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The Attorney General and contempt of court – some political and constitutional concerns

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Abstract
The Attorney General for England and Wales is the Government's Senior Law Officer who, inter alia, initiates certain kinds of legal proceedings. She is also a politician: a member of the House of Commons or the House of Lords and appointed to Government by the Prime Minister. This paper considers the Attorney General's role in initiating contempt proceedings against fellow politicians. I detail a number of cases where politicians have been involved in potential contempts by publication. I argue that, in such cases, the Attorney General's position may amount to an actual or perceived conflict of interest and may breach the principle that justice should be seen to be done.

Keywords: public law; Attorney General; conflict of interest; contempt of court

Introduction

Recent decades in the UK have seen significant constitutional change, not least in the attempts to achieve a clearer delineation between law and politics and thereby better to adhere to the principle of separation of powers. Prominent examples of this change include the creation of the Supreme Court to replace the Appellate Committee of the House of Lords as the final court of appeal in the UK;[1] the changes to the role of Lord Chancellor, particularly replacing him as head of the judiciary[2] and ending his right to sit as a judge;[3] and the removal of the Home Secretary's powers to set the minimum term for those given a mandatory life sentence.[4]

Against this background, the role of the Attorney General for England and Wales (hereafter, the Attorney General), which remains at the nexus of law and politics, seems increasingly anomalous.

This paper examines one aspect of the Attorney General's role which particularly brings her position as a politician and a Government Law Officer into question: the power to decide to initiate proceedings for contempt by publication in situations involving politicians. It begins with examples which illustrate the problematic nature of the Attorney General's role in relation to such potential contempts. I argue that these examples raise questions about the Attorney General's independence

[†]I would like to thank Amy Cowen, Dr Clare Kinsella and the anonymous peer reviewers for their help with, and comments on, earlier versions of this paper; any errors remain my own.

[1]Constitutional Reform Act 2005, s 23.

[2]Ibid, s 7(1).

[3]This is implicit within the Constitutional Reform Act 2005. See the explication of Part 2 of the Act in para 6 of the explanatory notes to the Act, available at https://www.legislation.gov.uk/ukpga/2005/4/notes?view=plain.

[4]This power is now exercised by the courts by virtue of the Sentencing Act 2020, s 322.

and accountability and that the current situation has the potential to amount to a conflict of interest and a breach of the principle that justice should be seen to be done. I then consider possible alternatives to the current arrangements.

1. The problem

This section considers five particular examples to illustrate the problem. The first concerns a social media post made by Jeremy Hunt when Secretary of State for Health. The second and third concern social media posts by the then Home Secretary, Priti Patel, about cases of people smuggling. The fourth and fifth involve comments made by David Cameron when Prime Minister during, respectively, the fraud trial of two former personal assistants to the celebrity cook Nigella Lawson and the trial for telephone hacking of Andy Coulson, Mr Cameron's former Director of Communications.

(a) Jeremy Hunt

In 2016, Jeremy Hunt posted a message (a Tweet) on the social network site Twitter during the manslaughter trial of a consultant anaesthetist and an NHS Trust for the death of Frances Cappuccini during surgery after a caesarean birth. The message contained a picture of Ms Cappuccini over a news caption which made reference to the trial and read: 'Tragic case from which huge lessons must be learned'.

On hearing of the Tweet, the trial judge, Coulson J, ordered it to be immediately removed and said:

> It's wholly inappropriate for anybody to pass comment which may be said to go to the result of the trial before that result is known, particularly in a very serious case. It could be regarded as contempt of court.[5]

Hunt's Tweet was potentially a contempt of court because, as per section 2(2) of the Contempt of Court Act 1981, it might amount to a publication which 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.

Under section 2(1), a publication

> includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.

The law on contempt by publication helps to ensure a fair trial by insulating courts from extraneous material which may affect, or appear to affect, them. The 1981 Act was enacted when the likely risks were from traditional broadcast and print media. Yet, the threat to the trial process from new media, such as Twitter, is perhaps an increasing one simply because of its ubiquity, reach and accessibility.[6]

[5]P Sawyer 'Health Secretary Jeremy Hunt reprimanded by judge over manslaughter trial Tweet' (*The Telegraph*, 28 January 2016), available at https://www.telegraph.co.uk/news/uknews/law-and-order/12123076/Health-Secretary-Jeremy-Hunt-reprimanded-by-judge-over-manslaughter-trial-Tweet.html.

[6]Law Commission *Contempt of Court: A Consultation Paper* (Consultation Paper No 209, 2012) pp 3, 35 and 38–39; I Cram and N Taylor 'The Law Commission's contempt proposals – getting the balance right?' (2013) 6 Crim LR 465 at 470; and *New Law Commission project to review the law on contempt of court* (28 June 2022) available at https://www.lawcom.gov.uk/new-law-commission-project-to-review-the-law-on-contempt-of-court. However, in 2019, commenting on the responses to a Government consultation on the impact of social media on criminal trials, the then Solicitor General, Robert Buckland QC MP said: 'our respondents reported that this risk [to the trial process from social media] is relatively minor …', 'Is social media harming our criminal justice system?' (Gov.UK, 5 March 2019) available at https://www.gov.uk/government/news/is-social-media-harming-our-criminal-justice-system. In Parliament, Buckland said: 'We can conclude that, for the moment, social media is not having a widespread impact on the trial process. This, however, may not remain the case if the issues identified [in the consultation] are not addressed': *Hansard* HC Deb, vol 655, col 29, 5 March 2019.

Further, there seems little doubt that the definition of a publication in section 2(1) of the Act is wide enough to include messages conveyed via social media[7] which are addressed to the public at large or any section thereof (which we can assume is the case with a Tweet by a leading politician).[8]

Under section 2(3) of the 1981 Act, contempt by publication arises only when proceedings are active which, for criminal proceedings, means when: there is an arrest without warrant; a warrant is issued for an arrest; a summons is issued; there is service of an indictment or other document specifying the charge; or an individual is orally charged with an offence. Criminal proceedings remain active until there is an acquittal, sentence, discontinuance or 'other verdict, finding, order or decision which puts an end to the proceedings'.[9] In civil cases, proceedings become active when the case is set down for trial or when a date for the trial or hearing is fixed and they remain active until disposed of, discontinued or withdrawn.[10] Moreover, by virtue of section 1, contempt by publication under the Act occurs whether or not there was an intention to interfere with the course of justice or whether the potential contemnor 'was aware that it might do'.[11] This is known as the strict liability rule.

Hunt's Tweet was potentially a contempt by publication for the following reasons. First, it was a publication while proceedings were active – there was an ongoing criminal trial for manslaughter. Second, by stating that 'huge lessons must be learned', Mr Hunt may be taken to be suggesting that the parties on trial for manslaughter – the NHS Trust and the anaesthetist – were at fault. This, in turn, might create a substantial risk of serious prejudice to the trial if, for example, a jury member saw the Tweet and was influenced by the fact that the Health Secretary seems to think the defendants are culpable. Alternatively, Mr Hunt's Tweet might have caused a substantial risk of serious impediment to the trial by, for instance, facilitating arguments that the Tweet is so prejudicial that the trial should be abandoned or that the trial is actually abandoned because of it and a retrial ordered.

Situations like Hunt's, where a politician may have committed a contempt, are a concern because of the role of the Attorney General in contempt proceedings. Section 7 of the Contempt of Court Act 1981 states:

> Proceedings for a contempt of court under the strict liability rule (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it.

It will be noted that section 7 allows proceedings to be instituted by a court having appropriate jurisdiction. For example, in *Re Lonrho plc*,[12] the Appellate Committee of the House of Lords initiated contempt proceedings in relation to a case being heard by the House. Yet, such a course of action

[7]In 2012, the Law Commission stated: '… we do not think there is any difficulty about including internet communications as publications under the definition in section 2(1) or that there is any prospect that a court would refuse to do so … The term "communication in whatever form" is so wide that it seems on its own to cover comprehensively or near comprehensively the new media': ibid, pp 40 and 42. See also Law Commission *Contempt of Court (1): Juror Misconduct and Internet Publications* (Law Com No 340 2013) p 12 and CJ Miller and D Perry (consultant eds) *Miller on Contempt of Court* (Oxford: Oxford University Press, 4th edn, 2017) pp 11, 168, 135. In *R v F* [2016] EWCA Crim 12, [2016] 2 Cr App Rep 13 para 43, Sir Brian Leveson P said: '… anyone posting a comment on a publicly available website which creates a substantial risk of causing serious prejudice faces the potential prospect of proceedings for contempt of court …' Moreover, in two recent cases involving the former leader of the English Defence League, Stephen Yaxley-Lennon, both the Court of Appeal and the Queen's Bench Division appeared to assume that a video broadcast via Facebook amounted to a publication under s 2(1) of the 1981 Act: *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 and *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB), [2020] 3 All ER 477.

[8]However, a private message conveyed by social media to one other person is unlikely to be considered to be addressed to a 'section of the public' and so would not amount to a publication under the 1981 Act; see D Eady and ATH Smith *Arlidge, Eady and Smith on Contempt* (London: Sweet & Maxwell, 4th edn, 2011) paras 438–439 and Miller and Perry, above n 7, p 168.

[9]Contempt of Court Act 1981, Sch 1, paras 4–5.

[10]Ibid, Sch 1, paras 12–13.

[11]Law Commission *Contempt of Court (1): Juror Misconduct and Internet Publications*, above n 7, p 9.

[12][1990] 2 AC 154.

is very rare[13] with the consequence that, in practice, the Attorney General exercises virtually exclusive power to decide whether to bring proceedings for contempt.[14] Even if this were not the case – if the courts proved themselves more willing to initiate contempt proceedings – there would still be the potential for the appearance of a conflict of interest if the Attorney General instituted contempt proceedings against a political opponent (rather than refraining from instituting proceedings against a political ally). Moreover, there is authority that a decision by the Attorney General not to bring contempt proceedings is immune from challenge by judicial review.[15]

The Attorney General's role here is a concern because she is a politician:[16] a Minister who is appointed – and may be dismissed – by the Prime Minister; she is a member of either the House of Commons or the House of Lords and an active political member of the Government. The concern, of course, is that when considering whether proceedings should be initiated against a political ally or opponent, the Attorney General may act – or may be perceived to have acted – for political, rather than strictly legal and impartial, reasons. This has implications for the Attorney General's role in terms of her independence from political influence and the possibilities for a conflict of interest; these are explored below.

The Contempt of Court Act 1981 provides three possible defences to strict liability contempt by publication: under section 3, a defence of innocent publication or distribution; under section 4, that the publication is a contemporary report of the proceedings; or, under section 5, that the publication is a permissible discussion of public affairs.

Section 3(1) of the 1981 Act states:

> A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.

Section 3(2) provides a similar defence for distributors. The defence is available only if the publisher or distributor did not know and has no reason to suspect, having taken all reasonable care, that the proceedings in question are active – for example, in a criminal trial, that there has been an arrest, a warrant issued for an arrest, or a charge made. Given this, the defence would not be available in the situation described above simply because Mr Hunt, in Tweeting a reference to the trial, demonstrated that he was aware that proceedings were active. Moreover, in order to rely on this defence, any would-be publisher – whether in the traditional media or new social media – must demonstrate that they took 'all reasonable care' to discover whether proceedings were active.[17]

Section 4 of the Act states:

> … a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

[13]'Although section 7 of the 1981 Act gave the court jurisdiction to deal with contempts of this nature of its own motion, *the almost invariable course would be for the matter to be referred to the Attorney General*': Lord Burnett LCJ in *Re Yaxley-Lennon*, above n 7, para 32 (emphasis added); see also *Contempt of Court: A Consultation Paper*, above n 6, p 20.

[14]However, by virtue of s 1 of the Law Officers Act 1997 'Any function of the Attorney General may be exercised by the Solicitor General … [and] has effect as if done by … the Attorney General.'

[15]*R v Solicitor General, ex p Taylor* [1996] Administrative LR 206. This decision is, though, 'open to criticism' as per Miller and Perry, above n 7, p 89; see also DJ Feldman and CJ Miller 'The law officers, contempt and judicial review (1997) 113 LQR 36.

[16]Though, in his evidence to the House of Commons Constitutional Affairs Committee, the then Attorney General, Lord Goldsmith, was reluctant to accept that he was a politician: House of Commons Constitutional Affairs Committee *Constitutional Role of the Attorney General* (HC 2006–07, 306) pp 30–31. In contrast, Hand suggests that the increasing tendency of recent holders of the office to have had previous ministerial experience before becoming Attorney General 'could exemplify a shift in the politico-legal role toward the political': J Hand 'The Attorney-General, politics and logistics – a fork in the road?' (2022) 42 LS 425 at 431–432.

[17]Under s 3(3), the burden of proof is on the person wishing to rely on this defence.

This defence permits the temperate reporting of legal proceedings in order to keep the public informed. It allows a report of, for example, what occurred in court – evidence given and arguments made – but it would not permit speculation on, say, the culpability or otherwise of one of the parties to the case. Thus, again, it would not offer a defence to a social media message such as that posted by Mr Hunt because it is commentary on the case rather than a 'fair and accurate report of legal proceedings' and, as already noted, his Tweet implied that the defendants in a criminal trial were at fault.

Under section 5 of the 1981 Act, a publication will not amount to strict liability contempt if it makes or is part of a discussion in 'good faith of public affairs or other matters of general public interest' and where the 'risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion'. This defence permits discussions of matters that are in the general public interest, even if there is a risk of impediment or prejudice to proceedings, as long as that risk is simply incidental to the discussion. In the above example of the trial of the NHS Trust and the anaesthetist for the death of Ms Cappuccini following a caesarean birth, a general discussion in a publication about the safety of patients in hospitals would be protected by the section 5 defence; this would be so even if the discussion focused on the subject matter of the trial: the safety of those undergoing surgery after a caesarean birth. Mr Hunt's Tweet would not be protected by section 5, though, because the risk to the trial was not incidental to his comment; rather, the trial was the subject of his Twitter post and so the risk was direct.

The following sections consider further publications, each involving Ministers, and each of which might amount to a contempt of court: two Tweets by the then Home Secretary, Priti Patel, and two statements by the former Prime Minister, David Cameron. Those of Cameron are a particular concern because of the power of the Prime Minister to, in effect, appoint or dismiss the Attorney General. First, though, it is worth noting for completeness that there is also a common law contempt by publication which was preserved by section 6(c) of the Contempt of Court Act 1981 and which may also be committed via social media: intentional contempt by publication. However, unlike contempt by publication under the 1981 Act, proceedings for intentional common law contempt may be instigated by parties other than the Attorney General and the Attorney General's consent is not required. For this reason – and because this common law contempt is seldom brought[18] (possibly because of the difficulty of proving an intention to prejudice or impede proceedings) – the focus of this paper will be on the pivotal role of the Attorney General in proceedings for strict liability contempt under the 1981 Act.

(b) Priti Patel

In October 2020, a Tweet was posted on the official Twitter account of the Home Secretary, Priti Patel. This read:

> One year ago today, 39 people lost their lives in horrific circumstances at the hands of ruthless criminals. My thoughts remain with everyone who was affected by that day, particularly the loved ones of the people who so tragically died.[19]

As with the Jeremy Hunt example, this Tweet was posted during the course of a criminal trial, in this instance, a trial for manslaughter and people smuggling in relation to the 39 people to whom Patel referred.

The problem with the Tweet is that referring to the defendants in an ongoing trial as 'ruthless criminals' suggests that they are guilty when this has not been established. That, in turn, might create a substantial risk of serious prejudice and so amount to contempt. This is particularly so given that

[18] *Contempt of Court: A Consultation Paper*, above n 6, p 19.

[19] 'Essex lorry deaths: trial was halted after Priti Patel Tweet' (*BBC News*, 20 December 2020) available at https://www.bbc.co.uk/news/uk-england-essex-55403058.

the Home Secretary is a senior Minister.[20] The trial judge instructed the jury to ignore social media comments by politicians or journalists which 'may assert or imply guilt of amongst others the men who are in your charge, two of whom are charged with the manslaughter of the victims'.[21]

In 2021, there was another problematic Tweet posted on Patel's official Twitter account. This made reference to the arrest and detention of a suspected people smuggler by the National Crime Agency[22] and read:

> Excellent work by the NCA in Birmingham arresting another vile people smuggler. A suspected high-ranking member of a Vietnamese network trading in human lives via the backs of lorries. Around 50 investigations are ongoing as we work to wipe out the top tier of these networks.[23]

This was a Tweet while proceedings were active – following an arrest – and referring to the suspect as a 'vile people smuggler' implies his guilt when that has not been ascertained. The Tweet was removed following criticisms of it.[24]

(c) David Cameron and the Lawson case

In 2013, two assistants of the celebrity food writer and cook, Nigella Lawson, were tried for fraud. The central issue in the case was whether their use of a credit card had been authorised by Ms Lawson. During the trial, an article was published in *The Spectator* magazine, based on an interview with the then Prime Minister, David Cameron, entitled 'Why he's on Team Nigella' (the phrase 'Team Nigella' had, according to the article, been used by her supporters on Twitter and even sprayed on some city walls). Cameron had said, in response to a question by the interviewer as to whether he is on 'Team Nigella', 'I am. I'm a massive fan, I've had the great pleasure of meeting her a couple of times and she always strikes me as a very funny and warm person …'[25] In the article, the interviewer makes it clear that he expected the Prime Minister to 'dodge' the question about Lawson[26] but he did not.

Lawyers for both defendants argued that the interview had the potential to prejudice the trial and that, consequently, the case should be dismissed. It is useful to note here the comments of one of the defence barristers, Anthony Metzer QC:

> Here is a commentary on the most important prosecution witness [Nigella Lawson] in the course of the trial.
> …
> This is not a trivial witness and her credibility is central. If she is believed about the non-authorisation of the credit card my client will be convicted. If she is not believed the case collapses.
> …
> This is endorsement from the highest possible level.
> …

[20]This point was made by one of the defence barristers, Alisdair Williamson QC: J Read 'Priti Patel "caused legal storm" with "ill-advised" Tweet about migrant deaths' (*The New European*, 22 December 2020) available at https://www.theneweuropean.co.uk/brexit-news-westminster-news-priti-patel-migrant-deaths-tweet-6863802/.

[21]Ibid.

[22]Details of the arrest may be found at https://nationalcrimeagency.gov.uk/news/suspected-high-ranking-people-smuggler-arrested-by-the-nca-in-birmingham-raid.

[23]J Miller 'Priti Patel accused of contempt of court after assuming guilt of suspected criminal – just months after almost causing similar trial to collapse' (*EvolvePolitics*, 16 September 2021) available at https://evolvepolitics.com/priti-patel-accused-of-contempt-of-court-after-assuming-guilt-of-suspected-criminal-just-months-after-almost-causing-similar-case-to-collapse/.

[24]Ibid.

[25]R Booth 'David Cameron's "Team Nigella" quotes could have sunk Saatchi PAs' trial' (*The Guardian*, 20 December 2013) available at https://www.theguardian.com/politics/2013/dec/20/david-cameron-team-nigella-lawson-quote-trial.

[26]Ibid.

> He [Cameron] is essentially commenting on Miss Lawson's credibility … The prime minister is essentially saying in the course of a trial that she is somebody he would support.
> …
> [It is] impossible to divorce an endorsement from someone as respected as the prime minister giving essentially a character reference for Miss Lawson.[27]

The trial judge did not halt the trial. He called the comments 'regrettable' and ordered the jury to ignore them. However, Metzer's claims illustrate the potential danger to the fairness of a trial created by such comments and the particular danger that comments from a senior politician pose; as he indicates, comments by the Prime Minister may be more likely than those by, say, a member of the general public to influence jurors and thereby create a serious risk that proceedings will be substantially prejudiced or impeded (and so amount to contempt). As Metzer says, Cameron's remarks amount to 'endorsement from the highest possible level'.

(d) David Cameron and the Coulson case

In 2014, Mr Cameron, again while Prime Minister, issued a televised apology for employing Andy Coulson as his Director of Communications. This apology was made after Coulson had been found guilty of one charge relating to the hacking of telephones, but while the jury was still considering two further charges. The Prime Minister said Coulson had provided him with 'false assurances'. The danger is that, by saying this, Cameron was casting doubt on the trust that should be placed in Coulson and it is this that may have prejudiced the trial.

The trial judge, Saunders J, wrote to Cameron to express his concern and ask for an explanation. The judge also said that 'politicians from across the political spectrum' had commented on the case.[28]

Significantly for present purposes, a Downing Street spokesperson said that the Prime Minister had taken 'the best legal advice' before giving the apology. It is thought that this meant that he had consulted the then Attorney General, Dominic Grieve, and Grieve's spokesperson confirmed that the Prime Minister had sought his advice before giving the apology.[29]

This example illustrates a further difficulty with the role of the Attorney General: that she may advise a ministerial colleague about the propriety of a statement they wish to make which, when made, may be thought to amount to a contempt. The apology from the Prime Minister for employing Coulson, after (it seems) consulting with Mr Grieve, along with the trial judge's concern, shows that this is not fanciful. In such a situation, one may question whether the Attorney General is capable of acting wholly impartially in deciding whether to bring an action for contempt with regard to a comment she had provided advice about.

These last two examples – Cameron's comments during the trials of Nigella Lawson's former assistants and about Andy Coulson – concerned remarks made by the Prime Minister but published by others. For this reason, the Prime Minister may not have been the person against whom contempt proceedings would be instigated.[30] Yet, there is still the potential for a conflict of interest: a decision

[27]Ibid.

[28]J Doleman 'Phone-hacking trial: judge rebukes David Cameron for Coulson statement' (*The Drum*, 25 June 2014) available at https://www.thedrum.com/opinion/2014/06/25/phone-hacking-trial-judge-rebukes-david-cameron-coulson-statement.

[29]'Judge rebukes Cameron for comments on Coulson conviction' (*BBC News*, 25 June 2014) available at https://www.bbc.com/news/uk-politics-28014035.

[30]The position here is not clear. Section 2(2) of the 1981 Act states that 'The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'; the Act does not specify which legal or natural persons may be held responsible for any contempt. Individual journalists, editors and corporate publishers may be responsible for a publication and be held to be contemnors in relation to it, see *Contempt of Court: A Consultation Paper*, above n 6, p 26. It is less clear whether those who make a statement when interviewed by a journalist which is then published by a corporate body (as in the Cameron interview which references Nigella Lawson) or who create material broadcast by others (as seems to be the case with Cameron's Coulson apology) may also be liable for any contempt.

to bring contempt proceedings against a publisher or broadcaster for reporting comments made by a politician would likely embroil that politician in negative publicity.

(e) An increasing problem

Thus far, the focus of this paper has been on incidents of possible contempts by Government Ministers; this is simply because they particularly demonstrate the problematic nature of the Attorney General's role in contempt by publication cases. There are, though, other recent examples of politicians or political activists making social media posts which may amount, or have amounted, to a contempt by publication. For example, in 2018, the leader of the Alliance Party of Northern Ireland, Naomi Long, Tweeted about comments made in the trial of two rugby players accused of rape. The Tweet was reported to have nearly 'collapsed the trial'.[31] (Though it should be noted, as explained below, that the Attorney General for Northern Ireland is not a politician and so the same concerns about an actual or perceived conflict of interest do not arise.)

In 2019, the right-wing activist, Stephen Yaxley-Lennon (also known as Tommy Robinson) was found by the High Court to be in contempt of court in a number of ways including contempt by publication. Among other things, he had live-streamed, on social media, video that he had taken of defendants in a sexual exploitation case arriving at court.[32]

In 2021, a Plaid Cymru member of the Welsh Parliament, Helen Mary Jones was instructed by the trial judge to appear before the court to explain a social media message that she had re-tweeted. The original poster of the message, Rachel Williams, was also instructed to appear before the court. This message referred to, and had been posted during, the trial of a man accused of murdering his wife. The original Tweet was critical of one aspect of the defence being put forward by the defendant and suggested that there was a history of domestic violence on his part. No evidence of a history of domestic violence was put before the court.[33]

Moreover, instances of politicians or activists making statements which might be a contempt may arise more and more. These are febrile political times and comments by politicians which could affect the fairness of a trial may become a more regular occurrence. The self-restraint exercised by politicians over such matters seems to be diminishing and this may be for a number of reasons.

Mainstream politicians will increasingly feel the pressure from, witness the success of, and wish to emulate, so-called populist politicians whose attractiveness to voters seems, in part, due to the fact that they are willing to trample over previous political niceties. In fact, part of the political attraction of such politicians may be that they are perceived to be genuine and unspun and this is apparent in their behaviour: their willingness to ignore and act against political conventions is part of their anti-establishment appeal.

The former US President, Donald Trump, is perhaps the epitome of such a populist politician in recent times. Trump's electoral success appeared in large part to be because of his obvious disdain for some of the principles of accepted political behaviour.[34] Indeed, Woodward indicates how many in Trump's entourage and election team considered his anti-politician and unpredictable persona to be an electoral asset when contrasted with the polished, orthodox, 'just another politician' perception

[31]H McDonald 'Former MP's tweet almost collapsed Ulster rugby rape trial' (*The Guardian*, 11 April 2018) available at https://www.theguardian.com/uk-news/2018/apr/11/former-mp-naomi-long-tweet-almost-collapsed-ulster-rugby-trial.

[32]*AG v Yaxley-Lennon*, above n 7.

[33]'Politician summoned to court after sharing "inappropriate" murder trial tweet' (*The Northern Echo*, 17 February 2021) available at https://www.thenorthernecho.co.uk/news/national/19097735.politician-summoned-court-sharing-inappropriate-murder-trial-tweet/.

[34]Persily agrees that the Trump campaign was 'unprecedented in its breaking of established norms of politics'; he argues that this type of campaign could only be successful because of the diminished power of traditional institutions and mainstream media and by making unmediated use of social media: N Persily 'Can democracy survive the internet?' (2017) 28 (2) Journal of Democracy 63 at 64.

of Hilary Clinton, the Democratic candidate for President.[35] And, of course, he made unrestrained use of social media to communicate directly with voters.[36]

Similarly, some current UK politicians avoid or are dismissive of the political and constitutional conventions by which their predecessors felt bound.[37] As Mike Gordon writes of Boris Johnson: 'in his [first] 16 months in office, the Prime Minister has shown an obvious disregard for a number of constitutional conventions … and democratic principles …'.[38] A similar disregard for constitutional and legal propriety was seen when senior Ministers refused to say unequivocally that the Government will consider itself bound by international law.[39]

There is also, as a growing part of the political landscape, politicians and activists who are outside of the mainstream parties. These often make extensive use of social media without the moderating influence which membership of mainstream parties imposes.

To all this we may add the ubiquity of social media and the fact that most politicians probably feel the need to have some presence on social media platforms. Indeed, Boris Johnson – in his leadership campaign, as Prime Minister and during the 2019 General election – largely avoided the mainstream media, preferring to use social media to communicate directly with the public.[40] Further, politicians, even of the mainstream parties, may post on social media without legal advice and without the restraining hand of a press officer or other official; as suggested above, they may calculate that unrestrained communication may pay them political dividends.

[35]B Woodward *Fear: Trump in the Whitehouse* (London: Simon & Schuster, 2018) pp 7, 9, 16, 17, 18, 26.

[36]In fact, his use of Twitter is so unrestrained that he was permanently suspended from the platform though this was later reversed: J Clayton 'Why Donald Trump isn't returning to Twitter (for now)' (*BBC News*, 25 November 2022) available at https://www.bbc.co.uk/news/technology-63725948.

[37]For instance, the All Party Parliamentary Group (APPG) on Democracy and the Constitution state that, in their behaviour towards the courts and judges or with regard to the outcomes of particular cases 'ministers have acted in a manner that may be considered improper or unhelpful given their constitutional role': All Party Parliamentary Group on Democracy and the Constitution *An Independent Judiciary – Challenges Since 2016: An Inquiry into the Impact of the Actions and Rhetoric of the Executive since 2016 on the Constitutional Role of the Judiciary* (8 June 2022) p 7; see also pp 37 and 55, available at https://static1.squarespace.com/static/6033d6547502c200670fd98c/t/629cedc11230cc13c184dc69/1654451651427/SOPI+Report+-+Exec+Sum+FINAL.pdf. The APPG also suggest that recent 'law ministers' (by which they broadly mean the Lord Chancellor and the Attorney General) are more politicised than previous holders of those offices: ibid, pp 8–9, 35 and 52.

[38]M Gordon 'Priti Patel, the independent adviser, and ministerial irresponsibility' *UK Constitutional Law Blog* (23 November 2020), available at https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-ministerial-irresponsibility/.

[39]House of Lords Select Committee on the Constitution, *United Kingdom Internal Market Bill: 17th Report of Session 2019–21* (HL Paper 151) pp 29–39, available at https://committees.parliament.uk/publications/3025/documents/28707/default/; 'Brexit: Lewis on breaking laws over Northern Ireland plans' (*BBC News,* 8 September 2020) available at https://www.bbc.co.uk/news/av/uk-politics-54073997. It is worth noting, here, a comment by McCormick which indicates the diminished regard with which some recent Law Officers are perceived; he says of the introduction of the United Kingdom Internal Market Bill, which would have authorised breach of the UK's international law obligations, 'it should not have happened under any respectable law officer's watch': C McCormick 'Evidence to the House of Lords Select Committee on the Constitution' available at https://committees.parliament.uk/oralevidence/9939/html/. Likewise, Green writes of those in the Government, including the Law Officers, that did not resign when the Government introduced the Bill, '[they] have destroyed their legal reputations for the sake of their political careers': DA Green 'The law officers in the new age of politics' (*Prospect Magazine*, 18 September 2020) available at https://www.prospectmagazine.co.uk/politics/law-officers-suella-braverman-lord-keen-robert-buckland-brexit-internal-market-bill.

[40]M Cormack 'Why Boris is avoiding the media' (*CGTN*, 5 December 2019) available at https://news.cgtn.com/news/2019-12-05/Why-Boris-is-avoiding-the-media-Max3xqU20U/index.html; L Tomkin 'Where is Boris Johnson? When and why it matters when leaders show up in a crisis' (2020) 16(3) Leadership 331 at 335; K Balls 'Why has Boris Johnson disappeared from view? He's betting you don't care' (*The Guardian*, 27 February 2020) available at https://www.theguardian.com/commentisfree/2020/feb/27/boris-johnson-mop-no-10-media-public.

2. Independence, accountability and conflicts of interest

The above examples – especially those involving Jeremy Hunt, Priti Patel and David Cameron – give some indication of the problem of the Attorney General's role in contempt of court cases. In this section, I examine this problem as a conflict of interest and breach of the principle that justice should be seen to be done. I also consider the independence and accountability of the Attorney General's functions in providing advice to Government and in contempt cases. First, though, I give a brief overview of the role of the Attorney General both generally and, in particular, with regard to actions for contempt of court.

The Attorney General for England and Wales is a senior member of the Executive and occasionally a member of the Cabinet.[41] She leads the Attorney General's Office, which also comprises the Solicitor General, the latter acting as the deputy of, and subordinate to, the former. Like all Ministers, by virtue of constitutional convention, the Attorney General and Solicitor General – who, along with the Advocate General for Scotland, compose the UK Government's Law Officers[42] – are also members of either the House of Commons or the House of Lords.[43]

The Attorney General has a number of significant roles. She is often said to be the guardian of the rule of law.[44] She provides superintendence of various prosecuting authorities, including the Director of Public Prosecutions[45] and the Serious Fraud Office.[46] In addition, the Attorney General's consent is required for the prosecution of certain offences.[47] She may also apply to the High Court for an order to restrain vexatious litigants,[48] refer unduly lenient sentences[49] and points of law[50] to the Court of Appeal or, by issuing a *nolle prosequi*, terminate criminal proceedings on indictment.[51] She is the chief legal adviser to the Government[52] and, in important cases, may appear personally on behalf of the Government and may also intervene in cases to represent the interests of either House of Parliament.[53] She is also *ex officio* leader of the Bar of England and Wales and a member of the Bar Council.

More pertinently for current purposes, as noted above, by virtue of section 7 of the Contempt of Court Act 1981, contempt proceedings under the strict liability rule may only be initiated 'by or with

[41]Though some criticise this arguing that, traditionally, there was a convention that the Attorney General, while being a Cabinet rank minister, should not be a member of, or regularly attend, the Cabinet; rather, the Attorney General should attend by invitation to discuss specific matters and then leave, see the HC Constitutional Affairs Committee, above n 16, pp 15, 35. Hand notes that the convention that Attorneys General are not members of the Cabinet helps maintain a 'level of independence', above n 16, at 428–430.

[42]For completeness, it is worth noting that the Advocate General for Northern Ireland is also one of the UK Government's Law Officers; however, by virtue of the Justice (Northern Ireland) Act 2002, s 27, this post is held by the Attorney General for England and Wales.

[43]Though there are exceptions, they are usually drawn from the House of Commons: C McCormick *The Constitutional Legitimacy of Law Officers in the United Kingdom* (Oxford: Hart Publishing, 2022) p 46.

[44]HC Constitutional Affairs Committee, above n 16, pp 5, 11, 12–14 and 56; House of Lords Select Committee on the Constitution, *The Roles of the Lord Chancellor and the Law Officers: 9th Report of Session 2022–23* (HL Paper 118) pp 3, 4 and 37–39 available at https://committees.parliament.uk/publications/33487/documents/182015/default/.

[45]Prosecution of Offences Act 1985, ss 2(1) and 3(1).

[46]Criminal Justice Act 1987, s 1(2).

[47]A schedule of offences requiring the Attorney General's consent to prosecute may be found in Annex 1 to the Crown Prosecution's website 'Consent to prosecute': https://www.cps.gov.uk/legal-guidance/consents-prosecute#b01.

[48]Senior Courts Act 1981, s 42(1).

[49]Criminal Justice Act 1988, s 36(1).

[50]Criminal Justice Act 1972, s 36(1).

[51]Though the power of the Attorney General to terminate criminal proceedings in individual cases will be exercised '[e]xceptionally, and only where in the Attorney General's opinion it is necessary to do so for the purposes of safeguarding national security': Attorney General's Office *Framework Agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020) p 10 available at https://www.cps.gov.uk/sites/default/files/documents/publications/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions__CPS.pdf.

[52]Lord Morris, the former Attorney General said that acting as the 'principle legal adviser to the Government' takes up the 'lion's share' of the Attorney General's time: HC Constitutional Affairs Committee, above n 16, p 30.

[53]Ibid, pp 10–11.

the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it'. The justification often given for the Attorney General having this function is that she is said to represent or be the guardian of the public interest or 'the guardian of the administration of justice'.[54]

The Attorney General's role in contempt proceedings concerning a fellow politician may be considered questionable in terms of the principles of the separation of powers[55] and the rule of law. However, it is submitted that the problematic nature of this function is most clearly seen when it is characterised as an actual or perceived conflict of interest and, consequently, a breach of the justice should be seen to be done principle.[56]

The rationale of the justice should be seen to be done principle is the preservation of public confidence in the administration of justice: that such confidence is safeguarded by the 'appearance as well as the fact of impartiality'.[57] The maintenance of public confidence in the administration of justice consequently requires not only judges to be – and appear to be – free from bias but also that others involved in the administration of justice are similarly impartial. The principle therefore applies to those, like the Attorney General, who make decisions about whether legal proceedings should be commenced against a particular person or persons.

In the Jeremy Hunt and Priti Patel examples, a decision by the Attorney General to initiate proceedings would have been extremely damaging to a senior colleague and political ally – respectively, Mr Hunt and Ms Patel – and thus damaging also to the Government of which the Attorney General is a member. This would surely be the case whatever the outcome of any consequent trial: the initiating of proceedings would, in itself, be detrimental. This is very obviously a potential conflict of interest.

This potential conflict arises even more acutely with the two examples involving comments made by David Cameron when Prime Minister concerning, respectively, the trials of Nigella Lawson's former assistants and Mr Cameron's former Director of Communications, Andy Coulson. Indeed, in the latter case, as we have seen, Mr Cameron seems to have been advised on his statement, prior to making it, by the then Attorney General, Dominic Grieve. The fact that the trial judge wrote to Mr Cameron expressing his concern about the comments would seem to indicate that the Attorney General would be obliged to consider whether they amounted to contempt. It cannot really be said that Mr Grieve was then able to consider whether this amounted to a possible contempt in which he should initiate proceedings in a way that was, and would be perceived to be, impartial and independent.

In addition, as already noted, both the Attorney General and Solicitor General are appointed, and may be promoted, demoted or dismissed, by the Prime Minister.[58] This seems to be the very epitome of a conflict of interest: that a decision maker – in this case, the Attorney General – must make a decision which, if taken one way rather than another, will be harmful to the person on whom the decision maker relies for their position.[59]

[54]See, for example, Lord Burnett LCJ in *Re Yaxley-Lennon*, above n 7, para 34.

[55]It is often said that aspects of the Attorney General's function offend the separation of powers principle on the basis that it may involve a member of the executive being involved in deciding whether certain classes of case may proceed: see, for example, HC Constitutional Affairs Committee, above n 16, p 17.

[56]Perhaps the most famous statement of this principle is by Lord Hewart CJ in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at 259: '… a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

[57]*R v Webb* [1994] HCA 30, (1994) 181 CLR 41 [9] (Mason C and McHugh J in the High Court of Australia); see, also, HWR Wade and CF Forsyth *Administrative* Law (Oxford: Oxford University Press, 11th edn, 2014) p 389 and *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, [2014] 1 WLR 1943 [39] (Arnold J).

[58]Formally, of course, they are appointed by the Monarch. However, in this regard, the Monarch acts on the advice of the Prime Minister which means, de facto, Ministers are appointed and may be dismissed by the Prime Minister.

[59]Diana Woodhouse made a similar point in 1997 in relation to the Matrix Churchill affair, and the then Attorney General's advice about the use of Public Interest Immunity certificates: '… the Attorney General … is portrayed as a lawyer making independent and impartial decisions, but whose actions nevertheless have considerable political consequences and who, as a minister, relies on prime-ministerial patronage for his position': D Woodhouse 'The Attorney General' (1997) 50(1) Parliamentary Affairs 97 at 108.

It is not only with political allies where the Attorney General's power to instigate or not to instigate contempt proceedings may give rise to concerns. A decision to take action against a political opponent may also seem to be politically motivated and so appear to be a conflict of interest. The same may even be true of a decision not to initiate contempt proceedings against a political opponent where, for example, it might appear advantageous to keep a politically weak opposition politician in place rather than take action which may lead to their removal or resignation.[60] In fact, with all these situations, where a possible contempt is committed by a fellow politician – whether an opponent or ally – the Attorney General may be subject to criticism for any decision they take. This point has been made by Diana Woodhouse (later quoted by the former Attorney General, Lord Goldsmith) in relation to prosecution decisions: 'It would seem that where politically contentious decisions are concerned, the Attorney-General is unlikely to escape criticism whatever [decision] he makes'.[61]

It may be, of course, that in politically sensitive cases, the functions of the Attorney General are undertaken by an official who is outside of party political life. That is, if there is a decision about whether contempt proceedings should be commenced against a politician, some mechanism is adopted by which the decision is taken by, say, a non-political Government lawyer and that an information barrier, or ethical wall, is maintained between the Attorney General and any decision maker.

I made a Freedom of Information request to the Attorney General's Office to ask whether any such mechanism exists. The reply was that the Office does not hold the information requested because there is no legal obligation to do so. However, the reply also stated:

> It may help to clarify that the Attorney General acts independently of government in deliberating on issues of contempt of court, as 'guardian of the public interest'. This is one of the many guardian of the public interest roles that the Attorney General plays, for example in relation to unduly lenient sentences and inquests.[62]

This seems to mean that, while there may be no formal separation mechanism by which political cases are considered, the Attorney General acting independently of Government in contempt cases is considered as an adequate safeguard. This seems questionable.

It is often said that the Attorney General has a quasi-judicial role.[63] This may have at least two meanings: one descriptive and one normative. First, that the Attorney General may make decisions – for instance, about commencing prosecutions – that are judicial in nature. Secondly, that in exercising certain functions, the Attorney General should act in a judicial manner: that she should – as the freedom of information reply states she does – act independently from, and not be influenced by, political or other pressures.

Yet, the use of the word 'judicial' here is instructive in another way. It would not be accepted that a judge, no matter how highly esteemed, should be involved in a case in which she is intimately connected.[64] Rather, the principle that justice should be seen to be done would require that a judge connected to one of the parties should recuse herself. A simple assertion that the judge will act

[60]Alternatively, in deciding whether to initiate contempt proceedings against a political opponent, the Attorney General may overcompensate in the sense that, in order to appear entirely fair, she does not take action where she perhaps should. A similar point was made by Dr Alan Whitehead MP (though with regard to prosecutions) in evidence to the Constitutional Affairs Committee: HC Constitutional Affairs Committee, above n 16, p 70.

[61]Woodhouse, above n 59, at 101. Lord Goldsmith made use of this quotation in his written evidence to the HC Constitutional Affairs Committee, above n 16, p 22.

[62]FOI reply, e-mail message to the author (12 July 2019).

[63]HC Constitutional Affairs Committee, above n 16, pp 5, 39, 66, 70 and 72; C McCormick and G Cowie *The Law Officers: A Constitutional and Functional Overview* (House of Commons Library, Briefing Paper No 08919, 28 May 2020) p 48.

[64]See, for example, *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL) where an earlier decision of the House of Lords was overturned because of a connection between Lord Hoffmann, who had sat on the earlier case, and one of the interveners, Amnesty International.

independently of any perceived connection would not be adequate. Given this, it is surely not sufficient for the Attorney General so to claim.[65]

Moreover, in the examples referred to above, if the question had arisen about whether Mr Hunt's, Ms Patel's or Mr Cameron's statements amounted to contempt and whether proceedings should be initiated against them, it could not be said that an outside observer would be confident that, in considering this question, the Attorney General had operated independently and by reference only to the applicable law and evidence.[66]

Writing in 1984, John Edwards stated:

> [there are] distinct whiffs of political pressure being exerted [since the 1950s] … [and] the ability to resist such pressures will vary according to the experience, personality and determination of the Law Officers concerned.[67]

This, it is suggested, is probably correct – that the Attorney General's ability to act independently of any explicit or implicit political pressure will vary according to the character of the holder of the office. Yet, the independence and consequent legitimacy of decisions about commencing legal proceedings should not vary according to the strength of character of the office holder.

There are also concerns about the transparency and accountability of the Attorney General's role in cases such as those described above. Lord Goldsmith, when Attorney General and giving evidence to the House of Commons Constitutional Affairs Committee, said that he exercised his duties 'independently, fairly and with accountability'.[68] Presumably, all Attorneys General would subscribe to these sentiments. However, a lack of transparency in the giving of legal advice and the factors considered when deciding whether to commence contempt proceedings may mean full accountability is not attainable.

With regard to the advice that Dominic Grieve seems to have given David Cameron concerning the propriety of the statement about employing Andy Coulson, it may be assumed that the public became aware that such advice had been given because it was politically convenient to make that fact known. Generally, though, the advice given by the Attorney General as chief legal adviser to the Government is not made public;[69] further, the Attorney General is under no obligation to make public that she has been consulted at all.[70] Thus, it may be asked whether full accountability can occur if the giving of such advice may not necessarily become known. This may be a particular problem with a decision not to instigate contempt proceedings against a Ministerial colleague following advice that may have previously been given about the legality of the statement in question (as appears to be the case with Cameron's statement about employing Andy Coulson). In short, if the very fact that such advice was sought and given is not known, the full context of any decision by the Attorney General whether or not to initiate contempt proceedings is also unknown. This, in turn, means that there cannot be full and effective accountability on these matters.

Likewise, the factors which the Attorney General takes into account when deciding whether or not to initiate contempt proceedings are not transparent.[71] Given this, it may again be asked whether there

[65]It is worth noting here the observation of Kenny MacAskill MP that in Scotland 'It is standard practice in cases involving politicians that the Lord Advocate recuses himself from involvement in the consideration or prosecution of the case …': *Hansard* HC Deb, vol 699, col 932, 20 July 2021.

[66]In attempting to evaluate this, we might adapt the test for bias provided by Lord Hope in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103] and ask whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Attorney General was biased.

[67]J Edwards *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) p 321. I am grateful to Dr Conor McCormick for bringing this to my attention.

[68]HC Constitutional Affairs Committee, above n 16, p 8.

[69]*The Cabinet Manual: A Guide to the Laws, Conventions and Rules on the Operation of Government* (Cabinet Office, 2011) p 50.

[70]Ibid; HC Constitutional Affairs Committee, above n 16, pp 21–22; *Erksine May Online* para 21.27, available at https://erskinemay.parliament.uk/section/4877/law-officers-opinions/.

[71]Law Commission *Contempt of Court: A Consultation Paper*, above n 6, p 21.

can be full accountability and if it is possible to evaluate whether a decision about instigating contempt proceedings against either a political ally or opponent is affected by political – rather than strictly legal and evidential – considerations.

3. Possible alternatives

The problems described above seem to be intrinsic to the role of the Attorney General (and, indeed, the Solicitor General) as it currently exists: where a political operative takes decisions about, among other things, whether to initiate or consent to some legal proceedings including certain types of prosecution or contempt proceedings.[72] The House of Commons Constitutional Affairs Committee recognised this in its 2007 report:

> [There are] inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office. Real and perceived political independence has to be combined with a role of an intrinsically party political nature in one office holder. This is at the heart of the problem.[73]

They continue: 'There is a lack of transparency in how each of these functions is carried out'.[74] The above account of the capacity for a strong conflict of interest in possible contempt of court actions involving politicians exemplifies these tensions.

Indeed, the potential for this type of conflict is already recognised, and guarded against, with regard to the Attorney General's supervisory role of the prosecuting authorities. The Framework Agreement between the Law Officers and the Director of Public Prosecutions, which governs the supervision by the latter of the former, particularly constrains the Attorney General in prosecutions where there is a potential political or personal conflict of interest. It states:

> Unless for any reason a decision is required from the Attorney General by law (such as in a consent case), the Law Officers will never be consulted or otherwise engaged on any case which:
>
> - relates to a Member of Parliament (including Peers) or minister;
> - relates to a political party or the conduct of elections; or
> - gives rise to any question of personal or professional conflict of interest for the Law Officer.[75]

There does not appear to be any equivalent safeguard with regard to the Attorney General's power over contempt proceedings. It is possible, though, for alternative arrangements to be established to prevent the perceived or actual conflicts of interest described above.

To begin with, it may be asked whether the courts could be more proactive in initiating proceedings for contempt. As noted above, section 7 of the Contempt of Court Act 1981 states that proceeding for strict liability contempt 'shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it'. As also noted, the courts rarely exercise their power to bring such proceedings.[76] If the courts were encouraged – statutorily, by way of a

[72]McCormick writes, with regard to the Attorney General granting consent to a relator to bring proceedings or to seek injunctive relief, 'controversies have arisen in the connection with the possibility of party-political motivations on the part of the law officers when issuing and refusing their consent in certain cases, and on the basis of similar suspicions in relation to proceedings for injunctive relief instigated or not instigated ex officio': McCormick, above n 43, p 70.

[73]HC Constitutional Affairs Committee, above n 16, p 3.

[74]Ibid.

[75]*Framework Agreement between the Law Officers and the Director of Public Prosecutions*, above n 51, p 12.

[76]Text to n 14.

Practice Direction or in some other way – more readily to initiate contempt proceedings, this might remove any apparent conflict of interest if the Attorney General does not instigate such proceedings herself. However, this could only ever be a partial solution to the problems noted above. If the Attorney General were still able to initiate contempt proceedings, then any exercise or non-exercise of this power in cases concerning fellow politicians may still give rise to a perceived conflict of interest.

It may also be asked whether the Attorney General need be a political operative at all. The Attorney General for Northern Ireland, for instance, has a similar role to the Attorney General for England and Wales: she is the chief legal adviser to the Northern Ireland Executive; she may represent the Executive in the courts; she acts to protect the public interest in law[77] and she is responsible for initiating contempt proceedings in Northern Ireland.[78] She is not, though, a political appointee[79] and cannot become an MP, a member of the Northern Ireland Assembly or a District Councillor in Northern Ireland while serving as Attorney General for Northern Ireland.[80] She must also exercise her functions independently of any other person.[81]

That said, the Attorney General for Northern Ireland model may still give rise to a perceived conflict of interest. This may occur, for instance, if – in a similar way to the Andy Coulson case mentioned above – the Attorney General of Northern Ireland, in her role as legal adviser to the Executive, were to advise on the legality of a statement made by a member of the Executive which was then thought to amount to a possible contempt.

Moreover, there may be resistance to the idea that the UK Government's Law Officers (the Attorney General, the Solicitor General and the Advocate General for Scotland) should not be Ministers. For instance, some value the role of a legal adviser who is a political operative and so able to give guidance on the legal implications of proposed policy in a way which takes account of the political goals of Government[82] and who is able to take legal decisions which are informed by colleague-to-colleague discussions with other Ministers.[83] Indeed, it is said that having a legal adviser who is also a senior Minister means that they have authority among their colleagues and are seen as part of the 'inner political team' with the consequence that their advice is trusted even if unwelcome.[84] Further, having Law Officers who are Ministers means that they are accountable to Parliament, which is also seen as important.[85]

Yet, even if it is accepted that it is preferable for the Government's primary legal adviser to be a political operative, it does not necessarily follow that she should also have the power to decide to initiate contempt proceedings against individuals.

Given this, perhaps a viable, possible alternative would be for a non-political, arm's length official to deal with and have oversight of contempt by publication cases and, perhaps, all contempt cases. This function could be undertaken by the Director of Public Prosecutions. The Law Commission

[77] *Attorney General for Northern Ireland*, available at https://www.attorneygeneralni.gov.uk/.

[78] Contempt of Court Act 1981, s 18.

[79] McCormick and Cowie, above n 63, p 40; McCormick, above n 43, p 143.

[80] Justice (Northern Ireland) Act 2002, s 23.

[81] Ibid, s 22(5). However, as per ss 27, 28 of, and Sch 7 to, the 2002 Act, and as already noted, the Attorney General for England and Wales 'shall, by virtue of that office, also be Advocate General for Northern Ireland' and thereby remain responsible for non-devolved matters. There is some potential conflict for the Attorney General for Northern Ireland between the role of adviser to the Executive and the obligation to be independent which may require her to take action against the Executive: McCormick, above n 43, p 162.

[82] House of Lords Select Committee on the Constitution, above n 44, pp 59–60; McCormick, above n 43, p 51; Ministry of Justice *The Governance of Britain – Constitutional Renewal* (Cm 7342-I, 2008) p 19. Hand notes that the level of policy engagement varies among individual office holders: above n 16, p 430.

[83] McCormick, above n 43, p 176; *The Governance of Britain – Constitutional Renewal*, ibid.

[84] See Sir Jonathon Jones, evidence to the House of Lords Select Committee on the Constitution, above n 44, p 60; *The Governance of Britain – Constitutional Renewal*, above n 82.

[85] House of Lords Select Committee on the Constitution, above n 44; *The Governance of Britain – Constitutional Renewal*, above n 82. As McCormick notes, Edwards rejected the suggestion that the office of Attorney General should be depoliticised because of the importance of political accountability: McCormick, above n 43, p 10.

considered and rejected this suggestion in 2012 (the Commission also considered whether contempt by publication should be treated as a criminal offence):

> If contempt by publication is to be treated as if it were a normal criminal offence, we consider that the Attorney General would still be the appropriate public officer to bring proceedings. The Crown Prosecution Service [which is led by the Director of Public Prosecutions] would not be in a position to do so because of the potential conflict of interest if it were alleged that the publication in question had seriously prejudiced or impeded a criminal trial to which the CPS were the prosecuting party.[86]

This reasoning seems questionable. It recognises the potential for a conflict of interest with regard to an independent official but does not seem to adequately appreciate the risk of conflict when contempt decisions are taken by a political actor who is a member of the Government.

Moreover, it is worth noting that in Western Australia contempt proceedings are usually undertaken by the Director of Public Prosecutions, though the Attorney General has a residual power to bring proceedings. The Law Reform Commission of Western Australia states that this is appropriate because

> [it provides] an alternative prosecutor in the not unlikely event that either the Attorney General's or the [Director of Public Prosecution's] perceived impartiality is compromised.[87]

That is, the very reason why the Law Commission of England and Wales stated that contempt proceedings should not be undertaken by the Director of Public Prosecutions – because of a possible conflict of interest – is at least part of the reason why the equivalent office-holder in Western Australia exercises this power in most cases.

Alternatively, Sir Harry Woolf (later Lord Woolf of Barnes) has suggested that there should be a Director of Civil Proceedings. The remit suggested by Sir Harry would include initiating proceedings in the public interest; assisting the court as *amicus* where arguments between the parties to a case would not necessarily alert the court to issues of wider public interest; bringing actions to restrain vexatious litigants; and general oversight for the development of the civil law.[88] And, of course, a Director of Civil Proceedings could undertake the Attorney General's current contempt of court functions.

Further, if it were thought necessary, the Attorney General could retain a residual role and a system similar to that adopted in Western Australia whereby the arm's length official will initiate proceedings in the majority of cases but the Attorney General may act to avoid an actual or perceived conflict of interest regarding that official. The relationship between the Attorney General and the Director of Public Prosecutions or a Director of Civil Proceedings could then be governed by a Framework Agreement similar to that which currently exists with prosecutions.

Any change to allow an arm's length official such as the Director of Public Prosecutions or a newly created Director of Civil Proceedings to initiate all or most proceedings for contempt would require section 7 of the Contempt of Court Act 1981 to be amended to facilitate this.[89] Moreover, even if the Attorney General played no role in initiating contempt proceedings, she could still be accountable to Parliament for the Director's decisions and actions. Such a change would thereby allow political accountability to be retained for decisions about instigating contempt proceedings while enabling such decisions to be taken by a non-political official in a way which better meets the principle that justice should be seen to be done.

[86]Law Commission *Contempt of Court: A Consultation Paper*, above n 6, pp 22–23.

[87]Law Reform Commission of Western Australia, *Discussion Paper on Contempt by Publication* (project no 93, March 2002) p 64.

[88]Sir Harry Woolf *Protection of the Public: A New Challenge* (London: Stevens & Sons, 1990) pp 109–113.

[89]As noted above, s 7 permits proceedings for strict liability contempt under to Act to be instituted only by the Attorney General or 'on the motion of a court having jurisdiction to deal with it'.

Conclusion

Diana Woodhouse, writing in 1997, states: 'In constitutional terms the position of the Attorney General is at best awkward and at times barely sustainable'.[90] As indicated in the introduction to this paper, over the last few decades, it has become more and more expected that, for most political members of the Executive, such awkwardness is avoided and that they should not be involved in judicial or quasi-judicial decisions. Yet, the awkwardness of the Attorney General's position remains, her role as a political actor who exercises quasi-judicial functions is increasingly anachronistic and perhaps, as Woodhouse writes, 'barely sustainable'.

There may, of course, be good arguments as to why the Attorney General should retain many of her judicial or quasi-judicial powers. Yet, there are also compelling arguments that the Attorney General's role in initiating contempt of court proceedings where the possible contempt involves a fellow politician should be curtailed. In the age of social media, the likelihood of politicians committing such contempts is ever more likely and, as argued above, there is the potential for an actual or perceived conflict of interest and a breach of the principle that justice should be seen to be done. I have suggested, as a solution, that the Attorney General's role in contempt proceedings should be exercised in all or most cases by a non-political, arm's length official, perhaps the Director of Public Prosecutions or a new Director of Civil Proceedings.

It may be argued that these concerns are misplaced and that the Attorney General's powers with regard to contempt are exercised in a politically neutral fashion. However, it is surely the case that, if the Attorney General's powers are truly exercised apolitically, they do not need to be exercised by a politician. The fact that they are exercised by a politician, in and of itself, brings their legitimacy into question and, where the contemnor may themselves be a politician, it is simply not appropriate.

[90]Woodhouse, above n 59, at 97.

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