# ADMINISTRATIVE TRIBUNALS AND THE LAW

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF BACHELOR OF LAWS, UNIVERSITY OF NAIROBI.

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C O N T EN T S

# PREFACE

In this paper such problems as follows are investigated. What are the functions of tribunals in a state? Are these bodies substitutes for the courts or are they altogether separate adjudicatory institutions? How do these bodies operate, how are they constituted and do we still need to maintain them in our system? The state of the administrative law especially as regards judicial review of administrative action is also discussed and other problems.

On the whole there is an attempt not to see tribunals as merely cheaper, quicker and more informal than the courts of law. They are fairly important centres of power and can be used either to bring good to the majority of the citizens or to oppress the economically weak.

The paper turned out to be too long and a very expensive exercise. Perhaps the Faculty Board may consider streamlining things somewhat. Mr. G.K.Rukwaro of the Faculty of law supervised the writing. To him and to the typist I say ' thank you so much'.

# TABLE OF CASES REFEREED TO

R. v. Gaming Board exp. Benaim (1970) 2 All E.R. 528

R .v. Governor of Brixton Prison ex parte Armach (1968)A.C. 192.

R.V. Inland Revenue Commissioners, Re Nathan (1884) 12 Q.B. 461.

R v. Medical Appeal Tribunal ex parte Gilmore (1957) 1 K.B. 338

Re Marles Application (1958) E.A. 153.

R.v. Metropolitan Police Commissioner ex parte Parker (1953) 2 All E.R. 717.

R .v.Northumberland Compensation Appeal Tribunal (1951) 1 K.B. 711

R.v. Paddington Rent Tribunal ex parte Millard (1955) 1 All E.R. 691.

Rayner v. Stepney Corporation (1911) 2 Ch. 312.

Re H (K) ( an infant) (1967) 2 Q.B. 615.

ARidge v. Baldwin (1962) 1 All E.R. 834

Simms Motor Units v. Ministry of Labour (1946) 2 All E.R. 201.

University of Ceylon v. Fernando (1960) 1 W.L.R.223

Vine v. National Dock Labour Board (1956) 3 All E.R. 939

Woollett v. Minister of Agriculture (1954) 3 All E.R. 529

Wotton v. Central Land Board (1957) 1 W.L.R. 424.

# TABLE OF STATUTES

Tribunals set up by the following Acts are referred to:

Advocates Act Cap 16 (Revised 1967)

Agriculture Act Cap 318 (Revised 1967)

Hotels and Resturants Act 494 (Rev. 1972)

Income Tax Act Cap 470 (Rev. 1977)

Land Acquisition Cap 295 (Rev. ed. 1970)

Land Adjudication Act Cap 284 (Rev. 1977)

Land Control Act Cap 302 (Rev. 1968)

Liquor Licensing Act Cap 121 (Rev. 1972)

Medical Practitioners and Dentists Act Cap 253 (Rev. 1972)

Pharmacy and Poisons Act Cap 244(Rev. 1972)

Rating Act Cap 267 (Rev. 1972)

Teachers Service Commission Cap 212 (Rev. 1968)

Trade Disputes Act Cap 234 (Rev. 1972)

Traditional Liquor Licensing Act Cap 22 (Rev. 1972)

Transport Licensing Act Cap 404 (Rev. 1962)

Valuation For Rating Act Cap 266 (Rev. 1972)

# TABLE OF PRINCIPAL ABBREVIATIONS AND MODES OF CITATION

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|---|---|---|
| A.C. | - | Appeal Cases (1891 onwards). |
| All.E.R. | - | All England Reports. |
| CH | - | CHancery Reports. |
| E.A. | - | East African Law Reports (1957) onwards) |
| E.A.C.A. | - | East African Court of Appeal (before 1957) |
| E.A.L.J. | - | East African Law Journal |
| E.R. | - | English Reports. |
| H.L. | - | House of Lords. |
| Ex.D. | | Exchequer Division |
| K.B. | - | King's Bench Reports. |
| K.L.R. | - | Kenya Law Reports |
| M.L.R. | - | Modern Law Review |
| Q.B.(D) | - | Queens Bench (Division) |
| Sol.Jo. | | Solicitors' Journal. |

# INTRODUCTION

## NATURE OF THE PROBLEM

Every Government attempts to or so it should to place the promotion of economic development and growth at the forefront of its objectives. Unchecked economic activity would have serious and even harmful social effects. This is one of the reasons why governments tend to have rather consistent social policies which are meant to streamline the adverse effects issuing out of the many economic and social relationships in the state.[1] In both areas of policy, tribunals of different kinds play an important part in assisting both in formulation and application of policy. In other words tribunals contribute greatly in ensuring good administration and secondly in providing a means by which individual rights and duties are taken into account in the implementation of policy.

Policy include such important functions as economic planning, regulation of private enterprises, development and distribution of social services, nationalisation etc. Indeed a vast amount of complex rules and regulations have been laid down to ensure fairness, efficiency and impartiality in the performance of these governmental functions. This necessitates the government to exercise increasing powers and inevitably cases will come up which do not fit the rules, or the way in which the rules are applied may be thought to create injustices, to be internally conflicting or capable of many interpretations. An ordinary citizen caught up in such a situation can act in several ways especiall after the relevant statutory body has taken a decision against him. He can write to the papers, consult his MP or a councillor, go to the ordinary courts of law etc. but normall

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1. An interesting discussion of this nature appears in Kathleen Bells' Book " Tribunals in the Social Services", 1965.

a decision of an administrative tribunal can be challenged by way of appeal to a more senior tribunal established for the purpose.[2]

We have so far seen that tribunals play an important role in the public administration. But what really are " Administrative Tribunals ? Admittedly not many ordinary men know even of the existence of these bodies until they come into contact with them. For instance an ordinary worker, dismissed by his employer may petition the industrial court to seek reinstatement if he believes he was wrongly dismissed. Asked what a tribunal is such a worker may say that it is a group of three wisemen, seated, listening to arguments or evidence from opposing parties and frequently asking searching questions and in the end giving a brief and decisive report or decision. This is as a good definition as any of a tribunal. Truly, courts of law, displinary committees of private institutions and clubs and other adjudicatory bodies are tribunals. However, the term'administrative tribunal' technically means those bodies purposely established under an Act of Parliament to hear and determine disputes between one individual, two individuals and the administration, and three, to regulate a sector of the economy and settle any disputes that may arise thereon. Thus these functions have been summarised as orderly implementation of social legislation and secondly as mainly regulatory , in the provision of social services.[3] Therefore tribunals are increasing as fast as social legislation and governmental regulation ( in transport and liquor licensing for example) are on the increase. There is no doubt that they will continue to grow in number and stature since the courts are already overcrowded.

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2. In certain countries e.g. Britain, Tanzania,Sweden etc. an individual can seek redress from an independent institution, the Ombudsman, generally supervised by Parliament.

3. Abraham Kiapi: Administrative Tribunals in East Africa (1975) 11 E.A.L.J. 35.

It is the aim of this paper to trace the development or undevelopment of administrative law in general and that of administrative tribunals particularly. I will then discuss the nature of tribunals and their manner of operations why they are preferred to take the place of ordinary courts of law in certain cases, and if the claimed advantages they have over the ordinary courts are real or merely imaginary. I will examine the controversy as to whether administrative tribunals are part and parcel of the judicial or the administrative arm of government and whether it makes a difference where they belong. I will further evaluate the arguments as to the need for independent review of administrative tribunal decisions and finally discuss the law with particular reference to the present state of development of administrative law as far as theory goes. Time and space permitting, I will suggest on which lines I feel administrative law should develop further.[4]

I may from the start intimate that my object is only to give an outline or scarcely more, of the very large variety of adjudicating agencies which over and above the traditional courts of law today have the powers to decide upon the rights, duties, claims and liabilities of thousands of citizens in innumerable different relationships. Time, facilities and space do not allow a more comprehensive work. As others in my situation have said elsewhere,[5] much of the work still awaits the patient research and investigation in the field most of which I am not capable of now. Perhaps another place , another time. A comprehensive work of this nature ought to comprise reports etc compiled from actual proceedings and original records of tribunal operations. Such a survey ought to provide the machinery

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4. The assumption here is that it is still developing (one of my major hypotheses in fact)

5. See particularly C.K. Allen on " Administrative Jurisdiction" (Stevens, 1956).

necessary to form a firm rational basis for the law. Meanwhile I intend to lay down most of the theoretical framework of tribunals and administrative law right from the English origins in the early 20th century down to today when it can be said " There is in fact scarcely an area of human activity where tribunals do not exist " [6] and tribunals deal with the administrative law mainly.

Tribunals may be grouped into various categories, for example, those made up of ordinary citizens, not forming part of the administration and those made up of ministers and other administrators of various ranks. The generally accepted categorization is that of firstly ministerial tribunals where members are appointed by the relevant minister from his ministry and whose deliberations constitute mainly policy considerations, secondly in certain cases where the ministers assume the powers of adjudication especially in Local Government, Lands and Agriculture. Thirdly, Domestic Tribunals mostly composed of professional associations, clubs and others. Some of these tribunals are statutory so that appeals from them lie to the courts. It is true that such tribunals have nothing to do with the public authorities and public administration, but since the courts of law use the same methods to control their jurisdictional exercises as they do in the care of administrative tribunals it is as well to group them together all being generally statutory tribunals. Finally, special (ad hoc) tribunals which are peculiar from others and within themselves. This last group of tribunals is not as common as the others and can be distinguished from the others in that it has no signs of permanency. Indeed most ad hoc tribunals are set up merely to conduct some inquiry for instance an air disaster, make a report, etc. and dissolve itself immediately after.

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6. Kathleen Bell (above).

Can a tenable definition of administrative law be extracted from the foregoing discussion? It has been argued that parliament lays down the general principle, the policy, and all that the administration is involved in is the application of that general principle of particular facts or sets of circumstances and at times also requires the taking of discretionary decisions, within the framework of the general policy provided . Administrative law is thus, like its cousin, constitutional law, a part of the public law, which unlike the latter is not merely descriptive, but examines the organs and organization of Government. Administrative law concentrates on individual trees whereas constitutional looks at the forest as a whole. Administrative law mainly deals with the rules some of them of law, others not strictly so; which are concerned with the conduct of the general business of government within those broad principles laid down by the policy-makers, the politicians and others.[7] This will appear, hopefully more clearly as I trace the development of this branch of the law down the ages. As usual with much of our legal system and legal history studies, England is the starting point. And in England it is widely accepted that tribunals are preferred to the courts of law because they provide redress cheaply, their procedures are simple and in formal and because of this reason their determinations take shorter times than the courts normally do. Other advanced reasons include the fact that most tribunal members are experts in the particular field and not likely to make many mistakes. Then there is also the question of implementation of government policy which the courts tend to shun. Suspicions have also been expressed that this is possibly a means by which the government attempts to shun the responsibility of its activities.

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7. See Generally Garner and Yardley on Administrative Law texts.

All in all tribunals have so far proved a worthwhile institution which acts as a compromise between the independent judiciary and the inherently arbitrary power of the executive arm of government.

In tracing the historical background of Administrative law and tribunals it will be noted that several explanations are given by different authorities. In the last analysis however they amount to the same things; that the common law based on an individualistic conception of society and the protection of individual liberty and property even to the peril of the majority had come to prove a miserable failure in harmonizing the increasing need of government control and the time honoured principles of freedom of contract, rule of law and the separation of powers.

# C H A P T E R  I

## THE DEVELOPMENT OF ADMINISTRATIVE LAW AND ORIGINS OF ADMINISTRATIVE TRIBUNALS.

It is today accepted all around that before the advent of colonialism the tribunal idea was a common institution to most of Kenya's ethnic groups. Perhaps the African model was different from the English model that purports to be based on the Magna Cartas promises of " trial by his equals" and "judgment by his peers", which incidentally Garner says are at the root of much of the English development of judicial and administrative procedures. Much of the people's disputes were settled by means of a tribunal of one type or another. It is however a truism to state that this is not the real origin of the present administrative tribunals. The white man as is characteristic of most conquerors introduced their political, legal and administrative systems into Kenya and to study the origins of these one has got to go back to England and trace the administrative legal history. Fortunately, one does not need to go farther back than 1900.

An English writer has said "

> " Tribunals and inquiries grew up as the logical result of finding that the problems of law and administration had grown too voluminous and detailed for the ordinary courts to be able to deal with them without prejudicing the work with which they were already accustomed to deal".8

This is only one side of the truth. Another is that events towards the close of the 19th century saw the abandonment of the famous principles of laissez faire. The state

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8. Yardley p.27.

interfered more and more with the individuals' interests and liberties in favour of the wider community. A certain degree of individualism nevertheless remained. Change was long overdue especially after much of the " modern civilization" and industrialization stage had been attained. There was great need for state organs to provide services to the people and a need for redistribution of wealth by deliberate government action and not merely leave things to the " natural forces in a free economy". These were the " welfare state" policies which resulted into an environment that provided much opportunity for disputes between administration and individual citizens. The courts of law were already crowded with criminal and civil litigation mainly, and at any rate courts were not considered good grounds for determining policy disputes. So the tribunal idea was conceived and the first statutes laying down provisions that set up tribunals were in 1908 and 1911.[9]

Also in Britain there never was a time when remedies for all possible wrongs eas provided for by the common law, and even where it provided remedy very many technical defences existed which may be misinterpretated to do injustice. This partly accounts for the provision of remedies through letters to the papers and parliament (by way of complaints to M.P's and Parliamentary questions etc), private arbitration and other non-judicial remedies. The tribunal was an inevitable development given such a background especially since it encompassed both law and politics. Many however did not think well of the development especially conservatives like Maitland saw them as legal cloaks for the use of arbitrary powers.

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9. The Old Age Pensions Act 1908 and the 1911 National Insurance Act . Back in 1897 the 'Workmen's Compensation Act was passed to mitigate the worst effects of application of the common law. Of particular concern was the test of " arising out of and in course of employment" which tended to be given very narrow interpretation. In fact dissatisfaction existed until acts providing for admin. tribunals came into the arena.

He went so far as to say:

> " a court of politicians enforcing a policy
> and not a court of judges administering the law".

The quotation is taken from Kathleen Bells' book.

Such men believed the chancery was adequate reform, true , this court had started well but over time it developed the " maxims of equity" which complicated its procedures just as that of the ordinary courts. Napoleon, a military and legal genius was meanwhile developing the " droit administratif", a law that would protect his officials vis-a-vis the administrative machine. The English courts meanwhile were not recognising the importance of public law so that a consistent body of administrative law never developed on the continental model lines.

During the early 1900's the British Parliament was raided by liberals, men like Churchill who were attracted by the German system and much was copied. The Act that carried provisions for a tribunal similar to those of today appeared in 1911, the National Insurance Act. The trend continued to cover, by 1929, fields like Public Health, Education, Welfare, slum clearance and others. No doubt then, that in 1929, " The New Despotism" wirtten by one Lord Hewart, the Chief Justice appeared with a scathing attack on the proliferation of the independent tribunals, as he saw then exercising arbitrary power in the hands of the bureaucracy . He wrote :

> " It is they (Civil Servants) who seek it
> It is they who ask for it,
> and it is they who contrive it ".[10]

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10. The New Despotism pages 157-158.

Such and other attacks led to the appointment of the " Donoughmore Committee " which reported in 1932. It reported that in fact there was no cause for alarm except for the inadequate provisions made for the publication and control of subordinate legislation. Otherwise it pointed out the inability of a subject to sue the crown in tort and expressed concern over the extent to which the courts were being replaced by special tribunals were control of administrative action was concerned - nothing was done about this until 1955.

Meanwhile the war (2nd World War) took its toll as tribunals became even firmly rooted. The compulsory enlistment policies generated many appeals for exemption, many claims also arose out of war damage and agriculture being very important to the war economy was subjected to rigorous control. Only tribunals could manage to deal with these in vew of their numbers and need for quick action.

Then followed the Franks Committee Report of 1957 which can be described as a 'peble which started a landslide'. The Committee was meant to consider and make recommendations on the constitution and working of tribunals other than the ordinary courts of law and the workings of such administrative procedures as includes the holding of an enquiry or hearing by or on behalf of a minister on an appeal or as the result of objections or representations from individual citizens. The Committee reported in 1957 and first and foremost recommended that three procedural principles ought to characterise tribunal hearings, to wit, openness, fairness and impartiality. Secondly, that the cord between tribunals and the ministries ought to be severed saying that, tribunals ought properly to be regarded as machinery provided by parliament for adjudication rather than as part of the machinery of administration, submitting that Parliament's intention to provide for their independence

is clear and unmistakable. Thirdly it recommended the establishment of a supervisory body, " The Council on Tribunals", which would make provisions as to the appointment qualffications and removal of tribunal members, the procedure of certain tribunals , provide for appeals to the courts from decisions of, or on appeal from certain tribunals, to require the giving of reasons for certain decisions of tribunals and ministers and other related matters. All this was implemented by " The Tribunals and Inquiries Act " of 1958[11]. It can therefore be argued that the Franks Committee Report marked the high water mark concerning the development of English Administrative law. Why however is Administrative law such a late-comer in the legal world as known to the common law?

Traditionally, all justiciable issues were referred to the courts of all for determination in Britain. During the laisser faire days however the common law was showing more and more weaknesses in handling individual grievancies. Monopolistic powers were used to curb greater returns to the detriment of the masses, the workers, needed legal protection and tort especially the tort of negligence was more and more eroded by doctrines such as contributory negligence, assumption of risk, common employment and others. As a first step most of the said defences were abolished; but the expenses and delay of court actions still remained. Next was introduced the principle of limited liability on the part of employers and specialised agencies (tribunals) which would dispose of citizens complaints quickly and without undue regard to technicalities of procedure. It was at this time, the hey-day of laissez faire that Dicey wrote his famous " Law of the Constitution" defending self-governed commerce, industry, etc and denying the existence of administrative law in England. Administrative law , it is said has never recovered from his attacks.

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11 Came to effect on 1st August 1958.

Dicey , writing in 1885, proved very influential when he formulated theories as to what rule of law means:-

> " In the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power . . . the existence of arbitrariness . . . or even of wide discretionary authority on the part of the government . . . It means again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts of law".[12]

Pursuing this sort of argument Dicey condemned the development of the Administrative Tribunals especially those of 1908, the Old Age Pensions and 1911 National Insurance Acts. He submitted that in these two, both the legislative and judicial authority had been conferred on the executive and declared in 1914 that a system " bearing a marked resemblance to the administrative law of France" was emerging. Dicey was however making a mistake; France's droit administratif related solely to the problems concerning judicial remedies so that it would appear the Administration was beginning to usurp this power traditionally assigned to the courts. The English conception was not limited in that respect and no wonder Justice Frankfurter has declared Dicey A.V.'s theories as " misconceptions of myopia". This may have been true but other influential figures took up Dicey's cause too. Lord Hewart as already seen wrote " The New Despotism " published in 1929 in which he claimed that much of the power the ministries exercised was in reality arbitrary; neither subject to parliamentary control nor that of the courts. It is for

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12. A. V.Dicey, 9th Edition (1939) p. 202

such reason, then that administrative law in Britain was ignored for long so that it either haphazardly found a place in other branches of the law (e.g. tort) or administrative decisions were simply ignored [13]

Administrative law was nevertheless destined to develop particularly because the laissez faire age disclosed that the government needed to play a more important role in governing the state. The Franks Committee Report 1957 paragraph 6 noted that:

> " In recent years most other Western Governments have been called upon to govern more extensively and more intensively, and finding a right relationship between authority and the individual has consequently become a matter of concern on both sides of the Atlantic". [14]

And a leading American Judge in 1954 said that the Administrative law was the outstanding legal development of the 20th century reflecting in the law the hegemony of the executive arm of the government.

This is very true. Dicey at the end of the 19th Century had said that in England Administrative law did not exist in just so many words. But by 1964 a prominent English Judge Lord Reid in Ridge v Baldwin [15] could say that

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13. This point is made in Principles of Australian Administrative Law: Benjafield , O.G. 4th Ed. 1971.

14. Franks Report, 1957 para.6.

15 [1964] A.C. 40 at page.76.

> " We do not have a developed system of administrative law because until fairly recently we did not need it".

This was an acknowledgement of the existence of such law as Dicey had in the 1880's denied its very essence " unknown to English judges and counsel . .. hardly intelligible without further explanation".

Moreover in 1971 Lord Denning M.R. speaking in Breen v. A Engineering Union (1971)[16] said . . .

> " There have been important developments in the last 22 years which have transformed the situation. It may truly now be said that we have a developed system of administrative law ...".

For now I will stop there not making any conclusions as to whether both Administrative tribunals and Administrative law have developed to the highest degree of perfection possible. Once things are however clear as relates to the Kenyan situation. There is firstly no supervisory body of all tribunals as in Britain, this means that there is no standardization of procedure and nor is there a coherent system of Administrative law that is being developed. Admittedly the various Acts of Parliament provide for the procedure and system of appeals to be adopted by the relevant tribunals, but this tends to make the tribunals a law unto itself. This more so when the aggrieved party has no finance or courge to appeal to the courts or appellate tribunals. Secondly, an institution equivalent to the Ombudsman which would provide truly impartial adjudicating organ between the individual and administration in all its shapes and colours is conspicuously lacking. Nevertheless since most of our legal and cultural guidance comes from Britain, I suppose their level of Administrative Law development can rightly be assumed also to be ours and that their

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16. (1971) 1 All E.R. 1148 at page 1153.

judicial decisions are of the highest possible persuasive quality. In all that follows in this paper I will adopt this view in toto. So much for the historical background, we will next examine the nature of tribunals, their various types and a quick comparison with the courts of law.

# CHAPTER 2

## THE NATURE AND STRUCTURE OF TRIBUNALS

Much has been written regarding the difficulties encountered when one attempts to classify tribunals. One author writes[1]:

> " To the general observer tribunals thus open a window on a fascinating panaroma of human activity. To the student of institutions they are pragmatic, illogical and exasperating for they challenge his instinct to classify them".

The name ' administrative tribunal ' has also been criticised as vague and at times misleading in favour of such terms as 'special' 'domestic' or other more descriptive terms. Special tribunals are public institutions that are set up by the government through an Act of Parliament to serve a particular purpose, invariably the implementation of some legislation. There has been no consistent attempt on the part of Parliament to make such a development coherent so that not many tribunals can be said to have clear similarities. This partly accounts for the difficulties of classification.[2]

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1. Wraith, R.E. ' Administrative Tribunals ' page 14.

2. Another explanation is the fact that each tribunal performs a function peculiar to itself. The manpower have peculiar qualifications etc.

It is however possible to attempt a classification based on the type of function the tribunal performs. One type of tribunal settles disputes between individuals or groups of individuals. These include the Rent Restriction tribunals and the professional displinary tribunals.[3] A second type settles disputes between individuals and the administration, the valuation courts, the land control boards and the Agriculture Appeals tribunal. The third and most important classificiation consists of the regulatory tribunals. Liquor licensing courts, Transport Lincensing Authority, the Hotels and Restaurants Authority and many others belong to this category.

Alternatively, tribunals can be classified on a National, Provincial and District basis. Unlike the ordinary courts tribunals have jurisdictions which not many people are aware of. Their secretariats are equally mysterious. Certain tribunals are mainly 'national' in operations. Good examples are provided by the Professional Displinary Committees, the Industrial Court, transport licensing and all the appeal tribunals. The only Provincial tribunals are those concerned with Agriculture and land control matters. The Provincial Commissioners sit at the head of such tribunals which hear appeals from district tribunals. Among the District based tribunals are the traditional liquor licensing boards, the District Agricultural Committees, the Land Control Boards and Land Adjudication Committees. The District Commissioners are either the Chairmen of such tribunals or play major roles in the appointment of the members. Invariably among the members should be two district council officials. This ensures the implementation of Government policy and some degree of consistency.

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3. Including such bodies as the Medical and Dentists Board and the Advocates Displinary Committee and several others.

To make a valid decision a tribunal ought to be duly constituted with a quorum and all. The majority of tribunals require a three member quorum,[4] the chairman and any two others. Others require four members to sit [5] or five.[6] Five is the maximum for all the tribunals that do not require a mere simple majority [7] as some do. An application is normally made to a tribunal to determine some question. For example, to the licensing tribunals an applicant applies for a grant, variation or renewal of a licence. The tribunal will then either vary, suspend, cancel, grant or even revoke the licence. The liquor licensing courts require an applicant to prove why he needs a license. If the applicant is not satisfied with the result he may lodge an appeal to the relevant appellate body according to the statute setting up the tribunal that made the decision.

Tribunals may also investigate and determine complaints made to them. An example of these are the professional bodies which may investigate, hear, consider and determine complaints of professional misconduct. Thus an opportunity to be heard is offered before any decision is made by any tribunal. It may also be noted that some tribunals sit with qualified advocates who act as assessors [8] and advise the tribunals on questions of law or on special matters that may arise in the cause of determining some questions.

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4. Under Liquor Licensing, Transport Licensing and Rent Restriction.

5 Medical and Dentists Practitioners Board.

6 Pharmacy and Dangerous Poisons Act.

7 For example under Land Adjudication Act

8 Such as the Agricultural Appeals Tribunal, the Transport Appeal Tribunal, the Tsc. Apps. Trib. etc.

Certain tribunals are not simply set up to settle disputes. The Central Agricultural Board which is also a tribunal advises the Minister on national Agricultural Policy and lends a hand in the co-ordination of provincial agricultural policies. The Teachers' Service Commission is responsible for the employment, posting, registration, payment and even dismissal of teachers. It is for such reasons that most tribunals take national policies into account in their operations as a matter of course. The ordinary courts of law do not and undoubtedly this is one of the major reasons why the two institutions exist side by side as none is quite well suited to replace the other.

A discussion of the nature of tribunals cannot be complete without a comparison between them and the courts of law. Most scholars of administrative law hold the view that tribunals have several salient advantages over the ordinary courts of law. The courts are also tribunals but with very general jurisdictions. Administrative tribunals can be regarded as ' specialist courts' which are not necessarily complementary to the ordinary courts of law but their substitutes for specific reasons. The tribunals are cheaper, informal, speedy and under normal circumstances easily accessible and expedient.[9]

Take first cheapness. Obviously not all parties to disputes are poor, not to say that even the few wealthy persons like paying the enormous litigation expenses.

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9. Doubts have been expressed lately regarding these advantages over the courts of law. It is argued that over time the tribunals have lost most of these attributes. Those are the views of certain English Administrative lawyers where the law has been on the move constantly. As in Kenya there have been no developments, at least none of them notable the position remains as it always was.

In civil matters, the issue of legal aid does not even arise, it is not available. What this means is that the citizen who cannot afford the financial burden to petition a court of law to declare or ' grant' a right will have to do without redress. Therefore a tribunal institution being cheaper has a real advantage over the expensive courts and is thus more accessible.

Secondly, the tribunals are informal, and speedy in operations. One thing, the procedures under a tribunal institution are flexible. The proceeding may even assume a conversational or inquisitorial nature. This will ensure that the parties are less baffled and daunted as sometimes happens in an ordinary court of law. The rules for the admissibility of evidence are relaxed and the solemn and the technical characteristics of a court of law altogether disappear. The informal nature of proceedings ought however to be kept within reasonable limits so that justice is not threatened by excess of informality.

By being informal the tribunals are likely to operate faster than the courts of law which are at any rate overcrowded since they hear cases of all types. Clearly the courts cannot resolve the many disputes arising out of the various aspects of conflict during implementation of social and economic legislation fast enough to allow the efficient realization of the peoples and governments' many social and economic goals. The judges are bound by the doctrine of precedent and cannot dispose of cases as fast as a tribunal can. This doctrine encourages conservatism which is a danger to the implementation of progressive legislation.[10] Due to the tribunals' informal proceedings

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10 A country whose foremost goal is economic and social development cannot afford to be obstructed by a reactionary judiciary.

and specialist manpower , their determinations are fast. Taken all around the tribunals are more accessible as compared to the crowded courts of law since they are cheaper , more informal, and operate with remarkable speed.

Thirdly, expedience and expertise. There are many tribunals which operate within a context in which the use of ordinary courts would not be appropriate. Such tribunals as have as a matter of policy to take into consideration matters of policy in decision making. This is why some statutes lay down factors which should be considered before a decision is made. For example, the Hotels and Resturants Authority has to consider the interests of the members of the industry and the development of the industry itself before making decisions. The courts more often than not shun questions of policy and in any case most judges are merely competent generalists and, not unnaturally in certain areas they have to be excluded from decision making. In the Agriculture and Hotel and Resturant industries for instance the relevant tribunals are constituted, inter alia, of persons with special knowledge or expertise or experience in the particular industry. Thus tribunals have the advantage of having manpower that understands and appreciates the problems involved and either out of their training or experience having repeatedly handled the same problem for long are better suited to determine the peculiar questions that come before the various tribunals.

In Tanzania , the courts have been barred from meddling with administrative decisions since their determinations amount to no less than " judicial sabotage of administrative action".[11] This was the danger realised

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11. (supra). Kiapi at page.38.

in 1965 when the inclusion of a Bill of Rights in the Constitution was rejected on the reasoning that there would be conflicts between the executive and the courts on the one hand and between the courts and the legislature on the other. It was argued that Tanzania:

> " Has dynamic plans for development which cannot be implemented without revoluntionary changes in the social structure; the courts must be left out of the sphere of determining the extent to which individual rights must give way to the wider considerations of social progress. These are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate".12

This sums up the position so well as to why tribunals are preferred to the courts where policy consideration is a major factor. Such an inspired view should be contrasted with reactionary views as the following as expressed by Lord Sankey speaking to the Franks Committee in 1957 sounding grand and noble but saying very little of interest :

> " amid the cross-currents and shifting sands of public life the law is 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".

The only question is, how is it possible to have justice when unequal parties bargain and when the court is biased in favour of the more economically powerful party (indeed a social class)?

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12 Tanzania: The Presidential Commission on the Establishment of a Democratic One-Party State, Report (1965) page 31.

Tribunals therefore are key instruments in modern economic development and there is a real need to polish the institution as a whole, revise the statutory provisions and provide a more tenable climate for their operations. The reaons for these will emerge in the next chapters.

# C H A P T E R 3

## THE ADMINISTRATIVE - JUDICIAL SPECTRUM : THE PLACE OF THE ADMINISTRATIVE TRIBUNAL, THEIR CONSTITUTION AND OTHER RELATED PROBLEMS

Whether a body is a tribunal or a court is primarily a matter of statute law. This is well settled now. What is not so well settled is whether tribunals are genuinely ' administrative' or 'judicial' or both in their functions. All the three classifications have found support in English jurists at some time or other. The third categorization has lately come to be accepted as 'special' tribunals by which is meant tribunals that are wholly statutory. Fortunately no one has alleged that they are also legislative [1] bodies.

When one talks of judicial and administrative generally there are two different concepts that are likely to be thought of : One, the place of the tribunals in the Governmental arrangements ; the Executive and Judiciary particularly by which is meant the administration and the courts[1a]. Two, their functions in real practice: Whether their operations are wholly judicial just like the courts of law or wholly administrative the same way as any responsible civil servant would act in exercise of his

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1. This should not appear frivolous for Ministers (M.P.s) also sit on appellate tribunals.

1a By this is meant : The Ministry or Ministries on the one hand and judicial services on the other Pursuing the argument further the question is really one of 'separation of powers' so that the Government is seen to comprise 3 separate arms: The Legislature, the Executive and the Judiciary.

official discretion. Both concepts are discussed in the following paragraphs.

My view is that whereas I agree with the scholars who hold that tribunals are part and parcel of the administrative machinery. I would not go so far as to say that they do not exercise judicial functions. Indeed, the crux of my arguments is that most of what the tribunals do is in fact judicial: the determination of individuals rights an impartially by way of a predetermined procedure mostly and the giving of reasoned decisions. But then most tribunals are constituted of administrators appointed by the head of the Ministry or department[2] and their decisions are supposed to take into account fully the national policy (or that of the Ministry) prejudicing individual interests in favour of those of the public at large. Thus on policy statutory tribunals can be properly be regarded as 'special' incorporating both the administrative judicial ( and other arms of Government? ) Legally they are clearly both administrative and judicial bodies.[3]

The wish of the courts to control both 'judicial' acts and ' administrative ' acts of tribunals has led to a " strained and still imprecise interpretation of " judicial" In the olden days in Britain the courts were called upon to supervise the new administrative jurisdictions just as they had done with the inferior courts. This they did by making both prohibition and certiorari orders available for excesses of administrative jurisdiction. The classic definition of the scope of these orders is that of Atkin, L.J. in

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2. This will be clearly towards the end of this Chapter. Membership.

3 See Principles of Administrative Law : Griffith & Street (Pitman, 1967) page 237.

R v Electricity Commissioners, when he said that they lie "

> " wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority" 4

R v Electricity Commissioners was authoritatively interpreted and applied by the House of Lords in the leading case of Ridge v Baldwin [5] which cover ruling earlier decisions[6] which treated the duty to act judicially as a very strict requirement more than merely the authority over citizens to determine their disputes. Today the orders lie to tribunals which have to exercise a discretion as well as to decide matters of law and fact. For instance bodies exercising licensing functions. The orders will however not lie if an administrative body exercises discretion and throughout has to consider the question from the point of policy and expediency [7]. Other remedies exist which all taken together form the methods of review by which courts control administrative powers. The problem with this branch of the law is so muddled up ... that it is virtually impossible to draw the boundaries of each remedy. It is probably in recognition of this more than anything else that the courts have been known lately to talk about the duty to act fairly whether an official or an administrative body is acting judicially or quasi-judicially . See particularly the case of In v H.K. ( an Infant). [8] Other

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4. [1924] 1 KB 171 at p. 205.

5 [1964] A.C. 40.

6 Nakkuda Ali v Jarayatne [1951] A.C. 66 ( and others)

7 Reg. v. Manchester Legal Aid Committee [1952] 2 Q.B. 413.

8 [1967] 2 Q.B 617: See Lord Parker at Pages 630-631.

Other remedies are also available on judicial review.[9]

The trend of development of the law relating to judicial review would seem to be heading towards simplicity and justice. This is one of the many attributes of administrative law and should be encouraged.

Tribunals themselves have come a long way from those days in Britain when they were merely thought of as " unwelcome intruders into the domain of the established courts ".[10] To day Administrative Tribunals have come to be regarded as a normal feature of the day to day life of the state but it is not yet very clear or at least scholars are not agreed as to what branch of the government they belong to. A starting point of the controversy may be made of the often quoted paragraph 40 of the Franks Committee [11] Report. Despite all that it said, in a case where all members on the tribunal are members of the ministry and other government officials, can the tribunal trully be regarded as a body in its own right apart from the general administration. It is true the position is different in England especially relating to composition of tribunals and this may account perhaps for the Committee's views, nevertheless contrary views have been expressed by other English scholars.[12] First the Committees Report quoted in extenso follows:

> " Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence . . . appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Govt.

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9. These will be discussed briefly later on in the paper.

10 Wraith R.E. (Supra) page 322.

11 Report on Administrative Tribunals and Enquiries, 1957

12. H.W. Wade feels they cannot fully be separated from the Administration, K Bell assets they are a compromise. Farmer sees no problem in asserting that tribunals are merely administrative 'courts' and nothing more.

> must retain a close and continuing responsibility . . adjuncts to the administration . . . We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather as part of the machinery of administration.[13] . . . Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance (Rent Tribunals, licensing Authorities) or on appeal from a decision of a Minister or of an official in a special statutory position (e.g. valuation officer) . . statutes do not in all cases expressly enact that tribunals are to consist of entirely of persons outside the Government services, the use of the term " tribunal" in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable". (my own emphasis).

This is a paragraph in the Report much couched in very sweet language. The thrust of the arguments posed it is felt is that, this is how it ought to be like; but is it? Griffith, reader in English Law has published a scathing attack on this paragraph particularly and the Report as a whole[14]. He says the paragraph is " riddled with confusion" (page 128). First the distinction between the view of the ' Government ' and the intention of 'Parliament' is not only false but also a mere ' Constitutional fiction'. Secondly, Tribunals are not 'machinery' provided by Parliament and Parliament has not " deliberately provided for a decision outside and independent of the Department concerned ". Thirdly, term " Tribunal " does not indicate independece of decision. Thus, the correct view is that of the " officials"[15], it is the Government, the departments which make all the rules. The dichotomy drawn between " "tribunals should properly be regarded as machinery provided

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13. This is the passage to be found quoted on all administrative law writings. This should be seen as a recommendation not as a restatement of the truth.

14 J.A. Griffith : Tribunals & Enquiries 22 M.C.R. 125-145.

15 See the quotation above: " Much of the official evidence.. . reflect the view that tribunals are part of the Administration."

by Parliament for adjudication rather than as part of the machinery of administration" [16] advances the issue no further and is in fact false too.

Is it then true that tribunals are created primarily to ensure decisions are made independently of the Departments (Ministries) ? As has so far been seen the real advantages of tribunals and the common reasons for their establishment are known to be their cheapness, their informality, their expertness and the speed with which decisions can be obtained. Surely to argue that industrial injury disputes, rent disputes, liquor licensing disputes and others were taken out of the courts jurisdiction and given to administrative tribunals in order to keep them away from the Ministries seems not only odd and absurd but utterly contradictory. Are the courts not likely to be least prone to ministerial influence?[17] The policy argument of course weighs heavily against the courts' favour but it should be noticed that not all tribunals decide on policy matters. Whether Mr. Kamau pays £100 or £1000 for his ten rooms in Muthaiga; whether Mrs Kamau is entitled to a widow's pension etc may not matter at all to the Ministry. Clearly the policy considerations are paramount in keeping decisions in the ministry and for this reason alone the assertation that Parliament in " clear and unmistakable " terms provided for tribunals inorder to ensure decisions independent of the ministries, can be condemned as frivolous and invalid.

It cannot fully be argued that Ministries or the Government does not have its good reasons for establishing tribunals. Ministries are not as avid for power as some circles tend to think even today; that they want to keep

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16 See the quotation above again.

17 At least in theory considering the constitutional theories of separation of powers. Indeed this is one of the main reaons why the Government takes away from the courts administrative jurisdiction: the courts would nost likely frustratet the intended policies.

everything in their hands, principle and detail, policy and administration alike. They err. Though ministries may want to substance of power; the making of vital decisions, they are not so eager to have to face the " responsibility for the application of principle and policy and happily use local authorities for this purpose - or administrative tribunals".[18] This is why the ministers will eagerly reply to complaints from citizens that this is something for which they are not responsible as 'Parliament' - that so convenient abstraction has vested the power and responsibility elsewhere".[18b] It may appear from this that after all the Committee was right in regarding tribunals as not " part of the machinery of administration" [19] and that they are truly set up by Parliament to adjudicate. Here lies the crux of the matter, the 'adjudication' process - on behalf of the various ministries and not on their own account. What the Committee should have said expressly ( and what it in fact impliedly said) is that "We think tribunals should be more independent "[20] and not to argue some fictional and theoretical notion of Parliamentary intention. Its more important recommendations of the establishment of a standing Council to review the constitution and working of tribunals; the appointment of chairmen and members by independent bodies, appeals not to lie as a general principle from tribunal to minister bear testimony to this.[21] Unhappilly in Kenya not much headway has been made to these ends.

The problem as to whether tribunals form a part of the administration or not still lingers on even after the Committee report. Several thesis have been advanced for and against, all after the Committee Report. Those that agree with Franks that tribunals should properly be regarded as part

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18 See Griffith's article (supra) page 130.

18b See footnote 18

19 Franks para. 40 (above)

20 Griffith's page 129.

21 Franks (supra) para. 48,49 and 105.

of the judicial not the administrative system are scholars like Allen in 1959 who referred to them as " adjuncts, or poor relations, of our courts" [22], Jackson in 1964[23] and Wade in 1967 who considered them as courts "enmeshed in the *administrative machinery of the state*".[24] J.A. Farmer agrees with administrators who gave their evidence to Franks. He writes

> " . . . tribunals properly form a part of the administration . . . It is the very failure to recognize this fact which has served to inhabit the effectiveness and growth of tribunals in many areas of governmental regulation where their use would otherwise provide a major contribution".25

This is true but like Franks the approach tends to ignore certain salient factors. Tribunals must sometimes act judicially. At times their decisions are frequently as important in determining individual rights as those of the ordinary courts of law, they observe a code of procedure, apply rules impartially to ascertained facts, exercise discretion in cases in which they apply standards and above all are subject to judicial review just as the inferior courts are. On the other hand, and particularly in the implementation of social policy much of the constitution and operations of tribunals is the responsibility and concern of the Minister. The appeal machinery is condensed within the ministry and as such tribunal can surely be said to perform administrative functions . Wade, H.W.R,[26] seems to agree with this dichotomous approach but not as clearly as Kathleen Bell commenting on the Franks Report (paragraph 40) :

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22 Allen C.K. "Courts & Judgements ", page 19 (Birmingham University).

23 Jackson R.M. (1964) " The Machinery of Justice in England" London: C.V.P. ) Pages 376-8.

24 Wade H.W. R. , in Administrative Law, Oxford , pages 234.

25 Farmer, J.A. : Tribunals and The Government . Page 4.

26 Administrative Law, Oxford (1967) p.234.

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25 Farmer, J.A. : Tribunals and The Government . Page 4.

26 Administrative Law, Oxford (1967) p.234.

> " The either /or approach adopted by Franks is not satisfactory. The truth is that tribunals are part both of the machinery for adjudication and for administration , . . the effectiveness of this constitutional device depends on finding a delicate balance between the two". 26a - re 'special tribunals' [illegible].

I agree with the reasoning and conclusion laid out above according to Bell K. Let it also be added that this categorization is not very important and what is needed is whereas tribunals should not revert to the ordinary courts' practices yet they should be more independent of departmental influence and yet not so independent as to frustrate Govt. policies.

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26a Kathleen Bell: Tribunals in the Social Services (p.31).

## CONSTITUTION OF TRIBUNALS : SOME PROBLEMS

Logically a discussion as to the place of tribunals in the administration of a state leads to questions as to who constitutes the so-called tribunals anyway, who appoints them, for how long and for what reasons. I intend to discuss under this heading not only the membership of tribunals but also the strengths and weaknesses of the methods employed. References will be made to the English Franks Committee because to date it is still the major authoritative work on this particular aspect of our law.

### 1. The Appointment of Chairmen and Members

The Franks Committee found that most Chairmen and members of tribunals in Britain in 1957 were being appointed by the Minister whose ministry dealt with their subject matter. They expressed the belief that this was wrong in principle but said that they had received no significant evidence that any influence was being exerted by the departments on the tribunals but recommended that in future all chairmen should be appointed by the Lord Chancellor[27]. The Lord Chancellor has a constitutional position that enables him to perform the equitable civil jurisdiction functions of the King as delegated to him. He can appoint and dismiss magistrates. He therefore is in a position free from the direct influence of government- less still that of the departments. I suppose the Kenyan offices of the Attorney-General and the Chief Justice fused together would be the closest , not equivalent to the Lord Chancellor's. Regarding the appointment of tribunal

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27 The Tribunals and Enquiries Act of 1958 implemented this recommendation to a great extent.

chairmen in Kenya [28] the position is still as it was in Britain prior to the Franks era and as they pointed out, it was wrong in principle.

As for the appointment of other members of tribunals while discouraging the formality of putting it under the Lord Chancellor also, they were also satisfied that appointments " should not rest with the Minister concerned with the subject matter of the adjudication" [28a]. Franks felt that to enhance independence of tribunals, both in appearance and in fact, members ought in their view to be appointed by the council on Tribunals which they recommended that it be established. It is reported that fifteen years after Franks the recommendation as to the chairmen had been implemented but not regarding the members. This is mainly accounted on grounds of members' qualifications. It is felt that neither the Lord Chancellor nor the Council would be well informed as to the candidates' suitable qualifications. Thus in Britain just like in Kenya as we shall see later the Ministers' powers to appoint still holds way as to appointment of members other than chairmen.

The established practice is therefore that members of each tribunal are appointed by the responsible minister. Members are taken to include chairmen here. There are however exceptions. In certain cases the President may appoint the Chairman himself or in others, the members themselves elect one of them to act as chairman. In certain other cases the Chief Justice has the power to appoint the chairmen and for example in land cases (Land Control Boards) senior government officers by virtue of their offices are automatic chairmen: the District Commissioners and the Provincial Commissioners

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28 The Chairmen of the Transport Licensing Authority and Hotels and Resturants. Tribunal are appointed by the executive.

28a See the Franks Report para. 45-58.

at both District and Provincial levels respectifully. True to the already noted tradition of Administrative Tribunals, this particular problem defies any practical classification also. So much so that under the Land Control Act [29] the Ministers of Economic Planning, Home Affairs, Agriculture and the Attorney-General sit as the Central Land Control Appeals Tribunal with the Minister of Lands sitting as chairman!

To recapitualate, some statutes give the President the power to appoint tribunal chairmen. The major consideration seems to be the importance of the matter being regulated. Examples include appointments under the Transport Licensing Act and the Trade Disputes Act.[31]

Next in importance appears to be appointments by the Chief Justice. Under the Agriculture Act (s.193) the Agricultural Appeals Tribunal is established and it is provided that the Chief Justice shall appoint the tribunal chairman who ought to be a lawyer of seven years standing and takes oath for the due execution of his new office. It is not very clear why this power was given to the Chief Justice except that the appeals are likely to involve many questions of law and the Chief Justice is certainly the most appropriate person to appoint a lawyer -Chairman for the tribunal.

Though the Minister has his hand in the Constitution of nearly all tribunals except perhaps under the Advocates Act [32] only, his powers to appoint the Tribunal chairmen

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29 Cap. 302 (1968) s.3. It almost appears as a small cabinet or even parliamentary meeting. Such a body is hardly a tribunal at all (but a version of the Legislature?)

30 Cap 404. s.3 - President appoints the Chairman.

31 Cap 234 , s.9 - President has the power to appoint the presiding judge of the ct. and all the others (2)

32 Cap 16 : None of the members is appointed by any Minister. See Section 59(1) which establishes the Displinary Committee made up of The Attorney General and D.P.P. as ex-official and three advocates elected by society.

directly is not so widespread. They appoint chairmen to tribunals whose functions are closely connected with the Ministry. The Teachers Service Commission and the Hotels and Resturants Authority are good examples.

The majority of Tribunal chairmen however are normally members of the Civil Service, the D.C.'s , P.C's and others. The District Commissioners are the chairmen to the various Land Control Boards, the District Agricultural Committees, the various Liquor Licensing Courts and others. The Provincial Commissioners sit as chairmen on all provincial tribunals e.g. the Provincial Land Control Appeals Boards, the Provincial Agricultural Boards and for the Nairobi Area Liquor Licensing Court.[33] The Director of Medical Services sits as the chairman to both the Medical Practitioners and Dentists and the Pharmacy and Poisons Boards.[34] The Attorney-General or the D.P.P. Chair all Advocates Displinary Committee meetings. In certain tribunals, the members present may elect one of them to act as chairman if the real one is not present. An example is s.4 (2) of the Pharmacy and Poisons Act. Otherwise normally chairmen preside over all meetings.

Members where they are not government officers are invariably appointed by the Minister. There are certain exceptions to this general rule. The County Councils appoint their own two representatives on the District Agricultural Committees and on Land Control Boards. The Land Adjudication Officers may with the approval of the D.C.'s and P.C.'s appoint members to the sectional adjudication committees and area arbitration boards respectfully. On the Advocates

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33 See the Liquor Licensing Act cap.121(s.4)

34 See cap 253 s.12(1) (a) and cap 244 s.3(1) (a) respectively.

Displinary Committee sits three advocates elected by the law society and three elected practitioners also sit on the Medical practitioners and Dentists Board. Government officers who may sit as members of tribunals are normally permanent secretaries and other senior officers. Take the example of the Central Agricultural Board s.35 of the Agriculture Act: The permanent secretary or his deputy , the Director of Agriculture, the Directors of Veterinary Services and of Settlements , the Commissioner for Co-operative Development and others like representatives of Marketing Organisations all sit as members of the Central Agricultural Board. There are other examples too.

## Qualification for Membership

It is perhaps surprising to note that the qualifications the tribunal chairmen must have are not always stipulated. It is only in two of some of the most important tribunals that the relevant statutes state that the Chairman shall be a lawyer: the Agriculture Act and the Trade Disputes Act (above) . A District Valuation Court [35] is chaired by a Magistrate, otherwise there are no clear provisions concerning the other tribunals except where the D.C.'s , P.C.'s , the A.G., the D.P.P. or the Minister himself sit as chairman.[36] These by virtue of their positions they are qualified to act as chairmen.

The case for other members is clearer. Members may not have interests in the matter being regulated or if they have especially interest, they must so declare. Examples in the Transport Licensing Act, Hotels & Resturants Act etc. Members must

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35 See Valuation for Rating Act cap.266. S.12(1)

36 All this is discussed in the section on membership and need not delay us repeating here.

be qualified in the field being regulated as in the Advocates' Displinary Committees etc. But it must be noted that there is no consistent pattern for laying down their qualifications. But again it is abundantly clear that where the functions are of a technical nature or since tribunals are of a technical nature or since tribunals are 'specialized courts' - the general qualification is usually professional knowledge or practical experience of the subject matter of the adjudication or the situation of the aggrieved party. Examples, members of the controlling bodies of the professional associations are also members of the profession; the Advocates Committee, displinary boards of the doctors, dentists, pharmacists, architects, veterinary surgeons, surveyors etc . etc. All this has been discussed in connection with general membership.

Expertise and practical experience are also important considerations. The Maize and Produce Board [37] consists, among others, three members appointed by the Minister being persons who possess qualities likely to benefit the Boards work one of whom shall represent consumer interests. Also under the Agriculture Act [38] where members of District or Provincial Agricultural tribunals must own or occupy farm land in the relevant areas and the Appeals Tribunal consists of two persons who should have practical experience in the agricultural industry and the chairman is the third member.[38]

The Land Adjudication Act, 1968 [39] seems to take into account certain special circumstances so that for the determination of land rights amongst wananchi, local elders constitute a Committee to determine who owns what land. If the material Country Council requests the Minister to apply the Act, and minister agrees by appointing a Public officer as the adjudication officer with power to divide

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37 Maize Marketing Act, cap.338 s.4.

38 Cap 318 (s.36)

39 Supra,cap 284.

the area into adjudication sections, then with consultations with the D.C. the Adjudication Officer so appointed to the 'adjudication area' may appoint ten persons resident within the section to form the Committee. The Committee applies the relevant customary law and advises the public officers carrying out the land adjudication. They will safeguard the interests of those absent from home or disabled persons and assist generally in the adjudication process like calling attention to unclaimed interests in land.[40] This is another form of the expertise or practical or the requisite special knowledge qualifications. But it is peculiar in that it centres on what has been termed ' local democracy' that " gives confidence to the affected parties that tribunal will operate fairly . . . and consider their special circumstances".[41] This about sums up what impression the tribunals should always evince as their prime qualities. In the situation of Africans, there is no greater way of doing this other than applying the Customary Law they understand. The Land Adjudication Act has gone far to satisfy this as further illustrated by the appellate 'Provincial' Arbitration Board which again is constituted of 'local' land owners.[42]

The qualification of persons by virtue of their offices has been discussed above in connection particularly with the Agricultural Boards where the D.C.'s, P.C.'s and officers responsible for veterinary services , forestry, co-operatives etc. are members. This and other facts prejudice impartiality.

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40 Cap 284, section 3 ss.6 to 8.

41 Administrative Tribunals : Kiapi , A. 1975, 11 E.A.C.J. page 42.

42 Cap 284 s.7. (1).

Normally tribunal secretaries are also public officers. This may be unavoidable for ministry and other government buildings are the secretariats of the tribunals. The secretary may have no vote but he must be influential in one way or the other especially in discussions. So much for that.

The duration of appointment and the size of membership are also important. First, duration of appointment. The period depends mainly on whether the member is an appointed elected or ex-officio member . Ex-officio members will serve as long as they remain in the appropriate office. This has disadvantages in that such permanent members (see the Veterinary Surgeons [43] Act Cap 366:s.2) may tend to know more than incoming members and tend to dominate the proceedings and decisions. Thus operations will tend towards non-impartiality. The nominated or elected members hold office generally for three years where the statute so provides. In some statutes there is no provision, yet in others members hold office at the ministers pleasure.[44] Where the period is stipulated, eligibility for re-appointment is also provided for. Members may resign by way of a written document or Minister may remove them for misbehaviour or inability to perform their functions but not all statutes provide for this. The Adjudication Committees and Arbitration Boards as established by the 1968 Kenya Land Adjudication Act appear to be permanent for no time limit is stipulated in the Act itself. These bodies provide essential but temporary services however and can be presumed dissolved after the land adjudication exercise is over.

This is therefore another mixed up aspect of administrative tribunals law. It is suggested that a reasonable period should be provided and a security of tenure within that period provided for. The Minister nor other

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43 The Director of Veterinary Services and Dean in the Faculty of Veterinary Medicine (NBI) are permanent members in this body.

44 See generally the Transport Act Cap 404 s.3.

political pressures should be given effect as appears to be the case now. The size of membership is not very important except that since normally the quorum is three the Chairman should not be in a position to overrule the other two.[45] It is also to be noted that it is felt since the Ministers' nominees are the majority in most tribunals it is not likely that their decisions will be surely impartial and independent as they should be. It is in fact the major consideration; that tribunals are set up to provide control of the administration by an outside impartial agency, strong and independent enough to prevent injustice to the individual, while leaving the administration adequate freedom to enable it to carry out an efficient but just government. Is this possible when a tribunal is housed under same roof as one of the parties? Does the party not judge its own cases then? One can sum up by asking: is the administrative tribunal part of the administrative process or the judicial process or is it a cross between the two in Kenya? We started by discussing this controversy and agreed that the either or approach is not satisfactory; tribunals are part of both and that is the proper view according to this paper.

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45 Most statutes provide that chairman has a deliberative and casting vote.

# C H A P T E R 4

## PROCEDURAL RULES AND PROVISIONS FOR APPEAL

### PROCEDURE

It has been seen so fat that most tribunal establishing statutes provide that each tribunal can regulate its own procedure.[1] In many cases such a power is subject to the regulations published by the Ministers to regulate the procedures of various tribunals. Procedural rules may relate merely to the conduct of proceedings or to the wider conceptions of procedure as we shall see. The former roughly comprises such procedural requirements as rights and duties before the hearing, at the hearing itself, regarding admission and taking of evidence and making of decisions and provisions for appeal. As for the latter we discuss such principles as those relating to the right of representation, burden of proof, public hearings and dependence on precedent. Most of these latter principles can be easily grasped if and when seen against the comparison of tribunals and ordinary courts of law. Such a discussion was carried out in chapter two. Where it was said that tribunals are cheaper, quicker and informal.

Talking about the informal atmosphere of tribunal proceeding this procedural dilemma may be noted now: a problem confronting most tribunals is how to combine an orderly procedure with an informal atmosphere. A dilemma that has been expounded on two fronts, one that procedure should not be so technical and formal as to discourage legitimate applications and two that even the most informal of tribunals will need some guidelines if proceedings are to be fair to both parties- " a tight-rope which not all tribunals have managed to walk successfully".[1a]

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1 Such a provision appears in one form or the other in all the statutory provisions that set up tribunals. In most cases it states that the tribunal or its chairman may prescribe rules of procedure with the approval of the Minister.

1a Wraith .E.R. (Supra) page 131.

It is submitted that it is essential that tribunal proceedings should be kept as simple and as informal as possible within the framework of the procedures laid down by law as per the statutes and common law.

The Need for Procedural Requirements

Making recommendations on procedure, the Franks Committ made the following classification : pre-hearing procedure, procedure at the hearing and procedure after the hearing. The Committee in its efforts to find a common denominator of the various tribunal procedures which of course are impossible to standardize, it came up with these three characteristics: Openness, fairness and impartiality. This is how it formulated and explained them:

> "that there are certain general and clsely linked characteristics which should mark their special procedures. We call these characteristics openness, fairness and impartiality. Take openness. If the procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take fairness. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly, there is impartiality. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds"?2

This passage was in fact meant to act as a substitute for the complex analysis of such concepts as judicial, quasi-judicial, administrative and so on as guides to the control of, or the allocation of powers to, tribunals and the courts of law. Nevertheless they sum up very

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2 Franks Report paras. 23-24. These principles are in fact a restatement and expansion on the well known doctrines of " audi alteram partem" (the right to be heard) and " Nemo iudex in re sua" ( the rule against bias that no man shall be judge in his own cause, in other words the need for impartiality).

well the need for procedures: confidence and acceptability of decisions by those affected being factors indispensable to curb maladministration. The Franks Report set out to explain and identify features of tribunal procedure which contribute to the three said characteristics. In these broad terms that:-

> " In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the assential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to prevent their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of Departments, concerned with the subject matter of their decisons".[3]

It is hereby submitted that these English principles are of the international application and therefore good guidelines for Kenya.

Also important to note is procedural guidelines as at law. The common law provided such rules for the good administration of justice as the rules of natural justice. These require that no man shall be a judge in his own cause[4], and no judicial decision shall be made without the parties being given an adequate apportunity

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3 See Report page 10.

4 The Bias rule: Nemo iudex in re sua (see footnote 2) several statutes expressly provide for this. Examples are the Hotels and Resturants Authority in which anyone to be appointed as member has to declare , if any, his financial interest in the businesses concerned. Also members of tribunals of first instance must also not sit on Appeal Tribunals. See the same Act: No.19 of 1971: s.10(3).

to state their cases.[5] All tribunals, like the courts, must oberve these rules, it is now sufficiently established in the administrative law[6] as understood by many. We will now discuss the aspects of procedure under the following headings.

## 1 Procedure Before the Hearing

If tribunals are to be easily accessible to the ordinary citizen a pre-hearing procedure should be provided for and it is important that it be reduced to the simplest possible form. The first essential in the cause of accessibility is that the applicant or claimant ought to know of his/her right to make an application. Again the method of lodging an application or appeal ought to be as simple as possible and with a resoanble time limit. More important however is notice of the case to be met and notice of the hearing itself.

## 2. Knowledge of Case to be Met.

Franks said :

> "The second most important requirement before the hearing is that citizens should know in good time the case they will have to meet, whether the issue to be heard by the tribunal is one between citizen and administration or between citizen and citizen".7

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5 'audi alteram partem'.

6 Wraith R.E. (supra) says at page 323 " Infact lawyers in this country (England) when they speak of "administrative law" very largely mean the nature and extent to which the High Court may review the adjudicatory processes of other bodies". Our wider understanding includes tribunal law and practice.

7 Report para. 71 p. 17 (1957).

In other words notice of the case itself and its nature. All procedures ought to fulfil this requirement.

Most statutes provide that the tribunal give due notice to those persons whose interests are affected or might be by its decisions. It is unfortunate to note that mainly what is required is simply 'notice' to be given.[8] Notice ought to indicate clearly where and when the tribunal will sit, the case to be met and the objections or representations made against his application. In this respect the licensing tribunals for liquor and transport are fairly good examples. Other examples are provided by provisions to be found in displinary bodies as under the statutes that cover the legal medical, architectural and other professions. A notice also ought to be very helpful in enabling the affected party to prepare his defence or his arguments.[9] Though notice may be communicated by way of the Kenya Gazette or the daily newspaper, it is recommended that personal service of such notice is in fact most desirable. Another desirable method is transmitting information through the local functionaries; the chiefs and their assistants, a method that has proved most efficient in other areas in Kenya. The most important thing is however to communicate the notice[10] of the intended hearing. The hearing proper then follows.

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8 This ought not be take as an all -around truth. Many tribunals give adequate notice, especially 21 days; 7 days under Advocate Act Cap.16 , 562(1) etc.

9 A good example is the Teachers Service Commission: A notice of allegations offering an opportunity to be heard and asking the teacher concerned to send a written statement before investigations and subsequent determination in 21 days: Cap. 212. Others clearly state when and where the tribunal will sit.

10 The problem of communication of notices in Kenya is not an acute problem. Where the matters are confidential the notice is always sent by way of registered post.

## 3. Procedure at the Hearing

Notice of hearing to be proper and just ought to give a reasonable time to the applicant to prepare his case. This notice presumes a right to a hearing and indeed most notices are also invitations to hearings.

### The Right to a Hearing[11]

This section is concerned with the rules dealing with how a hearing is to be conducted O- where a right to be heard exists at all. The practice of statutes is to give the interested parties an opportunity to be heard before a decision is made. Under the Liquor Licensing Act, not less than 21 days before the meeting of a licensing court, the Chairman of the Court must prepare a notice setting forth the names of all applicants, the type of licences applied for, the premises in respect of which the applications are made, time and place of the meeting at which the applications will be considered.[12] Members of the public may lodge objections to any of the applications and during hearing and consideration of applications, applicants must appear in person or by way of an advocate. The applicant must prove to the licensing court the need for the grant of the licence applied for and in the particular locality where application is made. If applicant enters an appearance by an advocate the court may require that- he himself appear or the manager of the premises to which the application relates.[12a] This illustration adequately shows the extent and nature of the rights to hearings as granted by the various statutes. Rights to a hearing are also provided for under the displinary proceedings provisions and the Rating Act.

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11 There seems to have been a debate as to whether such a hearing ought to be an oral hearing - especially in England- the position in Kenya is very clear that the Legislature intended only oral hearings for there are provisions for administration of oaths, production of documents etc.

12 Cap 121, Section 11.

12a Cap 121: S.8. Such notice to be published at D.C.'s office etc.

Where a completed draft valuation roll is laid in the offices of the local authority for public inspection. Those persons adversely affected by the duty to pay rates have a right to object to the valuations of the rateable property. The valuation court must hear and consider all such objections against increases or additions to rates. East African courts have also held in favour of a right to be heard.[13]

The tribunals have the power to require the attendance of parties and witnesses. The party who enjoys the locus-standi is normally the aggrieved one. Where an individual is claiming a right or benefit , the locus is restricted to the claimant for example, the lessee and lessor at a rent tribunal. Otherwise in most tribunals the party who cares to lodge an application or an objection has locus standi.

Beofre leaving this discussion about the procedure at the hearing note that most tribunals have power to regulate their own proceedings. Such powers being either or not subject to the ministers discretion to approve or not the regulations so made .[14a]

## Procedure in Regard to Evidence.

### The Rules of Evidence.

The concern here is not with 'rules of evidence' as understood normally by lawyers (e.g. in regard to hearsay, leading questions, need for collaboration, etc.) because the applicability of those rules will vary from tribunal to tribunal and even from hearing to hearing. In the same way the nature of the evidence upon which the tribunal will rely to reahh its decision, the form in which it is presented will vary according

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13 In such cases as Postwalla v. Secretary of State (1898) 1 E.A.L.R. 8; Re Maina's application Hl Ct. (Kenya) Unreported: No.7 of 1969; D'Souza v. Chairman and Members of Tanga Town Council (1961) E A. 377 etc. and others.

14a The significance of this is that it is impossible to give the last word concerning tribunal proceedural rules.

to the subject matter, the personnel, the type of the tribunal and parties before it and above all the nature of the issues to be determined.

Indeed some tribunal rules go so far as to expressly exclude the strict rules of evidence. Thus the Agricultural Appeals Tribunal during " hearing or determination of any appeal is not bound by any rule of law, other than those it makes relating to the admissibility of evidence or relating to the form in which such evidence should be adduced".[14] Such a provision is however not very common. Admittedly, though procedural safeguards are of notable importance nevertheless it is conceded that the niceties of evidential rules as developed and applied by the common law courts[15] have no place in the proceedings of certain tribunals like the Land Adjudication Committee which is constituted of not less than 10 persons resident within the adjudication section and in which the executive officer appointed to keep records by the Adjudication officer may be the only one who can read and write and speak another language other than the area's dialect. This is where such powers as are given to the tribunal's or the ministers or both to regulate procedures become important provisions since they can be used to " ensure that too much technicality does not intrude into proceedings".[16] There are however certain tribunals, for instance those that carry out professional displinary proceedings, which should observe at least some of the strict rules of evidence. Franks felt that these " more formal tribunals" should apply the " same rules of evidence as in courts of law". One Act at least declares that proceedings before the tribunal shall be judicial in accordance with the Evidence Act,[16a] though again it may regulate its rules of procedure: the

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14 S.197 (2) : Rules of Tribunal L.N. 635/1963: Agriculture Act , Cap.318 . Also under the Hotels and Resturants Act (19 of 1971) the Authority " shall not be confined to receiving and considering only evidence admissible in a court of law".

15 Our Courts follow most of these rules to the letter. Wraith R.E (Supra) P.44

16a Advocates Act Cap.16.s. 60(6) and (7).

Advocates' Disciplinary Committee as under the Advocates Act is the relevant body.

In England [17] the courts have held that tribunals are not normally bound by the technical rules of evidence. Two cases in Britain illustrate this R v Deputy Industrial Injuries Commissioner[18] which was quoted with approval by Lord Denning M.R. in T.A. Miller Limited v. Minister of Housing and Local Government [19] (1968) where the Minister acting on his Inspector's recommendation made a notice of enforcement of planning arrangements. On appeal, Lord Denning said at page 634 that:

> " Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law . . . Hearsay, is clearly admissible before a tribunal . . . in admitting it, it must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination . . . (though ) the other sid must have a fair opportunity of commenting on it and contradicting it"

This is accepted in this paper as a fair statement of the Law. Incidentally it leads to the question of cross-examination and as is apparent from the quotation this area of the law is added with contradictions: commenting, contradicting . . and cross-examination.

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17 Reference is made to England so many times because most of our tribunal rules and law have their origins in that country. Infact most of the law and practice is strikingly similar.

18 (1965) 1 All E.R. 81: Related to industrial injury.

19 (1968) 2 All E.R. 633: A case considered leading in this area. Wraith R.E. at page 145.

NOTE: that under the Agriculture Act s.197(1) (a) (ii) talks of " summoning and examination of witnesses" as a rule that may be made by the Chairman and approved by Minister.

## Cross- Examination

We have so far seen that all tribunals proper grant a right to a hearing. What is not so clear is whether the right if any to cross-examine witnesses and others making allegations against a party is also similarly widely granted. The common law position is that such a right is indeed an integral part of the right to be heard.[20] The statutes unfortunately are not so explicit though they allp provide for a right to be heard. We have already seen that the East African courts have held in favour of the right to be heard and so far so good. The only disappointment is apparently in the only case apparently in East Africa that discussed the right to cross-examine: In Patel v. Plateau Licensing Court [21] the court held that a party to a dispute before a tribunal of the nature of a Liquor Licensing Court is not entitled to an oral hearing and therefore by implication not entitled to cross-examine those making prejudicial statements against him but may explain or contradict the accusation by way of written representations only- and this would suffice. Much of the case law available supports this view. Such cases as Board of Education v Rice[22] and Franklin v Minister of Town and Country Planning[23] . However since the famous Franks Report came out in 1957 the trend has

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20 I am here relying on the authority of Ceylon University v. Fernando (1960) 1 W.L.R. 223 where it was held in substance that if Fernando had asked for a right to cross-examine his accusers and such a right was denied then this would have been fatal to the case. It is important to note that unlike earlier cases this one was after Franks (at the Privy Council).

21 (1954) K.L.R. 147 (vol.27).

22 (1911) A.C. 179

23 (1947) 1 ALL E.R. 616.

been changing in favour of cross-examination. In 1971 H.W.R. Wade wrote " . . . The right to call and cross-examine witnesses is therefore, as a general rule, part of the procedure required by natural justice".[24] Since there is no statutory restriction on the right to cross-examine witnesses today one can safely assume that the courts would only be too willing to agree with Wade (above) since cross-examination can be used to establish or tear up an accusers credibility effectively.

## Conduct of Proceedings: Discretionary Powers

An accurate record of proceedings has to be made by a public officer appointed by the Minister to act as the tribunal's secretary.[25] Written representations may be made but the statutes generally require the physical appearance of those concerned. Evidence may be taken on oath or affirmation or otherwise and like most other powers in a tribunals conduct of proceedings, this power is discretionary. The statutory wordings are characterised by words bearing resemblance to this one under the Medical Practitioners and Dentists Act " s.28 The Board, with the approval of the Minister, may make rules generally for better carrying out the provisions of this Act . . "[26]. So that the tribunals generally have the power to regulate their procedures and mode of proceedings and much will definitely depend on the personnel sitting to hear and determine the cases coming before thm. This can only mean that standardisation of mode of proceedings is impossible. Tribunals have however been said to lay emphasis on substance, the decision and not form, that is how the decision is arrived at - informally.

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24 In ' Administrative Law ' 3rd ed. Oxford (1971) p.231.

25 See S.4(5) of the Pharmacy and Poisons Act cap.244.

26 Cap.253 s.28.

How far is this true? We will now proceed on to the area of Decisions of tribunals and the need to give reasons for their decisions. As for informality enough has been said already.

## Reasoned Decisions

Franks sums up admirably the need for reasoned decisions:

> " We are convinced that if tribunal proceedings are to be fair to the citizen reaons should be given to the fullest practicable extent . . . in writing because the reasons are then more likely to have been properly thought out. Further , a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal" 27

That is, a reasoned decision would assist appellants and that the decision is likely to have been well thought out and presumably fair and reasoned. Thirdly, though not said explicitly by Franks, such a decision renders a tribunal more amendable to the supervisory jurisdiction of the High court in regard to errors on the face of the record. The question of lack of a record does not arise for it is a statutory requirement that proceedings and decisions be on a record prepared by the tribunal secretary. S.9(2) of the Hotels and Resturants Act requires the tribunal to give its reasons in writing upon such a request.

A good reason for insistence on the giving of reasoned decisions is also provided by Tanzania's Permanent Commission of Enquiry, Annual Report, 1966-67 when it said that certain tribunals failed to communicate their decisions

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27 Franks Report, 1957 para. 98 as quoted in Wraith R.

and if they did " . . . no reasons were stated for the decision, or at least in some cases, where the reasons were stated, the wrong ones were made. It is therefore suggested that in order to reduce the number of 'Not justified' cases, officials should state their reasons for acting or deciding this or the other way".[28]

This was prompted by the incidence of complaints to the "P.C.E." of the 'Not Justified Cases" many of which were, on closer scrutiny found to have in fact been decided correctly but for which either no reasons, or bad ones or none at all were given. A case normally considered leading in this aspect is Padfield v. Minister of Agriculture Fisheries and Food[29] in which Lord Denning M.R. said that good reasons had to be given and if not " the court may infer that he has no good reason",[29a] that is the Minister who claimed he was not bound to give reasons and that he had unfettered discretion in the matter under review. This case was referred to with approval in the House of Lords decision of Breen v.Amalgamated Engineering Union[30] in 1971 where again Lord Denning said that courts would not endorse a claim of unfettered discretion " they go too far. They claim too much. The Minister made the same claim in the Padfield case (1968) and was roundly rebuked by the House of Lords for his impudence. So should we treat this claim by trade unions." They are not above the law, but subject to it. As for giving reaons he said that"the giving of reason is one of the fundamentals

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28 PP. 8 - 9 (Supra)

29 (1968) A.C. 997. This is a case to which Lord Denning referred to as being a landmark case in modern Administrative Law - in Breen v. A.E.U (infra)

29a See Breen v. A.E.U. (1971) 1 ALL. E.R. 1148 at 1154

30 Breen v. A.E.U. (1971) 1 All.E.R. 1148 (C.A.) The quotations are to be found on page 1154 of the Report .

of good administration" and that like in the Padfield case if bad reasons are given they might vitiate the decision.

The law is therefore clearly that reasons ought to be given for administrative acts, omissions to act, decisions and determinations. We now turn to the realm of principle in respect of procedural rules of tribunals in contradiction with the ordinary courts of law. We discuss inter alia representation, public and private hearings, Evidence and the question of burden of proof. The positions concerning these are abundantly clear in respect of the courts; not so in the case of tribunals.

## Legal Representation

Statutes that set up tribunals and provide a right to be heard also state there in if the party is to appear in person or through an advocate [30a] or any other agent, [30b] in the majority of cases. The right to be heard should as a general statement of principle go hand in hand with the right to be represented by an advocate. A number of statutes expressly provide for such a right, the Advocates Act, The Medical and Dentists Practitioners Act, the Liquor Licensing Act and the Teachers Service Commission Act where it is provided that the Minister may empower the tribunal to allow advocates and other representatives to represent parties at hearings. [31] The majority of the other statutes provide that

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30a See for example S.87 of the Income Tax Act Cap. 470: ' appellate body" means the court, the Tribunal or a Local Committee . . . ' (a) the appellant shall appear before the appellate body either in person or by advocate on the day and time fixed for appeal"

30b See The Teachers Service Commission Act cap.212.s. 11.

31 An Advocate or other agent. The Agent may be in the case of teachers a member of their Trade Union see cap 212 Teachers Service Commission: Appeals Tribunal Rules (s.11).

rules and regulations may be made by the tribunal and approval by the Minister for the tribunals benefit in execution of its functions. Using this power legal representation can either be granted or denied. It is important to note however that there is no express denial in any of the statutes of legal representation unless the provision in some of them that the interested or aggrieved party must appear in person is interpretated to mean just that.

The common law position is that where the statute does not prohibit any one from appearing by way of an agent ( a relative or a member of legal profession), then the tribunal is bound to grant the right to be represented and if it does not, a mandamus may be issued to compel it so to do. Such was the holding in the case of The Queen v. Assessment Committee of St. Mary Abbots, Kensington (1891).[32] Mark also Pett v. Greyhound Racing Ass'n. Limited;[33] Lord Denning in this classic case has also held that if a right of audience was granted and especially where the charge concerns a man's reputation and his very livelihood, then there is a right to appoint an agent, and if so, then there is no reason at all why such an agent should not be a lawyer. He said :

> " In matters affecting reputation or livelihood or of serious import, when fairness demands an oral hearing , natural justice requires that a person can be represented, if he wishes, by counsel or solicitor " per Lord Denning M.R. 33 a

That goes further and asserts legal representation as one of the requirements of natural justice. A " Justice" that all tribunals ought to observe at all times. Unfortunately all the

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32 (1891) 1 Q.B. 378 ( The question may arise if Kenyan courts will accept this as an authority since it came before the (arbitrary ) Reception Date of English Common Law into Kenya - 1897. Obviously there is no good reason to fall back on such an argument)

33 (1969) 1 Q.B. 125, at page 133 A . See also Enderby F.C. v Football Association.

33a See Footnote No. 33

good work in the case above seems to have been undone later, in 1970 in the Court of Appeal in a decision endorsed by the House of Lords.[34] It was held that if important points of law arise they should be brought up in a court of law but if parties choose " not to bring them before the courts, but prefer to put them before a lay tribunal , they must put up with the imperfections of that tribunal and must abide by their ruling that there be no legal representation"[35] per Lord Denning. As if this was not enough Lord Atkinson added that if that was the rule, that natural justice required a right to legal representation, then very many people including the legislators themselves must have been insensitive over a long period of years to what natural justice requires". The appeal was dismissed.[36] The position therefore seems to me to be this: that where the statute permits legal representation, then it ought to be allowed, also where neither the statute nor the tribunal rules prohibit such a right. Where, however there are provisions to the contrary, such a denial will not vitiate the decision made. Short reference may be made to the right granted by the constitution to any person accused of a criminal offence to legal representation of his choice. There have been cases but of these are not relevant to administrative law though they have interpretated the section positively .[37]

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34 (1971) Ch 59 . These are cases dealing with Domestic Tribunal proceedings and note statutory ones. It is however felt the applicable principles are similar.

35 (1970) 3 W.L.R. 1021 , at page 1027 (C.A.) in Enderby F.C. case.

36 P. 1028 of Enderby F.C. case (supra).

37 See Constitution of Kenya s.77(2) (c) and (d) as interpretated by such cases as Rep. v. Andrew (1970) E.A. 46: Rep. v. Ogolla (1973) E.A. 277.

Is denial to legal representation in tribunal proceedings a big departure from the popular maxim that justice must nnot not only be done but must manifestly be seen to be done? Four related arguments have been advanced against making representation mandatory, that it is mostly expensive, time wasting , tends towards protraction of proceeding (series of appeals), and that it tends to complicate relatively straight forward matters. Indeed certain authorities who feel very strongly about it argue that if parties before tribunals are normally to be represented by lawyers then these bodies may as well cease to exist separately and transfer their jurisdictions to the courts. Further that many tribunals can transact business efficiently without the aid of lawyers and that lawyers should only come in where great economic or social benefits etc are at stake. At any rate a right to legal representation in East Africa is a bit irrelevant and even superfluous. It is only less than half the population who can afford the services of a lawyer and what is more is that there is no incentive for the legal profession to specialize in tribunal law and practice. It is submitted therefore that legal representation should not be permitted where it hampers the informality of the proceedings, intereferes with their speed efficience and tends to prejudice the party who is not rich-enough to afford legal services. Where permission to representation exists, such a right should be made known to the parties for parties who cannot present their cases coherently themselves may suffer injustice just because they did not know such a right existed at all. Alternative legal aid can be made available to parties who cannot afford legal fees, who appear before 'more formal' tribunals and whose cases are of a rather grave nature.

## Public Hearings and the Principle of Openness

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> " We are in no doubt that if adjudicating bodies, whether courts or tribunals are to

> inspire that confidence in the administration of justice which is a condition of civil liberty they should , in general, sit in public".[38]

It had already said[39] " openness includes the promulgation of reasoned decisions, but its most important constituent is that the proceedings should be in public". These are only general rules and obviously there must be exceptions particularly the following: considerations of public security, where intimate personal or financial circumstances have to be disclosed or where the hearing involves a preliminary investigation of a case involving professional capacity or reputation. An example of the first exception is the provision for a review of preventive detainees' cases in which a tribunal makes recommendations concerning the detained person. These are not, of course, binding.[40] Displinary inquiries and proceedings are categories of the latter two exceptions above. The Transport Licensing Act[40a] and the Liquor Licensing Act provide examples of tribunals that hold public hearings. In the majority of tribunals, the matter is left at the discretion of the tribunal itself and the Minister concerned.

Is it of fundamental importance anyway that hearings should be held in public? Why? Indeed a leading scholar on Administrative law has questioned the rationale of this apparent doctrine in such words as " courts are not obliged to sit in public; there is no rule of natural justice requiring other adjudicating bodies to sit in public"[41] This

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38 Report paras. 77.

39 Para. 76.

40 See especially s.83 (2) of the Constitution and the Public Security Act. Recommendations not binding on President.

40a Transport Licensing Regulations Reg. 13.

41 S.A. de Smith, Judicial Review of Administrative Action. 2nd ed. Stevens & Sons, 1968) p.179.

may be so, yet as Franks said to " inspire that confidence", openness . . . one of the three essential features of the satisfactory working of tribunals".[42] It is true there are conflicting influences on the tribunals - that of courts ( leaning heavily towards working in public) and that of the administration (which strongly leans towards privacy). It is therefore not surprising to note that in Kenya tribunals more often than not prefer private hearings to public ones inside the Administration's buildings! It is suggested the same rules as apply to court proceedings should also apply to the tribunals - concerning public hearings with the necessary exceptions.

## The Burden and Standard of Proof, Evidence and The Question of Disclosure of Documents and Precedent

It is something akin to mystery as to what the standard or burden of proof is in cases before tribunals. These have sufficiently been settled regarding ordinary court of law proceedings: in civil litigation, he who makes an assertion must prove it on the 'balance of probabilities' standard; in criminal jurisdiction the burden of proof is on the accusers, the prosecution to proof accused guilty " beyond reasonable doubt". On which camp do the tribunals belong? To the civil cases group because many of their cases are of a civil nature except a few that display an element of criminality? This would be a good solution only that it is rather simplistic since most cases coming before tribunals are not easily classifiable as either civil or criminal; the lawyer who is displined of professional misconduct may have defrauded clients of their money or the doctor may have carried out an illegal act of treatment on his patients and so on. An applicant who applies for a liquor licence is supposed t appear and prove why the licence should be granted or should not be cancelled. All the licensing court does is to consider the public interest, character of applicant, his age and financial position (e.g. Bankruptcy) and then determines the case at hand. We think such procedures suggest a civil conduct and while very much aware that each different case will

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42 See Footnotes nos. 2,3,and 4.

be treated differently and that most tribunal proceedings are indeed neither adversarial nor inquisitorial, submit that a clear standard of proof ought to be required.

Tribunals may seek their own evidence in addition to hearing that which is put before them, may take account of their expert knowledge, are not bound by the strict rules of evidence; can they however make use of documentary evidence prejudicial to a party's case and not disclose such evidence to him? The principle embodied in the maxim audi alteram partem (literally taken to mean no man shall be condemned unheard) a doctrine that has widely been accepted since time immemorial, does not prevent a deciding body from obtaining its own evidence but it does require such evidence to be made available to all parties. Thus undisclosed reports, private communications between one party and the tribunal or other evidence not disclosed may lead to the decision being quashed by a court of law. R v. Deputy Industrial Injuries Commissioner ex parte Jones [1962] [45] is an illustrative case in this regard. The Commissioner dismissed a claim relying on a medical expert's report which advised him that the injury complained of had not arisen out of and in the course of his employment. This was after the oral hearing had been completed. Lord Justice Parker faced wi these facts held that the commissioner should have notified the parties of the report and given them an opportunity to comment on it. Thus courts place emphasis on disclosure of reports and the opportunity to produced evidence in rebuttal and that the author cannot be cross-examined as held in Ex parte Jones (above). The position in East Africa is also that such reports ought to be disclosed and if not, such a failure constitutes a failure of natural justice.[46]

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45 [1962] 2 Q.B. 677

46 [1963] E.A. 84 : Cowasjee Bros. v. Cowasjee Employees Uni
Non-disclosure of a report even though it be in favour of complainant will constitute a serious breach of the rules of natural justice.

As for binding precedents , legal practice and theory is that triubnals are bound to follow precedents set by decisions of the High Court and Court of Appeal. Also where there is an appellate tribunal system, and this is the case in majority tribunals, lower tribunals should be bound by decisions of the higher ones and should take account of them in making future decisions. This is however easily said than done since in the majority of tribunals, the officials are not legally qualified and even if they are which is the exception other than the rule parties coming before them are normally not legally qualified. This is nevertheless not sufficient reason as to why no case law should develop. A very strong argument against such a development is obviously maintaining the informality and speed with which tribunals are praised to operate today and on which their history claims to have been the reasons for their original development. Tribunals certainly have not out lived their usefulness and since there is always an avenue of appeal they need not commit many blunders

Appeals

It is predominantly in Kenya that appellate tribunals are to be found in East Africa, Uganda and Tanzania having relegated their systems so that the relevant Ministers sit on appeal on decisions from tribunals. In Kenya any persons aggrieved by a decision of a tribunal of first n instance may either appeal to a more superior tribunal, to the Minister or to the High Court. Indeed, in all the tribunals, an appeal is possible to some other superior body and as the Franks Committee said such a system appears just to parties before it, knowing that they have two or more opportunities to convince separate bodies of the soundness of their cases. Probably not many appeal for all c

sorts of shortcoming -financial, ignorance, distances [47] etc.

Kenya's tribunal appeal system comprises a clear cut three- tier system, that is, separate appeals lie to appeal tribunals, the Ministers and to the High Court. In the majority o the statutes have set up two grades of tribunals the tribunals of first instance and the Appeal Tribunals . In a few cases three grades of tribunals exist. Examples are Land Control Boards, Agricultural Boards and tribunals under the Land Adjudication Act. In the last category are tribunals whose appeals only go either to the High Court or to the Minister whose decisions are generally final.

On appeal most Appeal Tribunals are the final arbiters in the case as is expressly stated in the statutes. The same applies to appeals to the Minister and ideally those to the High Court. There is however except in one case, Liquor Licensing , no express statement that the High Courts decision shall be final. Therefore it can be assumed that appeals in cases relating especially to professional displinary proceedings ( the legal, medical and pharmaceutical professions etc.). In cases where the Appeal tribunal is the final arbiter provision is nearly always made for stating a case to the High Court where a question of law arises. The High Court has only to determine the question and remit it to the tribunal for the cases decision. The Transport Licensing Appeal Tribunal is an exception in this respect, its decision is said to be final and conclusive but it need not even state cases on points of law that may arise to the High Court. The Rent Tribunals are in a class of their own.[48] The Chairman

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47 An example is in the Agriculture Act where to appeal from a District Committee to a Provincial Agricultural Board , one may have to travel a distance of hundreds of kilometres and considering the time and financial factors such an appeal may only be lodged by the very well of citizens.

48 Cap 296 as amended by the Rent Restriction (Amendment) Act No.1 of 1971. The procedures of the Tribunal under this Act are quite complicated. Under s.7 points of law may be decided by the Chairman only. Under s.9 substantial questions of law may be referred to the High Court and Appeals lie in exceptional cases.

has to be a qualified advocate and his deputy. It may state questions of law for the High Court's opinion and its decision is stated as being final and conclusive except in a few "exceptional cases" in which appeals lie to the High Court such as where the tribunal investigates and makes an order. Secondly, on any point of law and thirdly in the case of premises whose standard rent exceeds 200 shillings per month and the question raised is one of mixed law and fact. Determination of rents are stated to be questions of fact. Further the tribunal can review its decisions particularly where it delegates its powers to an administrative officer or any other person. This is a rather complicated procedure, but it appears attractive at least in theory.

What can be said concerning the above discussion is the tribunal appeal system has alrgely avoided the possible confusion that would result were the conditions of appeal to be very strict and invariably requiring distinctions as to fact and law.[49] This would be so since tribunal members are not legally trained and most parties not represented. As a general proposition appeals lie as of right where the inferior tribunals' decision is challenged and the appellate jurisdiction may affirm or alter the decision so challenged. The right of appeal is statutory. There are other ways however of challenging tribunal decisions and especially the proceedings. This is done by way of the supervisory power of the High Court referred to as judicial review. It is based on the constitutional theory that the High Court has an original civil and criminal jurisdiction so that the statutory statements that a tribunals decision shall be final will not affect the power to review especially where the tribunal acts outside its jurisdiction and breaches one of the fundamental rules of justice as laid down by the statute and sometimes by the common law where it applies. This will constitute much of the next chapter.

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49 Examples of the exceptions to this are (1) The Income Tax Act Cap 470 s.86(2) Where an appeal to the High Court from the Commissioner of Taxes assessment " may be made only on a question of law or of mixed law and fact (2) The Rent Tribunal (Footnote 48) such distinctions always are a source of disagreement.

# CHAPTER 5

## ADMINISTRATIVE ACTION: JUDICIAL REVIEW AND THE SOCIO-ECONOMIC IMPLICATIONS

Certain presumptions have evolved regarding the validity of administrative action. The main one is that in the absence of proof to the contrary courts tend to presume that all official action is valid and regular (omnia praesumuntur rite esse acta). Everything is presumed to have been done properly. In other words the courts of law will not show interest in administrative decisions unless a complaint is made to them expressly. The validity of an administrative decision can be challenged either on appeal if such a right exists or on review. Appeals consider the merits of the decision whereas on review it is the legality of the decision that is in issue. Many appellants either due to an ignorance of these technical points or wishing to lend much credence to their cases raise questions of legality on appeal. English courts have taken the stand that they would not decide such appeals but would merely issue an order of certiorari to quash the decision on jurisdictional impropriety grounds.[1] This merely postpones the problem and further restricts the rights of appeal. A failing in the law.

In this chapter, for lack of space, we intend to discuss briefly the need and methods of judicial review and the remedies available, demystify administrative tribunals as institutions that seen against the socio-economic and politico-economic background of our system tend to be agents of the propertied petty bourgeois class to facilitate exploitation of the workers. This is the sort of subject that would be

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1. The case Metropolitan Properties v Lannon (1968) 1 W.L.R. 815 is considered leading in this respect.

entitled, the political-economy of administrative tribunals in ordinary socialist literature. This is not. Finally we put forward a few suggestions for reform and record our conclusions.

Law has been variously defined as a body of customary or enacted rules recognised by a particular community as binding or the command of a sovereign or a tool for social engineering or an instrument used by the ruling classes, the state, to obtain habitual obedience from the masses or simply and realistically; that law is in fact just what the courts say it is. This last definition seems to fit very well in the context of Administrative Law as is popularly understood: what the courts say regarding administrative action is taken to be the law. It is equally true to argue that in present day Kenya, law serves the interests of the economically powerful class, which is a peculiarity of the Common Law systems. There have not been much effort to alter this state of affairs and to this extent, if no further, Kenya is a neo-colonial state.[1] The relevance of this is that English Administrative Law is all good law in Kenya and infact when one discusses judicial control of administrative action by the High Court.[2] English authorities provide much of the law.[3] It is in this light that judicial review ought to be seen.

Special tribunals are 'special ' in the sense that they are always created by statute to perform certain specific functions and no other unless empowered to do so by Parliament, and Parliament alone. This requirement is the key to the High

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2 English and other common law world authorities though not binding on Kenyan Courts are of high persuasive value. There is in fact very little difference if any between English and Kenyan Adm case law.

3 Administrative Law is essentially a case-law subject.

courts supervisory jurisdiction over inferior tribunals and other administrative bodies . . . The High Court may review any decision made by a body which has legal authority to determine questions affecting the rights of subjects if particularly that body acts in excess of its legal authority. Before discussing the principles governing judicial review we will first discuss the need for it at all.

Judicial Review ought to be viewed in the light of the needs of society, especially pertaining to social and economic development. Should the High Court consider government policies in executing its supervisory functions? In the case of The Kenya Aluminium and Industrial Works Limited v. Minister of Agriculture[4] this question was answered in the affirmative. In that case the issue was the protection of the wheat industry so that it could supply domestic needs, the court considered the policy as of paramount importance in deciding whether or not a licence should be granted. Policy questions are difficult to determine. A careful study of the relevant statute and an objective appraisal of the importance of the policy ought to provide some guidelines. It is true most special tribunals always decide on questions of policy but these also involves human individual's problems. Therefore the need for review has been explained in such terms as the protection of individual liberty since tribunals may err greatly and because of the uncertainty and inconsistency in scope and application of the doctrine of ministerial responsibility. Though of fundamental constitutional importance, the doctrine has apparently failed in its main objectives: that ministers should account for all administrative complaints in their ministries and departments. This, it will be noted can only be by way of questions addressed to the Minister by individual members of Parliament. Such a system is not efficient. Not many citizens know who their M.P.'s are, not all questions addressed to the Ministers are taken seriously, 'question time' comes shortly before the end of each day in Parliament will be sitting at all. The Ombudsman institution would provide a good alternative but this has been rejected in

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4 (1961) E.A. 248.

Kenya.[5] Judicial Review of administrative action is therefore still an important feature of administrative law today.

Judicial control of administrative action may be discussed under the following parts, the grounds on which review may be sought, the nature and remedies available, alternatives and one or two proposals for reform. Once again this is only a sketchy discussion.

Review is allowed on questions of jurisdiction (ultra vires, errors of law apparent on the record etc) and on the violation of the rules of natural justice. The popular approach is one in which is combined both ultra vires and jurisdictional errors so that many concepts are embraced.[6] Doing the wrong thing, in the wrong manner, for bad motives, unreasonably and with defects regarding jurisdiction over the facts and the law. The wrongful delegation of the power to decide and wrongful refusal of jurisdiction and others. Instances therefore arise of the wrong body doing the 'right thing' or the right body doing the 'wrong thing'. The obvious examples are an improperly constituted body in the former and a body acting in excess of jurisdiction in the latter. An improperly constituted body is considered not a ' tribunal' at all.[7]

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5. In Sessional Paper No.5 of 1974 arguing that the Parliament Courts of law provide adequate avenues of redress.

6 Jurisdictional error and ultra vires, although very similar, and are many times treated as similar, are technically different. It is infact possible to describe the same irregularity as involving either, but whereas certiorari and prohibition normally issue for the former, mandamus, injuction and declarations are appropriate for the latter.

7 See Wollet v. Minister of Agriculture (1954) 3 All E.R. 529.

## GROUNDS OF REVIEW.

### Theory of Jurisdiction

This is a difficult area of administrative law though the general rule is easily stated . The courts will review errors going to jurisdiction but not errors within jurisdiction. The chief problem is one of determining on which side a particular error falls or at times whether the tribunal has jurisdiction to determine the nature and extent of its own jurisdiction.

A tribunal that has jurisdiction, has not exceeded or abused its jurisdiction if it merely misconstrues a statute, admits illegal evidence or convicts without evidence. As is often quoted ' if a tribunal has jurisdiction to go right it has jurisdiction to go wrong" [8] meaning if it has the power to decide, its decision is equally valid whether "right" or "wrong". Such a decision by the doctrine of res judicata can only be impeached on appeal if such a right exists. This is assuming that the deciding body does not commit reviewable errors like breaching the rules of natural justice, taking into account extraneous matters or acting in bad faith and so on which are errors not within jurisdiction but going to jurisdiction.

A Tribunal will lack jurisdiction and be acting ultra vires if it exceeds its jurisdiction or is improperly constituted as we have already noted. In the former the tribunal will be deciding a matter it is not empowered to decide. The Anisminic Case[9] is a good example. In that case Lord Reid explained that the issue was not whether the Commission had made a wrong decision but whether they had enquired into and decided a matter which they had no right to consider.

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8 R.v. Governor or Brixton Prison ExP.Armach (1968 ) A.C. 192(p.234).

9 Anisminic Limited v. Foreign Compensation Comm. (1969) 2 A.C. 147.

An improperly constituted tribunal we have seen is not a "tribunal" at all.[10]

Secondly a tribunal will also be acting ultra vires if it wrongly refuses to do the right thing. This can be discribed as " Refusal of Jurisdiction". An analogy is drawn between a tribunal deciding that which it is not empowered to decide and a tribunal refusing to decide that which it is required by law to decide so that the latter is held also to be acting ultra vires. The most common example is where a tribunal mistakenly refused to entertain an application or appeal which it ought to hear. In R v. Paddington Rent Tribunal ex p. Millard [11] the tribunal misinterprating some procedural matters mistakenly refused to proceed with an application for security of tenure. The High Court held that the tribunal did have jurisdiction and should therefore determine the question.

Refusing to entertain an application is not the only example of a refusal of jurisdiction. De Smith [12] gives other examples like deciding a different question to the one before the tribunal, rejecting relevant evidence and certain other factors in the wrong belief that these matters are outside jurisdiction which all amount to wrongfully declining jurisdiction.

Thirdly, we will discuss procedural ultra vires, that is the doing of the 'right thing in the wrong manner! De Smith[13] say about this that Parliament merely prescribes the manner or form in which a duty is to be performed but seldom lays down what the legal consequences of failure to observe its prescriptions will be. This is important because the courts must decide whether the procedural requirements which have been violated are

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10 Woollet v. Minister of Agriculture (supra)

11 (1955) 1 All E.R. 691.

12 See De Smith, Judicial Review 2nd ed. 1968 , pages 108-1 and 126. This book is a leading work in this respect.

13 Rayner v. Stepney Corporation (1911) 2 CH 312
R.v.Industrial Tribunal ex p. G & T Limited (1967) 2 W.L.R. 259.

'mandatory ' ( and thus binding on the tribunal) or merely 'directory'. Lacking clear principles in this respect the courts are forced to decide as is convenient within the material circumstances. Certain procedural irregularities will be held to vitiate the proceedings: failure to give notice that a right of appeal exists , as required by statute or sending the notice not to the proper address but to another one given by the other party.[14]

Improper delegation and abdication of judicial power are two rather special examples of procedural ultra vires. They both illustrate the importance of statutory construction in this area. The tribunal which has the statutory power to decide should do so and not pass the duty on to someone else. Even where delegation is allowed, it must be exercised strictly and in accordance with the statute. Thus where there was power for the National Dock Labour Board in England to delegate its displinary functions to local dock labour boards, it was held that a decision made by a 'displinary committee' of a local board was ultra vires, because the power of delegation was limited to local boards, not their committees. Such a sub-committee may hear evidence on behalf of the board and in turn present it or an accurate summary thereof to the board. This was the holding in R v Local Government Board exp. Arlidge, in 1914.[15]

As to the abdication of judicial power or acting under the direction of someone else, it is wrong for a Minister, for instance to issue instructions to statutory officials as to how they are to decide cases and wrong for such officials to abdicate their disrection by deciding cases simply according to Ministerial or departmental instruction.[16] Regarding precedent it has been said that " A tribunal must not pursue consistency at

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14 Vine v. National Dock Labour Board (1957) A.C. 488 See also Allingham v Min. of Agriculture (1948) 1 All. E.R.R. 780, which also involved sub-delegation of delegated powers.

15 (1914) 1 K.B. 160.

16 See Simms Motor United v. Min. of Labour (1946) 2 E.R. 201.

the expense of the merits of individual cases. If the discretion is to be narrowed, that must be done by statute".[17]

Fourthly, any discretionary powers must be exercised according to law' [18] reasonableness, disregard of extraneous or irrelevant considerations, avoidance of ulterior motives or bad faith describe the extent of what is 'according to law'. This is like telling the tribunal how it should behave and not strictly how to do its job. This is one of the rationale for the distinction between errors in excess of jurisdiction and errors within jurisdiction, which admittedly has become somewhat blurred.

The Anisminic case illustrates how a tribunal is entitled not to consider irrelevant or extraneous matters to its jurisdiction. As for wrong or ulterior motives de Smith says that " if a power granted for one purpose is exercised for a different purpose , that power has not been validly exercised." [19]

Bad faith or mala fides may be described as dishonesty or fraudulent conduct. So far no court has established bad faith in a tribunals decision. In Lazarus Estates v. Beasley (1956) Lord Denning said " fraud unravels everything".[20] mere

Judicial pronouncements to date indicate that it is almost impossible to prove unreasonableness . The test is said to be ' if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the

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17 Merchandise Transport Limited v. British Transport Commission (1962) 2 Q.B. 173: Devlin, L.J. at p.193.

18 R v. Bowman (1898) 1 Q.B. 663, Wills J at p.666.

19 De Smith, Judicial Review, 2nd ed. 1968 p. 304.

20 (1956) 1 Q.B. 702 at page 712.

courts can interefere . . . . ."[21] This says it all. De Smith himself says this test " whittled down the requirement of unreasonableness till it had all but disappeared"[22]. The author agrees with him.

Error of Law

This is the seonnd ground on which tribunal proceedings may be vitiated. The doctrine of error of law on the face of the record was first expounded in 1950 when contrary to previous authority the court held that it was entitled to call up the record of any inferior court or tribunal and examine whether there was any error of law on the record and if so, quash the decision made. It was also held in the case that " if the tribunal does state its reasons,and those reasons are wrong in law, certiorari lies to quash the decision".[23]

This doctrine can operate if the record is a" speaking order", that is, if it gives the facts of the case, or the evidence or the reasons for the decision. Lord Denning has suggested that the court can order the tribunal to complete the record by making a finding on certain material facts for the tribunal cannot defeat certiorari by sending up an imperfect record on review.[24] Otherwise there is some doubt as to what constitutes the 'record'.

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21 Per Lord Green M.R. in Associate Picture Houses v.Wednesbu Corporation (1948) 1 K.B. 223 at 230. The test would "require something overwhelming".

22 In 'Judicial Review' page 315.

23 See R.V. Northumberland Compensation Appeal Tribunal (1951) . 1 K.B. 711 as affirmed in (1952) 1.K.B. 338 (C.A.) and at page 352.

24 See R.v. Medical Appeal Tribunal exp. Gilmore (1957) 1 Q.B. 575.

What, however is an " error of law"? The wrong interpretation of a statute or a misapplication of a legal doctrine clearly constitute " errors of law". Courts have extended this doctrine however, so that the failure to adjourn a hearing to afford an opportunity to be heard [25], taking into account irrelevant considerations [26] and even failure to give adequate or consistent reasons where a duty exists to give such reasons [27] amount to errors of law.

## Breach of the Rules of Natural Justice

This is the third ground on which judicial review may be based. If set of implied conditions on which any statutory powers is to be exercised. These rules are just a shorthand way of referring to the minimum procedural standards required of tribunals. The rules are based on two main principles, one that no man shall be condemned unheard, and two that no man shall be a judge in his own cause; as to the application and extent of these rules reference ought to be made back to the chapter on procedural requirements. A breach of these rules results into the quashing of the decision by way of an order of certiorari.

'Natural Justice' has for long been a problem area. For long, tribunals have been considered to be bound to observe the rules of natural justice only if under a duty to act judicially. It is difficult to determine what acting judicially comprises. Back in 1863 the court in Cooper v. Wandsworth Board of Works [28] laid down a very broad conception of a judicial function. This was restricted in subsequent years particularly in 1924 by Lord Atkin when he came up with

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25 Priddle v. Fisher (1968) 3 All E.R. 506.

26 Wooten v Central Land Board (1957) 1 W.L.R. 424.

27 Re Poyser and Mills Arbitration, (1963) 2 W.L.R. 1309.

28 (1863) 14 C.B. (N.S.) 180.

this classic pronouncement " any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially, acts in excess of that authority they are subject to review by these writs"[29] of certiorari and prohibition. This statement did not clarify the law but in fact added to the confusion so that in 1951 it was said that the issue or withdrawal of a licence was not a 'judicial' function, for a licence was a 'privilege' and not a 'right'.[30] Recent decisions have however avoided this confusion by making decisions which give the impression that the concept of judicial function is today virtually irrelevant. One such case is Ridge v Baldwin [31] which disapproved the distinction between " rights" and " privileges" and held that the observance of natural justice depends not on the function of the person exercising the power but on the nature and effect of the powers exercised on the complainant of the injustice.

In 1971 Lord Denning's observations seem to deal with Lord Atkin's statement the death blow. He said that " a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi- judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must in a proper case give a party a chance to be heard...." [32] This is the present level of development, not only are we back to Erle,C.J. in Cooper and Wandsworth but much farther. This is a very welcome reform

29 In the case of R v. Electricity Commissioners (1924) 1 K.B. 171 at p.204.

30 Nakuda Ali v Jayaratne (1951) A.C. 66; R.v.Metropolitan Police Commissioner exp. Parker (1953) 1 W.L.R. 1150.

31 (1964) A.C. 42.

32 Breen v. Amalgamated Engineering Union (1971) 1 All E.R. 1148 at page 1154.

for it serves to simplify the law a great deal.

The Remedies Available

These include the three prerogative orders, certiorari, prohibition and mandamus. The equitable and private law remedy of injunction and the relatively recent declaration.

Certiorari is an order which enables the High Court to quash a decision if it is satisfied that it should not stand for such reasons as an error on the face of the record, excess of jurisdiction or breach of the rules of natural justice. An order of certiorari has a statutory limit of six months and will not issue unless other alternative remedies are sought first.

Prohibition lies to review future action of prohibiting any continued excess in jurisdiction and preventing a proposed abuse of jurisdiction or breach of the rules of natural justice. This can be contrasted with a certiorari which lies to review an action already taken. Both orders are very similar though, and often issue together to quash and prohibit any future irregularity.[33] Since it relates to future acts, a prohibition has no time limit.

Mandamus, the third prerogative order lies always to compel the performance of a public duty in which the applicant has sufficient legal-interest ( locus standi). A mandamus will therefore lie where tribunals and other public bodies and officials mistakenly or otherwise refuse to entertain an application or perform any other public duty[34] after they have been asked to take appropriate action. A certiorari

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33 Thus Lord Denning at page 126 of " Freedom Under the Law" referred to these orders as " pick and shovel".

34 See R. v. University of Cambridge (1765) 1 W.B.K. 547 where the Vice-Chanellor of the University was ordered to set the University seal upon the appointment of a duly elected High steward.

may therefore issue to quash an improper decision and an order of mandamus to require the correct matters to be now considered in reaching a new decision. This order will not issue against the Government itself.[35]

An injunction which is a private law remedy issues normally to stop a person from breaking his legal obligations (on pain of contempt of court). A tribunal that purports for instance to withdraw a licence without first hearing any objections will be restrained by means of an injunction. Injunctions are readily available against private persons and they fulfil their usual function of providing a valuable alternative to actions for damages. Prevention turns out to be better than cure. This is realised by use of either an interim or a perpetual injunction to restrain a threatened wrong before it has taken place. A perpetual injunction provides a cure once and for all. The courts do not lend a ready ear to pleas of administrative inconvenience.[36]

Declaratory judgements. The right to ask the court to declare the law on some doubtful point is a very useful remedy, for it enables disputes to be settled before they reach the stage where a right is infringed.[37] In administrative law the great merit of the declaration is that it is an efficient remedy against an ultra vires action by government authorities of all kinds.[38] A person dismissed from office can insist that he still holds it.[39] It is

35 R v. Commrs. of Inland Revenue, Re Nathan (1884)12 Q.B.4

36 See Bradbury v. Enfield L.B.C. (1967) 1 W.L.R. 1311 Lord Denning M.R. said " Even if chaos should result, still the law must be obeyed".

37 Vine v National Dock Labour Board (1956) 3 All E.R. 939. The validity of suspension of employment of dock workers was in issue.

38 Smith v. East Elloe Rural District Council (1956) 1 All.E.R. 855.

39 As in Ridge v Baldwin (1964) A.C. 40

remarkable of declarations that they do not have a threat of judicial sanctions to back them. The Court merely declares the rights of the parties before any wrong is committed. Thus it saves litigants time and money. A declaratory judgement can be made in a case where a party has a justiciable interest against statutory as well as non-statutory bodies, it is of course not subject to express time limits and like a mandamus can issue to command public bodies to carry out their public functions. In the case of Prescot v. Birmingham Corporation [40] a taxpayer obtained a declaration that the Birmingham city owed a fiduciary duty to its taxpayers and should not give certain sections of the community subsidies at the expense of another merely for the sake of benevolence or philanthropy!

These remedies it is clear are not in good shape and the review structure needs some urgent reform. There should either be an administrative " court " or any other system that 'smoothly' covers the entire appeal and review structure. To fill the many gaps and loose ends existing in the remedies field of administrative law one single remedy as the one recommended in 1971 by the English Law Commission may be adopted. To be known as an application for review, such a remedy would enable the court to quash a decision command an authority to act, declare an act or order of determinations invalid and of no effect in law.

## Exclusion of Review

This is normally done by use of ouster or privative clauses. Otherwise all matters are justiciable unless expressl excluded by statute. In Kenya the High Court is competent

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40 (1955) CH 210.

to review the decisions of tribunals. The only problem is that the statutes neither deny nor grant the right. The only reasonable inference from this is that provided good reasons exist for the court's interference there would be nothing to stop their jurisdiction. The court however has no jurisdiction in areas concerning national security, land issues and immigration[41]. The law, it would appear is on the whole not in a satisfactory state.

## Socio-Economic Implications

Here we discuss very briefly the role of tribunals in a capitalist society and the implications of judicial review. Like all other institutions of this country, tribunals themselves reflect the structures and policies of the economic classes. They obviously render an invaluable service in the day today administration. But they administrate the interests of those they represent and to do this effectively they appear to stimulate or defend aspirations and demands that run counter to the logic and power structure of the capitalist system, but the capitalist logic itself rests on the so-called law of profit maximization. It is the pursuit of maximum profits which is subjected to certain limitations by pressures from without (rent tribunals, industrial court, professional boards etc.) which are merely extrinsic limits to the logic of capital and do not substantially infringe upon it. Indeed they tend to create more amenable circumstances for further maximization of profits, accumulation of wealth, inevitable inequalities and in the final analysis exploitation in every sense of the word.

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41 See In re Marles Application (1958) E.A. 153. Contrast this case with the Anisminic Case in which it was said that ouster clauses protect only valid decisions.

Judicial review , while it may correct procedural wrongs has very little to do with the substance. The courts merely enforce the conservative common law doctrines and under the present circumstances judicial review is simply a means of underscoring the class distinctions perpetrated by the judicial system. By democracy it is understood that those affected by a decision will participate in making it. This does not happen, neither in the courts nor in Parliament except as far as the ruling classes are involved. The courts fail miserably to exercise restraint to allow society to work out proper balances between the conflicting doctrines of principle and expedience due to their eargerness to assert the limits to which class distinctions may be blurred. In fact the 'good' reason as to the need of judicial review, that is, to protect individual liberty demystified means, to ensure the protection of private property and other vested interests in the system. It should not be forgotten for one moment that tribunals have proliferated to all key areas of the economy: in land, taxation, agriculture, transport, rented , housing , all the professions, trade disputes etc etc. This can only mean more efficient administration which will be accompanied by all the shortcoming discussed.

## Conclusion and Some Suggestions for Reform

We have therefore seen that the tribunal institution is invaluable in todays administration, that tribunals are neither courts of law nor are they merely departmental organs but an hybrid of both with varying degrees of similarity with each side as one notices when he studies them in detail. We have also seen that the law especially relating to judicial review is not in a very satisfactory state. Review may be allowed on grounds of excess of jurisdiction or ultra vires, which is quite well settled, or error of claw which still has to be settled and for breach of the rules of natural justice. The extent and importance of these rules is still not finally settled. It has also been seen that the tribunals have a role to play in the economic development of our country and that new fields exist to be conquered. Last and not least that the tribunals have not failed to perform the sacred role of the protection of the

sactity of private property which is the basis of our "free-market" underdeveloped capitalist economy.

As for Reform,s England has provided the guidance as it has always. This is their system and tribunals are their institutions and they should understand them better. In 1958 England set up the 'Council on Tribunals' which is a standing machinery for the general supervision of tribunal organization and procedure, a watch-dog, independence of ministerial control but without executive functions. It should just "bark but not to bite" [42]. It makes annual reports to Parliament. New Zealand has come up with a special administrative law branch in the High Court which handles all administrative law cases and the system has worked well so far. Such a system ensures expertise.

Tribunals themselves should be reorganized by [illegible] combining some of those that perform similar functions and each group should have a head who makes a report to a tribunal chief who in turn reports to Parliament.

The Ombudsman institution is regarded by some as an alternative to tribunals. Started in 1809 in Sweden , the institution has spread to England, Guyana, Tanzania etc. The Ndegwa Commission in 1971 recommended such an institution for Kenya [43] but the Government in 1974 rejected the proposal arguing that the courts and Parliament provided adequate legal and non-legal protection from administrative wrong doing. As the said commission said " a real need exists for the appointment of an ombudsman in Kenya. Serious allegations regarding tribalism, nepotism, corruption and other forms of malpractices . .. against civil servants and other public servants".

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42 Wade, H.W. : Administrative Law 3rd ed. 1971 page 268,

43 The Ndegwa Commission Report (1971) cap.xxii (Para.699)

Finally the so called rules of natural justice, so important in administrative law and yet so unclear in content and application should be reduced into a statute. The last problem is a voluble one: Is there a panacea for all the questions raised in this paper? The average university student in Africa today believes a change, an overhaul of the capitalist system in favour of socialism (or even Marxism) is the only solution. Others argue Revolution is no solution. Yet others preach a reversion to the old African life-style; communalism. Administrative Tribunals, essentially a product of welfare capitalism serves completely different purposes under truly socialist states. These are not many Cuba, China, Ugoslavia and others are often cited. Meanwhile Welfare, Democratic or any other branch of capitalism has failed to provide true social justice. Probably someone may come up with the solution any day now like " Welfare Socialism" or what you will, but socialist ideology is not doing so bad up to now and it clearly appears to be the only solution.

# P O S T - S C R I P T

The original dissertation topic was Administrative Tribunals and the Present State of the Law. After much toiling under much pressure I discovered I had already exceeded the maximum word limit permitted for the paper and then there was the question of typing expenses. Alas, one can even write a whole book on the present topic: " Administrative Tribunals and the Law ". What I have given is a mere outline.

P.N.N.N. - 1978

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