Attorney General’s Speech at UCL Law Faculty

Who decides what the public interest is?

8 February 2016

I welcome the opportunity to speak to you today, here at UCL.

Ronald Dworkin, who challenged and entranced generations of students and colleagues here, said that law is a branch of morality.

He was right.

And although it may not always seem to be the case, politics is another branch of morality.

And today, without seeking to reach Professor Dworkin’s intellectual heights, I want to talk about one way in which the common purpose of politics and law is exemplified by the office that I hold: that of Attorney General.

The aspect I want to focus on is my role, as Attorney General, in relation to the public interest.

This is not a function of the Attorney General that receives much comment, even within the legal world.

But I want to set out why I see it as an important part of my role.

And I would go even further: it is one which helps to explain why the role of the Attorney General is at the heart of our constitution.

It is essentially a way in which the Attorney, occupying his or her unique position between and within both the political and legal worlds, upholds a well-functioning and fair justice system.

That matters to Government.

But it also matters to the Courts, and the legal profession as a whole.
I want to say why I think that is. And then to say something about who, in a well-functioning justice system, is best-placed to decide what the public interest is.

So first, why does the role of the Attorney General matter?

**[THE CONSTITUTIONAL ROLE OF THE ATTORNEY GENERAL]**

The principal role of the Attorney, alongside the other UK Law Officers – the Solicitor General for England and Wales, and the Advocate General for Scotland – is to uphold and promote the Rule of Law through his or her constitutional functions.

First, some history.

Last year, the common law world celebrated the 800th anniversary of Magna Carta. I was honoured to be part of those celebrations.

The post of Attorney General must be one of very few which is almost as old as Magna Carta itself.

Last year we also celebrated 700 years since the first formal appointment recorded of a specially designated King’s Attorney, in the year 1315 – although there are records of individuals appointed to “sue the King’s pleas” as early as 1243, within living memory of Magna Carta.

And the title of Attorney General is first recorded in the fifteenth century.

All these centuries later, we are being told by independent observers that the Attorney General has an increasingly important role in relation to the Rule of Law in our constitutional arrangements.

That is the view of the Constitution Committee of our House of Lords.

The Law Officers are Government Ministers, the Attorney General being a Cabinet-level appointment. I am the principal legal adviser to Government at a ministerial level.

The Ministerial Code (at 2.10) provides that the Law Officers must be consulted before the Government is committed to critical decisions involving legal considerations.

Advising the Cabinet, and participating in Cabinet discussions, on legal and constitutional questions is the most direct way in which I ensure that the Government understands its legal and constitutional obligations.
I am also head of profession for lawyers within Government, and as such have oversight for
the legal advice given to Government by all government lawyers.
In other words, I am responsible, ultimately, for ensuring that the Government’s decisions
and actions respect and uphold the Rule of Law.

**[THE LAW OFFICERS’ PUBLIC INTEREST FUNCTIONS]**

But that is not the only aspect of my role.

I have other constitutionally significant functions, many inherent, others granted to me in
statute, in relation to the public interest in the Rule of Law.

I exercise these **independently** of my Government functions.

They include instituting proceedings for contempt of court, considering applications for fresh
inquests and referring potentially unduly lenient sentences to the Court of Appeal for
resentencing. I have a role in relation to charitable interests, and can intervene in cases
before the High Court and the Charity Tribunal.

These functions differ considerably in nature and scope.

But their common feature is that they are **exceptional and direct interventions in the
functioning of the justice system** in the interests of the supporting the system itself, and
maintaining public confidence in the administration of justice.

They are not normal functions of the executive.

But they are well-suited to be exercised by the Law Officers, who have a foot in both the
legal and political worlds.

As Sir Elwyn Jones, Attorney General from 1964 to 1970, said

> The Attorney is the protector … of the public interest generally. This aspect of his
duties had a very early origin. He has for long been the proper person to take legal
proceedings where the interests of the public are endangered, or acts tending to
public injury are done without authority.

The judiciary have shared that view.

Lord Wilberforce, in *Gouriet v AG*, said
In all these matters the Attorney-General’s role is to seek a just balance between often conflicting public interests. The functions referred to above may be held by the Attorney as an inherent part of his ancient office or may have been conferred upon him by statute. Thus Parliament has again and again recognised his particular role in this sphere of seeking to balance the public interest in matters of the character which have been mentioned. In doing so it has reinforced his inherent powers. Gouriet v AG [1978] A.C. 435 at page 443

And these public interest functions are not amenable to judicial review. In 1902, in the case of London County Council v AG, the Lord Chancellor, the Earl of Halsbury (no less!) said:

In a case where as a part of his public duty he has a right to intervene … the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. London County Council v AG [1902] A.C. 165 at page 169

My superintendence of the independent prosecuting authorities is also a public interest function.

It requires me to uphold a sensitive constitutional balance, supporting and defending the operational independence of the prosecutors, whilst at the same time consistently promoting their democratic accountabilities both in Government and in Parliament.

It also specifically requires me, in certain cases, to take responsibility for ensuring that the public interest is taken into account when deciding about whether or not to bring or discontinue prosecutions.

The unifying characteristic of all these functions is that they are a ‘backstop’ to prevent or remedy injustice in or pressures on other parts of the justice system.

And that is something, as I have said, that the Law Officers are uniquely placed to do.

A few examples will help to illustrate this point…

[The ULS scheme]

One of the functions of my office is the operation of the Unduly Lenient Sentence scheme.
In the event that someone (whether or not they have been involved in the case) feels the sentence awarded for a criminal offence to be too low, they are able to refer the matter to my office. If the offence is one of those in the Unduly Lenient Scheme and it is referred to us within the 28 day statutory time limit the Solicitor General or I will personally consider whether it is appropriate to refer the sentence to the Court of Appeal.

These are public interest decisions, not political ones, and it is essential that Law Officers are trusted to refer what they should and not to refer what they shouldn’t - to make these decisions as lawyers, not as politicians. Of course, these days it seems anyone who is even part politician needs to offer more than just reassurance on a matter of trust, so let me offer some evidence.

On the subject of referring what we should, let’s take a recent case – that of Sarah Sands, convicted of manslaughter for killing a convicted paedophile. Much of the public and political audience doubted she should have been convicted, let alone that her sentence of three and a half years should have been increased. My office received comments from members of the public that the sentence was too long, as well as those requesting that it be reviewed as it was too short. As an offence within the scheme I was required as a lawyer to consider the sentence in law, and it seemed to me to be unduly lenient. So I referred that sentence and the Court of Appeal subsequently agreed and increased it to seven and a half years. If I was acting on the basis of political expediency, I may have done something different.

On not referring to the Court of Appeal what we shouldn’t, our approach is clear from the outcomes of the cases that have been referred. Of 674 cases referred to my office in 2014 only 122 were referred to the Court of Appeal. That’s a fairly small percentage of cases referred to my office. And that percentage has remained constant even as the volumes of referrals have increased.

Of those 122, 117 were granted leave to be heard; and of those 117, the Court of Appeal agreed with the Law Officers and found in 109 of the cases that the sentence was unduly lenient. Were referrals made for reasons of political expediency, the outcomes may very well have been different.
I am rather proud of those figures – they show we are exercising this power where it is really necessary to do so, and that we generally get our judgments on the public interest right. But it is also worth saying that the power is there to rectify problem cases which are far better avoided in the first place. My ambition is for us not to have to exercise it nearly as much, as cases where it is necessary to challenge a sentence become fewer and fewer - and we work together to bring clarity to the sentencing framework and provide consistency in sentencing decisions.

It is also important to mention that any decision to refer is part of a continuing process; it does not stop at the point of referral. When a case is referred to the Court of Appeal we write to those representing the offender to explain the process, and invite them to make submissions. On occasion, we receive information that even leads to the reference being withdrawn, as happened in a case very recently.

[Inquests]

The unduly lenient sentence scheme is an alternative to a more general right for prosecutors or victims to appeal against a sentence. As such, it represents a filter mechanism to prevent ill founded cases clogging up the criminal justice system. It helps the Courts and the judges by ensuring their time is spent hearing deserving cases. Other of my public interest functions fit this bill too.

For example, the Law Officers consider requests by an interested party – often but not always the family of the deceased – who feels that an inquest should have been held but wasn’t, or that the inquest which did take place was in some way flawed.

If I agree, then I will grant permission for an application to be made in the High Court. In considering sentences or inquests, the Law Officers are responsible for determining whether a case should be put before a Court.

That is a question that in other areas might be considered by the Court itself, through a permission stage, as is the case in applications for judicial review, for example. But in these instances Parliament has said the Attorney General must grant permission before the Court can consider it. The decision the Law Officers take is not just whether
previous sentencing decisions or inquests were legally flawed, we also look at whether there is a public interest in reopening matters.

Let me emphasise again that we take these decisions extremely seriously and can only decide where the balance of the public interest lies by considering all aspects of it. These are executive powers to make rare exceptions to the important principles of legal certainty and the finality of court decisions. They are there for an important purpose. But they must be exercised circumspectly.

So for example, in a request for a fresh inquest: we will consider the views of the person requesting the fresh inquest; we will seek and consider the views of the other interested parties, including the Coroner; and we will then put the views of the interested parties back before the person making the request.

Careful consideration is given to the representations of all concerned before I take a decision. And again, that decision is a public interest one, not a political one. And again let me offer some evidence of that.

Recently, I granted permission to allow an application for a fresh inquest relating to deaths in Loughgall in Northern Ireland in 1987 potentially involving British soldiers, RUC officers, suspected IRA members and civilians. That decision was made at the height of fractious talks between unionists and nationalist parties, and so its timing was at the very least extremely inconvenient politically. Nevertheless it was the right legal decision, and it was the decision I took.

Let me turn to one more example of public interest decisions for the Law Officers, again in the Criminal Justice sphere…

[Consents to prosecution]

There are certain offences which cannot be prosecuted without the consent of the Law Officers. The list is not obviously a logical one – the offences for which consent is required are many and diverse covering areas from agricultural credits to war crimes.

Some of the offences are rarely prosecuted, others – such as terrorism offences – are far more topical.
Generally speaking, prosecutors are perfectly able to decide whether a prosecution should be brought and any consent required is that of the Director of Public Prosecutions. However, in some limited instances a check is needed as to whether prosecution is in the public interest.

It may be the case, for instance, that the offence is one which is incapable of precise definition in statute, and so a strict application of the law could bring about an unjust result. Or it may be that a vexatious private prosecution has been launched and it is appropriate for the Law Officers to step in to prevent the Criminal Justice system from being abused.

In acting as that check, the Law Officers bring consistency of approach. We are able to give consideration to the public interest. And because of our special position, we are able to consult colleagues in government when important issues of public policy or international affairs are concerned, for example in prosecutions for official secrets or hijacking offences. And of course we are also accountable to Parliament for the decisions we make.

This underlines Parliament’s role in holding the government to account in relation to the public interest.

[Other useful backstops to secure proper functioning of Courts]

Finally, my office also has a series of functions in respect of the Court process itself, one of which is policing contempt of court.

If an editor is planning to publish, or does indeed publish, an article or other piece of media which causes a substantial risk of serious prejudice to on-going Court proceedings, then it is my office that will intervene.

Another function is the appointment of advocates to the Court; better known perhaps to some amongst you as amicus curiae. So if a novel and important point of law arises in proceedings in which the Court feels that it would benefit from the assistance of argument from independent Counsel, then it is my office that will consider whether independent Counsel should be appointed as an advocate to the Court. These functions are interesting because they frequently involve judges coming directly to me asking for safeguards to the trial process; an unusual intersection between the judiciary and the executive.
In my view it is entirely right that there is some central oversight of decisions whether to instigate contempt proceedings, or to appoint advocates to the Court. Having that central oversight ensures both that a consistent threshold is applied and that questions of broader public interest can be considered. The Courts and indeed prosecutors may simply not have the information or expertise to come to a view where there is a difficult public interest balance to be made. There are a number of other public interest functions – I will spare you a recital of the whole list. I would though like to take some credit for the unsung work we do in protecting the justice system, and the public purse, from vexatious litigation. But the list of functions is not set in stone, and as any Minister must, I have to constantly review whether public money is being spent appropriately. My role in relation to charities is an important one. But we also now have a highly-regarded and professional Charity Commission. Some of my functions overlap with theirs. And I think there is scope for the Commission to perform more of its functions without interference from me where that is the right approach. A question for another day.

[WHO DECIDES?]

A question I want to raise today is one which occurs in many areas of my role, but has particular resonance given my public interest functions: within our constitutional and legal arrangements, who should decide what constitutes the public interest? This is a topical question. It goes to issues such as “who should have the final say on whether information should be released under the Freedom of Information Act?”, or “who should approve warrants to authorise intrusive surveillance?”. I will come back to both of those. When it comes to matters of the public interest, there is a tone to the debate sometimes that Government is partisan, making decisions for its own benefit. It is sometimes said that only
judges are sufficiently detached to be able to take decisions which truly balance competing public interests.

But the reality is more complex than that. There are both constitutional and practical reasons why it is not necessarily Courts that are best placed to take decisions involving matters of public interest.

In my view there are circumstances where it is clearly right that decisions on matters of public interest should be taken by an elected, accountable politician, rather than by a Court. I hope we can all agree on where some of those areas lie – how to carry out the United Kingdom’s foreign relations for example. Or our national security. My question for today is how much further those circumstances might extend? I believe we should ask ourselves where else we might agree that that logic applies.

[Example 1 – Evans]

Let’s look at one possibility. The future of the Freedom of Information Act is especially topical at the moment.

An Independent Commission on Freedom of Information is considering whether the current legislation strikes the right balance between the public interest in transparency and accountability on the one hand, and the need for sensitive information to be robustly protected on the other.

I won’t comment on that – the Government will consider its position once the Commission has reported.

But one of the reasons the Commission was set up was to look at the Act following the case of Evans.

In that case, the Supreme Court considered the operation of the power in the Act for Ministers to decide not to release information even if the Information Commissioner or tribunal disagreed

Section 53 of the FOIA gave Cabinet Ministers the power to use a ‘veto’ to prevent the disclosure of information.
This “veto” has been used very sparingly – only 7 times since 2005. To put that in context, there were some 263 appeals to the ICO in relation to central government FOI decisions in 2014/15 alone. The veto is a measure of last resort to ensure that sensitive information is not released in circumstances in which the Government considers that it would be against the public interest to do so.

This was at least how the position was understood prior to the judgment.

Evans was a case in which, unusually, an Attorney General had exercised the veto, not as the holder of information himself, but because the material belonged in papers of a previous administration of a different political colour, and the Law Officers had a role as guardians of the public interest aside from their government functions. The key issue in the case was the constitutional one: who in the end decides what is in the public interest. The Supreme Court held that the Act could not have been read as permitting the Executive to take a different view of the public interest to that of a tribunal.

Of course, the Government complied with the Court’s decision and released the letters in question.

But in my view, Parliament intended that the exercise of the veto should be an Executive function with democratic accountability for its use through Parliament. It constitutes a rare, but as I have set out far from unprecedented, recognition that the courts cannot constitutionally be the sole guardians of the public interest, and that there are important exceptions to the principle that courts’ views are final. Of course, the exercise of the veto would always be subject to the checks and balances of judicial review, so the veto was no sort of ouster clause. But a proposition that complex balances of the public interest – which are after all the daily business of modern government – can only be done by courts is plainly wrong.

The judgments in Evans, which the Supreme Court clearly found a difficult case, challenge all of us who have a part to play in maintaining the balance of our constitution, to reflect on the respective roles of judges, ministers, and indeed Parliament, in defining and defending the public interest.
The respective roles of ministers and judges have also been much debated in relation to the approval of warrants. This brings me on to my next example: the Investigatory Powers Bill.

[Example 2 – The Investigatory Powers Bill]

Many of you will be aware of the Investigatory Powers Bill; it was published in draft form towards the end of last year.

The Bill contains a revised oversight regime including a novel authorisation model for the use of interception warrants.

This model builds on recommendations made by David Anderson QC, the Independent Reviewer of Terrorism Legislation, in his June 2015 report: “A Question of Trust”.

The model is just one of a number of safeguards designed to ensure that the powers in the Bill are completely transparent and that the public can have confidence in their use.

Under the authorisation model, a senior judicial commissioner would review warranted powers on judicial review principles. In all but a small number of urgent cases, the review will take place before the warrant is issued. Importantly, judicial commissioners would have the power to quash warrants where they see fit.

This would mean that a warrant authorised by the Secretary of State must also be approved by a judicial commissioner, almost always in advance.

This authorisation model strikes a balance between democratic accountability and independent judicial scrutiny of the exercise of the most intrusive powers. Secretaries of State will have the powers to grant warrants, and that must be right: Ministers are ultimately accountable to Parliament and the public for national security matters.

However, this ‘double lock’ mechanism retains accountability while also ensuring independent judicial examination of the Government’s actions.

And the system is a good example of where Ministers and the Court can have different but complementary roles.
[CONCLUSION]

I hope I’ve shone a light on some of the less-well-known areas where the Attorney General exercises public interest functions, designed to work with the Courts.

And in some of those areas, I believe the Attorney is better-placed than the Courts, or indeed other Ministers, to decide what the public interest is.

I mentioned when I started this speech that I also wanted to say something about who is best placed to decide matters of public interest.

As the examples I have given show, decisions on matters of public interest are not always straightforward.

There is often a question of whether political accountability or judicial independence is the more appropriate safeguard.

These questions have exercised Attorneys past.

And they will continue to be relevant to problems confronted by me and my successors.

They illustrate that the role of Attorney General is a unique one in our constitution.

But in my view it’s an essential one, and one that it’s a privilege to perform.