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Chantal Stebbings
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CHALLENGES TO THE LEGAL PROCESS

Statutory tribunals today surpass the courts of law in terms of numbers of disputes heard and resolved. They are recognised as adjudicative bodies of central importance to the efficient operation of the regular courts themselves and the administration of justice in general. It has been shown that an individual citizen's personal contact with a formal adjudication process is far more likely to be in the context of an administrative tribunal than of a court of law. Tribunals operate in a wide range of aspects of everyday life,[1] hearing and determining appeals by individuals aggrieved by an administrative decision taken by an organ of the state. Their principal feature is that they do so in an effective, accessible, expeditious and inexpensive way.[2] They are today of a known constitution, applying clear rules to the dispute before them and arriving at a determination. Within this broad characterisation, however, there exist a very large number of tribunals,[3] varying considerably in their functions, jurisdictions, procedures and personnel. A tribunal's objective might be to adjudicate, investigate, regulate, advise or award, or perform a combination of two or more of these functions.[4]

[1] Modern tribunals deal with 'the whole range of political and social life, including social security benefits, health, education, tax, agriculture, criminal injuries compensation, immigration and asylum, rents, and parking': Sir Andrew Leggatt, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals* (London: HMSO, 2001), para. 1.16.

[2] These were described by the permanent secretary to the Lord Chancellor as 'the outstanding attributes of the administrative tribunal' in 'Minutes of Evidence before the Committee on Administrative Tribunals and Enquiries' (London: HMSO, 1956), Cmnd 218, p. 190, para. 4.

[3] The diversity and lack of coherence render even the enumeration of tribunals difficult. Depending on the definition adopted, numbers today range from 200 to the 70 considered by the Leggatt Review.

[4] H. W. Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1 at 38.

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Though modern tribunals retain some degree of executive provenance, they are often almost entirely adjudicatory in function. They establish facts and apply legal rules, albeit within a very specific jurisdiction, but are bodies existing outside the formal structures of the courts of law. Their place is, accordingly, ambiguous. Furthermore, while many individual tribunals are working well enough in practice,[5] as standards of administrative justice have risen a close scrutiny of individual tribunals' structures, jurisdiction and procedures has revealed weaknesses and anachronisms, which undermine their effectiveness as dispute-resolution organs.[6] This diversity and uncertainty of place renders any concept of a system of tribunals fallacious, makes definition or classification impossible[7] and principle unreachable. Though the situation has been improved immensely by the parameters necessarily drawn by the Council on Tribunals for its supervisory purposes, modern tribunals as an institution lack any unifying underlying principles other than of the most general kind. The work of the council, indeed the need for its creation in 1958,[8] reflects the lack of uniformity and consistency in constitution, process and personnel across the range of past and present tribunals. The diversity of form and process among modern tribunals undermines modern government's aim to arrive at a coherent structure for the delivery of administrative justice. The enduring concern and difficulty with the theoretical place of tribunals and with the practical work of reforming them to achieve some consistency in their nature and operation is reflected in the number of governmental reviews and inquiries into tribunals from the late 1990s.[9]

[5] Even the oldest extant tribunal, the General Commissioners of Income Tax, created by William Pitt in 1799 when he first introduced the income tax.

[6] See C. Stebbings, 'Historical Factors in Contemporary Tribunal Structure, Process and Reform', in Martin Partington (ed.), *The Leggatt Review of Tribunals: Academic Seminar Papers*, Bristol Centre for the Study of Administrative Justice Working Papers Series 3 (Bristol: University of Bristol, 2001), Chapter 8.

[7] See J. A. Farmer, *Tribunals and Government* (London: Weidenfeld & Nicolson, 1974), pp. 184–5; Arthurs, 'Rethinking Administrative Law', 3; R. E. Wraith and P. G. Hutchesson, *Administrative Tribunals* (London: George Allen and Unwin, 1973), pp. 14–15, 43–4.

[8] Tribunals and Inquiries Act 1958, 6 & 7 Eliz. II c. 66.

[9] JUSTICE, *Review of Administrative Law in the United Kingdom* (London: JUSTICE–All Souls Review, 1981); Lord Woolf, *Access to Justice: Final Report on the Civil Justice System in England and Wales* (London: HMSO, 1996); Tax

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The reasons for the diversity, lack of coherence, uncertainty of status and inherent individual weaknesses which have rendered both theoretical analysis and practical reform so problematic lie to a considerable extent in the historico-legal context of the statutory administrative tribunal as an institution in the nineteenth century. Its formative period began in broad terms at the height of the industrial revolution in the 1830s. The novelty of the social and economic demands they were created to meet, the complexity and diversity of governmental patterns and administrative practices and the legal context of the response rendered the classification of the new statutory tribunals difficult and ultimately unsatisfactory. The diversity of tribunals was as much a feature of the nineteenth century as of the present day, and the problems of definition existed then as now. The term 'tribunal', not being a term of art, referred to any dispute-resolution body or process, from the regular courts of law, through domestic bodies regulating clubs, societies and professions, to ministers making decisions in the course of their administrative duties. The nature of dispute-resolution powers, their prominence in the work of the body in question, the extent to which they were appellate or first-instance powers and to which they were discrete adjudicatory powers both in practice and in the intention of the legislature, all varied according to the tribunal. Furthermore the structure, powers and the guiding procedural principles of all tribunals were settled when the tribunals were first created. And yet within a period of fifty years political, social and legal demands had combined to construct the legal foundations of a new institution, albeit one broadly conceived: the statutory administrative tribunal, composed of predominantly lay adjudicators, hearing and determining appeals arising from administrative action in specialised fields of human activity. The formative period of statutory tribunals can be regarded as culminating with the creation of the Railway Commission of the 1870s, arguably the prototype of the modern tribunal.[10]

The aim of this study is to elucidate the legal foundations of modern statutory tribunals which perform an extra-judicial

Law Review Committee, *Interim Report on the Tax Appeals System* (London: Institute for Fiscal Studies, 1996); Leggatt, *Tribunals for Users*.

[10] Wraith and Hutchesson, *Administrative Tribunals*, p. 27.

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adjudicatory function and have become, in effect, a first tier of civil dispute-resolution and an independent replacement for the regular courts.[11] The study examines the evolution of the modern concept of the tribunal and the legal rules and doctrines which developed to sustain it within the context of the legal system itself and of legal theory. It explores the reasons for its emergence, the legal foundations of its constitution, processes and jurisdiction, and how it attained its place in the modern legal system. It is concerned with the coherence of the legal doctrines and their legal effect, explaining how the concept of the modern statutory tribunal and its procedures developed and how they were created by certain legal values and ideas.

The reason for undertaking a doctrinal legal study of this nature is to promote a more profound understanding of the tribunal as a legal institution, both for its own sake, and to permit the effective reform and adaptation of the law and the institution to modern conditions and changing values. In providing an analysis of legal evidence it also provides a resource for scholars in other disciplines pursuing alternative discourses, since any student of the nineteenth century, whatever his perspective, requires technical rigour and a degree of accessible legal contextualisation, and it thereby aims to illuminate the familiar history of government growth in the nineteenth century. The doctrinal approach is a traditional one, and one of the assumptions on which it is based is the orthodox view that law is formal and impartial with a discrete existence and a purpose and momentum of its own.[12] The doctrinal approach values the legalistic discourse as providing a disciplined legal analysis of a branch of modern law of considerable contemporary importance that has hitherto been somewhat neglected, partly because of its inherent intractability and partly because of the dominance of other perspectives. Indeed, the role of legal doctrine in the machinery of central government intervention has been largely untouched. Its study reflects the essential importance of the law in the historical continuum and ensures that legal issues are addressed as issues of importance and that they do

[11] Arthurs, 'Rethinking Administrative Law', 38.
[12] This centralist perspective of law has been challenged, notably by Professor Arthurs: H. W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto and Buffalo: University of Toronto Press, 1985), pp. 2–4.

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not become too diffuse. It asserts that the law was not purely reactive, but that it was influential in its own right. Furthermore, as one of the three traditional professions, and with a training even wider than its practice, the values, processes and perspectives of the law formed the intellect and values of many of the leading protagonists in the evolution of the statutory tribunals – ministers, politicians, the leaders in trade and industry, and intellectuals.

The doctrinal approach can be viewed as somewhat exclusive, self-referential and technically legalistic, and as such of value to and accessible only to lawyers. Though it makes the law itself the focus of study, it does not argue that law is necessarily the principal factor, or even of equal weight, in determining an historical trajectory, and so does not deny or diminish the further dimensions that exist alongside the purely legal one. It acknowledges and values the political, social and ideological influences that affected the choice and nature of the statutory tribunals' legal foundations, and as such is based on a broader intellectual infrastructure and seeks to sustain the permeability of intellectual boundaries. It will be seen that the genesis of the modern statutory tribunal as a genre was as political as it was legal in that it was rooted in the development of an increasingly centralised, interventionist and regulatory state, and that accordingly the political dimension to the law, and its interaction and interrelation with the legal dimension, is of undoubted importance in the formation of the law itself. The legal and political discourses are closely linked, with a strong relationship both historical and intellectual.[13] Since both entail the study of the same institutions and relationships on the basis of much common source material, to adopt a doctrinal study of the law of such institutions and relationships is essentially a difference in emphasis. In the case of the tribunal as a legal institution, social conditions made regulation imperative, political ideology dominated the highly controversial issue of the desirable degree of state intervention, while political policy initiated the legislation and dictated the subsequent pattern of law-making. The conception of law as the product of the political process is therefore particularly apposite in the context of the statutory tribunal. Within the political process, however, the values, traditions,

[13] See generally Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart Publishing, 2000).

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practices and existing institutions of the law were potent forces that contributed to the creation of the statutory tribunal as a new concept and the determination of its nature, structure and processes. In enacting the new regulatory legislation the state had clear political objectives, objectives that could not be fulfilled in practice through the traditional system of legal institutions, and were ultimately resolved by the development of new ones, the statutory tribunals, which form the subject of this study.

The tribunal that today constitutes such an important part of the civil justice system is the appellate tribunal, hearing and determining appeals against decisions made by a public authority. It is the elucidation of the legal foundations of this type of tribunal that forms the subject of this study. In theory each new tribunal, being created for a highly specific and self-contained purpose, is a new creation standing isolated from its contemporary and historical context and looking no further than its own parent Act. However, in terms of its essential nature and characteristics it belongs to a genre, and it is the legal foundations of that genre which can directly be traced to a relatively small group of implementing bodies created in the nineteenth century, and indeed to general legal values and traditions before then. The nineteenth century had relatively few tribunals in the sense of recognisable adjudicatory bodies in the public sphere, and yet it is those tribunals that form the lineal ancestors of the tribunals of today, despite a wide diversity of subject-matter, in the sense that it is through the former that the salient characteristics of the latter were formed and refined. The legal foundations of the modern statutory tribunal can therefore be discerned most clearly through the features and practices of those organs of the nineteenth century which enjoyed discrete, express and unambiguous dispute-resolution powers, the extremes of the judicial function allowing for clearer study. Those bodies determined appeals by individuals against administrative decisions, albeit with significant or even dominant administrative purposes, with oral hearings, proceeding according to some rules of guidance or process that were available to the public, following quasi-judicial processes and possessing a measure of independence from the executive. Even within this paradigm there was variation, notably in the balance of administrative and judicial functions, the nature of the powers as inquisitorial or adversarial and the character of the process. Some, for example,

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were inquisitorial bodies with a subsidiary though important dispute-resolution function.[14] Some bodies held hearings in private and some in public, some published their decisions and some did not, some members were paid and some were not, some decisions could be appealed against to the regular courts and some not. While these diverse emphases undoubtedly reinforced the unique nature of each tribunal, they did not entirely obscure the fundamental underlying principle of their creation. Four groups have been identified through which the study will be conducted, each possessing prominent and formal adjudicatory functions though exhibiting a different emphasis: the fiscal tribunals are selected as the oldest; the tithe, copyhold and inclosure tribunals as the most inquisitorial; the Assessment Committees as the most administrative; and the Railway Commissioners as ultimately the most judicial.[15]

In order initially to discern those nineteenth-century tribunals with clear dispute-resolution functions, and subsequently to explain a major factor in the evolution of the statutory tribunal from governmental body to legal institution, a distinction has been drawn between judicial and administrative functions. That such a distinction can be drawn at all is a controversial assumption that has been the subject of considerable scholarly debate.[16] The distinction is problematic since it has inherent theoretical weaknesses on close analysis. Yet addressing as it does one aspect of the boundary between the judicial and the executive, it is central to the development of the legal foundations of the modern statutory tribunal. However, for the purposes of such a study, and in that context, the distinction need be made only in the broadest and most practical terms. Only for specific purposes such as the application of judicial review and the claiming of privileges enjoyed by the regular courts did the distinction have to be drawn with any degree of real precision, and the problems in so doing

[14] These, notably the land rights tribunals, would now be perceived as statutory inquiries.
[15] Other tribunals perform a wide variety of non-adjudicative and essentially administrative functions. The study excludes public officials deciding questions according to internal rules.
[16] See H. W. R. Wade, ' ''Quasi-Judicial'' and its Background' (1949) 10 *Cambridge Law Journal* 216–40 and the authorities there cited; Carol Harlow and Richard Rawlings, *Law and Administration*, 2nd edition (London: Butterworths, 1997), pp. 31–3.

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were considerable.[17] The point of importance in tracing the legal evolution of the modern predominantly adjudicatory tribunal is to be able to identify the dispute-resolution or 'judicial' function of each tribunal within its overall duties. A tribunal's purpose was to implement, as an organ of the executive, the statutory regime consigned to it, work which in the nineteenth century comprised an admixture of legislative, administrative, ministerial and judicial functions.[18] The definition adopted for the purpose of this study is that the tribunals were exercising their judicial functions where they were resolving disputes arising from their implementation of the legislation, on their merits and objectively by the establishment of facts and the application to those facts of legal rules. In practice when the tribunals exercised their statutory powers to 'hear and determine' disputes, they did so in a manner discrete from the overall administrative process. When they met to hear appeals and objections, they did so on the basis of a specific statutory provision to that effect, and with sufficient formality of procedure, to indicate to the adjudicators themselves and the parties appearing before them that they were engaged in an activity of a character distinct from the general administrative and ministerial process, though within the context of that process. Procedural distinctiveness accordingly compensated to some extent for theoretical obscurity.

The necessary focus on the adjudicatory tribunals also inevitably relegates to the background those tribunals that were predominantly regulatory and administrative, notably the implementing organs relating to the poor law and the legislation for factories, public health, prisons and education. Political and social studies of the nineteenth century often concentrate on such bodies, because in social and political terms that legislation constituted the most important of the nineteenth century. First, it was principally through them that the social evils of the nineteenth century were relentlessly exposed and pressure for their amelioration sustained. Secondly, they epitomised the nature of the growth of the administrative state. In this respect the focus on adjudicatory tribunals has the effect of masking two important features of the period. It does

[17] See below, pp. 297–309.

[18] For an analysis of the terminology see S. de Smith, *Judicial Review of Administrative Action*, 4th edition (London: Stevens & Sons, 1980), pp. 68–89.

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not fully reveal the scope and degree of central government activity in English life in the nineteenth century, particularly in the field of social welfare. It also obscures the full extent of the tensions between centralism and localism that permeated this political revolution and suggests that central control of local administration was less than it actually was. When hearing and determining disputes in the course of fulfilling their overall regulatory functions, the adjudicatory tribunals were acting judicially and independently in the sense that they were administering their own particular statutory regime of law, with further recourse, if any, to the regular courts of law and not to any higher executive body. Those bodies engaged principally in regulation and inspection, however, did so through local authorities under the control of central government in Whitehall. This shift in administrative power was the real political revolution inherent in the early growth of the administrative state, and one that is most clearly seen in the regulatory tribunals rather than the adjudicatory tribunals. The independence of action of tribunals exercising their judicial functions can, therefore, be misleading in that it undermines the reality of the relationship between the tribunals and the central government, a reality that is revealed by political scholarship. It must be remembered, however, that it is a question of degree, and that nearly all tribunals possessed both administrative and judicial powers.

While the regulatory bodies are important as the prime examples of the efforts of Victorian governments to address major social and economic problems created by the industrialisation of Britain, their formal dispute-resolution function was relatively minor and they contributed little to the modern conception of an extra-judicial dispute-resolution legal institution. When the era of the modern tribunal began with the passing of the Liberal social welfare legislation in the early twentieth century, notably the National Insurance Act 1911, legislators looked to the adjudicatory tribunals of the nineteenth for the essential features and processes of their new implementing bodies. Paradoxically, therefore, while today the social welfare tribunals are particularly prominent in extra-judicial dispute-resolution, they owe their nature, structures and procedures more to the adjudicatory tribunals of the nineteenth century, notably those concerned with taxes, railways and land rights, than to their predecessors in the social welfare field. The conclusions drawn from this study will

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therefore necessarily be based on an examination of those tribunals that were predominantly adjudicatory in the sense that their judicial functions were clearer and more distinct than in the other early tribunals. The conclusions, however, relate to the function rather than the individual tribunal, to the presence of a judicial function within an administrative context, and so are valid for all statutory tribunals whatever the balance of administrative and judicial functions within the particular work of each and whatever the subject-matter.

Victoria's reign opened in 1837 at the height of a new challenge to the existing legal process to meet the demands of a new and dynamic industrial economy that was transforming the country. The immense expansion in commerce and industry which had gathered pace throughout the eighteenth century was, by the beginning of the nineteenth century, not only gaining momentum itself, but was also bringing other phenomena in its wake. The trebling of the population in less than a century, the migration from the countryside to the towns and changing working practices all engendered directly or indirectly a need for some kind of reforming social provision or regulation in almost every aspect of national life. The breadth of these areas of concern, dictated by prevailing ideologies, was astonishingly wide. Crowded towns, slum dwellings, disease and epidemic, dangerous working conditions in mines and factories, lack of education provision for children and the ever-present and increasing problem of pauperism were all obvious consequences, to varying degrees, of the industrialisation of Britain. Less obvious were deficiencies in the system of land tenure and taxation that rendered the country less able to support its growing population. Then there came issues emerging from advances in technology, such as new forms of transport, new public utilities and new inventions, or from the increased pace of commercial enterprise, such as bankruptcy. And underpinning these were issues of the public revenue, raised for the finance of foreign conflict but levied from the property and profits of the transformed British economy.

Inherent in the industrial revolution was a technological revolution that created one of the earliest and most severe social evils. The new machinery introduced into the textile industry required the construction of factories where the scale of operations was considerably increased from the cottage production of the

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