

What is to be done with the Attorney General?



Something has to be done to address the over-politicisation of the government's legal advice, says **Roger Smith**

Brexit continues to be an enormous political and economic shock to the UK, and it also magnifies other areas of constitutional stress. Some of these have been predictable: others less so. You would not necessarily have thought the Brexit vote would put in play the role of the Attorney General. But it has. And this is illustrated by the controversy surrounding Suella Braverman, formerly Attorney General under the Johnson administration and currently Home Secretary under Liz Truss. It has prompted no less than the Society of Conservative Lawyers (SCL) to publish a paper on reform of the Attorney's appointment and role. This is a response to its observation that, 'For perhaps too long, th[e] central and expansive role [of the Attorney] has relied on "good chaps".'

The SCL

The Society is generally at the urbane end of the Tory party. Not for it the bloodthirsty rhetoric of a Johnson, Truss or Braverman. Its president is the saintly Lord Mackay of Clashfern. The Forward to the paper is written by Lord Garnier KC. He is a Tory gent of the old, liberal school; a former MP and solicitor general; a proficient French speaker with a particular love of nineteenth century French literature; and both anti-Brexit politically and, as a lawyer, involved in some of the post-Brexit litigation. Lord Garnier deploys the age-old technique of praising another—in this case, former Tory Attorney Lord Rawlinson—to raise comparison: 'He was not a mere political

place-filler plucked from legal obscurity with hopes or ambitions for higher office. He had the character and the wisdom of a wartime soldier who had to make hard decisions in a hurry under fire, and who was able to see legal issues and evidential problems from the point of view of someone who was wise enough to know that the client needs advice about what is lawful and right, not advice to reflect some convenient political agenda. It took character.'

The subtext is strong. Others have clearly been such 'mere political place-fillers' plucked from deserved obscurity. Actually, that is a bit harsh on the first modern Attorney considered in the paper—Lord Goldsmith KC. He was quite prominent before his appointment, an early active advocate of pro bono. But, as the paper records, he fell from grace for his advice on the legality of the Iraq invasion and his production of a supporting opinion which his fellow Conservative lawyer, Lord Alexander QC, dismissed as 'scraping the bottom of the legal barrel'. The SCL paper records, in that understated style which many lawyers (including myself) find so attractively devastating: 'To outsiders, the fact that the Attorney General had initially provided an opinion in January 2003 to the effect that a second [UN] resolution would be required, but later advised that [a previous] Resolution... was sufficient, gave rise to the perception of partisan influence and government pressure in the investigation of the legal basis for war.'

Other cases of suggested political influence over legal judgement abound—both before

and after the Iraq war. But the issue that has got the SCL out of bed was the UK Internal Markets (UKIM) Bill which the then Northern Ireland minister Brandon Lewis admitted would break international law, if only in 'a specific and limited way'. This, says the SCL paper, 'led to the resignations of Lord Keen KC, Sir Jonathan Jones and Amal Clooney, the Advocate General for Scotland, the Treasury Solicitor (the head of the government legal service) and the UK's special envoy for media freedom respectively. In his letter of resignation to the Prime Minister, Lord Keen stated that he had "found it increasingly difficult to reconcile what I consider to be my obligations as a Law officer with your policy intentions with respect to the UKIM Bill".'

And, there's the rub. Braverman, as Attorney General, saw no problem with national legislation purporting to overrule an international agreement entered into willingly by the UK. Indeed, under attack from a Labour MP, she retorted that opposition to such legislation 'does a grave disservice to [the UK's] interests'—a reproach which, in the current circumstances, we might call the 'Putin defence'. For good measure, she told the MP to stop being so emotional. Few lawyers of any weight agreed with Braverman or the government: she subsequently got roasted at a Bar Council conference. *The Daily Mail's* headline was, for once, completely accurate: 'Britain's top lawyers accuse Attorney General Suella Braverman of wrecking country's reputation abroad with government plan to break international law over Brexit'.

Fixing the issue

If you agree with majority legal opinion, then something has to be done to address the over-politicisation of the government's legal advice. The radical option is to make the government's chief legal adviser an external appointment on transparent merit. The SCL goes as far as it can to avoid that. At least one of the law officers should continue to be an MP; the oath of office should include (as does that of the Lord Chancellor) an obligation to uphold the rule of law; there should be more supervision by the House of Commons; and, damningly for Braverman—'officeholders should be established practitioners with an understanding that the role is not a stepping stone to further political or ministerial advancement beyond that of Lord Chancellor/Secretary of State for Justice or the Home Office.' Well, good luck with that. But something needs to be done. Maybe the post should be independent of government?

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