Legal professional privilege of advice of the Attorney General

Kenealy, D. & MacLennan, S.

Original citation & hyperlink:
Kenealy, D & MacLennan, S 2020, 'Legal professional privilege of advice of the Attorney General' Coventry Law Journal, vol. 24, no. 2, pp. 81-87.

ISSN 1758-2512

Publisher: Coventry University Law School

LEGAL SYSTEM

Legal professional privilege of advice of the Attorney General

Dr Daniel Kenealy[*] and Dr Stuart MacLennan[**]

Introduction

The Attorney General of England and Wales is the United Kingdom Government's principal legal advisor.[1] The role is seldom a controversial one, with the majority of its occupants enjoying a relatively low profile.[2] The United Kingdom's departure from the European Union (EU), however, has brought the role to the forefront of political discourse. The role of the Attorney General came into sharpest focus during a parliamentary debate on 3 December 2018. The debate concerned whether or not the 'final, full advice provided by the Attorney General to the Cabinet on any completed [European Union] withdrawal agreement' should be disclosed to Parliament. Parliament, historically, enjoyed the power to demand the disclosure of official papers from Government through motions for return – a practice that enjoyed something of a renaissance during the 2017-2019 parliament.[3] While the Government of the day opposed these motions, the motion of 3 December 2018 was particularly contentious given the contested nature of the privilege of the Law Officers' advice to the government.[4] A day later, on 4 December 2018, the government was found in contempt of Parliament for failing to produce the 'final, full advice'[5] and, ultimately, the advice was disclosed.[6]

The Shadow Secretary of State for Exiting the European Union, Sir Keir Starmer, sought disclosure on the basis of four principles. The first was that advice should be disclosed in exceptional circumstances.

---

[*] Daniel's title
[**] Associate Professor in Law, Coventry Law School

[1] The most authoritative study is John Edwards, *The Attorney General, Politics and the Public Interest*. Sweet & Maxwell, London, 1984. Several holders of the office have written accounts or given lectures about the nature of the role. See, for example, Hartley Shawcross, 'The Office of the Attorney General' (1953) 7(4) Parliamentary Affairs 380; Elwyn Jones, 'The Office of Attorney General' (1969) 27(1) Cambridge Law Journal 43; and Samuel Silkin, 'The Functions and Position of the Attorney General in the United Kingdom' (1978) 59(1) The Parliamentarian 149. The advisory functions are well covered and explored by K.A. Kyriakides, 'The Advisory Functions of the Attorney General' (2003) 1(1) Hertfordshire Law Journal 73.

[2] When the Attorney General is noticed, it is seldom for a good reason. Francis Bacon famously described service as Attorney General as 'the painfullest task in the realm', quoted in Jones, 'Attorney General', 4. The office's role in three controversial matters between 2003 and 2006 prompted a wide-ranging inquiry by Parliament into the role. See House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, 5th Report of Session 2006-07, HC 306. London, HMSO, 2007. The three matters were the Iraq war, the 'cash for honours' investigation, and the Saudi/BAE case.

[3] See House of Commons Procedure Committee, *The House's Power to Call for Papers: Procedure and Practice*, 9th Report of Session 2017-19, HC 1904. London, HMSO, 2019.

[4] Nick Thomas-Symonds, HC Deb 3 December 2018, vol. 650, col. 550. In his role as the Shadow Solicitor General, Symonds led the debate for the opposition Labour party.

[5] See HC Deb 4 December 2018, vol 650. The contempt motion passed by 311 votes to 293 (division 272) with a government amendment to it failing by 307 votes to 311 (division 273). The amendment sought to have the question of whether the government's response fulfilled the request of the House referred to the Committee of Privileges.

[6] The advice was published on the UK Government website on 5 December 2019 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761852/05_December-_EU_Exit_Attorney_General_s_legal_advice_to_Cabinet_on_the_Withdrawal_Agreement_and_the_Protocol_on_Ireland-Northern_Ireland.pdf> accessed 10/1/2020.

The second was that this was general advice, more akin to government analysis. The third was that professional privilege vis-a-vis the Law Officers is different to that of other lawyers. The fourth was that disclosure should be made to all MPs on an equal basis. This article is principally concerned with the third of these arguments.

This article commences with an exploration of the operation of legal privilege in law and in practice. This article then considers the role of the Attorney General and whether or not the relationship is analogous to that which exists between lawyer and client. While there is little inherently exceptional about the legal advice of the Attorney General and, as such, should be subject to legal professional privilege; the question of Parliament's power to compel disclosure is, ultimately, a political one. This article concludes that with the restoration of 'normal' politics following the 2019 general election due consideration needs to be given to the balance between the constitutional principles at the heart of this debate.

Operation of legal privilege in law and in practice

The concept of privilege – selectively placing individual participants in the legal system in an advantaged position – is an ancient one.[7] In the United Kingdom, legal professional privilege grants certain classes of documents or information immunity from compulsory production in court. Legal professional privilege comes in two forms: legal advice privilege and litigation privilege. Legal advice privilege arises in relation to communications between lawyer and client for the purpose of any advice to the client in a 'relevant legal context'.[8] In *Three Rivers (No.4)* Lord Scott described legal advice privilege as covering 'communications between lawyers and their clients whereby legal advice is sought or given.'[9] Litigation privilege applies where the dominant purpose of a communication is prospective of live legal proceedings.[10] This article is solely concerned with the former of these privileges.

Legal advice is not, as Lord Broughman opined in *Greenhaugh v Gaskell*,[11] privileged 'on account of any particular importance which the law attributes to the business of legal advisers, or any particular disposition to afford them protection'.[12] Higgins outlines a number of justifications for legal advice privilege.[13] First, in relation to past events, a client may seek to clarify whether or not they have acted in a lawful manner and may potentially seek to rectify any unlawfulness. Second, a client may wish to protect confidences other than their own. Third, a client who is ambivalent about complying with the law may not seek advice if they fear that the fact of having sought advice might be used against them. Fourth, legal privilege plays a crucial role in ensuring equality of information, in particular as regards individuals and the state.

These justifications are all based upon a common supposition: that a client will be more forthright with their lawyer when they can be certain that their interlocution cannot be compulsorily disclosed and, similarly, a lawyer can be franker with their advice on the same basis. In *R v Derby Magistrates' Court, Ex p B*,[14] Lord Taylor of Gosforth CJ said 'a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth.'[15] Similarly, in *R (Morgan Grenfell & Co Ltd) v Special*

[7] Peter Garnsey. 'Legal Privilege in the Roman Empire' (1968) 41(1) Past and Present 3.
[8] *Balabel v Air India* [1988] Ch. 317.
[9] *Three Rivers District Council v Bank of England (Disclosure) (No.4)* [2004] UKHL 48; [2005] 1 A.C. 610, para. 10.
[10] *Waugh v British Railways Board* [1980] A.C. 521.
[11] [1883] 47 E.R. 35.
[12] [1833] 47 E.R. 35, 99.
[13] Andrew Higgins. 'Legal Professional Privilege and Its Relevance to Corporations' (2010) 73(3) Modern Law Review 371.
[14] [1996] AC 487.
[15] [1996] AC 487, 508.

Commissioner of Income Tax,[16] Lord Hoffmann opined that legal advice 'cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.'[17] Legal advice privilege, however, does not simply affect the frankness or otherwise of clients. Crucially, legal advice privilege encourages lawyers to provide candid legal advice to their clients. In *B v Auckland District Law Society*,[18] Lord Millett justified legal professional privilege on the ground that 'a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent.'[19]

An in-house lawyer?

The privilege that exists between lawyers and natural persons is clearly defined and fairly unambiguous. The privilege afforded to corporate clients[20] and in-house lawyers,[21] however, is more circumspect. In the present context this is of significance, as it is arguable that the government is akin to a corporate client, and the Attorney General is, effectively, an in-house lawyer. This is principally because the Attorney General wears a number of hats. First, the Attorney General is the cabinet's principal legal advisor. Second, the Attorney General attends cabinet and participates in its discussions. Third, the Attorney General exercises ministerial functions in its superintendence of the main prosecuting authorities.[22] Fourth, the Attorney General is a member of the legislature.[23] Given the many facets of the Attorney General's role it is easy to conclude that this distinguishes the role from the typical legal adviser, however, it is not uncommon for an in-house lawyer, in particular, to perform functions beyond those of simply providing legal advice.

The privilege afforded to in-house lawyers has attracted somewhat conflicting judicial treatment. In *Akzo Nobel Chemicals Ltd v European Commission*,[24] the Court of Justice of the EU held that the in-house lawyer's 'economic dependence and the close ties with his employer' means that they do not 'enjoy a level of professional independence comparable to that of an external lawyer' and, consequently, legal privilege does not apply in the Court of Justice.[25] Although the decision in *Akzo Nobel* denies legal privilege to in-house lawyers, the Court of Justice's subsequent decision in *Prezes* points to government lawyers as being more akin to conventional independent counsel than in-house lawyers.[26]

Domestic courts have generally been more sympathetic to the in-house lawyer. Lord Denning considered the privilege of in-house lawyers in *Alfred Crompton Amusement Machines Ltd. Appellants v Customs and Excise Commissioners (No. 2)*[27]:

> '[t]hey are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only,

---

[16] [2003] 1 AC 563
[17] [2003] 1 AC 563, 607.
[18] [2003] 2 AC 736.
[19] [2003] 2 AC 736, 757.
[20] Joan Loughrey. 'Legal Advice Privilege and the Corporate Client' (2005) 9(3) International Journal of Evidence & Proof 183.
[21] Case C-550/07 P, *Akzo Nobel Chemicals Ltd v European Commission* [2010] ECR I-8310.
[22] Section.3(1), Prosecution of Offences Act 1985, s.1(2), Criminal Justice Act 1987.
[23] Typically, Attorneys General have been members of the House of Commons, although between 1999 and 2010 the three Attorneys General were drawn exclusively from the Lords.
[24] *Akzo Nobel*, fn. 11, para. 49.
[25] The Court of Justice's decision in *Akzo Nobel* has been the subject of some criticism. See Justine Stefanelli. 'Expanding Azko Nobel: in-house counsel, government lawyers, and independence' (2013) 62(2) *International & Comparative Law Quarterly* 485.
[26] Joined Cases C-422/11 P and C-423/11 P, *Prezes* [2012] ECLI:EU:C:2012:553.
[27] [1972] 2 QB 102.

> and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.'[28]

Lord Denning distinguished between the legal advice given by in-house lawyers and other communications – citing work that is 'executive in nature' as an example.[29] This, arguably, is a useful analogue for the work of the Attorney General.

Privilege of the Attorney General

With respect to the law of evidence it would appear that the Courts have little difficulty in recognising the privileged nature of Law Officers' advice. In *Factortame (Discovery)*,[30] the applicants sought damages from the United Kingdom Government for their breach of European Community law by means of the Merchant Shipping Act 1988. EU Member States can only be held liable for breaches of EU law where the breach is 'sufficiently serious', with a key determinant of seriousness being 'whether the infringement and the damage caused was intentional or involuntary'.[31] Consequently, the legal advice the government received was crucial to the determination of the applicant's claim for damages.

In *Factortame (Discovery)*, the government only waived its privilege with respect to legal advice received prior to 29 October 1987, which, according to the Secretary of State, was the period in which the policy was formulated. The applicants sought discovery up to 25 July 1991. The High Court dismissed the application, affirming the entitlement to waive privilege with respect to specific periods or documents but maintain privilege with respect to others.[32] The Ministerial Code appears to operate on the assumption that the advice of Law Officers is privileged. s2(2) of the Code states that 'the fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority.'[33]

Returning to the arguments of Sir Keir Starmer, there would appear to be very little in either case law or constitutional convention to suggest that professional privilege vis-a-vis the Law Officers is different to that of other lawyers. The Attorney General, Geoffrey Cox, argued that

> '[t]here are hundreds of lawyers throughout the United Kingdom, I am delighted to say, who could offer a perfectly competent view on this agreement. I cannot see why there is anything exceptional about the current circumstances and about my advice.'[34]

Indeed, Sir Keir accepted the general principle that Law Officers' advice should not be disclosed. The arguments in favour of disclosure all hinged upon the same supposition: that 'Brexit' is an exceptional circumstance.[35]

'Brexit' is not the first instance of the privilege of the Attorney General being called into question. The question of the privilege of the Attorney General's legal advice arose with some significance in the

---

[28] [1972] 2 Q.B. 102, 129.
[29] fn. 12.
[30] Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur & Factortame (No. 3)* [1996] ECR I-1029, para 51.
[31] *Ibid*. para. 56.
[32] *R. v Secretary of State for Transport Ex p. Factortame Ltd (Discovery)* [1997] 5 WLUK 97.
[33] Section 2(13), Cabinet Office. 'Ministerial Code' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf> accessed 05/01/2020
[34] HC Deb 3 December 2018, vol 650, col 556.
[35] For an example of an exceptionalist argument see Gavin Murphy, 'Time to waive LPP on government legal advice in the UK', (2018) 44(3) Commonwealth Law Bulletin 311.

context of the United Kingdom's participation in military action in Iraq in 2003. In the case of Iraq Lord Bingham questioned whether the ordinary operation of privilege should apply to the advice of the Attorney General with respect to matters of war:

> There seems to me to be room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer's opinion on the lawfulness of war: it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the government, as the client. If the government is sued for damages in negligence for (say) injuries caused by an army lorry or a mishap in a military hospital, I see no reason why the ordinary rules of client professional privilege should not apply. The government's position as a defendant would be greatly and unfairly weakened if this were not so. An opinion on the lawfulness of war, the ultimate exercise of sovereign power, involving the whole people, seems to me to be quite different. And the case for full, contemporaneous, disclosure seems to me even stronger when the Attorney General is a peer, not susceptible to direct questioning in the elected chamber.[36]

In the contemporary context Lord Bingham's views could be interpreted in one of two ways. One interpretation is that the disapplication of privilege applies solely to matters of war on the basis of the direct consequences on the lives of military personnel that flow that the Attorney General's advice. Alternatively, it could be argued that an exception to legal privilege should exist where direct adverse consequences flow from such advice onto members of the wider public. Given the consequences of Brexit for British citizens within the European Union, and EU citizens within the UK, such an argument would favour another exception to the privilege afforded to the advice of the Attorney General.

The exceptionalist argument was, perhaps, somewhat persuasive with respect to Iraq as the lawfulness, or otherwise, of military action was at the core of the debate. Communications made to facilitate a crime are not privileged,[37] which, it could be argued, is analogous to legal advice with respect to military action of questionable legality. There was no question, however, that the EU withdrawal agreement was *lawful*. The question at issue was the effects of the agreement *within* the law. Given that, the exceptionalist argument with respect to Brexit is somewhat less convincing. It is, therefore, clear that the power of Parliament to compel disclosure of Attorney General's advice is political, rather than legal. This was reflected in the comments of the former Attorney General, who argued that

> '[i]t is open to a Government to decide to publish the legal advice, but, speaking as a past Law Officer, first I would be dissuading the Government from publishing legal advice […] and secondly, that is a different thing from this House trying to coerce the Government into publishing legal advice.'[38]

On the day following Parliament's debate surrounding the Attorney General's advice the Government published that advice in full. This followed a subsequent motion in the House of Commons in which the Government was held to be in contempt of Parliament. While this disclosure was ultimately a political, rather than a legal compulsion, it is arguable that this is a distinction without a difference.

Upon releasing the advice, Geoffrey Cox presented the decision as an instance of an Attorney General acquiescing to the publication of their advice by the Government and thus in accordance with

---

[36] L. Bingham of Cornhill. "The Rule of Law', Sixth Sir David Williams Lecture' Centre for Public Law (16th November 2006) <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript> accessed 24/11/2019.

[37] *R v Cox and Railton* (1884) 14 QBD 153.

[38] Dominic Grieve, HC Deb 13 November 2018, vol 649, col 213.

established convention. In a subsequent appearance before a Commons Committee he stressed that the incident did not establish a new precedent.[39] However, Erskine May has been updated since the events of 2018.[40] The section discussing law officers' opinions begins by reaffirming the convention that 'the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government' (para. 21.27). But the section on Motions for Return (para. 7.31) descriptively reports

> Although the opinions of the law officers of the Crown given to Ministers have generally been withheld from Parliament, the failure of the Government to comply with a resolution calling for the production of the Attorney General's legal advice to the Government has been judged to be a contempt.

Had the Attorney General still refused to release the advice after the contempt vote, it is not clear how the resulting impasse would have been resolved. The incident is thus a reminder of how the political constitution must be handled with care, with participants across the political divide taking steps to maintain good faith and trust. The alternative is a series of mini-crises where fundamental principles – in this case the principle of privileged legal advice and the principle of Parliament's right to call for papers – are placed in to conflict.

In the aftermath of these events, the Procedure Committee's report emphasised that 'in theory the [House of Commons'] power [to call for papers] is capable of being exercised without limitation', going on to acknowledge that it is a power 'limited at present by the House's established practice'.[41] During the inquiry it was suggested by several witnesses that the House could 'adopt a self-denying ordinance' to recognise the practice of not seeking papers covered by the Law Officers' convention, similar 'to the House's successive resolutions on matters *sub judice*'.[42] The Committee rejected this, preferring not to limit the power of the legislature in favour of a convention established, defined, and controlled by the executive. The inquiry failed to probe the issue of legal privilege, and the potential unintended consequences of eroding the Law Officers' convention, in sufficient depth. The minority Parliament of 2017-2019 raised a number of questions about the balance and separation of powers between the branches of government and revealed a number of problems with the procedures in place to handle conflicts. The opportunity to reflect and improve ought not to be lost as politics returns to the more normal tradition of majority government following the December 2019 general election.

Conclusion

The case law is concerned with the power of courts, and not Parliament, to compel disclosure of legal advice. The courts of England and Wales have consistently recognised the privileged nature of legal advice provided by legal professionals regardless of the nature of the client and their relationship with the lawyer. Likewise, there is little to suggest that Parliament has a legal power to compel disclosure of advice from the Attorney General to Government. The power of Parliament to compel production of privileged legal advice is, therefore, a political question, rather than a legal one. Such questions are, ultimately, entirely common within the British Constitution, and there is, at least, some precedent for courts to give legal force to constitutional conventions.[43]

---

[39] Oral evidence to the House of Commons Procedure Committee, 27 February 2019.
[40] The full and current edition of Erskine May can be accessed online at <erskinemay.parliament.uk> accessed 10/1/2020.
[41] Procedure Committee, House's Power to Call for Papers, page. 3.
[42] Ibid, page. 19.
[43] See, most pertinently, *Attorney General v Jonathan Cape Ltd* [1975] 3 All ER 484, or, more recently, *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.