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The Place of Public Statutory Tribunals in the
English Legal System.

Submitted by

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FOR THE DEGREE OF B.C.L.

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DEPARTMENT OF LAW

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ABSTRACT

A survey of tribunals in terms of history emphasises their unsystematic development. Two individual tribunals, the Traffic Commissioners and the Industrial Tribunals are taken as examples of this. The relationship between tribunals and the Executive, which is normally responsible for setting them up, continues to be uncertain and ambiguous. Despite the conclusion in the Franks Report that tribunals have an adjudicatory function, there is a lack of any recognised link between tribunals and the courts. This has led to increasing use of remedies ill-adapted to the purpose in order to challenge tribunal decisions in the courts. The emergence of a body of judicial opinion favouring appeal, at least on a point of law, has resulted in the blurring of legal principles. The rules of procedure for tribunals are unnecessarily varied and contain unjustifiable variations. The present selection of members is unsatisfactory and improvements are necessary in the provision of accommodation and administrative staff. The Council on Tribunals has not the resources for adequate supervision and has no power to remodel the system. The conclusion is that Parliament should find time for a comprehensive review. The advantages of tribunals are obscured by the difficulties outlined above. Legislation should be enacted to provide for systematic development in the future.

The Place of Public Statutory Tribunals in the English
Legal System.

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Chapter I

Introduction

In the present century a number of factors, some simple, some complex, often interrelated have led to the emergence, development and proliferation of tribunals, statutory decision-making bodies which are independent of ministers and their departments but which are not in the strict sense **courts** of law. The term "tribunal" itself is used with other connotations and can indeed also be used of a court of law; since the tribunals which are the subject of this work are created by statute, either directly or increasingly through delegated legislation, it is convenient to call them statutory tribunals.

Statutory tribunals have been set up as decision-making bodies in a number of diverse areas of law, many of which are more likely to be the concern of the man on the Clapham omnibus than are many of the questions brought before the ordinary courts of law. Thus a number of writers have remarked that the proceedings of statutory tribunals are more likely to affect the life of the ordinary citizen than are those of the courts of law¹. The term "administrative" is commonly applied to these tribunals and during the first half of the present century they were thought of as a part of the executive function of government. The Franks Report² declared in opposition to this view that "tribunals should properly be regarded as machinery provided by Parliament for adjudication"³ and this conclusion has since met with general acceptance.

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1. cf. Harry Street - Justice in the Welfare State; Archer et al - Poor People's Courts.
 2. 1957 Cmnd 218.
 3. Ibid para. 40.

However, despite this act of legitimation, tribunals were still not considered to be full members of the judicial family. "Tribunals are not ordinary courts but neither are they appendages of Government Departments"¹; this statement left tribunals inhabiting a no-man's land between the executive and the judiciary, belonging neither to the one nor to the other. It is arguable that the complexities of modern government require this land to be inhabited and that indeed statutory tribunals perform a valuable bridging function between the two. It is, however, unfortunate for the status of tribunals that they should be thus viewed as "nobody's children". In particular it has contributed to definitions of tribunals that abound in negatives, as exemplified in the Franks Report and in judicial pronouncements².

As a positive contribution, I would therefore define a tribunal as a statutory body with a clearly defined jurisdiction whose pronouncements have legally binding effect. Thus we can identify three essential features:

1. Statutory origin.
2. Limited jurisdiction.
3. Enforceable decisions.

As will be noted later, this power to make decisions as distinct from power to give advice (which distinguishes tribunals from inquiries) may still be in doubt. However, I would suggest that it is now essential, not least for maintaining public confidence in tribunals that their decisions should be binding in law.

1. Franks Report, para. 40.
2. Shell Co., Australia v. Federal Commissioner of Taxation [1931] AC. 275.

The tendency of governments to create specialised tribunals for particular problems has led to great diversity in and proliferation of tribunals (there are now over fifty different statutory tribunals in England and Wales). Tribunals have been described as occupying "a large part of a spectrum at one end of which is the every-day administrative decision taken in an office and at the other a judicial decision taken by a court"¹. This description suggests that any attempt to classify tribunals can do no more than assign to each tribunal its place along the line of the spectrum and there is a certain validity in this view. However, rather than being evenly distributed between the end points, statutory tribunals can be seen to cluster. There are a number of busy tribunals which operate as courts adjudicating between parties and a number of others which make decisions largely on grounds of policy that might equally well be made by an administrator. In terms of case load, statutory tribunals are clustered at either end of the spectrum and I propose to select one example of a tribunal from each cluster. Two tribunals, the Industrial Tribunals as court-like tribunals and the Traffic Commissioners as policy-centred tribunals will be examined in some detail.

Before proceeding to this examination, I shall outline briefly the origins and development of statutory tribunals up to the appointment of the Franks Committee in 1955. Tribunals had been within the terms of reference of the Committee on Ministers' Powers (the Donoughmore Committee)² which reported in 1932 but this report had concluded that tribunals

1. Wraith and Hutcheson, *Administrative Tribunals*, p. 22.
2. 1932 cmd 4060.

were exceptional and that those few that existed, provided that they observed the principles of natural justice, were working well. By 1957 the situation had changed in respect of this first conclusion. There were many more tribunals, too many indeed to support the view that they were exceptional. Meanwhile, criticisms of tribunals were widespread and could clearly not be met by an appeal to wide principles of natural justice; specific proposals were needed. Many of the problems examined by the Franks Committee must have existed in 1932 but because tribunals were few in number they were not subject to close scrutiny by the Donoughmore Committee which concentrated its efforts on delegated legislation. Scrutiny was thus postponed, some would argue with unfortunate results in the intervening years.

Statutory tribunals can be seen to adjudicate; that is they make decisions based on evidence placed before them. In this they operate more as courts than as administrators. However, the areas in which they operate, such as taxation, welfare, immigration, are areas where public considerations intrude on private actions. In this respect tribunals are part of public administration in which area they can be seen to administer by adjudication.

This study of tribunals and the peculiar position they hold in relation to the English legal system is based on the following preliminary consideration:

1. While it is not difficult to see historical continuity and social inevitability in the continuing

and expanding use of tribunals to settle disputes in particular areas of law and administration, the past is not by itself sufficient justification for continuing a practice without questions. Serious questions have been raised concerning tribunals and they deserve consideration and answers.

2. The absence of any clear objectives, apart from expediency, behind the establishment of most tribunals has resulted in a mixture of statutory bodies some of which are conspicuously more successful than others. It is so easy to legislate for a new tribunal that legislators are tempted to use the easy solution of a legislative formula already used on previous occasions. It seems desirable to clarify the objectives behind the operation of tribunals with a view to weeding out those tribunals that do not fulfill these objectives and to encouraging legislators to consider the implications before creating yet another tribunal.
3. Tribunals cannot by any stretch of the imagination be seen to-day as forming a system, yet a system is what is needed: a system that distinguishes between the jobs tribunals are asked to do and which provides a pattern that the average claimant can understand.
4. The lack of system is particularly apparent in the matter of appeals. There are a small number of higher level tribunals which hear appeals from lower tribunals. As all these

are staffed by lawyers, there seems no reason why they should not be amalgamated into a single Appeal Tribunal.

5. The Council on Tribunals has never been accorded the legal powers envisaged for it by the Franks Report nor has it in practice exerted much influence on the law. Its most careful pronouncements and sensible recommendations go by default because of its shadowy role and lack of "teeth". There is a strong case for re-defining the role of the Council on Tribunals and for reinforcing this role with appropriate powers.

The next two chapters will try to clarify the present position of tribunals, firstly by looking at their origin and secondly by describing two tribunals of disparate character. This leads to a discussion of the relationship between the executive and tribunals in general. Review of tribunals by the courts is examined next and their supervision by the Council on Tribunals is surveyed. There is a selective appraisal of the procedures and staffing of tribunals. The concluding chapter discusses the changes that might be desirable and the possibility of systematisation.

CHAPTER II

A Starting Point - Tribunals before Franks

This chapter contains a brief survey of the development of statutory tribunals up to the appointment of the Franks Committee in 1955. This survey has led me to the conclusion that there are three events of particular significance in the history of tribunals: the first of these is the provision in the National Insurance Act 1911 for tribunals (Courts of Referees) to form part of the administrative machinery of the unemployment insurance scheme; the second is the widespread use of tribunals in legislation enacted between 1945 and 1950, legislation which regulated areas of social activity such as education, medicine and the provision of rented accommodation previously left more or less to private arrangement; the final factor is the acceptance in the Franks Report of the function of tribunals as adjudicatory, a finding which identifies them as part of the court structure.

It is in the nature of things for a system of regulation to give rise to disputes among those who are subject to it. Therefore it is usually a part of any system of law to contain within it the machinery for settling such disputes. In England the Common Law Courts were initially concerned with property disputes, but they developed over the centuries to take account of other matters until they were systematised by the **Judicature Act 1875**. Decisions of these courts came to be an integral part of the law itself. A judicial decision clearly may be made in a court of law but currently many decisions that might be thought to be matters for judicial decision are made by tribunals.

The fact that these are differentiated from courts of law in name indicates that there should be some more substantial difference between them. An inquiry into these difference begins by observing how these tribunals came to be established at a time when a well-developed system of courts already existed.

The word tribunal seems to be derived from two Latin words: Tribunus, a representative of the people, usually considered a protector of their liberties and tribuna, a raised floor for a magistrates' chair. In its modern English usage, the word tribunal refers to a panel or group of persons, usually with the function of making decisions at a public sitting. In its widest sense, "tribunal" can be used to refer to a court of law. More frequently, however, the word is used to distinguish a rather more informal body from a court of law. This body is usually a small group of people (typically three, less frequently two or one) selected from among the general population. The tribunal usually holds public sessions but also acts informally in comparison to a court. It has power to pronounce or adjudicate on matters brought before it. Such tribunals have been variously described as "administrative", "ministerial", "special" and "statutory". I propose to use the term "statutory" as being the least misleading.

The task of describing a tribunal presents problems similar to those of describing an elephant. It is fairly simple to recognize a tribunal at work; it is difficult in general terms to describe the purpose and structure of a tribunal. It can be argued indeed that each tribunal is sui generis and that any definition that overrides the individual variation among tribunals is so wide as to be worthless.

Yet there are certain features common to most if not to all tribunals. The origin of the modern tribunal is in statute and because of a tendency for draftsmen to use standard clauses in Acts of Parliament, there is a basic similarity in the structure decreed by statute for different tribunals. Thus the members of a tribunal will be lay persons, but the method of selection will be designed to lead to the appointment of persons with a certain expertise or experience. The balance will usually be held by someone with legal training. Hearings are usually open to the public (who rarely attend them). A tribunal hearing is devoid of some of the formality that prolongs court proceedings but it follows a general pattern of procedure dictated by considerations of "natural justice". The decision reached by the tribunal at the end of its proceedings is binding in law but enforcement usually depends on further proceedings in the courts.

It is a feature of the modern tribunal as described above that it originates in statute and is given jurisdiction to deal with matters relating to the law enacted by that statute. Thus the Mental Health Review Tribunal was set up under the Mental Health Act 1959 for matters concerned with the operation of that act. Sometimes a tribunal may take over matters arising under a previous statute as the National Insurance Local Appeal Tribunals were empowered in 1959 to deal with disputed claims under The Family Allowances Act 1944, which had previously been settled by a referee. Sometimes a tribunal may be utilised by a subsequent statute as the Industrial Tribunals set up under the Industrial Training Act 1964 were used to deal with claims arising under the Redundancy Payments Act 1965, and the jurisdiction of these tribunals has

since been further extended. Nevertheless, a temptation to which most **legislators** succumb is to create a new tribunal to meet each new need that arises and the result is the existence of many more tribunals than could be justified by a systematic approach. It is possible then to define these tribunals as statutory decision-making bodies composed of laymen but with a specialized membership operating informally and aiming at a speedy conclusion so as to minimise costs.

The making of decisions is an essential function of government. Some of these decisions are thought to be appropriate for the courts of law and can conveniently be termed judicial decisions. Many decisions, however, defy classification and in practice the task of making these is often given to persons or bodies especially designated for the task. From the fourteenth century the Justices of the Peace were used for various tasks, involving the making of decisions for the regulation of labour and wages, for the maintenance of bridges and highways and for the relief of the poor. As one task fell out of use there was always another to take its place and the Justices of the Peace have a more or less continuous history of existence, but with a varying jurisdiction which later came to be that of a court for minor criminal offences as well as including a licensing function in connection with the sale of alcohol which is a familiar feature of the Justices' work to-day.

As the population of England increased and society became more complex, the job of making decisions had to be spread more widely and the nineteenth century, a century of experimentation, saw the setting up of a number of bodies to do this. Commissioners of

Income Tax were provided for by Statute in 1799 although at first the commissioners were often also Justices of the Peace. Two separate bodies, the General Commissioners of Income Tax set up in 1803 and the Special Commissioners of Income Tax in 1805, are recognisably within the definition given for tribunals and still operate to-day.

Despite their nineteenth century origins, however, tribunals are a twentieth century phenomenon. The prototype of the modern tribunals is the Court of Referees set up under the National Insurance Act 1911. This act was a legislative milestone for a number of reasons: firstly, it marked the acceptance by government of a role previously reserved for business, self-help and charitable organizations, that of insurers against certain risks of human existence; secondly, it was the first durable enactment, after a number of false starts, in that body of social legislation which set up what has come to be known as the Welfare State; thirdly, it was one of many solutions suggested, discussed and tried to the intractable problem of unemployment in an industrial society, a problem which had troubled the British people for over a century and her politicians for over a decade; of these solutions, it was the one that emerged as the long-term answer. The National Insurance Act 1911 founded the system of social security that operates to-day, albeit that the underlying insurance principle has become strained in the process.

Since 1911, there have been many National Insurance Acts but three basic features have remained the same: contributions shared between citizen and state, state regulated right to benefits and a statutory machinery for the administration of the scheme. Part of this

machinery as established in 1911 was the Court of Referees which was to set the pattern for those bodies now generally known as tribunals, and of which there are now over fifty different examples.

The National Insurance Act 1911 was in two distinct parts and should logically have been two separate enactments. As noted by William Beveridge "compulsory insurance against sickness and invalidity and compulsory insurance against unemployment were conceived in the same year, 1908, and they came to birth together three years later in the National Insurance Act 1911. But the parentage was different"¹. Part I which concerned health was diffuse and hastily prepared with the championship of David Lloyd-George; Part II, which introduced unemployment insurance had been carefully drafted and well-prepared by Winston Churchill and Hubert Llewellyn-Smith. During the passage of the National Insurance Bill through Parliament, most of the debate and controversy arose from the Part I proposals and those on Part II concerned finance, the actuarial basis of the Bill and the opportunities for exploitation of the scheme by idlers and scroungers. Tribunals, then called Courts of Referees, figured only in Part II and called forth no more than passing comment.

The administration of Part II of the National Insurance Act 1911 was a compromise between the local structure used since the reign of Elizabeth I for the administration of the Poor Law, and the central structure now seen as desirable both because of the size of the problem and because of the failure of remedies already tried organised at local level (as under the Unemployed Workmen's Act 1905). The new scheme was designed

1. W. Beveridge, Power and Influence.

with the intention of avoiding the petty mindedness and local variation that had always accompanied decentralized schemes. The Act provided for a Central (Unemployed) Board and Local Committees for designated areas and specific trades; the chairman of each local committee was to be legally qualified; members of the committee were drawn from owners of capital (employers) and workers (employees). A panel chosen from each committee was to act as "referees" should there be a dispute between a claimant of unemployment benefit and an "insurance officer", who was given the main decision-making function under the Act. A further appeal from the Court of Referees lay to "Umpires" appointed by the Crown from highly-qualified and senior lawyers. The Court of Referees later became the National Insurance Local Appeal Tribunal and the Umpires became known as the National Insurance Commissioners. A Commissioner, whether sitting alone or with others is defined as a tribunal under the Tribunals and Inquiries Act 1958, as are a whole variety of persons or bodies instituted since 1911, at which time it can hardly have been foreseen that a definition would be needed.

William Beveridge credits the whole idea of the referees to Hubert Llewellyn-Smith. These two undertook the detailed drafting of the National Insurance Bill, Winston Churchill having left the Board of Trade at an early stage in its development.

"As one experienced in dealing with Parliamentary questions, he(Llewellyn-Smith)said to me that some means must be found of relieving the President of the Board of trade of the constitutional responsibility for decisions on individual claims to benefit; otherwise

the President would have to spend most of his life in explaining why benefit had been refused to John Smith or withdrawn from him. There followed the invention of Insurance Officers, Courts of Referees and Umpires"¹.

Although Beveridge refers to this part of the scheme as a "novel feature", it seems likely that Beveridge too had influenced the scheme. Beveridge had prepared for the unemployment insurance scheme by visiting Germany where pensions and compensation for accidents at work were provided by a similar state-sponsored scheme. In September 1907 he had attended a hearing of a "Schiedsgerecht", which he describes as a court of arbitration dealing with disputes over pension rights. He had published an article in the Morning Post of 17th September 1907 on the German system of compensation for accidents at work, in which he wrote "Litigation between individual workmen and employers has been absolutely abolished and with it has gone a fruitful source of embittered relations between the two parties". Clearly Beveridge had observed the settlement of disputes by specialist tribunals and was predisposed to favour keeping certain disputes out of the ordinary courts of law.

The Courts of Referees can also be seen as a development of the systems used to regulate the railways in the previous century. The development of railways had posed new problems for society which were gradually seen to require state intervention. Throughout the middle years of the century various systems were tried: In 1840, the Railway Department of the Board of Trade was established, thus giving a government department the function of protecting the public interest; in 1844, the department's function was taken over by a separate

1. W. Beveridge, Power and Influence.

Railways Board; this Board was superseded by the Commissioners of Railways in 1846; in 1851 these independent bodies were abandoned in favour of a return to the Railways Department of the Board of Trade. All of these variously designated bodies were invested with different powers at different periods of time but in general they had to receive notice of the intended opening of a new line which they then had power to inspect; they had power to grant or withhold approval for the operation of the new line. In this they foreshadowed the Traffic Commissioners established in 1930 to regulate road transport. The regulatory bodies for the railways also scrutinised by-laws and investigated accidents. These responsibilities might involve settling disputes for which an "adjudicatory panel" was used.

The regulation of railways in the nineteenth century provided a testing ground in the search for an effective system of government intervention. This was carried out by "developing a system, many of whose features - delegated legislation, administrative tribunals, appeal to the Minister and quasi-legislation - have proved highly controversial"¹.

The Regulation of Railways Act 1873 consolidated the experimentation and set up the Railway and Canal Commission which was strengthened and given wider powers under the Railway and Canal Traffic Act 1888. The Commission had power to influence the rates charged by railway and canal operators for their services, a power inherited by the Transport Tribunal and similar to that now exercised by the Traffic Commissioner. The Railway and Canal Commissioners exercised some of their powers sitting as a "tribunal" whose structure was similar to

1. H. Parriss, "Government and Railways in Nineteenth Century Britain".

that of the Courts of Referees set up under the National Insurance Act 1911. Even if not acknowledged, the nineteenth century experience of railway regulation must have influenced the development of statutory tribunals in the twentieth century; "Hence, even to-day the nineteenth century origins of modern administrative law are not generally recognised"¹.

In 1911, however, the new Courts of Referees were seen as a part of an advisory service and their judicial function was hardly appreciated. However, their usefulness was clear and other new tribunals were set up particularly during the war-time period, 1914-1918. Some of these fulfilled a passing need, others had a more permanent existence. Among the temporary tribunals were the Munitions Appeal Tribunals set up under the Munitions of War Act 1915 which operated a jurisdiction over certain industrial disputes and which have been seen as pressaging the Industrial Tribunals². The Pensions Appeal Tribunals set up under the War Pensions (Administrative Provisions) Act 1919 took the now near-standard pattern of three members, in this case a legally-qualified chairman, a medical practitioner and a disabled soldier (commissioned or non-commissioned depending on the rank of the claimant). These particular tribunals were temporary in respect of the particular matter of war pensions but referees were established under S.29 of the Widows, Orphans and Old Age Contributory Pensions Act 1925 and similar tribunals were used to determine pension disputes during and following the second World War.

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1. H. Parris, *Op. Cit.*
 2. G. R. Rubin. *The Origins of the Industrial Tribunals* *Indust. L. J.*, Sept. 1977, 6, 149.

In 1920, The 1911 Act and its amending legislation were repealed and replaced by the Unemployment Insurance Act of that year, which effected the separation of unemployment insurance, now expanded and to a large extent established as a proper function of the State, from health insurance which was operated through the Friendly Societies. The two sorts of provision were not again to be united in the same act, nor were they seen as parts of one comprehensive problem until the Beveridge Report was implemented by legislation after 1945.

The problems which the 1911 Act was designed to solve were already receding in 1911 and during the war years unemployment all but disappeared; the heavy casualties of the war might have suggested that shortage of labour might become the new problem. Instead in the 1920's, unemployment reached unprecedented levels and much of it was sufficiently long term to take those unemployed beyond any legal right to benefit. The unemployment benefit fund staggered from one cash crisis to another and amending acts were passed at the rate of more than one a year. The two basic assumptions underlying the scheme, that levels of unemployment over time were predictable in that they followed a regular trade cycle, and that most unemployment represented a temporary phase in a person's life, were shown to be unjustified in the inter-war years.

The Unemployment Insurance Act 1920 re-enacted the provisions of the 1911 in respect of the administrative machinery. It provided that, a claim for benefit having been made in the first place to an Insurance Officer, a dissatisfied claimant might refer a dispute to a Court of Referees: "The Court of Referees, after considering the circumstances shall make to the

Insurance Officer such recommendations on the case as they may think proper and the Insurance Officer shall, unless he disagrees, give effect to these recommendations"¹.

Presumably in practice, Insurance Officers did give effect to those recommendations, but clearly in the early years findings by the Courts of Referees were not decisions, they were advice. During the 1920's, Parliament was mainly concerned with the government's failure to cope with unemployment. In 1929, during a House of Commons adjournment debate on unemployment, criticism of the disputes procedure forced the Government to reply. The Minister of Labour, whose department had evolved from the Board of Trade and since 1917 had taken responsibility for the scheme, said "The Courts of Referees were set up in 1911. We have a subsequent Act of Parliament (i.e. the 1920 Act) which is broad in its application, but these Courts have had to go on under regulations that have been superimposed upon other regulations and it is time there was an inquiry into the whole procedure"².

The promised Committee of Inquiry (The Morris Committee) was set up immediately and its report, The Report of the Committee on Procedure and Evidence for the Determination of Claims for Unemployment Benefit³, was published in 1929. The Committee commented on the difficulties the Courts of Referees had faced in administering the scheme in changed circumstances and dogged by frequent amendments. In particular they noted the extra burden placed on the Referees by the 78-day Review Procedure introduced on an interim recommendation of the Blanesburgh Committee⁴. The Committee also

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1. S. 11 Emphasis added. An Insurance Officer could also refer a question to the Court of Referees for their advice before he reached a decision.
 2. HC. Deb. 24th July 1929.
 3. Cmnd 3415, 1929/30.
 4. Cf. The Report of the Royal Commission on Unemployment Insurance, 1931/32, Cmd 4185.

noted that "the conclusion of a Court of Referees is not a decision but a recommendation to the Insurance Officer"¹. If the Insurance Officer declined to give effect to the recommendation, the claimant could appeal to an Umpire whose decision was binding. The Morris Committee thought that to involve the Umpires in this way was unnecessary and recommended that a decision of a Court of Referees should be binding, a recommendation that was implemented by the Unemployment Insurance Act 1930, S8 (3) of which provides that in the event of a dispute over a claim between claimant and Insurance Officer, the matter should be referred "to the Court of Referees for their decision". Thus were the Courts of Referees transformed from a panel convened to give advice to a tribunal empowered to adjudicate.

By 1940 there were a number of disparate tribunals exercising statutory powers of decision-making. Their existence was noted in "Justice and Administrative Law" first published in 1929 by W. A. Robson (Chapter VI of that book which deals with tribunals was significantly entitled "Trial by Whitehall"). Tribunals were at least marginally within the field of fire of Lord Hewart when he attacked what he saw as excessive administrative power in "The New Despotism". He saw the "ministerial tribunal" as a device whereby ministers could have a decision made by an alter ego so that effectively departments were the real judges and thus clearly tempted to rule in their own interests.

Tribunals came within the terms of Reference of the Committee on Ministers Powers appointed in 1929 "to consider the powers exercised by or under the direction of Ministers of the Crown whether by way

1. 1929/30 Cmnd 3415, para. 7.

of delegated legislation or by judicial or quasi-judicial decision". This Committee, known as the Donoughmore Committee, concerned itself more with delegated legislation than with tribunals and its report¹ found little to criticise of tribunals as they operated then. The Report rejected W. A. Robson's scheme for Administrative Courts, finding that ministerial tribunals were adequate and satisfactory so long as they adhered to the principles of natural justice which the Donoughmore Committee believed that they did. The Report spoke of the "necessary safeguards" to the practice of using tribunals as being a general right of appeal to the High Court on a point of law and the supervisory jurisdiction of the High Court. The fact that no such general right of appeal existed then or exists to-day seems to have been overlooked. As to the supervisory jurisdiction, the Report recommended a simplification of the procedure by which this was operated, and this was in fact carried out.

The soothing noises made in the Donoughmore Report represented a wasted opportunity. The disturbed international politics of the 1930's soon became war, and after that war tribunals were seen as a useful administrative device and were much used in the new social legislation which between 1945 and 1950 set up the Welfare State.

In retrospect, 1946 should be designated the year of the Statutory Tribunal. In that year, four major Acts of Parliament, The Furnished Houses (Rent Control) Act, The National Insurance (Industrial Unjuries) Act, The National Insurance Act and The National Health Service Act, established and conferred jurisdiction on

1. 1932 Cmnd 4060.

a number of important tribunals. This legislation stabilised the pattern, initiated in the National Insurance Act 1911 of a triumvirate made up of a chairman and two wingmen; it fixed the name as "tribunal" in place of the sporting references to referees and umpires in the 1911 Act; to these tribunals was given the power to settle numerous disputes, varying as to their legal basis, often involving major points of law and complex legal principles and appertaining to rights of high financial value.

1946 was the year that the statutory tribunal was accepted (seemingly with little thought or discussion) as the appropriate body to settle disputes arising from the social legislation of which these Acts were a part. The Acts themselves set up the tribunals in the most general of terms and the regulations made under the Act were not much more specific; examples are given below in connection with specific tribunals. Certain illusions existed in the minds of the framers of this legislation: that the number of disputes requiring settlement by the tribunals would be small, that the need for them would be a decreasing one, and that the decisions tribunals would be required to make would be simple in nature and require the application of common sense rather than legal knowledge. Thus Mr. Aneurin Bevan said in reference to Rent Tribunals, "these Tribunals in my view and in our expectation will be established in a limited number of areas"¹. Later in the same debate he said "I feel that these Tribunals ought to work with the utmost freedom and should have regard always empirically to the circumstances of the case rather than that they should seek to apply judicial principles"².

1. H. C. Deb. 415. 1940.

2. H. C. Deb. 415. 1941.

FURNISHED HOUSES (RENT CONTROL) ACT 1946

This Act provided that the Minister (of Health) could decide that a particular district in England and Wales should be subject to the Act S.1.(2) provided that "for each district in which this Act is in force there shall be a tribunal constituted in accordance with the schedule to this Act"; (the Minister was empowered to direct that one tribunal could act for more than one district). The schedule provided that a tribunal should have three members, all appointed by the Minister and holding office at his pleasure. Further regulations made by the Minister (Furnished Houses (Rent Control) Regulation 1946 No. 781) stated that procedure before the tribunals was to be "such as the Tribunal may determine". The same regulation (No. 8) provided that the Tribunal "may, if they think fit and at the request of either party shall, unless for some special reason they consider it undesirable, allow the hearing to be held in public". Representation before Rent Tribunals was allowed and decisions were to be given in writing, although there was no requirement that reasons should be given for such decisions.

The Furnished Houses (Rent Control) Act 1946 was almost word for word the same as the Rent of Furnished Houses Control (Scotland) Act 1943, a statute whose working had been commented on with approval by the Ridley Committee which recommended a similar measure to apply to England and Wales. In Scotland, however, The Act represented change of a procedural nature in that the issue of the level of rents had since 1920 been capable of submission to the Courts; this was not so in England and Wales.

The function of the tribunals under both Acts was to consider the amount of rent payable by a tenant of furnished living premises and to either confirm it or reduce it; or the tribunal could dismiss the reference. Application to a tribunal could be made by either party to the contract or by the local Authority. The tribunal could also make an order preventing the landlord from terminating the tenancy for a specified time.

Both Acts were thought of as temporary expedients: the 1946 Act was designed to end on the last day of 1947 and the 1943 Act was to expire six months after the ending of the Defence (Emergency Powers) Act. Both continued in operation and were amended and put on a permanent footing as from March 31st 1950 by the Landlord and Tenant (Rent Control) Act 1949 which applied to Scotland, England and Wales. The Rent Tribunals still operate as part of a larger scheme for control of rented property.

NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT 1946

This Act was the third in a series of four designed to implement the White Paper on Social Insurance, and it replaced the Workmen's Compensation Acts (1925-1945) with some savings as to "old" injuries and diseases. Under the Act, questions as to compensation, on the insurance principle, were removed from the jurisdiction of the courts. The courts had been seen by the working population as using legal niceties to prevent payment of compensation in deserving cases. The new Act set up two forms of tribunal machinery: firstly, Medical Boards and Medical Appeal Tribunals who were to be expert judges as to the causation, nature and extent of the injury or disease for which compensation was being claimed; secondly, Local Appeal Tribunals who were to hear appeals from claimants from decisions of Insurance Officers as to entitlement to benefit. The procedure here was

an exact parallel to that under the National Insurance Acts, originating in the 1911 Act and is dealt with more fully below.

Medical Appeal Boards set up under the National Insurance (Industrial Injuries) Act 1946 were to consist of "two or more medical practitioners". A claimant dissatisfied with a Board's decision could appeal to a Medical Appeal Tribunal made up of a Chairman and two others, both required to be medical practitioners. The appointment of personnel and the provision of procedure for both bodies was a matter for the Minister of National Insurance.

The Local Appeal Tribunals were also organised by the Minister of National Insurance. Appeal from a tribunal decision was to one or more Industrial Insurance Commissioners. The Tribunals were required to give decisions, with reasons, in writing.

THE NATIONAL INSURANCE ACT 1946

This Act preserved the tribunal system originating in the National Insurance Act 1911 giving new names to what had been the Courts of Referees, which became the Local Appeal Tribunal, and the Umpires which became National Insurance Commissioners. The sporting association was preserved in the Family Allowance Act 1944 and disputes under this Act were decided by referees until 1959. Moreover any question in a disputed claim under the National Insurance (Industrial Injuries) Act and the National Insurance Act, which related to matters governed by the Family Allowances Act was to be submitted to referees whose decision was to be accepted by the Local Appeals Tribunals.

The National Insurance Appeal Tribunals took over directly from the Courts of Referees and these were relatively mature. Their procedure was well-established, they gave decisions in writing supported by reasons and they had acquired a consistency of approach. They had been overworked in the late 'twenties and early 'thirties but this was not seen as a problem for the future.

NATIONAL HEALTH ACT 1946

This Act introduced a tribunal to consider the professional acceptability of practitioners in the various branches of the National Health Service set up by the Act. Schedule 7 provided for the now typical tribunal of chairman and two members; the chairman was to be a lawyer of at least ten years standing and appointed by the Lord Chancellor. The two members were to represent two interests, that of the Executive Councils set up to run the Health Service and that of the practitioners. The function of the Tribunal was to decide if the continued inclusion of any person within specified categories (covering most practitioners working in health or similar services) would be prejudicial to the Health Service. In effect the State was providing its own disciplinary tribunal to supplement that organised within the profession.

Thus by the end of 1946, these five new tribunals were created and one was re-named, and all were in legal existence if not in actual operation. These tribunals set up a pattern for other tribunals set up in the ensuing years. There were a number of features of the use of tribunals existing in 1946 which by default continued for the next twenty years until the Tribunal

system was reviewed by the Franks Committee.

The first of these features was that a diversity of functions was given to bodies called tribunals, and the standardisation of name served to disguise the diversity; thus a tribunal might hear and determine claims by citizens as to their statutory rights against the State (a National Insurance Local Appeal Tribunal); a tribunal might act as assessors of the degree of disease or injury sustained by an employee (a medical board); a tribunal might decide the desirable content of a term in a contract between two citizens (a Rent Tribunal); a tribunal might consider the professional conduct of a medical practitioner (a National Health Tribunal). The "rag-bag" process by which all these different questions came to be decided by tribunals was not recognised as a problem at the time.

A second feature was a widespread misconception as to the extent of use of these new tribunals. As early as 1929, the Morris Committee had commented on the delays before hearing by the Court of Referees; this, they said, was because more cases than expected had come before them. No lesson seems to have been learned from this experience.

Thirdly, it is obvious that at least on the Government side of the House of Commons, there was, in 1946, a widespread desire for informal procedure and a retreat from legalism. This blinded the legislators to the extremely complex nature of some of the issues assigned to tribunals.

Finally, it is clear from the reports of debates in both houses that tribunals were a decidedly minor

issue in the passage of the various bills through Parliament. Major social changes, especially nationalisation and the universal provision of medical care and education, were the main preoccupation of Parliament and people. Tribunals were seen as convenient and economical machinery for settling disputes which were constantly underestimated both in number and in complexity. Some comments and suggestions were made at the time during Parliamentary proceedings: the need for a system of tribunals rather than ad hoc bodies, and the necessity for complete independence from a Ministry¹. But a serious consideration of tribunals was delayed until the Franks Commission inquired into them.

At first the courts seemed to dissociate themselves from the new tribunals but during the next ten years, statutory tribunals were increasingly the subject of controversy and complaint and increasingly these complaints reached the courts, usually through the use of the prerogative orders which were used to fill the gap left by the absence of provision for appeal.

There were various reasons for this discontent: The area where tribunals were most active was that of welfare legislation, legislation that can now be seen as a logical development from earlier measures but at the time seemed a massive and sudden move. R. M. Titmus summed up the situation at the end of the war: "The State was assuming new and in many respects wide responsibilities for the well-being of individual members of society. From its initial pre-occupation with the crude manifestations of total war, expressed in such defensive policies as moving the injured to hospital,

1. Cf. HC Deb, Oct. 10th 1948. Col. 302 and Cols. 345-346.

the frightened to safety and the dead to the mortuaries, the Government was to turn under the pressure of circumstances and the stimulus of a broad conception of social justice to new fields of constructive welfare policies"¹. The ideas and ideals behind the policies pre-dated the war. Their implementation was both delayed by the occurrence of the war and hastened by its end. It was both the newness of the fields and the suddenness with which they were entered that provided problems for tribunals.

In 1945, the Labour Party had behind it a long history of commitment to its welfare programme but there seems to have been little preparation at a detailed level. What matters were suitable for reference to tribunals and what the terms of that reference should be were among the details that had received little or no consideration. Moreover the unexpected size of the Labour Majority was both a boon and a curse; On the one hand it made the dreams of pre-war days into reality but at the same time it removed the option of proceeding at a pace which allowed time for consideration of detail; indeed it argued for haste.

The result was that the tribunal figured largely in the 1946 legislation on grounds of expediency and economy. Criticism of their operation was thus inevitable. However, other factors contributed to the harsh opinions that now came to be held of them. The "war-time spirit" was bound to evaporate in time of peace and people soon became both less cooperative and more demanding. The requirement of security in sickness, difficulty and old age (provided at minimum by the State), was met by the 1946 legislation in terms that gave rise to the expectation that this should be met as of right. An awareness of rights led to a closer scrutiny of the

1. Titmus. R., Problems of Social Policy.

bodies making decisions affecting these rights. Then it must be remembered that the Welfare State was designed to be comprehensive. In terms of numbers alone, because the new legislation affected more people, it was inevitable that from these there should come more complaints. Further, many of those newly included in State Welfare provision were the better-educated and better-informed who were able to use their knowledge and express their discontent. Those affected now included the articulate and the litigious as well as the poor and meek. Also the jurisdiction of at least one class of tribunal, the Rent Tribunals, extended to property rights of individuals, which people were more concerned to defend than they had been to quibble over what appeared as state charity. The decisions of the Rent Tribunals directly regulated payment out of and into the pockets of the private citizen, and being without appeal, were among the first to be challenged by use of the prerogative orders.

Among the bogey-men feared by the Labour Government in 1945 was the Royal Judge intent on denying the benefits of social legislation to the needy and doing so by ingenious interpretations of statutory language and fine distinctions "on the facts", very much as had occurred with the Workmen's Compensation Acts. Indeed, Aneurin Bevan publicly referred to judges as potential "Saboteurs" of socialist legislation. There were other reasons too, such as a desire for speed and finality, for entrusting decisions solely to tribunals, and for making no provision for appeal.

Therefore, the courts were passed over in the social legislation of 1945-50 and judicial pronouncements of that time indicate a rather distant attitude towards

tribunals. Thus Goddard L.J. observed in *R. v. Brighton Area Rent Tribunal, ex parte Marine Parade Estate*¹. "Obviously, therefore, Parliament intended the procedure of these tribunals to be of the most informal nature". However, by 1950, a subtle change had taken place both in judicial attitude and public expectation. New judicial appointments were made of people more in touch (and in sympathy) with the new legislation which was now generally seen as "here to stay". At the same time there was increasing dissatisfaction with tribunals in operation. Inconsistency of decision among individual tribunals, unexpected interpretations of the rules or plain misapplication of the law were serious matters when no method of appeal existed. The prerogative orders especially that of *certiorari* were used as a way of bringing this dissatisfaction before the courts. If used in conjunction with the order of *Mandamus*, *certiorari* could lead to the setting aside of a tribunal hearing and to a new hearing of the case before a differently constituted tribunal. An action for a Declaration could also be used to enable the courts to pronounce upon the legalities of a tribunal decision but it was appropriate only in these cases where a declaration of the rights of the matter was all that was desired.

The Prerogative Order (once the writ) of *Certiorari* was once chiefly used in relation to proceedings before Magistrates' Courts but it could be used to bring the record of any "inferior tribunal" before the Divisional Court of Queen's (or King's) Bench. From this record the court could see if that tribunal had acted without jurisdiction or exceeded its proper jurisdiction.

1. [1950] , 1 ALLER 946.

Judicial opinion was opposed to any Statutory restriction on the issue of the Prerogative Writs (or Orders). General words giving finality to a decision were not sufficient to exclude review by Certiorari and even a specific exclusion of such review was inoperative if the application for Certiorari alleged improper constitution of the inferior tribunal, or procedural or other major irregularity.

"It is not in the public interests that inferior tribunals of any kind should be ultimate arbiters on questions of law. Parliament can of course make them so; but it is clear ... that a legislative intention to do so is not sufficiently expressed by the mere provision that the decision of such and such tribunal shall be final"¹.

Also, in the case of R. v. Northumberland, Compensation Appeal Tribunal ex parte **Shaw**² it was established that the Courts could review a decision by certiorari and could quash such a decision for patent error of law on the face of the record.

To some extent, dissatisfaction with statutory tribunals, was being heard in the courts in the 1950's. The procedural route to such a hearing had technical difficulties and the hearing did not always yield a satisfactory remedy. There was confusion over the grounds for such approaches to the courts. The principle that "Where Parliament has created new rights and duties and has appointed a specific tribunal for their enforcement, recourse must be had to that tribunal alone"³ continued to prevent more direct recourse being had to the courts and to preclude appeal unless it was provided for

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1. per Romer L. J. in R. v. Medical Appeal Tribunal ex parte Gilmore [1957] 2 W L R 498.
 2. 1952 1KB 338.
 3. De Smith, Judicial Review of Administrative Action, 224.

in the legislation. The ruling in *Barraclough v. Brown*¹, that where a right is given by a statute and the statute also provides for enforcement by a specific court, then no other court can entertain claims in relation to that right, was applicable to tribunals and, although distinguished on a number of points, effectively separated tribunal matters from the courts. General dissatisfaction with this position provoked a standard Government response.

On November 1st 1955, the Franks Committee was appointed. Its terms of reference were:

"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 Ministers' function;
- (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 a result of objections or representations and in particular the procedure for the compulsory purchase of land".

In the Report of the Franks Committee, tribunals were recognised as a permanent element of the legal system. This marked the end of a period of growth and initiated a new period of consolidation.

1. 1897 AC 615.

CHAPTER III

A Tale of Two Tribunals .

This chapter takes a closer look at two particular tribunals, the Traffic Commissioners and the Industrial Tribunals and examines how they were developed in response to particular needs. The variety of tribunals in existence to-day is bewildering to the layman and although in one sense they follow earlier models, especially that set up in the National Insurance Act 1911, each tribunal has its own identity and is the product of the particular circumstance which led to its establishment.

The two tribunals chosen illustrate two general situations which are likely to lead to the setting up of a tribunal: either a new area of policy decided on by government generates the need for impartial decisions to be made in particular cases or a new area of legislation requires an impartial body to adjudicate on disputes arising over the new legal rights and duties created by legislation. In the former case, in order that decisions should not be made by those with a political interest in the outcome, a policy-oriented tribunal may be set up: In the latter case where adjudication is thought to be inappropriate for a court of law, a court-style tribunal may be created.

The first of these is exemplified by the Traffic Commissioners who operate a licensing system for the operation of services of passenger and goods transport by road. The second is exemplified by the Industrial

Tribunals, recently referred to as "Courts in mufti"¹, and who among other things determine claims by employees for compensation for unfair dismissal. Both of these tribunals operate through regional organisation, an area of the country being served by tribunals organised from a central office in the area.

Each of these two tribunals has its own individual history in terms of need, legislation, jurisdiction and resulting procedural approach. Both are very busy tribunals holding regular public sittings. The tale of the two tribunals which follows illustrates many features of twentieth century statutory tribunals.

1. Article in the Guardian, 22.8.78.

Tribunals and Transport

The role of regulator in the public interest of the railways had been accepted with reluctance by governments in the nineteenth century and ran counter both to political philosophy and to public expectation at that time. Some of the regulations to which the railway companies were subject can be seen as the price for the privileges and powers conferred on them under the private Acts of Parliament that were used to set the companies up. The administrative machinery was largely a response to the fears in Parliament of the monopolistic position of the railways. However when road transport expanded and diversified in the present century, there was an equal lack of eagerness on the part of governments to interfere. Now seen as inevitable, public controls over enterprises which transported passengers and goods by road was undertaken through legislation some time after the problems of the inevitable free-for-all situation had become clear. No one could accuse governments of meeting their problems half-way.

The public control of railways and canals had been the subject of experiment and a number of different regulatory systems were tried. The Railway and Canal Commission was the durable result of a period of trial and error. The Commission's jurisdiction over fares and charges was given in 1921 to the Railway Rates Tribunal which was renamed the Transport Tribunal in 1947. This body was seen as a specialist court whose main function was the fixing of rates charged by the railway. The tribunal was intended to counterbalance

the power of the railways as the many small companies of the nineteenth century merged to form a few large companies each with a virtual regional monopoly. The nationalisation of the railways in 1947 removed much of the *raison d'être* of the Railway Rates Tribunal although it was renamed the Transport Tribunal and as such continues to operate to-day with a much reduced jurisdiction and an additional function to hear appeals against refusal by the Traffic Commissioners of Operators' Licences in respect of goods vehicles.

The use of road transport increased sharply in the 1920's in three forms: private transport, public passenger transport and carriage of goods. The first two were regulated by the Road Traffic Act 1930 and the last was covered by the Road and Rail Traffic Act 1933. These Acts put into effect with some alterations the recommendations of the Royal Commission on Transport which sat from 1928-1931.

The Road Traffic Act 1930 divided England and Wales into 11 traffic Areas (there were two more for Scotland). The Metropolitan Area of London was removed when London was given a separate system of regulation under the Transport (London) Act 1968, so that currently there are 10 areas. The Act required that for each area there should be three Traffic Commissioners, one full-time Commissioner and two part-time assistants who were to be drawn from a panel nominated by the Local Authorities. The powers of regulating road transport, which had belonged to Local Government Authorities and had been all but ignored by them, were taken from them and a new system of control instituted under the Traffic Commissioners. To constitute a tribunal, one or two

Commissioners held a public hearing; in the case of disagreement, the application could be re-heard by three Commissioners.

Under the Road Traffic Act 1930, the main function of the Traffic Commissioners who were required to report annually to Parliament was the grant of licences for passenger transport services by road. Later, under the 1933 Act, they were also to issue licences for the carriage of goods by road. The licensing function involved the exercise of discretion with very wide limits and gave considerable power to the Commissioners.

The Traffic Commissioners continue to operate to-day as licensing tribunals. The distinction persists between the licensing of passenger transport and that of goods transport. The personnel are the same for both, but the statutory authority, the constitution and the procedure of the tribunal and the conditions for the grant of a licence are all different.

In respect of licences for passenger transport services, the principal Act is now the Road Traffic Act 1960. The operator of a passenger transport service is required to hold two licences, one in respect of the vehicle (a public service vehicle licence) and one in respect of the service (a road service licence). In addition the operator's staff, that is drivers and conductors also require appropriate licences, which are also issued by the Commissioners.

The Public Service Vehicle Licence is issued as of right to a person who satisfies two requirements:

1. That there is a valid current certificate of fitness in respect of that vehicle (these certificates are issued by certifying officers appointed by the Secretary of State and are subject to conditions prescribed by regulation);
2. that the applicant, as to conduct and character, is a fit and proper person to hold a licence.

The Road Service Licence however is issued only to persons who can convince the tribunal there is a need for that particular service. The Commissioners have an absolute discretion to refuse a licence, to grant it or to grant it subject to conditions. The Road Traffic Act 1930 provided that the Traffic Commissioners in exercising their discretion to refuse grant or attach conditions to a Road Service Licence, should have regard to the following matters:

1. The suitability of the proposed routes for the service;
2. the extent to which public need for such a service was already served;
3. the extent to which the service was necessary or desirable; and
4. the needs of the whole area in relation to all forms of transport (S. 72).

These provisions were re-enacted by the Road Traffic Act 1960 without alteration (S. 135 (2)).

In addition to the power to grant or refuse the essential licence, the Commission has power to attach conditions to a licence. These conditions may be in relation to:

1. Any matter affecting the exercise of the Commissioners' discretion (see above);

2. the fixing of fares at a reasonable level;
3. the display of fare-tables and time-tables to the public;
4. the positioning of bus stops and fare stages;
5. the safety or convenience of the public, (Road Traffic Act 1960, S. 135 (4)).

There is an appeal from the tribunal's decision to the Secretary of State at the Department of the Environment. He can hear appeals from the refusal of a licence, from the imposition of unacceptable conditions and from the exercise of other powers of the Commissioners to revoke or suspend licences or to vary the conditions attached to them. In practice, the appeal may be heard by an inspector appointed by the Secretary of State, but the decision is taken by the Secretary of State who may or may not implement the recommendations in the Inspector's Report as he chooses. There is a further appeal, on a point of law only, to the Divisional Court of Queen's Bench.

The Traffic Commissioners are also responsible for the granting (and revoking) of licences for drivers and conductors of Public Service vehicles. Drivers are required to take a special test; conductors are required to satisfy the commissioners that **they are** "fit and proper" persons. Appeals in relation to these licences are heard in the Magistrates' Courts.

The granting of licences to operate goods vehicles on the roads was originally provided for by the Road and Rail Traffic Act 1933. The principle Act is now the Transport Act 1968. The 1933 Act provided that the licensing authority for goods vehicles should be a single

Traffic Commissioner; one of those already designated to issue licences in respect of passenger transport services. Instead of appeal to the Minister from a decision of the Commissioner, the Traffic Appeals Tribunal was set up to hear appeals. This tribunal was abolished in 1947 when its jurisdiction was transferred to the Transport Tribunal.

The licensing of goods transport was delayed until 1933 because the recommendations of the Royal Commission in this respect were more controversial than those concerned with passenger transport.

The 1933 Act provided for three types of licence: The 'A' licence or public carriers' licence; the 'B' licence or limited carriers' licence; and the 'C' licence or private carriers' licence (that is for someone carrying his own goods in his own vehicle). The 'C' licence was granted as of right to a fit and proper person. The 'A' and 'B' licences could be granted, refused or granted subject to conditions. In exercising their discretion as to 'A' and 'B' licences, the licensing authority was directed to have regard:

- (a) where the applicant is the holder of an existing licence of the same class, to the extent to which he is authorised to use goods vehicles for hire and reward;
- (b) to the previous conduct of the applicant in the capacity of a carrier of goods;
- (c) to the number and the type of vehicles proposed to be used under the licence;
- (d) in determining the number of vehicles to be authorised, to the need for providing for occasions when vehicles are withdrawn from service for overhaul or repair;

- (c) to the extent to which the vehicles to be authorised will be in substitution for horse-drawn vehicles previously used by the applicant for the purposes of his business as a carrier (S. 6(2)).

While directing themselves according to the considerations specified (the last of which is a reminder of the changes that have taken place in the transport scene since 1933), the Traffic **Commissioners** exercise a wide discretion. In issuing all licences, the Commissioners were directed "to have regard to the interests of the public generally as well as to those of persons providing facilities for transport" (S. 6).

Soon after the system came into operation, it was subject to inevitable criticism. The Traffic Commissioners were said to favour existing operators as against new applicants and to protect licence holders against their rivals. They were said to be stifling competition and to be denying to the public the benefits of such competition. The validity of these criticisms is assessed in an article "The Restriction of Road Passenger Transport in the 1930's - a critique"¹. The Author concludes, "on balance the public gained from control. Indeed, it might be argued that after the chaotic conditions of the 1920's any form of control would have been an improvement"².

Unlike passenger road transport licensing which has been largely unchanged since 1930, carriers' licences were reviewed by the Geddes Committee in 1965, after which a new system was introduced by the Transport Act 1968.

1. Studies in British Transport History 1870-1970.
2. ITD, p. 204.

The granting of licences for goods vehicles is still the function of the Traffic Commissioners; what has changed is the type of licence that they grant and the terms on which they grant it. In place of the old A, B and C licences there is now a single operator's licence. Two procedures for applications for licences were established by the Transport Act 1968. A full procedure for new applicants and a simplified procedure for applicants who held an A, B or C licence on March 1970, when the relevant provisions became operative.

Under the old system, C licences were issued as of right to fit and proper persons. A and B licences were issued at the discretion of the Licensing Authority who had wide powers to grant, refuse or issue the licence subject to conditions. The new operator's licence is issued as of right unless objections are made to the application. Such objections may be made only by any of three types of bodies: by a specified Trade Union or Employers' Association; by a Chief Officer of Police or by a Local Authority. The only admissible ground of objection is that the applicant is not a fit and proper person to hold a licence. If objections are made, the Licensing Authority holds a formal hearing as a result of which it may refuse or grant a licence or grant one on conditions. A person aggrieved by the decision of the Licensing Authority has the right to appeal to the Transport Tribunal.

The only circumstances which the Licensing Authority can now consider when deciding whether to grant or refuse a licence or to issue it subject to condition are those pertaining to the character and conduct of the applicant. Having once issued a licence (usually for 5 years), the

Licensing Authority has power to revoke or suspend the licence on evidence that he is not a fit and proper person to hold it. As with the other licences the Commissioners issue, reports may be received from Inspectors who have power to visit and examine premises and vehicles operated by licence holders. An inspector may also be called to give evidence in proceedings before the Commissioners. Proceedings are informal, evidence is not given on oath, principles of natural justice guide the order of proceedings so that evidence from an Inspector can only be received if the applicant has the opportunity to hear and contradict it.

In one sense it may be said that there is no dispute inter partes in an application before the Traffic Commissioners. As no one has an absolute right to a licence, refusal of an application does not put the applicant in a worse position than anyone else. In practice, of course, the expectation of a licence may be the basis of the applicants' livelihood and he is likely to see his application as a dispute between authority and himself.

The exercise of discretion by the Traffic Commissioners is wide but the guidelines for its exercise are clearly indicated by the legislation. The Authority is acting judicially and is subject to review by way of certiorari. In no case is a decision by the Authority final; the appeal available however varies depending on the type of application.

The Traffic Commissioners have had essentially the same function since they were set up by the 1930 Act. Any increase in their jurisdiction is a consequence of

an increasing use of road transport and not an extension of their functions. The Industrial Tribunals, an account of which now follows have experienced rapid changes in function during the relatively brief period of their history.

The Industrial Tribunals

"When in doubt the natural instinct of government Departments is to entrust new problems to new tribunals"¹. It was in response to this instinct that the Industrial Tribunals were set up. The consequence however of unthinking pursuit of this instinct is an unnecessary proliferation of tribunals when it would be preferable to have "fewer units and a clearer pattern"².

The real need is for a balance between requirements for specialisation, which suggests numbers of purpose-built tribunals and the requirements of a system which suggests rationalisation of jurisdiction. The Industrial Tribunals are an example of this balance achieved, in that they conveniently combine a number of related jurisdiction but it is more by luck than by judgement.

The Industrial Training Act 1964 implemented the White Paper on Industrial Training published in December 1962. The White Paper accepted the Robens Report which criticised standards of industrial training in Britain. The intention behind the Act was, obviously, to raise these standards. To this end, an administrative structure was created to apply the Act and ensure equality, among firms, of contribution and of gains - that is to prevent firms who did not provide industrial training from profiting from those who did³.

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1. Wade, Towards Administrative Justice, p. 15.
 2. Schwartz and Wade, The Legal Control of Government, p. 151.
 3. G. Terry Page, The Industrial Training Act and After.

The Industrial Training Boards instituted by the Act operated a levy/grant system. These Training Boards were set up in respect of forms of industrial activity so that all firms engaging in a particular type of activity were subject to the same board. Each Board exacted a levy directly related to the payroll of the organisation and the proceeds of the levy were then used by the Board to provide training or were returned in the form of loans and grants to those firms whose training measured up to the Boards' standards.

The Industrial Tribunals were brought into operation by ministerial regulation in May 1965 to settle disputes concerning the industrial training levy. The tribunals sat in private to hear appeals by firms against the imposition of levy on two possible grounds:

1. that the firm in question had been assigned to the wrong training board
- or 2. that the amount of the levy had been miscalculated.

Writing in 1965, K. W. Wedderburn reported that "some observers have inferred that the Industrial Tribunals are to be made into Labour Courts with wide-ranging powers"¹.

Under the Redundancy Payments Act 1965, the Industrial Tribunals were given jurisdiction over disputed claims for entitlement to compensation by an employee when dismissed for redundancy. As such payment was paid in part from a redundancy fund financed by contributions from employers, this jurisdiction had some slight similarity to the tribunals' existing jurisdiction, but in terms of case-load it represented a major extension.

1. K. W. Wedderburn, "Labour Courts" article in New Society,

It also brought before the tribunals difficult points of general law connected with the contract of employment. The parties to these disputes were employer and employee, concerned as they saw it to protect their rights and interests against each other, rather than as under the Industrial Training Act to maintain a claim against a Board.

After this first major extensions, there followed some hesitation, and a change of political colour of the government altered the prospects for the Industrial Tribunals. Conservative policy dictated the setting up of a court for industrial law disputes, but when the National Industrial Relations Court was set up by the Industrial Relations Act 1971, the Industrial Tribunals were incorporated into the same structure as the new Court.

The 1971 Act introduced a new right for employees "not to be unfairly dismissed" and claims in relation to this right were in the jurisdiction of the tribunals and, on appeal, that of the new Court.

The N.I.R.C. had a short and stormy period of existence until it was abolished in 1974. Schedule I of the Trade Union and Labour Relations Act 1974 re-enacted the rights of employees in relation to unfair dismissal, leaving such claims to be determined by the Industrial Tribunals with appeal to the High Court. Later the Employment Appeal Tribunal was set up by the Employment Protection Act 1975 to take over the appeal function.

The jurisdiction of the Industrial Tribunals now arises under the following leadings:

1. Claims for compensation for Unfair Dismissal. (Employment Protection (Consolidation) Act 1978);

2. Claims for redundancy payments (Employment Protection (Consolidation) Act 1978);
3. Claims for Equal Pay (Equal Pay Act 1970);
4. Complaints of discrimination in employment on grounds of sex or race (Sex Discrimination Act 1975, Race Relations Act 1976);
5. Certain disputes relating to contracts of employment (Employment Protection (Consolidation) Act 1978);
6. Appeals against Improvement or Prohibition Notices served by Health and Safety Inspectors; (Health and Safety at Work Act 1974);
7. Certain claims for loss of office or loss of pension rights (Docks and Harbours Act 1966).

During the short existence of the Selective Employment Tax, disputes concerning its application were decided by the Industrial Tribunals. As this tax has now been abolished, no new cases can be brought. In 1976 and 1977, the overwhelming majority of cases came within the first two jurisdictions outlined above. (The new claims may in some circumstances be combined). In the first six months of 1976, out of a total of 20,713 cases brought before the Industrial Tribunals, 18,411 were claims for compensation for unfair dismissal and/or redundancy; in the first five months of 1977, out of 20,400 cases, 18,283 were claims in that category. These figures give an average of 89% of all cases brought before the Industrial Tribunals as claims by employee against **employer**. Over the same two-year period the original jurisdiction of the tribunals under the Industrial Training Act gave rise to an average of 54 cases a year (0.13% of the total). This jurisdiction is now discharged by referees.

The Industrial Tribunals are organised on a presidential system. England and Wales is divided into regions each with its own regional office. There are sixteen of these including three for London. The regions are under the central direction of the President of Industrial Tribunals (there is a similar system for Scotland). The presidential system is in the spirit of the Franks Report which expressed general approval for some form of local organisation, and gave the Industrial Tribunals sufficient flexibility to absorb the very large extensions of their jurisdiction between 1965-1971. In order to cope with this jurisdiction, a number of full-time chairmen have been appointed. This practice was not approved in the Franks Report which indeed clearly stated that "we do not think that full-time service on tribunals is in general a desirable objective"¹. The Council on Tribunals, which was concerned to ensure the quality of decisions and had regularly expressed doubts as to whether sufficient persons of the right calibre could be found to take up appointments on the many new tribunals, welcomed the move to full-time appointments².

Under the Employment Protection Act 1975, the Secretary of State was given power to bring certain matters relating to contracts of employment (such as claims for arrears of wages) within the jurisdiction of the Industrial Tribunals by Ministerial Order. Legislation and amendments to procedural rules have all combined to make Industrial Tribunals very court-like both in their own procedure (see post Chapter VII) and in their structure of appeal integrated as it is with the courts. Some of the claims heard before the Industrial Tribunals contain

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1. 1957 Cmnd 218, para. 138.
 2. Annual Report of Council on Tribunals 1969/70, para. 46; 1972/73. para. 76 (on the appointment of women).

elements which are sufficiently sensational to be newsworthy. The press regularly attend Industrial Tribunal hearings which are, in nearly all cases open to the public. Individual members of the public rarely attend but if, as it has been argued¹, the press represent the public on such occasions, then these tribunals have a large share of public attention.

There is no strict rule that these tribunals are bound by precedent, but some of their decisions are reported and published and there is a strong tendency for previous decisions to be consulted and followed. The complexities of the legislation have presented these tribunals with difficult points of law to determine, and this and other factors (discussed later in Chapter VII) have led to an unusually high level of representation at proceedings. This in turn has produced demands for the legal aid scheme to be extended to cover representation before Industrial Tribunals².

Certain employers (and newspapers) see the Industrial Tribunals as favouring trade unions and workers at the expense of employees (although different in detail, this is substantially the same criticism that followed the Traffic Commissioners). An article in the Guardian³ newspaper summarises the main points of criticism. It is said that trouble-makers (encouraged by the lack of cost and the informality of these proceedings) use the proceedings to harass their employers (or ex-employers). It is also said that an employer's chance of "winning his case" is smaller

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1. Jones M. Justice and Journalism.
 2. Eq. Evidence of Lord Chancellor's Advisory Committee on Legal Aid to the Royal Commission on Legal Services, para. 24.3.
 3. 21.8.78, 22.8.78.

than that of his employee. The article refutes both these suggestions. The annual number of cases, at least in the more contentious areas, is now decreasing after the hectic years of uncertainty always generated by legislative innovation. It will, presumably, level off at some "natural" level. Of the cases settled before hearing, about 50% are settled in the appellants' favour; of those determined at a hearing about 30% are settled in the appellants's favour.

The criticism most stressed by the article is that many cases brought to the Industrial Tribunals are trivial and unnecessary; that the tribunals are being used to settle "disputes which civilised grown-ups ought to be able to decide without a state-appointed referee"¹. If this were valid, it would seem to me to justify the abolition of many of our courts of law, especially those exercising matrimonial jurisdiction which regularly settle disputes that one might expect civilised adults to resolve for themselves.

Perhaps the author of the article confuses triviality of evidence with triviality of legal principle. There are within the jurisdiction of the Industrial Tribunals many matters involving new rights, new duties and new procedures. Whether these should exist is a matter for political decision but given that they exist, the law relating to them must be administered. This administration could be entrusted to the courts of law (as in part it is). Various factors, included failure in the past on the part of the courts to administer such matters satisfactorily, have led to the setting up of the Industrial Tribunals. Now established for over a

1. Article in the "Guardian", 22.8.78.

decade, the Industrial Tribunals are unlikely to have a short history.

In one sense, both the tribunals examined in this section can be seen to have the same function, to deal cheaply and speedily with questions that **arise** concerning the application of a specialised area of law. In another sense, their **functions** are distinct: The Traffic Commissioners hear *ex-parte* applications which they may reject or allow. A decision against an application confers no benefit on anyone. Even when a permitted body, such as a local authority is heard as a party to the proceedings, its role is more that of an expert witness than of an interested party. The Industrial Tribunals are subsidised "People's Courts" who mainly listen to disputes between individuals and determine then in favour of one party or another.

Yet to the casual visitor there are striking similarities between the two tribunals. In Newcastle, both the Industrial Tribunals and the Traffic Commissioners occupy extensive premises in central positions (although the location of the Industrial Tribunals is noticeably more salubrious than that of the Traffic Commissioners). Both premises contain a "Court Room" with raised dais for the tribunal, seats for parties and their witnesses and seating for the public. Each has a clerk and follows a procedure which is recognisably "Court-like". Each party has the right to be heard, to call evidence and witnesses on his own behalf and to refute that called by another party. Before each tribunal a decision is

given supported by a statement of the reasons for it.

Where the subject matter is suitable for decision by a body operating in this way, then tribunals work well. On the whole matters within the jurisdiction of the two tribunals outlined above are amenable to this type of machinery. But one should not conclude from this that tribunals can successfully exercise any jurisdiction, as a sort of administrative maid of all work. Recent experience with planning inquiries has shown the **limits** of usefulness of that procedure. Tribunals however useful in one context may be inappropriate in another.

CHAPTER IV

Dependence or Independence - Tribunals and the Executive.

The function of a statutory tribunal is to make decisions; the extent to which tribunals should be freed from direction before the decision and from oversight after the decision is an unanswered and perhaps unanswerable question. In the earlier part of this century tribunals were seen as part of the machinery of executive decision-making, a view that was decisively rejected by the Franks Report which saw them as part of the machinery of adjudication. In practice, tribunals reside in limbo between the Executive and the Judiciary, and their relations with each are less than satisfactory. This chapter and the one that follows examine this twofold relationship.

A tribunal is usually accorded decision-making powers at the instigation of a government department in order to remove these decisions from the influence of politics and to protect the minister from questions and accusations of bias¹ that would be likely to follow if he took such a decision. The Executive parts with its decision-making power with reluctance, even when the quid pro quo is a corresponding protection from responsibility. In consequence some early tribunals were restricted to an advisory role.

Most tribunals operating at the present have power to make decisions and increasingly the tendency has been to make their decisions enforceable in the same way as

1. As in Hewart, *The New Despotism*, p. 154: "The Department becomes judge in its own cause".

decisions in a court of law. Even so there are areas of uncertainty¹. In all cases when Parliament legislates for a new tribunal, the Executive will wish to part only with a minimum of its own powers and may also wish to retain the possibility of influencing their exercise or even of withdrawing these powers in the light of subsequent developments.

There are a number of ways in which the Executive can keep strings on statutory tribunals, all of which ways are exemplified in current legislation.

Ministers' Questions

Certain elements in the matters assigned to tribunals may be reserved for the minister to decide. Thus a question as to whether or not the contribution record of an applicant for contributory social security benefits satisfies the statutory requirements is determined by the Secretary of State (Social Security Act 1975 ss. 93 and 95. This is now the principal act replacing earlier legislation). The Secretary of State is empowered to delegate this function or to refer it to the High Court.

There are two main objections to this separation of ministers' questions. One is that it fragments the tribunal's jurisdiction and while they are relieved of the responsibility for technical questions, they are burdened with the extra task of separating these questions which often appear as a single element in a disputed claim. The other objection is that it engenders a sense of frustration in claimants, unless there is a clear justification for the separation, to be required

1. A BBC "Checkpoint" reported on a local authority which continued to demand rates at their own valuation after this had been reduced by a local valuation court.

to apply separately for the resolution of different parts of the same question. In the case of the contribution record, this justification is hard to find. Now that contributions are recorded on computer, presumably a tribunal with access to this facility, would invariably reach the same result in an inquiry as would the Secretary of State.

On matters of immigration law, certain decisions cannot be reviewed by the Immigration Appeal Tribunal but are reserved for the Minister alone. Thus a decision not to allow a person to remain in United Kingdom is subject to full right of appeal to the tribunal but on a decision to refuse a work permit, the word of the Secretary of State is final. Again the logic of this position is not very apparent and the claimant is likely to be confused.

Ministerial Guidance. There are situations where a minister, while not reserving the power of decision, can guide the tribunal to their decision. The Civil Aviation Authority is required to act on such guidance¹. At one time it was thought that in giving such guidance a minister had merely to satisfy himself that it was necessary, a view that made the validity of such guidance (and indeed of other ministerial actions) virtually beyond review². Recently, however, the views expressed by Lord Atkin in his dissenting judgement in *Liversedge v. Anderson*³, that it was not sufficient for a minister to be personally satisfied as to the correctness of his view, but that he must have

1. Civil Aviation Act 1971.

2. *Liversedge v. Anderson* [1942] AC 206.

3. *Ibid* at pp. 225-247.

objective grounds for this view, have received judicial approval. In *Laker Airways Ltd. v. Department of Trade*¹, the Court of Appeal held that the guidance given by the Secretary of State to the Civil Aviation Authority (in this case that they should revoke the licence for the "Skytrain" service) had to be reasonable and consistent with the policy of the legislation. As it was not, the guidance was ultra vires.

The willingness of the courts to question the grounds for ministerial guidance is also seen in the decision of the House of Lords in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*². Here the Secretary of State was empowered (under the Education Act 1944) to give directions to a Local Education authority if satisfied that the authority was acting or proposing to act unreasonably. The House of Lords held the Secretary of State had acted ultra vires in giving directions to the Tameside L.E.A. as she had no objective grounds for considering their action unreasonable. Indeed, on the evidence, their Lordships found that the actions of the authority were reasonable.

Policy Considerations (published)

Legislation may require a tribunal to take into account considerations of policy. Such policy will emanate from government departments, and may in fact be changed from time to time. The Department may publish these policy considerations in the form of rules or a code. This is done by the Home Office for the Immigration Appeal Tribunal³. Such rules may be extremely helpful

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1. [1977] QB 643.
 2. [1977] AC 1014.
 3. The rules deal with such matters as the weight to be given to family ties and the expectation that students will normally leave when their studies are complete.

to both applicant and tribunal and make for consistency in decision making.

A Government White Paper on Transport Policy in 1977 proposed that the Traffic Commissioners should "have regard to Counties' and regions' policies and plans for public transport"¹ in the exercise of their licensing function for passenger transport service. This proposal has not been implemented by legislation. If it were introduced, the problem would arise that the Traffic Commissioners are already subject to statutory guidelines, including one to take account of the interests of the public. If policy is one to come from more than one source, how is the tribunal to resolve possible conflicts between results so dictated? By further rules, perhaps. As will be considered later, too much guidance is as bad as too little.

Policy Considerations (secret). While policy considerations may be unobjectionable if they are publicly stated, there must be misgivings about policy considerations regarded as confidential to the Department. The Supplementary Benefits Appeal Tribunals have been widely criticised for their subservience to the policy of the Supplementary Benefits Commission. Directly descended from the National Assistance Appeal Tribunals (1948-1966) and the earlier Unemployment Appeal Tribunals (1934-1948), these tribunals hear appeals against refusal of supplementary benefits, a mixed group of non-contributory benefits in cash and kind designed for persons in "need".

The Unemployment Assistance Board was the machinery for a new system set up in the 1930's to replace the

1. HC Deb. 935(2) 1577.

"temporary" expedient under the National Insurance Acts of allowing "uncovenanted payments"; that is benefits paid to unemployed men whose contribution record did not satisfy the legal requirements. The Board which was subject to ministerial direction, operated tribunals to hear appeals against decisions by officers of the Board.

The scheme has twice been restructured, as the National Assistance Board in 1948 and as the Supplementary Benefits Commission in 1966 but the terms of the legislation authorising all three are remarkably similar. Despite protestations of independence¹, these various bodies have been closely linked with a Government Department (currently the Department of Health and Social Services)².

Initially, claims for Supplementary Benefits are decided by Officers of the S.B.C. The scale level of benefits is established as a legal right but entitlement to them depends on 'need' as judged by the officer. Guidelines on the Commissions' policy³ are issued to officers but are not available to the public. Studies of the officers at work indicate that they usually apply the guidelines as strict rules.

If the decision of the officer is appealed, it is important to ask if the tribunal approaches the question of entitlement de novo, bringing a fresh mind to the factors determining 'need' or if the tribunal feels itself subject to the policy considerations of the Commission. A number of studies have indicated that

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1. The tribunals are closely examined in Adler and Bradley, Justice, Discretion and Poverty. The independence of the U.A.B. is seen as unrealistic in Alan Booth, An Administrative Experiment in Unemployment Policy in the thirties. Pub. Admin. Summer 1978, 139.
 2. Tony Lynes: Unemployment Assistance Tribunals in the 1930's, in Justice, Discretion and Poverty, ed. Adler et al.
 3. The so-called 'A' code.

these tribunals do feel so-obliged¹.

As the contents of the 'A' code do not have the force of law, in treating them as such a tribunal is erring in law. However, there is no appeal to the Courts so that the errors of the S.B.A.T.'s can be corrected only by review, in which case the error will remain undetected unless it appears on "the face of the record". The tribunals must give reasons for their decision on request and this will form part of the record. However, these reasons are often regrettably brief and may not disclose that a tribunal imposed limits on the discretion it was required to exercise. Where such limits are shown to have been imposed the Divisional Court can quash the tribunal decision. This was done in R.v. Birmingham Appeal Tribunal ex parte Simper² where the long-term addition to the weekly payment had been given in substitution for an exceptional needs allowance already reviewed by the claimant, because this was general practice (i.e. no separate consideration had been given to that claimant's needs).

Regrettably the practice held to be improper in the Simper case was then given legal force by subsequent regulations. The use of policy considerations to guide the exercise of powers given to tribunals is part of the ambivalence of the Executive when it comes to granting away powers which it believes belong to the executive function; "The administration regards its discretionary powers as essential not only for efficient administration but also for the good of the community the consequence is for the administration to view further limitation or subordination to the legal process as detrimental to the community as well as rendering administration less effective and efficient"³.

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1. Lewis N., S.B.A.T.'s 1973 Public Law 257-84.
Herman M., Administrative Justice of Supplementary Benefits, Occasional Papers on Social Administration 47. London, Bell 1972.
 2. (1973) 177 SJ, 304.
 3. Craig, The Reluctant Executive 1961, Pub. Law 45.

The use of policy consideration (both public and secret) to guide tribunals to their decisions may be inspired by the highest of motives but it should be used with restraint.

Appeal to the Minister. From certain matters decided by tribunal, appeal, sometimes the only appeal, lies to a minister. This practice was criticised in the Franks Report¹ but it has not been discontinued. An example is the appeal to a minister from decisions of the Traffic Commissioners in respect of Road Service Licences. There seems little logic in providing such an appeal when from a decision in respect of an operator's licence appeal lies to the Transport Tribunal. Presumably this Tribunal could deal equally well with both.

A Minister and his Department may also indirectly influence the decisions of a tribunal through the power to appoint personnel. The Franks Report recommended appointment by the Council on Tribunals but this was never put into effect. Some appointments are made by the Lord Chancellor, sometimes from a panel nominated by a Department. There is some evidence that the Unemployment Appeal Tribunals in the '30's were directly influenced by the appointment of persons amenable to the Board's policies and that non-conformist members were "dropped". The appointment of members to the new National Assistance Appeal Tribunals was therefore placed in a curious half-way position: the Chairman and one member was appointed by the Minister of Pensions and National Insurance and the other member by the National Assistance Board from a panel proposed by the Minister. The appointment of members is further considered in

1. 1957 Cmnd 218, para. 105.

Chapter VII. It can be seen that Ministers like to have some control over the appointment of members.

The Exercise of Discretion. The problem of adjusting the relationship of tribunals and the executive is part of the general problem of finding a balance between discretion and rules. Discretion is often demanded in the interests of efficiency as necessary if public administration is to be carried out in unforeseen or changed circumstances. In the interests of certainty and predictability the popular demand is often for rules (sometimes paradoxically combined with protest against legislation).

A recent study based on the American experience suggests that "the problem is not merely to choose between rule and discretion but to find the optimum point on the rule to discretion scale"¹. Davis favours what he calls "structured discretion"; that is discretion based on pre-established principles and "open" precedents. If justice is to be achieved, it is vital that these precedents should pre-date the hearing and that both the principles and the precedents should be "open" in the sense that they are available to parties to the proceedings.

Some tribunals operate in this way but in relation to others the Executive has retained some power to influence tribunal proceedings without exposing the terms of the exercise of this power². In any case, if the process of "legislation" is carried too far, the advantages of discretion are lost³.

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1. K.C. Davis, Discretionary Justice: A Preliminary Inquiry.
 2. The process of transforming policy into rules is examined in Jowell J., Legal Control of Administrative Discretion, 1973 Pub. Law, 178-220.
 3. Hill M. Some Implications of a Legal Approach to Welfare Rights, Br. Journal of Soc. Work 1974 V.4 no.2 187.

A recent example of how delicate this balance is, was the consequence of a decision of the National Insurance Commissioners. The Social Security Act 1975, S.36 introduced a non-contributory invalidity pension for a married woman, living with her husband, having a "substantial" disability. After a number of claims by physically disabled housewives had been rejected, an appeal came before the National Insurance Commissioners who interpreted "substantial" in such a way as to extend eligibility for the pension to women whose level of disablement had previously been rejected by Insurance Officers.

An order was immediately laid before Parliament, annulling the effect of the Commissioners' decision. The Minister justified this order by saying that the effect of the decision would have been to grant more pensions than his Department's budget allowed for. "It would", he said "be wrong to allow the setting of priorities to be pre-empted by a decision of the Commissioners to change the effect of the law"¹.

This statement is a curious non sequitur. The allocation of funds is a matter for the Executive, but it is no part of the Judicial function to take account of Departmental Budgets (and their shortcomings) in arriving at a decision. The Commissioners could hardly have been said to "pre-empt" a function entrusted to them by law, by an Act which had presumably originated in the Ministers' own Department. While the setting of priorities is an Executive function it should surely take place in time before the legislation is framed not after it is applied.

1. Statement by Alfred Morris, Minister for the Disabled, Sunday Times, October 8th 1978.

The incident is illustrative of an ambivalent attitude on the part of the Executive towards tribunals which simultaneously supports the entrusting of decisions to bodies independent of government departments but desires to retain a power to intervene when such decisions do not accord with departmental views (much as parents may grant independence to their children only to recall it when it is exercised contrary to parental standards). This ambivalence can be explained but not excused. It is also in my view responsible for a tendency in recent time to create decision-making bodies which have some of the characteristics of tribunals but which cannot be positively identified as such. These neo-tribunals are declared to be independent of the executive, their actions cannot be questioned in Parliament and they are likely to be outside the terms of reference of the Ombudsman; as they are not tribunals, however, they are not subject to the Tribunals and Inquiries Act 1972 nor are they under the Supervision of the Council on Tribunals. The Police Complaints Board set up under the Police Act 1975 is one such body¹. So also is the Criminal Injuries Compensation Board set up by Order in Council to make decisions affecting the exercise of prerogative powers. More recently there is the decision to set up Comparability Boards to investigate the basis of claims for increases in pay. The nature of these bodies is far from clear².

As times and situations change so must methods of government but where as with tribunals, a system has a proved usefulness and is familiar and acceptable to the public, then long and serious thought should be given before new bodies outside the system are set up; bodies

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1. Cf. Comments in the Annual Report of the Council on Tribunals, 1975-76.
 2. Since the change of government following the General Election, the continued existence of these bodies is in doubt, but no doubt other ad hoc deciding authorities will be devised.

that are "neither flesh, nor fowl, nor red herring"; set up, it may reasonably be suspected with some intention to evade the machinery of appeal and review that operate within the system.

It was doubted whether a decision (which is in fact a recommendation) of the Criminal Injuries Compensation Board could be challenged in the courts at all until the decision in *R.v. Criminal Injuries Compensation Board ex parte Lain*¹. In this case it was held that certiorari would lie to review the proceedings of the Board notwithstanding that whatever the determination of the Board, the actual payment of compensation remains a matter for executive discretion.

As will be seen in Chapter V, the Courts are currently taking a robust attitude towards decisions that are apparently beyond challenge. What the Courts cannot challenge is Parliament's manifest intention in legislation to put decision-making out of the range of attack of these affected by it. Too often legislation is designed to place decisions beyond challenge. This tendency should always be viewed with concern. If a decision is justified it can meet a challenge; if it is not then it deserves to fall.

1. [1967] 2 All ER 770.

Chapter V

A Second Opinion - Tribunals and the Courts.

The second part of the general question posed in Chapter IV is "to what extent should decisions of tribunals be subject to judicial review?" Where a matter is ascribed by the legislature for decision by a tribunal, this matter is almost invariably within the exclusive jurisdiction of that tribunal. Thus a party to the proceedings before the tribunal who is dissatisfied with the tribunal's decision is concerned to know if this decision can be challenged and if so how. Since the 1940's when tribunals became so pervasive a feature of public administration, three alternative general situations have obtained : there might be provision for an appeal to a higher tribunal, there might be a right of appeal to the courts of law; there might be no provision for appeal. Further complications exist in that any right of appeal might be limited as to the grounds on which it might be brought or the time within which it was required to be lodged or both.

There is often a desire to bring an unsatisfactory tribunal decision before a court. A "person aggrieved" is likely in the first place to derive his sense of grievance from the variation and inconsistencies in the provisions for appeal which result from policy, history or chance or a mixture of all these factors. His chances of obtaining his desired hearing before the courts will depend on two main factors; namely - the grounds of his complaint and the procedural route chosen for making it.

These two factors are interrelated in complex ways and are also connected with the features mentioned above, that is the terms of the statutory provision (if any) for appeal to the courts.

In this situation, the courts have been faced with questions concerning their relationship with tribunals and the answers to these questions have varied. The variation in time has been apparent in that the attitude of the courts has shown greater or less concern at different periods; also the operation of the case-law system ensures that any answer is in respect of a particular case and may not readily be generalised.

The consequence has not been fortunate. Faced with hard cases the judges have made bad law, bad in the sense that it is based on no principles clear and sound enough to allow a confident opinion to be expressed in new cases, and bad in the sense that it abounds in illogicality and circular argument. This chapter examines a number of decided cases, an examination that leads to the conclusion that it is high time that the legislature intervened to clarify the terms on which the courts could and should re-examine a tribunal decision.

The courts were excluded from the dispute-settling machinery set up under the National Insurance Act 1911 and clearly there was little occasion or desire for involvement by the courts in the operation of tribunals. This arose first from a feeling that the courts were not suitable for the resolution of matters ascribed to tribunals. The courts had protested against their being entrusted with the regulation of railway rates and when given jurisdiction over claims under the Workmen's Compensation Acts had spun a web of technicality which ensnared every one who approached. In respect of the munitions tribunals

set up under the Munitions of War Act 1915, it is suggested that "the reasonable degree of satisfaction with the workings of the unemployment insurance panels set up under the National Insurance Act 1911 helped to provide a favourable climate for more tribunal experimentation"¹. The courts as they then were (and they showed no propensity for change) were felt to be unsuited for the determination of matters which now appeared to require determination. "Law is concerned with rights and duties of persons and the body of legislation upon which the Welfare State rests imposes duties on and grants rights to virtually every member of the community From the very beginning of the national insurance idea it was recognised that the regular courts of law were a cumbersome tool for the settlement of questions arising in connection with these rights and duties"².

Secondly there was a feeling that new legislation was creating new problems that were not amenable to decision by the courts. "Social legislation is not a "matter of state" in the traditional sense. It is outside the customary function of government In social legislation. The government is undertaking to do for the citizen what the citizen is unable or unwilling to do for himself"³. Tribunals were thus preferable to courts when the law to be applied was specialised, detailed and novel. "The substantive law of National Insurance is entirely statutory and inevitably extremely complicated ... the addition of this work to any existing jurisdiction such as that of the County Courts would have constituted a heavy - and I suspect unwelcome burden for them. I think that this work would have swamped the courts"⁴.

These twin reasons for the growth of tribunals that

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1. G. Robson. The Origins of the Industrial Tribunals. Indust. L. J. Sept. 1977, 149.
 2. A. Harding Boulton. The Law and Practice of Social Security. Introduction p. XXii.
 3. B. B. Gilbert. The Evolution of National Insurance in Great Britain. P 289.
 4. R. Mickelthwaite. Another Experiment in Legal Procedure - National Insurance pp.5-6.

the courts could not cope and that the new legislation was unsuitable for application by them were noted by Sir Alfred Denning¹ (as he then was) who, however, seems to regard them as one reason. In fact the courts were not used as a matter of policy; they could, given the will and the funds, have been expanded to meet the enlarged case-load. The use of specialised "courts" is not new but had been discouraged after a period of ill-repute under the Tudors and early Stuarts. It has been said that "Administrative Tribunals have found their way back into the judicial system from which they were excluded by the aftermath of the 1688 Revolution"². The courts, however, did not always recognise tribunals as their long-lost relations and it was left to the Franks Committee to recognise that tribunals were an extension of the courts under an assumed name.

It was also common to stress advantages of tribunals that distinguished them from courts: "Possibly expert tribunals, working under central direction, may, even though not assisted by professional advocate, on the whole achieve equally just results, far more cheaply, with far greater expedition and with greater certainty"³.

In Parliament there was a genuinely **held** view among ministers and members that tribunals did a better job than the courts would have done in the same circumstances and that questions assigned to tribunals required the application of common sense rather than of legal training⁴.

Once created, the uncertainty arose as to whether tribunals were of the Executive or the Judiciary⁵. The

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1. Sir A. Denning. Freedom under the Law. P. 77.
 2. Wraith and Hutcheson. Administrative Tribunals. P. 24.
 3. Sir Hartly Shawcross. The State and the Law. 11 MLR 1.
 4. e.g. HC. Deb Oct. 10th 1948. Cols. 345-6.
 5. This controversy is examined in the Franks Report.

term "ministerial", which was often applied to them suggests that they were somehow the property of a minister, a useful device to be kept in his cupboard and brought out when needed. The Donoughmore Committee avoided the issue by **coining** the phrase "quasi-judicial" to describe the nature of a tribunal but the statement in that Committee's report that "all legislation which excluded purely judicial decisions from the jurisdiction of the courts of law and entrusts them exclusively to tribunals should be definitely regarded as exceptional"¹ was already unrealistic when it was written.

G. W. Keeton suggests that the complacency with which the Donoughmore Committee viewed tribunals delayed (for almost 30 years) any serious consideration of the problems associated with them. "The manifest determination to remove **disputes between the individual and authority from the jurisdiction of the ordinary courts contained within them dangerous potentialities which could be and were exploited to the detriment of private rights in a period of rapid social change**"².

This change was at its most rapid from 1945-1950 and the "manifest determination" was evidenced both by the widespread use of tribunals to determine issues arising under the legislation introduced during that time and by provisions in statutes that decisions of tribunals should be "final". There was an assumption that the two questions were so closely related that if a matter was denied to be suitable for determination by tribunal it was taken to follow that reference to the courts should be precluded.

There is no basis for this assumption as was clearly shown in that whereas the use of tribunals as a forum of

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1. 1932 Cmd 4060 para. 21.
 2. G. W. Keeton. Administrative Procedure and the Franks Report, 1958 C.L.P. P. 88.

first instance came to be seen as necessary and indeed desirable, increasingly people sought access to the courts as a means of challenging a tribunal.

The introduction (in 1948) of the Legal Aid Scheme and the extension of matrimonial causes contributed to a familiarity with the machinery of justice. The existence of a few appeal tribunals (the National Insurance Commissioners and the Transport Tribunal are examples) showed the advantages, in terms of consistency, respect and a public affirmation of justice, of the possibility of challenge. The popularity of recourse to the courts increased in a way unthinkable earlier in the century when the average working man's experience of them was likely to be limited to an unwelcome acquaintanceship with the Justices of the Peace. Because the legislation did not envisage appeal to the courts, the means available for doing so were complex, even devious, and the current situation, outlined below is highly complex.

1. Recourse to the courts cannot be used as a substitute for the procedures laid down by Parliament (*Barraclough v. Brown*¹). Usually, the courts cannot intervene in any matter until all other possible procedures have been exhausted.
2. The principle of ultra vires prevents a tribunal from making a determination which is outside its powers. The courts can always set aside such a determination (*Barnard and Others v. National Dock Labour Board*²). Failure to provide for appeal or even exclusion of appeal cannot prevent a review by the courts on this ground (*Taylor v. National Assistance Board*³).
3. Where appeal to the courts is provided for, this is usually limited to appeal on a point of law. In difficult cases the courts may have to decide

1. [1897] AC 615.
2. [1953] 1All ER 113.
3. [1957] 2WLR 189.

whether the alleged grounds of appeal constitute a point of law (Esso Petroleum Ltd. v. Minister of Labour).

4. On a matter which concerns his legal rights, any person is entitled to ask the courts to make a declaration as to the law (Thame R.D.C. v. Bunting²). An action for a declaration exists collaterally to other procedures (Pyx Granite v. Min. of Housing³) and is not excluded by reason only of the existence of alternative remedies (Francis v. Yiewsley and West Drayton V.D.C.⁴).
5. The Courts have inherent power to review the proceedings of inferior tribunals, a power which is rested in the Divisional Court of Queen's Bench. This court may quash a tribunal's proceedings where there has been an error of law, evidenced by the court record (R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw⁵), or where these have been improperly conducted (R v. Electricity Commissioners⁶). The power to review (by prerogative order) can be expressly excluded by statute, but where the tribunal has acted outside its jurisdiction this exclusion does not operate (ex parte Bradlaugh⁷).

In all cases the jurisdiction of the courts can be ousted only by the clearest words (London Borough of Ealing v. Race Relations Board⁸). But an applicant must himself choose the route by which he approaches the court and all the possibilities raise different problems of time limits, locus standi and result achieved. The confusion has been ameliorated but not removed by the new order 53 (R.S.C.) which is considered later.

The Prerogative Orders

The usual method by which to challenge a tribunal

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1. [1969] 1QB 98.
 2. [1972] Ch 470.
 3. [1960] AC 488.
 4. [1958] 1QB 478.
 5. [1952] 1KB 338.
 6. [1924] 1KB 171.
 7. (1878) 3QBD 509.
 8. [1971] 1All ER 424.

on the grounds of jurisdiction is the prerogative orders (formerly the prerogative writs). In the past these orders have shown periods of disuse and periods of popularity¹. The writ of certiorari (which originated as a royal request for information) has been shown to be the most adaptable and thus the one most frequently used. It has been used to review proceedings of the Justices of the Peace especially after the case of *Groenvelt v. Burwell*². Later when some functions of the Justices were transferred to Local Government Authorities certiorari was also used to supervise activities of these bodies³. Independent administrative bodies have been supervised in this way at least since the seventeenth century⁴. Since 1950 certiorari has been increasingly used to review decisions of tribunals.

The grounds for such review was generally thought to be confined to questions of jurisdiction although there were times when almost any defect was regarded as one of jurisdiction⁵: thus a tribunal (or other body) might lack jurisdiction to enter upon a hearing in the first place⁶, or might go beyond the limits of its jurisdiction⁷; irregularities in the constitution of the tribunal or deviation of correct procedure⁸ were also grounds for certiorari; so also was the use of fraud or deception in obtaining a decision or a denial of the principles of natural justice⁹. All of these were regarded as jurisdictional defects and clearly resulted from taking a very wide view of jurisdiction. These grounds were further extended when it was decided that on an order of certiorari the court could quash a determination for "a patent error of law on the

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1. For an account of their history see J. H. Baker. *An Introduction to English Legal History*. Chapter 9.
 2. (1709) 1Ld Raym 454.
 3. *Rv. Local Government Board* (1882) 10QBD 309.
 4. *Commins v. Massam* 82 ER 475.
 5. De Smith. *Judicial Review of Administrative Action*, p. 66.
 6. *Rv. Bolton* (1841) 1QB 66.
 7. *Rv. Blackpool Rent Tribunal ex parte Ashton* [1948] 2KB 277.
 8. *General Medical Council v. Spackman* [1943] AC 627.
 9. *Rv. Barnsley M. B. C. ex parte Hook* [1970] 1WLR 652.
 10. *Rv. Northumberland Compensation Appeal Tribunal. Ex parte Shaw* [1952] 1KB 338

face of the record"¹. Certiorari had always involved an examination of the record but to do so for an error of law was new and the consequences of the case have been regretted by a number of writers including the late Professor de Smith² and Professor Geoffrey Sawyer³.

Some of the authorities on certiorari were reviewed in *R.v. Governor of Brixton Prison ex parte Armah*⁴. Referring to cases where magistrates' decisions to commit for trial had been quashed on the grounds that there was not sufficient evidence to justify a committal, Lord Reid argued that these cases could not all have been based solely on want of jurisdiction. "If a magistrate or any other tribunal has jurisdiction to enter on the enquiry and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision"⁵. Nevertheless, decisions within jurisdiction had been set aside in the past.

The decision in Shaw's case undoubtedly led to increased use of the prerogative orders, especially that of certiorari, as a means of challenging tribunals' decisions. This tendency was assisted by two factors: the Tribunals and Inquiries Act S.12 required that tribunals (unless exempted from the provisions, and such exemptions as were asked for were resisted by the Council on Tribunals) should give reasons for their decisions and these reasons became part of the "record"; the decision in *R.v. Medical Appeal Tribunal ex parte Gilmore*⁶ established that where a record is so brief as to give insufficient information as to whether or not any error has been made, the court

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1. *R.v. Northumberland Compensation Appeal Tribunal. Ex parte Shaw* [1952] 1KB 338.
 2. 14 MLR 207; 15 MLR 217.
 3. *Error of Law on the Face of the Administrative Record. University of West Australia*, L.R. 24.
 4. [1968] AC 192.
 5. *Ibid* at p. 234.
 6. [1957] 1QB 574.

can order the tribunal to "complete the record". In *Re Poyser and Mills Arbitration*¹, the requirement of S. 12 was interpreted "as meaning"² that proper and adequate reasons must be given.

If an error of law appears on the record of a determination, then the determination can be quashed; "neither certiorari nor mandamus usurp the function of a tribunal but require it, having quashed its decision, to hear the case and determine it correctly"³. The disadvantages of certiorari are procedural. The form of the Order is archaic (despite attempts at modernisation) pleadings are technical and time limits short, (applications must be brought within six months and may be refused even if brought within a shorter period.

The extended use of the Order has contributed to the blurring of the distinction between an error as to jurisdiction and an error within the jurisdiction, a distinction already noted as a fine one⁴. The Master of the Rolls, Lord Denning, has expressed the opinion that this distinction is "so fine indeed that it is rapidly being eroded"⁵, but this opinion is far from universal⁶ nor is it to be welcomed.

Certiorari has been used in cases where appeal on a point of law would have been appropriate but where such appeal was not available. Similarly an action for a declaration has been used where certiorari was the more obvious choice as in *Anisminic and Foreign Compensation Commission*⁷. In this case, a majority of the House of Lords restored the judgement of Brown J. at first instance that the determination of the Commission was a nullity. The Court was

1. [1963] 1 All ER 612.

2. Ibid. Per Megaw J.

3. *Puntan v. Min. of Pensions and National Insurance*, [1964] 1 All ER 448.

4. *R v. Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area ex parte B. E. Barrett Ltd.* [1949] 2 KB 17.

5. *Pearlman v. Harrow School* [1978] 3 WLR 736.

6. Gordon, "What did the Anisminic Case Decide?" 1971 MLR 1.

7. 1969 2 AC 147.

prepared to hear the claim despite a clear "ouster" clause which extended to certiorari, although a minority of Lords Morris and Pearson would have upheld the Commission's determination as being plainly within their jurisdiction. Of the majority, Lords Pearce and Wilberforce found that a declaration was a most suitable remedy despite the doubts as to the standing of the applicant company expressed in the Court of Appeal¹.

In the course of his judgement, Lord Pearce admitted that "the courts have at times taken a more robust line to see that the law is carried out and justice administered by inferior tribunals and at times taken a more cautious and reluctant line in their anxiety not to seem to encroach or to assume an appellate function which they have not got"². While the decision in the Anisminic Case may be welcomed as an example of the "more robust line", it is to be regretted as having rendered meaningless a clause that excludes recourse to the courts and as having brought confusion to the concept of jurisdiction.

Relying on the principle that an ouster clause does not protect a decision where there is no jurisdiction³, the majority of the House of Lords held that the Commission had entered on an enquiry (into the nationality of "successors in title") which they had no jurisdiction to pursue. The problem that had faced the Commission was the interpretation of S.1. 1959 625. Lord Wilberforce referred to the "unfortunate telescopic drafting" of the Instrument and the court appeared unanimous in finding that the phrase "successor in title" had no meaning in that no-one had any

1. per Diplock L J. Anisminic v. Foreign. Compensation Commission [1968] 2QB 862.

2. [1969] 2AC at p. 234.

3. exp. Bradlaugh (1878) 3QBD 509.

title to compensation (which was discretionary) that any other person could succeed to. If "title" meant a "hope or expectation" of compensation then plainly the purchasers of the assets of Anisminic had not succeeded to it and their nationality (which was the decisive factor in the Commission's decision) was plainly not a factor to be considered.

Had the Commission destroyed its jurisdiction by considering an irrelevant factor? The minority held that they had not "the decision whether right or wrong was plainly within their jurisdiction"¹. Lord Wilberforce's argument is the most convincing in the majority judgements. He broke down the order as imposing a number of separate conditions so that a positive reply to an early condition (is the applicant a British national?) precluded looking further. Such fine analysis may be made by a Lord of Appeal in Ordinary but can hardly be expected of a tribunal, however expert. Further, if such an error destroys jurisdiction, and if a court may always intervene if there is no jurisdiction, it is impossible to think of an error of law that would not potentially destroy jurisdiction, and it follows that the courts must always look into such errors in order to ascertain whether or not the error took the tribunal outside its jurisdiction. If this is so, an ouster clause can have no effect.

The real issue in the Anisminic Case was not before the court at all, that is the justification for excluding recourse to the Courts and precluding appeal from a tribunal decision. As far as the Foreign Compensation Commission is concerned, the situation has now been corrected by statute, the Foreign Compensation Act 1969 providing for appeal from a determination of the Commission by way of case stated.

1. per Lord Pearson. [1969] AC at p.

Such an appeal would have disposed of the Anisminic Case, as clearly the Commission had erred in law and a statement of the case would have revealed such an error. The problems raised by the case remain. The distinction between an error of jurisdiction and other errors is blurred to no-one's advantage. If in the interests of cost and efficiency, rights of appeal from a tribunal decision are limited, these limitations can be rendered nugatory by alleging that the tribunal has erred so as to destroy its jurisdiction. In the meantime attention is deflected from the real issue of when (if at all) appeal should be limited and if so, on what terms.

Appeal. The Tribunals and Inquiries Act 1958 implemented the recommendation in the Franks Report by providing for a general right of appeal to the High Court on a (part) of law or by way of case stated from all tribunals specified or scheduled in the Act, a provision that is now re-enacted as S.13, Tribunals and Inquiries Act 1971. Procedure for such appeals is provided in Rules of the Supreme Court and is not the same for all tribunals. Moreover not all tribunals are subject to S.13.

Where such appeal is available, it must usually be made within six weeks and is limited to "point of law". Thus the court cannot reconsider the evidence for the decision (*Wooller v. Min. Agriculture*¹). The line between law and facts is difficult to draw. In the case of *Esso Petroleum Ltd. v. Min of Labour*², the interpretation of classificatory language was held to be a question of fact and thus not subject to appeal, a restrictive approach that was influenced by policy considerations: "the task of

1. [1955] 1QB 103.
2. [1969] 1QB 98.

classification is not entrusted to the courts of law. It is entrusted by Parliament to the Industrial Tribunals which is a body better fitted for it than the courts. In the first place, it is more knowledgeable, being composed in the main of industrialists. In the second place the Standard Industrial Classification is not drawn up by lawyers for interpretation by lawyer. It is drawn up by economists and statisticians for use by government departments. In the third place the headings are illustrative not exhaustive. They are not to be construed in a legalistic fashion according to the letter but broadly according to the intent. In the fourth place the task of classification is not a matter of law. It is a matter of fact and degree. The courts of law will not interfere with the decision of a tribunal unless it is a decision to which it could not reasonably come"¹. The policy element was emphasised in this case; "the courts ... should be very slow indeed to disturb the conclusion of the tribunal - even when not expressed in the language lawyers would have used"².

In matters of interpretation, the situation appears to be that while interpretation of statements of the law (such as a statutory provision) is a matter of law, the meaning of a word in ordinary usage is a matter of fact. The difficulties in this distinction are shown in the case of R.v. National Insurance Commissioners (ex parte Secretary of State for Social Security)³. In this case the meaning to be ascribed to the word "night" in the legislation providing for the constant attendance allowance was questioned as an error of law on the face of the record.

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1. Esso Petroleum Ltd. V. Min.of Labour [1969] 1QB 98 per Denning L J at p.108.
 2. Ibid. per Sachs L J at p.116
 3. [1974] 1WLR 1290.

The Divisional Court, while not approving the meaning ascribed by the National Insurance Commissioners, refused to find an error of law. However, the Commissioners had allowed an appeal on this basis from the finding by a National Insurance Local Appeal Tribunal that preparations for bed came within "day" and not "night" activities. Such decisions lead to the conclusion that the distinction between law and fact is one of degree rather than type; more serious errors being regarded as errors of law.

Furthermore, wider interpretations of what constitutes a point of law have been used. "An appellant who claims that there is an error of law must establish that the tribunal misdirected itself in law, or misunderstood the law; or secondly that the tribunal misunderstood the facts or misapplied the facts; or thirdly that the decision was 'perverse'".¹ On this view only a finding of primary fact cannot be an error of law, but an inference from the primary facts is a matter of law². The wide definition of a point of law in *Watling v. William Bird and Sons* was clarified as "there is an error of law in a case where, looking at all the primary facts, the decision upon what is a point of fact appears to the appellate Court to be wrong"³.

Apart from interpretation and application of the law, an error of law also occurs when the decision is against the weight of the evidence. This can be further complicated if the tribunal misunderstands on whom the burden of proof falls. Where there is a presumption of redundancy, sufficiency of evidence to rebut this presumption is a question of law⁴. Where it is clear that there is slight or no evidence to support a conclusion then there has clearly been an error of law⁵. But at some stage

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1. *Watling v. William Bird and Sons* (1970) 11 1TR 70 per Philip S J.
 2. *Marriot v. Oxford Cooperative Society Ltd.* (1969) 4 1TR 377.
 3. *Cooper v. British Steel Corporation* (1975) 10 1TR 137.
 4. *Etherington v. Henry Greenham (1929) Ltd.* (1969) 4 1TR 276.
 5. *Colleen Properties Ltd. v. Min. of Housing and Local Government* [1971] 1 All ER 10494.

where there is clearly some evidence for the conclusion, to allow an appeal may be to substitute the opinion of the court for that of the tribunal and this the courts have regularly said they will not do¹. Thus, on appeal by case stated, the court refused to reverse a finding that the contracts in question were contracts of employment, although the evidence might have supported a contrary conclusion². The problem always is to maintain a balance: "The court is not a second opinion where there is reasonable ground for the first"³.

The Declaratory Judgement. Appeal to the courts from a tribunal may exist in a limited form so that other procedures may be used to bring a case before the courts. Thus a person may ask the courts for a declaration of some aspect of the law as it affects him or seek an injunction to prohibit activity which infringes his legal rights or to compel some action to which he is entitled. An action for a declaration or an application for an injunction will be available in circumstances where appeal is not but they may not always be appropriate as their effect is not to make a new decision in place of one that is questioned, but, if successful, to prevent any effect of the challenged decision. Also both procedures involve problems of locus standi.

In the case of a tribunal decision, parties to the proceedings before the tribunal will usually have sufficient standing to challenge the decision by any available means and indeed other persons may be given standing by statute⁴. Recently the courts have adopted a fairly generous attitude to locus standi in relation to injunctions⁵, especially

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1. Retarded Children's Aid Society Ltd. v. Day [1978] 1WLR 763.
 2. Global Plant Ltd. v. Sec. of State for Social Security [1977] 1QB 139.
 3. Per Lord Radcliffe. Edwards v. Barstow [1956] AC 14.
 4. For example: The Secretary of State in relation to welfare tribunals.
 5. Gouriet v. Union of Post Office Workers [1977] 3WLR 300.

where these are interim, but imposed stricter standards in relation to a declaration¹.

The Declaration was hailed by some writers and judges as an imaginative re-discovery of an all purpose remedy² but others are more cautious³ and its shortcomings can be seen in *Woollett v. Min. of Agriculture*⁴. As well as imposing strict requirements as to standing, the action for the declaration may be different in scope from the needs of the claimant and interim relief, if the matter is urgent, is not available; the declaration is final. In many cases it will be wholly inappropriate and the Law Commission found that, even where an applicant could convince the Court as to his locus standi, the court would not grant a declaration to challenge the decision of a tribunal "where a declaration would be of no avail to the applicant"⁵. This situation is likely to obtain in relation to a tribunal decision which cannot be altered by a declaratory judgement. In *Pyx Granite v. Ministry of Housing and Local Government*⁶, however, it was held that in certain circumstances the action for a Declaration was available even if another remedy could have been sought. A Declaration may be coupled with an injunction, and this may obviate the lack of enforcement procedure in Declaratory judgements.

Both the Declaration and the Injunction may be the subject of a "relater action" in which either or both of these remedies is sought by the Attorney-General, on behalf of the public, but in this case there must be an issue of public interest (as judged by the Attorney-General) a factor which is rare in tribunal decisions. Both remedies are available unless excluded by the legislature and only clear words will suffice to do this.

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1. *Gregory v. Camden London*. B.C. [1966] 1WLR 899.
 2. G. J. Borrie. *The Advantages of the Declaratory Judgement in Administrative Law* (1955) 18MLR 138.
 3. I. Zamir. *The Declaratory Judgement Revisited* 1977 30CLR 43.
 4. [1955] 1QB 103.
 5. Working Paper no. 40. *Remedies in Administrative Law*, para. 71.
 6. [1960] AC 260.

The New Order 53. There is certainly a strong case for an "all purpose remedy" perhaps based on the principle of Ultra Vires¹. A case for amending the law in this way was made in the Law Commission's Working Paper on Remedies in Administrative Law which proposed a draft Bill. Instead a new procedure was introduced by way of amendment to the Rules of the Supreme Court. Under Order 53 an application may be made for "Judicial Review" but the form of the review is selected by the Court to suit the case. An applicant is required to have a "sufficient interest" but it is not clear whether this will be interpreted in the same way irrespective of what remedy is appropriate or whether "sufficiency" will have to be greater in some cases than in others. Surprisingly, in view of the Law Commission's opinion that six months was too short a period for certiorari, time limit within which an Application for Judicial Review should be brought is three months; longer than that amounts to "undue delay" and there is discretion to refuse.

As the Order 53 procedure is additional to and does not replace existing remedies, although it is envisaged that it will be used to obtain them, the proliferation of time limits is confusing. Short time limits are usually justified by the need for certainty but can amount to a denial of justice². In evidence to the Dobry Commission on Development Control, the point was made that "rather than streamlining planning procedures we should be slowing them down so that slow-thinking members of the public should not be left behind"³. The same could be said of recourse to the Courts.

Order 53 should be welcomed as a small simplification

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1. Gould. Anismic and Jurisdictional Review 1970 Public Law 358.
 2. Wade. Constitutional and Administrative Aspects of the Anismic Case 1969 LQR 198.
 3. Appendix to J. R. Lucas. "Democracy and Participation. Penguin Books 1976.

in a complex area but a change effected by delegated legislation cannot be a major one. The underlying system (or non-system) remains the same with all the failings and inconsistencies noted by Davis¹. Indeed so small a change as to make the remedies of public law "interchangeable under a single procedure"² can be seen as an evasion of the real issue, and "the general unwillingness of Government to allow a proper review by the Law Commission of our administrative law system has escaped parliamentary criticism"³.

The last twenty-five years have seen a movement by the courts from "judicial subservience" to government (seen to have reached a peak in *Liversedge v. Anderson*⁴) to a concern "to safeguard the citizen against executive action"⁵. Before 1950 the courts were "disinclined to review the correctness of an administrative determination where the power to determine is lawfully present"⁶. This approach was based on a feeling that the courts should not intervene without positive reason but that their function was to preserve a balance, to correct a tribunal that strayed outside its jurisdiction or ignored principles of natural justice but not to intervene so as to destroy the advantages of tribunal decision. "We cannot do without judicial review. The courts are the only protectors of our rights; it is their function to protect us. Yet if every administrative tribunal's decisions are to be reviewed we might as well abolish the tribunals; if we did we should swamp the courts with work for which they have neither the time nor the aptitude"⁷.

However, as judges came to accept more extensive

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1. K. C. Davis. *English Administrative Law - An American View*.
 2. Wade (1978) 94LQR 179.
 3. C. Harlow 1978 P.L.1.
 4. [1942] AC 206. See comments in Blom-Cooper and Drury. Final Appeal. *Liversedge v. Anderson* was similarly described as the "high-water mark of judicial quietism." Geoffrey Marshall. *Political Science and the Judicial Process*.
 5. Blom-Cooper and Drury. Final Appeal.
 6. Carr. Concerning English Administrative Law.
 7. Carr. Op. cit. p. 125.

government intervention as an inevitable product of changes in society and "concerned very largely with the social casualties associated with industrialisation", and as people applied to the courts when they were dissatisfied, the courts started to develop principles on which they would intervene. This change in attitude has been traced in respect of the House of Lords¹. "The House of Lords entered the 1950's with a record of extreme caution in matters of public law. The period 1950-1970 saw the emergence of a more spirited attempt to accommodate administrative rules within a precise legalistic framework"².

Perhaps that attempt has been too spirited. The caution expressed by Lord Denning in *R.v. Preston S.B.A.T. ex parte Moore*³ that "the courts should hesitate long before interfering by certiorari with the decisions of the appeal tribunals they should leave the tribunals to interpret the Act in a broad reasonable way the court should only **interfere** when the decision of the tribunal is unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision and if the tribunals have exceeded their jurisdiction or acted contrary to natural justice" is not very apparent in the *Anisminic Case* and the Court of Appeal decision in *Pearlman v. Harrow School*⁴ further confuses the position. In this case certiorari was granted, after refusal by the Divisional Court, in respect of a County Court Decision although the use of certiorari was excluded by the County Courts Act 1959. Their Lordships were unanimous in one thing only that this exclusion did not apply if the Court had exceeded its jurisdiction; Geoffrey Lane L.J.(dissenting) found that there was no such error,

1. Blom-Cooper and Drury. Final Appeal.

2. Ibid

3. [1975] 2 All ER 87.

4. per Denning M. R., *Pearlman v. Harrow School* [1978] 3 WLR.

Eveleigh L. J. that the Court had exceeded its jurisdiction by answering the wrong question and its determination was thus a nullity, and Denning M. R. having stated that the distinction can no longer be made between errors as to jurisdiction and errors of law within the jurisdiction, concluded that "when things go wrong in law, the High Court should have power to put them right".

As a statement of philosophy this may be justified but as a statement of the law it is misleading. Parliament does have power to exclude recourse to the courts and is not prevented constitutionally from providing that a determination shall be "final and conclusive". Even if we accept that "'final' is a word of many meanings"¹ the phrase must have some meaning and the decision in the Harrow School case would appear to deny it any.

The conclusion must be that what is needed is an acceptance by Parliament of some principle relating to appeal in Administrative Law. Perhaps a standard system should be enacted on the understanding that deviation from the system would require positive justification. Such a system should recognise that too liberal provision for appeal defeats the main objectives of the use of tribunals, a speedy decision, but to exclude all appeals must be undesirable. The system should recognise that the courts cannot take on the work of tribunals but on well-defined grounds at least one level of appeal should be available. As long as laymen are asked to reach decisions involving points of law, there should be some way of reopening that decision in a court of law.

1. per Lord Reid. Jones and Hudson v. Sec. of State [1967] 1A11 ER 210.

CHAPTER VI

A watchdog called Cassandra

The Council on Tribunals

Tribunals, whether qualified by the adjective statutory, administrative, ministerial or special have regularly been subjected to criticism, much of it entangled with criticism of that wider, loosely defined area now known as administrative law. For many years the existence of this branch of law had hardly been acknowledged by English lawyers. The constitutional struggles of the seventeenth century had enhanced the prestige of the Common Law Courts. At the conclusion of these struggles, the Judge emerged (not always deservedly) as a champion of liberty under the law and the independence of his position was confirmed by the Act of Settlement 1701. Other competitors in the field of administration of justice, such as the Court of Star Chamber and the Court of Requests were labelled instruments of tyranny and were abolished.

Once established in their favoured position, the courts proved, on the whole, resistant to change. During the next hundred years society was to be affected by the Industrial Revolution. Judges declined to interest themselves in the incidents of this upheaval and were slow indeed to recognize the significance in law of the urbanisation and technical advance that took place in the nineteenth century. Control over railways was given to administrative bodies¹; that

1. Parriss, op. cit.

over public health was entrusted to independent boards and later to the new local Government Boards¹. In matters such as these the courts remained aloof. When they were required to adjudicate on Workmen's Compensation claims, their decisions did little good for the image of the law or indeed of justice, and they provoked a reaction against judicial insensitivity and excessive legalism which has lasted to the present day.

It seems that the courts at the end of the nineteenth century were jealous of the erosion of their jurisdiction rather than concerned to develop the law to be consistent with social change. Claims in respect of injuries at work were transferred from the Courts under the National Insurance (Industrial Injuries) Act 1946. During debate in The House of Commons, Lt. Col. Rees Williams M.P. recollected that "when the first Act dealing with workmen's compensation came before this House, it was intended by the then President of the Board of Trade that the cases should come before some informal tribunal as is now contemplated and it was only under pressure ... that he was persuaded to alter that proposal and to allow cases to go before the courts of law"².

As tribunals came to take over functions that might have been thought suitable for the courts, the feeling was engendered that these new bodies were somehow inferior upstarts. The period of criticism from 1911-1930 was concerned with tribunals who usurped the functions of the courts. Between the publication of the Report of the Donoughmore Committee and that of the Franks Committee, a period of enormous expansion

1. Sir John Simon, English Sanitary Institutions.

2. H. C. Deb. 414, cols. 345-346.

in the number of tribunals in operation, criticism was directed against bodies accepted as necessary but who were seen to discharge their functions in an amateur and unjudicial manner. During a third period which extends from the Tribunals and Inquiries Act 1958 to the present day, criticism is directed at bodies whose important function is recognized but who through official oversight and economy have been denied the opportunity to function to their best advantage.

The National Insurance Act 1911 may be seen as instituting the prototype of the modern tribunal, the court of referees. Others were soon to follow dealing with disputes over pensions, transport and, in specialised areas and for the duration of the war, certain aspects of employment. In 1912 Hilaire Belloc attacked the whole National Insurance Act and its administrative machinery, claiming that it instituted a "Servile State" in which a worker submits to legal regulation in exchange for social and material benefits¹. In 1928, a legal text book significantly entitled the chapter on tribunals "Trial by Whitehall"². In 1929, came Lord Hewart's blast of the trumpet against the monstrous regiment of administrators which was directed at least in part against tribunals³. The publication of this last work led to the setting up of the Donoughmore Committee.

The philosophy underlying "The Servile State" is easy to ridicule. The freedom that Belloc prized so highly was in practice freedom to starve. But there is this much truth in his arguments - benefits for the people did not mean power for the people.

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1. H. Belloc, The Servile State.
 2. W. A. Robson, Justice and Administrative Law.
 3. Hewart, The New Despotism.

Nor was there any power in this area of law, in the courts. So, where was it? It was, it appeared secreted in the offices of civil servants. Administrative law was made and applied by Ministers and their underlings. Both Lord Hewart and Professor Robson saw the current problem as the emergence of administrative law by way of a change of location. Laws (in the form of delegated legislation) were no longer enacted in Westminster but were made in Whitehall; Justice (in the form of determination of claims and questions) was no longer dispensed in the Strand but was administered in Whitehall.

And to whom were these new law makers and dispensers accountable? To no-one it seemed but themselves; they were the new tyrants, the new despots.

The main onslaught of "The New Despotism" was directed at delegated legislation and executive decision making in general whether carried out by a minister alone or acting on a report (following an enquiry or a tribunal hearing). Lord Hewart saw, and did not like, what he saw and felt to be an abuse of the Constitution, the following practices:

1. Much executive action followed an inquiry or tribunal hearing which might be held in secret and in many cases was not required to be held.
2. The judiciary were seen by many ministers as lackeys of government.

There was some substance in Lord Hewart's outburst and reform eventually followed in the Statutory Instruments Act 1946 and the Crown Proceedings Act 1948. The immediate consequence

was the setting up of the Donoughmore Commission which reported, in soothing terms, in 1932 but may have served as a curb on executive arrogance. The attack on tribunals as such was no more than a passing shot in the barrage against administrative law which he described as "not really a system at all but simply an exercise of arbitrary power in relation to certain matters which are specified or indicated by Statute, not on any definite principle but haphazard, on the theory, presumably, that such matters are better kept outside the control of the Courts, and left to the uncontrolled discretion of the Executive and its servants"¹.

Professor Robson was more moderate in his criticism and yet he too was far from welcoming the increased power of the executive of which the increased use of tribunals (often termed ministerial tribunals) was a part. He recognized, as perhaps Lord Hewart did not, the factors that made the emergence of administrative law inevitable. Firstly, technological invention leading to social change in patterns of work had provided new problems for government. Secondly, a policy of social improvement such as governments of all political colours now pursued would inevitably conflict with these individual rights that the courts of law traditionally upheld. Thirdly, it was not possible, perhaps not even desirable for the courts suddenly to change direction in response to new expectations within society; "For the task of hammering out new standards in fields such as

1. Hewart, *The New Despotism*, p. 46.

these the courts of law would doubtless have been among the first to acknowledge their own manifest unsuitability"¹.

The advantages of tribunals set out by Professor Robson are cheapness (especially for the parties to a dispute), rapidity, flexibility, the expertise of their personnel and their utility in promoting a defined line of policy. The list has a ring of familiarity about it as it re-appears with modification whenever tribunals are the subject of discussion. The disadvantages of tribunals were also considered in "Justice and Administrative Law"; they were lack of publicity, the unsatisfactory and skimpy nature of many sets of procedural rules and rules of evidence applied by tribunals, and the opportunity they presented for political interference and direction by a Minister.

However, Professor Robson's attitude to tribunals was constructive. He saw that a decision of a tribunal is in general to be preferred to a decision by a Minister alone. He also saw tribunals as an opportunity to create standards (of fairness for example) in areas of new law and to promote consistency in decision making in these areas. There is a positive advantage in the expertise that may be held by tribunal members. However, he makes the point that cheapness and speed are not sufficient alone for creating a tribunal in preference to allocating matters to a court. If this were the only reason then the courts could be made cheaper and speedier in their operation.

The following are the main principles set out in "Justice and Administrative Law" for the setting up of "Administrative Tribunals": -

1. Robson, op. cit.

1. Matters to be referred to administrative tribunals should be legally novel - that is they should not be part of the law already administered in the courts;
2. Administrative tribunals should normally be of first instance;
3. Administrative tribunals should proceed by oral hearings and have power to compel the appearance of witnesses and the production of evidence. They should give reasons for their decisions;
4. The personnel of tribunals should be of high calibre, chosen where necessary for their specialist knowledge and expertise. They should always be independent of government;
5. Where an administrative tribunal is charged with implementing a line of policy, the principles of that policy should be clearly stated by the executive. Any discretion should be exercised by the tribunal alone;
6. All administrative tribunals should be subject to control by the courts. There should be a general right of appeal from all tribunal decisions.

The principles set out in paragraphs 1-3 are generally accepted and applied to-day. Lip service is paid to the requirements of paragraph 4 but there are undoubtedly practical problems, notably a lack of suitably qualified persons with the necessary spare time, in seeing them implemented. It is difficult to evaluate how the principles set out in paragraph 5 are applied in practice; the supplementary Benefit Appeal Tribunals, which are frequently criticised, seem to operate in an area where policy is unclear and even contradictory, and where discretion is not exercised as freely as some critics think is desirable. The question of appeals from tribunal decisions is unsatisfactory and the principles expressed in paragraph 6 do not operate generally. Professor

Robson himself gave evidence both to the Donoughmore Committee and the Franks Committee of the need he saw for an Administrative Division of the High Court which would both supervise and hear appeals from tribunals. Others have urged the use of high level appeal tribunals to hear such appeals. The Franks Committee recommended an appeal as of right on a point of law to the High Court from any tribunal decision¹. The Administrative Division of the High Court has never been created. Appeal Tribunals exist but only to hear appeals from selected tribunals. A general right of appeal to the courts from tribunals has never been established. The whole position of appeals remains piecemeal and unsatisfactory.

The Franks Committee took over the unfinished business of the Donoughmore Committee and subjected tribunals, now considerably more numerous and diverse than they had been in 1932, to searching scrutiny. Among the proposals contained in the report of the Franks Committee was one of which the Committee was clearly proud. This was that there should be set up a new body called the Council on Tribunals "to keep the constitution and working of tribunals under continuous review"². The suggestion arose from the evidence of Professor Robson and that of Professor Wade. The Franks Committee recognized difficulties concerning tribunals in the present and foresaw further difficulties for the future. The Committee felt that it was unsatisfactory to wait for governments to appoint ad hoc committees (like themselves) when the criticisms rose to a crescendo.

1. The Franks Report, op. cit., para. 107.
2. The Franks Report, op. cit., para. 43.

The Council on Tribunals has now carried out twenty years of continuous review. Described as a watchdog, it was designed to bark rather than to bite and more often than not its barking goes unheeded. Perhaps, the Council's bark is neither loud nor long; perhaps, like Cassandra, it was doomed from the first to be ignored.

Some fifty tribunals are subject to the supervision of the Council on Tribunals. The establishment of this supervisory body was a proposal of the Franks Report which was promptly implemented by the Tribunals and Inquiries Act 1958 (now replaced by the Tribunals and Inquiries Act 1971). The justification for such a body was the need recognized by the Committee for some continuing form of supervision. The Council which has been in existence since December 3rd 1958 relies on part-time members, 10-15 in number, who apart from the Chairman are unpaid and receive only their expenses. The Council contrives to meet rather less frequently than once a month, has an office in London with a modest secretariat. There is a separate committee of the Council for Scotland.

The principal functions of the Council on Tribunals, as laid down by the Tribunals and Inquiries Act 1971 are: -

1. To keep under review the constitution and working of the tribunals specified in Schedule I to the Act and to report on their constitution and working.
2. To consider and report on such particular matters as may be referred to the Council under the Act with respect to tribunals other than the ordinary courts of law (whether or not specified in Schedule I).

3. To consider and report on such matters as may be referred as aforesaid or as the Council may consider to be of special importance with respect to administrative procedures involving or which may involve the holders by or on behalf of a minister of a statutory inquiry or any such procedure.

The Council is required to report annually to the Lord Chancellor and the Lord Advocate and this report must be laid before Parliament. Additionally the Council may make a special report on its own initiative or any matter within its jurisdiction but in practice the Council does not make much use of this power.

It can be seen that the Council's supervision extends even beyond the very diverse tribunals listed in Schedule I to the Tribunals and Inquiries Act 1971. It extends to Inquiries and indeed to Administrative procedures in general. When the Parliamentary Commissioner for Administration (the Ombudsman) was first appointed under the Parliamentary Commissioner Act 1967 it was clear that the functions of the Ombudsman and the Council might overlap in some areas. In 1962¹ the Council had complained of lack of consultation with the Council concerning the Whyatt Report². The potential duplication of function between the Council and the Commissioner was remarked on by the Council³. Provision was made in the legislation for the Commissioner to be ex-officio a member of the Council, which he continues to be, but apart from this there was no formal delineation of functions and in certain cases a citizen aggrieved by maladministration might be perplexed as to where

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1. Annual Report of Council on Tribunals 1962.
 2. **The** Citizen and the Administration: The redress of grievances, Justice, 1961.
 3. Annual Report of Council on Tribunals 1968.

his complaint should be made.

The Council on Tribunals has two positive duties: -

1. The Council must be consulted by the appropriate rule-making authority before any procedural rules are made in respect of tribunals specified in Schedule I.
2. The Council must be consulted before any scheduled tribunal or any minister making a decision subsequent to a statutory inquiry is relieved of the obligation to give reasons for their decision (s. 12 of the Tribunals and Inquiries Act 1971 requires that reasons for such decisions must be given on request).

In practice a lot of the Council's time and energy is spent on reviewing draft rules of procedure, and judging from the matters raised in this regard in the Annual Reports, the Council appears to perform a valuable service. Government departments are normally responsible for drawing up these rules and they seem in general to adopt a cavalier attitude towards them. Early tribunals had rules of procedure of a brevity which amounted to total inadequacy. In its first Annual Report¹ the Council referred to procedural rules as "defective and incomplete", giving as an example the rules of the Milk and Dairies Tribunal which required the tribunal to communicate its decision to the Minister but not to the appellant. When pressed for time, departments tended to serve up left-over rules from past tribunals as a new dish, irrespective of their suitability. Conversely, different departments devised their rules in such isolation that quite illogical differences could and did exist (as to time limits for example). Moreover some rules were drawn up in such general terms that

1. 1959.

individual tribunals could appear, in their interpretation of them, to be operating under different sets. Thus in 1963 the Council received complaints from the National Council for Civil Liberties concerning the lack of similarity in procedure followed by different Mental Health Review Tribunals which made it difficult to brief patients and their representatives in advance¹. The Council itself found reason to criticise the Mental Health Review Tribunals for "the absence of any clearly defined procedure" (for example for handling of medical reports) and of any formal guidance for patients or their representatives prior to the hearing either in the Mental Health Review Tribunal Rules or in the form of a leaflet².

Moreover the Council found that draft rules occasionally contain ultra vires provisions³, a fact which indicates at the very least a lack of care at the drafting stage and one wonders if these provisions might not have been promulgated in their ultra vires form were it not for the vigilance of the Council. In 1967 the Council was forced to comment on the absence of any rules of procedure for the Rent Assessment Committees⁴. Incredible as it seems these tribunals had been operating for two years on an **internal** code of procedure. Prior consultation with the Council on rules of procedure is required by law but there is no obligation on the rule-making authority to accept the Council's advice. In all fairness one cannot point to many examples of unreasonable rejection of this advice; on the contrary the Council's recommendations are more often followed than not. Departmental short-

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1. Annual Report of Council on Tribunals 1963, para. 34.
 2. Annual Report of Council on Tribunals 1974-1975, para. 71.
 3. Annual Report of Council on Tribunals 1964, para. 29.
 4. Annual Report of Council on Tribunals 1967, appendix B.

comings as framers of rules seem to be caused by oversight rather than deliberate disregard of the Council.

Nevertheless the Council does see a problem in relation to those cases where their objections to draft rules are ignored. Thus in its first report, the Council on Tribunals urged that there should be some machinery to acknowledge Council objections to draft rules where these objections did not lead to alterations in the rules. Despite consultation on this point no machinery has been devised. One suggestion was that objections should be laid before Parliament together with the final Statutory Instrument containing the controversial rules. The Council can of course and does refer to such controversies in its Annual Reports but these Reports have never attracted much public attention.

In respect of principal legislation there is no requirement for the Council to be consulted, although there seems to be general agreement that where a new tribunal is proposed, the Council should be given the opportunity to comment at an early stage. Again, oversight rather than any deep laid scheme to avoid scrutiny seems to be responsible for the Council's being taken by surprise by new tribunals. In particular the Rent Assessment Committees were set up as new tribunals separate from the existing Rent Tribunal although matters within the jurisdiction of both tribunals were essentially the same. This was contrary to firm and consistent objections by the Council. The Council was notified by a proposal to include in the legislation the means of merging the two tribunals at a later stage but had to complain that this had not been done¹.

1. Annual Report of Council on Tribunals 1968.

The Council's face has always been set against unnecessary proliferation of tribunals. In 1960, in its Second Annual Report the Council announced that it was seeking "an opportunity to remedy the lack of system that has been a point of frequent criticism in the past". In the Annual Report for 1969/70 the Council stated that "we consider that in the framing of legislation too little attention is paid to the system of tribunals as a whole"¹. Two years later the Council reported that "we feel that it is once more necessary to re-emphasise our view that if the tribunal system is not to proliferate in a haphazard and illogical manner, proposals for new tribunals should be closely examined in the context of the overall structure of the tribunal system"². The same point had been set out at length in a letter from the Chairman of the Council on Tribunals to the Lord Chancellor. It is possible to detect a note of weariness in the Annual Reports. A pattern which is depressingly apparent throughout them is that of common sense advice repeatedly disregarded with the consequence that it is repeated to the point of tedium.

Another problem which affects the Council is that the limited resources available to carry out its functions may be wastefully utilised. As a body dependent on voluntary part-time service, time must be one of its most valuable resources. It inevitably happens from time to time that the Council is asked to consider proposals for legislation which are not implemented. The Annual Report for 1973/74 referred to that twelve-month period as "the year of the lapsed bills". If

1. Ibid., para. 48.

2. Annual Report of Council on Tribunals 1972/73, para. 18.

waste of time is to be an incident of the Councils' functions then it follows that it should be so structured as to make more time available.

It also seems unfortunate that the Councils' time should be spent on raising the same complaint on a number of occasions. This has happened in relation to a number of matters: accommodation, which the Council believes should be selected to emphasise the independence of the tribunal¹; nevertheless tribunals continue to sit in premises occupied by Government Departments, often the very Department responsible for the decision that the tribunal sits to review; the clerk, whose behaviour at proceedings sometimes suggests partiality and influence over tribunal decisions²; clerks are often seconded from the Government Department which may be a party to the dispute before the tribunal; **Chairmen**, who the Council believes should be legally qualified and should meet regularly to exchange views and promote consistency in decisions³.

One particular problem that arose and was reported on more than one occasion is connected also with the Councils continuing struggle for recognition on the importance of its function. It must seem sometimes to the Council's dedicated members that the Council was created only to be ignored. In order to supervise tribunals in practice, members of the Council try as far as time will permit to attend hearings of individual tribunals. Their experience has been that although they regarded these visits as part of their official function, their position was not recognised by the tribunal as any different

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1. Annual Report of Council on Tribunals 1972/73, para. 18.
 2. Annual Report of Council on Tribunals 1962, 1973/74.
 3. Annual Report of the Council on Tribunals 1969/70, 1970/71, 1971/72.

from that of any member of the public. Thus, they were not permitted to retire with the tribunal and were thus denied an insight into how the decision was arrived at. This problem was presented in the Council's First Annual Report, repeated in the Annual Report for 1960 and by 1961 it had become the plaintive cry that the term in relevant legislation "members of the public" should not be taken to include members of the Council on Tribunals¹.

The basic weakness of the Council is that it has functions but no powers. Therefore a picture emerges of it as a body which is extraordinarily busy but does not achieve anything. The Council has been criticised for delays in dealing with complaints, for inadequate replies to letters of complaint, for failure on some occasions to reply at all². The author of these criticisms concludes that the Council "has neither the power nor the resources to fulfill its functions properly"³.

Professor Harry Street expressed a similar view in the 1968 Hamlyn Lectures⁴. Supervision (by the Council on Tribunals) he said "is so slight as to be ineffective"⁵. He was reluctant to blame the Council as he saw the reason for its shortcomings in the same two factors, lack of power and lack of money. "Within the limits of its budget and powers it has done as much as could be expected in supervising administrative tribunals"⁶. The conclusion is clear; all that the Council can do, as at present constituted, is not enough.

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1. Annual Report of Council on Tribunals 1961.
 2. R. Lister, Council Inaction, C.P.A.G. pamphlet.
 3. Ibid.
 4. Harry Street, Justice in the Welfare State.
 5. Ibid. p. 63.
 6. Ibid. p. 62.

Over the past few years the Council has been re-assessing its position. A special Committee has been set up within the Council to consider its present and future role, to enquire into "the kind of supervisory body for tribunals and inquiries needed to meet the present situation"¹. It is clear that the Council is seeking a sense of direction and purpose. At the same time it needs to seek the more tangible features of power and money.

1. Annual Report 1976-77.

CHAPTER VII

Who's who and what's what

Personnel and Procedure

It has always been a feature of the administration of English law to use amateurs among its personnel. The use of the jury as a jury of presentment and later also as a trial jury is an example of this. A more notable example is the Office of Justice of the Peace, the forerunner of today's lay magistrate whose courts are the most numerous and the busiest in the country. Lay magistrates are appointed by the Lord Chancellor on the advice of local Committees. There are no required qualifications for appointment save that of local residence. Those appointed to administer the law in the Magistrates' Courts need have no knowledge of the law; they are required to follow some preparatory courses and to attend refresher courses, although lack of success on these courses or indeed failure to attend is not a disqualification.

In one way, the staffing of statutory tribunals in the present century is following this tradition. In another way, however, there has been a modification of this tradition in that those appointed are often required by the legislation to have a special expertise based on past training or experience or both. Thus the tribunal member is an amateur but an expert amateur.

The number of persons constituting a tribunal varies but is usually between one and three. Where a tribunal consists of one person only he is usually

rather different from the average lay-man (the Director General of Fair Trading for instance or a Traffic Commissioner). However, what we may call the traditional tribunal consists of three persons, usually a lawyer chairman and two "members". Sometimes the field of choice for the members is narrow, sometimes it is wide.

It does seem that Parliament when it sets up a new tribunal takes it very much as a matter of faith that suitable people will be available and willing to act as members. This faith is surprising where tribunal members are required to have an experience or expertise of a particular kind, especially as chairmen are, as a rule, poorly paid and other members are not paid at all, although they are reimbursed for their expenses.

It has certainly been a matter of concern and regular comment from the Council on Tribunals that sufficient persons of appropriate quality might not be available to staff the very large number of tribunals in operation today. One of the recommendations of the Franks Report which was not implemented by legislation was that the Council on Tribunals should be responsible for the appointment of members of tribunals¹.

In practice the most usual arrangement is for Chairmen to be appointed by the Lord Chancellor and for other members to be appointed by the Minister whose Department is most closely concerned with that particular tribunal. There is no indication that either the Lord Chancellor or Ministers are disposed to consult the Council on Tribunals concerning the discharge of their function to appoint tribunal personnel, although from

1. 1957 Cmnd, 218, para. 49.

time to time the Council is consulted on isolated problems connected with staffing. For example, the Industrial Tribunals were intended to be composed of a legally-qualified Chairman and two members, one selected from a panel proposed by local Trade Unions and the other from a panel proposed by local Employers' Associations. During the period of operation of the Industrial Relations Act 1971, the Trade Unions pursued a policy of non-cooperation with both the Industrial Tribunals and the National Industrial Relations Court, and thus no names were put forward for the Trade Union panel; indeed, Trade Union members were instructed not to act as members.

The Council on Tribunals was consulted on this problem as to the suggestion that for the time being the Department of Trade and Industry should operate a single panel and that both members should be drawn from this panel. The Council accepted this proposal although it did so with some misgivings¹.

There is a certain amount of mystique attached to how the field of selection for members of tribunals is arrived at, and a certain lack of comprehensive information. A few selected tribunals were studied as to their composition and the results of the study were published in 1962². Later two examples of two types of tribunal were subjected to closer scrutiny and these results were published between 1970 and 1974³.

These studies throw up some interesting figures but suffer from some serious defects. The Tribunals studied are selected most probably for ease of access and availability of information. Other unstudied tribunals might be found to have a wholly different membership. Even for those tribunals selected there remains a doubt as to whether the

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1. Annual Report of Council on Tribunals, 1971-72, para. 75.
 2. McCorquodale, The Composition of Administrative Tribunals. Public Law 1962.
 3. Cavanagh and Newton, The membership of Two Administrative Tribunals. Public Admin. 1970, 1971, 1974.

examples chosen exhibit the characteristics for that type of tribunal. For the information revealed in the study there remain uncertainties and difficulties of definition. The classification by occupation used was one designed for other purposes and it might be argued that in connection with membership of tribunals a classification by way of voluntary occupation or interest might be more meaningful than one by gainful occupation.

However, certain characteristics of tribunal members are clear from the Birmingham Survey: Tribunal members are predominantly, male, aged 45 or over and drawn from social class II (intermediate occupations) and from socio-economic classes 1 and 2 (Employers and Managers). Thus the same description might apply to them as was applied to the typical juror, before alterations in the law in 1972, that he was "male, middle-aged, middle-minded and middle-class"¹

When this description was applied to jurors it was taken as a demerit of jury service as it then operated and it led to reform of the system of selection². It was accepted that a juror, or at least a group of twelve of them, should typify the population at large and not a section of it. It can be argued that the function of the juror in a trial is to represent the views and interests of the man in the street. The function of tribunal members is surely a different one, although the members of an Industrial Tribunal have been described as an industrial jury. However, there may be some tribunals where the function of one or more members should be to stand for the ordinary citizen. What is disturbing is that the function of tribunal members is rarely sufficiently clearly expressed to allow a clear

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1. Sir Patrick Devlin, Trial by Jury, p.20.
 2. Criminal Justice Act 1972.
Juries Act 1974.

conception of the type of member sought. If members are found to be drawn from a narrow section of the community at large then this should be by design and not by accident. In particular of the Rent Assessment Panel investigated, 86% of its members were men and of the Mental Health Review Tribunal 84% were men and this unbalance has been noted with concern by the Council on Tribunals¹.

A similar proportion of members (84%) were aged 45 or over (in the case of the Rent Assessment Panel 66% were 55 and over). On the Rent Assessment Panel 63% were of Social Class II; on the Mental Health Review Tribunal this figure was 75%.

There may well be some justification for requiring tribunal members to have an experience of life that can only be coupled with maturity of age. At the same time, the danger that such experience belongs to a time past that differs from the present is a very real one. The infirmities of age, deafness, slowness of mind and speech are more the rule than the exception and the sufferer is all too often the last to be aware of them. The very real difficulties in increasing the numbers of the younger, more junior and less affluent members of our society to serve on tribunals should not prevent a serious effort being made in this direction. But for any effort to be of value, it is necessary for policy-makers to determine the sense of their direction.

One finding of the survey by Cavanagh and Newton was that more than half the members of the tribunals studied by them had some other judicial or quasi-

1. Annual Report of Council on Tribunals, 1974-75, para.83.

judicial experience; this figure rose to three-quarters when only chairmen were considered. The most common other experience was service as a Justice of the Peace or as a member of another tribunal. Thus it seems that the field from which tribunal members are drawn is further narrowed by the holding by one person of membership of more than one tribunal.

The problems of choice and appointment of the members of tribunals are similar to those connected with the choice and appointment of Lay Magistrates (Justices of the Peace). The use of unpaid and public-spirited laymen in the administration of justice is a practice in England with some six centuries of history behind it. The facts of life in society ensure that those rich enough not to require payment and with the disposition and leisure to spend their time in public service will inevitably be drawn from a small, restricted class within that society. The diminution and the uneven distribution of this class was a factor in the rise of the stipendiary magistrate who is, nevertheless, appointed in only a small minority of Magistrates' Courts.

The selection of Magistrates and their suitability (or otherwise) for the job has caused some disquiet, especially in recent years¹. While the juror may be distinct as to function from both the Magistrate and the Tribunal Member, there are sufficient parallels between the latter two to suggest that similar considerations should apply to both. The misgivings that have been expressed are firstly that although appointments are made by a Minister of the Crown, the way in which the names for selection are brought to the attention

1. Cf. for example Pat. Carlen, *Magistrates' Justice* Abel-Smith and Stevens, *Lawyers and the Courts*.

of that Minister (in the case of Magistrates, the Lord Chancellor) is variable, unpredictable and secreted in the proceedings of committees. Secondly, persons appointed are drawn from a section of society whose prejudices may operate adversely in the task these persons are called on to perform. Thirdly, those appointed are amateurs, however public-spirited and they require preparation and training for their task. Magistrates are indeed required to attend courses and for some tribunals, chairmen's conferences have been arranged with the encouragement of the Council on Tribunals. However, suitable training is not always available or it may be inadequate or under-utilised.

There is some substance to these misgivings and I believe that some preparation for these forms of public service should be a requirement for appointment and should be provided. The response to the criticisms of the present system for magistrates should be to improve that system. Meanwhile the case for some similar provision for tribunal members should be considered on its own merits.

Where a chairman of a tribunal is required to be a lawyer, his legal training will usually be sufficient preparation but although lawyers are frequently appointed to the Chairmanship of statutory tribunals, and for some this is a requirement, it is a variable practice. Indeed the Council on Tribunals has been concerned that the number of tribunals creates a demand on the legal profession to supply chairmen, which it cannot meet, and that the poor level of remuneration may discourage the busier, practising lawyer from seeking appointment,

leaving the mediocre man to be selected, faute de mieux.

How far a legal qualification is desirable in a chairman has been the subject of much inconclusive debate. Under the National Insurance Act 1911, advisory committees were set up on an area basis and each had a barrister as a chairman. The Committees also acted as the Court of Referees, sitting therefore with a lawyer Chairman, and this to some extent set up a pattern for other tribunals. However, in times of low popularity of lawyers, the view was often expressed in Parliament that lawyers were of no special value on tribunals and might indeed be a hindrance to the smooth operation of the tribunals. A number of tribunals, notably the Unemployment Assistance Appeal Tribunals and the Rent Tribunals were not required to have legally qualified chairmen and rarely did so. It is perhaps significant that the operation of both these tribunals has been the subject of strong criticism, although this may also be because of the sensitive nature of the disputes brought before these tribunals.

One effect of the presence of a legally qualified chairman is that he may dominate proceedings and turn the two members into redundant "yes" men.

"The wingmen whilst possibly specialists in their own fields, were restricted in their knowledge of the law and therefore were placed in a position where a chairman could easily dominate proceedings, because as a lawyer appointed by the Lord Chancellor's Office to be a Chairman of a Tribunal, he is a permanent sitting member of a tribunal whereas the wingmen are called to sit on tribunals as and when their other

commitments permit and are often therefore on a rota system. Another factor is that the Chairman through his training as a lawyer has developed through experience a retentive memory and the ability to look at and assess given facts and their pro's and con's more easily than his fellow tribunal members. The Chairman also has the advantage of knowing the law or statute under which and upon which the tribunal sits. The Chairman also can dominate the proceedings by the emphasis he places on his interpretation of the statute"¹.

To some extent, of course, the role ascribed to the Chairman ensures that he will show himself to be in charge and it is interesting that similar comments have been made by students after attendance at a Magistrate's Court that the Chairman of the Bench did all the talking and the others said little or nothing. I have myself observed that tribunal members can be very self-effacing and detached to the point of not seeming to follow the proceedings at all.

In the Parliament elected in 1945, opinion of lawyers in almost any capacity was low. Therefore, many of the new tribunals established during the next few years were not required to have lawyer chairmen; indeed, usually the only requirement as to a chairman was that he be appointed in the prescribed way.

By 1957 there had been a change in the general opinion of lawyers and among witnesses to the Franks Committee, there was general agreement that chairmen of tribunals should usually have legal qualifications. The Report of the Franks Committee took an equivocal

1. Extract from a student project: Sunderland Polytechnic.

stand on this point.

"We therefore recommend that Chairmen of tribunals should ordinarily have legal qualifications but that the appointment of persons without legal qualifications should not be ruled out when they are particularly suitable"¹. However, the report was definite that "all chairmen of appellate tribunals should have legal qualification"².

This change of attitude between 1945 and 1957 is part of a wider change. In this period the courts moved from a cowed subservience to Parliament, an insensitivity to social change and a studied dis-involvement from the issues of the day to an awareness of change and a new inventiveness that showed that the Common law was still alive and well. This change was accompanied by an esteem for lawyers and the law such as had not existed previously during this century.

In a speech to the House of Lords, Lord Denning speaking in a debate on the Franks Report said "A good layman on a tribunal is better than a bad lawyer and there are not enough good lawyers to go round"³. This also represents the view of the Council on Tribunals who, however, favours the use of legally-qualified chairmen as long as there are good lawyers to be found to act as such. The following comment was made in relation to members of S.B.A.T.'s: "Members of tribunals appear as plain honest men but they do not operate within a recognisable framework of law, they are not trained to contain their passions, to give appropriate weight to evidence or to understand the requirements of fair procedure"⁴. Today it is taken as

1. 1957 Cmnd 218, para. 55.

2. Ibid para. 58.

3. H.L. Deb. 206, Col. 529.

4. Norman Lews, S.B.A.T.'s.

[1973] Pub. Law 257.

meritorious if a tribunal has a legally-qualified chairman. With the encouragement of the Council of Tribunals there have been conferences of Chairmen of S.B.A.T.'s and where possible vacancies on these and other tribunals have been filled by lawyers. Despite certain reservations about overall balance, the earlier study on tribunal membership was impressed by the quality of chairmen, their experience and their interest in the work¹. The report concluded that "If one accepts the proposition that the main burden of adjudication rests with the Chairman, the conclusion seems to follow that the system works well and that the citizen appealing an administrative decision is getting a fair hearing before an impartial judge"².

The members of the tribunal are assisted by a clerk, whose position is an extremely equivocal one. His function is to handle matters of procedure and to advise the tribunal members on points of law. Thus he is intended as an impartial participant although, as is the case with clerks in Magistrates' Courts, the extent to which the clerk should assist the parties other than by reminding them of procedural niceties is largely a matter of individual interpretation. His impartiality is probably real but it is rarely apparent to claimants, especially to those who apply to welfare tribunals where the clerk is all too often an employee of the department against whose decision the applicant is appealing.

The Council of Tribunals have expressed concern about the practice of secondment of clerks and have

1. McCorquodale, The Composition of Administrative Tribunals [1962] Pub. Law.

suggested without avail that clerks should be recruited to a separate career structure within the civil service¹. A similar suggestion was rejected by the Franks Committee. A recent research study found that the role of the clerk varied on a continuum between advice and domination². These authors favoured the idea of a corps of clerks but felt that to be effective in providing the clear impartiality of the clerk, the change should be accompanied by a scheme of training for tribunal members which would diminish their dependence on the clerk³. The overall conclusion must be that the staffing of tribunals is a complex problem which cannot be solved by studying one aspect in isolation. It is linked with the problem of accommodation. Tribunal hearings are often heard in buildings which house Government Departments and their officers; indeed some purpose-built office blocks may contain a "tribunal room". A person whose claim has been refused by an officer of a Department may well doubt the independence of a tribunal that sits to hear his appeal in the same building where his claim was refused. In the administration of justice, appearance is a major factor so also is consistency. An agreed practice concerning accommodation and a standard system of appointment of personnel would be a small but important step in the right direction.

Procedure and Evidence

In matters of procedure, each type of tribunal has its own set of rules, now invariably contained

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1. Annual Report of Council on Tribunals 1962.
 2. Frost and Howard, Representative and Administrative Tribunals, p.45.
 3. Ibid.

in a statutory instrument (although some earlier tribunals operated according to a set of rules set out in a statutory schedule and some were simply issued with guidance notes). Apart from an obligation to observe its own rules, tribunals are self-governing in matters of procedure, subject only to an obligation to observe the principles of natural justice. There is considerable diversity among sets of rules both as to length and as to content. Particularly those tribunals set up between 1945-1950 had brief and simple, if not simplistic, rules of procedure. More recently the tendency has been to fuller and more specific rules, so that for newer tribunals and for those whose rules have been replaced or amended, there are comprehensive and detailed requirements.

To survey more than fifty sets of rules would be beyond the scope of this work, so that for purposes of illustration I shall refer principally to four sets; those for the Industrial Tribunals, the Mental Health Review Tribunals, the Immigration Appeal Tribunals and the Supplementary Benefits Appeal Tribunals. Procedural rules operate at six different stages in a case coming to hearing before tribunal: These are,

1. The pre-hearing stage,
2. the hearing,
3. representation and the taking of evidence.
4. the decision,
5. the provision for appeal,
6. enforcement and costs.

1. Pre-hearing. Many tribunals have little or no regulation of the pre-hearing stage other than the specification of the time limits within which

application must be made. These limits are notable for their shortness. Three months is a popular period with six months representing the upper limit. Compared with limitation periods for legal claims before courts these are brief, but perhaps the most confusing aspect is their variety. The Immigration Appeal Tribunal rules contain periods of 14 days, 28 days, 42 days and 3 months depending on the nature of the claims. Sometimes it is difficult to see the justification for the difference; a claim to an industrial tribunal for compensation must be made with 3 months if based on an allegation that the dismissal was unfair, but 6 months if it claimed that the dismissal was for redundancy.

The Industrial Tribunals are unusual in that their rules prescribe a pre-hearing procedure not unlike the pleadings in a civil action. The lack of such an exchange of information in Rent Assessment Committee Hearings was regretted by Lowther L.J. in *Hanson v. Church Commissioners for England*¹ where he felt that a requirement that copies of documents be exchanged would have prevented an expensive appeal in that case.

Proceedings before the Industrial Tribunals in respect of employment claims are commenced by an originating application in writing which is sent to the clerk to the tribunal and which contain the following information:

- (a) The name and address of the applicant;
- and (b) the name (s) and address (es) of the person (s) against whom relief is sought or of the parties to proceedings before the court (as the case may be);
- and (c) the grounds on which the relief is sought.

1. [1977] 2WLR 848.

This application must be in writing but may be in the form of a letter. A copy is sent to each respondent who within 14 days of receipt of the copy must notify the tribunal of his intention to defend the claim. Any party can ask for further and better particulars, discovery of documents and the attendance of witnesses, all of which can be ordered by the tribunal. Recent amendments to the rules designed to prevent frivolous or vexatious claims increase the requirement for information. At every stage, copies of the documents involved are supplied to all parties, so that each party is fully informed of the case to be met.

Most Tribunals accept relatively informal documents in the course of pre-hearing procedure and it is clearly right that they should do so if persons are to present their own claims without professional assistance. There is also a need for the parties, in order that they may be prepared to answer points that arise at hearing, to have the fullest possible information in advance. The most satisfactory rules are those that prescribe what information should be revealed while not fixing too rigidly the form in which it is to be expressed. The Mental Health Review Tribunal Rules¹ have scheduled some specimen documents; other tribunals rely on standard forms devised by Government departments. The necessity for satisfactory documentation was stressed in the Franks Report².

2. Hearing. Most tribunals are required to hold a hearing and according to Lord Reading, first Chairman of the Council or Tribunals, "It is highly desirable

1. S.1 1960/1139.

2. Cmnd 218, paras. 71-72.

that the proceedings should remain as informal as possible without sacrificing the element of dignity that ought to attach to any Court"¹. There is some vagueness in rules as to the form this hearing should take, which is noticeable in respect of the Mental Health Review Tribunals who, unless a "formal hearing" is requested, may "determine an application in such manner as they think appropriate"². This tribunal then has two alternative procedures: an informal hearing or a formal hearing, application for which may be refused if the tribunal is of the opinion that a formal hearing would be detrimental to the health of the patient. If the hearing is informal the patient can be excluded as long as he has the opportunity to submit evidence. Representatives of the National Council for Civil Liberties complained to the Council on Tribunals of the variation in the way different Mental Health Review Tribunals interpreted their rules of procedure³.

It seems that whatever the wording of their rules, all tribunals must hold some sort of inquiry into the matter for decision. One tribunal was authorized by its rules to determine appeals "without a hearing". The Courts held that this phrase meant "without an oral hearing", since to authorize a tribunal to infringe the principle of natural justice (*audi alteram partem*) would be *ultra vires*⁴.

Some Tribunals (the Traffic Commissioners and the Industrial Tribunals are notable examples) hold public hearings although in all the rules that I have examined

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1. Lord Reading - A Public Watchdog - The Listener Nov. 12th, 1959.
 2. S.1 1960 1139 R. 17.
 3. Annual Report of Council on Tribunals 1963 p.34.
 4. R.V. Tribunal of Appeal under Housing Act 1919 [1920] 3KB 334.

there is power to exclude the public; thus a hearing before the Industrial Tribunals "shall take place in public unless in the opinion of the tribunal a private hearing is appropriate for the purpose of hearing evidence which relates to matters of such a nature that it would be against the interests of national security to allow the evidence to be given in public or hearing evidence from any person which in the opinion of the tribunal is likely to consist of -

- (a) information which he could not disclose without contravening a prohibition imposed by or under any enactment; or
- (b) any information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person or
- (c) information the disclosure of which would be seriously prejudicial to the interests of any undertaking of his or any undertakings in which he works¹ (This rule is given virtually in full as an example of the sort of provision which affects most tribunals which hold public hearings although the same level of detail in relation to the circumstances in which a private hearing would be appropriate is not always given)

Correspondingly most tribunals which hold private hearings such as the S.B.A.T.'s do have power to admit the public usually with the consent of the applicant. It was in relation to these tribunals that the Council on Tribunals experienced the rebuff of having its members turned away from attendance at tribunals on

1. 1974 S1/1386 Rule 6(1).

the grounds that the "public" were not admitted. After complaints from the Council, new sets of rules usually contain a provision giving a member of the Council the right to attend in his capacity as a member¹.

Representation and the Taking of Evidence

All public statutory tribunals allow the parties appearing before them to be represented although the rules of some limit the type of representation. In *Enderby Town F.C.V. Football Association*² it was suggested that it was contrary to the rules of natural justice to curtail the right to representation but the court did not accept this, holding that in the absence of a rule, the right to representation is within the discretion of the tribunal. The decision in *McKenzie v. McKenzie*³ gives the right to all parties to be accompanied by a "McKenzie Man", who may remind and advise.

However, (with few exceptions) legal aid is not available for representation before tribunals although the "green form scheme" may be used to obtain advice before the hearing and to pay a solicitor to act as a "McKenzie Man".

The policy of keeping tribunals outside the legal aid scheme is based on the notion that tribunals are not courts and that cheapness and informality are incompatible with professional legal involvement in tribunals. However, this policy has already been modified to allow legal advice under the scheme and the use of representation has increased before all

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1. Eg. S.1 1972/1684 Rule 32(4); S.1 1960/1139 Rule 24; S.1. 1974/1386 Rule 6(2).
 2. [1971] 1 Ch 591.
 3. [1970] 3WLR 472.

tribunals but especially before the more court-like such as the Industrial Tribunals. A factor here was the legislation which placed a substantial portion of burden of proof on the respondent employer. The concept of the burden of proof is a strange one to the average employer. If he has previously been involved in litigation it will usually have been in a civil action for tort or contract where it is for the plaintiff to make good his claim with evidence. In a claim by an employee for compensation for unfair dismissal, once the employee has proved "dismissal" (as defined by the legislation) such dismissal, which is not usually in dispute, is presumed to be unfair unless the employer shows it to be fair. Employers soon found that they more readily discharged the burden of proof with legal assistance. This in turn produced a situation in which the applicant employee seemed at a disadvantage and he too was likely to seek assistance either from a solicitor or (more usually) from his Trade-Union. The Department of Employment suggests that in 1977 one-fifth of all applicants were represented and one third of all respondents¹.

Unfortunately the records kept by the Industrial Tribunals do not show conclusively the extent of representation. It is not always recorded whether or not a party to the proceedings was represented and it is not possible from the records to distinguish legal from lay representation.

In respect of the Industrial Tribunals the Government - financed A.C.A.S.² provides advice without

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1. Letter from the Department of Employment.
 2. Advisory, Conciliation and Arbitration Services - established on a statutory basis by the Employment Protection Act 1975.

charge concerning the majority of claims within their jurisdiction. This service is widely publicised and used. Indeed in many cases A.C.A.S. has a duty to attempt to conciliate between the parties and suggest a settlement. A.C.A.S. has no power to impose its assistance or its views on the parties and its services do not extend to the provision of representation.

While free advice may be of great value, representation for an inarticulate claimant may be crucial. The employee who is a member of a large, established Trade Union will usually be able to obtain representation by a Union Official who will often be very experienced and able to perform the service no worse and some would say considerably better than a legally-qualified representative. Even so he may have to submit his claim to a "pre-hearing" hearing by the union when the decision as to whether or not to give representation is made. For the non-trade unionist or the member of a small trade union, even this possibility does not exist.

The legal complexity of some issues brought before tribunals argues against keeping lawyers out of tribunals, whether by direct prohibition (now unusual) or indirectly by the non-availability of legal aid. Individual opinions for some time have favoured the extension of the legal aid scheme to cover tribunals¹ and these lone voices have been joined by the Lord Chancellor's Advisory Committee on Legal Aid².

At the same time the considerations of cost and the ability of the legal profession to meet the need,

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1. Frost, Howard. Representation and Administrative Tribunals: A.G. Henderson. Employment and Illegal Contract, N.L.J. March 10th, 1977.
 2. Report of Lord Chancellor's Committee on Legal Aid (1976-1977), para. 50. Evidence of Lord Chancellor's Advisory Committee on Legal Aid to Royal Commission on Legal Services, para 24. 3.

both in numerical terms and in terms of expertise, ensure that any extension will be selective. The principles on which such a selection should be made are uncertain. Should it favour those tribunals that deal with complex legal issues or matters of high financial value? Should it favour those tribunals with a large case load or especially disadvantaged applicants?

At present only two tribunals are within the legal aid scheme, the Land Tribunals and the Employment Appeal Tribunal, both high level appeal tribunals with a relatively light case load. Other tribunals find that legal advice and representation for their claimants come from organizations outside the legal profession such as the Citizen's Advice Bureaux, pressure groups like the Child Poverty Action Group or from Trade Unions. In one sense to extend Legal Aid to the Industrial Tribunals (described as a most pressing candidate¹) or the National Insurance Commissioners would be a questionable allocation of resources because claimants before these bodies do better in terms of advice and representation than do parties before the rent tribunals or the Mental Health Review Tribunals who have no obvious source of help within their means other than the Green Form Scheme.

My own view is that the question of Legal Aid cannot properly be separated from the question of provision of appeal. Denial of professional help is less serious at first instance, and the requirements of speed and informality correspondingly more influential, if appeal is possible to a higher tribunal or to a court and if legal aid is available for that appeal.

1. Evidence of Lord Chancellor's Advisory Committee on Legal Aid to Royal Commission on Legal Services.

Evidence before some tribunals is always taken on oath (e.g. the Industrial Tribunals); other tribunals have power to take evidence on oath but may choose whether to exercise it (e.g. M. H. R. T.'s) and before others, evidence is always taken unsworn (e.g. the National Insurance Local Appeal Tribunals). There seems to be no consistency behind the requirement for the oath (or affirmation). The use of the oath certainly increases the formal atmosphere of a tribunal.

There is general agreement that the strict rules of evidence (the rule against hearsay, for instance) should be relaxed in tribunals but not so far as to threaten the interests of justice. Disputed questions of fact must be decided by a tribunal; presumably on the balance of probabilities, and certainly on the evidence before them¹. However, a tribunal may accept uncorroborated evidence if the matter is fully argued before them².

The Decision.

The making of a decision is a central function of a tribunal but for many claimants an equally important matter is the reasons for that decision. The Tribunals and Inquiries Act 1971³ requires that for all tribunals under the supervision of the Council on Tribunals, reasons for their decision must be given to any party requesting reasons in advance. In practice many sets of procedural rules require all decisions to be communicated in writing with reasons, whether or not these have been previously requested. The justification for requiring reasons was set out in *Cooper v. British Steel Corporation*⁴. "Tribunals should give full reasons for each part of their decision for two purposes: first, so that the parties can know why the tribunal has decided

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1. *Starr v. Min. of Pension* [1946] KB345; *Stafford v. Min. of Health* [1946] KB 621.
 2. *Douglas v. Provident Clothing and Supply Co. Ltd.* [1969] 41TR 15.
 3. S. 12.
 4. (1975) 10 1TR 137.

as it has and secondly because there is an appeal only upon a point of law and it is desirable that this court, in reviewing, as it is obliged to do, the decisions of tribunals, should be able to determine precisely upon what grounds they have arrived at their decision".

"Good and sufficient reasons" must be clear and unambiguous¹.

A number of studies have concluded that some tribunals regularly evade the requirement to give reasons and that these tribunals are not sufficiently challenged (by certiorari) for this failure. It has been written of the Supplementary Benefits Appeal Tribunals that "evading the requirements to state reasons allows a tribunal to conceal its errors and, more significantly perhaps, to conceal the fact that it is rubber-stamping Commission policy or basing its judgements upon irrelevant considerations"².

There seems no reason why the rule that requires some tribunals to give their decision, supported by reasons, should not be applied as a matter of course. There should also be a policy of providing lay chairmen with the guidelines for giving clear, adequate and unambiguous reasons.

The Provision for Appeal. Because of the lack of any clear principles underlying it, provision for appeal is illogical and unsystematic, there has been a clear trend on an ad hoc basis for providing some sort of appeal from tribunal decisions; so that following the Anisminic case, an appeal by way of case stated was provided for from the Foreign Compensation Commission

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1. Givaudan Co. v. Min. of Housing and Local Government
[1967] 1WLR 250
 2. Norman Lewis. S.B.A.T.'s.
[1973] Pub. Law 257.

and the rules of the Supplementary Benefit Appeal Tribunals were amended¹, with effect from January 1978² to allow appeal on point of law to the High Court. Nevertheless, there is considerable difference between the Industrial Tribunals which are well integrated into the courts system in terms of appeal and others not included in the general provision for appeal by way of case stated (Tribunals and Inquiries Act 1971 s.13).

It is hard to see any justification for anything less than a general provision for appeal to the courts possibly subject to a requirement for leave to appeal. A distinction could be made between decisions of appeal tribunals, which already have the status of a court and from which appeal could reasonably be limited to matters of legal importance, and tribunals of first instance or which hear appeals from a decision of an "officer". From the latter, appeal to the courts should exist as of right unless there is an appeal to a higher "special" tribunal.

Costs and Enforcement

English courts have a discretion in the matter of costs and in practice, the civil courts usually order the loser to pay the winner's costs, that is, the costs follow the event; in tribunal proceedings the usual practice is for each party to bear his own cost, although some tribunals meet claims for expenses and loss of earnings, the payment being from public funds. The underlying assumption is that there are no costs in tribunal proceedings. The operating costs of the tribunal and its associated offices and staff come from government funds. In practice, the increasing complexity of matters brought before tribunals has widened the need

1. S.1 1977, 1735.

2. Appeal now lies to the National Insurance Commissioners

for assistance in the preparation of a case and this assistance does not usually come free. Before certain tribunals, there may be two parties with costs to meet.

The Industrial Tribunals have a limited power to order that the costs of both sides be paid by a party whose claim is "frivolous or vexatious"¹ or who obtains unnecessary adjournments (which aggravate costs). Such an order may also require reimbursement, by the party against whom it is made, of the Department of Employment for expenses paid for attendance at the tribunal².

The Industrial Tribunals are closer to the courts than other tribunals and their powers as to costs are an illustration of this. All tribunals are alike in their lack of enforcement procedures. A tribunal ruling may be accompanied by an order such as the order for reinstatement or re-engagement that can be made by an Industrial Tribunal or a direction by a Mental Health Review Tribunal that a compulsory patient should be discharged. The former orders cannot be enforced directly but the Tribunal can order compensation if they are not complied with; the latter could, if necessary, be enforced by the use of the writ of habeas corpus and the direction would destroy the legality of the detention.

Where a tribunal orders a money payment, the help of the courts is needed to enforce it; payments ordered by the Industrial Tribunals can be enforced in the County Courts. Some tribunals, however, have power to specify payments but no legal enforcement machinery exists. This is because these tribunals (e.g. the Criminal Injuries Compensation Board) are seen as

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1. For the meaning of this expression see *Master Ltd. v. Robertson* [1974] 1CR 72.
 2. M.J. Goodman, *Industrial Tribunals' Procedure*.

independent advisors as to the exercise of a prerogative power.

This situation is anomalous and confusing. Most claimants before tribunals would be astonished to find that if successful, they have no enforceable right to the fruits of that success. A standard, simple and cheap enforcement procedure should be available for all tribunal orders for money payments. Other orders should either be directly enforceable or be backed up by an alternative; that is if it were recognised in principle that an essential function of a tribunal is to make binding decisions, confusion could be avoided. Advisory bodies, if thought desirable, could be set up with a clearly delineated function and name, so as to avoid misleading applicants in their expectations.

There is a clear need for standardisation and consistency in the planning, staffing and regulation of tribunals. The Tribunals and Inquiries Act 1971 is neither sufficiently comprehensive nor generally applicable. It should be replaced by a new statute in which a pattern is laid down for tribunals, existing and future, a pattern which covers composition, jurisdiction, powers and appeal in terms which apply to all; a pattern from which new tribunals would be allowed to differ only on the showing of clear justification for the difference.

Such a statute would strike directly at the least desirable attribute of statutory tribunals, their unnecessary diversity. It would almost certainly be resisted by government departments as a restraint on their own initiative. The use of delegated legislation to reform the procedure for administrative remedies when the Law Commission had produced a draft bill was seen

as an indication of "the general unwillingness of Government to allow a proper review by the Law Commission of our administrative law system ..."¹. This unwillingness is in part prompted by a view of law as an "external constraint" on an otherwise free and dynamic administration².

Any view is likely to differ according to the view point of the person holding it. What to the administrator may seem to be flexibility to the administrated may appear as caprice. The actions of tribunals touch closely, even intimately, on the lives of the majority of citizens "Fair play in administration will enlist the citizen's sympathies and will enormously reduce the friction with which the machinery of government works. All good administrators should take care that the machinery is properly tended and that the lubricant of justice is supplied in the right quantity at the right points"³. This fair play and justice is more likely to exist within an accepted framework of legal restraint such as could be provided by an Administrative Law Statute.

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1. Harlow, Comment. [1978] Pub. Law 1.
 2. This view is discussed in relation to the American experience by P. Nonet, Administrative Justice. P. 4.
 3. K. C. Davis, Administrative Law Treatise.

Chapter VIII

Conclusion - The Way Ahead.

Public statutory tribunals occupy an important but ill-defined place in the English Legal System. The initiative to set up tribunals comes from the Executive which nevertheless is reluctant to relinquish control over discretionary decisions. When the courts are excluded by the legislation from any meaningful contact with tribunals, these nevertheless are functioning as courts but in isolation, despite the finding by the Franks Committee that tribunals are part of the judiciary.

Tribunals need to be rescued from their position between the Executive and the Judiciary and this can only be accomplished by a positive movement towards change. The areas in which such change is needed and which must be assessed in order to achieve it are summarised below.

1. The present collection of tribunals in operation bears no resemblance to a system. It should be possible to amalgamate some or form groups of tribunals with similar jurisdiction. A "Beeching for Tribunals"¹ has been called for to do for tribunals what the Courts Act 1971 did for the Criminal Courts. The Council on Tribunals has called for "fewer and stronger units"².
2. The diversity of proceedings operated by tribunals is contrary to good administrative practice and a source of frustration to the

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1. Cavanagh and Newton. Lay members on Tribunals. 1974 Pub. Admin.
 2. Letter from the Chairman of the Council on Tribunals to the Lord Chancellor. 20th July, 1970.

public (and probably to those members of the legal profession who are involved). In a recent Upjohn Memorial Lecture¹, Master L. H. Jacob of the Queen's Bench Division deplored unnecessary differences in procedure between High Court and County Court and went on to advocate a standard civil procedure which would apply to tribunals as well.

3. Those tribunals that are alike should be operated alike but in fact tribunals are a far from homogeneous group² and where differences between them are of substance this should be recognised in the nomenclature applied to them and in their operation.
4. Two urgent problems, that of the system of appeal³ from tribunals and the provision of legal aid for the parties, must be dealt with but should not, as seems likely, be treated on an ad hoc basis. There should be clear legislative statements of principle concerning the structure and functions of tribunals which would enable the questions of appeal and legal aid to be established both for all tribunals now in operation and for those not yet established.
5. The supervision of tribunals cannot be adequately carried out by the Council on Tribunals alone, in its present form and with its present powers⁴. The Council is in need of legislative reforms. For some tribunals, alternative forms of supervision should be examined.

1. The Case for a System. The extreme diversity and ad hoc nature of the over 50 different kinds of tribunals operating in the United Kingdom regularly attract comment and to the continental jurist appear inexcusable⁵. Calls

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1. Given at the Annual Conference of the Association of Law Teachers 1979.
 2. Farmer. Tribunals and Government.
 3. C.K. Allen calls it an "un-system". Administrative Jurisdiction.
 4. Harry Street. Justice in the Welfare State, p.62/P.91.
 5. Cf. Michel Fromont. Les "Administrative Tribunals" en Grande Bretagne.

for a system have come from The Council on Tribunals, the judiciary, academics and research workers, pressure groups and, less coherently, from bewildered members of the public. The advantages of a system would be numerous; a few are now considered.

Some of the problems of staffing referred to in the previous chapter would recede or even disappear if tribunal organisation was more systematic. In particular it is a waste of scarce resources to make the large number of appointments to individual tribunals which are now necessary. If a legal qualification is thought desirable, experienced, qualified chairmen may be best provided through full-time appointments but these can reasonably be made only to tribunals with a steady and substantial case load. Similarly, for some tribunal work, training and preparation may be either necessary or desirable and this too can be more easily provided within the framework of a system.

Not only the problems of the appointment of Chairmen and members but also that of supporting staff, particularly the clerk would be less severe within a system. It is clearly undesirable that so important a role as that of the clerk should be played by someone temporarily loaned or seconded by a government department. Within a system, an appointment as a tribunal clerk could be part of a career structure, backed up by its own training and without links to any individual department.

Accommodation should be provided, not on the present piecemeal basis but to meet the requirement of suitability for the purpose (i.e. the holding of tribunal hearings). Not only would systematisation reduce overall demand, by preventing underuse of some accommodation, but where amalgamations had taken place, the jurisdictions of some

tribunals would be wider and there would be less reason to suggest links with departments. (Thus, the Industrial Tribunals are not thought of so much as "belonging" to the Department of Employment, but many applicants think of the Supplementary Benefit Appeal Tribunals as just another Office of the Department of Health and Social Security).

A system would also lead to less diversity of procedure and even to more consistency in decisions. The capacity of the public to know of and understand tribunals is severely strained in the present situation. Fewer individual units and a rational allocation of jurisdiction, would at very least reduce the current confusion and ignorance.

2. The Rationalisation of Procedure. The variation in the rules of procedure is in fact a separate issue of great importance. Some sets of rules are comprehensive and moderately detailed with supplementary guidance notes and textbook material; others are so general as to allow for differing interpretations among tribunals subject to them. The Rules of the Mental Health Review Tribunals (SI 1960 1139) which allow for two types of hearing "are so generally drawn that there is in practice little distinction between the two procedures"¹.

Moreover on certain matters not only do various sets of rules differ but it is hard to see the principle behind the difference. As an example, take the **question** of evidence. It is possible to recognize that it is desirable for some tribunals to receive sworn and other to receive unsworn evidence, but if the use of oath or affirmation is felt to conflict with informality then there seems no reason why any tribunal should receive sworn evidence, and if the principle is to avoid

1. J. D. McClean. The Legal Context of Social Work, p.150.

formality unless the issue is so important or complex as to require sworn evidence, then it is hard to explain why evidence relating to loss of work through industrial injury is unsworn and evidence relating to loss of work through redundancy is given on oath.

A first step towards the systematisation of tribunals could be a generalising of their rules of procedure. Their must be some rules of such general application that they should apply to all tribunals. One would then be left with a few exceptional cases which would require their own justification. The inconsistencies arise mainly because rules originate in Government Departments. They are required to consult with the Council on Tribunals but often do so at a stage too late to permit variation; in any case they are not obliged to follow the Council's suggestion. If this situation were reversed, if the procedural rules were made by the Council on Tribunals subject to the requirement for consultation with the appropriate department, then more consistency would surely result and the department would be forced to justify any divergence from principle that it required. Preferably this function should be entrusted to a special rule-making Committee of the Council on Tribunals which could call on the services of active members of tribunals, close to the realities of applying rules of procedure.

3. The Classification of Functions. Thus far in this conclusion I have referred to tribunals as if they were a homogeneous group which clearly is far from the case. If we look below the **form** at the functions of statutory tribunals they form clusters: **some** are designed to settle disputed legal **claims**, others to process applications for

licenses or privileges, others to consider claims by an individual against the state; around these clusters there are others which it is hard to classify. Another view is that all statutory tribunals can be placed along "a spectrum". Within the cluster theory it is possible to place tribunals in one of two groups, the "court-substitute" tribunals and the "policy-oriented tribunals"¹. The spectrum theory sees some tribunals as being close to decision-making by a minister and others as simple courts, and the remaining tribunals on the spectrum in between; on this view both the Donoughmore Committee and the Franks Committee "allowed too little for the subtle gradations of colour in the spectrum"².

It is arguable that the differences between tribunals in the groups or at the two ends of the spectrum (depending on the view taken) are sufficiently large to indicate that distinct considerations apply to the two types, suggesting differing arrangements for supervision and review. A starting point could be the introduction of some consistency in nomenclature; (tribunals are variously known as "commission", "committee", "commissioners", "authority" and "board" as well as "tribunal" and "court" and where the tribunal is an individual, he carries an official title such as "adjudicator", "director", "registrar", "arbitrator" or "controller"). This may seem a trivial point, but a name arouses expectations and carries associations, and the multiplicity of names which are different for similar bodies and alike for different bodies certainly contributes to the confusion in the public mind as to what is a tribunal. If the word "tribunal" were always used for the court substitutes and the word "commission" for the policy decision makers, then some concept of the

1. Farmer. Tribunals and Government.

2. Wraith and Hutcheson. Administrative Tribunals.

distinct functions of these entities might develop.

4. Legal Aid and Appeals. It is all the more important to be clear on these distinctions if the recommendations of the Lord Chancellor's Advisory Committee on Legal Aid are in any way to be implemented. There is provision in the Legal Aid Act 1974 for extension of the existing scheme to tribunals to be made by delegated legislation. The Advisory Committee recommended the extension of the scheme to allow representation in prescribed cases¹, and favours such extension using the "Green form" machinery which allows a solicitor to make on the spot assessment of his client's means; legal services are provided, based on this assessment, either free or for a contribution and most importantly without delay. Obviously the scrutiny of means is not so thorough as under the civil legal aid scheme but the administrative costs are markedly lower and the Law Society is impressed by the efficiency of the scheme in practice.

If the extended scheme is to apply only to designated tribunals, then it is necessary to determine which shall be designated and some grouping in terms of function would facilitate such determination. Also were certain tribunals to be designated, this would result in extending the scheme to one party only in that "the other side" is a government department whose own staff are trained to present a case; for other tribunals the scheme, if it applied, would be available to both sides, thus doubling the number of potential applicants.

Moreover the legal aid scheme may not be the best form of help to parties before tribunals. A number of

1. Report of the Lord Chancellor's Advisory Committee on Legal Aid 1976, para. 50.

studies have shown that the party without any assistance is at a grave disadvantage¹. In terms of successfully sustaining a claim, unrepresented parties do worse than those that have a representative (not necessarily a lawyer)². Tribunal members when interviewed were reluctant to admit any disadvantage for the unrepresented claimant³ but conceded that the claimant who did not appear was likely to lose his case⁴. One noticeable feature is that the claimant who is represented (or indeed advised) is likely to obtain a more lengthy hearing than the unrepresented claimant, whose case is typically disposed of in less than ten minutes.

One objection to an extension of legal aid is that it will increase the cost and complexity of tribunal hearings, thus defeating these prized objects of cheapness and informality. Both of these characteristics can be open to abuse, if cheapness is emphasised to the extent of depriving a party of a reasonable chance to present his case and informality too may be abused when, as was reported to me "members of the tribunal chain-smoked and held private and irrelevant conversations during the proceedings". C. K. Allen expressed the view in relation to formality that "Justice need not be in a stiff shirt but also need not be in shirt sleeves"⁵. The presence of a representative may serve as a useful check of the way proceedings are conducted.

Even if it is accepted that aid is desirable, it may be that such aid should not necessarily come from the legal profession. Parties to tribunal proceedings have become accustomed to seeking help elsewhere, either because

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1. See e.g. Frost & Howard, Op. Cit. Table 2. 14.
 2. See Bell, Collinson, Turner and Webber. National Insurance. Local Tribunals. J. Soc. Pol. Vol 3 .4 Table 1.
 3. Ross Flockhard. Some aspects of Tribunal Membership. This author thought that this response was probably a form of self-protection.
 4. Ross Flockhard. Some Aspects of Tribunal Membership in Adler and Bradley Justice, Discretion and Poverty.
 5. C. K. Allen. Administrative Jurisdiction.

of lack of funds on their part or because of lack of expertise on the part of the legal profession. From some organisations, assistance is available on a regular basis and the government adopted the idea when it set up A.C.A.S. on a statutory basis.

At present the problem is not so much lack of aid as that the help that can exist is available on a partial and unco-ordinated basis. Chance therefore plays too large a role in determining what assistance a party receives. If the legal aid scheme were extended, it would apply equally throughout the country. It is undesirable that in some tribunals and in some areas, non-lawyers such as trade union officials and social workers do an excellent job as advisors and advocates and are seen by some as an alternative to lawyers¹. This could be combined with general assistance and encouragement for parties to present their own cases². But without some coordination, this will happen unevenly with resulting injustice. A reformed Council on Tribunals could provide the necessary oversight or perhaps there could be a Tribunals Advisory Service on the model of A.C.A.S.

It is clear that a positive step is needed to provide systematically assistance for parties appearing before tribunals. Given that "Claimants stand a much better chance of success if they are skilfully and/or legally represented"³ then the opportunity to be represented should be equally available to all. As C. K. Allen wrote as long ago as 1956 "to deny persons who are unable to express themselves the services of a Competent Spokesman is a very mistaken kindness"⁴.

The question of legal aid (or some substitute for it) cannot be separated from the question of appeal, where

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1. Maughan and Thomas. Lay Advocacy. New Society, Jan. 3rd, 1974.
 2. Ibid.
 3. Field F. Poor People's Courts (1972) 122 N.L.J. 1007.
 4. C. K. Allen. Administrative Jurisdiction. P. 79.

the situation contains many inconsistencies. It must be remembered that some tribunals are hearing an application at first instance, some are reconsidering a decision made by an official and others are hearing appeals from tribunal decisions. To me it seems obvious that any decision as to what provision for appeal should be made should rest initially on the type of tribunal under consideration but this does not appear to happen for we find appeal tribunals from which it is easy to appeal those from which there is no appeal or a linked appeal and we find the same for both other categories.

Then it would seem self-evident that only exceptional factors can justify the exclusion of any reference to the Courts but despite numerous statements from eminent sources to this effect such exclusion does occur without any special pleading. Equally, however, there is no merit in a free-for-all of appeal to the Courts "It does not follow, because an administrative tribunal may make mistakes even on a point of law that therefore the courts must always have power to rectify them. To take this view would be to throw away all the advantages of the present system ... "¹.

The new simplified procedure for Judicial Review should work alongside a comprehensive system of appeal so that appeals do not appear masquerading as review. From any administrative decision there should be one appeal available on facts and law; from the appealed decision it should be possible to appeal on a point of law; more than one level of appeal on point of law should be subject to the leave of the court. This leaves open the question as to what body should hear appeals.

There are, I believe strong arguments for extending

1. Lawson. Comment 1957 Pub. Law.

the operation of the Higher Appeal Tribunals¹. The National Insurance Commissioners, The Employment Appeal Tribunals and, to a lesser extent, The Transport Tribunal, perform a valuable function in filtering cases from the courts. These appeal bodies are staffed by lawyers (in some cases, judges) of seniority and experience, and although to some extent they are specialists in the field of law they administer, a group of them clearly contains a wide field of expertise.

As these appeal tribunals are centralised in London, it is possible to envisage an amalgamation into a single statutory appeal tribunal². How short a step this is from the Administrative Division of the High Court so persistently urged by Professor Robson, it is hard to measure; indeed, the difference might be purely formal. Such a tribunal, however, could well incorporate those features of informality, cheapness and expedition seen as so desirable.

A decision without appeal has the appearance of injustice whatever the reality may be. The whole question of appeal should be determined on the basis that any party has the right to one appeal and should have the chance of two. Legal aid (or some equivalent) should always be available for appeals. If it is always possible to appeal and if aid is available for such appeals then the arguments for extending legal aid to first instance tribunals is considerably weakened.

The existence of a right of appeal may not necessarily result in widespread use of the right but it can have very **salutory** effects on the conduct of tribunal hearings. More thought will be given to a **decision** and the reasons for

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1. A view also advanced by Henry Hodge. Really: Yet Another Tribunal? C.P.A.G. Bulletin. November 1975.
 2. R.S.W. Pollard in Administrative Tribunals at work, suggested a General Appeal Tribunal.

it if these can be brought before another "court". A tribunal usually comes to know if its decisions are reversed on appeal and this influences its behaviour and the claimant who knows that he can appeal will be less aggrieved by any shortcomings in the hearings before the lower tribunal.

A general appeal system is also likely to promote consistency in decision-making by tribunals, seen by Mr. Justice Phillips as an achievement (within their jurisdiction) of the Employment Appeal Tribunal¹. There is no system of binding precedents at the level of tribunal decisions and tribunals vary in the importance they attach to previous decisions. Commentators have seen the lack of system of precedent in the case of S.B.A.T.'s as operating against the interests of the claimants² and certainly the existence of a system of reporting the decisions of the National Insurance Commissioners (and of their predecessors, the Umpires) has contributed to a coherent and predictable body of law in this area³.

A rationalisation of the appeal system and increased opportunity for reference to the Courts cannot by themselves promote consistency; some form of supervision is needed. There are the problems of the high proportion of lay members on tribunals and their variety, which even if reduced to a minimum, will continue to exist. The supervision of the Council on Tribunals is valuable despite its shortcomings.

Reporting as it does to the Lord Chancellor's Office, the Council is best suited to the supervision of the Court-like tribunals. The policy-guided tribunals come more

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1. The Hon. Mr. Justice Phillips. Some Notes on the Employment Appeal Tribunal, Ind. L. J. Sept. 1978.
 2. Steve Burkeman. We go by Law Here. Justice, Discretion and Poverty.
 3. Micklethwaite. The National Insurance Commissioners.

logically within the terms of reference of the Parliamentary Commission for Administration (The Ombudsman). The Ombudsman is an ex-officio member of the Council but the relationship between them is uncertain especially as it arose from an afterthought and not from pre-arrangement.

Like the Council, the Ombudsman lacks power but has shown himself influential and the Ombudsman concept has now been applied to Local Government and to the Health Service. Both the Council and the Ombudsman should now be re-appraised in the light of experience and the legislation amended to clarify their functions and increase their power¹.

The most useful functions of the Council on Tribunals are threefold: to supervise and direct the operation of existing tribunals; to act as a consultant on impending legislation involving tribunals and to act as an avenue of complaint when the operation of tribunals goes astray. In order to carry out these functions the Council needs clear definition of its powers and an extension of them; in particular, it should be able to require certain principles of fairness to be observed and it should have power to obtain redress in situations where complaints are found to be justified.

If the list of tribunals subject to the Council's jurisdiction were reduced to those best suited to this form of supervision, the Council could more effectively carry it out. Other tribunals could then be within the Ombudsman's jurisdiction and these could include some outside the Council's supervision (the Police Complaints Board, for instance).

In respect of the Ombudsman, the requirement for complaints to him to be preferred through an M.P. should

1. Cf. Recommendation in Garner. The Council on Tribunals. 1965 Pub. Law 321.

be discontinued and the Ombudsman should have the power to require redress for complainants whose complaint is a valid one.

A Place in the System

The majority of public statutory tribunals in England are courts dealing informally with specialised areas of law. They represent a break with the traditions of dignity and formality (and expense) that have shaped the higher courts of law (referred to as a "Rolls Royce system of Justice")¹; however, the courts themselves now have alternative procedures in response to demands for cheaper, simpler and speedier justice². The difference between tribunals and courts is not fundamental; it is a matter of detail and of degree.

There is a strong psychological influence in names. A tribunal, however formal, may sometimes be preferred to a court, however informal because of the associations of their names. This was recognised at the time of the Franks Report: "Only a certain type of lawyer, politician and constitutionalist dearly loves our system of established courts. The man on the Clapham omnibus and the man in the Company Rolls are alike in this, that they would prefer to be driven in their respective vehicles to any arbitration or tribunal rather than to the Courts"³.

This prejudice was a factor in the wide unpopularity of the National Industrial Relations Court, although the Industrial Tribunals then took a transfer of the major part of its jurisdiction and has continued to exercise it since 1974 without suffering similar attacks.

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1. Harry Street. Justice in the Welfare State, P. 3.
 2. e.g. The small claims procedure in the county court; the new procedure for undefended divorce; the relaxation of probate requirement in the administration of small estates.
 3. J. A. G. Griffith. Tribunals and Inquiries 22 MLR 125.

To suppose however that these tribunals are a wholly different animal from the court is clearly unfounded.

Because tribunals have, on the whole, given satisfaction to their customers they have acquired a reputation for dealing informally, expeditiously and economically with matters assigned to them; at the same time the courts have retained a reputation from an earlier time for expensive maladroit handling of legal matters. Neither reputation is entirely deserved. There is a danger that an impatient legislature will always turn to a tribunal (frequently invented for the purpose) when questions under legislation have to be determined. The hopes of thus avoiding legalisation are not always fulfilled¹.

In recent years the courts have recognised that most tribunals are truly part of the machinery for the administration of the law and have attempted to impose standards and to establish legal principles in respect of them. The influence of the courts has sometimes come about by devious means, and the courts have justified the use of a procedure on the grounds that no other means is available. In the process the important distinction between a decision bad in law and a decision arrived at through some irregularity has been blurred and the situation concerning judicial review is now so fluid as to be indefinable². The admirable concern of the judiciary however has not yielded an effective remedy for the citizen³.

The idea that administrative law is not a proper study for lawyers has at last been abandoned and academic lawyers too have raised their voices to suggest principles and ask plaintively for consistency. Research studies have pointed

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1. K. W. Wedderburn. Labour Courts? New Society 9th Dec. 1965.
 2. H. W. R. Wade. Anisminic ad Infinitum 95LQR 163.
 3. H. W. Jones. The Rule of Law and the Welfare State. 1958 Col. L.R.

to some problems and suggested some solutions.

Tribunals are usually studied in the context of administrative law and are commonly referred to as administrative tribunals but it is clear, especially to foreign observers that the law they are concerned with is not administrative law. The distinction between a tribunal decision and a true administrative decision is, as pointed out by R. M. Jackson, procedural¹. The procedure in most tribunals is judicial in that the decision is made according to law and the evidence².

What is now needed is for the Executive to recognise this reality and to cease to hanker for the "ministerial tribunals" of the 1930's. If a minister wishes to control a decision he must take the accompanying responsibility for it. If he wishes to issue guidelines for the exercise of a discretion, these should be public and available, as part of the legislation, as codes of practice or as published precedents.

Finally, the legislature too must resist the temptation to multiply when it ought to arrange, and must reverse its consistent failure to clarify intentions. No one would now suggest that we can do without tribunals; therefore what we do with them should be consistent and constructive, and based always on considerations of justice, the machinery of which they form an essential part.

1. R. M. Jackson. The Machinery of Justice in England. 7th ed. p. 156.

2. Jackson uses the term "special" to describe tribunals.

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