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TRIBUNAL REFORM – THE SCOTTISH DIMENSION

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Introduction

1. Although I have in England all my life, I like to think of myself as a citizen of the United Kingdom. I have some family credentials.¹ I have a Scottish name, dating apparently from the time when my father's ancestors left Lanarkshire in the 17th C to join the settlements in Northern Ireland. There they lived until early the last century when my grandfather as a doctor came to work in the Ministry of Health in London. My mother also had a Scottish name, Armstrong, and on her side I can claim a Welsh great-grandmother, who both lived in Wales and spoke Welsh.
2. In the law, my introduction to Scots law and Scots lawyers came relatively early. As Revenue junior in the early 1980s I used to be instructed in as a second junior in Scots tax cases in the Lords. The idea I think was that I would guard against the risk of some quirk of Scottish law or procedure infecting the integrity of the British system. I cannot remember contributing, or needing to contribute, much in that respect. But I was fortunate to meet and make friends of some distinguished Scots lawyers, including the present Lord President.
3. I had a closer encounter with the substance of Scottish law as Chairman of the Law Commission in the late 1990s. I was lucky to discover a shared interest in music with Brian Gill, my opposite number at the Scottish Law Commission – a shared interest, which I believe added also to the harmony of our legal exchanges. It was in that period that I became acutely aware of the need, on almost any subject we tackled, to keep in mind the “cross-border” dimension. Perhaps the most stimulating joint project was on the law of Partnerships, on which I was privileged to work with Patrick Hodge. I saw the project as a model of the ability of the two legal systems to evolve common solutions to shared problems, although starting from radically different legal theories about the nature of partnership.
4. Against this background I have relished my appointment to what I think is the first UK wide judicial appointment at this level, made with the “concurrence” of the chief justices of each of the three jurisdictions. By “this level” I mean the intermediate appellate level immediately below the House of Lords (or the new Supreme Court). In the tribunal world we are used to first instance jurisdictions extending to the whole UK, notably in tax and asylum; and we are used to a UK wide appellate jurisdiction at the highest level. In between we have divided responsibilities between the three systems. I shall return to this issue.
5. In this talk I want to talk briefly about the background to the tribunal reform

¹ My sister-in-law, Mrs Julia Carnwath, has kindly provided some notes on family history to support this claim: see the Appendix to this speech.

programme, and what has been achieved so far; and then to look to the future, and in particular some of the implications for Scotland as I see them from a judicial perspective.

The tribunal reform programme

6. As you know, specialist tribunals have a long history in the UK. Earlier examples, dating from the 17th Century, were concerned with tax or excise duties. The Commissioners of Customs and Excise were given powers to determine disputes over such matters. These were criticised by legal commentators at the time as a serious breach of the principle that decisions on legal rights or obligations were the exclusive province of the courts. Dr Johnson went further. His Dictionary defined “excise” as -

“... a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom the excise is paid.”

7. That was a somewhat extreme view. But ambivalence about the true constitutional position of tribunals remained, until the Franks report in 1957 confirmed the modern status of tribunals in the UK as part of the judicial system:

“ “... tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.”

8. Even with that clear signal it took some time for tribunals to be welcomed by the judicial and legal establishment. In a Scottish case in 2006, *Gillies*, Baroness Hale spoke of the transition of tribunals from being objects of “the deepest of suspicion” to their acknowledged role as “an essential part of our justice system“.
9. Of course, when talking about tribunals, generalisations are dangerous. Tribunals vary greatly in the complexity of the cases before them, their financial significance, and the degree of procedural formality appropriate to them. In some, such as for example a social security tribunal assessing disability benefit, cheapness, accessibility and freedom from technicality are desirable and achievable objectives. But there is no obvious parallel with, for example, a major case before the Special Commissioners of Tax or the Lands Tribunal. The sums there involved may be as great as in any case in the High Court, and the legal and factual issues equally complex. A degree of procedural formality is unavoidable if justice is to be done, and the specialist expertise of the tribunal is unlikely to be an adequate substitute for expert representation of the parties.
10. What then is the hallmark of a tribunal, which distinguishes it from the ordinary courts? To my mind there are two main factors. First, there is the specialist expertise and experience of the members. Although most tribunals are presided over by a lawyer (in some cases a serving judge), he or she will normally be a specialist in the applicable law and assisted by one or more non-lawyers with qualifications or experience relevant to the subject-matter of the dispute. The other important characteristic is the flexibility which enables the tribunal to develop and vary its procedures to suit the particular characteristics of the jurisdiction, and the

needs of its users, be they unrepresented individuals or sophisticated City institutions.

11. In any event, the model has been sufficiently attractive to legislators that by the time of the Leggatt review in 2001, he was able to list over 60 extant tribunals, created at different times and for different purposes, with widely differing levels of activity. If one adds the locally administered tribunals, and those with exclusive jurisdiction in Scotland or Northern Ireland, the full list extends to more than 100.
12. The introduction to the Leggatt report explained the problem and his general approach to a solution:

“ “In the 44 years since tribunals were last reviewed, their numbers have increased considerably and their work has become more complex. Together they constitute a substantial part of the system of justice in England and Wales. But too often their methods are old-fashioned and they are daunting to users. Their training and IT are under-resourced. Because they are many and disparate, there is a considerable waste of resources in managing them, and they achieve no economies of scale. Most importantly, they are not independent of the departments that sponsor them. The object of this review is to recommend a system that is independent, coherent, professional, cost-effective and user-friendly. Together tribunals must form a system and provide a service fit for the users for whom they were intended.” ”

13. Although that passage referred to England and Wales, his terms of reference extended to tribunals administered by the UK Government with jurisdictions extending to Great Britain and the UK, and required him to take account of the recent devolution. He hoped that “in the interests of coherence and consistency” his recommendations would be applied “cross-border”, but he recognised the complexities arising from the different ways in which devolution had been achieved in each country.
14. The report made two main recommendations: first, the creation of new independent tribunal service to take over the management of the tribunals from their sponsoring departments, and secondly the creation of a composite, two-tier tribunal structure, under the leadership of a senior judge. In this way, it was hoped, tribunals would acquire –

“ “a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended.” ”
15. He proposed the creation of a new composite structure, divided into two tiers, led by a Senior President of Tribunals, into which the existing jurisdictions would be transferred.
16. The 2004 White Paper adopted the general thrust of the report, but went even further. The reform of the tribunal system was seen as but one part of the

commitment across government to the better handling of complaints and proportionate dispute resolution. The unified tribunals system would -

“... become a new type of organisation, not just a federation of existing tribunals. It will have a straightforward mission: to resolve disputes in the best way possible and to stimulate improved decision-making so that disputes do not happen as a result of poor decision making.

... we need to go further and to re-engineer processes radically so that just solutions can be found without formal hearings at all. We expect this new organisation to innovate. The leadership of the new organisation will have the responsibility to ensure that it does.”

17. Another key part of the new structure would be the remodelled Council of Tribunals, which would become a new Administrative Justice and Tribunals Council, and would be “an advisory body for the whole administrative justice sector”. The important role of the Scottish Committee of the Council would be preserved in the new system, and matched by a new Welsh Committee. My appointment as “Shadow Senior President” was announced at the same time as the White Paper was published.
18. As I was relieved to discover, the White Paper did not contain a job specification for Senior President. But it set out some general aspirations. It was envisaged that he or she would be “strong and vigorous”, and provide a “single clear voice able to speak for the tribunals judiciary collectively”. In the immediate future the role would be “strategic, co-ordinating and directing judicial input” into the development of the new service. In the longer term, the new leadership would have responsibility for developing more radical approaches to dispute resolution.
19. It was clear from the outset that “cross-border” issues would loom large in the agenda. One of the obvious problems was that the devolution settlement had been agreed and enacted before tribunal reform had moved onto the political agenda. The arrangements for tribunals reflected their historical links with different sponsoring departments, rather than their future role as part of the judicial system. However, it was clear that those arrangements were not likely to change in the near future. This made it particularly important to establish strong links with the judiciary in each country, including the members of both devolved and non-devolved tribunals. I was very lucky that Colin Milne, President of the Scottish Employment Tribunal, was willing to undertake the task of “cross-border” adviser. He was helped by Judge John Martin in Northern Ireland. Soon after my appointment I visited the Lord President and the LCJ (Northern Ireland). I was very grateful to each of them for agreeing to establish a tribunal judges’ forum chaired by a senior judge. I have been impressed and delighted by the contribution that each forum has been able to make in finding a way through the complexities and political sensitivities, and working toward a distinctive and coherent tribunals policy in each jurisdiction.

Establishing the new system

20. Coming back to the reform programme, the first practical step towards the creation of the new system was administrative, and did not require legislation. One of my first tasks as Senior President in summer 2004 had been to take part in the appointment for the first Chief Executive of the new Tribunal Service (Peter Handcock), and to start work with him on preparing for the establishment of the new Tribunal Service as an Executive Agency under the then Department of Constitutional Affairs (later to become the Ministry of Justice). The Tribunal Service was formally launched in April 2006. At the same time, following some complex negotiations with the different Departments, it was able to take over responsibility for the administration of the most important UK tribunals.
21. We have developed our own governance arrangements, distinct from those of the Lord Chief Justice under the CRA. The key to these arrangements was my strong belief, shared Peter Handcock and his successors, that judges and administrators must work together in partnership, in pursuit of a common goal. While judicial independence was of course a non-negotiable fixed factor in the relationship, we should avoid artificial barriers to joint working. Accordingly, I was content that the Senior President would not have his own judicial office, legally separate from the tribunals service. My support is provided from within the Tribunals Service, by a separate team, headed by a senior civil servant (“the Tribunals Judicial Office”). He is also a member of the Tribunals Service Executive Team (“TSET”). Although the formal line management remains with the Tribunals Service Chief Executive, there is a firm understanding (agreed by me with Peter Handcock, as Chief Executive) whereby my office is answerable to, and owes primary loyalty, to the Senior President and through him to the tribunals judiciary, rather than to Ministers. On the other hand we have not so far felt it necessary to develop a direct equivalent to the HMCS joint board. Judicial leadership is provided through the Tribunal Judges Executive Board, which I chair, and which brings together the Chamber Presidents and other senior tribunal judges, with the support of my office. It is also attended by the Chief Executive and other senior officers from the Tribunals Service as required. Meanwhile I (or my nominee) sit as active “observer” on the Tribunals Service Management Board, chaired by the Chief Executive, which includes independent non-executive directors. There are a number of working groups on different issues chaired by judges nominated by me, but also attended by appropriate officers.
22. Turning to the legislation, the TCEA, enacted in 2007, provides the statutory framework for the creation of the new tribunal system. Section 1 extends to tribunal judiciary the guarantees of judicial independence conferred on the court judiciary in England and Wales by the Constitutional Reform Act 2005 (and now replicated in Scotland by the Judiciary and Courts (Scotland) Act 2008 (JCSA). It thus finally gives legislative effect to the Franks Committee’s recommendation of 60 years before, by confirming the place of tribunals as part of the judicial system, rather than as an appendage of the administration. Consistently with that status, the Act requires that the tribunal judges coming into the new structure should swear the judicial oath. The logistics of that are daunting. But to judge from our experience so far, it has proved a valuable symbol of our new status as full members of the judicial family.
23. Section 2 creates the new post of Senior President of Tribunals, as a free-standing

statutory office (not directly subject to the authority of the chief justices or anyone else). His responsibilities extend to non-devolved tribunals throughout the United Kingdom. The statutory functions are modelled in many respects on those of the Lord Chief Justice under the CRA (and repeated for the Lord President under the JCSA). They confer wide-ranging responsibility for judicial leadership, including representing the views of tribunal judges to Parliament and to ministers, and for training, welfare and guidance (on which the Senior President has mutual duties of co-operation with the chief justices).

24. A distinctive feature of the Senior President's role, as compared with those of the chief justices, is to be found in section 2. It imposes a set of duties, which can be seen as defining the special characteristics which Parliament wished to be protected in the tribunals system. The Senior President is required in exercising his functions to have regard to the need for tribunals to be accessible, for proceedings to be handled quickly and efficiently, and for members to be "experts in the subject-matter of, or the law to be applied in, cases in which they decide matters". Finally the "radical" agenda of the White Paper is reflected in the duty (perhaps unprecedented for a judge) to -

"have regard to the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals".

25. The Act envisages the replacement of the various existing tribunals (however described) by two new composite tribunals: the First-tier Tribunal and the Upper Tribunal. The different specialisations are protected by the provision for them to be divided into "Chambers", each with its own Chamber President. Tribunal members, legal or non-legal, lose their existing offices, and become tribunal judges or members of one or other of the new tribunals, assigned to an appropriate chamber. Thereafter new judges and members will be recruited through the Judicial Appointments Commission. There is also power for the Senior President to assign judges and members from one chamber to another, in accordance with policy guidelines to be agreed with the Lord Chancellor. An important innovation is the incorporation of court judges (from the Court of Appeal or Court of Session downwards) as *ex officio* members of the new tribunals, able to serve by request of the Senior President. The Employment Tribunals (both sides of the border) and the Employment Appeal Tribunals are retained as a separate "pillar" of the new system, also subject to the overall leadership of the Senior President. The Asylum and Immigration Tribunal is also retained for the time-being, although that may change under proposals currently subject to consultation.
26. The TCEA provided no more than a framework. The details of the new chambers structure has been developed in consultation with judges and users, and is now reasonably settled. The First-tier will be divided into six chambers: Social Entitlement; Health, Education and Social Care; War Pensions and Armed Forces; Tax and Duties; General Regulatory; and Land, Property and Housing.. The first three were established on "T-day" (3rd November 2008). The next will be Tax and Duties on 1st April 2009. The others will follow later this year or next year. The Upper Tribunal is likely to be divided into three Chambers: Administrative Appeals, Finance and Tax, and Land. The Lord Chancellor has agreed that the Presidents of both Chambers should be High Court judges. The Land Chamber

will follow in June, and will initially replicate the jurisdiction of the Lands Tribunal for England and Wales. A competition for Chamber President is currently under way. Another very important development has been the establishment of the Tribunal Procedure Committee, chaired by Elias J (then President of the EAT, now Elias LJ). Within a very short period, and with the support of the some highly skilled MoJ lawyers, they have stamped its authority on the tribunal scene, and achieved a common framework across all the tribunals within the new system. I pay tribute to their work, which will provide a very strong basis for developing and improving tribunals procedure in the future.

27. The major part of the work of the AAC will comprise the previous work of the Social Security and Child Support Commissioners, both sides of the border. From T-day they have become judges of the Upper Tribunal. The AAC will also take appeals on points of law from other jurisdictions within the new First-tier chambers, the most significant initially being mental health and special educational needs. Judicial leaders from the previous specialist tribunals have been become deputy judges of the Upper Tribunal, in order to ensure that we have the necessary expertise in all relevant areas of the law.
28. Thus, for example, the first judgment of the AAC on a mental health appeal was handed down in January. It was heard by a panel consisting of Judge Hickinbottom (now a High Court judge), Acting President of the AAC, sitting with Judge Philip Sycamore, Chamber President of HESC, and Mark Rowland, former Social Security Commission. The judgment (available on the web-site) gives guidance on the important and sensitive issue of disclosure of patient records. I myself have recently sat on my first Upper Tribunal appeal, with Edward Jacobs. The case involve an important issue about the extent to which a tribunal hearing a child support case is bound by findings of fact by a district judge in related maintenance proceedings between the parents.

The Upper Tribunal and the Higher Courts

29. The Upper Tribunal represents the fulfilment of one of the key recommendations of the Leggatt report. He described the current system of appeal routes as “haphazard, having developed alongside the unstructured growth of the tribunals themselves”. They are being replaced by a single tribunal, which is be a “superior court of record”,² and will be able to combine the strengths of the senior specialist tribunal judiciary with those of court judges on both sides of the border. It will be based in London, but will sit at other main centres when required, including Edinburgh. Where an error of law is found the Upper Tribunal has all the necessary powers to substitute its own decision on the merits, and to hear evidence for that purpose. The TCEA also provides for the Upper Tribunal to have powers of judicial review, in cases transferred (by category or on a case-by case basis) from the High Court.
30. The new tribunal offers an unprecedented opportunity to work towards a more coherent and distinctive system of tribunal justice, drawing together the strands of

² The precise legal significance of this expression is not entirely clear, even in England, and possibly not at all in Scotland. There is high authority for the view that a superior court of record is not amenable to judicial review, but this is not free from doubt.

the principles developed for the various jurisdictions. The purpose is not simply to replicate the function of the High Court or Court of Sessions in administrative law, under a different guise. Implicit in the TCEA is the proposition that conferring these powers on a new dedicated judicial institution will bring benefits that the courts cannot give. The legislature has thus recognised the advantages, particularly in relation to complex welfare or regulatory schemes, of supervision by judges who are specialists in the particular law and practice under review.

31. In this respect the Act is a logical development of a trend which has been evident in recent cases in the courts. Hale LJ (as she then was) sowed the seeds of the new approach in the Court of Appeal, in *Cooke v Secretary of State*. That concerned the circumstances in which permission should be granted to appeal from decisions of the Social Security Commissioners to the Court of Appeal. She advocated a cautious approach, with respect to the Commissioners' greater familiarity with the "complex legislation":

"The commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They will be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success." (para 16)

32. She referred to social security law as "highly specialised" and "rarely encountered in practice" by most lawyers. The link of an appeal to the ordinary courts was important to maintain "fidelity to the relevant general principles of law", but the courts should approach their task with "an appropriate degree of caution". This passage was recently adopted by Baroness Hale in the House of Lords, without dissent from her colleagues, in *AH (Sudan)*, relating to the AIT.
33. With this encouragement at the highest level there is the opportunity to develop the Upper Tribunal as the principal appellate authority for tribunal cases. The possibility of appeal to the Court of Appeal (or Court of Sessions) and thence to the new Supreme Court will remain. But if the Upper Tribunal is doing its job properly, its decisions should come to be regarded as sufficiently expert and authoritative for onward appeals to be rare.
34. This enhanced role is particularly appropriate for the cross-border jurisdictions. It seems anomalous that there should be a unified jurisdiction at the lower tribunal level, and at the highest level (the Supreme Court), while in between we have a bifurcation to the Court of Appeal or the Court of Sessions. It would seem more logical, economical and convenient for users, if the Upper Tribunal, exercising UK wide jurisdiction, were able to act as far as possible as the final court of appeal for cases which are not going to the House of Lords. The TCEA provides a flexible mechanism to enable the Upper Tribunal to be adapted or strengthened as necessary, by bringing in judges from the courts. It is early days to be thinking about cutting out the court of appeal or court of sessions altogether and it would require legislation. But given the hands-off approach advocated by some members

of the House of Lords, we may be moving in that direction.

35. The establishment of the new Supreme Court, due to open in October 2009, provides an opportunity to develop this relationship. Legal problems in tribunals do not often attract much political interest, but they can affect large numbers of people. They need to be sorted out in a practical and timely way, with proper understanding of the legal and social context, and the implications for those trying to administer the law in practice. I may be prejudiced, but I believe that the structure of the Upper Tribunal is potentially better adapted to provide that kind of service than the traditional court model.

Conclusion – Scottish reform

36. I am not going to be so rash as to make suggestions as tribunal system should develop this side of the Border. Lord Philip's committee has provided a valuable framework for the continuing political debate, which I shall watch with interest. However, as Senior President with cross-border responsibilities, I cannot remain entirely disinterested. I hope that during this transitional period, the office of Senior President has provided a useful link between the different systems, and their judicial leaders. Whatever the final choice adopted for Scotland, I do not believe the legal systems can ever become entirely separate. Perhaps we should establish a UK wide standing conference, of representatives of the judiciary at all levels. This would provide a forum for regular discussion of the many issues of common concern – relating both to administration and substantive law. Tribunal judges could bring valuable experience and specialist knowledge to the discussions. Furthermore in our relations with the European legal institutions we need as far as possible to present a united front if we are to play our full weight in the development of law and policy.
37. I have been lucky to have had regular dealings with judges from each part of the UK, and I have learnt much from the exchanges. This evening is an opportunity to build on those links. Whatever the future structure is to be for tribunals in Scotland, I look forward to a close continuing relationship with the judiciary at every level.

Borderer ancestry of Robert Carnwath

By Julia Carnwath (sister-in-law and family historian)

1. Insofar as you are English, you are a Borderer. With only one exception, you have no ancestor born south of Count Durham or East of Shrewsbury. The exception is your father who only happened to be born in Salford, Manchester, in 1909 because your grandparents had almost literally just got off the boat from Ireland.
2. Beginning with the Carnwaths, they were settled in Co. Tyrone near Strabane from the beginning of the seventeenth century, both your grandparents families on that side having been part of the immigration from Scotland, especially Lanarkshire, of that period. James Carnwath was at the Siege of Londonderry of 1689 and was amongst the townsmen to petition William III for reparations following his loss of property and goods in the course of the siege. The old Carnwath farm lies in what is now very much border territory between Northern Ireland and the Republic. Although in the early stages strongly associated with the Presbyterian Church there is much surname evidence in the eighteenth and nineteenth centuries of connections with both sides of the religious divide.
3. On your mother's side too you are a Borderer twice over. Your maternal grandfather's family tree is a roll-call of Riever names: Armstrong, Dodd, Forster, Atkinson with marriages into families unambiguously from the northern side of the shifting border such as Anderson and Macdougall. In the sixteenth century the Armstrongs were extraordinarily prolific and already had a particular interest in the law, you might say: Armstrong males were hanged in their tens and dozens at Carlisle and Berwick for their large contribution to the havoc in the "Debateable Lands" of the period. Your ancestry in this line also is both Protestant and Catholic. In the seventeenth century the Armstrongs settled down for generations as millers and farmers in Northumberland, occasionally singling out an eldest or youngest son to be trained as an apothecary or a lawyer in Newcastle or Edinburgh.
4. Further south and beyond the Pennines in the Marches of Wales, your maternal grandmother's family had an equally impressive Border profile. Small tradesmen from Shrewsbury and the market town of Newtown, Montgomeryshire, Welsh speaking farmers from Lanbadarn, Radnorshire, they, like the Armstrongs, in the nineteenth century were strongly aspirational for their sons, and the preferred route is clearly the law.
5. By blood 50% Northern Irish, 25% Northumbrian, 25% Anglo-Welsh, you are a Borderer to your very marrow.

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