, because no lawyer has the authority to block the Government in the first place.

23. These are basic propositions of constitutional law that hold even if government lawyers feel that they enable Parliament and the Government to take unpalatable decisions. Should they feel strongly about this, however, the proper response is not to undermine constitutional fundamentals by radically claiming a non-existent authority, but to resign.

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