BINGHAM CENTRE FOR THE RULE OF LAW

THE UK'S *THE JUDGE OVER YOUR SHOULDER*: A MODEL FOR KENYA?

Report

Bingham Centre for the Rule of Law

April 2016

www.binghamcentre.biicl.org

Citation: This report should be cited as: J van Zyl Smit and L Moxham, *The UK's* The Judge Over Your Shoulder: *A Model For Kenya?*, Bingham Centre for the Rule of Law, 2016.

ISBN: 978-1-905221-66-0

Copyright: © Bingham Centre for the Rule of Law / BIICL 2016. This document is available for free download from the Bingham Centre's web site.

About the authors: Jan van Zyl Smit and Lucy Moxham are Associate Senior Research Fellows at the Bingham Centre for the Rule of Law.

Acknowledgements

The Bingham Centre gratefully acknowledges the financial support which it has received for this project from the UK Foreign and Commonwealth Office's Magna Carta Partnerships Fund and the Department for International Development's Rule of Law Expertise Programme (ROLE UK).

This report is based on a Bingham Centre discussion paper presented at the "Article 47 workshop" convened by the Katiba Institute and hosted by the Kenya School of Government in Nairobi on 21-22 March 2016. We are grateful to the Katiba Institute and the School of Government for inviting us, and to Steven Bramley CBE and Professor Cora Hoexter of the University of the Witwatersrand, South Africa, whose participation in the workshop as part of the Bingham Centre delegation was funded by ROLE UK.

Our thanks go to the UK Government Legal Department for permitting us to use past, present and forthcoming versions of *The Judge Over Your Shoulder* under Open Government Licence version 3.0 http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/. We are particularly grateful to Government Legal Department lawyers Stephen Braviner-Roman, Steven Bramley CBE and Lee John-Charles and to Nicholas Short of the Civil Service Policy Profession Support Unit for discuss their work with us and being extremely generous with their time. Phil Dixon of the Foreign and Commonwealth Office Legal Department kindly spoke to us and to the Katiba Institute at the outset of this project. Thanks also go the Crown Law Office of New Zealand for providing us with both editions of New Zealand's *The Judge Over Your Shoulder*.

The Founding Director of the Bingham Centre, Professor Sir Jeffrey Jowell QC, played a key role in steering this project. Bingham Centre interns Joanna Wilson, Sapna Reheem and James Divecha provided valuable research assistance. Professor Christopher Forsyth of the University of Cambridge and Professor Maurice Sunkin of the University of Essex kindly read and commented on an earlier draft of this report. None of these persons should be held responsible for the views expressed or any errors that remain.

The Bingham Centre for the Rule of Law

The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. A London-based organization working internationally, the Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity.

The Bingham Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

BINGHAM CENTRE FOR THE RULE OF LAW

BIICL British Institute of International and Comparative Law

www.binghamcentre.biicl.org

www.biicl.org

EXECUTIVE SUMMARY

This report considers the benefits of providing civil servants with a guide to administrative law. It examines the development and use of the UK's *The Judge Over Your Shoulder*, which has inspired similar administrative law guides in New Zealand and Malawi. The report draws on these experiences to ask how Kenya might develop an administrative law guide for its own civil servants.

Administrative Law

- Administrative law is entrenched in Kenya by the right to fair administrative action (Article 47 of the 2010 Constitution), and partly codified by the Fair Administrative Action Act 2015.
- This body of law builds on principles of English common law, which courts use to review decisions on grounds of legality, procedural fairness and reasonableness.
- Alternative mechanisms such as ombudsmen provide further scrutiny.

The UK's *The Judge Over Your Shoulder (JOYS)*

- *JOYS* is written for civil servants, but is also publicly available.
- The concrete aims of *JOYS* are to inform public servants about the principles of administrative law and guide their recourse to legal advice.
- The further objectives of *JOYS* are to promote good administration and reduce the risk of decisions being challenged in court.
- In practice, *JOYS* has become part of a wider programme of legal awareness aimed at improving decision-making and interaction with government lawyers. It also provides the basis for bite-size guides and interactive workshops.
- Four editions of *JOYS* have been produced since 1987, with a fifth edition due to be published in 2016. They have expanded in length and legal detail, while adding practical information on the judicial review process.
- In future, the civil service plans to expand the range of legal awareness activities, making full use of digital technology.

New Zealand's *The Judge Over Your Shoulder*

- Though modelled on the UK's *JOYS*, this version also contains a practical guide to consultation exercises and the preparation of recommendations for ministers.

The *Manual of Administrative Justice in Malawi*

- The *Manual* is based on the constitutional right to administrative justice and the common law. It seeks to consolidate the rule of law.
- The *Manual* was requested and designed by senior civil servants, and is addressed to both ministers and civil servants at all levels.
- Civil servants have used it in training, decision-making and to resist illegal actions.
- The *Manual* has extensive appendices, including an overview of judicial review proceedings and a guide to the civil service disciplinary process.

The report concludes with a set of **questions arising for Kenya**, including the rationale for introducing a Kenyan administrative law guide, how to decide on the content, format and approach of such a document, and how to make the most of the guide once it exists. In our view, an administrative law guide offers the potential, best realised through appropriate training or legal awareness activities, to equip civil servants with a sound knowledge of this body of legal principles which is essential to ensuring decision-making that is lawful, procedurally fair and reasonable. The work of civil servants impacts on the daily lives of ordinary people and the delivery of public services, and any improvement in adherence to administrative law principles represents a real and practical gain for the rule of law.

TABLE OF CONTENTS

Introduction 1
A. Administrative law in the English and Kenyan legal systems 3
B. The UK's *The Judge Over Your Shoulder* 9
C. New Zealand's *The Judge Over Your Shoulder* 21
C. The *Manual of Administrative Law in Malawi* 25
E. Questions Arising for Kenya 31
Conclusion 34
Appendix: Tables of Contents of Administrative Law Guides 36
United Kingdom 36
New Zealand 40
Malawi 42

Introduction

1. What are the benefits of providing civil servants with a guide to administrative law, and how are they best achieved? To the extent that an administrative law guide enables civil servants to adhere more closely to principles of legality, procedural fairness and reasonableness, it offers the potential to strengthen good governance and legal accountability. But how much can one hope to communicate about this often complex area of law in a guide for the general reader, and how should such a document be used to best effect in civil service training, decision-making and related activities?
2. The Bingham Centre for the Rule of Law has been examining these questions at the suggestion of the Katiba Institute, an independent institute based in Nairobi. As part of its work to promote constitutionalism, Katiba plans to develop an administrative justice guide for the Kenyan civil service. Katiba's project is not confined to administrative law, as it is intended that the guide will also address the wider context in which public decisions must now be made under the new Constitution, including its extensive commitments to the rule of law, human rights, and principles of good governance and ethical conduct in the public service. At the centre of the guide, however, will be the right to "fair administrative action" established by Article 47 of the 2010 Constitution of Kenya, and its implications for administrative law and the work of the civil service.
3. In this Bingham Centre report, we consider what lessons could be learned from the experience of the UK civil service, where the administrative law guide *The Judge Over Your Shoulder* (sometimes known by its abbreviation, "*JOYS*") has been in use since 1987. It is widely thought that *JOYS* has been instrumental in raising standards of administration in this country and reducing the need for decisions to be challenged in court. However, there is relatively little information publicly available about how the guide has been used within the civil service, or about the thinking of those responsible for revising it over the course of four successive editions, with a fifth edition due to appear in 2016. The Bingham Centre research team has been fortunate to explore these issues further through interviews with senior government lawyers and other professionals involved in civil service training. In addition, we have researched the administrative law guides of New Zealand and Malawi. Both countries initially drew on the UK's *JOYS* to develop their own administrative law guides, although the results have been quite different. (We are also aware of a Hong Kong version of *The Judge Over Your Shoulder*, but this guide is not publicly available.) As a developing jurisdiction with a constitutional commitment to administrative justice, Malawi may be a particularly relevant parallel to Kenya.
4. This report was first presented at an "Article 47 workshop" convened by the Katiba Institute at the Kenya School of Government in Nairobi on 21-22 March 2016. The purpose of this workshop was to discuss the potential for developing a guide to administrative law for Kenyan public servants. Among the public bodies represented at the workshop were the School of Government, the Public Service Commission, the Commission on Administrative Justice and the Kenya National Human Rights Commission.
5. Section A of this report presents a very brief outline of administrative law in the English and Kenyan legal systems, in order to provide some idea of the need for a civil service guide to this subject. Section B sets out the development, purposes and use of the UK's *JOYS*, including its place in broader legal awareness programmes within the civil service, while also summarising developments in the content, format and approach across the four

published editions and discussing possible future developments. Sections C and D respectively examine the administrative law guides that exist in New Zealand and Malawi, both of which have been influenced by the UK's *JOYS*. Section E draws on the findings of our comparative research to pose a series of questions about the rationale for introducing a Kenyan administrative law guide, and how to decide on the content, format and use of such a document. The Appendix contains the tables of contents of the various editions of the UK's *JOYS* and the other administrative law guides discussed in this report.

A. Administrative law in the English and Kenyan legal systems

Overview

6. Readers of this report will need no reminding that administrative law is concerned with the allocation of public power, the proper exercise of that power, and mechanisms that enable the exercise of power to be challenged by way of judicial review or other independent scrutiny.
7. This rough definition stands in need of some elaboration:
   - For present purposes, "public power" is being used loosely to refer both to the functions allocated to public bodies, and to public functions performed by certain private bodies.
   - The allocation of such powers rests ultimately on foundations of constitutional law, and as a consequence the competence of Parliament to grant powers by legislation may be subject to various limits.
   - As to the proper exercise of public power, the interpretation of the statute or other legal provision granting it is of vital importance. An important ingredient in that interpretation, in any legal system with common law heritage, is the judicial review case law that has established grounds of review which courts may find to be applicable to a particular situation.
   - Because the grounds of review very often do not appear explicitly in the text of the empowering provision, it may be difficult for lay people, including civil servants, to appreciate their impact. For example, even where there is no mention of conducting a consultation exercise or holding an individual hearing, the courts may still hold that this is what procedural fairness requires before a particular statutory power may be exercised in a particular way. One of the principal functions of the UK's *JOYS* and other administrative law guides is to make civil servants aware of such implicit limits on their decision-making power.
   - Finally, it is also important for civil servants to know about mechanisms other than judicial review that may enable their actions and decisions to be challenged and investigated, for example internal appeals within their department, or scrutiny by external bodies such as an ombudsman or a human rights commission.
8. In what follows, the features of English and Kenyan administrative law are considered in somewhat more detail, and we highlight significant differences that have emerged since Kenya gained independence from Britain in 1963. The English common law heritage of judicial review is something which Kenya has in common with the other jurisdictions mentioned in this report, New Zealand, Malawi and South Africa. Space precludes a full summary of how administrative law has developed in those jurisdictions, but their salient features will be mentioned where relevant.

English administrative law

9. It is commonly accepted that there are three broad grounds of judicial review in English law:[1] legality, procedural fairness and reasonableness or substantive review.[2] These are no more than broad groupings, each of which contains numerous more specific grounds of review that have been developed through case law.

10. The pace of development of these grounds by the judiciary began to accelerate dramatically in the mid 20th century. The expansion of judicial review grounds was not simply a matter of piecemeal accumulation of precedent, but also involved the courts recognising broad new principles which opened up whole areas of public decision-making to scrutiny. Two examples from the 1960s illustrate the scale of these underlying shifts, although arguably they did not come from nowhere but rather reflected a working-through of rule of law principles already present in the common law:
    - Procedural fairness was transformed when the courts decided that natural justice, or the right to a fair hearing, should no longer be confined to cases in which a public body was performing judicial or quasi-judicial functions.[3]
    - Illegality was reshaped when courts declared that they would examine not only whether a public body was acting within its powers, but also whether it was exercising such powers for the purpose for which they had been granted.[4]

11. The rapid development of judicial review grounds continued through the 1980s, when *JOYS* first attempted to summarise administrative law for civil servants, and the field remains an area of considerable judicial activism today. For this reason, successive editions of *JOYS* have taken the approach of "warning" civil servants that particular grounds of review are likely to undergo further development by the courts, which might render the information in *JOYS* out of date. Among the notable developments in this era have been the rise of legitimate expectations, a review ground which emphasises the value of consistency when individuals are affected by a series of public decisions over time, and the clarification of circumstances in which procedural fairness requires decision-makers to step aside to avoid a conflict of interest or an appearance of bias. The procedural law concerning challenges to public bodies has been subject to legislative reform at regular intervals, and the courts have also contributed to developments in this area, for example through precedents expanding their ability to grant interim relief in judicial review proceedings and financial damages in civil suits against public bodies.

12. Constitutional changes in recent decades have had a significant impact on administrative law. Although the United Kingdom still has no written constitution, the Human Rights Act 1998 (HRA) imposes a strong duty on courts to interpret legislation, including the powers of public bodies, in a way that is compatible with the European Convention of Human Rights (ECHR). In the area of substantive review, this has helped to ensure that when public bodies take decisions that affect fundamental rights they will be held to standards of proportionality which are more demanding than mere rationality or *Wednesbury* reasonableness. The treaties and legal instruments of the European Union (EU) have an

---

[1] This paper focuses on administrative law in England and Wales and does not deal with the slightly different systems that exist in Scotland and Northern Ireland.
[2] Following Lord Diplock these are sometimes referred to as "illegality", "irrationality" and "procedural impropriety". See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410.
[3] *Ridge v Baldwin* [1964] AC 40.
[4] *R v Minister of Agriculture ex parte Padfield* [1968] AC 997 (HL).

even stronger domestic effect than the ECHR, and in some cases this requires courts to override domestic legislation. Although very important in terms of UK constitutional law, EU law does not have any obvious equivalent in Kenya. It is therefore beyond the scope of this report, as is the devolution of some legislative and executive powers to Scotland, Wales and Northern Ireland.

13. Besides judicial review, there are numerous other mechanisms by which public bodies may be held accountable for the exercise of their powers. One of the oldest is the Parliamentary Commissioner for Administration (PCA), sometimes referred to as "the Ombudsman". Many sector-specific ombudsman offices and other oversight institutions also exist. There is a network of statutory tribunals for the adjudication of individual complaints in areas such as immigration, housing, social welfare and freedom of information. These have been consolidated in the past decade with most now falling under an Upper Tribunal which has the effective status of a court, with its decisions being appealed to the Court of Appeal. The powers of these bodies vary widely. Tribunals may combine the powers of a reviewing court with a more extensive ability to revisit a public body's decisions and substitute a new decision. Ombudsman offices, by contrast, tend to have only powers to investigate and make recommendations, but they are often able to deal with a wide range of complaints, for example "maladministration" in the case of the PCA, which goes beyond the established grounds of judicial review. Their recommendations need not be confined to the rights and wrongs of an individual case but may also address systemic failings and make proposals for reform.

Kenyan administrative law

Before the 2010 Constitution

14. Kenyan administrative law must be understood against the background of the constitutional history and politics of Kenya. The British colonial period saw wide-scale land dispossession, racial discrimination and an increasingly militarised form of government. After independence in 1963, the rapid expansion of Presidential power led to Kenya becoming a *de facto* and then a *de iure* one-party state, until multi-party politics was restored in 1992. The 1990s and 2000s were a period of intense political contestation which included a broad movement for constitutional change. This resulted in a constituent assembly, and finally, notwithstanding the devastation of the 2007 post-election violence, the adoption of the 2010 Constitution through a popular vote. The Constitution is characterised by its commitments to the achievement of social justice, an inclusive and democratic society, human rights and the rule of law. It restructures the legislative, executive and judicial branches of government and establishes a number of new institutions to promote good governance and ethical standards in public life.

15. Although Kenyan courts did have a judicial review jurisdiction before the 2010 Constitution, many serious abuses of power went largely unchecked. These included widespread detention without trial during the most authoritarian periods as well as many other human rights abuses. For a number of years the judiciary refused to hear any cases for enforcement of the Bill of Rights and constitutional provisions were understood as placing the President above the law.

16. The underlying system of administrative law during this period was still a form of English common law, imported by legislation. The Law Reform Act, which is still in force, was first enacted in 1956.[5] It introduced the system of judicial review which then existed in England, including its remedies and procedures. After independence, the Kenyan courts continued to cite English case law. However, it appears that the adoption of new doctrines such as legitimate expectation and proportionality was hampered by the limited availability of legal materials. [6] The situation improved when a Judicial Review and Constitutional Division of the High Court was established in 2003 and the judges of this bench developed greater expertise in this area.

The 2010 Constitution and its impact

17. The 2010 Constitution contains a number of measures to strengthen administrative law mechanisms for holding the government and other public bodies to account. It guarantees the judicial review jurisdiction of the courts by confirming that the High Court is vested with "supervisory jurisdiction … over any person, body or authority exercising a judicial or quasi-judicial function".[7] On the face of it, this is a relatively narrow formulation and the reference to a "judicial or quasi-judicial function" recalls the traditional English law position with regard to review for procedural unfairness before this area was liberalised in the 1960s.[8]

18. It is unlikely that any such restriction is intended, however, as the Constitution also establishes a right to "fair administration action", in terms that are far more generous. Article 47 provides:

> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
> (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
> (b) promote efficient administration.

19. The inclusion of this provision in Chapter 6 of the Constitution, the Bill of Rights, indicates how important it is that individuals should be able to challenge the exercise of public power in a society based on social justice, inclusive government, human rights and the rule of law to which the Constitution is committed. By affirming that every person is entitled to this form of legal accountability as a constitutional right, the Kenyan Constitution follows the example of a number of other constitutions since the early 1990s, most of them in Africa. For reasons which we will consider later in this report, two particularly relevant constitutional

[5] Cap 26.
[6] Peter Kaluma, *Judicial Review: Law, Procedure and Practice* (LawAfrica 2009), section 2.5.
[7] Article 165(6).
[8] See para 10 above.

provisions are those of South Africa, where the wording is almost identical, and Malawi, where the constitutional right is still quite similar and its effects have been considered in a civil service manual on administrative law.

20. The substantive provisions of Article 47 are for the most part expressed in very general language. There is a specific right to written reasons whenever "a right or fundamental freedom of a person has been or is likely to be adversely affected", which is very likely to be what the more flexible common law would also require in a case where fundamental rights were affected.[9] Apart from this, administrative action is required to be "lawful, reasonable and procedurally fair" – which simply restates the modern English law grounds of review at the highest level of generality – and also "expeditious" and "efficient".

The Fair Administrative Action Act 2015

21. If Article 47 had contained only these broad guarantees, it would have been the task of the judiciary to develop the Kenyan common law by interpreting the terms "expeditious, efficient, lawful, reasonable and procedurally fair" in a purposive and progressive manner. This might very well have left the courts with too much discretion and perhaps some judges could have been pressured into adopting interpretations that favoured speed or efficiency at the expense of accountability. However, the problem was avoided as Article 47(3) required Parliament to enact legislation to give more detailed effect more to these principles. In this respect, Kenya followed the model of the South African constitution. Parliament proceeded to enact the Fair Administrative Action Act 2015 (FAAA), which shares a number of features with South Africa's Promotion of Administrative Justice Act 2000 (PAJA):

- Public powers are made subject to a set of default steps that should be taken to ensure procedural fairness in certain situations:
    - The FAAA sets out the requirements for a fair hearing when administrative action is likely to adversely affect the rights or fundamental freedoms of a person.
    - The FAAA also makes provision for consultations to be held when the rights or interests of a group of persons or the general public are at stake.
- Provision is made for persons who are materially or adversely affected by administrative action to be provided with reasons on request. Failure to do so triggers a presumption that the action was taken without good reason.
- The grounds of judicial review and the remedies that may be issued are listed, which effectively codifies these aspects of administrative law. However, in the case of the FAAA this is not an exhaustive code as the common law is expressly preserved.

22. The FAAA has been in force for nine months, so it may still be somewhat too early to gauge its effect. Since the common law is not abrogated, it will be interesting to see how the courts will use the provisions of the FAAA, and the constitutional right which underpins it, to develop the Kenyan case law of judicial review. Perhaps a more practical and immediate

[9] Article 47(2). In the common law, it is difficult to imagine a case in which a public decision which affected Convention rights would be upheld without reasons being tendered to satisfy the proportionality test.

benefit of this partial codification of administrative law is that it may help many people to learn about their administrative law rights. Like most Kenyan legislation the FAAA is available online, whereas administrative law textbooks are generally not. To the extent that the FAAA sets out some of the workings of administrative law in relatively clear language, it may therefore improve access to justice in areas where internet access is readily available. The FAAA was also expected to further access to justice by enabling individuals to seek review of administrative action in tribunals other than the High Court, but the Act, while not excluding this possibility, does not establish any new tribunals.

Alternative scrutiny mechanisms

23. Alternative mechanisms of scrutiny do exist in addition to judicial review, and these have been appreciably strengthened by the Constitution. Article 59 of the Constitution establishes the Kenya National Human Rights and Equality Commission, and permits further commissions to be established to share its mandate. The Commission on Administrative Justice (CAJ) is one such body, with specific responsibilities in the area of the Article 47 right to fair administrative action. The CAJ is also known informally as "the Ombudsman" and possesses wide powers to "adjudicate on matters relating to administrative justice."[10] The CAJ may investigate and inquire into complaints regarding the conduct of public bodies, on grounds ranging from "unlawful, oppressive, unfair or unresponsive official conduct" to "discourtesy, incompetence, misbehaviour, inefficiency and ineptitude".[11] However, it is prevented from investigating "anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to."[12] Like many ombudsman institutions around the world, the CAJ does not have the power to issue legally binding remedies but only recommendations. It is also tasked with strengthening the complaint handling capacity of other institutions and promoting alternative dispute resolution.

24. The foregoing is a very brief survey of the Kenyan administrative law landscape, with which most of our readers will be far more familiar than we are. It mainly serves to illustrate the point that the Constitution has provided a powerful impetus for accountability in an area where the Kenyan legal system has long been subject to the constraints of authoritarian politics and lack of resources. At the same time, the combined effect of the Article 47 right to fair administrative action, the statutory code introduced by the FAAA and the creation of the CAJ and other new institutions of scrutiny has heightened the need for a guide which explains the new administrative law system in a way that is accessible to lay readers, which would include most civil servants except those who are legally trained.

[10] Commission on Administrative Justice Act 2011, s 26(c).

[11] Commission on Administrative Justice Act 2011, s 8.

[12] Commission on Administrative Justice Act 2011 s 30(g). The Commission also has discretion under s 34(a) to decline to investigate a complaint if the Commission thinks that adequate remedies under any written law or administrative practice are available.

B. The UK's *The Judge Over Your Shoulder*

What is *The Judge Over Your Shoulder*?

25. The UK civil service has had a guide to administrative law, entitled *The Judge Over Your Shoulder* (*JOYS*), since 1987. In that time, *JOYS* has more than doubled in length and there have been interesting changes in content, format and approach along the way. The most recent edition was withdrawn on 31 March 2015 and is currently being revised, though it is still publicly available on the internet.[13] *JOYS* is a publication of the Treasury Solicitor's Department,[14] which became the Government Legal Department (GLD) on 1 April 2015.[15] The GLD sits within the wider Government Legal Service (GLS) and is the "single largest provider of legal services to government", both acting as litigation lawyers and providing legal advisory services in relation to policy, legislation, employment and commercial matters.[16] The editorial team drafting the forthcoming Fifth Edition of *JOYS* are primarily litigators as they are "closer to the courts".[17]

Why was *JOYS developed*?

26. During our interview with a senior GLD lawyer, *JOYS* was presented as a response to increased judicial review in the 1980s and 1990s, and seen in the context of the increased judicialisation of political decision-making.[18] This is also the view of many academic observers. Professor Maurice Sunkin has observed that until the mid-1980s "central government's reaction to judicial review litigation was typically case-based, reactive and pragmatic".[19] However, from this point onwards, "the overall approach within central government started to change so that planning for judicial intervention was to become more proactive and systemic".[20] According to Professor Diana Woodhouse, the civil service was relatively unprepared for the rise in court challenges because, "unlike its continental counterparts, the British civil service has not been dominated by those with legal training".[21] Therefore, raising the legal awareness of administrators became necessary, and *JOYS* was part of the government's response.

27. Initially, *JOYS* was distributed to administrators free of charge, though it was later sold to departments.[22] Crucially, it was not publicly available, which attracted strong criticism at the

[13] See https://www.gov.uk/government/publications/the-judge-over-your-shoulder-JOYS-edition-4. This and all other websites last accessed 11 April 2016.
[14] See e.g., Fourth Edition https://www.gov.uk/government/publications/the-judge-over-your-shoulder-JOYS-edition-4.
[15] See https://www.gov.uk/government/organisations/treasury-solicitor-s-department.
[16] See https://www.gov.uk/guidance/guide-to-the-government-legal-service-gls-organisations See also Stephen Braviner-Roman (Director General, Legal Services Directorate A, GLD), via email – on file with authors.
[17] Lee John-Charles (Head of Litigation Division B, GLD), interview.
[18] Braviner-Roman, interview.
[19] 'Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies' in Marc Hertogh and Simon Halliday (eds) 'Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives' (CUP, 2004) 63.
[20] Sunkin (2004) 63.
[21] 'A Code of Good Administration: A Parliamentary Response to Judicial/Executive Tension' (1998) 4 Journal of Legislative Studies 89, 95.
[22] See Dawn Oliver, 'The Judge Over Your Shoulder' (1989) 42 Parliamentary Affairs 302, 304.

time.[23] The Second Edition was available to purchase from the Cabinet Office,[24] and the Third and Fourth Editions are freely available online.[25] One of our interviewees commented that while there would be increased scope to give, for example, more tactical advice if *JOYS* was an internal document, there was still a place for a publicly available guide in which the focus was on stating the law as objectively as possible.[26]

What is the stated rationale of *JOYS*?

Informing civil servants about basic legal principles

28. When it first appeared, *JOYS* was described as giving "administrators at all levels an introduction to the basic principles of administrative law and judicial review".[27] The Fourth Edition, the most recent edition, "maintains the tradition of addressing mainly junior administrators, paying particular attention to the practical application of legal principles, but may well be useful at a more senior level too".[28] Indeed, during discussions, a senior government lawyer recognised the value of *JOYS* and wider legal awareness for senior civil servants.[29] At a practical level, therefore, a consistent aim of the UK's *JOYS* has been to inform civil servants about the basic legal principles of administrative law in a manner that is accessible and relevant to their work.

Guiding recourse to legal advice

29. Another consistent and practical aim of *JOYS* has been to help civil servants decide when to seek legal advice. The First Edition warns, "This pamphlet is not, and cannot be, a substitute for seeking legal advice. … What it can do is to enable warning bells to ring so that you can take legal advice at the right time".[30] Successive editions have added more detailed guidance about when civil servants should seek legal advice, for example, referring to particular stages of the decision-making process or the pre-action stages of an impending judicial review challenge.[31]

[23] Oliver (1989) 316. See also A.W. Bradley, 'Protecting Government Decisions from Legal Challenge' [1988] Public Law 1, 2.
[24] See Dawn Oliver, 'Publication Review: Judge Over Your Shoulder: Judicial Review: Balancing the Scales' [1994] Public 514, 514 fn2.
[25] See https://www.gov.uk/government/publications/the-judge-over-your-shoulder-joys-edition-4 and http://www.lawteacher.net/PDF/english-legal-system/Guide%20to%20Judicial%20Review.pdf. However, we have been unable to locate the Third Edition on a government website.
[26] Lee John-Charles, interview.
[27] First Edition, inside cover.
[28] Foreword to the Fourth Edition.
[29] Steven Bramley CBE (Director, Department for Communities and Local Government Legal Advisers), presentation at Nairobi workshop.
[30] First Edition, para. 3.
[31] See e.g., Third Edition paras. 2.10 and 3.10.

Reducing the risk of judicial review challenges

30. While in concrete terms the stated aims of *JOYS* have remained focused on informing civil servants and guiding their recourse to legal advice, the further objectives sought to be achieved by this have been presented differently over the years. In line with the concerns about reducing judicial review litigation that prompted the development of *JOYS*, the First Edition states, "The purpose of this pamphlet is to give you guidance as to the principles involved and to highlight the danger areas where you are particularly at risk of laying your Minister open to a challenge in the courts".[32] This negative tone was criticised at the time for failing to mention "any positive justification for the judicial control of governmental actions within a democracy".[33]

Promoting good administration

31. In later editions, by contrast, we see greater emphasis on how civil servants can improve the quality of their decision-making by adhering to administrative law principles. Commentators welcomed this change of tone in the Second Edition,[34] in which it is acknowledged that "there are no shortcuts or magic formulae to evade the Court's supervision and to attempt to give any would not be in the spirit of the principles of good administration that the citizen has the right to expect from us".[35] Similarly, the Fourth Edition, states that its objective is "to inform and improve the quality of administrative decision-making – though, if we are successful, that should have the incidental effect of making decisions less vulnerable to Judicial Review".[36]

32. The emphasis on good administration has not completely eclipsed the original objective of reducing the risk of court challenges, however. Indeed, these are two sides of the same coin: improvements in the quality of decision-making ought to lead to fewer challenges (and to fewer successful challenges). For example, the Fourth Edition speaks of *JOYS* providing civil servants with "a good understanding of the legal environment in which decisions are made and an ability to assess the impact of legal risk on their work".[37] We are grateful to the GLD for sharing with us a pre-publication copy of the forthcoming Fifth Edition.[38] The Preface to the draft Fifth Edition acknowledges these dual aims: "We intend that readers, by understanding the principles of judicial review, will be better placed to advise on and make decisions less vulnerable to judicial review" and also "We have tried always to emphasise what is best practice in administrative decision making, rather than what you can get away with".[39]

---

[32] See First Edition, para. 3.
[33] A.W. Bradley, 'The Judge Over Your Shoulder' [1987] Public Law 485, 487. See also Oliver (1989) at 304.
[34] See Oliver (1994), 514-515.
[35] Second Edition, para. 3.
[36] Preface to the Fourth Edition.
[37] Foreword to the Fourth Edition.
[38] On file with authors – copy provided by GLD.
[39] Preface to the draft Fifth Edition – on file with authors.

How has *JOYS* been used in the UK? Where would we be without *JOYS*?

33. In order to understand how *JOYS* has been used in practice, we sought and were granted interviews with senior lawyers in the UK's GLD, and a policy profession adviser at Civil Service Learning (CS Learning).[40] Our interviewees were extremely helpful, not only in discussing *JOYS* but also in telling us about wider programmes to promote "legal awareness" among civil servants. Civil servants can also make use of online resources created by commercial legal publishers and others, demonstrating that "government does not need to be the sole creator of content".[41]

34. When it came to considering the impact of *JOYS,* it proved difficult to separate *JOYS* from wider sources of legal knowledge, or from external events such as courts upholding challenges to specific decisions of a department or a public body. The academic literature on the impact of judicial review on public administration indicates that it is often difficult to attribute changes in decision-making practices to particular causes.[42] Nevertheless, we tried to identify the contribution that *JOYS* has made as best we could, by pursuing as one of our lines of inquiry "Where would we be without *JOYS*?"

35. Our impression is that initially *JOYS* was used a great deal. For example, it was reported that "more than 35,000 copies of the [First Edition] had been sold to the departments by the Cabinet Office".[43] For example, it was reported at the time of the Second Edition that *JOYS* had been "reissued recently to 16,000 government officials".[44] When the Fourth Edition was published, *JOYS* was still part of the curriculum of the National School of Government,[45] a body that was later dissolved with its place now taken by CS Learning.[46] It has also been stated that "there was a time when every senior civil servant carried a copy of guidance entitled *The Judge Over Your Shoulder*".[47]

36. The picture today is rather different. A senior government lawyer, while noting that it would be difficult to obtain quantitative data about the use of *JOYS*, suggested to us that *JOYS* is "not as well known among policy officials as it once was".[48] Though available in electronic form, "*JOYS* is no longer on everyone's desk and it is not routinely part of the induction and training of policy officials".[49] Similarly, we were told by the CS Learning adviser that *JOYS* is not "one of the key drivers in policy-making" and that most civil servants probably rely more on "larger-scale guidance" such as the civil service code.[50]

37. Nevertheless, the simple fact that *JOYS* has been revised and republished so many times, and with a Fifth Edition forthcoming in 2016, suggests that the civil service has found it to be useful and sees a continuing role for *JOYS*.

---

[40] Nicholas Short, Civil Service Policy Profession Support Unit.
[41] Braviner-Roman, interview.
[42] For a recent assessment of this field of research see Maurice Sunkin, 'The Impact of Public Law Litigation', in Mark Elliott and David Feldman (Eds), 'The Cambridge Companion to Public Law' (CUP, 2015).
[43] Maurice Sunkin and A. P. Le Sueur, 'Can Government Control Judicial Review?' (1991) 44 Current Legal Problems 161, 168.
[44] See reference to a report in The Times, 6 December 1994 in Michael J. Beloff, 'Judicial Review – 2001: A Prophetic Odyssey' (1995) 58 Modern Law Review 143 fn 26.
[45] See Foreword to the Fourth Edition.
[46] See e.g., https://www.gov.uk/government/news/shake-up-of-civil-service-training.
[47] R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department, [2014] UKSC 60 at para. 105 available here: https://www.supremecourt.uk/cases/docs/uksc-2013-0098-judgment.pdf.
[48] Braviner-Roman, interview and via email.
[49] Braviner-Roman, via email.
[50] Short, interview.

Informing civil servants about administrative law principles

38. Our sense is that nowadays *JOYS* is more often used indirectly than directly to inform civil servants about administrative law. Indeed, it no longer seems sufficient to have *JOYS* available as a document in print or electronic form. The UK civil service is finding it increasingly necessary to have smaller, more digestible products available in order to increase the uptake of legal awareness programmes.

39. One of our interviews was with a senior lawyer leading work within the GLD to create a library of legal awareness materials built around core topics, including administrative law.[51] This lawyer also participated in the Nairobi workshop in March 2016. During the workshop, he observed that having a single department for most government lawyers has allowed the gathering of best practice from across government and the "standardisation of a government legal approach to proper administrative decision-making".[52] He noted that legal awareness has a dual aim of improving awareness of the law and legal system among civil servants so that "they can do their jobs better" and so "they can engage with government lawyers better".[53] He explained that materials in the GLD's legal awareness library are intended to be delivered by lawyers (who may adapt them for a particular department) and are generally delivered as interactive workshops.[54] During our initial interview, he explained that these materials, typically brief, are developed to cater to the different learning styles that exist in any audience and thereby convey key learning points to as many civil servants as possible.[55] In order to reach those individuals who were not likely to absorb the message of *JOYS* if simply given the volume as a self-study exercise, the shorter materials are used as a basis for interactive workshops:

> … the most efficient way … is not producing a 100-page manual and just hoping for the best that they internalise everything, but actually if necessary getting together in a meeting, giving them the 10 points that they need to bear in mind, giving them an exercise to see how well they've learned it, then a good rich discussion about what the right answer was and why people thought it was something else, and what's the principle that's really underlined here, then round it off and then give them the learning materials that they might need including [*JOYS*] if they want to research further.[56]

40. Within the topic of administrative law, for example, there is a workshop titled "Judge Over Your Shoulder" which is a 15-page PowerPoint presentation with a link at the end to the full *JOYS* manual.[57] Another workshop, "Introduction to Judicial Review: A Guide to Good Decision Making" includes "An example step-by-step approach to lawful decision making" as well as a case study exercise.[58] The idea is that the materials and case studies can be customised to deal with the subject matter for which the department is responsible.[59] In

[51] Bramely, interview and Braviner-Roman, via email. See also print outs of GLD intranet pages, on file with authors.
[52] Bramley, Nairobi workshop.
[53] Bramley, Nairobi workshop.
[54] Bramley, Nairobi workshop.
[55] Bramley, interview.
[56] Bramley, interview.
[57] See print outs of intranet pages, on file with authors.
[58] See print outs of intranet pages, on file with authors.
[59] Bramley, interview.

addition to the workshops, "bitesize guides" are available (again adapted by lawyers for the particular department) and these are "designed not to be taught or explained, but used directly by the administrators who are taking those decisions".[60] The government lawyer also explained that these legal awareness programmes often use a blended learning technique that will also include digital or online resources.[61] An added benefit of having the online library is that the GLD is able to monitor "hits" and the extent to which the library is being used.[62]

41. During the workshop, the senior government lawyer described *JOYS* as playing "a huge role in the development of legal awareness", commenting that it was the first time government lawyers thought of a different way of interacting with policy or casework colleagues.[63] Reflecting on the wider library of legal awareness materials, our impression is that *JOYS* may have lost some of its initial impact in part when it became a longer, more technical document in later editions. However, as will be discussed below, *JOYS* retains an important role as "part of a suite of interactions that [government lawyers] have with policy and casework colleagues".[64]

Guiding recourse to legal advisers

42. Lawyers are an expensive resource within the civil service. Therefore, the legal awareness programmes we heard about aim to improve the way in which civil servants interact with their legal advisers.

43. One of our interviewees stressed that "it's all about working more efficiently and effectively – that doesn't mean not having lawyers, but it means having a more intelligent client".[65] Legal awareness is therefore aimed at raising the awareness of civil servants so that they make fewer basic errors and are able to make worked-through requests for legal advice when they contact the legal advisers supporting their department.[66] Indeed, at the Nairobi workshop, the senior government lawyer emphasised that "we do not want to encourage the civil servants taking the decisions to think of themselves as lawyers" rather the aim is to "regulate the level of demand on departmental lawyers" so that civil servants "have refined their request for advice, and the lawyer can give it quickly, efficiently, in terms that can be understood, without a lengthy interaction".[67]

44. The CS Learning adviser who spoke to us agreed that legal awareness programmes help civil servants "to be intelligent consumers and, at the top level, commissioners of legal services".[68] The ideal would be that they are sufficiently familiar with the framework of administrative law to have "option-driven discussions".[69]

[60] Bramley, Nairobi workshop.
[61] Bramley, Nairobi workshop.
[62] Bramley, Nairobi workshop.
[63] Bramley, Nairobi workshop.
[64] Bramley, Nairobi workshop.
[65] Bramley, interview.
[66] Bramley, interview.
[67] Bramley, Nairobi workshop.
[68] Short, interview.
[69] Short, interview.

Promoting good administration and managing legal risk

45. The interviews we conducted shed some light on the ways in which current legal awareness programmes might influence administrative practice. For example, our interviewee from CS Learning thought that improving civil servants' knowledge of administrative law should enable them to work more quickly and efficiently as the "back and forth" to legal advisers should be reduced; for the same reason, the policies they eventually formulate should be less likely to be challenged.[70] If such gains in the efficiency and stability of policy-making could be verified, this would represent progress towards good administration.

46. *JOYS* also touches on the preparation of written submissions to ministers and other senior decision-makers. The evidence provided by civil servants' submissions to ministers can be very relevant when courts apply certain review grounds, for example when they assess whether the decision-maker has taken account of all relevant considerations and has not strayed into considering irrelevant matters. As the Fourth Edition states, "The Minister may have made his decision on the back of a detailed submission prepared for him by officials, and it may be necessary to show that submission to the Court, in order to demonstrate that the Minister was properly briefed, so that when he took his decision he was in possession of all relevant information".[71] Indeed, during our interview, a government lawyer noted that courts are now asking to see submissions to ministers and that "the level of scrutiny has got much, much higher".[72] He also noted that nowadays "you certainly write your submission on the basis that it might be disclosed".[73] However, providing detailed submissions can give rise to tension with other aspects of good administration. For example, we were also told that ministers were sometimes unhappy about the length of submissions and that "the sign of a good policy person is being able to really pare it down effectively".[74]

47. During the Nairobi workshop, the senior government lawyer described a new approach to identifying and classifying legal risk in the GLD, which includes consideration of the likelihood of there being a challenge, the likelihood of the challenge being successful and the seriousness of the consequences – "the risk to government business" – if the challenge were successful.[75] There is also support for a "red, amber, green approach" and for giving percentages of legal risk.[76] This shows the context in which administrative decision-making occurs and in which advice is given.[77] This is more nuanced than what seems to be the approach of the First Edition of *JOYS* of simply trying to stem the rising tide of judicial review challenges.[78] At the same time, he stressed that "The mission of GLD is to help government to govern well within the rule of law".[79] *JOYS* and related legal awareness programmes should mean that civil servants are better equipped to point out the constraints of administrative law to ministers and other decision-makers, and in this way to uphold the rule of law.

[70] Short, interview.
[71] Fourth Edition, para. 3.26.
[72] Bramley, interview.
[73] Bramley, interview.
[74] Short, interview.
[75] Bramley, Nairobi workshop.
[76] Bramley, Nairobi workshop.
[77] Bramley, Nairobi workshop.
[78] See also discussion in Sunkin and Le Sueur (1991).
[79] Bramley, interview.

Developments in the content, format and approach of *JOYS*

48. We have been able to locate the following four editions of *JOYS*:

Edition	Title	Date	Main text	Case examples
1	*The Judge Over Your Shoulder: Judicial Review of Administrative Decisions*	March 1987[80]	17 pages	6 examples
2	*Judge Over Your Shoulder: Judicial Review: Balancing the Scales*	1994/1995[81]	27 pages + 2 annexes	14 examples
3	*The Judge Over Your Shoulder: A Guide to Judicial Review for UK Government Administrators: GLS Version*	March 2000[82]	54 pages + 2 annexes	15 examples
4	*The Judge Over Your Shoulder*	January 2006[83]	37 pages + 2 annexes	27 examples

The tables of contents appear in the Appendix. As we will discuss, there have been interesting changes in content, format and approach over the course of the four editions. In particular, we will consider some of the more user-friendly aspects of *JOYS* and see that it frequently offers practical examples and points out when it would be essential or desirable to seek legal advice. This can all be seen against the backdrop of our interviews which highlighted the place of *JOYS* within broader legal awareness efforts and the related aim of improving interactions with lawyers.

49. The First Edition was the shortest and arguably the most accessible version of *JOYS,* offering a very clear summary of the main principles of administrative law and judicial review. In our view, it has several other strengths:

- The discussion on the giving of reasons is an example of *JOYS* seeking to present best practice in administrative decision-making: "Quite apart from any legal obligation ordinary courtesy may require the giving of reasons".[84] It also offers practical advice: "Do not use 'make weight' reasons if they do not hold up under close examination. It is generally better to give two good reasons than to give three good reasons and one bad".[85]
- A particularly user-friendly feature is the two pages of "Questions to Ask Yourself" at the end of the document. This section translates the three main review grounds of illegality, irrationality (unreasonableness) and procedural impropriety into a practical checklist, setting out groups of questions and referring readers to the corresponding sections in the main text.[86] The First Edition concludes, "If you have serious doubts on any of these questions you should take legal advice before committing your Minister or your department to a particular decision".[87] The "Summary" in the Second Edition

[80] On file with authors.
[81] On file with authors. This edition is undated. We have seen reference to it being published in September 1994 – see Oliver (1994) at 514. Other reports suggest 1994 is correct – see e.g., Beloff (1995) at footnote 26. However, the Third Edition of *JOYS* states that the previous edition appeared in May 1995.
[82] On file with authors. Also available here: http://www.lawteacher.net/PDF/english-legal-system/Guide%20to%20Judicial%20Review.pdf
[83] Available here: https://www.gov.uk/government/publications/the-judge-over-your-shoulder-joys-edition-4
[84] First Edition, para. 11.
[85] First Edition, para. 12.
[86] See First Edition, para. 26.
[87] First Edition, para. 27.

performs a similar function.[88] The Third and Fourth Editions, however, do not contain a similar summary of the core principles of administrative law.

50. The **Second Edition** is also written in a highly accessible style. It uses language that is less legalistic than the First Edition, and many of its headings are framed as practical questions (for example, "What Powers Are You Exercising?"), rather than explicitly referring to the main review grounds. Other significant developments include:

- An attempt is made to explain why judicial review is valuable. For example, it describes judicial review as "a part of the whole process of good administration".[89] Later, in relation to the giving of reasons, it notes "Your decisions will affect people: they are entitled to feel that they have been given a fair crack of the whip and that their arguments have been considered".[90]
- A new section "What Happens in a Typical Judicial Review Case?" summarises the process and describes the civil servant's role in it.
- There is an important acknowledgement that good administration is sometimes better served by *not* opposing a judicial review claim: "If the legal advice is that the challenge cannot properly be defended, and the department accepts that advice, the proper course is for the case to be conceded so that the matter can be considered afresh. It would be improper to seek to defend the challenge on purely presentational grounds".[91]
- The Second Edition also adds two annexes: a short glossary which is very useful but is not continued in later editions; and suggestions for further reading and training.

51. The **Third Edition** is the longest and is more technical than previous editions. In part, this reflects a decision to tackle cross-cutting issues of constitutional law in greater depth than previous editions. The Second Edition had added a brief chapter "What About Europe?" dealing with EU law. This section was however very brief and advised, "In any case which raises such questions, you should seek immediate legal advice".[92] The Third Edition adds a substantial chapter "What Else Should I Know About?" which covers EU law, the ECHR, the HRA and devolution, though some of these issues are also discussed in the main text. The new chapter again advises readers to seek legal advice.[93] It is likely that the need for a separate chapter arose because many of the constitutional changes were very recent and had not yet been fully absorbed into UK case law. In fact the HRA had not yet fully entered into force when the Third Edition was published. Other notable features of the Third Edition include:

- Ease of reading is promoted by the more frequent use of bullet points.[94]

[88] Second Edition, paras. 37-39 (paras. incorrectly numbered in the original).
[89] Second Edition, para. 3.
[90] Second Edition, para. 16.
[91] Second Edition, para. 28.
[92] Second Edition, paras. 23-24.
[93] Third Edition, paras. 5.31 and 5.44.
[94] See e.g., to describe the procedure at a judicial review hearing – Third Edition, para. 3.25.

- The discussion of judicial review procedure has by this stage grown to 30% of the main text,[95] including new sections on "Remedies Following a Successful Challenge" and "When Can the Court Award Damages?".[96]
- There is a brief paragraph dealing with the Parliamentary Commissioner for Administration (the Ombudsman).[97] This passage also mentions *The Ombudsman in Your Files* which it describes as "the companion guide" to *JOYS*.[98]
- Finally, it is interesting to note that there are two versions of the Third Edition – "one essentially for administrators, and the other for lawyers".[99] We have been able to locate both of these versions in the Parliamentary Archives.[100] The version for administrators notes that "A slightly longer version has also been prepared for lawyers in the Government Legal Service".[101] The main difference is that the GLS version includes almost twice as many footnotes (141 as compared to 78 in the version for administrators). There is also some additional language in the GLS version's discussion of the HRA and the ECHR in Part 5. For the avoidance of doubt, references in this report to the Third Edition are to the GLS version, unless stated otherwise.

52. In some respects, the **Fourth Edition** is more user-friendly than its predecessor.[102] Although shorter than the Third Edition, it manages to provide more case examples in text boxes in the main text, while having significantly fewer footnotes (there are only 39 footnotes in the Fourth Edition). In many instances old cases that had been used to illustrate the main principles of judicial review are replaced with more recent decisions. Other significant developments include:

    - Cross-cutting constitutional issues are integrated into the main text to a greater extent. There is no longer a separate section on HRA and ECHR issues, which are brought within earlier chapters. It does maintain separate chapters on EU law and devolution, as well as raising some issues in the main text, but no longer advises readers to seek legal advice.
    - Turning to the chapter on "A Typical Judicial Review Case" (now 35% of the main text) the main difference is that the discussion of the pre-action stage is much longer and includes a new section on "Alternative Dispute Resolution".[103] There are also new sections on "Duty of Candour", "The Freedom of Information Act 2000" and "Evidence Where the Decision Was Taken by the Minister Personally".[104] All of these sections offer practical advice rather than merely summarising the legal position. Due to the coming into force of the HRA, there is detailed consideration of some remedies, with declarations of incompatibility and damages under s8 HRA now in separate

---

[95] Third Edition, Parts 3 and 4.
[96] See limited discussion in earlier editions: 'Will The Courts Substitute Their Own Views For Those Of The Decision-Makers?' in the First Edition and 'The Powers of the Judge' in the Second Edition.
[97] Third Edition, para. 4.7.
[98] Third Edition, para. 4.7 at footnote 95.
[99] Hansard, House of Commons, Written Answers to Questions 4 July 2000 : Column: 101W available here: http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000704/text/00704w01.htm#00704w01.html_sbhd0
[100] On file with authors.
[101] Foreword to the Third Edition (Administrators version) – on file with authors.
[102] For example, the Fourth Edition sometimes uses bullet point summaries after detailed discussions (see para. 2.28). Also, new practical examples are given of when a legitimate expectation might arise (see para. 2.54) and there is also a new bullet point list of factors relevant to whether a legitimate expectation has arisen and whether it can be overridden (see para. 2.55).
[103] Fourth Edition, paras. 3.5-3.9.
[104] Fourth Edition, paras. 3.12-3.16 and paras. 3.26-3.29.

sections.[105] This edition also makes tactical suggestions in places. For example: "The Rules require only a 'summary' of the Defendant's grounds for opposing the Claim, and it is a matter of tactics and practicalities how much effort should be devoted to meeting the Claim at this preliminary stage".[106]

- With regard to the giving of reasons, the Fourth Edition still seeks to promote good administration: "We have tried always to emphasise what is best practice in administrative decision-making, rather than what you can get away with: see for example on the recording and giving of reasons".[107] While acknowledging that the "need to record reasons when the decision is made with a view to their disclosure may be onerous" it notes that "it encourages careful decision-making".[108] Moreover, "it is bad practice – and unlawful – to make your decision first and construct your reasons only when challenged".[109] By way of practical assistance the section gives an outline for recording reasons and notes "If all this (or as much as suits the case) is recorded on the file, then it will provide a framework for your decision letter".[110]

The future – the Fifth Edition of *JOYS* and wider legal awareness programmes

53. As already noted, the Fourth Edition of *JOYS* was withdrawn in 2015 and is currently being revised in order to ensure that it reflects the latest case law and relevant statutory reforms since the last edition, such as the introduction of the public sector equality duty.[111] Since the last edition appeared more than 10 years ago the revision is also necessary to reassure users that *JOYS* is a relevant, current piece of guidance.[112]

54. Given that publication of the Fifth Edition is still forthcoming, we do not propose to discuss this new edition in detail here. However, as regards the format of the new edition, during our discussions government lawyers stressed the need to make legal information and *JOYS* more accessible to a wider audience.[113] So, for example, the draft includes a flowchart on the stages of judicial review and includes summary boxes throughout the text. It also re-introduces in an appendix, a "Checklist For Making Decisions" which was a useful feature of the first two editions of *JOYS*. Crucially, the purpose of the Fifth Edition "continues to be to inform and improve the quality of administrative decision making" and includes coverage of judicial review "which is an increasing part of every Department's workload".[114] It is acknowledged that it is "still a sizeable guide" and advises "We do not expect you to read this guidance in one sitting, but you may find it useful to keep this guidance close at hand whenever you are advising on a decision or policy or dealing with an application for judicial review".[115]

[105] Fourth Edition, paras. 3.39 and 3.41.
[106] Fourth Edition, para. 3.21. See also e.g., Fourth Edition, para. 3.36.
[107] Preface to the Fourth Edition.
[108] Fourth Edition, para. 2.66.
[109] Fourth Edition, para. 2.66.
[110] Fourth Edition, para. 2.66 and Third Edition, paras. 2.76-2.78.
[111] Braviner-Roman and John-Charles, interviews.
[112] Braviner-Roman, interview.
[113] Braviner-Roman and John-Charles, interviews.
[114] Preface to the draft Fifth Edition – on file with authors.
[115] Preface to the draft Fifth Edition – on file with authors.

55. CS Learning is at present considering how to develop a legal awareness module for inclusion in the broader curriculum for civil servants working in the policy profession.[116] It is not yet decided who will produce and deliver the legal module of this new curriculum, though there will be close interaction to meld CS Learning's expertise in curriculum development and theories of learning with the in-depth subject knowledge within the GLD and the wider GLS.[117] It was suggested that there could be a range of providers, for example, with CS Learning facilitating (possibly in conjunction with the GLD/GLS) "broad stroke learning opportunities" and individual departments providing more "specialist learning".[118] For present purposes, the CS Learning adviser highlighted the challenge of delivering *JOYS* in segments that are directly relevant to a civil servant's current work.[119] He also identified a need to "genuinely think digitally" and noted the navigational benefits of online formats and the ability to respond to new developments with more frequent updates.[120] He emphasised that CS Learning is deeply committed to an iterative approach to developing learning products, working closely with content providers and learners to evaluate their impact and whether change is achieved.[121]

56. We found strong support within the GLD for the further development of digital resources as a means of delivering legal awareness material.[122] One of their priorities for the future is to support the mainstreaming of legal content, which will see more legal concepts and principles incorporated into the wider learning and development programmes provided to policy professionals, such as the CS Learning initiatives described above.[123] At the same time, the GLD is also exploring the potential for expanding its use of digital tools to aid the interaction between civil servants and their legal advisers, for example by introducing new systems for logging requests for advice and conducting some interactions through online portals.[124] Another example was given of using digital media to reach planning inspectors who may be located in different places across the UK.[125]

57. The introduction of *JOYS* was a landmark for the raising of legal awareness within the UK civil service. The 2016 edition will take its place within a nuanced set of strategies which aim to make full use of the wide range of possibilities offered by modern technology for making civil servants more familiar with administrative law.

[116] Short, interview.
[117] Short, interview and via email.
[118] Short, interview.
[119] Short, interview.
[120] Short, interview.
[121] Short, interview.
[122] Braviner-Roman, via email.
[123] Braviner-Roman, via email.
[124] Bramley, interview.
[125] Bramley, Nairobi workshop.

C. New Zealand's *The Judge Over Your Shoulder*

Background

58. The administrative law of New Zealand is in many ways very similar to that of the UK. New Zealand is the only other country in the Commonwealth which is still without a codified constitution. The common law of judicial review has continued to develop through case law and there are significant judicial and scholarly exchanges between the two jurisdictions.

59. It is therefore perhaps unsurprising that within two years of the appearance of the first UK *JOYS* in 1987, New Zealand had produced its own *The Judge Over Your Shoulder*.[126] This was followed by a Second Edition in 2005, which is still in use today.

60. Our research into the New Zealand experience has been limited to a desk-based comparison of these two editions and their UK counterparts. Although not officially available online, the Second Edition was designed from the outset to be publicly accessible and copies can be obtained from the Crown Law Office.[127]

Rationale

61. The First Edition shows clearly the influence of its UK counterpart at the outset, to the extent that most of the introduction is almost identical. However, in a sign of more substantial differences to come, the introduction sets out aims that go somewhat beyond those stated in the UK version. We have seen that in the UK version the two concrete aims are to inform civil servants about administrative law and guide their recourse to legal advice. The New Zealand First Edition adopts these two aims, but adds a specific focus on the recommendations that civil servants make to ministers or other decision-makers, stating that: "General advice as to the format of recommendations and the process to follow is also offered".[128] This can be seen as a third concrete aim, to provide civil servants with guidance on internal stages of the administrative process before a decision is made. We will see that the New Zealand editions are somewhat more prescriptive in this regard than any of the versions of the UK's *JOYS*.

62. The New Zealand First Edition does not state any further objectives to be achieved by pursuing these concrete aims. In this regard it differs from the UK First Edition, which as we have seen refers to rapidly rising rates of judicial review litigation and makes clear that *JOYS* is intended to enable civil servants to help reduce the risk of government decisions being challenged in court.

63. The New Zealand Second Edition, produced in 2005, does mention that "the scope and volume of administrative law and judicial review have continued to develop at an increasing pace" since the First Edition, and speaks of new legislation providing "fertile

---

[126] The First Edition was produced in 1988/89, according to the Second Edition preface.
[127] See http://www.justice.govt.nz/publications/global-publications/d/directory-of-official-information-archive/directory-of-official-information-december-2011/alphabetical-list-of-entries-1/c/crown-law-office and contact details provided there.
[128] First Edition, page 1, para 2.

ground" for government decisions to be challenged.[129] This is a somewhat clearer indication that one of the purposes of the guide is to enable civil servants to manage the risk of legal challenges to their decisions. The Second Edition mentions that another objective is "to highlight the principles of good administration which the courts expect us to apply".[130] It follows that the twin objectives of reducing legal risk and promoting good administration, which by then had become established in the text of the UK's *JOYS*, are present in the Second Edition. However, the New Zealand Second Edition still places less emphasis on these objectives. It does not try as hard as the later UK editions to explain how complying with administrative law leads to better decision-making. This is not necessarily problematic. Instead of being either hostile to judicial review or trying to justify it, the New Zealand approach seems to reflect an implicit assumption is that civil servants are committed to the rule of law and accept that this means exercising their powers within the framework of administrative law. The guide therefore concentrates on the more concrete issue of what administrative law requires of them in practice.

Content, format and approach

64. A comparison of the First and Second Editions of New Zealand's *JOYS* shows a number of developments which seem to have occurred in parallel with the changes in successive UK editions over this time period. There is a clear increase in length. The First Edition consists of 30 pages of double-spaced typescript, whereas the 31 pages of the Second Edition are in a much smaller font and with tighter spacing. The full tables of contents of both editions appear in the Appendix to this report.

65. For readers who are already familiar with the first UK *JOYS*, the outstanding features of the New Zealand **First Edition** are as follows:

- More case examples are provided, predominantly from the decisions of the New Zealand courts.
- After discussing the grounds of judicial review, the First Edition turns to the evidence that may have to be provided to a court. It warns that "everything that is relevant and not subject to some type of privilege (such as opinions and advice from your lawyers) is available to the challenger and the Court as evidence of the way the decision was made".[131]
- From this point onwards, the focus is on guiding civil servants on how to conduct their internal processes, including recommendations to a minister, in a way that will stand up to scrutiny in court.[132] For example, it is pointed out that papers relating to a decision should capture the reasons as required by the common law and by statute. They should also show that all relevant considerations have been considered. If the papers supporting a recommendation to a minister fall short of these standards, the court will examine the minister's affidavit and may summon the

[129] Foreword.
[130] Foreword.
[131] Page 22.
[132] Pages 22-24.

minister to appear for cross-examination on any discrepancies.[133] This is clearly meant as a warning to civil servants.

- The most detailed practical advice concerns steps to be taken to ensure procedural fairness. There is a six-point outline of steps to be taken to consult persons who would be affected by an administrative decision. Once again, there is a particular focus on situations in which the civil servant makes recommendations to a minister or some other decision-maker. If the decision-maker proposes to take a different decision from that recommended by the civil servant, it is advised that further consultation with affected parties may be required. The six-point outline is not completely inflexible, but civil servants are told that they should seek legal advice is proposing to follow a different process.
- Practical suggestions are also offered with regard to the content of any letters of advice which civil servants may write to inform affected persons of the decision that has been made.[134] It is suggested that a person who is adversely affected by a decision may be less likely to institute legal proceedings "if it is clear from the letter that his or her arguments were considered, and reasons for the decision are provided". At the same time, civil servants are warned against casual and imprecise formulations which may differ from the assessment of the issues in internal documents and give rise to challenge in court.
- The First Edition concludes with a "Checklist" that consists of 25 questions for an administrator. These cover not only with the legal principles of judicial review, which are the main focus of the 11 "Questions to Ask Yourself" at the end of the first UK *JOYS*, but also the practical steps relating to consultation and recommendations to ministers which we have just discussed. The 25 questions are grouped under three headings: "The recommendation"; "The decision" and "The letter of advice".

66. The **Second Edition** retains many of the features of the First, notably its focus on the the processes of consultation, recommendation and the writing of letters of advice. However, there are also important differences of content. Between the appearance of the First and Second Editions, New Zealand enacted a number of statutes of constitutional significance, including the New Zealand Bill of Rights Act 1990, which strengthened the ability of courts to take into account rights when interpreting legislation, and the Human Rights Act 2001, which established a Human Rights Commission. There had also been a marked increase in legal significance accorded to the Treaty of Waitangi, the principal 19th century agreement between the British settlers and Maori. International human rights law had also come to be more frequently cited by the courts. The Second Edition adopts the following approach:

- Legislative and constitutional developments are integrated into the three chapters which deal with the traditional grounds of judicial review: "Illegality"; "Unfairness" and "Unreasonableness". We have seen that the UK's *JOYS* has moved in the same direction, with the Fourth Edition, published after New Zealand's Second, integrating most human rights matters with the grounds of judicial review.
- Case examples in this edition are taken entirely from New Zealand decisions, and many are presented in boxes which separate them from the main text and allow a fuller summary of the facts.

---

[133] Page 24.
[134] Page 26.

- Alternative scrutiny mechanisms such as the Ombudsman's Office, Official Information Act and parliamentary oversight committees are briefly introduced in a single paragraph.[135]
- The chapters on the grounds of judicial review are followed by a chapter entitled "The Process and Outcome of Judicial Review". However, the title of this chapter is somewhat misleading and its content differs significantly from the chapters on judicial review proceedings in the UK's *JOYS*. For example, the New Zealand Second Edition does not deal with matters such as standing or with the pre-action stage. Instead, this chapter accommodates the discussion of internal processes of consultation and recommendation which we have seen were already present in the New Zealand First Edition. As before, there is a strong focus on explaining how such processes should be conducted in order to withstand scrutiny in court.
- The Second Edition abandons the comprehensive checklist for civil servants which appeared at the end of the First Edition. It does, however, retain the outline of steps to be taken in consulting affected persons and making recommendations to a final decision-maker, which is expanded from six to eight points.[136]

67. In summary, while English administrative law and the administrative law of New Zealand have much in common, the New Zealand *JOYS* adopts an approach that is distinct from the UK's *JOYS* in a number of respects. It is less concerned with the politics of judicial review, and more practical in orientation. The practical advice is more detailed on a number of points, particularly with regard to consultation, recommendations to decision-makers and letters of advice to persons affected by an administrative decision.

[135] Page 3.
[136] Page 30.

C. The *Manual of Administrative Law in Malawi*

Background

68. Administrative law in Malawi must be seen in the context of the 1994 Constitution, which brought an end to three decades of autocratic rule by President Hastings Kamuzu Banda. The Constitution has provided the foundation for a vibrant multi-party democracy under the rule of law and there have been several peaceful changes of government since it was adopted. At the same time, formidable challenges remain in achieving the rule of law and access to justice for many Malawians in view of high levels of poverty and corruption.

69. By including a right to administrative justice in the Bill of Rights, the Malawian Constitution followed the example of South Africa and Namibia by declaring that all persons are entitled to the benefit of administrative law protections. This represents a recognition of the important role of administrative law in securing the rule of law. Section 43 of the Constitution provides:

> 43. Administrative justice
>
> Every person shall have the right to:
>
> (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
>
> (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known.[137]

70. The inclusion of this right has undoubtedly strengthened the ability of the courts to hold public bodies accountable by way of judicial review.[138] However, the Malawian judicial review case law continues to be based on common law decisions.[139] No legislation has been introduced to codify the main grounds of review, unlike in South Africa and Kenya where we have seen that such legislation was constitutionally required.

71. The government that was elected in 1994 had made strengthening the rule of law a priority, and to this end a workshop for senior civil servants on administrative law was convened in 2000.[140] It was resolved at this meeting that Malawi should have its own manual of administrative law, written in an accessible style for use by both ministers and public servants. Further workshops were held in which the Permanent Secretaries of civil service departments and other senior officials discussed their ideas for the content of the proposed manual with its eventual authors, Professor Christopher Forsyth of Cambridge University and Steve Matenje SC, then Solicitor-General and now Attorney-General of Malawi.[141] They subsequently published an account of this process, which is our principal source of information on how the manual was developed.[142]

---

[137] *Sic*. Presumably the words "are affected" are to be implied.
[138] See Danwood Chirwa, 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' (2011) 55 Journal of African Law 105.
[139] Chirwa (n138) criticises the approach of the courts in this respect.
[140] Christopher Forsyth and Steve Matenje, 'Some Reflections on Administrative Justice in Malawi' [2006] *Acta Juridica* 389, 393.
[141] Forsyth and Matenje (2006) 392.
[142] Forsyth and Matenje (2006).

Rationale

72. Like the other administrative law guides we have examined, the Malawi *Manual* sets to inform its readers about administrative law. However, the *Manual* is written for a slightly wider audience as it is explicitly addressed to all government decision-makers, not only civil servants and but also ministers.[143] It aims to provide these decision-makers with a "practical tool",[144] by providing "guidance … on how they may make decisions in ways that ensure that those decisions are fair, reasonable and lawful".[145]

73. The *Manual* has less to say than its UK or New Zealand counterparts about the circumstances in which decision-makers should seek legal advice, perhaps because Malawi has relatively few government lawyers and private legal advice would generally be too expensive to justify outside the immediate context of litigation.[146] Instead, there is an emphasis on the importance of getting decisions "right" the first time, in the sense of satisfying the standards set by administrative law.[147]

74. It is made clear at the outset that although the *Manual* has a practical orientation its use is intended to serve important constitutional objectives. According to a Foreword by then President of Malawi, the *Manual* was developed to help "consolidate the rule of law in the civil service", and is intended to enable decision-makers "to perform their functions well and avoid making arbitrary decisions". It is also pointed out that the proper protection of other constitutional rights and freedoms depends on decisions being made in accordance with administrative law.[148]

75. Malawi's bitter experience of "increasingly arbitrary and repressive rule" by its first President may be one of the reasons why the guide is so clearly presented as an initiative to strengthen the rule of law.[149] The rule of law is certainly given more explicit attention than it receives in the UK or New Zealand *JOYS*. However, there is also an extended discussion of how a greater awareness of administrative law among civil servants may contribute to other aspects of good administration. It is made clear that administrative law forms part of the wider system of good administration and that the *Manual* should enable civil servants to set the Malawi Public Service standards in proper legal perspective.[150] Compliance with administrative law also "ensures that the lawful policies adopted by the Government of Malawi are effectively implemented".[151]

76. Reducing the risk of legal challenges, the other objective so prominent in the UK and New Zealand, is also among the objectives of the Malawi *Manual*. Even if it is the case that fewer judicial review claims are brought in Malawi, the cost of defending legal claims may place significant if not more serious strains on a smaller public purse. The *Manual* refers to the importance of ensuring that "scarce resources are not frittered away in endless

---

[143] See page vii. The full title is *Manual of Administrative Law in Malawi: A Guide for Ministers and Public Servants*.
[144] *Manual*, page vi (Foreword).
[145] *Manual*, page vii.
[146] Appendix 4 of the *Manual* does discuss the position of the State Law Officers (the Attorney-General and the Solicitor-General), and outlines the circumstances in which they may be approached to provide legal advice.
[147] Forsyth and Matenje (2006) 393.
[148] *Manual*, page vii.
[149] *Manual*, page v.
[150] *Manual*, page vi.
[151] *Manual*, page vii.

litigation".[152] The award of substantial damages to successful claimants would be more damaging still in financial terms. In the early years of the Constitution there were several cases in which the courts made large awards after finding that public servants had been unfairly dismissed.[153] The *Manual* responds to this problem by including a detailed appendix on the requirements of procedural fairness in civil service disciplinary proceedings.

How the *Manual* has been used

77. In their published study of the *Manual* and its impact, Forsyth and Matenje draw on the findings of a survey of Permanent Secretaries which they conducted in August 2005.[154] This is the most recent empirical information that is available to us. Whereas only 30% of respondents had used the *Manual* for training, 80% had referred to it when making a decision. The latter figure suggests that the *Manual* had basically proved to be useful as an aid to good administration, which is partly confirmed by a comment from the Ombudsman that it was receiving fewer complaints of the kind that would be attributable to a lack of awareness of procedural fairness and the need to provide reasons.[155] Even though the *Manual* was developed partly as a training resource, limitations of time and resources may well explain why it had not been used more widely in training.

78. Interestingly, approximately 20% of the senior civil servants reported using the *Manual* "to *justify* their decisions to a Minister", and a similar proportion had done so in discussions with other civil servants.[156] This suggests that the *Manual* was able to make a distinct contribution to the intended objective of consolidating the rule of law in the civil service. It also chimes with the statement by Forsyth and Matenje that civil servants participating in the initial workshops had "difficulty standing up to Ministers who would order their civil servants to do things contrary to the principles of administrative law", which was why they wanted the guide also to be explicitly addressed to ministers.[157]

Content, format and approach

79. The *Manual* acknowledges permission received from the UK government to use material from *JOYS*. The amount of borrowed text seems quite limited, however. We will see that a distinctive approach is adopted both to general principles of administrative law and to the specific legal provisions and mechanisms of scrutiny that exist in Malawi.

80. Totalling 111 pages in length, the *Manual* is much longer than any of the UK editions. However, the main body is only 52 pages long, with the balance being made up of six

---

[152] *Manual*, page vii.
[153] Forsyth and Matenje (2006) 392.
[154] Forsyth and Matenje (2006) 396.
[155] Forsyth and Matenje (2006) 396.
[156] Forsyth and Matenje (2006) 396, emphasis added
[157] Forsyth and Matenje (2006) 393.

appendices numbering 48 pages and a glossary of 21 pages. The full table of contents is reproduced in the Appendix to this report.

81. This way of dividing up the *Manual* was intended to ensure that the discussion of constitutional foundations and legal principles of administrative law in the main body of the text would flow as smoothly as possible, by relegating most other matters to the appendices.[158] Much of this is material is specifically applicable to Malawi. The two longest appendices are those which reproduce the Bill of Rights and Public Service Act in full, presumably for general convenience and particularly for the benefit of administrators in remote areas who might not otherwise have access to the relevant legal texts. The other appendices cover provide relatively brief summaries of the judicial review process; the disciplinary procedures of the civil service; the Law Officers and the circumstances in which they will provide legal advice; and the Malawi court system.

82. At 21 pages, the glossary contains definitions for a very extensive list of legal terms. Its range is much wider than that of the only other glossary that exists among the guides discussed in this report, which is the two-page glossary of "Legalese and Latin maxims" that is provided in the second edition of the UK's *JOYS*. Once again, the context of Malawi as a developing country may very well justify this type of glossary. Lay persons in any jurisdiction will frequently need to look up legal terms, but the availability of technology affects how this can most conveniently be done. The UK Government Legal Department told us that they were considering incorporating hyperlinks in *JOYS* and other materials that would enable readers to simply click on a term and be taken to a definition. However, when the *Manual* was produced in 2002 it would not probably have been reasonable to assume that all public servants in Malawi would have had ready access to the internet. It is clear that the glossary was a more reliable and convenient way of providing definitions of terms. This may still be the case today, although the spread of smartphones and 3G networks is rapidly changing matters.

83. We return to the main body of the *Manual* to consider its content and approach. Several features stand out:

- The constitutional foundations of administrative law are given a prominent and lengthy treatment at the start of the *Manual*. This contrasts with the UK and New Zealand *JOYS* in which human rights and other constitutional matters make their appearance only in the later editions, where they are seen as "cross-cutting issues" to be dealt with either at the end of the guide or in sections devoted to a particular ground of review. The *Manual* discusses the Bill of Rights and the constitutional right to administrative justice, which was then still fairly new just only in Malawi but also globally. It also examines the nature of the other main sources of law, namely statute law and common law. There follows an explanation of the difficult distinction which holds that courts may review the legality and but not the merits of administrative decisions, in the context of a wider account of checks and balances that exist between the different branches of state. This has the potential to clarify, for thoughtful readers at least, why administrative law is a valuable part of the legal system and an aid rather than an obstacle to good administration.[159]

[158] Email communication from Professor Christopher Forsyth to the authors.
[159] See the extract from the *Manual* reproduced in Forsyth and Matenje (2006) 397-399.

- The same chapter also provides practical advice on how a new constitution can invalidate existing laws that date from the authoritarian past.[160] Examples include ouster clauses which purport to exclude certain decisions from judicial review and provisions that allow public bodies to act without giving reasons. Civil servants are warned not to rely on such provisions without considering whether they might be wholly or partially invalidated.
- The *Manual* contains a four-page section on the Ombudsman and the Human Rights Commission, which is much more detailed than corresponding sections in the UK or New Zealand *JOYS*. This includes an attempt to explain the wide remit of these bodies to investigate "maladministration" by providing examples from their past decisions. Readers are also referred to the Ombudsman's own published guide.
- The grounds of judicial review are presented in an ingenious way, being divided into procedural fairness, retention of discretion, abuse of discretion, and finally *ultra vires* in the narrow sense of exceeding substantive or procedural limits expressly laid down by the empowering provision. Procedural fairness appears first and receives the most detailed treatment.[161] The authors attribute this choice to the fact that the constitutional right promises among other things "procedurally fair administrative action" in so many words. There may well be other reasons why it is a good idea to foreground procedural fairness in this way. One of these was mentioned previously: it is particularly important for civil servants to know about implicit common law requirements to provide a certain type of hearing when exercising a statutory power if, as is often the case, the relevant statutory provision is either silent or does not deal with all aspects of how a hearing is to be conducted.
- This section also contains practical advice that reflects the reality of Malawi as a developing country. Civil servants are urged to consider that the persons affected by their decisions will be "confused, or uneducated or illiterate". If procedural fairness is to be achieved in such cases, it is "particularly important … that the issues at stake are fully, clearly and correctly explained to them and that their view should be heard and recorded even if this takes longer".[162] Regarding the provision of reasons for administrative action, which is also specifically addressed in the constitutional right,[163] the *Manual* states that when the law imposes a duty to give reasons, that duty "will not be discharged by the use of vague general words. Reasons which are not intelligible and do not address the substantial point that have been raised in the decision-making process will not be adequate."[164]
- The *Manual* uses a wide range of case examples to illustrate the legal principles that are discussed. The majority are from the decisions of English courts, but a significant proportion are Malawian decisions and there are also a few cases cited from other relevant jurisdictions, such as South Africa.

[160] *Manual*, pages 5-8.
[161] See the extract from the *Manual* reproduced in Forsyth and Matenje (2006) at 399-402.
[162] *Manual*, page 28
[163] *Manual*, page 31.
[164] *Manual*, page 31.

- The *Manual* concludes with a list of "Questions to Ask Yourself". This comprises a total of six pages, which more than three times as long as the corresponding sets of questions provided in the first two editions of the UK's *JOYS*. Each question is accompanied not only by references to the relevant sections of the *Manual*, but also a short note recapitulating the main points of those sections.[165] This has the effect of creating almost a self-contained guide-within-a-guide to administrative law.

84. The content of the appendices has already been outlined above. The appendix which summarises the judicial review process offers practical advice on what civil servants should do at various stages of proceedings. If it becomes clear that a decision is flawed, the *Manual* advises civil servants to settle or concede the action rather than incur greater legal costs.[166] Civil servants are urged to brief their counsel on the practical consequences of any remedies which a court may grant, so that the court may be fully informed about the risks of administrative disruption when exercising its remedial discretion.[167]

85. The Malawi *Manual* is clearly designed to work on a number of different levels. It presents the intended audience of ministers and civil servants with a thorough grounding in the constitutional basis and justification of administrative law, as well as practical guidance on its implications for everyday decision-making. The guide reflects the reality of a Malawi as a country in recovery from authoritarian rule and seeking to consolidate the rule of law amid widespread poverty and other challenges of social justice and economic development.

[165] See the extract from the *Manual* reproduced in Forsyth and Matenje (2006) at 402-404.
[166] *Manual*, Pages 68-69.
[167] *Manual*, Page 69.

E. Questions Arising for Kenya

Rationale and other preliminary questions

1. What is the rationale for having a Kenyan administrative law guide for civil servants? For example, is it intended to increase legal awareness, improve interactions with government lawyers, reduce the risk of decisions being challenged in court, and/or raise the quality of administration and decision-making?

2. Who is the intended audience (for example, junior or senior civil servants, government lawyers)?

3. Will the guide be an internal government document or made available to the public (perhaps with supplementary confidential guidance for internal use)? Will the guide be made available free of charge?

4. Will the guide be available only in hard copy or also online?

5. What process will be followed when putting together the guide? Who will be involved? Will there be broader consultation?

What will the guide cover?

6. What will the guide cover and how detailed will it be? For example, the UK's *JOYS* focuses mainly on administrative law and specifically on judicial review. Nonetheless, the guide has more than doubled in length since 1987.

7. Are there any constitutional matters that need to be addressed in detail? (For example, the Malawi *Manual* discusses both the constitutional right to administrative justice and the Bill of Rights, the separation of powers and the main sources of law. The UK's *JOYS* also considers questions of EU law, the European Convention of Human Rights, the Human Rights Act and devolution.)

8. Will the guide discuss alternative scrutiny mechanisms such as ombudsmen and human rights commissions? (The most extensive treatment of such mechanisms is a four-page section in the Malawi *Manual*. It is also possible that the civil service may have a separate guide to such mechanisms, as is the case in both the UK and Malawi.)

9. Will the guide suggest when to seek further legal advice?

10. Will the guide cover the judicial review process? For example, later editions of the UK's *JOYS* consider what happens in a typical judicial review case and the role of the civil servant (35% of the latest edition). This helps to demystify the court process and might be particularly relevant in countries where civil servants face high levels of judicial review challenges.

11. If the guide does cover the judicial review process, will it also consider the pre-action stage, alternative dispute resolution and the circumstances in which the government might settle or concede a challenge?

12. How many case examples will be included? Will there be any reflective discussion of the case law? Will the guide offer case examples only from Kenya or also from other jurisdictions? Recent or old?

What approach will the guide take?

13. Will the guide suggest good practice even beyond strict legal requirements? For example, the First Edition of the UK's *JOYS* suggested "Quite apart from any legal obligation ordinary courtesy may require the giving of reasons".

14. Will the guide offer practical guidance with regard to how administrators should interact with the public? (For example, the Malawi *Manual* advises administrators to ensure real procedural fairness by taking into account the needs of persons who are illiterate, uneducated or intimidated by the administrative process. For example, the Third and Fourth Editions of the UK's *JOYS* give an outline for recording reasons. The Third Edition also advises taking care in drafting official press statements or advice to the public to avoid giving the impression of discretion being fettered.)

15. Will the guide offer advice on how civil servants should carry out particular internal aspects of their role, for example the preparation of recommendations to ministers? (This aspect of civil service work is discussed at length in New Zealand's *JOYS*.)

16. Will the guide offer tactical suggestions for litigation? See for example, the approach in the Fourth Edition of the UK's *JOYS*.

Format and other presentation questions

17. How will the guide deal with constitutional matters? At the start (Malawi), integrated into the grounds of review (New Zealand) or partly integrated and partly at the end (UK's *JOYS*)?

18. Will the guide use annexes for supplementary material? The Malawi *Manual* relies heavily on this approach in order to preserve a focus on principles of administrative law in the main body of the text.

19. Will the guide include a summary or checklist of "questions to ask yourself" at the end of the document? Is this still feasible given the complexity of the law?

20. If the guide is made available online, will the guide have interactive features such as hyperlinks in the text? Are there existing legal resources that the guide could link to? Will it include a glossary or hyperlinks to define key terms?

21. Will the guide include summaries throughout the document, at the end of each section or after a particularly detailed discussion?

22. Will it include features such as flowcharts, bullet points and/or textboxes for certain highlights (such as case examples or key time limits)?

<u>Making the most of the guide</u>

23. How often will the guide be updated? If online, is there a way of providing regular updates between editions? Will feedback be sought when revising the guide, and from whom?

24. How will the key learning points in the guide be delivered in training sessions? What will be the method of delivery? Is the guide intended to be a training document in itself or a reference document? Will there be case studies and interactive exercises? If so, will these be adapted as relevant for different departments?

25. Do you need lawyers to deliver the training or can non-lawyers do so?

26. How will the guide fit into broader training and legal awareness programmes for civil servants in Kenya?

Conclusion

This report is the Bingham Centre's response to the request we received from the Katiba Institute to undertake background research that would inform the development of an administrative law guide for the Kenyan civil service. We set out to examine what could be learnt from the UK's experience with *The Judge Over Your Shoulder* (*JOYS*), and have also considered the administrative law guides that exist in New Zealand and Malawi.

There is a clear family resemblance to these guides. Besides drawing on the text of various editions of the UK's *JOYS*, the New Zealand and Malawi guides have also maintained the tradition of providing a general account of the principles of administrative law in their jurisdiction. Because of the focus on general principle, each guide must necessarily be complemented in practice by further guidance material and/or legal advice on the specific responsibilities of civil servants in particular departments. Furthermore, by choosing to focus mainly on the principles of judicial review, the guides do not offer a full account of alternative scrutiny mechanisms such as ombudsman bodies, although in some cases reference is made to other documents that summarise the workings of such mechanisms.

Our research has enabled us to comment on some of the strengths and weaknesses of the administrative law guides that exist in the jurisdictions we have examined including, for example, the extensive guidance offered by New Zealand's *JOYS* on how to prepare recommendations for ministers, or the various ways in which the *Manual of Administrative Law* in Malawi seeks to persuade ministers and civil servants at all levels of seniority of the need to adhere to administrative law principles in order to consolidate the rule of law. We have also considered how these guides have developed to reflect particular features of their legal systems. In the case of the UK, we were able to interview a number of civil servants, including senior government lawyers, about how they have used *JOYS* and other materials derived from it in order to conduct legal awareness programmes for civil servants. The information gained from these interviews has given us an understanding of how the UK civil service uses *JOYS* in practice to pursue its objectives of reducing the risk of legal challenges to official decisions and improving standards of administrative decision-making.

The experience in the UK, New Zealand and Malawi formed the basis for the above "Questions Arising for Kenya". Some of these questions were discussed during the final session of the Katiba Institute's "Article 47 workshop" held at the Kenya School of Government in Nairobi on 21-22 March 2016. Those who took part in the discussions were generally of the view that Kenya would benefit from the adoption of an administrative law guide. We now briefly summarise some of the main conclusions to come out of the workshop discussions. First, it was suggested that in common with Malawi, the guide should set the scene by contrasting past practices of the civil service in a more authoritarian era with what Article 47 of the 2010 Constitution requires. Second, it should encourage civil servants by pointing out that they now enjoy greater autonomy and better protection from unfair dismissal. At the same time, it should emphasise the responsibility of civil servants for "getting things right first time" in their implementation of government policy in accordance with the Constitution and the general law. The consequences of failure to do so might be spelt out, for example, critical feedback from managers and in extreme cases disciplinary action. Third, the guide should also encourage civil servants to be more responsive to the public they serve. Fourth, regarding the content of administrative law, the guide should aim for brevity and should use accessible language. The presentation of the grounds of judicial review might use the provisions of

the Fair Administrative Action Act 2015 to provide a structure, but should avoid excessively complicated treatment of questions concerning the overlap of the Act, the Constitution and the common law, and differences in the procedural requirements for bringing a challenge in respect of each of these.

Finally, participants in the workshop also suggested that a trial version of the guide should be produced as rapidly as possible to be tested in the training activities of the Kenya School of Government. It was suggested that the trial version of "Kenya's *JOYS*" should aim for the clarity and accessibility that was especially evident in the first UK edition of *JOYS*, which was considerably shorter than subsequent editions. In time, a longer guide might be required, and some increase in length would probably be inevitable as case law fleshes out what amounts to fair administrative action under Article 47 of the 2010 Constitution and the 2015 Act.

Our overall conclusion from this research, which was confirmed by the discussions in Nairobi, is that there are very good reasons for any civil service to develop and adopt a guide to administrative law. Such a guide offers the potential, best realised through appropriate training or legal awareness activities, to equip civil servants with a sound knowledge of this body of legal principles which is essential to ensuring decision-making that is lawful, procedurally fair and reasonable. The work of civil servants impacts on the daily lives of ordinary people and the delivery of public services, and any improvement in adherence to administrative law principles represents a real and practical gain for the rule of law.

United Kingdom

The Judge Over Your Shoulder: Judicial Review of Administrative Decisions, Edition 1, 1987

INTRODUCTION 1

WHAT IS ADMINISTRATIVE LAW? 2
The basic question in judicial review....................3

THE GROUNDS OF CHALLENGE 4
Illegality 4
Irrationality 6
Do you have to give reasons?....................7
Procedural impropriety 9
Fettering discretion 11
Bias 11
Legitimate expectation 12
Abuse of power 13

WHO MAKES THE DECISIONS?....................14
Will the courts substitute their own views for those of the decision-makers?....................15

QUESTIONS TO ASK YOURSELF....................16

Judge Over Your Shoulder, Judicial Review: Balancing the Scales, Edition 2, 1994/1995

Foreword from Sir Robin Butler 1

Introduction 3

Good administration 4

What is administrative law? 5

Acting illegally? Me? 6
What powers are you exercising? 6
Is it your decision? 8
Are you exercising the power to achieve the purposes Parliament intended?....................9
How may you exercise these powers?....................10

What factors will inform your decision?....................11

What about Wednesbury?....................12

Do you have to give reasons?....................13

Fettering of discretion....................15

Bias 16
Pecuniary interest....................17

Legitimate expectation......18

What about Europe?......20

What happens in a typical Judicial Review case......22
Leave 22
Evidence 23
Witnesses 23
At the hearing 24

The powers of the Judge......24
Interim relief 25
Appeals 26

Judicial review in Scotland......27

Summary 28

ANNEX 1 – Legalese and Latin maxims 31

ANNEX 2 – Further information about administrative law 33

The Judge Over Your Shoulder: A Guide to Judicial Review for UK Government Administrators, Edition 3, 2000

INTRODUCTION TO THE THIRD EDITION......1

PART ONE
Good administration and administrative law......2
What is administrative law?......2

PART TWO
Making a decision......4
The context of executive action......4
Do we have the power?......5
"Constitutional" limits......5
Is the power being exercised for a lawful purpose?......6
What factors should inform the decision?......7
Discretion or duty - must we act?......9
Delegation - who can make the decision?......9
Does the power have to be exercised in a particular way?......10
Procedural fairness - can other limits be implied?......11
Consultation - "double fairness"......12
Fettering discretion......13
Bias, impartiality and independence......13
"Legitimate Expectation"......16
Has the decision been made in an "unreasonable" way?......17
Intensity of the courts' review of "unreasonable" decisions......18
Proportionality 19
How will the courts determine whether ends are legitimate?......21
Proportionality after legitimacy......21
Do we have to give reasons?......22
Recording reasons - what needs to be included?......24

PART THREE
A typical judicial review case......26
Standing - can anyone challenge a decision?......26
What constitutes a decision?......28
Are there any decisions the courts cannot review?......28
Before the challenge reaches court......29

The "permission" hurdle....29
Evidence 31
Witnesses 32
At the main hearing....32
The powers of the court....33
Interim relief....33
Remedies following a successful challenge....34
When can the court award damages?....35
Appeals 35
Judicial review in Scotland....36

PART FOUR
Private law damages in judicial review....38
Negligence 38
Misfeasance in public office....40
The Ombudsman....41

PART FIVE
What else should I know about?....42
Human Rights Act 1998 and the ECHR....42
Why will the HRA give Convention rights further effect?....44
How will the HRA work in practice?....45
What happens when the courts find legislation incompatible with ECHR rights?....46
The effect of HRA before 2.10.2000....47
Devolution 50
EC Law....52
The categories of Convention rights in the HRA....55

How to find more information....56

The Judge Over Your Shoulder, Edition 4, 2006

1. Good administration – and Administrative Law....7
What is "Administrative Law"?....7

2. Making a Decision....8
What Constitutes a Decision?....8
The Exercise of Discretion....8
Is the Power Being Exercised for a Lawful Purpose?....10
The Convention Rights and Other Legal Limits....11
What Factors Should Inform the Decision?....12
Making a "Reasonable" Decision....13
"The Wednesbury Principles"....13
Proportionality 15
Having a "Policy"....16
Discretion or Duty?....16
Delegation 17
Procedure 18
Procedural Fairness....18
"Hear the Other Side's Case"....20
Consultation 20
"It wouldn't have Made Any Difference"....21
Bias, Impartiality and Independence....21
Legitimate Expectation....22
Giving Reasons....24
Are any Kinds of Decision Immune?....26

3. A Typical Judicial Review Case....28
"Standing" – Can Anyone Challenge?....28
Pre-action Stage and Protocol....29

ADR 29
Timing 30
Duty of Candour....................30
Freedom of Information....................31
Judicial Review – Procedure....................32
Permission Stage....................32
Service on the Defendant....................32
Permission Refused/Granted....................33
Witness Statements....................33
Evidence Where the Decision Was Taken by the Minister Personally....................34
Procedure at the Hearing....................35
Powers of the Court – Remedies....................36
Declarations of Incompatibility....................37
Damages in Judicial Review and under HRA....................38
Private Law Damages in JR – Negligence....................38
Misfeasance in Public Office....................39
The Ombudsman....................40
Judicial Review in Scotland....................40

4. Devolution....................41

5. EC Law in Domestic Cases....................43

APPENDIX 1
A Classification of the Convention Rights....................45

APPENDIX 2
Further Reading....................46

New Zealand

The Judge Over Your Shoulder: Judicial Review of Administrative Decisions, Edition 1, 1989

INTRODUCTION 1

GENERAL PRINCIPLES....3

THE BASIC QUESTION IN JUDICIAL REVIEW IS: - HAS THE DECISION-MAKER ACTED WITHIN THE SCOPE OF THE POWER OR DISCRETION CONFERRED, REASONABLY AND FAIRLY 3

THE GROUNDS OF CHALLENGE....4
Illegality 4
Unreasonableness 12
Unfairness 14

BIAS 18

NEED TO BE CONSISTENT....19

SUBSTANTIVE UNFAIRNESS....21

EVIDENCE 21

PREPARING THE RECOMMENDATIONS 22

THE LETTER OF ADVICE....26

CHECKLIST 27
The recommendation....27
The decision....29
The letter of advice....30

The Judge Over Your Shoulder: A Guide to Judicial Review of Administrative Decisions, Edition 2, 2005

INTRODUCTION 2

THE NATURE OF JUDICIAL REVIEW....2

THE GROUNDS OF CHALLENGE....5

FIRST GENERAL GROUND OF REVIEW – ILLEGALITY....6
Error of law....7
Error of fact....7
Ultra Vires....8
Relevant or irrelevant considerations....8
Rigid application of a pre-determined policy....9
Acting under dictation....9
Invalid delegation....10
Improper purpose....10

SECOND GENERAL GROUND OF REVIEW – UNFAIRNESS ... **11**
Natural Justice ... 12
Bias ... 13
Legitimate Expectation ... 14
Lack of consultation ... 15

THIRD GENERAL GROUND OF REVIEW – UNREASONABLENESS ... **16**
Substantive Unfairness ... 17
Other impacts on judicial review ... 17
The Treaty of Waitangi ... 18
International obligations ... 20
New Zealand Bill Of Rights Act 1990 ... 21
Remedies ... 24
Human Rights Act ... 25

THE PROCESS AND OUTCOME OF JUDICIAL REVIEW ... **26**
Interim orders ... 26
Relief ... 26
Process ... 27
Discovery ... 27
Affidavits ... 28
Getting the process right ... 28
Consultation ... 29
Preparing the recommendations ... 29

Malawi

Manual of Administrative Law in Malawi: A Guide for Ministers and Public Servants, 2002

Foreword v
Preface vii
Acknowledgements ix
Contents xi
Table of Decided Court Cases xiii
Table of Ombudsman Inquiries xvii
Table of Statutes xix
Books and Other Reference Materials xxi

I. Introduction 1

II. Constitutional Fundamentals and Basic Legal Principles 2
2.2 The sources of law 3
2.2.1 The common law 3
2.2.2 Case law and judicial precedent 3
2.2.3 Public and private law 4
2.3 The principles of the Constitution 5
2.3.1 The principles of Constitutional Supremacy 5
2.3.2 The Doctrine of the Separation of Powers 8
2.3.3 The principle of checks and balances 10
2.3.4 Administrative justice and natural justice 12
2.4 The Definition of Discretion 13

III. The distinction between the merits of a decision and its legality 14

IV. Alternative forms of accountability 18
The Ombudsman 18
The Human Rights Commission 21

V. The Grounds of Judicial Review: Procedural Fairness 22
5.1 The duty of procedural fairness 22
5.2 The varying content of procedural protection 24
5.3 The hearing rule 25
5.4 The rule against bias 28
5.5 Legitimate Expectations 30
5.6 The duty to give reasons 31
5.7 Delegating the hearing 32
5.8 Improper Procedure 32

VI. The Grounds of Judicial Review: The Retention of Discretion 33
6.1 Failure to retain discretion 33
6.2 Improper delegation 33
6.3 Over-rigid policies 34
6.4 Contracts 35
6.5 Estoppel 35

VII. The Grounds of Judicial Review: The Abuse of Discretion 36
7.1 Abuse of power 36
7.2 Proper Purposes and relevant considerations 37
7.3 The use of subjective language 38
7.4 Reasonableness 40
7.5 Proportionality 42

VIII. The substantive and procedural limits of power……43
8.1 The principle of *ultra vires*……43

IX. Questions to ask yourself in making decisions……45

Appendix One
Chapter Four of the Malawi Constitution……53

Appendix Two
Judicial Review Procedure and Remedies……67
The Rules of Standing……67
The Requirement of Leave……67
The Substantive Hearing……68
Remedies ……69

Appendix Three
The procedure for taking disciplinary action against a civil servant……71
Public Service Commission Regulations……71
The Preliminary Investigation……72
Interdiction and Suspension……73
Charges ……73
The Disciplinary Enquiry……73
Criminal Proceedings……74
Absconding Officers……75
Industrial Class Employees……75

Appendix Four
The Law Officers and when to take legal advice from them……75

Appendix Five
The Court System in Malawi……79

Appendix Six
Public Service Act……81

Glossary of Terms……91

BINGHAM CENTRE FOR THE RULE OF LAW