



Government Lawyers: Technicians, policy shapers and organisational brakes

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Philip Lewis and Linda Mulcahyⁱ

Introduction

Government lawyers have been rather neglected by scholars interested in the workings of the legal profession and the role of professional groups in contemporary society. This is surprising given the potential for them to influence the internal workings of an increasingly legalistic and centralized state. Thirty years ago Gavin Drewry referred to the topic as a 'largely unexplored jungle' (1981, p.15) and little has changed since. In-depth discussion of government lawyers in the UK has been left to just a handful of descriptively rich contributions (see in particular Moorhead *et al* 2018; Drewry, 1981, 1983, 1986, 1988; Daintith and Page, 1999; Page 2001; Yong, 2013). This article aims to partly fill the gap left by looking at the way that lawyers employed by the government and the administrators they work with talk about their day to day practices. It draws on the findings of a large-scale empirical study of government lawyers in seven departments, funded by the ESRC. The study was undertaken between 2002-2003 by Philip Lewis, and is reported for the first time here.ⁱⁱ By looking at lawyers in bureaucracies the interviews conducted sought to explore what government lawyers do, how they talked about their work, and what distinguished them from the administrative grade clients and colleagues they worked with.

In undertaking the research reported in this article Philip drew on two particular strands of theoretical research about lawyers (see also Lewis, 1997). The first of these developed by Dezalay (1992, 1995a, 1995b) has described a number of situations in which occupations (including lawyers) have competed for authority in a particular field by asserting a combination of expertise and idealised visions of their role. In his ESRC project Philip attempted to explore the applicability of this account in a different context. More particularly, he wanted to know in what circumstances others accept claims of expertise, and why ideology should be involved. The second strand of work driving the ESRC project was that undertaken by Rosen (2002) and Nelson and Nielsen (2000) on in-house lawyers in US corporations. This focused on the construction of the lawyers' roles when they worked alongside non-lawyers and the pressures they faced from colleagues who focused on business rather than law. It has since become more common for government lawyers to be seen as a species of in-house lawyer (Moorhead *et al*, 2018), making this line of inquiry even more relevant.

On completion of data collection, Philip prepared a report for the ESRC but did not write up the research for publication. There is evidence that transcripts for all the interviews were prepared but these could not be found on his death. What did remain was the preliminary analysis contained in the report to the ESRC, a short bibliography of nine books and articles he had been particularly influenced by,ⁱⁱⁱ just under 90 pages of thematic analysis undertaken by Philip which included supporting quotations, and notes about how he planned to organize the material for a book. The material contained in the sections which follow has been written up by Linda Mulcahy and tries as far as possible to stay true to Philip's notes and interpretation of the data.^{iv} However in the course of writing this article additional literature has been introduced into the discussion and judgements have been made about what constitute the most compelling arguments that could be presented in the much shorter format of an article.

Background: Lawyers in bureaucracies

Several writers have drawn attention to the fact that the notion of legal professional is no more than a folk concept. In his review of Richard Abel and Philip Lewis's three volume set of *Lawyers in Society*, Berends (1992) argued that the meaning of such terms as 'lawyer' and 'legal profession' is elusive making them questionable analytical instruments in research. In the UK lawyers working in-house in commercial organisations, in private practice, in law centres and in government departments share a common professional training but otherwise differ considerably. They can be distinguished in terms of the salaries, social and cultural capital they attract as well as the type of places they work, the professional development available to them and clients they serve. Increasing recognition of variance between different types of lawyers has resulted in what Dezalay (1995a) has called a professional 'pot pourri'. Even within firms different sub-cultures or sense of habitus may govern the work of litigators, transactional lawyers and 'back office' lawyers. However, these differences are often obscured by the prevalence of research that focuses on lawyers in private practice with the result that sociologies and histories of 'the' legal profession fail to recognise the full range of activities and people that fall under the broad label of 'lawyer'. For instance the extensive body of work that has been undertaken on the ways in which lawyers have sought to control existing markets or to colonise new markets overlooks the fact that some lawyers, including those who work for government, do not practice in a commercial marketplace or are driven by profit. This would not be such a serious problem if it was just a case of redressing the focus of research but a major contribution that Philip made to the field was the recognition that more work needed to be done from the bottom up in order to discover what a range of lawyers outside of private practice actually do on a day to day basis (Lewis, 1989).

Philip Lewis (2008) defined government lawyers as qualified lawyers (either barristers or solicitors) employed by the Crown to act for the government and its executive agencies. This simple definition belies the fact that one of the problems with studying government lawyers is the difficulty of understanding the places where, and the ways in which, they have exerted their influence. Different types of lawyers, doing very different sorts of legal work have traditionally been scattered across Whitehall Departments. In their discussion of the Haldane Committee, set up in 1918 to review the machinery of government, Abel-Smith and Stevens (1967) suggested that there was no more glaring case of haphazard development than in the departments responsible for legal affairs. More recently Drewry (1981) has referred to the blurred history of government lawyers made up of overlapping but distinct stories depending on the government department being discussed. Despite shifts towards centralisation since Philip undertook his empirical study there continue to be pockets of lawyers employed within particular departments in the civil service.^v In his study of seven departments, two case studies, Customs and Excise and the Foreign and Commonwealth Office, had and continue to have their own legal team while the Treasury Solicitors Office (now the Government Legal Department) has always formed the core of attempts to centralise government legal services. The Government Legal Department^{vi} is now the single largest provider of legal services to government. The general rule is that if departments need continuous legal advice then lawyers are part of the departmental team, but in other instances legal services are provided by the Government Legal Departments.^{vii}

While there is much talk in work on the sociology of the professions of the decline of the professional status of lawyers in-house lawyers appear to be getting more recognition from researchers (Moorhead *et al*, 2018). Moreover, the work of those employed by the government is expanding at a healthy rate and has become increasingly significant in

numerical terms. As the welfare state and the work of courts and tribunals has grown so too has the need for lawyers in state employment as prosecutors, litigators, regulators, conveyancers, researchers and administrators. The steep increase in judicial review actions from the 1980s onwards, and the introduction of the Human Rights Act in 1998, has also required more lawyers to anticipate challenges to government decisions. By the early twentieth century there is evidence that staff with legal qualifications were employed in at least twenty four government departments and by 1975 there were at least 1,000 legal civil servants spread across departments (Drewry, 1981). There are now around 2,300 lawyers providing civil advisory and litigation services to central government departments, the majority of whom (1,800) are employed in the Government Legal Department.^{viii}

An initial question which arises in the context of research into lawyers employed by the state is the relevance of the existing literature on the legal profession to their work. Much existing work relates to lawyers who work alongside other lawyers in private practice or the collective struggles of lawyers to obtain recognition and market share. The fact that all lawyers share some common training might suggest that they might have shared understandings of what distinguishes legal expertise from other types of knowledge or employ the same ideological discourse (Dezalay, 1995a). However, the significance of professional bodies and common educational practice has been undermined with the rise of consumerism and the emergence of new transnational legal orders (Moorhead *et al*, 2003; Galanter and Roberts, 2008). For instance, it has been argued that commercial lawyers in mega-law firms have experienced significant task seepage and now resemble their corporate clients more than other types of lawyers (Flood, 2013). This suggests that the distinctiveness of a lawyers' perspective is diminishing, if indeed it ever truly existed.

While there are many problems with the notion of a profession, what is clear is that bureaucracies are commonly treated as antithetical to them, with some scholars arguing that professionals in bureaucracies are a recognised sociological and analytical problem. While professional work is associated with specialist expertise, autonomy and allegiance to peers, bureaucratic work has been linked to routine tasks, supervision and hierarchy (Davies, 1983). This raises the questionable assumption that routine tasks, supervision and hierarchy do not characterise work in private practice. Other research suggests that professionals working in bureaucracies can feel a sense of role conflict (Abbott 1981, 1986; Gorman and Sandefur, 2011). More generally, there have also been calls to move the focus of research away from assumptions about conflict and competition in order to pay more attention to collaboration or co-operation between lawyers and others in the workplace (Kim, 2013). When lawyers work alongside non-lawyers research has focused on what distinguishes them from others by emphasising the specialised knowledge they possess, their use of technical vocabulary, their role as conceptive ideologists of the middle classes and experience of the matters over which they are dealing (Cain, 1979). The gaps between lawyers and others that have been identified commonly gives rise to concerns about inequality, translation, information asymmetry and power imbalance in which it is inevitably the lawyer who controls the relationship. It is noticeable that much work in this ilk has focused on clients who are inexperienced 'one-shotters' with personal injury or family law problems. Others have been keen to focus on the fact that power is not static and is frequently negotiated, even when the client is a one-shotter (Sarat and Felstiner, 1997). Thinking about lawyers-client relationships in terms of asymmetries of power also causes problems where we turn to situations in which lawyers work alongside articulate and knowledgeable clients. It is significant in this context that research on commercial law firms has painted a more nuanced picture of 'repeat player' business clients who often exert influence over lawyers (Galanter 1974; Nelson and Nielsen,

2000; Flood 2013). This is of particular interest when studying government lawyers who service the legal needs of powerful politicians acting as government Ministers and experienced civil servants who are knowledgeable about law in their own right. The remainder of this article will explore the extent to which these various characterisations of lawyers have resonance when looking at Philip's empirical study of government lawyers.

Methods

The main source of information for Philip's study was interviews which explored lawyers' and administrators' views on their own and each others' knowledge.^{ix} Rather than treating lawyers as a distinctive group, it was assumed that lawyers across the civil service were exposed to different cultures and influences based on the nature of their work. It is not clear from Philip's notes how a sample frame for the study was constructed but it seems likely that he included Departments and Offices that had significant numbers of lawyers. An analysis of the *Civil Service Yearbook* (2004) for the year in which the empirical research was completed reveals that legal staff at that time were working in the Home Office, Treasury Solicitors Office, Parliamentary Counsel's Office, Department for Constitutional Affairs, Legal Secretariat to the Law Officers, Law Commission and Crown Prosecution Service Home Office, Department of Trade and Industry and Department of Transport and the Inland Revenue. Formal interviews took place with 50 lawyers (including two recently retired) and 21 administrators. The breakdown of interviewees by the Department they worked for is shown in table one below. As mentioned above, despite the shift towards the centralization of legal services in the Government Legal Department (then Treasury Solicitors Office) three of the units studied continue to arrange their legal work in the same way as they did when the study was undertaken.

Govt. Department	Lawyers	Administrators
Department of Trade and Industry	12	3
Department for Constitutional Affairs	11	5
Home Office	10	4
Treasury Solicitors Office	10	2
Customs and Excise	7	4
Foreign and Commonwealth Office		2
Cabinet Office		1
Total	50	21

Table one: To Show the number of interviews by Department

There were nine additional interviews involving a former Treasury Solicitor, two former Permanent Secretaries, two former Law Officers, one Parliamentary Counsel, two lawyers, an administrator with responsibility for organisational and training and two extended conversations with Ministers. The study was skewed towards senior staff. Nearly half of the lawyers interviewed were senior civil servants compared with 17 per cent of staff in the Government Legal Service generally but this meant that they could reflect on the knowledge and skills of lawyers for whom they had line responsibilities and on change over time. Female lawyers made up 44 per cent of those interviewed compared with 53 per cent in the Government Legal Service. Eight per cent of the lawyers were believed to be from ethnic minorities.^x

The project benefited from the advice and support of an Advisory Committee of former senior civil servants who suggested people who might be interviewed and ways in which reports might be made helpful to users. In order to avoid the danger of contrived or self-serving accounts from interviewees, Philip made every effort to become well-informed about the work undertaken in particular departments. His notes indicate that it soon became clear that people answered questions on a subject more freely once it appeared that he had spoken to someone else about an issue, though some remained cagey out of habit. All lawyers were asked about the knowledge and skills they used in their work, what administrators looked to them for, and where relevant their involvement in policy-making. Interviews with administrators tended to be shorter and focused on their knowledge of law and their use of lawyers. A proportion were asked about disagreements between lawyers and administrators, or difficulties in understanding each other.^{xi} The remainder of this article discusses four main insights that arose from the project which allow us to understand in more depth what it is that government lawyers do, the level of control they have over their own work, how they negotiate the occasionally thin line between policy formation and advice giving and the circumstances in which it becomes part of their job to intervene by advising against a course of action.

What do government lawyers do?

In order to understand the social world of the government lawyer at work, it was important to explore what they did and how this might differ from lawyers who worked for private clients. In one sense there appeared to be similarities between private and government work despite large differences in the type of client. By way of example, those interviewed recognised that working for a knowledgeable and well-resourced client was an aspect of their job that they shared with others such as large scale commercial law firms and in-house counsel in multinational corporations. Interviewees also claimed to draw on the sort of knowledge and skills used by all lawyers whatever their area of practice. Like other large organisations they drew attention to the fact that the government occupies land and buildings, purchases goods and services, and employs people. This calls for transactional lawyers, conveyancers and litigators; involving government lawyers in a lot of 'ordinary' legal work. Speaking of the routine nature of their appeal work in Customs and Exercise one lawyer said:

We get the appeal form in, and you answer whatever grounds for appeal they put forward. The statement of case is really no longer than about three sides of A4. They're generally very short because the facts are very, very short. They've come in, they've got excise goods, the car's been seized, they've been interviewed, been given an explanation, they've stated their grounds for appeal, and we'll state the law. So they're very short form feedings. ... It's not a legally complex document at all. In fact, most of it is on a *pro forma*, so you fill in the factual background, which is going to be different in each case, but the law, so far as we're concerned, is always the same...The actual processing of a case file is very, very quick because they're not complex cases.

There was much talk of routine legal tasks. In describing their work interviewees talked about the importance of understanding legal principles, being able to read legislation and cases in conjunction with each other, researching the law relevant to a particular topic, identifying precedents and explaining technical terms and processes. They described themselves as the 'recipients' of problems defined by administrators or a legal challenge that required specialist analysis:

So, they come to us to ask for legal advice. Are the arguments that x has put forward – I’m not talking about litigation here – are these arguments, do they have any merit? Are there any ways we can counter that, do we need to, should we, can we defend it in the court? Should we change the legislation? What are the policy points? If we change the legislation in this field, then one says ‘What’s going to happen, is there a knock-on effect? Are there political ramifications?’

The routine ad transactional nature of the work discussed is relevant in the context of government policy since 1988 which has focused on hiving off transactional work which focuses on the deliver of a service to Executive Agencies. Her Majesty’s Courts Service (now Courts and Tribunals Service) was transformed into an Executive Agency in 2005 and the Government Legal Department in 2015.^{xii} This severing of legal services suggests that the work they do can easily be conducted at arms-length from the civil service departments they advise, with a resulting gulf between policy and delivery.^{xiii}

While interviewees recognised that much of their work might involve employing the same set of standardised skills as lawyers working outside of the civil service, they also drew attention to the many ways in which their work was distinctive.^{xiv} Prominent amongst these accounts was their sense of being constantly subjected to the sort of immediate, extensive and ever-changing political pressure that would not be experienced in private practice. In this context it was felt that government work required lawyers to have extensive and highly specialized knowledge of the legal machinery of government, legislative proceedings, the position of the Crown, esoteric constitutional doctrines and fundamental statutes. Particular emphasis was placed on government lawyers needing a detailed knowledge of public law and issues pertaining to the concept *ultra vires*. As we shall discover later this occasionally meant that government lawyers occasionally needed to play an active role in reining the powers of government in.

Attention was also drawn to the need for a type of “quality” lawyering that is peculiar to government work and allowed interviewees to make clear the ways in which they added value to the work of generalist bureaucrats. This involved going beyond an analysis of a discrete problem, which might be common in private practice, to look at wider contexts or patterns. This sense of there being a broader landscape to government lawyering was most commonly discussed in the context of framing legislation in a way that solved problems rather than contributed to them. In the words of one interviewee:

[T]he other contribution I think we made ... was pointing out to them the legal regulatory regime that applied [to industry]. I think they had a fair idea of how the industries worked in general terms through their consultation, but I think they weren’t really aware of the vast, of the complicated legal regime, licensing regimes, that were underpinning it all, and how, because it was a legal regime then, it had to really be taken care of.

Interviewees were keen to stress that what was referred to as a sense of custodianship distinguished lawyers from administrators within the service, and represented a duty to ensure that the law was precise and comprehensible. As one lawyer explained in their discussion of a piece of legislation:

[The Act] is probably the most stupid Act I’ve ever come across. I don’t blame the draftsman, but it is very badly drafted. I don’t know how much you know about it? ...

Administrators love it, not surprisingly, because it's a way of getting things done without the need for primary legislation.

Drawing on a sense of collective identity with other lawyers she went on:

Lawyers hate it, because the terminology, activity, burden, rights, is so vague. It's quite clear that the Act was intended to go wider than its predecessor; it simply isn't clear how wide it does go. The parliamentary debates confuse matters rather than clarify matters, and it's an absolute nightmare. ... So that's one of the examples that's going into a big request for advice to the Law Officers, who will almost certainly go to Treasury Counsel, and it is highly regrettable that an act which is only a year old is going, for the second time, to the Law Officers for advice on what it means. It is deeply depressing.

These examples make clear that the work of some government lawyers is very different from private practice or other in-house lawyering because of the close connection with the making, and not just the interpretation or implementation, of the law. Interviewees drew attention to the fact this aspect of their work required them to adopt both a sociological and doctrinal approach to their work. As one lawyer from Customs and Excise made clear:

Well, in a sense, there wasn't any law because we were writing it for the first time. What you were looking at was what behaviours do we want to change and what instruments has the government chosen to do this.

Participation in law-making means that government lawyers also work according to a different sort of timetable from other lawyers. A number of those interviewed drew attention to the vagaries of time when predicted schedules were hampered by the pace of political debate or the level of interest in an issue. A policy initiative might simmer on the 'back burner' for some time before being suddenly propelled into the limelight. Constant negotiations about the ambit of legislation or policy as it was formed was also a prominent feature of some interviewee's work:

So we had it, we were working at it all the way through from 1999, spring, to 2000, spring, and it was more or less finalised. Well, it was ready to go, but [prominent politician] wanted to give them another chance to self-regulate before he introduced it... . Anyway, it's now come in, but it all got changed during that year ... because they had another year to think about it and new people got involved. Lots of things changed about it, so we had another year of redoing the legislation and consulting, and then the secondary legislation had to be in place after last year's Y Bill, so this year's been generally the secondary legislation plus another round of amendments to the primary legislation. I think there'll be a load more next year as well.

Interviewees were keen to stress that the technical knowledge required in formulating policy and legislation was not only considerable but would also be impossible for others outside the civil service to acquire. In this context they described this unique aspects of their role as 'seers' expected to look to the future and make an assessment of the chance of the legislation being judicially reviewed, challenged under the Human Rights Act 1998 or just difficult to interpret. In the words of one lawyer:

I look to – very important – the political ramifications; not only the legal, but the political ramifications, and the dangers of litigation, albeit it might be two, three years later. And that, of course, brings in [the question of] whether any tax payer, or the Commissioner of the European Community, or anybody because we've got treaty rights, or Strasbourg could challenge. So, I look right into the future in that respect.

This aspect of the government lawyers work was sometimes contrasted with their legal education where the focus was on the past and mere speculation about what might happen in the future. A number commented that it was only government legal service that had allowed them to develop the necessary anticipatory skills they had since acquired.

Independence and autonomy

Numerous studies of professional status have focused on the struggle and success of lawyers in acquiring monopoly or control over certain types of work and the social, political and cultural capital that is acquired in their wake. Accounts of struggles around the *loss* of status and prestige are less common, though this is an important theme in Abel's (2003) seminal work on the English legal profession. Like cream on milk, it has been argued that lawyers in organisations will generally rise to the top (Dezalay and Garth, 2016). In the context of government lawyers it is significant that the British civil service has generally favoured generalists over specialists, with the result that specialists have been seen as being kept on tap rather than on top (Drewry, 1981). Indeed, specialist civil servants such as doctors, surveyors, engineers and architects have often been seen as part of the problem in twentieth century attempts at reforming the machinery of government rather than a solution.^{xv} Drewry (1988) has argued that the status of government lawyers in the twentieth century has actually slipped slightly sideways, if not downwards, in a system that does not value their knowledge and skills, limited as they are to particular types of work. Elsewhere in this collection, it has also been argued that there have also been hierarchies between government lawyers with those closer to the policy making process attracting the most prestige (Mulcahy and Rowden, 2020).

There was evidence in Philip's study that lawyers were more likely to be conceptualised as being available on tap. A number of interviewees talked about the common conceptualisation of lawyers as mere technicians, helping to implement policies but excluded from discussions about what those policies should be. This sharp separation of policy formation from legal work is a position that is likely to have increased when the Government Legal Department was designated an Executive Agency and policy work more clearly distinguished from service delivery as a result (Cabinet Office, 2018). One interviewee stressed the importance of lawyer having to cede control to other civil servants and rein in the contribution they might want to make to policy formation:

... the administrators are the policy surrogates of a minister...the lawyers offering possible ways of doing things, but not dictating which way it should be, because they are essentially, in the end, not legal questions. We come back to the reduction of jury trial; the lawyers can say 'yes, we can draw a line here, and that will have the following results', but is it acceptable in a democratic society that people should be subject to potential criminal convictions without the right to trial by their peers? Not in the end a legal question, and the lawyer has to recognise that, however strongly they may feel about it.

Another administrator spoke in very uncompromising terms about the government lawyer as a service provider. Much work on the legal profession has focused on an asymmetrical relationship between lawyer and client in which the lawyer is the expert translator. But this research raised important questions about who controls whom in the government lawyer-government client relationship. In the words of one administrator:

I view our departmental lawyers in the same way as I view our departmental accountants or our departmental economists or our departmental statisticians, which is they are a specialist service provider and I think it's up to me to manage them. I have an obligation to be absolutely clear about what it is I want from them and they have an obligation to provide what I ask for. If you get your relationship right, if you ask the wrong question, they'll tell you and they will also offer unsolicited advice. But ultimately the administrator drives the relationship because they [the lawyers] are a service provider to us, not the other way round.

Lawyering as a technical service was particularly resonant in the context of the work done by Parliamentary Counsel when drafting legislation:

Parliamentary counsel are seen as the servants of government departments and their lawyers. Their work is regarded as the work of lawyers involved in purely legal tasks, and they will not become involved in policy issues: ... [T]hey don't interfere at all. They will draft what you want, as long as it makes sense They will say, 'I can't draft this' or they'll say ... 'What you're asking me is not clear'. ... [I]f you want eight different tax points and that's what you want, they'll draft you eight different tax points. They won't suggest you only have two tax points ever. ... [T]hey will not get involved in policy at all. You can sometimes put two things to them and say 'Do you think it would be better to do this or that?' And they might ... say 'That's up to you.'

Litigators were also apt to feel that they were the passive recipient of problems that they had no part in framing. As one complained: I just sit here and [policy] just rains down on me ... we deal with what happens as a result of everybody else up there making the decisions. (AG: 25). However, as the next section shows there were, in a limited number of situations, instances in which lawyers saw it as their job to assert their authority and stand in the way of the plans of policy makers or generalist civil servants.

Saying No

Much research on the legal profession has focused on the role of education, ethics, professional networks and self-regulation in the production of particular roles or distinctive values (see for instance, Chambliss, 2005; Mire and Parker 2008). In the context of government lawyers these influences might play out in a situation in which a lawyer said 'no' to a proposal that they consider illegal, unethical or ultra vires. Working in-house is said to bring with it dangers that lawyers become 'ethically risky insiders' because of their close connection and shared sense of purpose with their client (Moorhead et al, 2018 p.5). Several corporate scandals have alerted us to the fact that lawyers who should have been working to put a brake on the excesses of management failed to do so because of close partnerships with clients. Moorhead *et al*, (2018) have argued that organisational misconduct is largely dependent on the extent of embeddedness within organisations. The data collected by Philip suggests that the ability and willingness of lawyers to say no to Ministers and policy makers was an important way in which the lawyers in this study re-asserted their power and professional values. In the words of one lawyer:

Within the law. I will not be dictated to. I will not say their policy, and then suit the law for their policy, within the law. I always try to accommodate them, but policy doesn't dictate law. The law will dictate always. It doesn't lead it, and therefore I think many, many years ago, there were some lawyers who worked on the policy, and then fitted the law to suit it. ... That was in the Seventies. That is not happening now.

Another interviewee described how there is a line beyond which you say 'No reasonable ...', there's a sort of Wednesbury line where you say, 'No reasonable minister could choose that.' (PB: 22). Others expressed the need to say no in terms of personal values and professional responsibility:

Integrity is the first, and intellectual integrity, is the first requirement. We are not hired thugs. Part of the increasing difficulty as the Civil Service changes is that they want us to be hired thugs, they want us to go out and find legal arguments for particular courses of action, ... what is special about Government law is that you must continue to give objective, unbiased advice.

Interviewees were aware that saying no was often characterised by others as a lawyerly tendency to be overly pedantic or risk averse. This view of lawyers was frequently raised in the context of them being conservative and as cautious, or disposed to the safe option. Innovation was said to make them nervous. In the words of another administrator:

You can run into policy officials who see lawyers as – maybe with justice from some experience, I don't know – they can see them as inhibiting or an obstacle course really, almost an enemy, they're just fusty, fudgy old lawyers who're making life difficult. It's going about the business of saying, 'Well good lawyers shouldn't be doing that. They should be helping you do what you want to do.'

This description was recognised by lawyers but they were also keen to justify this approach. In the words of one:

There's certainly a feeling among some officials that Whitehall lawyers are by nature very conservative, that lawyers are very conservative to begin with, and Whitehall lawyers are particularly a conservative type of animal, and that they were partly to blame, as they are for other things, stopping things that would very usefully carry forward ministers' policy. Now the other side to that argument of course is ... the lawyers' function to make sure that things are done properly and that ministers will not thank lawyers for letting them do a proposal that ends up being holed below the water line ... and a whole programme collapsing. So conservatism has got its point. That's the debate that goes on all the time.

It was recognised, however, that the safe option is often also the sensible one. The reason for caution was summed up simply by one interviewee: 'if you did something that turned out to not work, the prospects would be appalling, absolutely appalling.' Another recognised that:

....they're doing it within a system that's got a rule of law, and so you've got to go through all this tiresome business of getting advice and making sure that you are proceeding lawfully and properly and taking opinions. As I say, officials that have been using lawyers for years instinctively just know that, they're not a problem, whereas

some lawyers, some people who haven't got that experience, they've got a learning curve as well.

Others drew attention to the fact that the repercussions of failing to say no could all too easily be played out in the public eye if a legal challenge was mounted e.g., by a pressure group. There was a sense in interviews of sensitivity to risk and accountability having become more heightened in recent years, reflecting academic speculations about the emergence of a risk society from the late 1980s onwards (Beck, 1999; Giddens, 1991; Douglas, 1992).

Lawyers as policy influencers

The characterisation of lawyers as mere technicians or brakes on policy presented in the sections above focus on situations in which lawyers and other civil servants see themselves as having very distinctive and bounded roles. Other findings from the empirical work undertaken by Philip suggest a more complex and subtle relationship between administrators and lawyers. This was particularly evident in discussions about how policy comes to be made, and suggests a more collaborative understanding of the relationship between lawyers and administrators than has been anticipated by those who consider bureaucracy and the legal profession to be antithetical. While the divide between service delivery and policy was frequently referred to, mention was also made of the fact that 'good' administrators would usually accept informal suggestions from lawyers about policy matters. In part, this was because policy was not always fully formed or tested when it was presented to lawyers. In these instances, an "iterative" process developed in which solutions slowly emerged from discussion and a distinctively legal contribution to 'policy' debate was rendered possible. In such contexts, lawyers commonly guided, but did not dictate, policy. They might also prompt administrators to see matters in a different light. At times, administrators seemed reluctant to accept this argument, but lawyers generally felt that they had helped administrators articulate policies. For some lawyers, opportunities to influence policy formation had been facilitated by cuts in the civil service budget which meant that administrators were happy to get help wherever they could. Lawyers mentioned the fact that policy instructions were increasingly given at a lower level by administrators who were less confident or clear about traditional boundaries. Indeed, lawyers complained that initiatives would sometimes reach them insufficiently ready for legal implementation. But more generally, lawyers and administrators acknowledged that there had been cultural shifts in the Civil Service towards greater co-operation and a less obviously territorial approach. For a number, changes in the law such as the Human Rights Act 1998 or Regulatory Reform Act 2001 meant that existing law was inextricably bound up with policy formation and required lawyers to be much more centrally involved in guiding the process by which policy decisions were reached (see also Yong, 2013).

The sort of influence that lawyers had on implementation could be very subtle. They might, for instance, be included in policy discussion on the basis that it was important for them to be able to understand the broader context in which their work would later be carried out. At other times the traditional distinction between substance and technique which some administrators attempted to draw did not hold in practice. By way of example, the fine line between value judgement and increasing attention to risk management is indicated in the following exchange between interviewer and government lawyer:

Q: [One lawyer said] 'We can advise on policy', or 'We can advise on the implementation, and sometimes we send things back because something is too harsh',

and that quite struck me, because in some sense, is ‘harsh’ ... a legal value, which is something in your area, or is it something which is just a value judgement –

A: No, I think it is part of [what we do] to advise whether it is too harsh ... because ... if it is too harsh ... it is too harsh because it will be challenged – judicial review... it is no good having a policy ... that doesn’t work, or you’ll be ending up in court every five minutes. Now – that is part of our job, so that they are guided, not misguided, and that is very important. You guide them, you give directions and guidance on matters of policy... I can’t believe any lawyer says I’m not involved in policy; ... what is the lawyer doing if he’s not guiding? He can’t dictate it – he guides, and he directs; guides and advises.

Other lawyers commented that their contribution could make the policy process more realistic, grounding it in practical realities by drawing attention to specific problem scenarios. For a number of interviewees, the very act of being briefed on policy threw up situations in which the approach adopted by policy makers began to be critiqued:

... sometimes you take it more objectively as well, and you can grasp things and say ‘Well, I don’t quite understand that’, and in the course of discussing why you don’t quite understand it, something else comes out. ... In your naivety, you ask someone, and they start thinking about it, because some people can be too close to it. And then they start thinking about ‘Oh yes, and what if that happened’ – and it starts it developing all over again, and we might sometimes go back to the drawing-board. So, there is an element of being a little bit naïve which tests, and questions. I think the most important thing for a lawyer when they’re developing, helping to develop, a policy is to question as much as they can.

And again,

... high level communications between policy and the Sol’s Office has always been there. I think what was reasonably novel was that we actually brought it down. ... [T]his was what was happening on the ground, and policy had to come down to see what was happening and had to be present in the process. ... There’s been a direct input into, not into policy but into the mindset of the policy makers by that process.

Lawyers were very aware of how carefully they had to tread when opening up discussions about policy questions, not least because of the repercussions for their career or standing. As one senior lawyer, who had stressed the service aspect of the lawyer’s work, said:

... you need to recognise that you can offer, you can hint, you can assist, but it is their job to take the responsibility for advising ministers which way to go. And that you’re very foolish if you don’t, because then they won’t ‘own’ the policy, and when it goes wrong, they will say ‘Oh, but I was just doing it because the lawyers told me to.’

More generally, interviewees talked of the many ways in which lawyers and administrators drew on familiarity with each other and a joint understanding of recurrent problems in their day to day workings. In this context they characterised legal advice as a process rather than a discrete and merely technical event. The increasing importance of collaborative working in pursuit of a common mission was a major theme to emerge from interviews. As one lawyer explained:

We've just had ... lots of stuff about more 'team working'. But the reaction of most of the lawyers is 'but, that's what we do'. If we don't ... there are things where there is great hostility between the lawyers and the administrators, and everything is fought through. There are things where the lawyers feel very 'left out' – but there are very large number of cases where there is the closest possible joint working, and where there's 10 per cent pure law at one end, and 10 per cent pure policy at the other, and the middle 80 per cent, it is very difficult to say who is doing what, and if the two of them, or if the two groups of people are working well together, it doesn't need to be resolved.

Administrators also admitted that discussing things with the legal team could actually strengthen or test arguments they were already inclined to make to Ministers. In this way, the lawyers' skill in asking difficult questions was considered critical to the success of a policy or programme. But, lawyers also drew attention to the fact that administrators often had non-legal knowledge that was critical to an understanding of the field at their fingertips. In some instances, collaborative working was difficult to avoid if lawyers and administrators worked in close physical proximity or were required not to speak to others outside of the department because of the highly confidential nature of issues.

Conclusion

The research described in this article aimed to add to the limited literature on government lawyers that has been undertaken to date. Like other studies which have shifted the focus away from High Street practice and poverty law it has revealed a number of ways in which lawyers collaborate with knowledgeable clients. Since the research reported here was undertaken there has been a burgeoning interest in in-house lawyers but it remains rare for government lawyers to be separated out as a distinct sub-set who operate in a radically different culture to other lawyers. This study suggests that there are important distinctions to be further explored in the sort of work they undertake, not least of which are detailed knowledge of the policy and law making process or constitutional law and convention. Like most empirical accounts of behaviour it shows that the picture on the ground is much more complex and nuanced than theorists would have us believe. As well as the many distinctions between lawyers and administrators to which interviewees drew attention to which suggest role conflict, it is also apparent that task seepage, of the kind found by Flood (2013) in commercial practice is also apparent in the formulation of policy. These findings bring to the fore the many ways in which they collaborate or compromise in contrast to the traditional trend of focusing on difference and conflict. Of all the data presented here the willingness of lawyers to say no to initiatives that they consider ultra vires is most critical to claims that they undertake a special type of role in government circles.

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Endnotes

ⁱ Linda Mulcahy's thanks go to Alan Paterson for reading and making comments on an earlier version of this draft.

ⁱⁱ Grant number R000239565. Keith Hawkins was a co-applicant on the project and Dr C Clifford was employed as a research officer on it from February 2002 until July 2003

ⁱⁱⁱ These are Daintith and Page (1999); Dezalay, (1992); Dezalay, (1995a); Dezalay, (1995b); Drewry, (1981); Freidson, (2001); Page, (2001); Nelson and Nielsen (2000) and Rosen, (2002).

^{iv} Sincere thanks go to Alan Paterson who read and commented on an earlier version of this draft. As a friend of Philip it was hoped that he would be more sensitive to how to capture his academic voice.

^v Some Departments such as the Attorney General's Office (AGO), HM Revenue & Customs (HMRC), Government Communications Headquarters (GCHQ), the Security Service (MI5) and the Secret Intelligence Service (MI6) continue to have their own in-house legal teams. Other organisations such as the Foreign & Commonwealth Office, Crown Prosecution Service, Office of the Parliamentary Counsel, HM Courts & Tribunals Service and the devolved administrations in Scotland, Wales and Northern Ireland also employ their own lawyers. Assessing the significance of the shift towards centralisation would involve a rerun of the research reported here. It is argued that the data still has much to contribute to our understanding of how lawyers who work alongside administrators think about their work and identity. See further <https://www.gov.uk/government/organisations/civil-service-government-legal-profession/about>

^{vi} The Treasury Solicitor's Department (TSol) was a non-ministerial government department that provided legal services to the majority of central government. On 1 April 2015 TSol became the Government Legal Department (GLD).

^{vii} See further: https://web.archive.org/web/20131029202717/http://www.tsol.gov.uk/about_us/our_history.htm

^{viii} See further: <https://www.gov.uk/government/organisations/civil-service-government-legal-service/about/recruitment#flexible-careers>

^{ix} Philip Lewis's notes make clear that he was cautious in his use of documentary sources such as Legal Department guidance notes, given their apparent lack of significance for those interviewed.

^x Women enter private practice in large numbers but do not progress as easily to senior posts (Webley, and Duff 2007; Tomlinson, Muzio, Sommerlad, Webley and Duff 2011). But women are in a majority amongst in-house

lawyers (Moorhead et al, 2018). In this study differences in grading levels between lawyers and administrators and a breakdown in centralised grading prevented comparison with the administrators.

^{xi} There is no evidence from the records Philip left of any of the interviewees being legal qualified administrators. This sort of overlap between roles is evident in other fields such as doctor managers in the NHS.

^{xii} The Government Legal Department does however continue to be a non-ministerial department.

^{xiii} See further Cabinet Office (2018)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690636/Executive_Agencies_Guidance.PDF

^{xiv} On this point see The Review of Government Legal Service conducted by Sir Robert Andrews 1988-89

^{xv} See for instance Appendix D of the Fulton Committee Report.