Six roles of legal experts advising the government”

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Abstract

This paper investigates the role of legal experts who advise democratic governments on the legality of policy decisions. Within systems of democratic governance there is a push and pull between law and the demands of politics. The problem which legal experts face in a political environment is how to negotiate the inherent tension between the law and the government’s policy agenda. To answer this question, I consider how, in theory and practice, legal experts’ influence on government decisions is affected by politics and the policy process. Drawing from theories about law in society and public policy models for technical experts in policy and politics, this paper develops a conceptual framework which shows six idealised role choices open to legal experts advising government on policy. These are: the “Arbiter”, the “Non-Practitioner”, the “Adversarial Advocate”, “the Issues Advocate”, the “Engineer” and the “Pragmatic Lawyer”. These role choices are then contextualised within different institutional settings and types of politics with varying degrees of values contest. The framework maps the role choices open to legal experts in different political terrains and shows how those choices affect the rule of law.

Key Words: policy process legal experts government lawyers rule of law public ethics

1. INTRODUCTION

In modern democracies, government decisions are made by the institutions of politics but because of the legalistic nature of the modern state, the executive government *requires* expert legal advice to ensure that its decisions are legitimate. "Legalism" is most visible in laws providing for the judicial review of administrative actions and is founded in the idea of the rule of law. In its thin, distilled version the idea of the rule of law requires the government, just as much as its citizens, to act in accordance with the law. Although the nature, meaning and purpose of the rule of law are highly contested,[1] in all its incarnations it assumes law, policy and politics are separate spheres. Paradoxically, for law to remain integral to government decision-making law must remain apart from the political process. This paradox is not restricted to law but applies to other kinds of technical expertise.[2] But unlike other forms of technical knowledge, law has a symbiotic relationship to government under the system of separated powers. Legal experts are integrated within modern democratic governance arrangements in a way that other technical experts such as scientists are not as illustrated by the long-established role of Attorney-General as head of the executive legal branch.[3]

Most government decisions are not tested in the courts so official's knowledge about the legal limits of their authority is based largely on the advice of legal experts. Karl Llewellyn, one of the founding fathers of legal realism observed "often administrative action is to the *layman affected,* the last expression of law in the case."[4] When government officials decide to act on expert legal advice that advice has as much impact on people affected by the decision as a judge's determination. In the United States, this reality has prompted some scholars to argue that lawyers are the most significant actors in public law: they are "law-givers" or "quasi-

[1] Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy* (Melbourne University Press ,1980) 3.
[2] Roger A. Pielke, *The Honest Broker. Making Sense of Science in Policy and Politics* (Cambridge University Press, 2007) 5.
[3] Gavin Drewry, 'Lawyers in the UK Civil Service' (1981) 59 *Journal of Public Administration* 15,17.
[4] Karl N. Llewellyn, 'A Realist Jurisprudence – the Next Steps', (1930) 30 *Columbia Law Review* 431,455.

legislators" as much as they are "advisers."[5]

This paper proposes a conceptual framework to examine the role of legal experts who advise the executive branch of government on the legality of its decisions. The essential premises of this paper are:

1) legal experts have choices as to how they position themselves in relation to government decisions and those choices affects their ability to influence decision-makers' courses of action; and
2) the choices of legal experts are better informed when they understand how legal knowledge relates to the political and policy context within which government decisions are made.

2. WHO ARE LEGAL EXPERTS?

The "legal experts" who advise government are a difficult group to corral. Depending on the government's model for legal services, both in-house government lawyers and private practitioners might directly advise officials within government institutions on what the law "is."[6] This legalistic definition of legal experts acting in a solicitor/client capacity has the advantage of being precise as it captures lawyers regulated by the rules governing the legal profession but it is a narrow view of how legal experts contribute to the policy process. Legally qualified citizens outside government may use their legal knowledge either in their private capacity as interested citizens or on behalf of public interest organisations to engage in public debates about how government should improve the law. "Citizen lawyers"[7] make a value judgment about how the public welfare should be advanced by the law and actively seek to influence policy outcomes. Some citizen lawyers, for example, act as lobbyists and make

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[5] See Cornell W. Clayton, 'Introduction: Politics and the Legal Bureaucracy' in Cornell W Clayton (ed *Government Lawyers: the Federal Legal Bureaucracy and Federal Presidential Politics* (University Press of Kansas, 1995) 1, 13; David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2007)131.

[6] For example, the Australian federal government currently adopts a contestable model for legal services. Secretary of the Attorney-General's Department, *AGD Secretary's Review of Commonwealth Legal Services, Issues Paper 1* (2 November 2015) 15.

[7] The term "citizen lawyer" has no fixed meaning in scholarship. Here I use the term to indicate lawyers who perform a civic service rather than client service and use their legal knowledge to improve the functioning of the legal system. See Robert Gordon, 'The citizen lawyer – a brief informal history of a myth with some basis' (2008) 50 *William and Mary Law Review* 115.

submissions and give evidence on the law applicable to policy questions before public commissions of inquiry. Others may seek to influence government policy by engaging in civic education – for example, through the media, public conferences and scholarly writing.[8] Citizen lawyers in this public domain might include legal academics, retired judges and lawyers, representatives of professional associations and independent think tanks, and "cause" lawyers focused on promoting social change on behalf of specific social groups such as refugees. More rarely, the opinions of non-practising lawyers are sought by politicians for example, to bolster partisan positions in parliamentary debate

The way this broader class of experts use their legal knowledge to influence government policy is not "legal advice" as understood by practising lawyers: there is no solicitor/client relationship in the normative sense.

The approach of this study is to leave the definition of legal experts and legal advice quite open: legal experts seek to use their legal knowledge to influence government decision-makers to make policies within the law.

3. THE PROBLEM CONFRONTING LEGAL EXPERTS IN GOVERNMENT

Government lawyers who work within the bureaucracies of Anglo-based legal systems are the subject of considerable scholarship which addresses their exposure to the competing pressures of law and politics. A central problem identified by this literature is how lawyers advising public officials in a political environment should negotiate the inherent tension between the law and the government's policy agenda. Because their role is embedded within government institutions government lawyers are perceived by many scholars to be best placed to influence officials to act within the law and the most susceptible to pressure from officials to bend the law for political ends.

As an example of this tension, last year (2016), the pressures faced by federal government lawyers in Australia were brought to public attention in an inquiry by the federal Senate Legal and Constitutional Affairs References Committee. The inquiry originated in a dispute between the Attorney-General and the Solicitor-General about the proper parameters of the latter's role. While the Attorney-General is referred to as the Commonwealth's first law officer, the role

[8] See Mark Tushnet, 'Citizen as Lawyer and Lawyer as Citizen' (2009) 50, *William and Mary Law Review* 1379 and Lawrence M. Friedman, 'Some thoughts about Citizen Lawyers' (2009) 50 *William and Mary Law Review*, 1153, 1166.

nowadays is first and foremost political. It is the Solicitor-General's office which sits at the top of the government's legal service and provides advice on the important and sensitive issues of government policy.

Technically, the subject of the committee's inquiry was whether the Attorney-General, George Brandis consulted Justin Gleeson S.C, the Solicitor-General, before issuing a direction on May 4, 2016,[9] the last sitting day of parliament. Ministerial directions are statutory instruments which serve as a tool of responsible government. The terms of the direction, prohibited anyone in federal government, including the Prime Minister, from seeking the Solicitor-General's advice without the Attorney-General's signed written consent. Brandis argued the direction was an administrative procedure, designed to ensure better coordination within and between government agencies of matters of high legal importance. In his evidence to the committee, he argued the direction merely clarified the operative terms of the *Law Officer's Act 1964* and formalised working arrangements that have been in place for some time. The issue of "consultation" he dismissed as a semantic dispute over the meaning of the word rather than one of substance.

Gleeson's evidence to the committee of his experience advising the federal government on legal policy issues gave some insight into how he understood his position in relation to the policy process:

> There are tensions in that process because the fundamental way government works is usually policy driven. There is nothing wrong with that; politicians and governments are elected to represent the people and to advance good policies for the community, and there is debate over what good policies are.
>
> A central part of what happens within the government lawyer's work—and most of it is done out of the public eye—is to look at a proposed policy and see whether it complies with the Constitution and whether it complies with the statute law. If it does not, can it be modified to be brought within the law? There are times when any government lawyer, but particularly a Solicitor-General, must give the hard news that it is his or her view that a policy if turned into legislation would be struck down by the High Court.[10]

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[9] The direction was made by way of an amendment to the *Legal Services Directions* 2005 (Cth).

[10] Commonwealth, public hearing, Senate Legal and Constitutional Affairs References Committee, *Nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016,* Friday 14 October 2016 (Justin Gleeson S.C., Solicitor-General of the Commonwealth of Australia).

Gleeson made clear in his testimony to the committee that for him the direction raised fundamental concerns about the ability of his office to support the rule of law. The direction was he said, a hobble on the office, "a radical change" which constrained the Solicitor-General from even speaking to a government official, until he has received a brief with the Attorney-General's signed consent. Gleeson expressed his anxiety that the direction would be used to bar his office from fulfilling its mandate. "Do I lie awake at night and think, 'Reading this direction literally, the AG could seek an injunction against me to restrain me from performing my office'? I do."[11]

Ten days after the hearing concluded, Gleeson resigned amidst media speculation he had antagonised the Attorney-General by giving advice which ran contrary to several key government policies.[12] Shortly after posting an advertisement for Gleeson's successor, Brandis withdrew the direction.

Senior government lawyers advising politicians on significant constitutional issues within the institutions of government may experience the antinomies of politics and law most acutely but the question facing all legal experts in government practice is essentially the same: how to negotiate the inherent push and pull between the law and the government's policy agenda and position themselves to influence government decision-making.

4. PERSPECTIVES ON LEGAL DECISION-MAKING IN GOVERNMENT

The approach of the literature to the problem of legal advisers in government has been largely theoretical and treated as either as an issue of an individual's ethical choices or innate behaviour coupled with flawed institutional design. While there is vibrant discussion around these themes, there are limited empirical studies into how government lawyers and decision-makers experience their role in practice.[13]

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[11] *Ibid.*

[12] See Gabrielle Appleby, 'Statutory interpretation: Navigating a complicated relationship: The role of the Solicitor-General' (2016) 29 *Law Society of NSW Journal* 70-72. Also on-line news reports "George Brandis and Justin Gleeson departed over case involving West Australian Taxation" Australian Financial Review, 25 November, 2016.http://www.afr.com/news/the-deal-behind-the-george-brandis-justin-gleeson-rift-20161125-gsxj2n retrieved 7/2/2007 and "Advice on Same Sex Marriage Plebiscite intensified row between Brandis and Top Adviser", Sydney Morning Herald, 6 October, 2016. http://www.smh.com.au/federal-politics/political-news/advice-on-samesex-marriage-plebiscite-intensified-row-between-george-brandis-and-top-adviser-20161006-grwiyz.html retrieved 7/2/2017.

[13] Gabrielle Appleby, *The role of the Solicitor General: negotiating law, politics and the public interest*

Theoretical ethics scholars have rigorously scrutinised the "standard conception," sometimes called the "adversarial advocate" or "hired gun" role for government lawyers. .[14] The adversarial advocate is a heuristic but it is reflected in numerous regulatory instruments across the Anglo-law based jurisdictions including England, the United States, Canada and Australia.[15]

The adversarial advocate model has been widely criticised as a model for government advice work, although it is generally thought to be acceptable for court room advocacy where it is moderated by lawyers' duties to the court.[16] Primarily criticism of the model arises because of the public context of government lawyers' work and the social impact of the policies upon which they advise. The principle of "partisanship" which underpins the adversarial advocate's role is particularly controversial because the rule of law requires the government to act within the law.[17]. Partisanship implies the main goal of government lawyers is to devise arguments which promote the government's preferred outcome rather than compliance with the letter of the law.

Intense debate continues to rage amongst ethics scholars as to what ethical attributes government lawyers performing an advisory role should cultivate, and whether they should orient their role towards the client,[18] the public interest,[19] ideals of justice[20] or the rule of law.[21] Scholars of this literature are optimists: they assume decision-makers will respond positively

(Hart publishing,2016); Laura Dickinson, 'Military lawyers on the battlefield: an empirical account of International Law compliance' (2007) 104 *American Journal of International Law* 1, Michael K Young, 'the role of the attorney-adviser in the U.S. department of state: institutional arrangements and structural imperatives' (1998) 61 *Law and Contemporary Problems* 133, Edward, Page, 'Their Word is Law: Parliamentary Counsel and Creative Policy Analysis' (2009) 4 *Public law* 790.

[14] Adam Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government lawyers as Custodians of the Rule of Law" (2010) 33 *Dalhousie Law Journal* 1.

[15] *Ibid.*

[16] A useful critique of this literature appears in Matthew Windsor, 'The Ethics of Government Legal Advisers, Ch *8 Law in Politics, Politics in Law*, David Feldman (ed) Vol 3 Hart Studies in Constitutional Law (Hart Publishing, 2013),118. One notable defender is Bradley W. Wendel in *Lawyers and Fidelity to the Law* (Princeton University Press 2010).

[17] Adam Dodek*, n14*.

[18] See Bradley W. Wendel *Ibid*

[19] Steven Berenson, 'Public Lawyers and Private Values: Can Should and Would Government Lawyers Serve the Public Interest' (2000), William Simon, 'Ethical Discretion in Lawyering (1998) *Harvard Law Review* 10833, Elisa E. Ugarte, 'The Government Lawyer and the Common Good' (1999): 40 *South Texas. Law Review* 269.

[20] David Luban, *Lawyers and Justice an Ethical study* (Princeton University 1998), William Simon *Ibid.*

[21] John Tait, 'The public service lawyer, service to the client and the rule of law' (1997) *Commonwealth Law Bulletin,* 542, 543, Jeremy Waldron, 'The Rule of International Law' in J Waldron, *Torture, Terror and Trade Off's Philosophy of the White House* (Oxford University Press 2011) 323-4.

to opinions from legal experts which invalidate government policy positions because a democratic government must adhere to the rule of law. This literature also tacitly assumes experts' influence over decision-makers flows from the provision of "legal advice," (an un-defined concept) from legal practitioners and that government decision-making on legal questions follows a rational, unitary decider model. There is little acknowledgment of the influence on government of the wider range of legal experts identified earlier in this paper.

A second inter-disciplinary conversation in the literature on government lawyers is concerned to understand the psychological and institutional pathologies in government legal practice. Scholars of both politics and law have drawn on insights from cognitive psychology, institutional sociology and rational choice theory to better understand the institutional and psychological factors that pre-dispose government lawyers to support officials' policy agendas.[22] This literature is more pessimistic of the ability of government lawyers to influence decision-makers but has given little consideration to the factors in the policy context which might discourage decision-makers from accepting legal advice.

Contemporary public policy scholars have been concerned to understand the dynamics of government decision-making. Decision-making models established in public policy scholarship reveal that the process of government decision-making involves complex sets of elements that interact over time.[23] Scholars have used models such as the "advocacy coalition framework" to understand how government decisions are shaped by interactions between multiple variables such as different institutions and their hierarchies, types of actors and interest groups, the degree of political saliency in issues under consideration and the extent to which outcomes are uncertain and involve ambiguous values choices.[24]

The literature on government decision-making is coloured by a vigorous debate about the

[22] Robert Rosen, 'Problem Setting and serving the Organizational Client- Legal Diagnosis and Professional Independence (2001) 56 *University of Miami Law Review* 179, 208, Nelson Lund ,'Rational Choice at the Office of Legal Counsel' (1993) *Cardozo Law Review* 437, Bruce Ackerman, *The decline and fall of the American Republic (*Harvard University Press, 2010), D Fontana 'Executive Branch Legalisms' (2012) 124 *Harvard Law Review Forum* 21, Cassandra Burke Robertson, 'Judgment, Identity and Independence' (2009) 42 *Connecticut Law Review* 1, Jonathan Macey and Geoffrey Miller, 'Reflections on Professional Responsibility in a Regulatory State' (1994) 63 *George Washington Law Review* 1105, Geoffrey Miller, 'Lawyers in Agencies: Economics, Social Psychology and Process' (1998) 61 *Law and Contemporary Problems*, 109-131.

[23] For a useful summary see Paul A. Sabatier, *Theories of the Policy Process* (Westview Press, 2007))

[24] Paul A. Sabatier, 'An advocacy coalition framework of policy change and the role of policy-oriented learning therein' (1988) 21, (2) *Policy Sciences* 129.

extent to which policy can or should be about rational decision-making. The concept of rationality in policy is exemplified by Harold Laswell's "policy scientist for democracy."[25] Laswell along with Myres Mc Dougall advocated that if decision-makers were informed by systematically derived inputs from scientific experts then "better" more socially desirable policy ends would result. He also had an interest in improving lawyers' training and argued they could play a more useful role in society if they were given an "enlightened" education which focused on developing skills of policy analysis[26]. The evidenced based policy movement are the modern inheritors of Laswell's work. The more technocratic stream of this scholarship seeks to use research based knowledge to inform policy choices. This approach has been criticised for reducing the complexity of the policy process to a simple equation of knowledge inputs and outputs. More nuanced approaches to the evidenced based ideal have explored whether "evidenced-influenced" policy is a more realistic goal for policy-making. Part of this project involves examining whether the ideas of "rationality" and "knowledge" can be re-conceptualised to adapt experts' practice to the complexity of the policy context.[27]

An influential contemporary strand of scholarship on government decision-making focuses on the importance of values in decision-making. These scholars argue that policy choice is less about decisions than judgements. Giandominico Majone suggest policy-making is essentially about argumentation. He makes the point that policy-making is analogous to legal argument. Both policy and judicial processes are adversarial debates in which stakeholders argue their case using "evidence" rather than facts to support their position. In both processes, what counts for evidence is contested and stakeholders must persuade the decision-maker that information is to relevant and reliable if it is to influence the outcome of the contest.[28] Deborah Stone argues that rational decision models are themselves a form of "dramatic story" devised by vested interests to persuade other people to support the outcome.[29] She holds up a mirror to the rational

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[25] Harold D. Laswell, 'The policy Orientation' in D. Lerner and H. Laswell (eds), *The Policy Sciences: Recent Developments in Scope and Method* (Stanford University Press, 1951)

[26] Myres S. McDougall and Harold D. Laswell 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 Yale Law Journal 203

[27] Brian Head, 'Three lenses of Evidenced Based Policy' (2008) 67 *The Australian Journal of Public Administration* 1, Brian Head, 'Towards more "Evidence -Informed" Policy Making?' (2015) 76 (3) Public Administration Review 472, Adrian Kay, 'Evidenced-Based Policy Making: the Elusive Search for Rational Public Administration' (2011) 70 (3) *Australian Journal of Public Administration* 236.

[28] Giandominico Majone, *Evidence, Argument and Persuasion in the Policy Process* (Yale University Press, 1989)

[29] Deborah Stone, *Policy Paradox: the art of political decision-making* Revised edition (Norton and Company, 2002)

narrative of government policy-making, to show how every judgment in the *polis*, including those relating to the law, involves values choices.[30]

An important insight of Deborah Stone's work, is that ambiguity over choices is a virtue in the policy process. Ambiguity provides policy-makers with much needed "wriggle room" in which to argue options and alternatives and to determine the allocation of competing values in the policy mix.[31] This need extends to the design and application of legal rules in the policy process which need to be sufficiently flexible to allow for the resolution of complex and variable policy problems.

The values based approach to policy naturally leads to the conclusion that the policy process is innately political and that the project of making government decision-making more rational is problematic from the outset. Adherence by decision-makers to legal rules which limit their authority will inevitably be subject to influences and pressures beside their official obligation to comply with rules.

The literature on models of government decision-making has yielded useful criteria for public policy scholars to explore the influence of different kinds of expert knowledge in government decision-making.[32] However, to date scholars have concentrated on researched based expertise and limited attention has been given to legal knowledge. In part, this may be due to disciplinary boundaries and the dominance of the idea of the rule of law in democratic discourse. Law frames policy as a question of the decision-maker's authority rather than as an inquiry into the production of social outcomes. The next section of the paper explains how criteria used in public policy scholarship to understand the role of expert knowledge in the policy process might be used to create a conceptual framework within which to explore the problem of legal experts in government.

[30] *Ibid* 302
[31] *Ibid* chapter 12.
[32] *Ibid*, Majone, *n27*, H. Theodore Heintz, Jr and Hank C. Jenkins Smith, 'Advocacy coalitions and the practice of policy analysis' 1988) 21 *Policy Sciences* 263, Roger A., Pielke, *n2*.

5. Conceptual Framework

Drawing from theories about law in society and the role of experts in policy, the conceptual framework outlines six idealised role choices open to legal experts advising government. These are the *Adversarial Advocate*, the *Arbiter*, the *Non-Practitioner*, the *Issues Advocate*, the *Engineer* and the *Pragmatic Lawyer*. The *Non-Practitioner*, the *Adversarial Advocate* and the *Arbiter* are more associated with legalist theories about the social role of lawyers and the *Issues Advocate,* the *Engineer* and *Pragmatic Lawyer* more closely allied with realist theory.

The role choices in the conceptual framework are contextualised using three criteria which are also "idealised". The first criterion is the forum in which the decision is under consideration which may be open or closed or partly open and closed.

Open Forums are public and adversarial and fit with theories of government decision-making that emphasise the need for deliberation and contestation rather than technical inputs in policy processes, particularly where the issue has a high degree of political saliency. When political decisions are framed as technical questions with technical answers, there is a risk decision-makers can subvert democratic processes. Roger Pielke makes this point in his case study of the United States' narrative of pre-emption in the second Gulf War which was framed by the expert' reports "evidencing" Iraq's stockpiling of weapons of mass destruction.[33] A similar point might be made about the use of legal advice by the US and its partners in the "coalition of the willing", to evidence the legality of the war.

Closed Forums are bureaucratic, and professionalised in their orientation.[34] These forums are allied with theories that argue experts can influence decision-making, although this may not be as simple as 'inputs" equals "outputs". Some scholars argue that even in environments conducive to rational analysis, outcomes will be less "rational" than "rationally bounded."[35] In the *Hybrid Forums* introduced by this paper the parameters of the decision are refined within a *Closed Forum* but will be resolved externally, typically in parliament or the courts.

In practice, the institutional parameters of government-decision-making are permeable and involve complex and subtle interactions between the forums. The ability of legal experts to

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[33] Roger A. Pielke, *n2,* Chapter 7.

[34] The categories of open and closed forums are described in H. Theodore Heintz, Jr. and Hank C. Jenkins-Smith*, n31,* 270

[35] Linda Courtney Botterill and Andrew Hindmoor, 'Turtles all the way down: bounded rationality in an evidence-based age' (2012) 33 (5) *Policy Studies* 367.

engage with different fora will often be limited. For example, government lawyers who advises executive branch officials in a *Closed Forum* can only join the fray in an *Open Forum* if invited to do so by their political superiors. Should government lawyers publicly comment on government policy proposal in a way that is averse to the government's interests, they risk being dismissed or forced to resign.

The second criterion in the framework is the degree of values consensus on the decision. The third is the degree of uncertainty in the political environment within which the decision is under review. These criteria are encapsulated in Roger Pielke's concepts of *Tornado Politics* and *Abortion Politics*.[36] *Tornado Politics* is characterised by a high degree of values consensus amongst the community. Decision-makers have a shared commitment to a specific goal and the choice of the decision-maker is simple and tightly bounded. Pielke argues expert knowledge can be useful to decision-makers in this context. In contrast, *Abortion Politics* is characterised by a high degree of values conflict, where there is no commitment to a specific goal and where expert knowledge makes a limited contribution to the outcome. Abortion is the quintessential example of a political debate which is riven by values conflict. Recent emotionally charged public discourses around refugees and immigration in the United States and the United Kingdom are also characteristic of *Abortion Politics.* A decision in the case of *Abortion Politics* depends on the exercise of power in the appropriate political decision-maker or entity.

This conceptual framework explores the inter-play between the political context and the human actors involved in making decisions about the government's authority to make policy. Rather than prescribing which role choice is appropriate in any given context, the framework is intended to serve as a "mud-map' of the role choices open to legal experts in different political terrains and show how those choices affect decision-makers approach to the boundaries of government authority.

6. TYPOLOGY OF LEGAL EXPERTS

The roles described in this section of the paper have been constructed by clustering attributes drawn from the literature. Contemporary legal scholars generally recognise there is a range of determinacy in the law ranging from low to high with legalism and realism being the theoretical extremes of a hypothetical "determinile." For legal experts to find and apply the law to a

[36] Pielke, *n2*, 53

problem may be understood task with varying degrees of difficulty. Consequently, an issue of key importance is how legal advisers should approach the exercise of interpretive discretion when advising officials on policy problems. Because legal interpretation is commonly understood to involve both technical knowledge and degrees of discretionary judgment, each role type in the framework has a combination of skills and ethical attributes which are related to the theoretical degree of determinacy in the law.

The typology is summarised in **Table 1** of the *Appendix*. In **Table 2** of the *Appendix*, I show how these role types map onto different fora and their relationship to the policy process and the idea of the rule of law. **Table 3** of the *Appendix* shows how different degrees of values consensus in politics and uncertainty around the policy map onto the framework developed above.

The Adversarial Advocate (Legalist + Hybrid Forum)

The classic role for the legalist legal expert is that of the *Adversarial Advocate*. Decision-makers value *Adversarial Advocates* for their ability to construct legal arguments which advance the government's preferred outcome. This type is a legal practitioner in accordance with the rules of the legal profession and their native domain is the courts and tribunals who review executive decisions. Legalism treats legal ethics as a branch of the law of "professional responsibility". The "professional responsibility" approach provides a simple, clear guidance to legal practitioners' conduct in any given situation.[37] For the *Adversarial Advocate,* there is a clear line between the domains of law and politics. Courts answer questions of what the law "is" in any situation and the institutions of politics determine what law" ought to be."

Three core principles define the ethics of the *Adversarial Advocate* in theoretical ethics scholarship. Firstly, legal practitioners are required to be partisan (zealous) in pursuit of their client's interests, maximising the likelihood the client will prevail. Partisanship is considered necessary in adversarial proceedings to ensure the adversaries can advance all legitimate arguments in their favour. Secondly, the *Adversarial Advocate* must be neutral towards their client's objectives (provided they are lawful). Thirdly they must be held non-accountable for their client's actions in reliance on legal advice.[38] If the lawyer was accountable, it is said, the lawyer may be unwilling to defend the client's interests.

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[37] Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Legal Ethics' (2004) 30 (1) *Monash Law Review*, 53
[38] Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) *University of New South Wales Law Journal* 38 See also Matthew Windsor n14, 121-123

The *Adversarial Advocate* is as noted earlier is ideally suited to court proceedings where the government must advance of defend its policy position and the decision is in theory outside the government's control. The more contentious question is whether this model applies when legal advice is required outside the context of a court or tribunal. In legalist theory, the rule of law idea makes this approach more difficult with increasing degrees of legal uncertainty.

It might be thought that the *Adversarial Advocate* role in the court context is as effective in *Abortion Politics* as *Tornado Politics* because courts are invested with power to determine the validity of government decisions. Sometimes decision-makers choose to resolve a policy contests in the courts, particularly if they believe the political process involves greater risk. In that case, the court in an adversarial system, operates in a way that is analogous to political processes. Many court battles, however, will not be of the decision-makers' choosing. Decision-makers may be anxious about the outcome of the judicial process if the decision is one in which political capital is invested and the values contest in the community is intense. There is a risk in such circumstances that officials will lose trust and confidence in the *Adversarial Advocate's* abilities if the outcome results in the decision being invalidated. Another risk confronting this type is where different executive branch institutions are invested in the outcome of court proceedings but have conflicting goals[39]. For example, where an agency wishes to take legal proceedings to enforce a statutory mandate but this runs contrary to short term tactical goals of political decision-makers.

The Arbiter (Legalist + Closed Forum)

The *Arbiter* is a qualified legal practitioner who is instructed by officials to provide a formal opinion on narrow questions of law. Decision-makers value the advice of *Arbiters* for its objectivity and independence as well as its technical accuracy. To preserve their independence *Arbiters* are reactive to government decisions and are consulted once the policy options are developed (a "linear" or "assembly line" model of policy making).[40] The *Arbiter's* advice is in the form of a qualitative judgement of the risk a decision will be invalidated based on legislation and judicial opinions. Once given the *Arbiter's* advice will be treated as binding by decision-makers unless and until a court decides otherwise.

[39] William H. Simon, 'Whom or What does the Organization's Client represent? An Anatomy of Intra-Client Conflict' (2003) 91 *California Law Review* 57.
[40] Thomas O. Mc Garity, 'The Role of Government Attorneys in Regulatory Rule-Making' (1998) 61 *Law and Contemporary Problems* 19, 20.

The *Arbiter* strives to provide the government with a "best view of the law." [41] Because the *Arbiter* must give authoritative advice on what the law "is", this type must minimise the exercise of interpretative discretion in difficult cases where the rules are less clear. When asked by officials to give advice on a policy question that doesn't clearly fall within the parameters of existing law, the *Arbiter* will take a conservative stance against the government's policy position.[42]

The *Arbiter* focuses solely on determining the legal rules applicable to technically framed questions and will scrupulously avoid commenting on issues of policy discretion. Canadian lawyer, John Tait, emphasises that to fulfil their rule of law duty, government legal advisers must conduct "a fair inquiry into what the law actually is".[43] This inquiry should not be a pretext for involving lawyers in moral and policy issues beyond the expertise of their discipline.

While the *Arbiter* polices the divide between law and policy, this type is risk averse and can find themselves in conflict with decision-makers focused on achieving outcomes. The difficulty for *Arbiters* in *Abortion Politics* is at some point in the policy process, decision-makers may need to decide and may be unwilling to accept advice which is contrary to their preferred outcome. The *Arbiter* may feel pressure to compromise their ethical stance and "legitimise" the government's policy choice. Should the *Arbiter* refuse to do so their position may be difficult and they may face criticism from senior officials.

In *Abortion Politics*, the *Arbiter* may be tempted to actively intervene in the policy process to minimise the risk that the government will make policy choices that lack legal authority. The risk management approach can also be contrary to decision-makers needs when other factors in the policy context require decision-makers to keep their options open. *Arbiters* are the most likely of all the roles to face ethical challenges, torn between the need to provide objective advice, their rule of law commitment and the complexities of the policy context.

The Non-Practitioner (Legalist + Open Forum)

The *Non-Practitioner* has legal-knowledge but is not engaged in "legal practice" as understood by the rules regulating the legal profession. A *Non-Practitioner* is likely to be a scholar,

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[41] Dawn E. Johnson*, 'Faithfully Executing the Laws: Internal Legal Constraints on Executive Power' (2009) 54 University of California Law Review 1559*
[42] Jeremy Waldron, *n19*, 323-4.
[43] John Tait, 'The public service lawyer, service to the client and the rule of law' (1997) *Commonwealth Law Bulletin,* 542, 543.

engaged in researching legal doctrine and teaching future practitioners. Traditionally, law has been analysed and taught from a 'black-letter perspective' in which the meaning of law is discovered through interrogating legislation and judicial decisions which constitute the archive of rule-based sources of law. The black-letter approach can be described a as "technocratic" and "autonomous" as it views law as separate from other disciplines.[44]

Non-Practitioners have the rights of any other citizen to contribute to public discussions of government policy and are free of the professional responsibilities which apply to practitioners. However, because their legal knowledge derives from judicial doctrine a strict legalist theorist might argue it should not be injected into policy debates in a democratic system based on the separation of judicial and political powers.

In practice, few if any academics will identify with this type's exclusive focus on doctrine and disinterest in the potential real-world influence of legal scholarship. Contemporary legal pedagogy and scholarship is more diverse and responsive to policy questions, particularly those relating to reform of the legal system, than this model allows. Scholars who engage solely in doctrinal research will likely harbour a hope their work will be read by judges and be persuaded to their interpretation of the subject-matter.[45]

Pragmatic Lawyers (Realist +Closed Forum)

Realist scholars argue that legal knowledge resides less in authoritative rules than in the values based choices made by legal experts in the process of interpreting the law. A realist perspective of the role of lawyers in society takes a flexible view of what constitutes legal expertise. Karl Llewelyn emphasised the importance of tacit knowledge and know-how based judgments over legal precepts and doctrine in guiding lawyers to craft solutions for their clients.[46] Realist legal ethics considers "right actions" are those that bring about desirable social consequences. The *Pragmatic Lawyer* directly advises government officials and understands public policy to be the domain of political decision-makers. This type is kin to philosophical pragmatism rather than extreme realism which holds a law is in effect policy making because it is significantly indeterminate and values based.

Pragmatic Lawyers will share the goals of the decision-makers and will actively contribute to debates which shape the policy outcome. The role of the *Pragmatic Lawyer* is facilitative in cases where a policy is highly contentious. In contrast to their legalist counterparts they are

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[44] Fiona Cownie, Legal *Academics: Culture and Identities* (Hart Publishing, Oxford 2004), 33.
[45] David Howarth, *Law as Engineering: Thinking about what lawyers do.* (Edward Elgar, 2003)153
[46] Karl Llewellyn, 'The Crafts of Law Re-valued' (1942) 15 *Rocky Mountain Law Review*, 1-7

sceptical of the ability of legal rules to invalidate government decisions and are willing to incur the risk that policies made in reliance on their advice will be tested in the courts or by the electorate. Because the *Pragmatic Lawyer* understands that more than one result may be supported by the law, they will work actively within a community of policy experts to formulate a range of options, considering all the collective interests and values in the mix.

Pragmatic Lawyers are ethically attuned to support the institutional design of the political process and the principles and values which are embedded in public law. These will vary depending amongst different jurisdictions. English and Australian judicial thinking about public law tends to give precedence to the value of the rule of law and is concerned to ensure officials are controlled by the law and are accountable to the courts through the mechanisms of judicial review.[47] In the United States, the separation of powers, individual rights and the ideology of pluralism is more influential. *Pragmatic Lawyers* advising a Westminster style government will give precedence to the values of accountability and legality in advising decision-makers. By corollary, the US *Pragmatic Lawyer* will be committed to promoting procedural fairness to ensure all groups are represented in the policy process. "The government lawyer's role should always be reconciliation – or at least accommodation of as many different interests as possible, rather than the vindication of any single interest."[48]

Since the approach of the *Pragmatic Lawyer* allows government officials the greatest discretion to choose their preferred outcome it is important that this type can challenge officials' positions. This includes questioning whether decisions in *Abortion Politics* should be framed as technical legal problems and engaging officials in conversations about the longer term social and institutional impacts of their decisions. In practice, an individual's ability to assume the attributes of the *Pragmatic Lawyer* will depend in part on how decision-makers view their role. Thomas O. Mc Garity observes lawyers who advise officials within government are only as accountable and influential in shaping policy outcomes as upper level decision-makers allow them to be.[49]

The *Pragmatic Lawyer* fits with a team based model of policy advising and is most applicable to senior government lawyers who have a deep institutional knowledge and understanding of

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[47] See Peter Cane and Leighton McDonald, *Principles of Administrative Law* 2nd Edition (Oxford University Press Australia, 2013), 305.
[48] Note 'Rethinking the Professional Responsibilities of Federal Agency Lawyers' (2002) *Harvard Law Review* 115, 118.
[49] Thomas O. Mc Garity, *n39,*

the policy process and undertake a mix of legal and management responsibilities.

Engineer (Realist + Hybrid Forum)

The *Engineer* designs and builds legal instruments which achieve the political purposes of government decision-makers. These instruments most usually take the form of written documents and include constitutions, legislation, bills, inter-governmental agreements, and grant schemes which provide coercive force to policy. This view of legal expertise originates in the work of realist theorists Roscoe Pound and Karl Llewellyn and has been developed most recently by David Howarth.[50]

Like the *Pragmatic Lawyer*, the *Engineer* is committed to advancing the goal of political decision-makers which allows them to adapt their practice to *Abortion Politics*. Although interpreting the law is an essential skill of the *Engineer*, this type does not view their work as providing legal advice but as making "workable" legal policy instruments which achieve decision-makers political purposes. The production of legal policy instruments is an iterative and collaborative process. *Engineers* work closely with decision-makers to ensure they thoroughly understand their objectives and to test the robustness of the instrument as it develops. The testing process requires *Engineers* to consider the risk the instrument may be invalidated by court proceedings but more importantly whether the instrument works as decision-makers intend it to work. Legislative drafters are the *Engineers*-in-chief of Westminster style democracies. They work within the back room of the executive branch and take an active part in shaping decisions of policy detail but the instruments they devise are subject to parliamentary scrutiny, debate and modification. *Engineers* will share the *Pragmatic Lawyers* commitment to the values of public law and maintaining the institutional integrity of the system.

Engineers can find themselves ethically challenged by *Abortion Politics,* although this will be rare. As David Howarth notes officials might ask *Engineers* to construct devices which undermine core values and principles of institutional design. Legislative drafters for example have in recent time drafted immigration legislation which limits judicial review of certain kinds of administrative action.[51] This is likely to be problematic in jurisdictions such as the United-Kingdom which accords parliament ultimate constitutional supremacy and does not provide

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[50] Howarth, *n44* 6-21.

[51] An Australian example is 474 of the Migration Act 1958 (Cth) which provides certain "privative clause decisions" of migration officials are "final and conclusive" and may not be subject to challenge in any court.

the courts with a constitutionally entrenched right of judicial review. Additional problems can arise when *Engineers* are asked to draft devices whose true policy purpose is hidden for example by ambiguous wording.

Issues Advocate (Realist + Open Forum)

The *Issues Advocate* explicitly seeks to advance social values and public purposes through the law and is engaged in public debates in *Open Fora.* General values, particularly as commitment to the promotion of social and political conceptions of justice, define the ethics of the *Issues Advocate*.

Realist scholar Mark Tushnet comments that the legal training of lawyers makes them well suited to contributing to policy debates:

> Good lawyers are adept at generating examples that they can use to test whether a constitutional interpretation that makes intuitive sense for the policy at issue makes equally good sense for some other policies. Our comparative advantage as lawyers, that is, may lie in our ability to look some-what farther beyond the problems immediately before us than ordinary people.[52]

Lawrence Friedman agrees, noting that lawyers understand the interactions between legal and non-legal institutions in society and "the importance of structure in making judgements about politics."[53]

The potential for practising lawyers to engage in public debate is also countered by some doubt about their enthusiasm for such activity and the ethical issues it might raise. Lillian Corbin is concerned that practising lawyers are likely to have little time to contribute to policy debate outside of working hours.[54] Mark Tushnet notes the normative ethical duties of practising lawyers may prevent them from taking public positions on policy issues that conflict with a client's interests. The *Issues Advocate* is therefore more likely to be an institution such as a law society who represents the profession as a constituency or a non-practitioner, such as a former lawyer, judge or academic who is un-concerned about breaching ethical duties towards their client.

[52] Mark Tushnet *n8*.
[53] Lawrence M. Friedman, *n8* 1166.
[54] Lillian Corbin 'Australian Lawyers as Public Citizens' (2013) 6, *Legal Ethics* 57, 69.

7. Conclusion

In day to day government practice, legal experts seek to use their knowledge to influence government decision-making and breathe life into public law. The idealised conceptual framework presented in this paper assumes that legal experts can choose their role and that more than one choice may be available in any given context. While legal experts may identify primarily with one role, they have the capacity to step back and reflect upon whether that role is appropriate, and adjust their behaviour if they deem it necessary. These role choices impact on decision-makers judgments about the boundaries of their authority and their willingness to submit those judgments to the courts or the electorate.

The legalist and realist lenses of the typology are not offered as an exhaustive account of legal theories, nor an argument that any view of the law is more desirable than another. They were chosen to represent polarised viewpoints about how law relates to policy and the relationship of law to the values which are at play in policy decisions. Another way of looking at the framework is as a description of how law and politics coexist in dialectical tension. English public law scholar, Martin Loughlin explains:

> Law seeks the closure of that which democracy tries to keep open. The relationship between law and democracy is never going to be easy, expressing as it does ambivalence between innovation and conservation, change and stability, openness and closure, and the inheritance of the past against the possibilities of the future.[55]

For these competing forces to be balanced and accommodated there is a need for legal experts with different orientations towards the law – on one hand to regulate and stabilise decision-making and on the other to provide the means or instrument for achieving political goals.

The conceptual framework is limited in several respects. It does not provide for the cases which involve a 'middling level" of uncertainty and values conflict. In practice, the capacity of legal experts to characterise the policy context and form a judgment about their role is likely to be difficult for several reasons. Many decision contexts will fall within the extremes of the conceptual framework on values conflict, uncertainty and types of fora.[56] In addition, legal experts may also interpret the context differently particularly as decision-makers tend to frame

[55] Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 100.
[56] H. Theodore Heintz, Jr. and Hank C. Jenkins-Smith, *n31* 274.

legal problems as technical rather than political. Those individuals without substantial experience in government may fail to appreciate how values contests enter political decision-making and why decision-makers need to keep their options open. Policy contexts are also mutable which means that legal experts may be required to adjust their roles as circumstances evolve.

All the roles choices explored in the conceptual framework have strengths in some contexts and weaknesses in others. All are required in democratic decision-making but not in all circumstances. The *Arbiter*, is the most difficult role for legal experts to assume other than in situations where there is low level of conflict and legal in-determinacy and should be approached with caution. In situations of *Abortion Politics*, it may be preferable for decision-makers to consult a team of *Arbiters* who constitute a "better-view" of the law, rather than an individual oracle of the "best view of the law". A combined view may be preferable to decision-makers "opinion-shopping" for a second or even third opinions from different individuals. For the un-chartered territory that lies between *Abortion Politics* and *Tornado Politics* I suggest that a *Pragmatic Lawyer* who is responsive to decision-makers view of their role, may be the best-placed to contribute legal-knowledge into the policy process.

APPENDIX

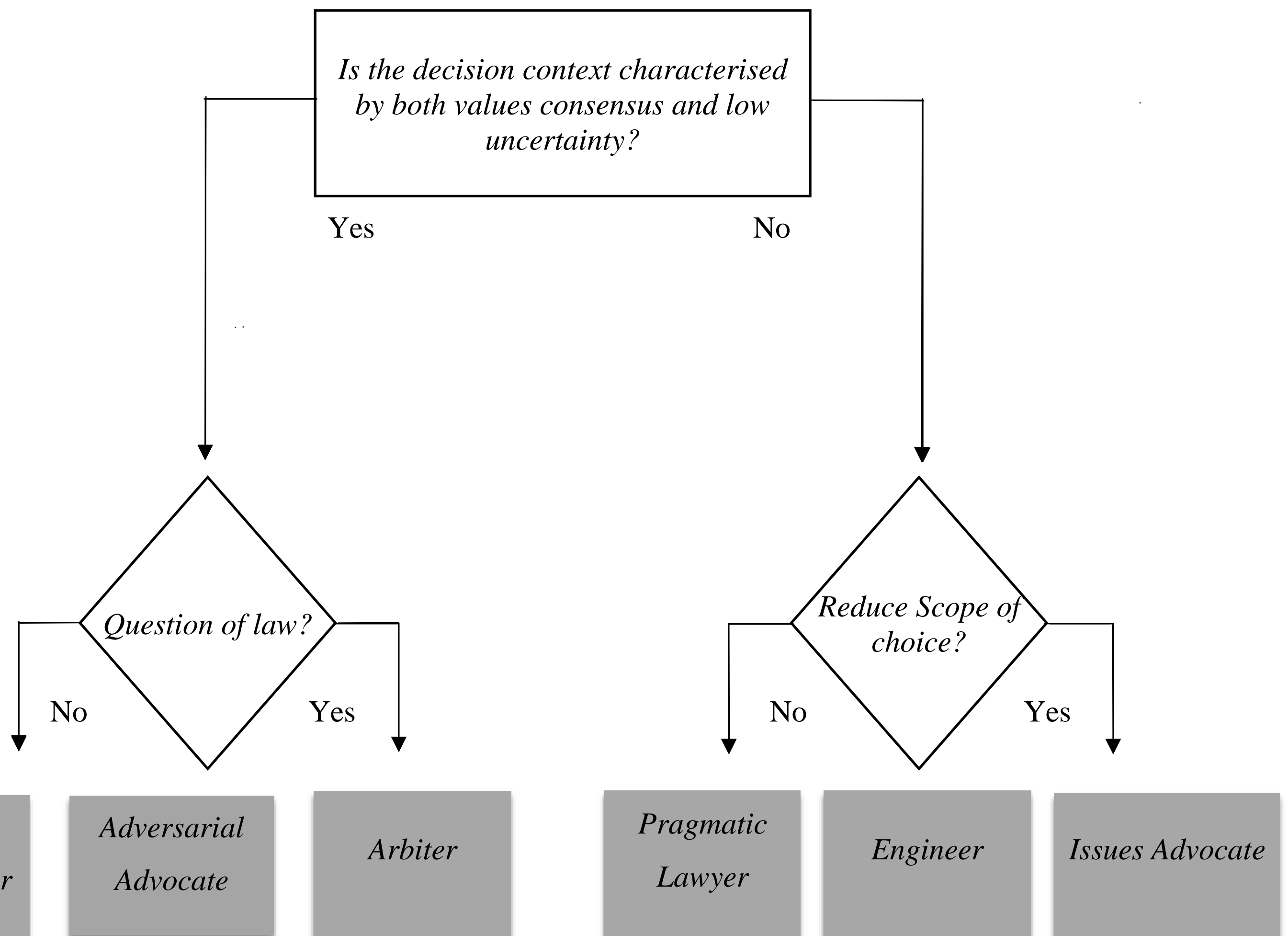
Table 1 Attributes of idealised roles for legal experts

Non-Practitioner	*Issues Advocate*
• No interest in application of law to decisions • Pure academic (law as doctrine)	• Makes case for one alternative over another • View of law most favourable to cause
Adversarial Advocate	*Engineer*
• Argues case for the client ("hired gun") • Partisan to client interest, neutral to outcome and non-accountable	• Constructs instruments which express and give force to policy • Tests robustness of instruments • Interprets but does not advise • Principles of institutional design
Arbiter	*Pragmatic Lawyer*
• Answers legal questions decision maker thinks relevant • Independent and neutral to outcome • Advice is perceived to be authoritative	• Expands scope of choice or clarifies choice • May question the question • Integrates legal knowledge with other stakeholder concerns • Team player

Table 2: Idealised role of legal experts

		Theory of law and society	
		Legalist	Realist
Fora	Open	*Non-Practitioner*	*Issues Advocate*
	Hybrid	*Adversarial Advocate*	*Engineer*
	Closed	*Arbiter*	*Pragmatic Lawyer*

Table 3 Map of role choices



Adapted from Pielke p.51