

Abstract

This paper traces the development of administrative tribunals in the UK, from the modern phase of their development in the second half of the 19th century, via some constitutional controversies in the first half of the 20th century, to the radical overhaul of the tribunal system that has been taking place in the last few years – in parallel (so far as recent developments are concerned) with other major reforms of the machinery of justice. The story is one of a fairly steady movement towards an increasing formalisation and judicialisation of the tribunal system. In this context ‘judicialisation’ means that tribunals have become more and more like ordinary courts, adopting formal and increasingly adversarial procedures (thereby perhaps making life harder for unrepresented appellants, the traditional core-users of the system). We will consider whether this tendency is, on balance, a good thing. We will also need to reflect on whether – recent reforms notwithstanding – the word ‘system’ is strictly apposite in this context, given the piecemeal development and continuing diversity of tribunals; and whether use of the adjective ‘administrative’ may beg too many questions about the nature and *raison d’être* of tribunals (hence the inverted commas round the word in the title of this article). Sometimes the more neutral adjectives, ‘special’ or ‘specialist’ have been used.

Important landmarks in the history of tribunals have been the reports of three major official inquiries – the Donoughmore Report, (Donoughmore, 1932), the Franks Report, (Franks, 1957) and the Leggatt Review, (Leggatt, 2001). The terms of reference of these inquiries, discussed in the body of the article, can be found in Appendix 1. Appendix 2 lists some of the main administrative tribunals that were under the supervision of the (former) Council on Tribunals¹ in the mid-1990s, before the changes set in motion by the Tribunals, Courts and Enforcement Act 2007. Appendix 3 gives a snapshot of the (still evolving) reformed tribunal system, following the coming into force of the 2007 Act.

1 On 1 November 2007 the Council on Tribunals was replaced by the Administrative Justice and Tribunals Council, established by the Tribunals, Courts and Enforcement Act 2007. See below.

THE JUDICIALISATION OF ‘ADMINISTRATIVE’ TRIBUNALS IN THE UK: FROM HEWART TO LEGGATT

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Introduction: Administrative Tribunals and Administrative Justice

It is much rarer than it used to be to hear laments from public lawyers about the UK's tardiness in developing a proper system of administrative justice. Judicial review has been a growth industry in the last three or four decades; there is now an Administrative Court; the UK has a growing human rights jurisprudence, following the enactment of the Human Rights Act 1998; and it has a well-established ombudsman system. But, even in the days – back in the 1940s and '50s – when academics like William Robson and Ivor Jennings were struggling to exorcise the unquiet ghost of Professor A.V. Dicey, and when judges seemed generally nervous about entertaining challenges to the Executive, administrative justice did have one area of sturdy – and quite longstanding – existence, in the shape of 'administrative' tribunals. Many of these bodies have offered a specialised adjudication facility, alongside the ordinary courts, operating for the most part without the daunting procedural formality (e.g. with regard to strict adherence to the rules of evidence) that characterises those courts, for citizens aggrieved about their treatment by the State in respect of their administrative rights and legal entitlements.

These tribunals, important cogs in the machinery of administrative justice, have recently undergone some major reforms – which will be discussed later in this paper. Tribunals are sometimes, as one might expect, the subject of critical discussion – but most informed observers of the machinery of justice nowadays would probably see them as generally useful adjuncts to the court system and certainly not as in any way threatening. At the beginning of the 20th century, however, with widespread acceptance in legal circles of Dicey's dogmatic assertion that introducing a separate system of administrative law in the UK would pose a threat to the rule of law (Dicey, 1961, chapter XII) tribunals were seen and denounced in some quarters as constitutionally subversive. The most prominent exponent of this view was Sir Gordon Hewart, Lord Chief Justice of England and Wales, 1922-40. Hewart's trenchant views were set out in a book entitled *The New Despotism* (Hewart, 1929) – and a high-powered official Committee on Ministers Powers was set up, expressly to refute his assertions.

The Committee affirmed the constitutional respectability of the tribunal system, but did nothing to raise their profile. For many years, tribunals were the Cinderellas of administrative justice, receiving little professional or academic attention. Part of the explanation for this neglect lay in the fact that most of them (particularly those operating in the welfare field) were perceived as poor persons' courts, operating relatively informally and inexpensively; certainly not as high-profile arenas where ambitious practising lawyers could earn large fees and enhance their reputations. The undertaking of sociological studies of access to and usage of legal institutions is a comparatively recent phenomenon. Even now, although there has been a considerable amount of socio-legal research into administrative justice, 'it has so far had little impact on mainstream public law scholarship' (Richardson and Genn, 2007, p. 118, and notes 13 and 14).

Moreover, as we will see, tribunals were still regarded by some critics, not as subversive institutions as in Lord Hewart's wilder imaginings, but as slightly constitutionally ambiguous - too close to government departments to be truly independent, and too informal in their procedures to bear comparison with real courts of law. Indeed, it was not until the Report of the Franks Committee on Tribunals and Enquiries in 1957, that their status as part of the judicial system, rather than as creatures of the administration, came fully to be recognised. Half a century later, in 2007, following the Report of another official committee, chaired by a retired judge of the Court of Appeal, Sir Andrew Leggatt, the enactment of the Tribunals, Courts and Enforcement Act 2007 has put the tribunal system onto a completely new statutory footing and embedded them even more solidly into the fabric of the judicial system.

The image of tribunals seems to have gone through several evolutionary changes, from enemies of the rule of law, to useful but rather marginal entities, floating around in a no man's land somewhere between the judicial and the administrative systems, towards becoming fully-fledged, professionally accredited bodies set in the mainstream of a modernised and better integrated system of administrative justice. Let us trace this process of transformation in more detail, and consider its implications for the wider picture of administrative justice.

The Origins of Administrative Tribunals

In the UK, as in many countries, the existence of special courts, operating in parallel with the ordinary judicial structure is nothing new. Courts of chivalry, ecclesiastical courts and courts martial – some of which can be traced back to feudal times – are obvious examples of this. Sir Robert Carnwath, the first holder of the new office of Senior President of Tribunals (see below), has pointed out that, in the 17th century, the Commissioners of Customs and Excise were controversially given the power to adjudicate on disputes over tax or excise duties (Carnwath, 2009a) but although this use of a non-judicial body for such purposes may be seen as part of the prehistory of our present subject-matter, the specialised courts – administrative tribunals – that we are considering here have their origins in industrialisation and the development of the modern interventionist State. Their history is well documented in the academic literature (Wraith and Hutchesson, 1973; Farmer, 1974; Stebbings, 2006; Cane, 2009).

The story begins with the development of the railways in the first half of the 19th century. Legal disputes sometimes arose out of the trading practices of the large and monopolistic, privately owned, railway companies. To begin with, by an Act of 1854, such disputes were assigned to the ordinary courts. But the judges sometimes found themselves uncomfortable in this unfamiliar and technically specialised territory and those seeking to have their disputes resolved were often less than happy with the inexperienced adjudication that was on offer. In 1873, a special tribunal of Commissioners was established: in 1888 this became the Railways and Canals Commission, with a judicial chairman, assisted by lay advisors (one of them an expert in railway matters) nominated by the Home Secretary. This provided one model for the further development

of tribunals in the 20th century though the general presumption remained that legal disputes should be a matter for the ordinary courts.

The picture began to change after 1906, when the Liberal Government took the important first steps towards a welfare state by introducing old-age pensions and unemployment benefits. By definition, those seeking justice in the welfare field tend to be drawn disproportionately from the poorer and less well-educated sections of society: so one great virtue of tribunals operating in this area, apart from their specialist expertise, has always been their perceived relative informality (e.g. a fairly relaxed approach to applying formal rules of evidence) and the fact that applicants could appear without legal representation, and hence at little or no cost to themselves. Then came the First World War and a scheme of disablement pensions for wounded servicemen: disputes about eligibility were determined by a specially constituted tribunal. In the 1920s, government ministries were granted many new statutory powers, often subject to the right of appeal to a special tribunal.

The proliferation of tribunals continued through the 20th century, albeit in a somewhat unsystematic way. By the time that the Leggatt review took place, in 2000-1, there were some 60 or more different jurisdictions, established at different times in response to particular perceived needs, but many now 'moribund'. The active ones covered subjects as diverse as social security, employment, asylum, tax, land registration and mental health. They were handling well over half a million cases a year, and using the skills of several thousand full-time or part-time tribunal members. (Carnwath, 2009b, p. 48; Leggatt, 2001, para. 2).

Dicey's Legacy – Hewart and 'The New Despotism' of Tribunals

As we have just noted, the early development of tribunals was as by-products of the industrial revolution and their subsequent proliferation was driven by the growth of collectivist-interventionist government and the emergence of a welfare state. In his polemical book, *The New Despotism*, published in 1929, Lord Chief Justice Hewart (who had a political background, as a former member of a Liberal Government) sought to compare constitutional tendencies in the modern era of collectivism with the seventeenth century excesses of the Stuart monarchy:

The old despotism [of the Stuarts], which was defeated, offered Parliament a challenge, the new despotism, which is not yet defeated, gives Parliament and anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will or the caprice of the Executive unfettered and supreme (Hewart, 1929, p. 17).

Hewart had two particular concerns. First, the growing practice of by-passing the legislature by delegating substantial rule-making powers to civil servants. His second objection was to the increasing tendency to assigning judicial powers to specialist tribunals, by-passing the ordinary courts – in contravention of the idiosyncratic

interpretation of the rule of law propounded by Dicey (whose views were regularly invoked throughout Hewart's book).

The Lord Chief Justice also referred to circumstances in which statutory public inquiries into matters relating to town and country planning are conducted by an inspector appointed by a minister; although the inspector (a civil servant) conducts the hearing, it was the minister himself who, acting on (or disregarding) the advice of the inspector, made the final decision.¹ There was, in those days some confusion between the respective functions of tribunals (exercising specialised adjudicative functions in particular areas of public administration) and planning inquiries (collecting evidence at a public hearing as a basis for ministerial decision). The waters were further muddied by the then prevalent habit of using the unhelpful term 'quasi-judicial' in respect of public inquiries (Harlow and Rawlings, 1987, pp. 31-33; 2009, p. 573) and usage of the loaded term 'ministerial tribunals'. Tribunals and inquiries both formed part of the respective remits of the Donoughmore Committee and later, in the 1950s, of the Franks Committee (but the present article is concerned almost exclusively with the role of tribunals).

Hewart's biographer notes that 'the book caused great anger in Whitehall', not least because he himself, in his previous role as Attorney General, had often personally supported the kind of delegated legislation, giving wide powers to the executive, to which he now took exception (Jackson, 1959, p. 214). Nevertheless, the book generated a lot of support, and the views of a Lord Chief Justice, however misconceived, cannot simply be brushed aside. So the then Lord Chancellor set up a committee, initially² under the chairmanship of the Earl of Donoughmore, to consider whether the executive had improperly compromised the sovereignty of Parliament or by-passed the judiciary, and hence undermined the rule of law, through the proliferation of tribunals.

The Committee tried to steer a middle course between supporting the status quo and out-of-hand rejection of Hewart's complaints. So far as tribunals were concerned, it endorsed their use in principle:

Our conclusion on the whole matter is that there is nothing radically wrong about the existing practice of Parliament in permitting the exercise of judicial and quasi-judicial powers by Ministers [a reference to public enquiries] and of judicial powers by Ministerial tribunals. (Donoughmore, 1932, p. 115)

But it said that there should always be a presumption in favour of using the ordinary courts rather than tribunals to adjudicate on administrative disputes. The Lord Chancellor (then, and until recently, the minister responsible for judicial appointments) should be consulted by ministers about tribunal membership. There should be a right of appeal from tribunals to the High Court on points of law. And there were various

1 Though, in practice, nowadays, the planning inspectors themselves – the Planning Inspectorate is an executive agency of central government - make the decisions, in all but the biggest and most contentious cases.

2 He was later succeeded by Sir Leslie Scott KC.

other procedural recommendations, e.g. about the desirability of tribunals giving reasons for their decisions.

The Donoughmore report served its main purpose, which was to take the heat out of a rather synthetic controversy without unduly offending a top judge, but its substantive proposals, such as they were, made little or no impact. Predictably, operating as it did in the shadow of Dicey, the committee rejected out of hand a proposal by Professor William Robson of the London School of Economics for a separate administrative court – a development that was destined to wait for another seventy years to come to fulfilment. Towards the end of his judicial career, Hewart apparently changed his mind, particularly with regard to his former hostility towards delegated legislation, and confessed that he regretted ever having written *The New Despotism* (Jackson, 1959, p. 216).

The Franks Report, 1957

It might be tempting to depict the next major enquiry into the tribunal system as part of a purposive movement away from Dicey towards the establishment of a developed system of administrative justice - but this would be misleading. Certainly, the decade or so following the end of the Second World War did see some important developments, including the publication of C.J. Hampson's BBC Reith Lectures, *Executive Discretion and Judicial Control* (Hampson, 1954) which included an informative and positive account of Dicey's *bête noire*, the French *Conseil d'Etat*; and the journal *Public Law* was launched in 1956. Textbooks on administrative law began to appear. But judicial review of administrative action remained something of a backwater, stunted by chronic judicial timidity, exacerbated by arcane procedures and inadequate legal remedies. The publication of the Franks Report in 1957 did stimulate some academic interest, but book-length studies of tribunals did not begin to appear until the 1970s.

The Franks Committee's report's narrow terms of reference (see Appendix 1) gave it little scope for a synoptic review of administrative justice – even if it had had the appetite to do undertake such an exercise, which it probably had not. But, so far as the tribunal system itself is concerned, the report was something of a watershed. It strongly reaffirmed the merits of tribunals, it gave out the important message that they were part of the judicial system, operating independently of government, and it enunciated some significant principles relating to their operation, along with various specific reforms – some of which were implemented, others not.

The genesis of the Committee came about in rather odd circumstances – as an oblique response to the famous 'Crichel Down affair' in 1954, in which the Minister of Agriculture had resigned over the unfair treatment of a landowner by civil servants in the Ministry. The details of this case have been discussed elsewhere (Griffith, 1955; Griffith 1987; Nicolson, 1986) and need not detain us here. Suffice it to say that, despite the Franks Committee's apparent origins, its remit had little or nothing to do with the circumstances that had obtained in the Crichel Down case. Indeed, the issues arising from that case were much more akin to what later became known as maladministration, and arguably Crichel Down made a much more relevant

contribution to the early debates about establishing a Parliamentary Ombudsman, that eventually came to fruition in 1967, than it did to the development of tribunals and planning inquiries.

The Franks Report concluded that tribunals 'have come to stay'. It identified their advantages as 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.' And it enunciated three broad principles that should govern the operation both of tribunals and of planning inquiries: openness, fairness and impartiality. English common lawyers will probably notice that these principles resemble the old rules of natural justice that had been the historical basis of judicial review, exercised by the courts. Indeed, the Franks Report was very much a lawyers' report, strongly imbued with traditional, albeit post-Diceyan, legal values.

Donoughmore had used the term 'ministerial tribunals', and had regarded them as part of the machinery of administration. The Franks Report saw their role quite differently:

Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence ... appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social services field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. *We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.* The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance ... or on appeal from a decision of a Minister or of an official in a special statutory position... Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable (Franks, 1957, para. 40). (Italics added).

Having avoided reference to 'ministerial' tribunals, the report should perhaps have spelt an end to the usage of the almost equally loaded adjective, 'administrative', but it did not, and this terminology is still used in some contexts even today.

The Report went on to make quite a number of specific recommendations, many of which were implemented by the Tribunals and Inquiries Act 1958 (subsequently amended and consolidated); some recommendations were either ignored, or were overtaken by events. Many of the changes that came about in consequence of Franks were superseded by subsequent reforms, including the recent ones discussed later in this article. The following are some of the highlights:

- Establishment of a Council on Tribunals (an advisory 'non-departmental public body') to oversee the constitution and working of the various tribunals.

- The Chairmen of tribunals should be appointed by the Lord Chancellor. Franks recommended that members of tribunals should be appointed by the Council on Tribunals rather than by ministers: this was rejected, though ministers were required to 'have regard to' any general recommendations about membership that the Council might make.
- Franks recommended that tribunal chairmen should be legally qualified. This was implemented in respect of some categories of tribunal, but not others.
- A tribunal should give written notice of its decision and the reasons for it. The 1958 Act merely left it to tribunals to give their reasons on request.
- Hearings should generally take place in public.
- There should be a right of appeal to the High Court on points of law: this was broadly implemented by way of a 'case-stated' procedure.³
- Parties should be entitled to legal representation and legal aid should be available. Very little happened to implement the latter recommendation – which, in any case, cuts across the procedural informality that is commonly regarded as one of the strengths of a tribunal system.

The Franks Report came in for a good deal of criticism both at the time and subsequently, mainly because of the narrowness of its remit, which the committee itself chose to interpret even more narrowly. Once again (as he had done in the context of the Donoughmore Committee's enquiry), William Robson advocated a movement towards an administrative court – a General Administrative Appeal Tribunal – and once again his arguments were rejected (Franks, 1957, paras. 120-123; Robson, 1951, pp. 426-437). It may be argued that this proposal foreshadowed recent reforms of the tribunal system (see below) – particularly the establishment of an Upper Tribunal, with appellate functions.

But one of the most interesting issues arising from the Franks exercise is the extent to which the identification of tribunals as part of the machinery of adjudication led the Committee, in making its specific recommendations, down the road of increased legal formality and judicialisation. If tribunals were to be adjuncts of the court system, then they must surely behave more like proper courts: legally qualified chairmen, legal representation, orderly procedures, hearings in public, reasoned decisions and provision for appeals to the courts. As Harlow and Rawlings have pointed out, 'over the next quarter-century, tribunals were pushed increasingly towards a court-substitute function' (Harlow and Rawlings, 1987, p. 393). The informality which the Franks Committee itself identified as an important part of the *raison d'être* of tribunals (or at least some of them, see below), stood at risk of being significantly compromised. If tribunals lay claim to providing an alternative to the courts, how real is that 'alternative'

3 An inferior court or tribunal may be requested by one of the parties to prepare a statement of relevant facts and one or more points of law for adjudication by a higher court or tribunal; the ultimate decision is taken by the inferior court or tribunals on the basis of that adjudication.

in practice? This tendency – and the questions it raises - has been carried at least one step further by the post-Leggatt reforms, to which we now turn.

The Legatt Review

In May 2000, the Lord Chancellor appointed Sir Andrew Leggatt, a former Court of Appeal judge, to carry out a review of the tribunal system. His report was published in August 2001 (Leggatt, 2001). This exercise can be seen as part of a series of radical reforms of the civil and criminal justice system by the Labour Government that came to office in 1997. In 2000, a new Administrative Court had replaced the Crown Office List in the Queen's Bench Division of the High Court, to hear applications for judicial review and some statutory appeals in the field of administrative law. Lord Woolf's reviews of the civil justice system in the late 1990s had resulted in a substantial overhaul of the management of business in the civil courts, including the High Court and the Court of Appeal (Drewry, Blom-Cooper and Blake, 2007, chapter 4). The post-Leggatt reforms of the tribunal system took place alongside the enactment and implementation of the Constitutional Reform Act 2005, creating a Ministry of Justice (subsuming the office of Lord Chancellor), paving the way for the transfer of the judicial function of the House of Lords to a new Supreme Court, and creating a more transparent and independent system for appointing judges and tribunal members through a new Judicial Appointments Commission.

The terms of reference of the Leggatt review (see Appendix 1), had a strong flavour of the 'new public management' orthodoxies that have taken root in the past two or three decades. And, as the title of the report makes clear, this was a user-oriented exercise, reflecting well-established customer-focus principles that can be traced back to the Citizen's Charter of 1991 (Cmnd. 1599) – and probably beyond. The report observed that that the haphazard development of tribunals had resulted in 'wide variations of practice and approach, and almost no coherence'. The current arrangements, it said, appeared 'to have been developed to meet the needs and conveniences of the departments and other bodies which run tribunals, rather than the needs of the user (Leggatt, 2001, para. 1.3).' It concluded that four criteria needed to be fulfilled if tribunals were to meet the needs and expectations of the modern user:

First, users need to be sure, as they currently cannot be, that decisions in their cases are being taken by people with no links with the body they are appealing against. Secondly, a more coherent framework for tribunals would create real opportunities for improvement in the quality of services than can be achieved by tribunals acting separately. Thirdly, that framework will enable them to develop a more coherent approach to the services which users must receive if they are to be enabled to prepare and present cases themselves. Fourthly, a user-oriented services needs to be much clearer than it is now in telling users what services they can expect, and what to do if the standards of these services are not met (Leggatt, 2001, para. 1.4).

The Report recommended that there should be an independent Tribunal Service – a new executive agency analogous to the Courts Service - that would take over the

management of tribunals, keeping them at arm's length from their parent departments. It also recommended the creation of a new, integrated two-tier structure of tribunals, to be headed by a senior judge who would exercise wide functions of judicial leadership. In August 2001, the Lord Chancellor's Department (as it then was) published a consultation paper on the report, and the responses to this exercise were published in March 2003. A White Paper, setting out the Government's proposals – substantially implementing the Leggatt proposals – was published in July 2004 (Department for Constitutional Affairs, 2004). It addressed tribunal reform in the wider context of what it called 'proportionate dispute resolution' (PDR):

The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provide tailored solutions to resolve the dispute as quickly and cost-effectively as possible. It can be summed up as Proportionate Dispute Resolution (Department for Constitutional Affairs, 2004, para. 2.2; Adler, 2006).

By this principle, tribunal adjudication should be reserved only for cases which cannot be resolved otherwise. It has been pointed out that, while some kinds of dispute between citizens and the state may require independent adjudication via an oral hearing by a tribunal, others may be better dealt with by negotiation (Richardson and Genn, 2007, p. 141).

Coinciding with publication of the White Paper, a senior Court of Appeal judge, Sir Robert Carnwath, was designated 'Shadow' Senior President of the embryonic reformed system (he was formally appointed Senior President in November 2007). A draft Tribunals, Courts and Enforcement Bill⁴ was published in July 2006 and the Bill itself had its first reading in November 2006. The Tribunals, Courts and Enforcement Act (TCEA) eventually received the Royal Assent in July 2007. Much of the detail has been, and will be, fleshed out by way of delegated legislation.

The Council on Tribunals – the 'advisory non-departmental public body' which had been set up by the Tribunals and Inquiries Act 1958, following a recommendation by the Franks Committee – was to be replaced by a new Administrative Justice Council (later changed to the Administrative Justice and Tribunals Council, the AJTC). The terms of reference of this body underlines both the holistic approach to administrative justice underlying these reforms and their emphasis on the consumer. It

keeps under review the administrative justice system as a whole with a view to making it accessible fair and efficient. [It seeks] to ensure that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users (Administrative Justice and Tribunals Council, 2009).

4 The Bill covers other matters, apart from tribunals – hence its extended title.

The AJTC is a statutory body, established by the TCEA. Meanwhile, in April 2006 the new executive agency, the Tribunal Service, had been established, without the need for legislation, in the Department of Constitutional Affairs, many of whose functions later moved to a new Ministry of Justice Its Annual Report and Accounts can be accessed online (Tribunals Service, 2009).

The TCEA explicitly confirmed the status of the tribunal judges (as the legally-qualified members of tribunals are now called) as part of the independent judicial system, extending to them the same guarantees of independence as apply to the judges in the ordinary courts. Appointments to tribunals will be made by the Judicial Appointments Commission. The Act created a two-level tribunal system comprising a First-tier tribunal and an Upper Tribunal both divided into specialist 'chambers'. The Upper Tribunal has appellate (confined to points of law), enforcement and supervisory/guidance functions. It includes an Administrative Appeals Chamber, which will operate in partnership with the Administrative Court and take over the judicial review jurisdiction of that Court in respect of tribunal decisions. Most of the existing tribunals, along with their members, have been or will in due course be transferred into one or other of these chambers: this is an ongoing process at the time of writing, and Appendix 3, with its text and diagram gives a snapshot of the state of play as it looks in September 2009 and with planned changes in early 2010.

Tribunals – Convergence with Continuing Diversity

The post-Leggatt reforms have resulted in a new framework for the structure and operation of tribunals – something more than a mere tidying-up operation, but less than a move towards all-embracing convergence. However, it would be unfair to criticise Leggatt, and the authors of the TCEA for this: trying to squeeze such a diverse system, that has evolved over many decades in such a piecemeal way, into a procrustean bed of complete uniformity would have been both unwisely counter-productive and would, in the end, probably have proved unachievable. The continuing diversity of tribunals has always made it difficult to offer generalisations about them and how they should work.

Take, for instance, the issue of whether or not the legal representation of parties should be encouraged. Some tribunals (in the field of taxation, for example) display such a high degree of procedural formality that they have always been, to all intents and purposes, specialised courts. Tribunals operating in the field of state welfare have traditionally attached importance to informality, proclaiming the virtue of helping (through the use of a quasi-inquisitorial style of proceeding) of unrepresented appellants. And is representation by *lawyers* necessarily the most appropriate kind of representation: may it not be the case that, in Mental Health Tribunals, for instance, medical or psychiatric expertise might be more useful?⁵ Most tribunals operate in

5 The medical (non-lawyer) member of a Mental Health Tribunal is usually a consultant psychiatrist.

the field of administrative justice, adjudicating disputes between citizens and the state – and to that extent may be thought of as ‘administrative’ tribunals; but others operate more as specialist civil courts, to which the adjective administrative cannot accurately be applied. This point has been well made by Sir Robert Carnwath:

The majority of tribunals [covered by the TCEA] can fairly be described as ‘administrative tribunals’, in that they are concerned with disputes between the citizen and the administration in one form or another. However, there are many exceptions. Employment tribunals deal with all kinds of employment disputes, whether involving private or public employers. Others are hybrids. A notable example is the Lands Tribunal. Its jurisdictions include citizen-state disputes on matters such as compensation for compulsory purchase and rating [local property tax] valuation, and private party disputes, such as applications to modify restrictive covenants, and appeals from the Leasehold Valuation Tribunals over leasehold enfranchisement valuation or service charges (Carnwath, 2009b, pp. 53-54).

Conclusions

The post-Leggatt reforms are still unfolding at the time of writing and it is far too early to come to firm, evidence-based, conclusions about the working of the new arrangements. The points made earlier about the continuing diversity of tribunals, making generalisations hazardous, should also be borne in mind. However, a few tentative observations are offered here.

From a ‘law and public administration’ standpoint, the new arrangements, as reflected in the terms of reference of the Leggatt review, and in the substance of the report itself, clearly mark the extended application of new public management principles that have already been applied to many other aspects of the machinery of justice – ‘efficiency, effectiveness and economy’, greater use of transparent performance indicators, combined with a much stronger customer focus. The setting up of a new executive agency in the Ministry of Justice to manage tribunals, in parallel with the role of the previously established Courts Service Agency is one institutional manifestation of this. The important managerial and supervisory role of the office of Senior President, established by the TCEA – analogous to that of the Lord Chief Justice under the Constitutional Reform Act 2005 (Carnwath, 2009b, p. 50) - is another.

The new arrangements are a further step towards a more flexible and holistic approach to delivering administrative justice, as reflected in the change of the title and functions of the post-Franks Council of Tribunals, whose oversight role, more broadly defined to embrace ‘courts, tribunals, ombudsmen and alternative dispute resolution providers’, has been transferred to the post-Leggatt Administrative Justice and Tribunals Council. The ‘Proportionate Dispute Resolution’ (PDR) principle in the 2004 White Paper reflects the same flexible and holistic objective.

Tribunals are not quite the same as ordinary courts: they are distinguished by their specialised jurisdictions (though some courts also specialise) and by the inclusion

of non-legal members with relevant expertise. But courts and tribunals have become and are becoming both more similar and more closely integrated in all kinds of ways. The appointment of the membership of tribunals has been moved under the umbrella of the Judicial Appointments Commission. Provision has been made for interchange of judicial personnel between courts and tribunals. Some judicial review functions are to be transferred from the Administrative Court to the Administrative Appeals Chamber of the Upper Tribunal. Although most appeals (on points of law) from first instance tribunals will generally go to the Upper Tribunal, some exceptional cases may (with leave) go on upwards to the Court of Appeal and to the new Supreme Court.

Recent reforms have carried forward an evolutionary tendency to systematise and judicialise the structure and working of tribunals. This is, in this writer's view, inevitable and, on the whole, desirable – though with some negative implications as well as more positive ones. Some of the old informalities that were seen to characterise and to be an important strength of tribunals, particularly in the welfare field, may increasingly be replaced by more formal methods. This arguably poses a potential problem for many impecunious and less well-educated appellants, who have traditionally been encouraged to appear without professional representation. Although, in theory, this need not matter very much if PDR really works to resolve informally at least some disputes before they even reach a tribunal, one cannot of course be entirely sure that PDR will really deliver everything that is claimed for it. Meanwhile, however, if and when appeals do reach a tribunal, it is surely to everyone's benefit that they are handled properly - not perhaps identically to the way in which traditional courts would handle them - but in a systematic and professional way that has regard both to the legitimate expectations of users and to modern human rights notions of due process.

Tribunals are key elements in a multi-faceted administrative justice system. As Baroness Hale (a former member of the Council on Tribunals) said in an important House of Lords appeal concerning a tribunal, 'tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system.'⁶

6 *Gillies v Secretary of State for Work and Pensions* [2006] 2 UKHL, [2006] 1 WLR 781.

Appendix 1

Terms of Reference of the Donoughmore, Franks and Leggatt Enquiries

The Committee on Ministers' Powers (Chairman The Earl of Donoughmore). Appointed 30 October 1929. Report, Cmd. 4060, 1932.

To consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.

The Committee on Administrative Tribunals and Enquiries (Chairman, Sir Oliver Franks). Appointed 1 November 1955. Report, Cmnd. 218, 1957.

To consider and make recommendations on:

- a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions.
- b) The working of such administrative procedures as include the holding of an enquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations and in particular the procedure for the compulsory purchase of land.

Review of Tribunals, by Sir Andrew Leggatt. Appointed 18 May 2000. Report ('Tribunals for Users - One System, One Service'), 16 August, 2001, <http://www.tribunals-review.org.uk/>

To review the delivery of justice through tribunals other than ordinary courts of law, constituted under an Act of Parliament by a Minister of the Crown or for purposes of a Minister's functions; in resolving disputes, whether between citizens and the state, or between other parties⁷, so as to ensure that:

- There are fair, timely, proportionate and effective arrangements for handling those disputes, within an effective framework for decision-making which encourages the systematic development of the area of law concerned, and which forms a coherent structure, together with the superior courts, for the delivery of administrative justice;
- The administrative and practical arrangements for supporting those decision-making procedures meet the requirements of the European Convention on Human Rights for independence and impartiality;
- There are adequate arrangements for improving people's knowledge and understanding of their rights and responsibilities in relation to such disputes, and that tribunals and other bodies function in a way which makes those rights and responsibilities a reality;

⁷ Some tribunals – for instance, those dealing with disputes between landlords and tenants and operating in the field of employment law - adjudicate in private law disputes, to which the state may or may not be a party, see text.

- The arrangements for the funding and management of tribunals and other bodies by Government departments are efficient, effective and economical; and pay due regard both to judicial independence, and to ministerial responsibility for the administration of public funds;
- Performance standards for tribunals are coherent, consistent, and public; and effective measures for monitoring and enforcing those standards are established; and
- Tribunals overall constitute a coherent structure for the delivery of administrative justice.

The review may examine, insofar as it considers it necessary, administrative and regulatory bodies which also make judicial decisions as part of their functions.

Appendix 2

The Main Administrative Tribunals in the 1990s

- agricultural land tribunals;
- child support appeal tribunals;
- the Civil Aviation Authority and the Director General of Fair Trading in their licensing functions;
- criminal injuries adjudicators;
- the Data Protection Registrar;
- education appeal committees;
- immigration adjudicators and the Immigration Appeal tribunal;
- employment tribunals;
- the Lands Tribunals;
- mental health review tribunals;
- the Comptroller-General of Patents;
- war pensions appeal tribunals;
- rent assessment committees;
- social security appeal tribunals and the Social Security Commissioners;
- the general and special commissioners of income tax;
- traffic commissioners;
- valuation and community charge tribunals;
- VAT tribunals.

Appendix 3

The New (And Still Evolving) Tribunal System, Following Enactment of the Tribunals, Courts and Enforcement Act 2007

(Extracted, in October 2009, from the web site of the Tribunals Service – an executive agency of the Ministry of Justice, see text).

A major reorganisation of tribunals is taking place. Most tribunals are being combined into a single First-tier Tribunal with jurisdiction for some purposes throughout the

United Kingdom. The Upper Tribunal has been created to deal with appeals from, and enforcement of, decisions of the First-tier Tribunal.

- All the legally qualified members of the First-tier Tribunal and Upper Tribunal are now called judges (that includes all of those judicial office holders who transferred into the new tribunals structures with their jurisdictions (for example the Lands Tribunal, the Social Security and Child Support Commissioners). Other judicial office holders (for example the surveyors in the Lands Chamber (Lands Tribunal) and disability experts in social security cases) are known as Members. All new judges and members are appointed through the independent Judicial Appointments Commission.
- The opportunity provided by these changes is being used to reform and simplify the rules and procedures for jurisdictions as they move into the First-tier Tribunal and Upper Tribunal.

The First-tier Tribunal is a new generic tribunal established by Parliament under the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal's main function is to hear appeals against decisions of the Government where the tribunal has been given jurisdiction. It has jurisdiction throughout the United Kingdom for some purposes.

The First-tier Tribunal currently has jurisdiction over a range of appeals formerly heard by the Social Security and Child Support Appeals Tribunal, the Pensions Appeals Tribunals (England and Wales), the Mental Health Review Tribunal, the Care Standards Tribunal, the Criminal Injuries Compensation Panel, the Asylum Support Tribunal, Special Educational Needs and Disability Tribunal, VAT and Duties Tribunals and the Special Commissioners.

In September 2009 a General Regulatory Chamber was established in the first tier: this will take over the jurisdictions of several important tribunals in areas concerned with regulatory functions in the areas of, for instance, charities, consumer credit, estate agents, some transport services, immigration, gambling and official information.

It is intended that the First-tier Tribunal will eventually exercise the jurisdictions exercised by most of the tribunal jurisdictions administered by central government.

The Upper Tribunal is a newly created court of record with jurisdiction throughout the United Kingdom. It has been established by Parliament under the Tribunals, Courts and Enforcement Act 2007. Its main functions are:

- To take over hearing appeals to the courts, and similar bodies from the decisions of local tribunals;
- To decide certain cases that do not go through the First-tier Tribunal
- To take over some of the supervisory powers of the Courts to deal with the actions of tribunals and of the government departments and other public authorities whose decisions may be appealed to tribunals; and
- To deal with enforcement of decisions, directions and orders made by tribunals.

The Upper Tribunal is divided into three chambers. The Administrative Appeals Chamber started work on 3 November 2008 followed by the Finance and Tax Chamber on 1 April 2009 and the Lands Chamber on 1st June 2009.

Judicial Review Functions: As part of its new powers, the Upper Tribunal has powers to conduct a judicial review of decisions or actions that cannot be appealed.

Lord Judge, the Lord Chief Justice, made a Direction on 29 October 2008 with effect from 3 November 2008 transferring two classes of action for judicial review from the High Court to the Upper Tribunal.

The two classes are:

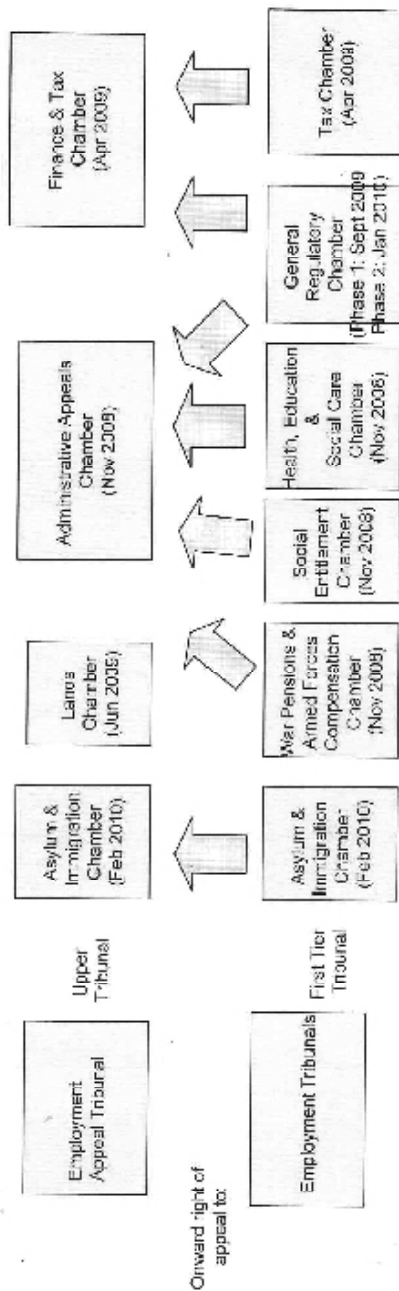
- Appeals against decisions of the First-tier Tribunal on appeals against review decisions of the Criminal Injuries Compensation Authority
- Reviews of decisions of the First-tier Tribunal made under the new Tribunal Procedure Rules for the Tribunal where there is no right of appeal to the Upper Tribunal against the decisions.

In all cases, [applicants] must have permission from either the High Court or the Upper Tribunal to bring the action for judicial review. And [they] must show that [they] have a sufficient personal interest in the matter that [they] seek to challenge. [They] must also make any application without undue delay.

Judges and Members: All the decision-makers in the Upper Tribunal are judges or expert members. They take the judicial oath, and their judicial independence is protected in the same way as court judges under the Constitutional Reform Act. They are specialists in the areas of law they handle. Some of the judges and members are full time appointments to the Upper Tribunal. For example, Social Security Commissioners who transferred in are now Judges of the Upper Tribunal. Surveyor members of the Lands Tribunal have transferred into the Lands Chamber and continue to hear cases as they did previously. High Court judges, county court judges and other judges may also sit as full-time or part-time Judges of the Upper Tribunal.

In the Upper Tribunal cases are usually decided by a judge (or often in the Lands Chamber, a member) sitting alone. However in complex or novel cases a tribunal may be comprised of more than one judge sitting with expert member(s) if required.

First Tier Tribunal and Upper Tribunal structure as created by the TCE Act 2007



Notes

- All first instance appeals will be dealt with in the First Tier Tribunal apart from the following which will be dealt with in the Upper Tribunal:

- > Lands appeals (Lands Chamber)
- > some Transport appeals – Traffic Commissioner cases (Admin Appeals Chamber)
- > some Charity appeals (Finance & Tax Chamber)
- > some Information appeals (Admin Appeals Chamber)
- > FINSMAT & PRT (Finance & Tax Chamber)

- Onward appeals from the Upper Tribunal will lie to the Court of Appeal.

- The Employment Tribunal and Employment Appeal Tribunal will not transfer into the TCE structure

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