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Lawyers in UK Central Government: Key Specialists in a Generalist Bureaucratic Culture*

Gavin DREWRY**

'People in this country have had enough of experts'
(Michael Gove MP, June 2016)[1)]

Abstract

The UK civil service employs more than 2000 professionally qualified lawyers to provide legal services – including the provision of legal advice and the conduct of government litigation – to central government. Most of these lawyers work in the Government Legal Service, headed by the Treasury Solicitor, who is answerable to a government minister, the Attorney General (the government's chief legal advisor). Lawyers, with a wide range of different responsibilities, are to be found throughout the numerous ministries and agencies of central government, and a small number (not categorised as civil servants) are also employed separately by Parliament. The civil service has a strong 'generalist' culture, dating back to the 19th century, that tends to relegate 'specialists' to a subordinate status in decision making – 'on tap but not on top'. But although lawyer civil servants are specialists, the manifest importance of legal expertise across the whole range of government activities has given them a uniquely important role – a role that is growing in significance as the UK wrestles with the huge legal challenges of withdrawal from the European Union in the aftermath of the 'Brexit' referendum in 2016.

Scope of the Discussion

The focus of this paper is on the role of professionally qualified 'specialist'

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1) Michael Gove, The Secretary of State for Justice, speaking in a broadcast interview during the 2016 'Brexit' referendum campaign – dismissing the views of 'pro-remain' economists.

lawyers in the UK Civil Service, considered in relation and in contradistinction to the role of their non-lawyer, 'generalist' colleagues. It must be conceded at the outset that civil service lawyers are by no means the only source of legal expertise that is available to government – but they are the first port of call for ministers and senior officials seeking advice; they have a particularly important role in legislative drafting; they represent the government in the courts; and they undertake a large range of other legal tasks that are necessary to keep the machinery of government working smoothly.

The first half of the paper sets the scene by looking at the meaning of 'generalism' and at the broader context in which different kinds of legal expertise provided by civil service lawyers contribute to the work of government. The second half of the paper seeks to explain why the expert contribution made by civil service lawyers has grown in importance in the last fifty years or so, and then looks at 'who does what' – offering an *tour d'horizon* of the leading actors and government agencies in which government lawyers are deployed.

Any discussion of the contribution made by legal experts to law and law-making would look rather strange if it did not also include some reference to Parliament – the UK's national legislature – and this paper does include a short section on legal expertise in Parliament. But the brevity of that section is explained by the fact that policy making, and the legislative process that gives legal effect to policy decisions through the enactment of Acts of Parliament and delegated legislation (statutory instruments) founded upon Acts of Parliament, are substantially driven by the political Executive. The latter comprises the prime minister and other government ministers (who are, by convention, required also to be members of one or other of the two Houses of Parliament). Ministers are party politicians, advised by their non-political civil servants. Some of that advice comes from specialist lawyers but, as we shall see, the dominant advisory roles in the civil service are undertaken by generalists who, for the most part, have no professional training in law. Parliament does have its own bureaucratic infrastructure, but parliamentary officials are not civil servants, even though they too are mostly generalists and are employed on practically identical terms – salaries, pensions, tenure, etc - to those of their civil service counterparts. They serve *Parliament*, whereas civil servants serve *the Crown* – i.e. the Executive branch of government.

Although the UK is not, strictly speaking, a federal state, it comprises four historically and culturally distinct countries, with substantial powers having been devolved to semi-autonomous elected legislatures and executives in Scotland,

Wales and Northern Ireland. This essay covers England and Wales but not directly either Scotland or Northern Ireland, which have separate judicial and bureaucratic arrangements and, in the case of Scotland, a legal system that differs in many important respects from that of the rest of the UK. Although Wales also has its own elected national Assembly, and its own Executive, exercising substantial devolved powers, its legal system is closely integrated with that of England, and the two countries can be bracketed together for the purposes of this discussion.

One further point to be borne in mind is that the manpower numbers given in this paper are, necessarily, approximations. Recent government policies of economic austerity have resulted in substantial cutbacks in budgets across the whole of the UK public sector and the numbers of people employed by state institutions at all levels have generally been on a downward trajectory. This not only introduces some marginal uncertainties into the factual details given here but it also reflects the difficult challenges that continue to confront public sector managers on how to handle sharp reductions in the manpower at their disposal. The cuts in staffing numbers has also increased the workload burdens on many state employees – including the civil service lawyers who are the main subjects of this discussion.

A Snapshot of the UK Civil Service

Every country's civil service has its own distinctive characteristics and indeed the term 'civil service' – even allowing for many linguistic variations in translation - means different things in different countries. In many countries, the term (or its national linguistic equivalent) is applied generically to all or almost all state employees. In the UK, civil servants are much more exclusively defined as the non-political employees of *central government* ministries and agencies. This narrow definition excludes many categories of staff on the state payroll. In particular, the definition excludes the approximately 3.5 million staff of local government and the National Health Service and for that reason, these important parts of the public sector are not discussed in this essay. We have already noted that officials of Parliament – about 2,500 in total - are not categorised as civil servants, though we will say something about them later.

Thus only about 10 percent of the UK's five million state employees are covered by the definition: this gives us a total head-count about 500,000 civil servants (full-time equivalent), of whom about 27,000 (almost all of whom are university graduates) are in the top policy grades and 4,000 are in the top five 'senior civil service' (SCS) grades. Among those in the higher grades are about

2,000 professionally qualified civil service lawyers, of whom about 160 are in the SCS. The organisation and deployment of these lawyers will be discussed later in this essay, but first it is necessary to set the scene with an explanation of the important distinction between 'generalists' and 'specialists' – civil service lawyers being an important sub-category of the latter.

The Generalist Tradition of the UK Civil Service

A key feature of UK public administration that sets it apart from many other countries, including its continental-European neighbours, is its longstanding adherence to a 'generalist' tradition in its civil service. This characteristic is reflected in a frequently repeated assertion – originally attributed to Sir Winston Churchill[2], with reference to the advisory role of government scientists - that experts should be 'on tap, but not on top.' Civil servants with specialised professional expertise should, when required, make their expert advice available to decision-makers, but should not, themselves, take a lead in the decision-making process.

The main key to the origins of this tradition are to be found in the Northcote-Trevelyan Report of 1854[3] – which began the slow process of modernising a fragmented, sometimes corrupt and notoriously inefficient civil service, whose staff were appointed by ministerial patronage, into a coherent organisation that would be fit for purpose in administering a newly-industrialised and increasingly urbanised society. The report, based on an official enquiry commissioned by the Treasury, headed by a top civil servant, Charles Trevelyan, and a leading parliamentarian, Sir Stafford Northcote, recommended that all future civil service appointments should be filled by open competition, with the creation of an independent Board to conduct the competitive examinations. Significantly, it stipulated that these examinations 'should be in all cases a competing literary examination' - i.e. in liberal arts and the humanities rather than in professional or technical subjects.

Examinations for top posts should, it said, be 'on a level with the highest description of education in this country' – which meant equivalence with the degrees of the top universities, in particular the ancient universities of Oxford and Cambridge (commonly conflated together under the pseudonym of 'Oxbridge'). In

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2) Quoted in Randolph S Churchill, *Twenty-one Years*, London, Weidenfeld and Nicolson, 1965, p. 127

3) *Report on the Organisation of the Permanent Civil Service*, C. 1713, London, 1854

those days the latter still retained much of the character of religious foundations, teaching a largely classical (Latin and Ancient Greek), curriculum and attended almost exclusively by wealthy men from upper-class and aristocratic backgrounds: hence the enduring charge (albeit somewhat less accurate now than it used to be) of 'Oxbridge elitism.' The University system – like the civil service – underwent processes of extensive expansion and modernisation from the middle of the 19th century onwards, but that interesting story lies beyond the scope of this paper.[4)]

Many government ministers were resistant to the idea of losing their powers of patronage and were hostile to the recommendations in the Northcote-Trevelyan Report. Nevertheless, an independent Civil Service Commission was established in 1855 to oversee the implementation of the new recruitment policy; but continuing resistance ensured that ministerial patronage was very slow to disappear, and pockets of it lingered on until the 1890s. The civil service started recruiting increasing numbers of specialists (including lawyers) towards the end of the 19th century – and this tendency accelerated after the First World War. But, by this time, the culture of generalist dominance was firmly entrenched.

Why, in contrast to most of the rest of Western Europe, where specialist civil servants, such as engineers, scientists and lawyers hold many top positions, and where civil servants are trained, in administrative law and other relevant subjects, to do their job, did Britain become so strongly wedded to a generalist tradition? Back in the 1960s, Professor V.M. Subramanian[5)] offered an interesting suggestion that the rise of the generalist tradition can be explained in terms of the peculiar two-stage evolution of British representative democracy.

According to Subramanian's thesis, the British side of the story began in the seventeenth century when power was wrested away from the monarchy by enlightened aristocrats and the landed gentry. At this stage the administrative structure was rudimentary and fragmented; the eighteenth century saw the consolidation both of a 'lay' tradition in government (in those days local magistrates played an important role in many aspects of administration) and a decentralization of power to the local 'squirearchy' – high-status landowners. Then, in the mid-nineteenth century (an industrial revolution having meanwhile taken place without government assistance, and certainly without the aid of

4) For an historical overview of university reform see Keith Vernon, *Universities and the State in England, 1850-1939*, London: Routledge, 2004

5) V.M. Subramanian, 'The Relative Status of specialists and generalists: an attempt at a comparative historical explanation', *Public Administration* 46, 1968, pp. 331-40

technocratically trained civil servants), there was an expansion of governmental functions. Extension of the electoral franchise led to the rise of organized political parties, competing with one another to win votes by offering the electorate increasingly ambitious policy programmes; ministers turned for advice, and for assistance with burdensome administrative and policy-making detail, to generalists from the same social and classically-educated background as themselves.

Subramanian contrasted this two-stage process with the single-step transition from absolute monarchy to representative democracy that occurred in France and Prussia, and that occurred more abruptly and much later than in Britain. European monarchs buttressed their position with a powerful, technically skilled administrative apparatus, which was taken over by their democratic successors. There was no cult of enlightened gentlemen, nor of deference towards a liberal arts-based education, and hence no predisposition to reserve a special place for the generalist administrator. Ministers seeking to run this high-powered governmental machine and to communicate with technocrats surrounded themselves with *cabinets* of their own staff - a model still found in France and elsewhere.[6)]

What, then does generalism, mean in practice? The core definition of the term lies in the pre-entry educational entry qualification for 'generalist' administrators – which, since the reforms of the 19th century, has been the achievement of a good university degree in ANY subject (followed by a good performance in competitive interviews and practical tests). Entrants to the higher administrative posts in the UK civil service do not undergo intensive pre-entry training like their counterparts in France, not are they expected to have had a training in law, as in Germany. Moreover, their post-entry training is also limited and *ad hoc* – see below

The competitions for the recruitment of 'specialist' civil servants are conducted quite separately from the generalist competitions, the main pre-entry requirement being strong professional qualifications in the relevant fields - economics, medicine, accountancy, engineering. law, etc.

Generalism – the Fulton Critique

The historic dominance of 'generalists' in the higher civil service has come in for a lot of criticism over the years – some of it from 'specialists' who have resented being treated, as they see it, as second class citizens; also from some

6) The UK government seems recently to have been moving towards a similar model, with its declared intention to establish 'extended ministerial offices' in government departments. See *Civil Service Reform Plans: One Year on Report*, London, Cabinet Office, July 2013, p. 31.

political critics, mainly on the left-wing of the ideological spectrum, who have tended to associate generalism with a throwback to 19th century social elitism that is inappropriate to a modern, democratic and egalitarian society.

Both these lines of criticism were reflected in the Fulton Report published in 1968[7], based on an inquiry into the Civil Service, set up by Harold Wilson's Labour Government. The Labour Party, having languished uncomfortably in Opposition to successive Conservative governments from 1951 until 1964, had long been critical of what it perceived to be the social elitism and ideological conservatism of the higher civil service, and this critical perception set the context and the tone of the Fulton enquiry.

The Report criticised the 'amateurism' and social elitism of the generalist culture. As an antidote to generalism it recommended the provision of more training and, on the basis of that recommendation, a Civil Service College was set up to provide limited post-entry training, mainly via short courses for generalists. In 2012 the College (by then re-named the National School of Government) was closed down for cost-saving reasons. It would be a considerable exaggeration to suggest that generalist civil servants are not given any training, but it is probably fair to say that formal and systematic post-entry training has never been given a very high priority. The survival of the 19th century generalist culture is an important part of the explanation for this.

Many of the Fulton Report's main recommendations stemmed from its firm conclusion that specialists – including lawyers – had been seriously undervalued and should be accorded a more prominent role and higher status. Part of the problem stemmed from the fact that the civil service was then – and largely still is – organised into parallel hierarchies, each of which separately define the respective career paths of generalists and of the various specialist groups. One of those hierarchies is the Government Legal Service, which we will be looking at in more detail in the second half of this paper. Fulton argued that this structural separation between generalists and specialists produced delay and inefficiency, prevented specialists from exercising the full range of responsibilities usually associated with their respective professions, and obscured lines of responsibility and accountability for decision making. Fulton argued for the introduction of a unified grading structure across the civil service to integrate these disparate categories.

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7) *Report of the Committee on the Civil Service, 1966-68*, Cmnd 3638, 1968. Its Chairman, Lord Fulton, had served as a university vice chancellor, and later as a governor and vice-chairman, of the BBC.

In the result the civil service itself, given the task of implementing this proposal, dragged its feet and very little was done. There was some rationalisation of grading structures, but the only significant progress towards integration of hierarchies was the creation of an 'open structure' for the three highest grades at the very top level of the service, to be filled (in theory anyway) by the most suitable candidates available, whether generalists or specialists. But although this change did result in a lot of these top positions being filled by specialists, in practice all those posts have specialist job descriptions. A very few top civil service lawyers – like the Treasury Solicitor and the Director of Public Prosecutions (discussed below) – hold the top rank of permanent secretary, but these positions are open only to well qualified professional lawyers; and, conversely, the Treasury Solicitor would never be seriously considered, or would wish to be considered, for the post of permanent secretary in the Departments of, for instance, Education or Health.

Lawyers – A Special Kind of Specialist?

The Fulton Report shone a much-needed spotlight on the under-valuing of specialist expertise in the civil service. And, although Report's recommendations, though they were broadly welcomed when published, were only partly and selectively implemented (they were, in any case, soon overtaken by the transformative 'new public management' reforms of the Thatcher Government in the 1980s), it is probably fair to say that the status of specialist civil servants has improved to some extent in the past half century. It is also the case that the social and educational backgrounds of recruits into the generalist administrative grades have broadened considerably – though vestiges of Oxbridge elitism remain.[8] But when it comes to policy making and advising ministers it is still generalist administrators who usually take the lead: civil service lawyers, like their other specialist colleagues, still remain largely 'on tap', albeit (for various reasons explained below) less so than in the past.

Nevertheless, lawyers do have some claims to pre-eminence over other categories of specialist. They have been around government for a lot longer than other professional categories and, in the UK as in other countries, their influence within the sphere of government is particularly important and pervasive. As the

8) An official report published in 2014 showed that 57 percent of Permanent Secretaries had been Oxbridge graduates. *Elitist Britain?*, report by the Social Mobility and Child Poverty Commission, London, August 2014.

19th century French commentator, Alexis de Tocqueville once observed:

'as the lawyers constitute the only enlightened class which the people does not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution.'[9)]

Some aspects of de Tocqueville's analysis might nowadays look old-fashioned (he was observing a post-revolutionary United States, in the aftermath of its having won independence from Britain); but the fact remains that law – and the lawyers who practice it - are a crucial instrument for preserving social cohesion and governmental authority; a state-funded legal system is an important part of the public service; and law (through legislation) is the main instrument for delivering public policies. Constitutional law – even in the UK, which almost uniquely, does not have a codified constitution - and administrative law provide a normative framework for conducting public business. Although, as we shall see, a lot of the day-to-day work of lawyers civil servants in the UK is of a routine character there is also a considerable input of expert legal advice into policy making and into the shaping and drafting primary and secondary legislation.

But what does 'legal expertise' mean in this context? In practice, the contributions made by legal experts to government take many different forms.

What Kinds of Legal Expertise Does the Government Need?

Forty years ago an official memorandum submitted in evidence to a Royal Commission on Legal Services[10)] identified four main categories of work done by lawyer civil servants. These categories (still broadly relevant today, though they have been slightly modified by this writer for our present purposes) were as follows:

1. Normal Solicitors' Services. These closely approximate to the services provided by private solicitors to their clients: 'Litigation and conveyancing, the negotiation of commercial agreements and advice on claims of various kinds occupy all, or part of, the time of many government lawyers.' So far as litigation is concerned,

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9) Alexis de Tocqueville, *Democracy in America*, 1835, Part 1, chapter XV

10) Royal Commission on Legal Services, Final Report, Cmnd 7648 and 7648-1, 1979-80. Memorandum of Evidence by the Official Group on Legal Services, 'Lawyers in the Civil Service', 20 December 1976.

special mention should be made of judicial review (see below) – public law actions initiated by citizens or private bodies against the state - the legal substance and status of which is distinctive enough to raise a question mark about its being characterised as a 'normal' solicitor service (though judicial review cases are far more numerous than they were at the time of the Royal Commission).

2. Legal Advisory Work. This includes work outside the scope of ordinary private practice, concerned with the legal powers of government and with constitutional and administrative law. The legal adviser 'is also concerned with the legal and practical implications involved in the development of Government policies and with the preparation of the mass of legislation that is formulated each year. Bill work and the work of drafting subordinate legislation is very demanding on the time of the more experienced legal advisers to departments'. In practice, advisory work is hard to disentangle from category 1 - particularly litigation (and how to avoid it). And legislative drafting, though closely linked to advisory functions, deserves a separate category on its own (see 5, below). It may also be noted that, as we shall see, lawyers in the Foreign and Commonwealth Office (a Department not much given either to litigation or to primary legislation) has its own legal advisers, specialising in the esoteric intricacies of international (including EU) and Commonwealth law.

3. Prosecutions. The main departments involved here are the Crown Prosecution Service and the Serious Fraud Office, but lawyers in other departments (e.g. Revenue and Customs) are also involved in prosecution work.

4. Direct Services to the Public (including the Administration of the Justice System). This category covers work done by lawyers in specialised agencies slightly outside the mainstream of ministerial departments, such as the Land Registry and the Charity Commission, whose lawyers do not practice the law in the ordinary sense but are chiefly engaged in the administration of particular statutory codes.. Under this heading must be included the bureaucratic support underpinning the administration of justice itself - courts, tribunals, legal aid, etc. The Courts and Tribunals Agency of the Ministry of Justice, plays the major role in this though, as we shall see, the senior judges themselves, headed by the Lord Chief Justice, now play an important role in managing the work and careers of the judiciary.

To these four categories should be added another, already mentioned:

5. Legislative Drafting. Primary legislation in England and Wales is drafted by the Office of the Parliamentary Counsel. Departmental lawyers prepare instructions to and liaise with parliamentary counsel, and are themselves responsible for the drafting of statutory instruments. Lawyers of the Foreign and Commonwealth Office draft, or supervise the drafting of international agreements, and draft secondary legislation, including Orders in Council establishing or amending the constitutions of dependent territories.

And there is perhaps a sixth category, which cuts across 'policy advice', 'administration of justice' and 'legislative drafting':

6. Law Reform. Lawyers in general and government lawyers in particular have a special professional concern with the state of the law and the smooth working of the machinery of justice. The phrase "lawyers' law" is sometimes used to denote technical areas of legislation that are of little interest to non-lawyers. The English and Scottish Law Commissions, to which draftsmen from the Office of the Parliamentary Counsel (and from the Scottish legal departments) are seconded, have a special role in this area. However, it is perhaps appropriate to think of law reform as being a ubiquitous professional interest as well as a specialised legal task as such: law being their stock in trade, civil service lawyers will always view policy and legislative change from a legal-professional standpoint as well as from a departmental and governmental one.

Shifting our focus slightly in the light of the comment just made, it should be borne in mind that legal functions in government are sometimes, but not necessarily coterminous with lawyers' jobs. Thus the list of government lawyers' tasks, above, mentions familiar (but overlapping) functions like management, policy making, and legislation, to which lawyers make a special but – given the generalist culture of the civil service - not exclusive contribution. It also identifies a cluster of jobs to do with the substantive government functions of administering justice and of providing public services through the operation of legal codes. We must also remember that civil service lawyers, at a senior level, are administrators and managers; and that 'legal jobs' (e.g. the operation of revenue law by the tax inspectorate, the distribution of welfare benefits or the day-to-day running of the courts by the huge corps of administrators employed by the Courts and Tribunals Service of the Ministry of Justice) are performed by non-lawyers.

Moreover, hidden between the lines of formal legal job categories lie important secondary functions, whose description requires a different, less formal, vocabulary. Thus legal advice may fall into the category of 'troubleshooting' (the

detection and correction of mistakes,). Underpinning decisions with solid legal expertise may serve the important purpose of legitimating those decisions in the eyes of the suspicious outside world of the private sector (a world that also employs its own lawyers). Lawyers are part of the essential intelligence gathering network of government, alert to legal developments, such as judicial rulings, and translating them into a form that can be assimilated by non-lawyer decision makers.

It seems self evident that Governments need lawyers for many important purposes; it also seems to be the case that, in spite of the enduring dominance of generalists, the relevance of legal expertise has grown considerably in recent years. One explanation for this lies in the expansion of administrative law; another has been the growing influence of European law. Another possible contributing factor has been the impact of new forms of communication and information technology. We will now consider each of these in turn.

Legal Civil Servants and Administrative Law

Contrasting the training given to administrators in Germany and France with the backgrounds of their counterparts in Britain, C.H. Sisson observed that 'in general the continental administrator, of the type that corresponds more or less to our Administrative Class[11], is a lawyer, specialising in that branch of law – namely administrative law – which is most directly concerned with the functions of government.'[12] Unlike the senior personnel of European bureaucracies, non-specialist UK civil servants are not trained in administrative law. French civil servants have long been accustomed to supervision by administrative courts: but until quite recently the UK had no administrative court.

In any case, Sisson was writing in the 1950s, at a time when administrative law, as a distinctive legal sub-discipline, was not widely recognised or taught as part of the curriculum in British law schools. Those seeking an explanation for this have often pointed the finger of blame at the distinguished and influential Oxford law professor, A.V. Dicey who, in the late 19th and early 20th century

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11) This was the term once applied to the higher generalist grades in the UK civil service. The terminology was abolished following recommendations in the Fulton Report.

12) C.H. Sisson, *The Spirit of British Administration*, London, Faber and Faber, 1959, p. 39. Sisson entered the civil service as an assistant principal (a probationary junior administrative grade) in 1936 and retired from the service as an under-secretary in 1972. He was also a noted poet.

denounced the French *droit administratif* as a breach of the rule of law because – as Dicey erroneously thought – it apparently made French state officials subject to different legal rules than the ones applying to ordinary citizens. This and other aspects of the interesting history, and slow development, of UK administrative law have been told elsewhere[13] and need not be repeated here.

In the past fifty years or so, the picture has changed dramatically. Administrative law is now treated by the legal professions and by law schools as a core subject and there are numerous textbooks on the subject In the 1960s, judicial attitudes towards administrative law began to change. In the first half of the 20th century, British judges had acquired the rather unhappy reputation of being reluctant to uphold cases brought by aggrieved citizens against the government; but in the 1960s, inspired by some leading judges like Lord Reid (then the senior presiding judge in the Appellate Committee of the House of Lords), the judiciary began to take a more bold and robust attitude to such claims. During the 1970s and '80s, the procedures for bringing judicial review proceedings were streamlined and simplified; further major reforms have come into effect, following a radical revision of the rules of civil procedure in 1999, based upon a major review of civil justice undertaken by the senior Court of Appeal judge (later, Lord Chief Justice), Lord Woolf.[14]

Partly because of these changes, the numbers of judicial review proceedings against the government has, in recent years, expanded substantially: in 1980, there were just 491 such applications; currently, the annual total is about 12,000. The number of appeals brought to administrative tribunals has also significantly increased and recent reforms have integrated and the tribunal system – historically providing a relatively informal avenue for administrative justice – into the mainstream of the judicial system.[15] In 2000 an Administrative Court was established, as a sub-division of the Queen's Bench Division of the High Court, dealing mainly with judicial review proceedings and statutory appeals against

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13) See this writer's account: Gavin Drewry, 'Judicial Review: The historical Background', in M. Supperstone, J. Goudie and P. Walker, *Judicial Review*, 6th edition, Lexis Nexis, 2017, chapter 2.

14) Interim Report of Lord Woolf, London, Lord Chancellor's Department, July 1995 and Final Report, September 1996. See Charles Blake, 'Modernising Civil Justice in England and Wales', in M.Fabri and P. Langbroek (eds), *The Challenge of Change for Judicial Systems*, Amsterdam: IOS Press, 2000, pp. 37-45.

15) Tribunals, Courts and Enforcement Act 2007

administrative decisions.

Meanwhile, in 1967,[16] an independent Parliamentary Ombudsman's office had been established to investigate complaints by members of the public about alleged injustice consequent upon maladministration by central government departments and agencies. The terms of appointment of the Ombudsman are similar to those of a judge but, unlike many other countries, the UK Ombudsman is not required to have legal or judicial qualifications.

In the last few decades, administrative law has become a much more prominent feature of UK public administration, and this has inevitably had a significant effect on roles and the working lives of civil service lawyers. At the same time, the expansion of administrative law and the growing impact of judicial rule proceedings have had the effect of exposing the continuing lack of legal expertise among generalist administrators. In the 1980s, when the Thatcher Government was embarking upon its major 'new public management' reforms of the public sector, and seemed sometimes to be in too much of a hurry to circumvent legal obstacles to their plans, public bodies were faced with an increased number of challenges in the courts, many of which were successful. The Government responded by preparing a handbook for non-lawyers in the civil service – drafted by the Treasury Solicitor's Department – called *The Judge over your Shoulder*, 'to help you understand the legal environment in which government decisions are made and assess the impact of legal risk.' This document has subsequent been revised (e.g. to take account of the enactment of the Human Rights Act 1998, see below) and the most recent edition was published in July 2016.[17]

'European' Dimensions

Another major set of factors that has hugely increased the importance of law in the operation of UK government, and thereby raised the profile of government lawyers, has been the closer relationship – currently being renegotiated in the aftermath of the 2016 'Brexit' referendum – between the UK and neighbouring countries on the continent of Europe. This huge subject can be touched upon only very briefly in the space available here. It has two main – separate, but interrelated

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16) Parliamentary Commissioner Act 1967. The parliamentary ombudsman subsequently acquired a parallel jurisdiction in respect of complaints of maladministration and service failures in the National Health Service. There is a separate ombudsman scheme for local government.

17) It can be downloaded from the official website, https://www.gov.uk/government/publications/judge-over-your-shoulder

– aspects that are relevant to this discussion.

The first, and more obvious, is UK membership of the European Union, which began on 1 January 1973 having been given statutory effect by the European Communities Act 1972. A vast amount of UK legislation – primary and secondary - enacted since accession has originated in the decision-making processes of the EU. And on matters relating to the interpretation of EU law, rulings of the EU Court of Justice in Luxembourg are authoritative and in many circumstances binding on the courts of member states. The pervasiveness and complexity of EU law requires all parts of the UK Government to have constant access to expertise in EU law, which has long been an essential part of the skill-set of civil service lawyers across Whitehall.

The second, separate, but related, European dimension is the UK's commitment to the provisions of the European Convention on Human Rights, enshrined in UK domestic law by the Human Rights Act 1998, which enables the UK courts to adjudicate human rights issues, notably in judicial review proceedings. Not only do administrators have to ensure that all their decisions are consistent with the UK's obligations under the Convention, but it is also the case that legislators and the drafters of legislation have to ensure that their products are Convention-compliant. This is another area where in-house legislative expertise is constantly needed.

Apart from these substantive implications of European engagement, there have also been important, if less tangible, implications for the administrative culture. Although the British Constitution remains uncodified, commitment to the EU Treaties and the Convention on Human Rights, both of which are interpreted and applied by extra-territorial European courts, have acted as a quasi-constitutional constraint on domestic sovereignty. The bureaucratic culture of continental Europe and of the EU and the Council of Europe is strongly legalistic, and UK government has become infused with that culture. One significant by-product of Brexit – which many of those who campaigned to leave the EU sought to justify as a necessary step to restoring UK sovereignty - may eventually turn out to be a reversion to a less legalistic style of politics and government. But , if so, this will not happen overnight.

Information Technology

An interesting study by Dr Ben Yong, using data gleaned from interviews with government lawyers, included an interesting finding about the impact of information technology on the role of lawyers in the decision-making process. He

notes that the development of new IT systems in Whitehall since the 1990s, particularly email and intranet networks, has meant that departmental lawyers tend to be copied into policy documents at an early stage of discussion – instead of being sent, as was the case in the past, a bundle of paperwork for comment at a late stage, by which time the direction of a policy has already been decided.

'Government lawyers are now regularly copied into emails and contribute to ongoing discussions in policy development.'[18] This, Yong suggests, has the effect of integrating them into the process as members of the policy team, instead of relegating them to the sidelines with the more limited – 'on tap' - function of commentating on decisions that have already been made by their generalist colleagues.

Where is Legal Expertise located in the UK Civil Service?

We will now look at how legal specialists[19] are deployed in the civil service, identifying the government ministries and agencies that are principally concerned with different aspects of the government's legal business.

(i) The Ministry of Justice

It would probably look rather strange to omit the Ministry of Justice (MoJ) from this account of legal expertise in UK Government – but the reason for including it is mainly historical. The MoJ's main responsibilities are the management and funding both of the courts and tribunals system and of the prison service. It is headed by the Secretary of State for Justice, a minister of Cabinet rank, who also holds the office of Lord Chancellor, and virtually all its civil service staff are non-lawyers.

It used to be the case that the Lord Chancellor – an office that originated in mediaeval times – was invariably a senior barrister, who combined office as a government minister, sitting in the House of Lords, with being head of the

18) Ben Yong, *Risk Management: Government Lawyers and the Provision of Legal Advice within Whitehall*, London, The Constitution Society, 2013, para. 3.7

19) The legal profession in England and Wales is divided into two professional categories, barristers and solicitors. It should be noted, however, that eligibility for practically all appointments to legal positions in the civil service make no distinction between the two branches of the profession. Indeed, some posts that for historical reasons carry the label of 'solicitor' (the Treasury Solicitor is the most obvious example) have often been filled by barristers.

judiciary - and so served as a constitutional 'bridge' and a channel of communication between the judicial, executive and legislative branches of the constitution. The senior civil servants in the Lord Chancellor's Department (as it used to be called) were also required to be professionally qualified lawyers. The Ministry of Justice was created by the Constitutional Reform Act 2005, which transferred the position of Head of the Judiciary to the Lord Chief Justice – who heads a small Judicial Office (see below), responsible for matters such as the deployment, training and discipline of judges. Lord Chancellors, as Secretaries of State for Justice, are no longer required to be lawyers – and since the passing of the 2005 Act, all the holders of the office have been members of the House of Commons, and the most recent incumbents have been non-lawyers.

(ii) The Judiciary and the Judicial Office

The Judicial Office is part of the Ministry of Justice and is staffed by about 200 civil servants, most of whom are non-lawyers. It provides administrative support for the English and Welsh courts and tribunals and reports to the Lord Chief Justice and Senior President of Tribunals. Although the Judicial Office itself is not a significant source of legal expertise, the senior judiciary, who it supports, are a source of authoritative legal opinions – not only through the judgments that they deliver in the courts but also through their occasional speeches and lectures and through their evidence (invariably confined to administrative matters or technical areas of law reform) to parliamentary select committees. The Lord Chief Justice produces an annual report on the judiciary, which is followed up by an oral evidence session with the House of Lords Constitution Committee. In all these extra-judicial contexts, the judges are required to avoid areas of political controversy and to steer clear of any issues that they might subsequently have to adjudicate in court.[20)]

(iii) The Attorney-General

The Attorney-General, the Government's chief law-officer (the deputy to the Attorney is the Solicitor-General), is the minister ultimately responsible for legal

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20) This writer has written elsewhere about judicial accountability to Parliament: Gavin Drewry, 'Parliamentary Accountability for the Administration of Justice', in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law*, 2nd edn., Oxford, Hart Publishing, 2018, chapter 11.

advice to governments and for the work of lawyers in the civil service: though the Treasury Solicitor (see below), who is answerable to (and advises) the Attorney, is the *de facto*, managerial head of most of the Legal Service. As a government minister, the Attorney is a Member of one or other of the two Houses of Parliament and is a qualified practising barrister. His main role is to give top-level legal advice to his ministerial colleagues[21)], to represent the government in high profile court proceedings and to answer parliamentary questions on legal matters. He has a number of other particular responsibilities – such as referring criminal cases to the Court of Appeal on the grounds that a sentence passed by the trial court appears to be too lenient. He has a staff of about 50 civil servants, including 12-15 lawyers, who are on secondment from other legal departments.

(iv) The Treasury Solicitor and the Government Legal Service

The key office of Treasury Solicitor dates back to 1655[22)], but the centralisation of civil service legal functions, in a Government Legal Service, that eventually came to be headed by the Treasury Solicitor, began in the 1870s[23)] Over the years there has been some resistance to centralisation from various departmental permanent secretaries who have always wanted to keep full managerial control over their own legal staff. But today the Treasury Solicitor – who ranks as a permanent secretary - runs the Government Legal Department (with 1400 lawyers and 600 support staff), and oversees the career management of about 600 other civil service lawyers in the Government Legal Service.

Most of the 1400 lawyers in the Government Legal Department are concerned with legal advice and civil litigation. There are also specialists in, for example, e.g. employment law and commercial law. In practice most of the advisory lawyers are physically out-stationed to other government ministries – though their line-manager is the Treasury Solicitor.

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21) One particularly high profile instance was the controversial advice given in 2005 by the then Attorney General, Lord Goldsmith, to the Blair Government about the legality of going to war with Iraq.

22) See Sir Thomas Heath, *The Treasury*, London, Putnams, 1927, p. 186.

23) For this writer's account of this and other aspects of the history of civil service lawyers see: Gavin Drewry, 'Lawyers in the UK Civil Service', *Public Administration*, vol. 59, 1981, pp. 15-46.

(v) Drafting Bills: Parliamentary Counsel

The Office of Parliamentary Counsel was established in 1869[24] and is now part of the Cabinet Office: it currently consists of 47 lawyers and 13 support staff. The head of the Office, which is not part of the wider Government Legal Service, is First Parliamentary Counsel, who ranks as a permanent secretary and who often advises the government on constitutional and legislative matters. The Office drafts all primary legislation, acting on instructions from departmental lawyers. But when it comes to secondary legislation (statutory instruments, promulgated under the provisions of 'parent' Acts of Parliament), the drafting is done by departmental lawyers.[25]

(vi) The Foreign and Commonwealth Office

The office of Legal Adviser to the Foreign and Commonwealth Office was established in 1876.[26] Today this office, which (like the Office of Parliamentary Counsel) is separate from the main Government Legal Service, consists of about 50 lawyers and 20 support staff. Some of the legal advisers are posted overseas – e.g. to the UK missions to the UN in New York and Geneva, with the UK Permanent Representation to the EU in Brussels and to the British Delegation to the Council of Europe in Strasbourg. The main work of the office is, as might be expected, is legal advice and litigation in the field of international law, including human rights.

(vii) The Crown Prosecution Service,

The Crown Prosecution Service was created in 1986[27], though the office of its head, the Director of Public Prosecutions (DPP), was established in 1880[28] - originally as part of the Home Office. The DPP, who ranks as a permanent secretary, works closely with and is answerable to the Attorney-General, who answers questions in Parliament about prosecution-related matters. The Office has

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24) See Gavin Drewry, 'Lawyers and Statutory Reform in Victorian Government', in R. MacLeod (ed.), Government and Expertise in Britain 1815-1914, Cambridge University Press, 1988, pp. 27-40.

25) On delegated legislation see Edward Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-MakingI*, Oxford, Hart Publishing, 2001.

26) Sir John Tilley and Stephen Gaslee, *The Foreign Office*, London, Putnam's, 1933, p. 115

27) Prosecution of Offences Act 1985.

28) The office of DPP was merged with that of the Treasury Solicitor in 1884, before again becoming independent in 1908.

about 7,000 staff, and 2,900 lawyers are on the 'advocate panel' (employed externally or self-employed), engaged in criminal casework, and it conducts about 800,000 prosecutions each year.

(viii) The Serious Fraud Office

The Serious Fraud Office – another organisation operating under and reporting to the Attorney General – was established in 1988,[29)] in response to a number of major financial scandals that had hit the headlines. It has both investigatory and prosecuting powers and has about 300 staff – including lawyers and forensic accountants – headed by a Director, who is a senior lawyer. A lot of its work extends to overseas jurisdictions

(ix) Her Majesty's Revenue and Customs

Several other departments and agencies employ legal staff outside the mainstream of the Government Legal Service. Most of these are small, but one substantial exception is the Solicitor's Department of HM Revenue and Customs, which employs about 200 lawyers and 200 other staff and has extensive investigatory, prosecution and litigation functions relating to tax and customs duties.

Legal Expertise in Parliament

It has already been noted that the initiation and drafting of legislation is primarily the function of the executive, rather than of Parliament, whose role in legislation and policy-making has mainly to do with holding ministers to account, individually and collectively, and with critical scrutiny both of the government's administrative competence and of its legislative and policy proposals. Nevertheless, in carrying out these functions, both Houses of Parliament – and their many committees - do need regular access to expert legal advice. As a senior House of Commons Clerk, Andrew Kennon, has recently noted, Parliament's need for legal expertise is 'varied' and 'growing.'[30)]

Legal support is needed in both Houses, in particular, for scrutiny of draft Bills, EU draft directives and secondary legislation. This need is particularly acute for the Opposition parties who do not have access to official sources of legal

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29) Criminal Justice Act 1987

30) A Kennon 'Legal Advice' in A Horne, D Oliver and G Drewry (eds), *Parliament and the Law*, Oxford, Hart Publishing, 2013, p.137

advice. Some MPs and peers in the House of Lords have legal backgrounds, but they are in a minority: it used to be the case that parliamentary work could be regarded as a part-time occupation that could be combined with a busy legal practice – but this has long ceased to be possible.

The main sources of legal advice for parliamentarians are as follows:

- There is a small House of Commons Legal Services Office, headed by the Speaker's Counsel.
- The equivalent to this in the House of Lords is the office of Counsel to the Chairmen of Committees.
- Select committees of both Houses often employ legal advisers – mostly temporary appointments, remunerated on a *per diem* basis – to assist with enquiries into particular subjects.
- The Libraries of both Houses employ small teams of legal specialists to brief MPs and peers. Both Libraries regularly publish research papers on topical subjects, many of which have legal themes.
- The House of Lords used also to be the UK's highest appeal court – until 2009, when its judicial functions were transferred to the new UK Supreme Court, under the provisions of the Constitutional Reform Act 2005. Some judges and retired judges are still members of the House of Lords and make regular contributions to debates and to committee work, particularly in technical areas such as the scrutiny of delegated legislation.

Conclusions – Civil Service Lawyers Today, and the Challenge of Brexit

As the legal context and content of government decision-making and public administration has become more and more complex the importance of having high quality legal expertise readily available has become ever more apparent. The expansion of administrative law has meant that more and more disputes involving government decisions end up in court – and, equally importantly, non-lawyer ministers and 'generalist' civil servants need constantly to be steered down paths of legality that will keep such cases out of court. European law has added further complexity to the mixture, and decisions of the European courts (the EU Court of Justice and the European Court of Human Rights) have had a growing influence on UK jurisprudence.

All this has meant that generalist administrators are obliged to consult their lawyer-colleagues more and more often. We have noted that the increased use of IT systems mean that lawyers tend to be copied routinely into departmental circulation lists – and this brings them into the decision-making loop at earlier

stages than used to be the case. Lawyers have come to be seen, and to see themselves, more and more as an integrated part of a departmental team. In most contexts they are still a long way from being 'on top' – but the rather dismissive description of them as being merely 'on tap' would be to greatly underestimate their present day importance in the scheme of things.

What of the future? In the short and medium term, the government's agenda looks likely to be dominated – perhaps even, as some worried observers fear, overwhelmed - by the aftermath of the Brexit referendum in 2016. Disengaging from the EU after more than forty years of membership and then grappling with the legal consequences of having done so, and forging new trading and other international relationships, will be a daunting prospect for everyone in and around the government – and the expertise of government lawyers will be much needed and hugely stretched.

It is seems appropriate, therefore to end with some words from the Government's top lawyers. First, the Treasury Solicitor, the head of the Government Legal Service: interviewed in December 2016 he was asked, 'what has been the most significant change in your service this year?' To which he replied: 'Inevitably it's Brexit. The outcome of the EU referendum created major new strands of work – on the legal processes for leaving the EU, on options for the UK's future relationships with Europe and on the changes that will be necessary to our domestic legal framework'[31)] Ten months later, his ministerial boss, the Attorney-General, interviewed by the Legal Correspondent of *The Times* newspaper, in October 2017, also highlighted the massive legal importance of the Brexit process and its significance for the role of lawyers in government:

> '[Brexit] is probably the biggest thing that any government has had to do for generations. It is a huge privilege to be expected to contribute to this process and an opportunity to deliver and really contribute to the future of the country. I think that is what we should all be in government to do.'[32)]

31) Interview with the Treasury Solicitor, Jonathan Jones, *Civil Service World*, December 2016

32) Frances Gibb (interview with Jeremy Wright , the Attorney-General), *The Times*, 26 October 2017