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The Status of Administrative Judges in the U.K.: Recruitment, Tenure, Training and Appraisal*

Martin Partington**

INTRODUCTION

The "status" of administrative judges in the United Kingdom ("U.K.") is a theme that has not received the direct attention that it deserves, though it underpins in significant ways most of the ideas currently being considered about how the administrative justice system in the U.K. should develop. Although this paper is country-specific, I anticipate that many of the issues raised here will be common to other jurisdictions. I look forward to the interchange of ideas and experiences that will result from the publication of this paper.

This paper has been revised following the publication of the Leggatt Review of Tribunals ("Leggatt Review").[1] The purpose of the Leggatt

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* This is a revised version of a paper presented to the 2nd International Conference on Administrative Justice, "In search of Universal Values in Administrative Justice," held in Quebec City, Canada in June 2001. CANADIAN COUNCIL OF ADMINISTRATIVE TRIBUNALS, *at* http://www.ccat-ctac.org (last modified Aug. 2001) (The Canadian Council of Administrative Tribunals organized the conference). I am most grateful to the editors of this Journal for their assistance in putting my text into the appropriate style.

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1. SIR ANDREW LEGGATT, TRIBUNALS FOR USERS: ONE SYSTEM, ONE SERVICE (Mar. 2001), *at* http://www.tribunals-review.org.uk (last visited Jan. 28, 2002). Sir Andrew Leggatt, a retired judge from the Court of Appeals, chaired the Review of Tribunals. The Report of the Review was established in May, 2000 and asked to report by March 31, 2001. The final copy was delivered to the Lord Chancellor on March 29, 2001 and it was published in

Review, the most far-reaching official review of the administrative justice system in Britain in over forty years, was to develop proposals for rendering current institutional arrangements for the delivery of administrative justice in the U.K. more coherent. The British Government has launched a public consultation exercise to explore the extent to which the proposals made by Leggatt and his team should become Government policy.[2] The timing of these matters demonstrates that the issues raised in this paper are at the very top of the agenda relating to the institutional development of administrative justice in the U.K.

This paper is divided into three parts. The first part briefly sketches the development of administrative tribunals and how the issues of recruitment, tenure, training and appraisal have been dealt with historically.[3] The second part consists of a summary of the Leggatt Review's likely comments regarding these issues.[4] Finally, I will offer personal observations about how the U.K.'s administrative law system may develop in the future.[5] Although the paper is general in its analysis, many of the examples are taken from the development of the U.K.'s social security adjudication – the largest single branch of the administrative justice system, and the aspect with which I am most familiar and have had most involvement.

SECTION 1: HISTORY

Though administrative tribunals have been in existence for nearly one hundred years, in the U.K. and other countries, they are still a relatively new creation. The first administrative tribunals in the U.K. were established in 1911.[6] Initially, the tribunals were clearly seen as part of the

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August, 2001.

2. SIR ANDREW LEGGATT, CONSULTATION PAPER ABOUT THE REPORT OF THE REVIEW OF TRIBUNALS (Aug. 2001), *at* http://www.lcd.gov.uk/consult/leggatt/leggatt.htm. (last visited Jan. 28, 2002).

3. *See infra* Section 1.

4. *See infra* Section 2.

5. *See infra* Section 3.

6. This assertion is not wholly uncontroversial. The General Commissioners of Income Tax, which hear appeals against the Taxing authorities, trace their origins back to the 18th century. *See generally* Chantal Stebbings, *Historical Factors In Contemporary Tribunal Structure, in* THE LEGGATT REVIEW OF TRIBUNALS: ACADEMIC SEMINAR PAPERS (Martin Partington ed., Bristol 2001) (on file with author); Martin Partington, *The Evolution of Administrative Justice in England: The Case of Social Security, in* HUMAN RIGHTS AND LABOUR LAW: ESSAYS FOR PAUL O'HIGGINS (Ewing, KD, Gearty, CA, and Hepple, BA eds., Mansell 1994) (on file with author).

administrative arm of government.[7] They were established on a highly fragmented basis, as individual governmental departments found them to be desirable or necessary.[8]

Five generalizations can be made regarding administrative tribunals during this period:

- Recruitment and appointments to tribunals were made by the sponsoring departments;[9]
- Tribunal membership was essentially a part-time occupation;[10]
- No serious consideration was given to questions of job security;[11]
- There was no evidence of any training program for chairs and members, save through learning by experience;[12] and
- There was no concept of formal performance appraisal.[13]

Though the development of administrative tribunals was subject to some sharp criticism and an official review in the late 1920s and early 1930s,[14] it was not until 1957, when the Franks Committee ("the Committee") issued its report, *Administrative Tribunals and Enquiries* ("the Franks Committee Report"), that a clear view emerged.[15] According to the Franks Committee Report, tribunals should not be seen as a part of the administrative arm of Government, but rather, should be seen as part of the adjudicative arm, with a proper sense of impartiality and independence from Government.[16]

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7. *See, e.g.,* WILLIAM ANTHONY ROBSON, JUSTICE AND ADMINISTRATIVE LAW: A STUDY OF THE BRITISH CONSTITUTION 89-90 (3d ed. 1951). In some countries – Australia is the prime example – tribunals, at least at the national level, are still regarded as part of the executive arm of government; this is a result of specific constitutional provisions which enshrine this status.

8. *See id.*

9. *Id.* at 68-69.

10. *Id.* at 43.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See generally* LORD GORDAN HEWART, THE NEW DESPOTISM (Cosmopolitan Book Corp. 1929) (1929) (on file with author).

15. COMMITTEE ON ADMINISTRATIVE TRIBUNALS & ENQUIRIES, REPORT, 1957, Cmnd. 218 [hereinafter FRANKS COMMITTEE REPORT] (on file with author).

16. *Id.; see also generally* JOSEPH M. JACOB, THE REPUBLICAN CROWN (Aldershot 1996) (describing a fascinating account of the background of the Franks Committee Report) (on file with author). As was noted in discussions in Canada, one of the advantages of the (unwritten) British Constitution is that a decision to reconceptualize tribunals as part of the adjudicative rather than as part of the administrative branch of government is easier to achieve than in countries with written constitutions, where the boundaries of the adjudicative branch are more firmly set.

In relation to the matters being considered in this paper, the Committee made a number of significant points, though there were also significant omissions.

Recruitment and Appointments

First, the Committee noted that the bulk of the adjudicative personnel of tribunals (for example, chairs and members) were at that time being appointed by the sponsoring government departments, against whose decisions appeals were being made.[17] The Committee regarded this as objectionable in principle, particularly in cases where the department concerned was an interested party to the tribunal proceeding.[18]

To address the problem, the Committee received strong representations that the appointment of all chairs and members of tribunals should be made by the Lord Chancellor.[19] In the alternative, it was argued that if the Lord Chancellor appointed members as well as chairs, too great a burden would be imposed on his department.[20]

The Committee recommended that the powers of appointment by the Lord Chancellor be limited to chairs.[21] In relation to the tribunal members, the Committee recommended that they no longer be appointed by the heads of the government departments, but rather, should be appointed by a proposed Council on Tribunals ("Council").[22]

In terms of the qualifications of chairs and members, the Committee suggested that chairs should be legally qualified, while also explaining that others not legally qualified should not be ruled out where otherwise suitable. The Committee felt the quality of members was "on the whole satisfactory," [23] and the Committee had "no general proposals to make with regard to their qualifications."[24] However, the Committee said that the quality of the Appellate Tribunals' members should be higher than those in the first instant tribunals.[25]

The Committee did not have anything specific to say about the processes that should be adopted for recruitment. The public advertising of

17. FRANKS COMMITTEE REPORT, *supra* note 15.
18. *Id.* at 45.
19. *See id.*
20. *See id.*
21. *See id.*
22. *Id.* at 46-49.
23. However, the basis of this assertion was not derived from any research. *Id.* at 56.
24. *Id.* at 58.
25. *Id.*

candidates for appointment, which is now an accepted part of the recruitment and appointment process, was not on the Committee's list of issues.

Tenure

On the question of tenure security, it is clear from their report that the Committee assumed that existing appointments were temporary.[26] Indeed, the Committee's approval is reflected in the following statement: "We are agreed in rejecting any suggestion that in general, tribunal service should become whole time or salaried . . . We believe that public spirited citizens will continue to serve without remuneration on many tribunals . . . . "[27] The Committee argued that if removal of either a tribunal chair or a member became necessary during the time of his or her tenure in a particular tribunal, the matter should be undertaken by the Lord Chancellor.[28] However, where an existing chairman or member has been appointed by a minister other than the Lord Chancellor, removal would take place by that minister.[29]

Training and Appraisal

One of the great paradoxes of the Franks Committee Report, when read with modern eyes, is that is that the tribunals claimed to have a great advantage over the courts because they had expertise in the subject matter of the dispute, despite the lack of consideration as to how that expertise might be acquired.[30] In other words, there was no consideration of how chairs and members might or should be trained for the tasks they were required to perform.[31] According to the Franks Committee Report, chairs and members would be qualified in one of three ways.[32] First, they may bring pre-existing knowledge of the relevant law to the tribunal room.[33] Second, and more likely, they may pick up the particular area of law under discussion either by osmosis or by trial and error.[34]

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26. *See id.*
27. *Id.* at 57.
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*

Finally, they may rely on guidance from departmental officials.[35] Perhaps they could utilize a combination of all three. Today, the omission of any mention of training seems both bizarre and incredible, but evidently not thought necessary then.[36] Similarly, there was no mention of the possibility that the performance of tribunal chairs and members should in any way be formally appraised.[37] Though the basic Franksian principles of openness, fairness and impartiality became a kind of mantra and helped to shape developments in the administrative justice system over the next forty years, many of the detailed Franks Committee Report recommendations remained unimplemented. In the present context, the most notable non-development is related to the appointment of members, which remains a departmental responsibility.[38]

It is perhaps fair to say, however, that the Committee began to raise some expectations about how tribunals should operate.[39] In particular, the Committee inspired the creation of the Council on Tribunals in 1959, which was an important first step.[40] Once the Council began examining the tribunals' operation, they began to identify and rectify the failures found in the system.[41] Although the Council has not been as effective as some might have liked, it has had a significant "behind-the-scenes" influence. The Council has also been successful in drawing attention to problems associated with tribunals, many of which are discussed in this paper, and helped shape opinion on them.[42]

During the 1960s and early 1970s, tribunals faced increasingly strident public criticism, particularly those tribunals dealing with social se-

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35. *See id.*

36. *See id.* (There has of course been a revolution in attitudes toward questions regarding professional education and development in the interim.).

37. *See id.*

38. *See id.*

39. *See generally* MARTIN PARTINGTON ET AL., COUNCIL ON TRIBUNALS ANNUAL REPORTS: ANNOTATED INDEX, 1959-1993 (Univ. of Bristol 1994) (providing a summary of Council on Tribunals Annual Reports and an analysis of their contents) (on file with author); *see also* COUNCIL ON TRIBUNALS ANNUAL REPORTS, *available at* http://www.council-on-tribunals.gov.uk/annual.htm (last modified June 8, 2001) (providing the latest annual reports).

40. *Id.*

41. *Id.*

42. The Leggatt Review is likely to propose new means of enabling the Council to be sharper in its comments. The Council itself sees a need for this and has adopted a "Change Programme." 1999-2000 COUNCIL ON TRIBUNALS ANN. REP. 1, 2-4, *available at* http://www.council-on-tribunals.gov.uk/annualreports/00/00index.htm (last modified June 8, 2001).

curity matters.[43] Much of this was linked to the rise of the Welfare Rights movement in the U.K.[44] Taking social security tribunals as a case study, tribunals were attacked for their perceived lack of "independence" and the fact that very basic legal principles (for example, that the discretionary policies of government departments were not legally binding on appeal tribunals) were not understood, let alone applied, in the tribunal hearing due to lack of adequate training.[45]

The Department of Health and Social Security ("DHSS") responded to these criticisms by commissioning two independent research programs conducted by Professor Kathleen Bell.[46] Bell concluded that while National Insurance Local Tribunals, which were chaired by part-time lawyers, were functioning more or less satisfactorily, Supplementary Benefits Appeal Tribunals chaired by lay people, were not.[47]

These criticisms led the DHSS to take the following steps:

- First, it funded a basic training program in 1977 and 1978 (organized by Professor A. W. Bradley, then of the University of Edinburgh) targeted at lay people (for example, not legally trained) who were then chairs of the Supplementary Benefits Appeal Tribunal.[48] Thus, from an early stage, training was seen as a key aspect in the enhancement of quality;

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43. *Id.*

44. *See generally* MELVIN HERMAN, ADMINISTRATIVE JUSTICE AND SUPPLEMENTARY BENEFITS, OCCASIONAL PAPERS ON SOCIAL ADMINISTRATION NO. 47 (London 1972) (on file with author); *see also* RUTH LISTER, JUSTICE FOR THE CLAIMANT: A STUDY OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNALS 1 (Child Poverty Action Group 1974). This movement was inspired by developments in the United States.

45. 1999-2000 COUNCIL ON TRIBUNALS ANN. REP. 1, *available at* http://www.council-on-tribunals.gov.uk/annualreports/00/00index.htm (last modified June 8, 2001).

46. Kathleen Bell et al., *National Insurance Local Tribunals*, 3 J. SOC. POL'Y 292 (1974) (on file with author); *see also* Kathleen Bell, *Research Study on Supplementary Benefit Appeal Tribunals*, 4 J. SOC. POL'Y 1 (1975).

47. *See generally* MARTIN PARTINGTON AND MONICA FLETCHER, UNITED KINGDOM, INTERNATIONAL ENCYCLOPEDIA OF LAWS: SOCIAL SECURITY (2d. 2000) (on file with author). The distinction between National Insurance Benefits and Supplementary Benefits is not an easy one to explain. Broadly, National Insurance Benefits derive from a National Insurance Fund into which people make (compulsory) payments. Supplementary Benefits are funded from General Taxation and are designed to provide a minimum level of welfare benefit below which people should not be allowed to fall. Entitlement to benefits, such as sickness benefits, in the former scheme were much more closely defined in legal rules than the much more discretionary Supplementary Benefit scheme. The detailed nomenclature has now changed greatly.

48. Martin Partington, *The Restructuring of Social Security Appeal Tribunals: A Personal View*, *in* PUBLIC LAW AND POLITICS 169 (Carol Harlow ed., Sweet & Maxwell 1986) (providing additional comments on these developments).

- Second, in 1980, the first step towards a more professional judicial management structure occurred with the appointment of four full-time "Senior Chairmen" who began to work together to devise ways of improving the role of the social security tribunals.[49] Most importantly for the purpose of this paper, the Senior Chairmen began to take active steps to attract new candidates for appointment to the tribunal systems.[50] Though they did not at that stage invite candidates to become chairmen and members by public advertisement, they did go out of their way to bring in persons who, under the former practices adopted for recruitment by the DHSS, would not have been appointed to the tribunal.[51]

These developments were taken significantly further in 1983, when the Health and Social Services and Social Security Adjudication Act (HASSASSA) passed.[52] This act accomplished three things. First, it merged the two separate tribunal systems into a single system.[53] Second, it created a new full-time post of President to lead the tribunal system.[54] Third, it placed on the President a statutory obligation to provide training for both chairs and members.[55]

The President developed a regional structure, with each region headed by a Regional Chairman.[56] One of the most important tasks for the Regional Chairman was to further develop their procedures for identifying suitable candidates for chairman and membership appointment.[57] From the outset, they became increasingly willing to appoint independent-minded people, many of whom had experience in assisting claimants, or who, like myself, had an academic interest in the subject.[58] Thus, they

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 170.
53. *Id.*
54. *Id.* at 171.
55. *Id.* at 176.
56. Julian Fulbrook, *HASSASSA and Judge Byrt – 5 Years On*, 18 INDUS. L. J. 177 (1989) (providing a note of appreciation) (on file with author). The first president was HH Judge John Byrt QC – a quite remarkable man of vision for this key appointment in the tribunal system.
57. Partington, *supra* note 48, at 177.
58. One of the interesting side issues that this raises is that, although academic achievement and distinction is not, on its own, currently seen as a proper basis for appointment to the judicial bench – unlike the situation in many other countries, there is a considerable number of law professors and other legal academics who sit in tribunals – not just social security, but more broadly.

understood the law, but were also committed to the even-handed application of the law.

Training was a key responsibility for the President.[59] He delegated this to one of his Regional Chairmen who was further assisted by a training advisory group.[60] From an early stage, they sought to move away from a simple diet of lectures, the preferred format, towards the more effective though expensive use of small group work.[61] For example, they used video films, though they were not always successful.[62] Most importantly, they pioneered attempts to introduce training in the interpersonal skills needed by chairpersons to run their tribunals successfully.[63]

There have been further significant changes since then. One change, which has occurred in a number of tribunal systems,[64] has been the marked shift from an almost total reliance on part-time chairpersons to the establishment of a substantial cadre of full-timers.[65] They have been justified both in terms of their enhanced judicial efficiency, as well as their role in the training and appraisal of part-time adjudicators.[66]

In addition, there has been a further restructuring of the whole social security appeals service, designed to improve efficiency in service delivery.[67] These developments include the following: training in the law and in interpersonal skills to improve judicial performance; the appraisal of that performance; systems mergers to enhance efficiency; the appointment of the President to provide judicial leadership; and the role of Regional Chairs and other full-time chairs to support these initiatives. These developments can all be seen as a process of professionalization of the social security tribunal system that has occurred over the last fifteen years.[68]

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59. Partington, *supra* note 48, at 176-77.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Notably Employment Tribunals, and Immigration Adjudication.

65. Partington, *supra* note 48, at 177.

66. *Id.* at 176-77

67. Social Security Act, 1998, Eliz., c.14 (Eng.); *see also* Nick Wikeley, *Burying Bell: Managing the Judicialisation of Social Security Tribunals,* 63 MOD. L. REV. 475 (2000) (reviewing these developments) (on file with author).

68. Another development, not mentioned here, is the development of Users Groups to improve communication with client groups and the accountability of the tribunal system to users.

A similar story of professionalization not developed here can also be told in relation to the Employment Tribunal System, the other major player in the tribunal world.[69] One may also tell an equally impressive story relating to the development of the Planning Inspectorate who, though they hold inquiries, are effectively tribunals in all but name.[70] Other tribunal systems began to follow suit, some more reluctantly than others. Particular examples include the Mental Health Review Tribunal, where a number of chairs and members took matters into their own hands and began to organize induction training, and Immigration Adjudicators, who moved into this area at the insistence of one or two individuals in the early days, even in the face of opposition from the Chief Adjudicator at the time.

During this period, the Council expressed concerns about standards, particularly those related to training, that became increasingly heard.[71] Many of these were discussed in the Council's special report regarding the independence of tribunals which was published in 1997.[72]

At this time, there were three other major institutional developments that must be mentioned. One of these developments was the reformation and expansion of the roles of the Judicial Studies Board ("JSB").[73] The JSB first established its Tribunals Committee in 1988 and gradually thereafter began to include training for tribunals within the scope of its activities. The JSB also began to publish a journal entitled "Tribunals" on a bi-annual basis to discuss issues relating to tribunal practices and procedures.[74]

The Tribunals Committee delivered some important achievements in its over ten years of existence. First, it raised awareness regarding the

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69. Arguably the employment tribunal is not a "true" administrative tribunal in that it does not deal with citizen and state issues, but party and party employment disputes. Nevertheless, they do share many of the characteristics of tribunals.

70. *See, e.g.*, Chris Shepley, *Recruitment, Training and the Monitoring of Quality in the Planning Inspectorate, in* ADMINISTRATIVE JUSTICE IN THE 21ST CENTURY 417 (Michael Harris and Martin Partington eds., Hart Publishing 1999).

71. *Tribunals: The Organisation and Independence*, 1997, Cm. 3744, *reprinted in* 1996-1997 COUNCIL ON TRIBUNALS ANN. REP. 1, at Appendix A, *available at* http://www.council-on-tribunals.gov.uk/annualreports/97/appa.htm (last modified June 8, 2001).

72. *Id.*

73. Martin Partington, *Training the Judiciary in England and Wales: The Work of the Judicial Studies Board*, CIVIL JUST. Q. 319-36 (1994) (on file with author); *see also* JUDICIAL STUDIES BOARD, *at* http://www.jsboard.co.uk (last visited Jan. 21, 2002) (providing additional information on the work of the Judicial Studies Board).

74. Partington, *supra* note 73.

importance of training throughout the tribunal community.[75] When it first started its work, many tribunal systems in existence either provided no training whatsoever (and were happy to assert that they it wasn't necessary) or offered only limited training.[76] Today, however, newly appointed chairs and members expect to receive not only initial training, but are given ongoing training as well, due in large part to the influence of the Tribunals Committee.[77]

Second, the Tribunals Committee accepted, not without controversy, the need to provide training in interpersonal and judicial skills as wells as training in the law.[78] Although the JSB decided it had to offer "generic" courses of assistance to all tribunals, it refused to offer courses in specific areas of substantive law, and instead chose to focus on issues that related to the quality of a hearing.[79]

There were, however, limits to the ability of the JSB to provide training for tribunals. For example:

- First, the JSB lacked the cash resources.[80] The primary responsibility of the JSB is to train the judges that sit on the ordinary criminal and civil courts.[81] Therefore, after completing its primary task, there were few resources available for tribunals.[82]
- Second, and a more technically difficulty, is that the JSB is sponsored by the Lord Chancellor's Department ("LCD").[83] The effect is that the JSB only receives direct funding to enable it to deliver courses for tribunal systems that are run by the LCD.[84] Although at the beginning of the Tribunals Committee's work, those sponsored by the LCD were few in number, the amount significantly increased throughout the 1990s.[85] Tribunal chairs sponsored by other depart-

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75. *Id.*

76. *Id.*

77. *Id.* The general change in attitudes towards Continuing Professional Development contributed as well.

78. *Id.*

79. *Id.* This was important, given the fact that legal aid was not on the whole available for legal representation of parties appearing before tribunals. It was important that the tribunal was able to "enable" the un-represented party before it to present his or her case fully and fairly. *But cf.* HAZEL GENN AND YVETTE GENN, THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS (London 1989) (providing criticism of this position) (on file with author).

80. *See generally* Partington, *supra* note 73.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* This was particularly true when responsibility for General Commissioners for

ments therefore had to be funded by those departments; however, the funding was not always forthcoming, as had been hoped.[86]

- Third, even when the resources for training were available, only tribunal chairs were able to attend because the courses were not offered to other tribunal members.[87]

The second institutional change of great importance occurred after years of neglect and indifference, when the LCD began to take over administration of some important tribunal systems.[88] In addition, it slowly began developing policy in relation to tribunals.[89] The high point of this new attitude was the establishment of the Leggatt Review,[90] noted above and discussed below.

The Lord Chancellor's Department also began to adopt different approaches to recruitment in particular with regard to the appointment of chairs of tribunals.[91] Recruitment is now performed through public advertisement rather than the use of informal procedures undertaken "behind the scenes."[92]

Third, the enactment of the Human Rights Act of 1998 drew new attention to the importance of ensuring that the resolution of civil disputes conformed to Article 6 of the European Convention on Human Rights. Article 6 provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[93] This provision had an immediate impact on a decision of the Scottish Court of Session, which raised questions about the impartiality of part-time judges where confirmation of appointment was dependent on a particular Minister's approval.[94] A new set of rules was

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Income Tax was transferred to the LCD.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See generally* Michael Harris and Martin Partington, ADMINISTRATIVE JUSTICE IN THE 21ST CENTURY (Michael Harris and Martin Partington eds., Hart Publishing 1999). It was the LCD that invested in the International Conference on Administrative Justice held in Bristol, England, in November 1997.

90. Leggatt, *supra* note 2.

91. *See generally* SIR LEONARD PEACH, INDEPENDENT SCRUTINY OF THE APPOINTMENT PROCESSES OF JUDGES AND QUEEN'S COUNSEL (Dec. 1999) (reporting on and giving recommendations for the judicial appointments system), *available at* http://www.lcd.gov.uk/judicial/peach/indexfr.htm (last visited Jan. 28, 2002).

92. *Id.*

93. Human Rights Act, 1998, Eliz., c. 42, art. 6, sched. 1 (Eng.).

94. *Starrs and Chalmers v Procurator Fiscal* [2000] SCOTS LAW TIMES 42 (on file with author).

introduced to ensure that part-time judges are only removed for misbehavior or failure to observe the standards expected of the office.[95]

SECTION 2: THE LEGGATT REVIEW OF TRIBUNALS

Notwithstanding all these developments, and an increasing recognition that tribunals are far more likely than the ordinary courts to be the body which determines legal cases affecting the individual, tribunals are still frequently perceived as "second class courts," or bodies in some sense inferior to the courts, rather than first class tribunals which have an important and distinct role to play in the English legal system.[96] A prime objective of Sir Andrew Leggatt in his *Review of Tribunals* was to change this perception, particularly among lawyers who have little or no experience in tribunals, since there is no funding to encourage them to take these cases to tribunals. His aim was to produce recommendations for a new Tribunals System of which all those who worked in it could be proud.[97]

The Leggatt Review has made a substantial number of detailed recommendations about how the tribunal world should develop. At the heart of his proposals, however, are some key issues about the shape and structure of administrative justice in England and Wales. If adopted, Leggatt's proposals will affect major changes to the status of administrative judges in the U.K.

Leggatt began by recounting that, in the forty-four years since tribunals were last reviewed, their numbers had increased considerably and their work had become much more complex.[98] Together they constitute a substantial part of the system of justice in England and Wales. Nevertheless, Leggatt argued that too often their methods are old-fashioned and daunting to users. In addition, their training and information technology are under-resourced.[99] Because there are many and disparate tribunals, there is a considerable waste of resources in managing them, and

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95. 1999-2000 JUD. APPOINTMENTS ANN. REP. §§ 2.14-.18 (2000), *available at* http://www.lcd.gov.uk/judicial/ja_arep2000/judapp.pdf (last modified Oct. 2000); *see also* Carol Harlow, *The ECHR and Administrative Justice*, *in* THE LEGGATT REVIEW OF TRIBUNALS: ACADEMIC SEMINAR PAPERS (Martin Partington ed., 2001) (on file with author).

96. Martin Partington, *Lessons from Tribunals*, *in* SHAPING THE FUTURE: NEW DIRECTIONS IN LEGAL SERVICES 246-56 (Roger Smith ed., Legal Action Group 1995) (on file with author).

97. Leggatt, *supra* note 2.

98. *Id.*

99. *Id.*

they achieve no economies of scale.[100] Most importantly, they are not independent of the departments that sponsor them.[101]

The Franks Committee argued that tribunals should be independent, accessible, prompt, expert, informal, and cheap.[102] The most important of these qualities is independence. Today, the only evidence of independence lay in the LCD's administration of twelve of the more important tribunals.[103] Otherwise, a department of State may provide the administrative support for a tribunal, promote the legislation prescribing the procedures which it is to follow, and pay the fees and expenses of panel members. The tribunal was independent in neither appearance nor fact in these circumstances.[104] Such a relationship may have become vulnerable to challenge under the Human Rights legislation.[105] In any event, the fact that tribunals appeared to be subject to their sponsoring departments did not aid the administration of justice. For users, "every appeal is an away game."[106]

Leggatt argued that the only way to achieve independence and coherence is to have all the tribunals supported by a single Tribunals Service.[107] For example, Leggatt suggested the creation of a common administrative service answerable to the Lord Chancellor, analogous with but separate from the Courts Service.[108] To do this would raise their status, while preserving their distinctness from the courts.[109]

Of course, Leggatt was not concerned exclusively, or even primarily, with the question of status. He was focused more on the efficiency of a system of justice that affects so many individual citizens. In the medium term, Leggatt suggested the reforms would :

> yield considerable economies of scale, particularly in relation to the provision of premises for all tribunals, common basic training, and the use of [information

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100. *Id.*

101. *Id.*

102. FRANKS COMMITTEE REPORT, *supra* note 15.

103. Most of which had only recently been taken over by the LCD. *See supra* notes 86-95.

104. Leggatt, *supra* note 2.

105. Human Rights Act, 1998, Eliz., c. 42, art. 6, sched. 1 (Eng.)

106. Leggatt, *supra* note 2.

107. *Id.*

108. *Id.* The Courts Service is the Agency responsible for the administration of the civil courts and the principal criminal courts in England and Wales. There are separate courts systems in Scotland and Northern Ireland.

109. *Id.*

> technology]. It would also bring greater administrative efficiency, a single point of contact for users;. . . a better relationship between members and administrative staff, improved career patterns for both, common standards, greater prospects of job satisfaction, an enhanced corporate image, and improved geographical distribution of tribunal centres. It should be committed by [a new Consumers'] Charter to provide a high quality, unified service, to operate independently, to deal openly and honestly with users of tribunals, to seek to maintain public confidence, and to report annually on its performance.[110]

The key aim was to provide a system in which users are able to represent themselves, not one obsessed by throughput targets.[111] Many of the detailed suggestions relate to status issues, which are considered in the next section.

Status

In Leggatt's view, the Tribunals System should be headed by a Senior President, who should be a High Court judge sitting in one of the appellate tribunals.[112] Presidents should also be judges, or at least be of judicial status, though not necessarily all from the Courts Service.[113] Each President would be in charge of one or more divisions.[114] "It should be the task of the Presidents to promote, by leadership and coordination, both consistency of decision-making and uniformity of practice and procedure throughout their respective areas of responsibility."[115] They should also have regular meetings with departments to help them improve their decision-making process.[116] All too often, those who sit in tribunals see themselves, and are regarded by others, as inferior to the courts. To enhance their standing, as well as their self-esteem, Leggatt suggests that full-time chairmen should from time to time be appointed as Division Presidents, and so as circuit judges.[117] In addition, those Division Presidents who have shown themselves worthy of high judicial

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

office should be given consideration for the appointment to the High Court of circuit judges.[118]

Notwithstanding these points, Leggatt was not persuaded by arguments that tribunal chairs should henceforth be titled "judges" as some had argued. To do this, in Leggatt's view, would send the wrong message – that tribunals needed to be thought of from the perspective of the court system rather than being a distinct service in its own right.[119] In this sense, Leggatt saw the value in developing some notion of a "career progression" for successful tribunal chairs. This could well assist in the recruitment of appropriate people to the administrative justice judiciary.

Training

The prime necessity in Leggatt's view, is "for improved training in the interpersonal skills peculiar to tribunals."[120] This issue was at the heart of the Leggatt vision that tribunals should be a forum where appellants could represent themselves, and where a "user-focus" was paramount. It would be a mistake to suppose that such skills could all be acquired simply by experience. Rather they "should be [acquired] by a competency based approach to the training of chairmen and members."[121] This position is also supported by the JSB. To ensure that standards of the provision are maintained, it is essential to have national training co-ordination, which would be easier to arrange when all groups of tribunals have a president or deputy president.[122] Each should appoint a national training officer, and set a training budget.[123] The skills required for the efficient conduct of a tribunal should be imparted by means of introductory training in core competences, followed by continuation training.[124] Training should also be provided in the additional competences needed by chairmen, especially those needed to help them overcome the communication, language and literacy difficulties experienced by some users.[125] Specialist knowledge required by the members

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118. *Id.*

119. *Id.* Nevertheless, there may need to be more public recognition of the work of those who sit in tribunals than is presently the case. Currently the judiciary receive a number of perks and benefits denied to their tribunal colleagues.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

of some tribunals should be provided in-house.[126]

One of Leggatt's fundamental recommendations is that a serious injection of resources should be provided as soon as possible to the JSB to enable it to begin the expanded program of training seen as the key to the successful development of administrative justice in the U.K.[127]

Appraisal

All chairmen and members should participate in an annual review of their performance while sitting on a tribunal.[128] They "should also have the benefit of a tribunal handbook and training newsletters."[129] The purpose of this was not to challenge the independence of their decision taking. The focus would be on the question of how they ran their tribunals, and whether they were achieving the fundamental objective of appropriate levels of service to the tribunal user.

Recruitment and security

Since appointment systems currently vary, Leggatt argues they are therefore vulnerable to challenge under the Human Rights Act.[130] He suggests that, like part-time judicial appointments, all part-time tribunal appointments should be made by the Lord Chancellor, and "should be for a renewable period of five or seven years. Subject to age, renewal for further such periods would be automatic, unless [defined] grounds for non-renewal" are established.[131] These grounds "would include misbehaviour, incapacity, and failure to comply with sitting and training requirements."[132] The Lord Chancellor would prescribe similar grounds for removal with the concurrence of the Lord Chief Justice. "There should be an upper age limit of [seventy]" because any other limit would "exclude many experts who are less readily available" before they retire.[133] "Members should be assured not of a minimum number of sitting days but of a fair share of the sitting days available to the members of their own tribunal. Those who are qualified to sit as chairmen or as

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

members in one tribunal should be entitled to become qualified to sit . . . in other associated tribunals," thereby improving flexibility in the use of adjudicator power, as well as enable chairmen to be offered new challenges and new contexts within which to work.[134]

Leggatt argues that there is no justification for members, whether expert or lay, to sit on a tribunal unless they had a particular function to fulfill.[135] Thus, the President should have discretion as to whether or not lay members should sit in any particular case or category of cases.[136] By limiting the number of lay members on a tribunal, the President may more providently allocate resources to train those members who remain.[137] Those lay members who remain on the tribunal should be afforded instruction "in the process of finding facts, and in particular in the weighing and evaluation of evidence."[138] Use of expert members would continue much as before.[139]

Tribunals and the Courts

One of the issues underpinning the review of tribunals was the interface between the work of tribunals and the courts. If tribunals were not up to the tasks they were required to perform, or if there were gaps in the structure of tribunals, this could lead to additional work in the courts, particularly judicial review, which was wasteful of resources. One of the key parts of the Tribunal Service that Leggatt proposed, therefore, was a strengthened appellate level which, Leggatt hoped, would remove the need for a large number of judicial review cases to be brought to the Administrative Court.[140] Instead, he wanted to see a more rational structure for appeals made to the courts, usually to the Court of Appeal, where there was a point of law to be resolved.[141]

SECTION 3: FUTURE DEVELOPMENTS

Given the particular moment in history when this paper is being prepared and delivered, it is particularly difficult to anticipate what the final

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

outcome of the process will be.

The re-election of the Labour Government following the June 2001 General Election and the re-appointment of Lord Irvine as Lord Chancellor after he was involved in setting up the Leggatt Review in the first place might lead one to think that Leggatt's proposals will have a fair chance of being brought into effect. However, the change in the machinery of government that will be required will be a substantial one and will need great determination to pursue. Given that reform of administrative justice is not an issue, like education or health, which grabs the media headlines, there will need to be continuing and firm support for the proposals within the Government.

The need for this degree of support is that the implications of the Leggatt Review are quite substantial in terms of institutional change, which many (Civil Service) Heads of Ministries may well try to resist. Of course it can be argued that the harder they resist (on the basis that they should control tribunals whose activities they sponsor) the more they prove the Leggatt argument (that too many tribunals are not sufficiently independent of their sponsoring departments). But this cannot disguise the fact that there will be some pretty bloody "turf wars" to be fought and resolved.[142]

A further difficulty in predicting the final outcome is the simple fact that, even if the Government decides that it should proceed with the program suggested by Leggatt, it will not happen overnight. It will have to be managed incrementally, with full implementation taking a number of years. The nature and detail of any program of change may itself be altered in cases where implementation is so drawn out.

In conclusion, four specific points should be made:

First, Leggatt has proposed that the Council on Tribunals' role should be enhanced. For example, Leggatt's focus on tribunal users suggests that the Council should meet with representatives of user groups to educate itself about how specific parts of the tribunals system are developing.[143] The Council should not only report to the Lord Chancellor, but should also report to a Select Committee of the House of Commons, as does the Parliamentary Ombudsman. Administrative justice is about the quality of decision making in Government. Members of Parliament

142. *Id.* The tone of the Consultation Paper issued by the Government at the time the Review was published seems designed to bring out into the open the tensions within the machinery of government about whether or not the Leggatt agenda should be taken forward.

143. *See id.*

should be encouraged to take a greater interest in the Council's work, thereby enhancing the professionalism of the tribunal service. The Council, particularly under its new Chairman, is anxious to take on these new responsibilities. I predict that whatever happens to the overall scheme, a Council with a bit more "edge" than it had in the past will emerge.

Second, international influences and experience should be considered. The conference at which this paper was originally presented is a clear example of how discussion about administrative justice and the principles on which administrative justice systems should be founded is becoming international. It cannot be said that the present system of tribunals in the U.K. is satisfactory. It needs reform. Examples from overseas will give those who can see the need for such reform further ammunition to use against those who may wish to resist change.

Third, there is a slowly developing U.K. jurisprudence arising from the enactment of the Human Rights Act of 1998. In particular, Article 6 (mentioned above) is likely to have some continuing impact on the development of the administrative justice system in the U.K., even though this may not be as dramatic an impact as some would like.[144] What is essential, in my opinion, is that court rulings do not impose a straitjacket on procedural and institutional innovation in the administrative justice system. The system has evolved over the last century; there is no reason to think it has reached some ideal state. There must be room for continued development and experimentation. (The potential impact of information technology on the hearing process is just one obvious issue that will come increasingly to the fore in the years ahead; these will be thwarted by rulings that "hearings" can only take place with all the parties physically present before an administrative judge.)

Finally, I would like to think that there are lessons for the Courts Service[145] and the way the Courts operate which might arise from reform of the operation of tribunals, were the Leggatt proposals to be adopted.

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144. A dramatic challenge to the legality of the British Planning Inquiry System, based on the provisions of the Human Rights Act, has been resolved by the House of Lords in *R v Secretary of State for the Environment, Transport and the Regions Ex p Holding and Barnes Plc; R v Secretary of State for the Environment, Transport and the Regions Ex p Alconbury Developments Limited; R v Secretary of State for the Environment, Transport and the Regions Ex p Legal & General Assurance Society Limited* on 9 May 2001 [2001] U.K.HL 23 (on file with author).

145. Much of the philosophy underlying the Consultation Paper *Modernising the Civil Courts* published by the LCD in January 2001 is very similar to that of Leggatt, though there is no mention of the latter in the former.

While the distinction between courts and tribunals has in the past been very marked, there are changes of culture occurring in the courts as well. Greater understanding of the work that is undertaken by the administrative judiciary in tribunals will, in my view, add to discussion about the way in which the courts – particularly civil courts – should be developing.