

THE RISE AND FALL OF ADMINISTRATIVE JUSTICE – A CAUTIONARY TALE

Michael Adler*

This paper comprises a case study of the history of the Administrative Justice and Tribunals Council (AJTC) in the United Kingdom from its establishment in 2007 to its likely demise five years later, in 2012. It outlines a number of competing approaches to administrative justice and identifies some of the key milestones on the road to reforming the ways in which disputes between citizens and the state are handled in the UK. It traces the rise and fall of the AJTC and considers how arguments for the establishment of an ‘oversight body’ that seemed, until recently, to enjoy all-party support could, within a very short time, be insufficient to secure its continued existence. The paper attempts to assess the contribution of the AJTC to the achievement of administrative justice in the UK and considers the implications of its demise for this goal. Along the way, it briefly compares the role of the AJTC on a UK-wide basis with that of its Scottish Committee and assesses the importance of timing and scale in determining their respective futures. After a brief sideways look at administrative justice in India, it concludes by discussing the implications of strong parliamentary sovereignty and weak constitutional protection, which together characterise governance in the United Kingdom, for administrative justice in the United Kingdom.

I. INTRODUCTION.....	29
II. BACKGROUND.....	31
III. THE UK EXPERIENCE – ADMINISTRATIVE JUSTICE EMERGES FROM THE SHADOWS	32

* Emeritus Professor of Socio-Legal Studies, School of Social and Political Science, University of Edinburgh; address: 8 Buccleuch Place, Edinburgh EH8 9LW, Scotland, UK; tel: +44-131-650 3931; e-mail: michael.adler@ed.ac.uk. The author is a Member of the Scottish Committee of the Administrative Justice and Tribunals Council but writes here in a personal capacity. An earlier version of this paper, entitled ‘Parliamentary Sovereignty, Constitutional Protection and the precariousness of Administrative Justice’ was presented to the CRN 10 Panel on Civil Justice and Disputing Behaviour at the Law and Society Association Annual Conference, San Francisco, 2-5 June 2011.

IV. CONTRASTING APPROACHES TO ADMINISTRATIVE JUSTICE.....	34
V. THE SWING OF THE PENDULUM.....	35
VI. KEY MILESTONES ALONG THE ROAD.....	38
1. The Franks Report.....	38
2. The Leggatt Report.....	39
3. The 2004 White Paper and the 2007 Act.....	40
VII. THE RISE AND FALL OF THE TRIBUNALS SERVICE.....	42
VIII. THE RISE AND FALL OF THE ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL.....	46
1. The UK Position.....	46
2. The Position in Scotland.....	49
IX. THE IMPLICATIONS OF DEVELOPMENTS IN THE UK FOR INDIA.....	51
X. CONCLUSIONS.....	54

I. INTRODUCTION

At one level, this article comprises a case study of a unique institution (the Administrative Justice and Tribunals Council) in the United Kingdom (UK) from its the establishment in 2007 to its likely demise five years later, in 2012. But, at a deeper level, it also comprises an analysis of a concept (administrative justice) and the successive emergence of different dominant conceptions of that concept, each of which have had different implications for policy.¹

The case study is not only of interest in its own right but also because it can be used to throw light on theories of legislative change. The United Kingdom does not have a written constitution and there are few limits on what the UK Parliament

1 The coexistence of a single concept with several competing conceptions of it suggests that administrative justice is, like many other important social and political ideals, *essentially contested* (see W.B. Gallie, *Essentially Contested Concepts*, in PHILOSOPHY AND HISTORICAL UNDERSTANDING (1964)). As such, it can be defined in a fairly uncontroversial way (in this case as the principles of justice that apply to administrative procedures) but those principles are the subject of considerable disagreement.

can do. The House of Lords, whose members are appointed for life, can force the House of Commons, whose members are elected periodically, to think again, but in the end, the views of the elected House of Commons will normally prevail. Moreover, although legislation can be challenged by means of judicial review in the courts, they do not have the power to strike down the legislation. Under the Human Rights Act (HRA) 1998, if a court determines that an Act of Parliament is in breach of the European Convention on Human Rights, it can declare the legislation to be incompatible with it. This does not affect the validity of the legislation – the HRA does not undermine parliamentary sovereignty as the UK Parliament is free to decide whether or not to amend the law. This is in marked contrast with the US Bill of Rights or the German Basic Law, which allow the courts to strike down incompatible legislation.

In the UK, a ‘progressive’ government with a majority in the House of Commons can pass ‘progressive’ legislation, but there is nothing to stop a ‘reactionary’ government, as long as it has a majority in the House of Commons, from reversing it. As a result, ‘progressive’ measures, like the legislation that resulted in the establishment of the Administrative Justice and Tribunals Council in 2007 and reflected an integrated conception of administrative justice that combined ‘top-down’ and ‘bottom-up’ conceptions, can be very transient. This is much less likely in countries which have a written constitution, where the legislation in question is safeguarded by the constitution. Of course, the existence of a written constitution is not in itself a sufficient guarantee. India has a written constitution that empowers the Indian Parliament to create tribunals to deal with administrative disputes – although not to establish ombudsmen to investigate administrative grievances² – but this power is an enabling one rather than one that imposes duties on the Government or creates rights for the citizen. Thus there is nothing in the Constitution to stop a future Indian Parliament from abolishing the tribunals or the ombudsmen that have been set up in India or requiring the Indian Government to promote administrative justice.³

2 An amendment to the Indian Constitution that would allow for the establishment of a central *Lokpal* (Parliamentary Commissioner) and compelled states to establish their own *Lokayukta* (ombudsman) institutions has been introduced into the Indian Parliament eight times since 1968 but has not yet been enacted.

3 For an excellent comparative discussion of the role of constitutions, constitutional

In attempting to throw light on the rise and probable fall of the Administrative Justice and Tribunals Council and to account for the progression of competing conceptions of administrative justice, the article adopts a ‘law in context’ approach and uses socio-legal research methods rather than the well-honed techniques of the ‘black letter’ or doctrinal lawyer. Socio-legal approaches adopt an *external perspective* to the law in contrast to the *internal perspective* favoured by ‘black letter’ or doctrinal scholars. In addition, they usually adopt a ‘bottom-up’ approach that focuses on the everyday experiences of members of the public rather than a ‘top-down’ approach that focuses on the leading cases that are decided in the superior courts, which is associated with ‘black letter’ or doctrinal scholarship. The article is also socio-legal in the sense that it describes the emergence of conceptions of administrative justice that are grounded in the myriad of first instance decisions, the ways in which they are experienced and the problems that they can give rise to. This particular conception of administrative justice has all the hallmarks of a socio-legal approach.

II. BACKGROUND

The Administrative Justice and Tribunals Council (AJTC) was set up by statute in 2007, with a wider and more ambitious remit than its predecessor, the Council on Tribunals (COT), to keep the administrative justice system of the United Kingdom under review and to ensure that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution mechanisms promote justice and reflect the needs of citizens.

Very soon after coming into office in May 2010, and as part of its overall Spending Review, the new (Conservative-Liberal Democrat) Coalition Government carried out a review of so-called ‘arms-length bodies’, i.e. non-departmental public bodies (NDPBs). As a result of this review, the government proposed that 192 of these bodies should cease to be public bodies with their functions either being

bills of rights, constitutional courts and judicial review and their impact on legislation, see VICKI C. JACKSON AND MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2006), especially chapters 2-8 and 13. For a very helpful discussion from a UK perspective, see Chapter 4 of CAROL HARLOW AND RICHARD RAWLINGS, *LAW AND ADMINISTRATION* (3rd ed. 2009).

brought back into central government, devolved to local government, moved out of government or abolished altogether. The AJTC was included among the NDPBs that the government wished to abolish. Although the proposal to abolish the AJTC was rejected when the Public Bodies Bill was introduced in the House of Lords and the majority of those who responded to the Government's consultation on the Bill were in favour of retaining it,⁴ the Government was unmoved, and with the slimmest of majorities, it eventually got its way. The Bill, which was given Royal Assent on 14 December 2011, gives the Secretary of State for Justice the power to abolish the AJTC without introducing legislation to this effect and a draft order to abolish the AJTC is expected to be laid in the spring of 2012. This will have to be approved by both Houses of Parliament before it can come into force but it is almost certain that the Government will get its way.

III. THE UK EXPERIENCE – ADMINISTRATIVE JUSTICE EMERGES FROM THE SHADOWS

The terms 'civil justice' and 'criminal justice' are familiar and reasonably well understood in the United Kingdom. Civil justice refers to the provision by the state for all its citizens of the 'means by which they can secure the just and peaceful settlement of disputes between them as to their respective legal rights⁵ and a remedy if their rights are infringed. Criminal justice refers to the means for 'convicting and punishing the guilty and helping them to stop offending' and for 'protecting the innocent'⁶ but also includes the means for detecting crime and carrying out punishments sanctioned by the courts, such as collecting fines and supervising community and custodial disposals.

By comparison, the term 'administrative justice' has, until quite recently, been shrouded in obscurity and was not a concept with which many people – except,

4 MINISTRY OF JUSTICE, RESPONSE TO CONSULTATION ON REFORMS PROPOSED IN THE PUBLIC BODIES BILL (2011), at paras 10-12.

5 *As cited in* LORD WOOLF, INTERIM REPORT TO THE LORD CHANCELLOR ON ACCESS TO JUSTICE, § 1.2 (1995).

6 *See* HOME OFFICE, A GUIDE TO THE CRIMINAL JUSTICE SYSTEM OF ENGLAND AND WALES § 1.3 (2000).

perhaps, a few academics and researchers – were familiar.⁷ This contrasts with administrative law, the body of law that governs the activities of administrative agencies, which has expanded greatly in recent years and is now a recognised component of English (and Scots) law. It also contrasts with the plethora of administrative tribunals, complaints systems and ombudsmen which very large numbers of people in the United Kingdom have occasion to use.⁸

A few years ago, the profile of administrative justice began to change – the UK Government’s White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, published in July 2004,⁹ devoted a chapter to ‘The Administrative Justice Landscape’ and recommended, *inter alia*, that the Council on Tribunals, which was set up in 1959 to keep administrative (and other) tribunals¹⁰ under review, should be replaced by an Administrative Justice Council, with a wider remit to keep under review the performance of the administrative justice system as a whole, which includes first-instance administrative decision-making, complaints procedures, ombudsmen and alternative forms of dispute resolution such as mediation as well as administrative tribunals and the courts, and to advise the government on changes in legislation, practice and procedure that would improve the ways in which it works. This and other changes proposed in the White Paper were implemented in the Tribunals, Courts and Enforcement Act 2007.¹¹

7 In 1997, a large international conference on administrative justice took place at the University of Bristol. The conference, which was organised by the University’s Centre for the Study of Administrative Justice, led to the establishment of a Steering Group of conference delegates and civil servants should be set up to promote the realisation of administrative justice. See ADMINISTRATIVE JUSTICE IN THE 21ST CENTURY (Martin Partington and Michael Harris eds., 2009: Introduction and Conclusion). However, these early moves to promote administrative justice were not conspicuously successful.

8 According to research undertaken for the National Audit Office, 803,000 cases (most of which were appeals against administrative decisions) were heard by tribunals in 2005, 543,000 complaints were lodged, and 42,000 cases were submitted to ombudsmen and mediators. See PATRICK DUNLEAVY ET AL, CITIZEN REDRESS: WHAT CITIZENS CAN DO IF THINGS GO WRONG IN THE PUBLIC SERVICES Table 20 (2005).

9 SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS, TRANSFORMING PUBLIC SERVICES: COMPLAINTS, REDRESS AND TRIBUNALS (2004).

10 In the UK, most tribunals deal with *citizen vs. state* disputes but some, notably employment tribunals, deal with *party vs. party* disputes.

11 In order to take account of the sensitivities of those associated with *party vs. party* tribunals, especially employment tribunals, the supervisory body established by the 2007 Act was to be known as the Administrative Justice and Tribunals Council.

IV. CONTRASTING APPROACHES TO ADMINISTRATIVE JUSTICE

As noted in a recent paper by the author,¹² a number of contrasting approaches to administrative justice can be identified. On the one hand, there is the approach that sees administrative justice in terms of the principles formulated by the superior courts and, to a lesser extent, by the top tiers of other redress mechanisms that come into play when people who are unhappy with the outcome of an administrative decision, or with the process by which that decision was reached, challenge the decision and seek to achieve a determination in their favour. We can call this approach the traditional *administrative law conception* of administrative justice. Although the decisions of the superior courts are of particular importance for this approach, those of other bodies, such as administrative tribunals (which hear the large majority of appeals against administrative decisions in the UK)¹³ and ombudsmen (which, in the UK, consider complaints about decision-making where it is alleged that maladministration or service failures have given rise to injustice), are also important. Those who adopt the traditional administrative law approach assume that the principles formulated by courts and other redress mechanisms are applied and put into effect by first-instance decision makers and that administrative justice is achieved in this way.

On the other hand, there is the approach that sees administrative justice in terms of the justice inherent in routine administrative decisions. This approach does not accept that the formulation of principles by the courts and other redress mechanisms is sufficient and emphasises the importance of efforts that aim to improve first-instance decision making directly, such as recruitment procedures, training and appraisal, standard setting and quality assurance systems. We can call this approach the *justice in administration conception* of administrative justice. While the administrative law approach focuses on the relatively small number of cases that come before the superior courts and the top tiers of other redress mechanisms and can be characterised as a ‘top-down’ approach, the justice in

12 Michael Adler and Sara Stendahl, *Administrative Law, Agencies and Redress Mechanisms in the United Kingdom and Sweden*, in *COMPARATIVE LAW AND SOCIETY*, (David S. Clark ed., forthcoming 2012).

13 Unlike the USA and many European countries, the UK does not have a separate system of administrative courts.

administration approach focuses on the huge number of first-instance decisions and can be characterised as a ‘bottom-up’ approach.¹⁴

However, the choice is not simply between these two approaches. There is a third approach which sees the merits in both of the above approaches and seeks to combine them.¹⁵ It is thus more wide-ranging than either of the other approaches because, although it recognises the importance of courts, tribunals, ombudsmen and other external redress mechanisms that the administrative law approach of administrative justice is pre-occupied with, it is also concerned with other (internal) means of enhancing the justice of administrative decisions that the justice in administration approach of administrative justice focuses on. It sees administrative justice as something that applies to an end-to-end process that begins with an administrative decision and ends, in a small minority of cases, with the decision of an ombudsman, a tribunal or a court. We can call this approach the *integrated conception* of administrative justice. It places considerable importance on ‘feedback’, i.e. on first-instance decision-makers drawing lessons from judgments made in cases that are subject to challenge.

V. THE SWING OF THE PENDULUM

The importance attached to these contrasting approaches to administrative justice has ebbed and flowed in recent years. Until quite recently, the administrative law conception of administrative justice was dominant in the UK – textbook discussions of administrative justice analysed the principles found in the judgments of the superior courts, particularly in actions of judicial review, and policy makers were relatively inactive. In parallel with this, socio-legal researchers undertook a number of empirical studies of tribunals,¹⁶ although there have been few studies of front-line decision making in recent years.¹⁷ In addition, many government

14 See Paul A. Sabatier, *Top-Down and Bottom-Up Approaches to Implementation Research: a Critical Analysis and Suggested Synthesis*, 6 J. PUB. POL’Y 21-48 (1986).

15 *Ibid.*

16 For a review of research on tribunal users’ experiences, perceptions and expectations, see MICHAEL ADLER AND JACKIE GULLAND, *TRIBUNAL USERS’ EXPERIENCES, PERCEPTIONS AND EXPECTATIONS: A LITERATURE REVIEW* (2003)..

17 One major hurdle to conducting research of this kind is that it requires the approval of the government department or public body concerned, and they are distinctly

departments conduct customer satisfaction surveys.¹⁸ In different ways, empirical studies of tribunals and customer satisfaction surveys embody the justice in administration conception of administrative justice which constituted a challenge to the administrative law approach. However, in the UK, the pendulum swung towards the integrated conception of administrative justice. Thus, the Tribunals, Courts and Enforcement Act 2007 defined the administrative justice system as:

The overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including

(a) the procedures for making such decisions,

(b) the law under which such decisions are made, and

(c) the systems for resolving disputes and airing grievances in relation to such decisions.¹⁹

In this definition, administrative justice embraces the concerns of the administrative law approach with the 'law in the books' and with the determinations of courts, tribunals and ombudsmen that resolve disputes and grievances, as well as the concerns of the justice in administration approach with decision-making procedures.

The White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (referred to above), which preceded the 2007 Act, approached administrative justice from the perspective of the normative expectations held by members of the public. Thus, it made it clear that:

unenthusiastic about this kind of research. A recent example of such a study is Weber's research on the detention of asylum seekers at UK ports of entry. See LEANNE WEBER AND LORRAINE GELSTHORPE, *DECIDING TO DETAIN: HOW DECISIONS TO DETAIN ASYLUM SEEKERS ARE MADE AT PORTS OF ENTRY* (2000) and LEANNE WEBER AND TODD LANDMAN, *DECIDING TO DETAIN: THE ORGANISATIONAL CONTEXT FOR DECISIONS TO DETAIN ASYLUM SEEKERS AT UK PORTS* (2002). The National Audit Office, which audits most public-sector bodies in the UK and produces value for money reports on the implementation of Government policies, has carried out a number of enquiries, which have included appraisals of front-line decision making. See, for example, NATIONAL AUDIT OFFICE, *GETTING IT RIGHT, PUTTING IT RIGHT – IMPROVING DECISION-MAKING AND APPEALS IN SOCIAL SECURITY BENEFITS* (2003).

18 For example, the Department of Work and Pensions (DWP) publishes an annual survey of Jobcentre Plus 'customers'. The most recent report is STEVE JOHNSON AND YVETTE FIDLER, *JOBCENTRE PLUS CUSTOMER SATISFACTION SURVEY 2007*, DWP RESEARCH REPORT No. 480 (2008).

19 Part 2, para. 13(4) of the Tribunals, Courts and Enforcement Act of 2007.

[w]e are all entitled to receive correct decisions on our personal circumstances; where a mistake occurs we are entitled to complain and to have the mistake put right with the minimum of difficulty; where there is uncertainty we are entitled to a quick resolution of the issue; and we are entitled to expect that, where things have gone wrong, the system will learn from the problem and will do better in the future. (Secretary of State for Constitutional Affairs 2004: para 1.5).

The White Paper defined administrative justice in terms of these normative expectations, pointing out that they apply to the huge number of ‘routine’ administrative decisions that officials make every day. However, at the same time, it is largely concerned with reforming the procedures for dealing with disputes and complaints, and with improving the feedback from dispute and complaint-handling procedures to first-instance decision makers, not because it is regarded as the only, or even the most important, means of ensuring that front-line decision makers ‘get it right in the first place’ but because it is assumed that this can contribute towards that end.

According to the White Paper (*ibid.*, Para 1.6), ‘the sphere of administrative justice... embraces not just courts and tribunals but the millions of decisions taken by thousands of civil servants and other officials’. From the standpoint of this paper, this was a most welcome change and pointed the way to a real enhancement of administrative justice for millions of people who are on the receiving end of administrative decisions. Its realisation would, however, have called for a much more proactive approach on the part of policy makers and for the prioritising of administrative justice over competing pressures associated with the pursuit of lower unit costs and efficiency savings.

The enhanced role in promoting administrative justice that was given to the Administrative Justice and Tribunals Council,²⁰ its promotion of a set of ‘principles of administrative justice’,²¹ designed to be used by officials in public bodies, and of a set of recommendations for ‘getting it right first time’²² also

20 The hybrid name was intended to assuage the concerns of a relatively small number of *party vs. party* tribunals, in particular employment tribunals which are not really part of the administrative justice system.

21 ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL, PRINCIPLES OF ADMINISTRATIVE JUSTICE (2010).

22 ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL, RIGHT FIRST TIME REPORT (2011).

constituted grounds for optimism. However, the new Coalition Government's enthusiasm for simplification and its intention to abolish the Administrative Justice and Tribunals Council as part of its plan to abolish or merge more than 192 non-departmental public bodies²³ – ostensibly to cut costs and increase accountability – not to mention its stringent programme of public expenditure cuts, which will, *inter alia*, reduce the resources allocated to administration, indicate that any gains for administrative justice may only have been very short-term.

VI. KEY MILESTONES ALONG THE ROAD

Before considering the consequences of the probable abolition of the AJTC for administrative justice, it may be helpful to outline the main changes in official thinking over the last 50 years about the ways in which disputes between the citizen and the state should be handled. This involves comparing the Franks Report,²⁴ which was published in 1957 and led to the Tribunals and Enquiries Act 1958, with the Leggatt Report,²⁵ which was published in 2001 and led to the 2004 White Paper and the *Tribunals, Courts and Enforcement Act 2007*.

1. The Franks Report

In 1955, the Lord Chancellor at that time, Viscount Kilmuir, invited Sir Oliver Franks (as he then was) to chair a Committee to consider, as one part of its remit, 'the constitution and working of tribunals, other than the ordinary courts of law'. In the UK, most disputes between the citizen and the state are heard by bodies known as tribunals, rather than by the ordinary courts. Tribunals resemble, but are more informal than and, at least until recently, have been less independent than the specialised administrative courts that exist in many jurisdictions, e.g. in the USA and in many European countries.

The Committee, which reported in 1957, concluded that tribunals 'should properly be regarded as machinery provided by Parliament for adjudication rather

23 By the time the Bill had completed its passage through Parliament, the number had been reduced from 192 to 177.

24 SIR OLIVER FRANKS, REPORT OF THE COMMITTEE ON TRIBUNALS AND INQUIRIES (1957).

25 SIR ANDREW LEGGATT, TRIBUNALS FOR USERS – ONE SYSTEM, ONE SERVICE (2001).

than as part of the machinery of administration.²⁶ Three characteristics – openness, fairness and impartiality – were proposed as the hallmarks of good tribunals and a number of recommendations were made with the aim of ensuring that these principles would, in general, govern the working of tribunals.²⁷ Publication of the Report led to the passage of the *Tribunals and Inquiries Act 1958* (UK) and to the establishment of the Council on Tribunals, which was given statutory responsibility for keeping under review those tribunals that were placed under its jurisdiction.

In the period following the publication of the Franks Report, there was a phenomenal growth in the number of tribunals – 50 years afterwards, 70 tribunals were supervised by the Council on Tribunals and a further 24 by its Scottish Committee²⁸ – and, over the years, tribunals became more and more like courts.²⁹ The proliferation of tribunals happened in a piecemeal fashion, in parallel with the development of the welfare state and the growth of state regulation, to meet the political and policy needs of ‘sponsoring departments’. Although the Council on Tribunals attempted to resist the establishment of new tribunals, to encourage a degree of procedural standardisation, and to raise standards of tribunal decision-making, the limited resources that were available to it restricted its effectiveness. It has not had a good press – for example, with a part-time chairman, 10-15 part-time members, a staff of six and a budget of only £1.25m, it has been described as a ‘shoestring operation’³⁰ and its operations have been compared unfavourably with those of the Law Commission, an independent statutory body that keeps the law under review and recommends reform where it is thought to be needed.

2. The Leggatt Report

More recently, the need for a further review of tribunals was recognised by a subsequent Lord Chancellor, Lord Irvine of Lairg.³¹ In May 2000, he argued

26 Franks, *supra* note 24, at para 40.

27 *Ibid*, at paras 23-24.

28 See Council on Tribunals, *Annual Report 2006/2007*, HC 733 (2007:Appendix G).

29 See generally, Nick Wikeley, *Burying Bell: Managing the Judicialisation of Social Security Tribunals*, 63 MOD. L. REV. 475-501 (2000) and Harlow and Rawlings, *supra* note 3, at chapter 11.

30 Harlow and Rawlings, *supra* note 3, at 506-507.

31 For a fuller account, see Michael Adler, *Waiting in the Wings: The Leggatt Report, the White Paper and the Reform of Tribunals*, 13 J. OF SOCIAL SECURITY L. 73-85 (2006).

that, after reforming the civil and criminal justice systems, it was time to review the administrative justice system and announced that he had commissioned Sir Andrew Leggatt, a former Lord Justice of Appeal, to conduct a wide-ranging review of tribunals.

The Leggatt Report recommended that all tribunals should be brought together into a unitary Tribunals Service, which would be an Executive Agency within the Lord Chancellor's Department and, as such, would be in a position analogous to that of the Court Service. Since the Lord Chancellor's Department was not an 'interested party' in any tribunal proceedings, this would ensure that tribunals were more independent from those government departments that not only 'sponsored' them but had an interest in the outcome of the cases they determined.

Leggatt proposed that the unitary Tribunals Service should be organised into a number of divisions, each defined in terms of its subject matter. He further recommended that the Tribunals Service should have a two-tier structure, making it possible for appeals from all First Tier tribunals to be heard in a second-tier or appellate division. He also proposed that it should, as far as possible, develop common administrative procedures and information technology systems, and that it should seek to exploit the opportunities for economies of scale, not least in terms of the use of its estate. The Leggatt Report argued that an important goal of reform should be to make tribunal procedures so 'user friendly' that, in the majority of cases, 'users' would be able to represent themselves. Although it supported the provision of pre-hearing advice, Leggatt said nothing about lay representation and was strongly opposed to legal representation at public expense.

In March 2003, the Lord Chancellor announced that the Government had accepted the general approach to reform taken by the Leggatt Report and, after further negotiations with government departments, a White Paper was published in July 2004.

3. The 2004 White Paper and the 2007 Act

The White Paper accepted most of the key recommendations in the Leggatt Report and proposed that all tribunals that were administered by central

government departments should be brought together into a new Tribunals Service (TS), which would be an Executive Agency within the Department for Constitutional Affairs (DCA).³² It proposed that the TS should, in the first instance, be based on the ten largest tribunals and that other tribunals might join later.

Although employment tribunals were given judicial autonomy within the TS,³³ the arguments of those who believed that they should remain outside the new service were overruled. The White Paper favoured a two-tier service but rejected the idea of a divisional structure that had been proposed in the Leggatt Report on the grounds that the limited number of jurisdictions that would be brought together in the new TS made this unnecessary.³⁴

The White Paper was considerably more ambitious than the Leggatt Report in that it aimed not only to reform the organisation and operation of tribunals but also to improve the entire system of administrative justice. It emphasised the importance of improving first-instance decision making for administrative justice. However, although it attached considerable importance to feedback from the new, unitary, TS, it did not consider other ways of improving first-instance decision making.

It took Leggatt's proposals for tribunal reform very seriously but considered them alongside other systems of redress, such as complaints procedures, ombudsmen and judicial review. It aimed to 'turn on its head the Government's traditional emphasis first on courts, judges and court procedures, and second on legal aid to pay mainly for litigation lawyers', claiming that its aim was 'to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provide tailored solutions to resolve the dispute as quickly and cost-effectively as possible'.³⁵

32 The DCA replaced the Lord Chancellor's Department (LCD) in June 2003 and was itself replaced by the Ministry of Justice (MoJ) in May 2007.

33 The Employment Tribunals and the Employment Appeal Tribunal, are described as 'distinct pillars' within the Tribunals Service, which provides administrative support for them.

34 Secretary of State for Constitutional Affairs, *supra* note 9, at para. 6.38.

35 *Ibid*, at para 2.2.

The White Paper referred to this as ‘proportionate dispute resolution’. However, as far as representation at tribunal hearings was concerned, it took a very similar position to the one taken by the Leggatt Report, arguing that ‘[h]earings are intended to be less formal and adversarial in nature’ and that this ‘ought in time to reduce the need for representation’.³⁶

Although tribunal adjudication is a somewhat muted form of the adjudication encountered in civil and criminal courts, the White Paper was very conscious of the pathology of what Kagan has referred to as ‘adversarial legalism’³⁷ and quite explicitly set out to limit its impact. To promote this broader approach to administrative justice, the White Paper proposed that the Council on Tribunals should evolve into an Administrative Justice Council (subsequently re-styled the Administrative Justice and Tribunals Council in order to take account of the sensitivities of those associated with *party vs. party* tribunals, especially employment tribunals). As a result of this, the restyled Council was given a wider remit and correspondingly greater responsibilities than the Council on Tribunals.³⁸

VII. THE RISE AND FALL OF THE TRIBUNALS SERVICE

Lord Justice Carnwath, a senior judge who has sat in the Court of Appeal since 2001, was appointed ‘Shadow’ Senior President of Tribunals in July 2004³⁹ and the Tribunals Service was set up, in advance of legislation, in April 2006. The Tribunals, Courts and Enforcement Act 2007, which – unlike the White Paper – made provision for the organisation of tribunal business into ‘chambers’,³⁹ was given Royal Assent in July and, soon after that, Lord Justice Carnwath was appointed Senior President⁴⁰ and the Administrative Justice and Tribunals Council was established.

36 *Ibid*, at para. 10.11.

37 See R. A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

38 However, the responsibility for drafting model tribunal rules has been taken away from the predominantly lay Council and given to a new Tribunals Procedure Committee, comprising a majority of judicial members.

39 Section 7, Schedule 4 of the Tribunal Courts and Enforcement Act 2007:.

40 Lord Justice Carnwath will step down as Senior President of Tribunals in April 2012 when he joins the Supreme Court.

The Tribunals Service initially comprised the largest tribunals, some of which were already administered by the Department for Constitutional Affairs, while others were transferred from other government departments. However, over time it has grown and currently comprises 32 tribunals.⁴¹ The First-tier Tribunal, which hears appeals at first instance from administrative decisions, now has six chambers⁴² (a seventh chamber is to be added),⁴³ while the Upper Tribunal, which hears appeals on points of law from decisions of the First-tier Tribunal, has four chambers.⁴⁴ Each Chamber comprises cognate jurisdictions and calls for similar types of expertise in determining appeals. As mentioned above, Employment Tribunals and the Employment Appeal Tribunal constitute ‘distinct pillars’ which stand apart from these chambers, although they do receive administrative support from the Tribunals Service.

Each chamber of the First Tier Tribunal is headed by a chamber president and, within each chamber, each section/jurisdiction is headed by a principal judge. In all cases, decisions are made by a tribunal judge who may sit alone or with one or two other members. The practice varies between chambers and sections, and also depends on the complexity of the appeal. In most cases, appeals against decisions of the First Tier Tribunal can be made to the Upper Tribunal, but only with the permission of the First Tier Tribunal or the Upper Tribunal.⁴⁵

The 2007 Act provides for a Tribunal Procedure Committee (TPC), which can make tribunal rules for the First Tier and Upper Tribunals, and new sets of procedural rules have been introduced for each chamber. In doing so, the TPC has been guided by a number of principles: it has attempted to make the rules as simple

41 Including those tribunals that are outside the unified two-tier structure. *See* Tribunals Service, *Annual Report and Accounts 2009-2010*, 2010 TRIB. SERV: Annex 1). The Residential Property Tribunal was transferred to the Tribunals Service in July 2011.

42 A General Regulatory Chamber, a Health Education and Social Care Chamber, an Immigration and Asylum Chamber, a Social Entitlement Chamber (dealing, *inter alia*, with social security), and a Tax Chamber.

43 The Land, Property and Housing Chamber.

44 An Administrative Appeals Chamber, a Tax and Chancery Chamber, an Immigration and Asylum Chamber, and a Lands Chamber.

45 In the case of Criminal Injuries Compensation and Asylum Support cases, there is technically no right of appeal, but a decision may be reviewed by way of an application to the Upper Tribunal for judicial review of the First Tier Tribunal's decision.

and straightforward as possible; to avoid unnecessarily technical language, to enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and to adopt common rules across tribunals wherever possible.⁴⁶

The establishment of the Tribunals Service constituted a striking change for the better in the procedures for resolving *citizen vs. state* disputes. Tribunal justice was upgraded and, although reform is an ongoing process, the case for it, as set out in the Leggatt Report and in the White Paper, would appear to have been largely realised. However, as far as administrative justice was concerned, there were clearly problems.

Under Section 43 of the 2007 Act, the Senior President is required to make an annual report on the cases heard by the First Tier and Upper Tribunals. This provision was intended to lead to improvements both in the workings of the two tribunals and in the standards of initial decision-making and review in the cases they heard. However, in his first Annual Report, the Senior President noted that he saw little point in doing so ‘unless and until there is a responsive culture in the receiving departments and machinery to give it effect’.⁴⁷

Although it is clear that Lord Justice Carnwath did not think these conditions had been met in the ‘receiving departments’, it is a hopeful sign that, in his second Annual Report, he referred to a number of initiatives in the Department for Work and Pensions, which is responsible for social security in the UK and makes the largest contribution to the Tribunals Service’s caseload, that were designed to get decisions right the first time.⁴⁸ However, in light of the stringent programme of public expenditure cuts and the reduced resources that are available for administration, it must be recognised that the prospects of achieving major improvements in administrative justice by such means are not great.

46 Senior President of Tribunals, *Annual Report: Tribunals Transformed*, MIN. OF JUST. 24 (2010).

47 *Ibid.*, at para 12.

48 Senior President of Tribunals, *Annual Report*, MIN. OF JUST. 10-11 (2011). These initiatives include ‘reconsideration pilots’ in which decision-makers are asked to reassess cases by asking whether they can support the decision in question, and the provision of ‘benchmark decisions’ by senior tribunal judges which can provide guidance for original decision-makers in some common areas of difficulty.

Still, as far as tribunals were concerned, the new, two-tiered, multi-chambered framework provided a very promising institutional framework for resolving *citizen vs. state* disputes in a ‘user-friendly’ way that was both ‘fit for purpose’ and different from the way in which most *party vs. party* disputes were dealt with in the courts. However, this sense that tribunals had been brought in from the cold and the general feeling of optimism that their status had been upgraded was not to last for long.

In March 2010, the outgoing Labour Government announced that Tribunals Service would be merged with Her Majesty’s Court Service to form a new unified body for all courts and tribunals in England and Wales. No timetable was given but a consultation with stakeholders was promised. Both commitments were taken over by the incoming Coalition Government and, after a very superficial consultation exercise, the merger took place on 1 April 2011 with the formation of Her Majesty’s Courts and Tribunals Service, which, as was the case with the Tribunals Service, is an agency of the Ministry of Justice (MoJ). This, at the very least, puts a very big question mark over the prospects for tribunal justice in the UK.

It should be noted that both the constituent parts of the new unified Courts and Tribunals Service were recent creations – Her Majesty’s Court Service, which integrated the Magistrates’ Courts Service with the Courts Service, was established in 2005 and the Tribunals Service in 2006 – and that the prospect of an eventual merger was not envisaged when they were set up. A merger between them was not the subject of prior consultation with stakeholders and the case for merger was not well made by the government. In his response to consultation, Richard Thomas, Chair of the Administrative Justice and Tribunals Council, expressed concern that the merger would raise significant risks for tribunal users if it led to a ‘one size fits all’ approach that took insufficient account of differences in the ways in which *citizen vs. state* disputes are handled in tribunals and *party vs. party* disputes are handled in courts.⁴⁹

There is, of course, some overlap between courts and tribunals. Some courts, particularly lower-tier courts dealing with small claims, housing disputes and family matters, have adopted the *active, interventionist* and *enabling* procedures that

49 RICHARD THOMAS, *A PLATFORM FOR THE FUTURE?»: RESPONSE TO CONSULTATION ON A UNIFIED COURTS AND TRIBUNALS SERVICE* (2011).

are associated with tribunals and, especially where the parties are not represented, adopt *inquisitorial* rather than *adversarial* procedures. At the same time, some tribunals, particularly when the parties are represented, are rather formal, adopt a ‘hands-off approach’ and favour *adversarial* rather than *inquisitorial* procedures.

Some people argue that it doesn’t matter what the forum is called, i.e. whether it is called a ‘court’ or a ‘tribunal’, that what matters is the appropriateness of the procedures that are adopted and that a unified Courts and Tribunals Service should be in a good position to determine the appropriate procedure for dealing with different types of disputes. However, there are real differences in culture between courts and tribunals and there is little doubt about who the senior partner in this merger is. There is thus a real danger that a ‘court culture’ will prevail in the unified Courts and Tribunals Service and that the distinctive approach to dispute resolution that has been associated with tribunals, and championed by its supporters, will be put at risk.

VIII. THE RISE AND FALL OF THE ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL

1. The UK Position

The Administrative Justice and Tribunals Council (AJTC) was established under Section 44 of the Tribunals, Courts and Enforcement Act 2007 on 1 November 2007 with a wider and more ambitious remit than its predecessor, the Council on Tribunals (COT). Although the resources available to it were not increased to take account of its wider responsibilities, the Council responded enthusiastically to its enhanced role in promoting administrative justice.

It has published a set of ‘principles of administrative justice’,⁵⁰ which embrace the integrated conception of administrative justice outlined above. These comprise seven ‘core principles’ that apply across the ‘administrative justice landscape’, i.e. to first-instance decision makers, tribunals, ombudsmen and courts. It has also produced a set of recommendations for ‘getting it right first time’,⁵¹ which stress the importance of ‘feedback’ that should make it possible for first-instance decision makers to learn

50 Administrative Justice and Tribunals Council (2010).

51 Administrative Justice and Tribunals Council (2011).

from their mistakes, i.e. from those cases that give rise to appeals and complaints and are upheld by tribunals and ombudsmen.

Very soon after coming into office in May 2010, and as part of its overall Spending Review, the new Coalition Government reviewed the position of so-called ‘arms-length bodies’, i.e. non-departmental public bodies (NDPBs). As a result of this review, it proposed that 192 of these bodies should cease to be public bodies with their functions either being brought back into central government, devolved to local government, moved out of government, merged with another body or abolished altogether. Ostensibly, the aim was to cut costs, reduce bureaucracy and increase accountability. While it is unclear what the financial savings from this ‘bonfire’ will be, it will undoubtedly weaken government and civil society and is hard to square with the Prime Minister’s vision of ‘the big society’.

The Administrative Justice and Tribunals Council was initially included in Schedule 1, which listed the bodies that were to be abolished. However, when the Bill was introduced into the House of Lords and, on 29 March 2011, the Lords voted in favour of an amendment moved by the Conservative Peer Lord Newton, who had been Chair of the AJTC,⁵² to move the Administrative Justice and Tribunals Council from Schedule 1 to Schedule 2, which comprised bodies that were to be merged; the Government was unmoved. When the Commons considered the Lords amendments to the Bill, it used its majority in the Commons to reinstate the Administrative Justice and Tribunals Council in the list of bodies in Schedule 1 that it wished to abolish.

A last-ditch attempt to save the Administrative Justice and Tribunals Council was made in the House of Lords on 23 November 2011 when an amendment to that effect, again moved by Lord Newton, was defeated by 233 votes to 236, i.e. by a Government majority of 3.⁵³ The Bill, which was given Royal Assent on

52 And its predecessor, the Council on Tribunals.

53 The Government’s determination to proceed with the abolition of the AJTC may have been influenced by the fact that, late in the day, the Ministry of Justice had decided not to abolish two other bodies that originally appeared in Schedule 1 of the Bill, the Youth Justice Board and the Office of the Chief Coroner.

14 December 2011, gives the Secretary of State for Justice the power to abolish the AJTC without introducing legislation to this effect, notwithstanding the fact that the AJTC was created by primary legislation⁵⁴ and a draft order to abolish the AJTC is expected to be laid in the Spring of 2012. As with other such Orders under the Public Bodies Act 2011, it will have to be approved by both Houses of Parliament before it can come into force. However, although nothing is certain, it is very likely that the Government will get its way.

In reviewing its arms-length bodies, the Ministry of Justice was required to address the overarching question of whether the body needed to exist and whether its functions needed to be carried out at all. Where the answer was ‘yes’, it was then asked to assess whether the body in question satisfied any of the following three tests: did it perform a technical function, did its activities require political impartiality and did it need to act independently to establish facts? In the case of the AJTC, the MOJ argued that the development of administrative justice policy was properly a function of government and that the existence of an advisory body resulted in a duplication of effort and a waste of resources. It claimed that independence was not a prerequisite for advice on administrative justice policy and that MOJ officials ‘working in close consultation with stakeholders’ could provide ‘objective, impartial and expert advice’.⁵⁵

However, in its report on the proposed abolition of the AJTC, published on 8 March 2012, a Select Committee of the House of Commons (House of Commons Public Administration Select Committee 2012) was clearly unconvinced and called on the Government to ‘revisit its’ plans’.⁵⁶ It agreed with the Government that responsibility for the development of policy in relation to administrative justice

54 In its report on the Public Bodies Bill, published in November 2010, the House of Lords Constitution Committee argued that, by denying Parliament the opportunity to debate and deliberate on proposals to abolish, merge, and modify the public bodies identified in the Bill, these provisions were nothing short of a violation of the constitutions. *See* HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, REPORT ON THE PUBLIC BODIES BILL [HL], 6th REPORT OF SESSION 2010-2011 (2010).

55 MINISTRY OF JUSTICE, MEMORANDUM FOR THE PUBLIC ADMINISTRATION SELECT COMMITTEE INQUIRY INTO THE FUTURE OVERSIGHT OF THE ADMINISTRATIVE JUSTICE SYSTEM (2011), at para. 7.

56 HOUSE OF COMMONS PUBLIC ADMINISTRATION SELECT COMMITTEE, FUTURE OVERSIGHT OF ADMINISTRATIVE JUSTICE: THE PROPOSED ABOLITION OF THE AJTC, 21ST REPORT OF SESSION 2010-2012 (2012).

properly belonged to the MOJ but did not share the Government's view that this function was duplicated by the AJTC. It also accepted the Government's argument that some functions of the AJTC had been taken over by HMCTS but concluded that the need for independent oversight of the administrative justice system remained. Crucially, it questioned whether the proposal to abolish the AJTC met any of the three criteria for deciding whether to retain a public body. It also considered that the MOJ's estimates of cost savings were exaggerated and called on the Government to provide more detailed information about how it proposed to take over the AJTC's functions and about its plans for improving administrative decision making and redress mechanisms. It concluded that, if the AJTC is abolished, the MOJ should report annually to Parliament on the operation of the administrative justice system.

2. The Position in Scotland

The Leggatt Report was commissioned by the Lord Chancellor and covered two sets of tribunals: tribunals in England and Wales and Great Britain-wide tribunals. The 2004 White Paper and the 2007 Act likewise dealt with these sets of tribunals and the Tribunals Service, which was introduced by the 2007 Act, related to them as well. The position in Scotland differs in that the Tribunals Service in Scotland only includes a subset of 'reserved' tribunals while 'devolved' tribunals continue to function outside it.⁵⁷

In part because the Scottish Government in Edinburgh has had different priorities from the UK Government in London,⁵⁸ tribunal reform in Scotland has lagged behind tribunal reform elsewhere in the UK by several years. In

57 Following devolution and the passage of the Scotland Act 1998, 'reserved' matters refer to those that are the responsibility of the UK Parliament and the UK Government while 'devolved' matters are those that became the responsibility of the Scottish Parliament and the Scottish Government.

58 These priorities included reform of ombudsmen institutions. The Scottish Public Services Ombudsman (SPSO) was set up in 2002 as the final stage in the procedure for dealing with complaints against the Scottish Executive (now the Scottish Government), the NHS in Scotland, Scottish local authorities and housing associations. Since then, responsibilities for hearing complaints against most water and sewerage providers, colleges and universities and prisons have been added. As far as ombudsmen are concerned, Scotland has a much more integrated set of arrangements than England.

2008, the Administrative Justice Steering Group, chaired by Lord Philip, identified five options for tribunal reform in Scotland⁵⁹ but indicated that only two of them – the establishment of a new Scottish Tribunals Service, either for ‘devolved’ tribunals or for all (‘reserved’ and ‘devolved’) tribunals sitting in Scotland, would satisfy the key principles of independence and impartiality. The Scottish Committee of the Administrative Justice and Tribunals Council, in response to a request to submit advice on these options to the Scottish Government, came to a similar conclusion, and recommended the establishment of a Scottish Tribunals Service, chaired by a Senior President of Scottish Tribunals, which would include all ‘reserved’ and ‘devolved’ tribunals sitting in Scotland.⁶⁰

The Scottish Government subsequently set up a Scottish Tribunals Service (STS) which will, as a first step, provide administrative support for five ‘devolved’ tribunals,⁶¹ with the prospect of further reforms to come. The question of who will provide the judicial leadership of the Scottish Tribunals Service and the issue of the relationship between the STS and HM Courts and Tribunals Service in England and Wales are still to be resolved. This would suggest that, as far as tribunal reform is concerned, Scotland is a few years behind England.

Like its predecessor, the Council on Tribunals, the Administrative Justice and Tribunals Council has a Scottish Committee, whose remit is to keep under review the overall administrative justice system in Scotland and the reserved and devolved tribunals that sit in Scotland and come under its oversight. As a Committee of the AJTC, it contributes to the advice that the Council gives to UK Ministers but also reports directly to Scottish Ministers. If the AJTC is abolished, the Scottish Committee would no longer exist, although it could, if the Scottish Government chose the option, become a free-standing

59 SCOTTISH CONSUMER COUNCIL, *OPTIONS FOR THE FUTURE ADMINISTRATION AND SUPERVISION OF TRIBUNALS IN SCOTLAND: A REPORT BY THE ADMINISTRATIVE JUSTICE STEERING GROUP* (2008).

60 SCOTTISH COMMITTEE OF THE ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL, *TRIBUNAL REFORM IN SCOTLAND: A VISION FOR THE FUTURE* (2010).

61 These five tribunals were the Mental Health Tribunals for Scotland, Additional Support Needs Tribunals, the Private Rented Housing Panel, the Pensions Appeal Tribunal and the Scottish Charities Appeal Panel.

body with similar responsibilities.⁶² Although the MOJ appears to have ruled out a merger between the Administrative Justice and Tribunals Council and the Civil Justice Council in England and Wales; the Scottish Government is actively considering whether the Scottish Civil Justice Council that, following one of the recommendations of Lord Gill's Civil Courts Review,⁶³ it proposes to set up, should have responsibilities for administrative justice as well as for civil justice.⁶⁴

It is too early to say whether this proposal will find favour with the Scottish Government but there is a possibility that some of the oversight and policy advice functions of the AJTC may be taken over by a body with responsibility for both civil and administrative justice in Scotland. That may not be an ideal outcome but is probably the best that can be achieved in the circumstances. If the Scottish Civil Justice Council does take over some of the functions of the Scottish Committee of AJTC, administrative justice might still have a champion in Scotland.

IX. THE IMPLICATIONS OF DEVELOPMENTS IN THE UK FOR INDIA

What is the meaning and significance of the developments outlined in this paper for India? India does have a system of administrative tribunals although, by comparison with the United Kingdom, it is both at an early stage of development and much in need of reform. Article 323A of the Indian Constitution empowers Parliament to create administrative tribunals to deal with disputes involving civil servants, either at Union or State level, while Article 323B enables Parliament and the State legislatures to create tribunals

62 In its 1957 Report, the Franks Committee: recommended that separate Councils on Tribunals should be set up in Scotland and in England and Wales. *See Franks, supra* note 24, at para 43.

63 LORD GILL, REPORT OF THE SCOTTISH CIVIL COURTS REVIEW (2009).

64 In September 2011, the Scottish Government issued a consultation paper on the creation of a Scottish Civil Justice Council in which, inter alia, respondents were asked whether they thought the Council should be able to make recommendations in relation to administrative justice and tribunals. The Scottish Committee of the AJTC responded positively to this suggestion, provided that the structure and composition of the Council reflected the importance of its responsibilities in respect of administrative justice.

to deal with a wide range of disputes.⁶⁵ A decision of the Supreme Court⁶⁶ has made it clear that Parliament (and State Legislatures) are empowered to create tribunals to deal with any matter within their jurisdiction. Although the constitutional amendment inserting Articles 323A and 323B was passed in 1976, the Administrative Tribunals Act was not passed until 1985. Since 1990, according to one commentator, 'Central Government went into high gear and started creating one tribunal after another' and 'the new millennium has seen a further proliferation of tribunals'.⁶⁷ However, the growth of tribunals has been haphazard and there is no policy for determining which types of citizen vs. state dispute should be dealt with by the civil courts and which by tribunals.

Many tribunals are controlled by the executive who manage the appointment, promotion and transfer of members. Members are often former civil servants who lack the requisite judicial skills. Some of them are on leave from their previous job and members are often appointed as a 'pre-retirement perk'.

In 1966, the Indian Government set up an Administrative Reforms Commission (ARC) headed by Morarji Desai, who later became the Prime Minister of India. The ARC recommended the establishment of ombudsman institutions (known as *Lokpal* at the Central Government and *Lokayukta* at the State Government level respectively) for investigating citizens' grievances relating to administrative actions taken by or on behalf of Central Government, State Governments and certain public authorities. These institutions were intended to be independent of the executive and to supplement the courts.⁶⁸

65 Levy, assessment, collection and enforcement of any tax; foreign exchange/import and export disputes; industrial labour disputes; land reforms; urban land ceilings; election disputes of Parliament, State Legislatures; production and distribution of essential commodities; control legislation; offences and fees payable in regard to any of the above. See Arvind P. Datar, *The Tribunalisation of Justice in India*, ACTA JURIDICA 288-302 (2006).

66 Union of India v. Delhi High Court Bar Association, (2002) 4 SCC 275.

67 Datar, *supra* note 65, at 292.

68 Parsa Venkateshwar Rao Jr., *Hanging Fire since 1968, Will it be Ninth time Lucky for Lokpal?*, DAILY NEWS & ANALYSIS, July 5, 2011, available at http://www.dnaindia.com/analysis/report_hanging-fire-since-1968-will-it-be-ninth-time-lucky-for-lokpal_1562387.

The recommendation to set up *Lokpal* and *Lokayukta* institutions was intended to improve the standard of public administration, by looking into complaints against administrative actions, including allegations of corruption, favouritism and official indiscipline. Bills that would have established a central *Lokpal* institution (Parliamentary Commissioner) and compelled States to establish their own *Lokayukta* institutions have been introduced into the Indian Parliament eight times since 1968 but none of them have been enacted so far. However, at the local level, many States have taken the initiative and passed their own *Lokayukta* Acts.⁶⁹ Since the structure and scope of *Lokayukta* are not uniform, an amendment to the Indian Constitution has been proposed to implement *Lokayukta* institutions uniformly across all Indian States.

From the above it is clear that, in recent years, India has seen a rapid but haphazard growth of administrative tribunals which are not independent of the executive and cannot be relied on to produce just outcomes in the *citizen vs. state* disputes that they adjudicate. Although the majority of India's 28 states now have ombudsman-type institutions (*Lokayukta*) for investigating citizens' grievances, these focus on corruption, favouritism and official indiscipline rather than the more mundane forms of maladministration giving rise to injustice that constitute the 'bread and butter' work of ombudsmen in the United Kingdom. Significantly, there is, as yet, no ombudsman-type institution (*Lokpal*) for investigating citizens' grievances against Central Government.

Although, albeit at an early stage of development, some of the constituent parts of an administrative justice system are in place in India, there is, as yet, little awareness of administrative justice as a set of principles and practices concerned with the ways in which administrative decisions are made and administrative disputes are dealt with. There is little awareness that administrative justice deals with an end-to-end process that begins with myriads of administrative decisions and ends,

69 Orissa was the first state to present a bill on establishment of Lokayukta in 1970, but Maharashtra was the first to establish the institution, in 1972. Other states followed: Rajasthan (1973), Bihar (1974), Uttar Pradesh (1977), Madhya Pradesh (1981), Andhra Pradesh (1983), Himachal Pradesh (1983), Karnataka (1984), Assam (1986), Gujarat (1988), Delhi (1995), Punjab (1996), Kerala (1998), Chhattisgarh (2002), Uttaranchal (2002), West Bengal (2003), Haryana (2004) and Uttarakhand (2011).

in a very small proportion of cases, with the decision of an ombudsman, a tribunal or a court, and all that this would entail.⁷⁰ There is, likewise, little awareness of administrative justice as a system and of the need to ensure that the relationships between its constituent parts promote justice and reflect the needs of citizens.

X. CONCLUSIONS

This paper has attempted to chart first the rise of administrative justice 'as it emerged from the shadows' in the United Kingdom, and then its fall as tribunals, which constitute a distinctive way of dealing with citizen vs. state disputes, were merged with courts, and the Administrative Justice and Tribunals Council, which was set up in 2007 to 'keep under review the performance of the administrative justice system as a whole and advise the government on changes in legislation, practice and procedure that would improve the ways in which it works' faces abolition. These developments raise questions as to how all this could have happened. A provisional answer is that, in a political system in which the principle of parliamentary sovereignty is only weakly constrained by constitutional considerations, where governments that can command majorities in Parliament can almost always get their way, political 'gains' are very precarious and can be very short-lived. The care and consideration that preceded the passage of the Tribunals, Courts and Enforcement Act 2007 and the establishment of the Tribunals Service and the Administrative Justice and Tribunals Council as the 'hub of the wheel of administrative justice'⁷¹ are in marked contrast with the political intransigence and absence of rational argument that were associated with their demise. Thus, as far as administrative justice in the UK is concerned, it looks very much as if the rise of the pendulum set in motion by the Leggatt Report and given further impetus by the 2004 White Paper and the 2007 Act will be followed, only a few years later, by its fall. The shaft of light which fell on administrative justice is likely to be followed by its renewed eclipse by civil justice.

70 One book whose title 'Administrative Justice in India' suggested that it might deal with the problem, RADHAKANT NAYAK, ADMINISTRATIVE JUSTICE IN INDIA (1989) proved to be a disappointment. It comprises a detailed survey of the statutory basis for, judicial decisions of and other literature on administrative tribunals in the State of Orissa.

71 Leggatt, *supra* note 25, at para 21.