

**THE RIGHT HON. THE LORD THOMAS OF CWMGIEDD,  
LORD CHIEF JUSTICE OF ENGLAND AND WALES**

**BUILDING THE BEST COURT FORUM FOR COMMERCIAL DISPUTE  
RESOLUTION**

**WALES COMMERCIAL LAW ASSOCIATION, CARDIFF, 21 OCTOBER 2016**

**1. Introduction**

1. Today I intend to look at the position of the courts and tribunals of the State as underpinning the economy, in addition to the more commonly appreciated role of the courts. As I am here in Cardiff I will direct my remarks to Wales and to Cardiff, but exactly the same could be said of the regions of England and their great cities<sup>1</sup>. It follows I do not intend to talk of devolution, but to focus on commercial dispute resolution.
2. We all know what we want in relation to a dispute. We want a means of resolving that dispute before it goes to a court or tribunal for adjudication. And, if it has to go to adjudication, whether it be a court or tribunal which adjudicates disputes between citizens or between the citizens and the State, we want a process that while being as simple, as flexible and as inexpensive as possible yields a quick and just determination of the dispute.
3. Historically, the State never sought to provide a mechanism for resolution of disputes outside a court or tribunal. There have, of course, always been private means of settling disputes – arbitration being the most common, but recent years have seen the development of more formalised means of alternative dispute resolution, including not only mediation but also the ombudsman system. The State traditionally provided a system for adjudication through the courts but, over the years, it has gradually developed a number of different types of adjudicating tribunal to make decisions in addition to the

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<sup>1</sup> In Wales, there are separate devolved tribunals (as in Scotland) which are not part of the Tribunals system of England and Wales, but exercise jurisdiction over the territory of Wales. This talk assumes that changes will be made by the Wales Bill to enable cross deployment.

courts of law. More recently still, it has also developed formal means to resolve disputes consensually via the courts. Whether that is via judicial early neutral evaluation, small claims mediation schemes, or Sir Michael Briggs' proposals to introduce an Online Court with a built-in mediation process, courts and tribunals now provide justice in a broader sense than that captured by simple adjudication and the doing of justice according to law in a formal court setting.

4. I want to focus on the current position where our courts and tribunals are concerned, and look at the extent to which there has been a conflation of the characteristics that we look for in a judicial forum as a mechanism for dispute resolution (both in the sense of resolution without the adjudication of the dispute and the adjudication of a dispute) and to examine the options that this provides.
5. I first must outline, for I can do no more than that, the development of the current complex system that evolved for the second task – dispute determination by way of adjudication<sup>2</sup>. It explains why we are where we are and provides some ideas for the future.

## **2. The Historic Choice: The Position in the Nineteenth and Early Twentieth Century**

### *The Railways*

6. The advent of the railways brought the need not only for regulation (which is not a characteristic of an adjudicating tribunal), but for settling disputes between competing private interests and protection from the effect of monopolies. Naturally at that time the courts were tried for this purpose, leading to the observation by Lord Campbell, Lord Chief Justice from 1850-59, that Parliament was trying to turn them into railway directors.<sup>3</sup> A review by a select Committee in 1873 concluded that one of the problems was lack of a speedy and summary tribunal which had a practical knowledge of the

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<sup>2</sup> The present lecture draws some of the historical background from a lecture *Judge, Jury and Tribunal*, which I gave in 2006 at the Centre for Legal Research, University of the West of England

<sup>3</sup> R. M. Jackson, *The Machinery of Justice in England*, (4<sup>th</sup> edition, 2015 reprint) at 324.

subject – a description not applicable then to the Court of Common Pleas to which the jurisdiction had then been assigned.<sup>4</sup>

7. In 1873, a tribunal was created to resolve such disputes with a lawyer chairman and two lay members. This was not satisfactory. Under the Railway and Canal Traffic Act 1888, the tribunal was reconstituted into a Commission comprising a High Court Judge and two lay members, one of whom had to have experience of railway management. There was no appeal on issues of fact, although appeals on issues of law lay to the newly created Court of Appeal. Its procedure, although adversarial, was less formal than that of the courts. This tribunal, a court of record, is generally recognised to be the model on which much of the modern tribunal system has been founded.

*The proposals to establish a mixed tribunal for commercial cases*

8. In the great Victorian examination of the courts of law and equity carried out by the Judicature Commissioners between 1869 and 1873, consideration was given to creating a better form of tribunal for the resolution of mercantile disputes. In the Third Report of 1874,<sup>5</sup> the Commissioners had to consider whether England and Wales should follow the continental model of a tribunal for commercial cases comprised of a judge and two merchants; the majority (who included such great lawyers as Jessel, Blackburn and Bramwell, the Lord Chancellor of the day and two former Lord Chancellors) rejected that solution.<sup>6</sup>
9. They considered a tribunal in which mercantile men had a casting vote would lead to uncertainty in the law. However, they accepted that judges needed help to adjudicate on mercantile cases and put forward a less radical solution; merchants would not be members of tribunals and adjudicate, but would give advice as assessors,

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<sup>4</sup> Report of the Joint Select Committee on Railway Companies Amalgamation; Parliamentary Papers 1872, Vol. 13, Reports from the Committees at 67.

<sup>5</sup> Judicature Commission, *Third Report of the Commissioners*, (1874) (C.957) at 8 – 9.

<sup>6</sup> For a detailed consideration see, C. Bursset, *Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire*, Law and History Review (August 2016) Vol. 34, No.3 615.

“We are of the opinion that many cases involving for their comprehension a technical or special knowledge cannot be satisfactorily disposed of by the ordinary tribunal of a judge and jury and that the proper tribunal for such cases would be a court presided over by a legal judge, assisted by two skilled assessors, who could advise the judge as to any technical or practical matters arising in the course of their enquiry, and who by their very presence would frequently deter skilled witnesses from giving such professional evidence as is often a scandal to the administration of justice.”<sup>7</sup>

10. Problems with experts are nothing new! The Commissioners thought that there would be no practical difficulties in carrying this less radical proposal into effect. It never happened. Litigators and judges did not want it; they preferred the adversarial system of resolving commercial or technical issues through experts. The decision was a significant one because the courts in effect turned their backs on the development of a mixed tribunal for mainstream law and rejected the type of solution that had been adopted for railways.
11. Instead the judges solved the problem by the creation of the Commercial Court in London in 1895 – a specialist court that for over a century has been the world’s preeminent court for commercial disputes and has been much copied in recent years. As I explained in a lecture I gave to the Cardiff Business Club in January 1999, it is clear that the effect of the creation of the Commercial Courts was the transfer of commercial and business disputes to London, a trend that was not reversed until the creation of the specialist Chancery, Mercantile and TCC courts out of London in the last decade of the last century, almost 100 years later.

### *The County Courts*

12. These were established in 1846 to provide a simple and cheap means of determining disputes<sup>8</sup>; they were immensely successful – they were accessible, cheap and had a simplicity of procedure. In the nineteenth century, they were viewed as the tribunal of choice for carrying into effect modern legislative schemes.

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<sup>7</sup> Although see the power to appoint assessors under CPR r.35.15.

<sup>8</sup> The County Courts Act 1846 (9 & 10 Vict c 95).

“Every Member of Parliament who has a new legal measure on the stocks naturally suggests that the County Court shall be the instrument or machinery for carrying out his scheme. The staff is there, so all objections to the proposal on the score of expense are ingeniously avoided, and undoubtedly a considerable amount of important modern legislation relating to social subjects would have been impracticable if the useful domestic court of all work was not at all times available and equal to the occasion.”

13. However, by the beginning of the twentieth century, the attraction of the legislature to the County Courts was not what it once was. It took but a short time from the introduction of workmen’s compensation to produce an approach by the courts which discouraged the giving of further business to these courts; the judges and lawyers had quickly made that scheme a labyrinth of legal complexity.

*The introduction of social legislation in the early 1900s*

14. The conservatism that had seen the rejection of the scheme for assessors in mercantile cases, the disenchantment with the courts as a result of workmen’s compensation and the attraction of the continental model of providing for social benefits,<sup>9</sup> led in the period immediately before the First World War to the establishment of the first of many tribunals set apart from the courts – the Court of Referees for unemployment benefit being constituted by a representative of the employers, a representative of the employed and a chairman who was usually a lawyer.

**3. Tribunals in the course of the Twentieth Century**

15. It is quite outside the scope of this lecture to examine in detail the development of tribunals in the century that followed. But a clear picture can be obtained by reference to the three main reports which examined tribunals (1) Donoughmore (2) Franks and (3) Leggatt.

*(1) The Donoughmore Report: 1932*

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<sup>9</sup> Wraith and Hutchinson, *Administrative Tribunals*, (1973) at 33; Gilbert, *Evolution of National Insurance in Great Britain*, (196) at 253.

16. By 1929, the growth in the system of tribunals was modest and largely confined to national insurance and pensions.<sup>10</sup> The Lord Chancellor, Viscount Sankey, was able to eulogise the position on the courts:

“Amid the cross-currents and shifting sands of public life, the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice.”<sup>11</sup>

17. In contrast the use of tribunals was attacked in the same year by the then Lord Chief Justice, Lord Hewart, in a somewhat intemperate way in a book entitled *The New Despotism*;<sup>12</sup> typical of the attack were phrases such as “hole and corner fashion” to describe the failure to give reasons and “a queer sort of justice that will not bear publicity” to describe sitting in private.

18. In consequence of the attack by Lord Hewart, Viscount Sankey established a Committee under the Earl of Donoughmore, an Irish Peer and conservative politician, to examine the exercise of Ministers’ powers by way of delegated legislation and judicial or quasi-judicial decisions. It reported in 1932.<sup>13</sup> Although it accepted that the attack by Lord Hewart had been useful in leading to the examination of the system, it rejected Lord Hewart’s criticisms as exaggerated. The Committee saw tribunals as a useful part of the system of providing justice. The report is of particular relevance to my subject for three reasons:

- (a) First the Committee recommended that the presumption should always be that where a judicial determination was needed,<sup>14</sup> then that task should always be entrusted to the courts or what it described as a specialised court of law – tribunals such as the Railway and Canal Commission. It was only in specific circumstances that such decisions should be entrusted to Ministers or Ministerial Tribunals, such as the Court

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<sup>10</sup> See Appendix IV to the Report of the Donoughmore Committee.

<sup>11</sup> Speech in the Mansion House on 5 July 1929.

<sup>12</sup> at 48-9, 157-8.

<sup>13</sup> Cmd 4060.

<sup>14</sup> Section III, paragraph 9.

of Referees; however the specific circumstances were to be exceptional and only for justifiable reasons.<sup>15</sup>

(b) There was an acceptance that Ministerial Tribunals had much to commend them:<sup>16</sup> it identified six characteristics that supported their view.

- (i) Cheapness: where justice had to be done at minimum cost, they were likely to be cheaper than the ordinary courts of law;
- (ii) Accessibility: they were more readily accessible geographically;
- (iii) Freedom from technicality;
- (iv) Expedition;
- (v) Expert Knowledge;
- (vi) Uniformity of practice and decision making; they were better able to establish this than the lower courts.

I shall return to examine whether these six characteristics are now equally applicable to courts and tribunals.

(c) There was a narrow approach to what was required of such a Ministerial Tribunal:

- (i) It should be independent of the Minister;
- (ii) A party before the tribunal had the right to be heard (though not orally) and know the case he had to meet;
- (iii) Reasons should generally be given in a formal document;<sup>17</sup>
- (iv) Decisions should be published to give general guidance;
- (v) There should be a right of appeal on a point of law.

*(2) The growth of the tribunals: The Franks Report 1957*

19. The acceptance by the Donoughmore Committee that Ministerial Tribunals were suitable for judicial determinations arising out of social legislation was significant given the volume of social legislation in the period immediately following the Second World War.

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<sup>15</sup> Section III paragraph 10 and 21.

<sup>16</sup> Section III, paragraph 10.

<sup>17</sup> Section III, paragraph 13.

Some of the older Ministerial Tribunals were adapted and given new functions; new ones were created such the Rent and Agricultural Lands Tribunals; some took over work transferred from the courts, such as workmen's compensation. Many tribunals, as was the original purpose, determined disputes between the citizen and the State but some, such as the Rent Tribunals, determined disputes between citizens. There was a view that the courts could not have coped with the volume of business these handled; for example, 50,000 claims a year were decided by the National Insurance Tribunals.<sup>18</sup> The volume of business had vastly increased.<sup>19</sup>

20. It was in these circumstances that in 1955, the Lord Chancellor, Viscount Kilmuir, appointed a Committee under the chairmanship of Sir Oliver Franks, a mandarin, a diplomat and "one of the founders of the post war world",<sup>20</sup> to consider the working of the tribunals. It reported in 1957.<sup>21</sup> The interest of this Committee to my subject is the conclusion that it reached: that tribunals had come to stay; the tendency to establish them would increase rather than diminish, though they repeated the mantra that a decision should be entrusted to a court rather than a tribunal in the absence of special circumstances. They saw tribunals as often having the same advantages over courts as Donoughmore had spelt out:<sup>22</sup> The Committee concluded that Parliament

"having decided that the decisions with which we are concerned should not be remitted to the ordinary courts, should also have decided that they should not be left to be reached in the normal course of administration. Parliament has considered it essential to lay down special procedures for them....it is clear that there are certain general and closely liked characteristics which should mark these special procedures. We call these characteristics openness, fairness and impartiality."<sup>23</sup>

21. It is clear that there was a significant body of evidence that supported the advantages the Donoughmore Committee had set out.<sup>24</sup> Moreover there was a general contentment with

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<sup>18</sup> Memorandum of The Treasury Solicitor, Day 8 p 227; evidence of the Treasury Solicitor, Day 8 p 224.

<sup>19</sup> Memorandum of Sir Edward Bridges: Appendix I to the Minutes of Evidence of the Franks Committee, p.7.

<sup>20</sup> So described in the Dictionary of National Biography

<sup>21</sup> Cmnd. 218.

<sup>22</sup> Paragraph 38.

<sup>23</sup> Paragraphs 20 and 23.

<sup>24</sup> See for example the Memorandum submitted by the Federation of British Industries paras 3-5 12th Day (25th May 1956) Minutes of Evidence taken before the Committee on Administrative Tribunals and Enquires and para 5 of the



the way most tribunals operated. This can be illustrated by reference to the six characteristics identified by the Donoughmore Committee.

(i) *Cheapness:*

The chairmen of tribunals were paid less than judges; if experts were asked to sit with judges instead of tribunal chairmen, it would be a good deal more expensive.<sup>25</sup>

“Many of the disputes in question do not warrant ... the services of a highly remunerated judge; they are of a nature in which justice can be done just as fully by a practising or retired member of the legal profession, or by a layman whose specialised knowledge more than compensates for the lack of training in the impartial examination of facts which is acquired by practice at the Bar or as a solicitor . . .”<sup>26</sup>

Parties in several tribunals often did not have legal representation and in some lawyers were excluded.<sup>27</sup>

(ii) *Accessibility*

Tribunals were geographically convenient; in speaking of Agricultural Lands Tribunals, one of the chairmen pointed out:

“It is of course of great convenience to all the parties concerned that the hearings before the Tribunals are held at a place which is normally in close proximity not only to where the land is situated but also to where the parties themselves reside.”<sup>28</sup>

(iii) *Freedom from technicality*

“The procedure [was] quite informal and free from the inevitable sense of intimidation felt by the ordinary man in going into a court of law . . . The attitude of the tribunal is friendly and helpful . . . I do not really feel that people will appear unrepresented before County Court Judges.”<sup>29</sup>

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Memorandum of the British Employers' Confederation 13th Day (4th June) Minutes of Evidence taken before the committee.

<sup>25</sup> Evidence of the Treasury Solicitor in respect of Lands Tribunals – Day 8 p 226.

<sup>26</sup> Written Memorandum of Permanent Secretary to the Lord Chancellor para 9.

<sup>27</sup> See Permanent Secretary to the Lord Chancellor paras 1625-1629 and 1637; The Hardship Committees under the National Insurance Act 1948; see Written Memorandum of the PS to LC para 5.

<sup>28</sup> Para 25 of the Written Submission of Sir Frank Costello to the Franks Committee.

<sup>29</sup> Treasury Solicitor p 223, p 254; See also the Memorandum submitted by the Association of British Chambers of Commerce who wished the informality to be preserved.

There was, as one witness pointed out,<sup>30</sup> a stark contrast with the courts where in the High Court the statement of procedure in the then White Book ran to 3,850 pages (excluding the index and tables which comprised a further 814) and in the County Court where the Green Book was 1,925 pages long excluding the tables and index which comprised a further 420 pages. Today, Volume 1 of the White Book runs to 2,840 printed pages, with the second volume running to 3,236 pages.

(iv) *Expedition*

Speaking of one tribunal it was observed,

“. . . it has the advantage of being composed of Judges with specialist knowledge, which tends to make for despatch . . .”<sup>31</sup>

(v) *Expert knowledge: The evidence disclosed two distinct aspects of expert knowledge:*

(a) Expertise gained by the lawyer chairman in the course of his work;

“County court judges could hardly be expected to carry out numerous inspections of furnished premises, mostly of the humblest kind . . . Inevitably the county courts would have relied more on strict proof of the facts in court, with the necessary concomitants of legal representation and expert witnesses, and more delay and expense.”<sup>32</sup>

(b) Partnership in decision making with the expert lay member. One chairman saw it in these terms

“It would . . . be quite impracticable for the matters which come before the Tribunals to be dealt with in an ordinary Court, either by a High Court or a County Court Judge. Neither would have the time or perhaps the inclination to go trampling over farms and agricultural land at all times of the year and in all weathers as the members of the Tribunals have often had to do. The inspection of the holding concerned is indeed an integral and sometimes crucial part of the proceedings . . . If the cases were heard in an ordinary Court the Judge would have to rely entirely on the reports of surveyors and other witness and in any event would probably require the assistance of ‘assessors’ . . . Due to the way in which the Tribunals are constituted the

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<sup>30</sup> Professor Robson, memorandum para 17.

<sup>31</sup> Memorandum of the Ps to LC para 6.

<sup>32</sup> Treasury Solicitor, Day 8 p 227; he saw inspection as being the principal advantage of the Agricultural Lands Tribunal – more was obtained from that than hearing evidence or reading documents.

‘nominated members’ do themselves fulfil all the functions of technical ‘assessors as well as being members of ‘the Court’.’<sup>33</sup>

(vi) *Uniformity*

The publication and dissemination of decisions in the larger tribunals or the small size of the other tribunals made for general dissemination.

22. However not all were pleased with the tribunals as they then stood. Mr Douglas Frank, later a most distinguished President of the Lands Tribunal, in his memoranda pointed out:

“There are a considerable number of Tribunals dealing with matters relating to land and property. Some of these Tribunals, such as the Lands Tribunal are held in high repute and others are the subject of dissatisfaction. An examination of these various Tribunals, and my experience of them, has led me to the conclusion that dissatisfaction springs from one or more of the following cases:-

- (a) Lack of professional qualifications and experience.
- (b) Absence of judicial attitude.
- (c) Local prejudice
- (d) Excess of informality.
- (e) Failure to give reasoned decisions.
- (f) Inaccessibility.”<sup>34</sup>

There was also criticism of the judicial review of the Executive and in particular of the Rent Tribunals and the enormous cost of litigation and the need for a proper procedure. Although these criticisms were made, there was a general satisfaction with the way in which tribunals were operating and in particular with the expertise they could bring to dispute resolution.

*The contrast with the courts in the middle of the twentieth century*

23. The contrast with the way the courts operated at this time in the twentieth century was striking:

- a. The existence of tribunals was seen as saving the courts. At that time there were just over 40 High Court Judges, just under 80 judges of the County Court and a very few

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<sup>33</sup> Paras 25 and 26 of the written evidence of Sir Frank Costello CBE Chairman of the Agricultural Lands Tribunal for South west England.

<sup>34</sup> P. 11 of Appendix I to the Minutes of Evidence Memoranda submitted by persons and organisations who did not give oral evidence.

permanent judges of Quarter Sessions and other criminal courts. The then Permanent Secretary to the Lord Chancellor saw the judiciary in terms of a cadre of a very few.

“It is plain, I think, that if all the disputes now determined by administrative tribunals had to be transferred to the ordinary courts, such a transfer would necessarily involve the creation of a large number of additional Judges, particularly in the County Court. For unless judge power was increased very significantly, the inevitable result would be to slow down the administration of justice in those courts and speed is regarded as essential in many classes of case now dealt with by administrative tribunals.

. . . I believe that it is essential for the administration of justice as a whole that, because the Bench should be of the highest possible quality, any proposals for dilution should be jealously regarded . . . I believe. . . that the system of administrative tribunals, as it has grown up in this country has positively contributed to the preservation of our ordinary judicial system.”<sup>35</sup>

- b. Second, this desire not to overwhelm the courts was fostered by a conservative attitude amongst the judiciary to the creation of more specialised courts. The creation of the Restrictive Practices Court in 1957, where a judge sat with two laymen, is a paradigm example; there were clearly good arguments as to whether the issues for this court were justiciable, but the attitude of the judges was generally hostile, even though there was a lack of business in the courts. They did not like, for example, the idea of a judge being one among two laymen as members of a court or the fact that there might be a political dimension. The Chancery Division was particularly hostile. Lord Devlin was in a minority of one in favouring it:

“I welcome the decision that issues of great importance between the Government and individuals should be determined by the High Court.”

The majority of judges had a similarly hostile attitude to Lord Devlin’s suggestion that the Commercial Court (which then had very little work) should look to reforming itself by a judge sitting with lay persons. It is not the time to examine that proposal, but it is of interest that one of the judges, Megaw J, whilst advocating more modest reforms, tentatively suggested similar radical reforms, though describing his proposals as “heretical”; his ideas included the use of lay persons along the lines of the

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<sup>35</sup> Written Evidence of Permanent Secretary to the Lord Chancellor para 8 – 10.

Restrictive Practices Court. He saw them possibly serving as members of the Commercial Court deciding questions of fact and serving as assessors. He concluded:

“I believe that this might have a very useful effect, not only in keeping the law merchant in touch with reality, but also because of the influence which it could exercise in the commercial community in creating a feeling of partnership in the development and administration of commercial law”

(3) *The Leggatt Review Report in March 2001*

24. The expansion of the number of tribunals continued in the remaining decades of the last century, the most important being the creation of tribunals that have jurisdiction over liberty (Mental Health and Immigration) and the expansion of tribunals that deal with disputes between citizens, particularly the Employment Tribunals.
25. 43 years after the Franks Committee, Sir Andrew Leggatt, by then a retired Lord Justice, was appointed to chair a Committee which conducted a review of tribunals. By that time there were 70 different tribunals, but only 20 dealt with more than 500 cases a year.
26. The picture of contentment current at the time of Franks had changed. The Committee concluded that the procedures in some were old fashioned and daunting to users, their IT and training were under resourced and the services provided to them were not efficient.
27. It proposed in its report in March 2001 a system that was independent, coherent, professional, cost effective and user friendly, by making the 70 separate tribunals into one tribunals system, ensuring that they were independent of their sponsoring department by having them administered by one service, providing proper training and providing a procedure in which unrepresented parties could appear without apprehension. Of the characteristics set out by Franks and Donoughmore, the Committee saw independence as the most important; tribunals should be as independent as the courts.

**4. Developments in the Courts and Tribunals in the Past Decades**

28. It is striking that the Leggatt report's stringent criticisms of the tribunals lay in their lack of training, the lack of active case management, and the need for a uniform procedural code.

29. In these and other respects there have been fundamental changes which now need to be taken into account in deciding where the future lies.

(1) *Changes in the courts*

30. First the changes in the courts have been considerable.

- a. First in April 1999, the civil courts had undergone the biggest procedural changes since 1873, with the introduction of a single procedural code, the CPR, and active judicial case management.
- b. Second, the size of the judiciary had expanded enormously; there are now about 1,400 judges who sit in the courts, excluding Deputies and Recorders.
- c. Third, a number of factors had contributed to a wider view of the role of a judge. The most obvious is the effect of the Human Rights Act, 1998 but less obvious is active participation by judges in bodies such as the Parole Board, as well as in the tribunals themselves.

(2) *The effect of the constitutional changes*

31. There have been a number of profound constitutional changes.

- a. In 2005, the Constitutional Reform Act reformed the office of Lord Chancellor and made the Lord Chief Justice head of the courts' judiciary and responsible for, amongst other things, judicial deployment.
- b. This was followed in 2007 by equally profound reform of the tribunals themselves. Building on the Leggatt Report, in 2007 the Tribunals, Courts and Enforcement Act radically reshaped the tribunals. Except for a limited number of exceptions, such as the Employment Tribunal, a single tribunals system, with a first-tier and Upper Tribunal, was created from the tapestry of subject-specific tribunals that had grown over the course of the 20<sup>th</sup> Century. In this it would mirror the reforms to the courts carried out in the 19<sup>th</sup> Century.

(3) *Parallel systems of governance etc*

32. The changes in the governance, support and training have been based on the same principles
- a. The new system has a single tribunals' judiciary, and also utilises courts' judges for the most important leadership posts.
  - b. It has a governance system similar to that of the courts. The Senior President of Tribunals, who is a judge drawn from the senior courts of England and Wales, Scotland or Northern Ireland. The Senior President has many of the same responsibilities for tribunals which the Lord Chief Justice has for the courts.
  - c. The tribunals have their administration carried out by a Tribunals Service sitting alongside Her Majesty's Courts Service. These were merged in 2011 to create HMCTS.
  - d. The systems for pay and pensions are the same.
  - e. The Judicial Studies Board, now the Judicial College, ensured judges had been subject to an increasing amount of training from the 1980s; the training of the single Tribunal system has been undertaken by the Judicial College.
  - f. Since the Crime and Courts Act 2013, greater flexibility in the deployment of judges from the tribunals into the courts and vice versa has been possible.

(4) *Overlapping jurisdictions*

33. These changes were also mirrored by further changes which have blurred any historic distinction between the courts and tribunals. The most striking is the growth in parallel jurisdiction, a point made recently in a speech by Sir Ernest Ryder, the current Senior President of Tribunals, when he referred to the fact that the courts and tribunals have 'overlapping jurisdictions in a number of areas'. He highlighted two of them: the courts and tribunals, in the form of the Employment Tribunal and the Property Chamber (and its equivalent in Wales) in respect of property disputes, have overlapping jurisdictions.<sup>36</sup> Sir

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<sup>36</sup> E. Ryder, *The Modernisation of Access to Justice in Times of Austerity*, (2 March 2016) at [33] <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf>>.

Michael Briggs in his recent Civil Courts Structural Review drew attention to the same issues.<sup>37</sup> Other examples can be given.

34. Parallel jurisdiction is not without problems, as the courts learnt in the 19<sup>th</sup> Century. At that time, different courts had overlapping jurisdiction for disputes in relation to companies. The same claim could be litigated before different courts, with different results. Where parallel jurisdiction incorporates limits so that a single action must effectively be litigated before two different fora, unnecessary complexity, cost and delay are the result. No one benefits from this, least of all the litigant. Again the 19<sup>th</sup> Century saw this issue at its most acute for the courts, where litigants had to issue proceedings for discovery in Chancery to assist their claims at common law. Sir Michael Briggs highlights similar problems in property matters in his report, building on work done by the Civil Justice Council under a working party chaired by the President of the Property Chamber of the First-tier Tribunal.<sup>38</sup> We have seen the development of a situation as between courts and tribunals that existed as between the courts in the 19<sup>th</sup> Century.

*(5) A single judiciary*

35. But we have in reality a single judiciary: the courts' and tribunals' judiciary. Some judges may sit predominantly in the courts, some in the tribunals. Others sit for significant periods of time in both. This is particularly true of courts' judges who sit in the Upper Tribunal. And post-2013 the judiciary is developing the means by which there is greater deployment of tribunal judges into the courts. With common training and common qualifications for the legally qualified judges in both courts and tribunals, and comparable provisions governing their deployment across the courts and tribunals, the idea that we have two different cohorts of judges sitting in two different sets of judicial forum is becoming increasingly historic a concept.

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<sup>37</sup> M. Briggs, *Civil Courts Structure Review*, (July 2016), chapter 11 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>>. See also the Civil Justice Council Report: <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf>

<sup>38</sup> *Ibid.* at 108.



(6) *A re-examination of the six criteria set out by Donoughmore*

36. But yet, it could be said there are differences between the courts and tribunals. Let me look back to Donoughmore's six criteria.

(i) *Cheapness*

37. There are many aspects to providing an inexpensive forum – three lie outside the scope of this talk – the fees charged for access, the availability of legal representation and the risk of the loser having to pay the costs of the proceedings. However, the concept that the cost to the State of a tribunal was cheaper than a court has disappeared. Salaries and fees paid to courts and tribunals judges are now, broadly speaking, on the same level, with both being determined in the light of independent assessment by the Senior Salaries Review Board. Here we see another important factor in the equalisation of the two systems.

(ii) *Accessibility*

38. The concern has always been local justice. Courts and tribunals are now increasingly utilising the same buildings. We have a system of multiple use of hearing centres; save possibly in London or one or two of the largest cities, buildings and court rooms are being or will be shared.

39. We are also moving to a system where process and hearings will in a significant degree move online. An online process and online hearing in a system that is both digital by default and design is one that is intended to be more accessible, as well as more inexpensive for users and the State, but importantly is one that presents a future where distinctions between courts and tribunals become formalistic and increasingly historic. Again, it seems that there has been and will be greater equalisation.

(iii) *Freedom from Technicality*

40. The most significant change has been the greater use of judge-based case management of proceedings by both courts and tribunals judges. In every jurisdiction, there has been a move to ensure that the forum takes charge of the case at the outset, identifies the issues and timetables its resolution. The real question by which the procedure of any forum has

to be assessed is, “Does the procedure identify the issue to be determined and then assist the making of that determination in as informal and as flexible a manner as possible for the decision which has to be made?” There is again equalisation.

41. The development of digital systems is being progressed on the principle that there will be a single system for the civil and family courts and the tribunals. Systems analysis has shown something of which we ought all to have been aware, namely that the processes are essentially the same whether one is in a court or tribunal. Common systems again minimise differences between the jurisdictions and provide comparable levels of technicality or rather, greater simplicity.

42. Both courts and tribunals deal with litigants in person. Much tribunal procedure was based on the assumption that the procedure must be premised on this fact. Courts are following suit at lower levels of dispute resolution.

(iv) *Expedition*

43. The speed at which any forum can reach a decision depends on the complexity of the issues and the resources available to the parties and the forum. All fora for decision making generally, including some arbitration schemes, have available means for the speedy resolution of disputes, but each seems to provide the opportunity for delay by a party determined to frustrate the process. Again there has been an equalisation.

(v) *The need for expertise – the domination of the specialist forum*

44. There are two circumstances that have to be distinguished.

(a) *The need for a decision maker to have specialist knowledge*

There is undoubtedly a perceived desire by most litigants to have a judge or single tribunal member who has deep knowledge and experience of the type of case to be tried. As lawyers become more specialised, the concept of what is deep knowledge of the area of law and experience becomes ever narrower; that perception is imparted to the litigant.

There is undoubtedly greater pressure from litigants and lawyers for greater specialisation in any forum. The reasons are various – the case will go quicker before a forum where the decision maker knows the subject; it will therefore cost less. It is felt that the more expert the decision maker is, the greater the chances they will get it right – how often was it said in criticism of a Court of Appeal decision that its composition did not reflect expertise in the subject. The provision for specialisation is self evident in tribunals and has long been the reason for their creation. However, specialisation has also been long recognised in some courts such as the Commercial Court or the Patents Court. The requirement in a court for specialist judges in almost every sphere is being encouraged by two different trends.

- a. First, there is a much tighter system of training and authorisations; for example, judges are only allowed to try care work if they have been trained and have an authorisation.
- b. Second, but of equal significance, in my view, in areas where authorisations are not needed, is the greater attention paid in the allocation of work to the experience of the judge in a particular area of law; one of the most important parts of the role of the judge in charge of a court centre or group of courts is to see cases are allocated to the judge with the right experience. Thus there is undoubtedly a trend to the specialist as much in the court as in the tribunals.

(b) *The need for a judge to sit with others with specialist knowledge*

The second aspect of expertise relates to a mixed tribunal. As I have attempted to show, the idea that a legally qualified person should sit with two others to form a forum has a long history that has met with varying degrees of judicial acceptance or resistance. In examining this issue, it is important to be clear about the capacity in which the other members sit. If they sit as assessors, then they have no part in the decision making; outside the narrow sphere of the Admiralty Court, where assessors have advised on navigation for a very long time, there has been little acceptance of the assessor.<sup>39</sup> On the other hand a forum where the decision is made by the judge (or lawyer) and two non

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<sup>39</sup> Although see Equality Act 2010, s.114 (7).

lawyers (one or both of whom has specialist knowledge) has proved a popular and workable form of tribunal, both for tribunals established by the State and for arbitration tribunals.

(vi) *Uniformity of decision making*

45. Justice which is not administered consistently is not justice. One of the functions of an appellate structure is to ensure consistency. One of the problems in the 19<sup>th</sup> Century in terms of different courts dealing with the same issues of law was inconsistency, and lack of legal certainty. That was resolved by the creation of a single High Court and a Court of Appeal; the latter providing authoritative decisions on appeals from both the County Courts and High Court. Appeals from both the courts and the tribunals lie to the Court of Appeal. Justice is not administered along parallel lines at the highest level.

**5. The way forward**

46. Where does this leave us?

- a. We have both courts and tribunals providing a forum for dispute resolution. They have both over the last two decades become increasingly similar in structure, personnel and process. Innovation is a hallmark of the courts as the reforms in the courts such as the Family Courts and the Chancery, TCC and Commercial/Mercantile Courts demonstrate. Some differences remain, not least the tribunals' focus on specialisation, though as I have shown specialisation is also an aspect of the trends in the courts.
- b. We have both the courts and tribunals administered by the same body: HMCTS. That body is currently undergoing a reform process that will see administrative processes and courts and tribunals procedure digitised through what will be a single and uniform IT system. Out of that common processes and practices for both courts and tribunals will be created.
- c. The distinction between the courts' and tribunals' judiciaries is one that is an ever decreasing one.

47. Nonetheless we have not acted on the change that has occurred. We have retained the formalistic divisions between the courts and tribunals concerning their jurisdiction to resolve particular types of dispute; we have retained the differences in procedure; we have retained the difference between the court judiciary and the tribunal judiciary. These distinctions ought to be relegated to history as they aid no one, particularly litigants.
48. This has led to one conclusion, as set out in the joint statement that the Lord Chancellor, the Senior President and I issued in September 2016 – the plan “to create one system and one judiciary”<sup>40</sup>. I would envisage this plan would bring about:
- a. an end to the parallel existence of courts and tribunals and the parallel courts and tribunals’ judiciaries.
  - b. The creation of a single judiciary in a single system - a system that combines the best qualities and processes of the present courts and tribunals systems.
49. In this way we can ensure that trained, expert judges are capable of deployment to the right dispute; and that that dispute can be determined without the need of artificial and formalistic resort to the assistance of another court or tribunal. We can also ensure that where proceedings can benefit from specialist viewpoints, they can be secured as they currently are in the tribunals by the use of a mixed forum. And we can imbed into the whole system the aim of developing innovative processes long known in the tribunals, which is now becoming part of the courts’ approach.
50. This is not a reform for its own sake. No reform should be undertaken on such terms. It is reform with a very specific purpose: to improve the delivery of justice. It is a reform based on providing the best forum for dispute resolution for all court users.
- 6. What does this mean for great cities out of London such as Cardiff in the resolution of Commercial and other business disputes?**

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<sup>40</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553261/joint-vision-statement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf)

51. May I now return to the importance of this discussion to Cardiff and the cities out of London and the fundamental question of what type or types of forum should we have to resolve the huge range of business and commercial disputes?
52. This calls for radical thought as to what is best for justice. It is thought that must not be dominated by London. It must be thought that strengthens justice out of London – a task that requires considerable resilience and fortitude, as the trend is undoubtedly to look at reforms under the strong influence of those whose interest it is predominantly in London.
53. Justice out of London was the topic I addressed on 21 October 2013 in my first lecture after my appointment as Lord Chief Justice, the Birkenhead Lecture which I gave in Gray's Inn. Apart from touching on what the profession should do, a topic I have not touched on today, I addressed three issues for the judiciary – greater deployment out of London, the provision of a proper infrastructure and uniformity of procedure. Although that was exactly three years ago, I did not envisage we would secure the investment finally announced this year and the scope not only of its ambition, but its deliverability. When I then spoke of procedural uniformity, I spoke of uniformity in a narrow sense – the elimination of local practices within each of the jurisdictions.
54. The fact that we have come a long way in so short a time is a prosaic illustration of the pace of change and the need now for radical new thought about the type of forum we need in the medium term and how we best capitalise on the unification of the courts and tribunals by working out the best form of tribunal for the resolution of business and commercial disputes.
55. On the way, there will be interim solutions such as that envisaged by a report for the Civil Justice Council for the resolution of property disputes by Lord Justice Briggs for the resolution of employment disputes. My invitation to you is to think what is best for justice in Cardiff and the principality of Wales. The same question must be asked for the regions and great cities of England.

56. At this time, I do not want to put forward my own views. I have simply told you where we are now. The history I have set out demonstrates that the issues are perennial and different solutions have been considered appropriate at different times. But ideas from the past may still provide ideas for the future. There is much on which we need to hear from you.

## **7. Conclusion**

57. The fact that it has taken a century of development of the tribunals, and the last two decades of the courts and tribunals growing together, to bring us to this position would perhaps have brought a wry smile from the Commissioners of the 1870s. They might even have said that the common law works itself fine over time. It has, and that time has now come to combine our courts, tribunals and judiciaries and build the best possible court forum for dispute resolution we can. In October 2015 Sir Ernest Ryder, the Senior President, said at the Legal Wales Conference, that it was time for one justice system, with one judiciary, providing better quality, and affordable, justice for all.<sup>41</sup> That idea I wholeheartedly endorsed and it was embodied in the joint statement. It is now a central part of the reform programme.

58. The question now is what should you as practitioners and judges in Wales encourage us to do to capitalize on this and the other changes that will take place in the course of the modernisation programme to provide the best form of State dispute resolution for business and commercial disputes in Cardiff and the principality of Wales and the regions and great cities of England.

59. Thank you

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<sup>41</sup> E. Ryder, Speech to Legal Wales Conference (9 October 2015) at 5 – 6 < <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/spt-legal-wales-conference-2015.pdf>>.