Nuffield Foundation

Notes from seminar on

Why Tribunals? - 12th May 2011.

Professor Carol Harlow -- Why Tribunals?

- Traced the historical movements that have meant administrative tribunals were, in their first half-century, viewed more as part of the administrative arm of the government departments of state, and less as a judicial mechanism that was part of the court service. This is an enduring tension, with arguments about being close to, and a corrective to, administrative decision-making without being too tied up in legal proceduralism on the one hand, compared to arguments about independence from the administrative branch and having procedural safeguards on the other.

- Arguably, we are now closer to a fully-fledged judicialisation now, in the move from Franks to Leggatt. This is reflected too in the role of judges and lawyers as adjudicators, and the fact that training is now provided by the (new) Judicial College, and administration provided by the new Courts and Tribunals Service. Tribunals are courts in all but name, though courts that offer a specialist service.

- Only the Administrative Justice and Tribunals Council has retained a strong interest in the links with the administrative departments, and how the adjudicative function might lead to improvements in administrative decision-making (it is of course harder for judges with their mantle of independence to ensure that they follow up the administrative implications of their rulings).

- So a first research priority might be **impact studies**, looking at the impact that tribunal rulings (in various specific domains) have had on administration, either substantively or procedurally.

- There are a set of questions about what might distinguish a tribunal from a court. Why are immigration appeals heard by a tribunal and not a court? Are employment tribunals included because, although they are not about citizen/state interactions, they do raise some similar procedural issues. But why are small-claims heard by a district judge in a court? Why do we still retain the two 'non-legal' members representing employer and employee interests in employment tribunals?

- This raises questions about the professionalization of the tribunal chairs (and the fact that they are now mostly legally qualified or even judges), and the role of lay members. Are lay members supposed to confer some substantive expertise, or to ensure some representative quality or to ensure that the environment is one in which litigants can participate fully without needing legal representation? How do and should we value these different aims, and when are these more apparent or symbolic than real?

- Of course, in considering all these issues now we have to consider the current plans for legal aid, which will reduce even further the aid available for non-criminal cases of all kinds, including advice seeking. Does it matter if we turn certain matters into complaint-handling issues, rather than adjudicative one?

- So a second gap in research is noted. This is about the paucity of work on **complaint-handling**, especially where introduced instead of or in comparison with more formal dispute resolution processes, like courts or tribunals. What does formal justice offer that complaint-handling cannot?

- A related issue concerns **mediation**, where successive governments hope that mediation will reduce the number of contested hearings of all sorts, though the research evidence seems clear that mediation saves neither time nor money, and much of the research shows rather equivocal results about outcomes and the views of potential users. More objective work, especially about outcomes, would be useful here.

- This should not however obscure the important research questions about which we know little in relation to the more formal, trial-type proceedings. This includes examinations on **case management** (and what effects this may have, or different types of management may have). There remain too some fundamental questions about whether, in the areas in which tribunals currently operate, more consideration should be given to **inquisitorial procedures and models.** Where is the UK equivalent of the work of Bedford and Creyke? Should there be a 'duty to inquire'?

- More concretely, there could even be a **comparison of, for instance, the workings of the Social Fund Commissioner's office, which operates largely as an inquisitorial complaint-handling office, and some Social Security Appeals Tribunals**? Could an inquisitorial model replace tribunals? If so, would be more economical and effective? Would it give rise to greater consumer (user) satisfaction? Do users prefer the whole tribunal model or would something more focussed and less onerous be more desirable?

- This leads to a set of questions too about **information technology** and whether it is being used to best effect. The Parking Adjudicators largely carry out their work from on-line submissions. Could other tribunals do so too?

- There may be more statistical and administrative data available now than previously, and not all worth-while research will be statistical and empirical. We would benefit from research on **merits reviews by tribunals, the relationship between judicial review and tribunals, especially in the field of fact-finding, and the relationship between precedent and proportionate dispute-resolution. Comparative studies are another area of potential interest, with special attention paid to Europe, rather than always looking at common-law jurisdictions.**

- Finally, there may be some role for further work with consumers and users of various tribunals. And there remains a question about how there will be independent

oversight of the heterogeneous workings of the tribunal sector, when the AJTC is abolished.

Professor Judge Nick Wikeley (discussant)

Touching on 4 themes, with special reference to tribunals hearing social security appeals:

- **Judicialisation.**

  Over the long-haul, it does seem that tribunals have moved to a position where lawyers and professional judges are far more prominent. This is function of two phenomena:

  - **Substantive legalisation**, where formerly discretionary internal guidance has now become formally binding rules. Examination of the corpus of social security law from 1980 to now would bear this out. On the one hand, this reduces the scope for arbitrary decision-making; on the other, it means some useful distinctions are more difficult to make. It also increases government control of benefit spending.

  - **Procedural judicialisation:** See for example the regulations on revisions and supersession of decisions on benefit claims.

  - This poses a question, at least part of which is research question: **are these developments undermining the inquisitorial principle traditionally seen as one of the distinctive features of social security appeal tribunals?**

- **Lay participation.**

  In employment tribunals, arguably the 'industrial jury' model still has relevance. But in social security appeals, changes not only in the types of cases but also in the model of how, for instance, fitness for work or invalidity are now established, means that the natural constituency of lay participation (embedded in an industrial relations model) was gone, and medical expertise had arguably taken its place. So, while the role of the lay member in employment tribunals is also under pressure, and there seemed to have been rather a move toward single-person tribunals, this has never quite materialised, with up to 70% of social security appeals still heard by 2 or 3 member tribunals, typically on the subject of incapacity or disability issues.

  The composition of tribunals, not only between tribunals but for different sorts of case within tribunals, is now not only *not* subject to primary legislation or even regulation but is often governed by practice statements alone. There is some work to do in examining why some sorts of cases are thought to need 2 or more adjudicators while others are dealt with by a single judge, and more research would be welcome here.

- **Procedure: the trial paradigm**

  It may be fair to say that court procedural rules, especially in the higher courts, are written on the assumption that parties will be legally represented, whereas tribunal procedural rules start from the assumption that the parties will be acting in person. But are they beginning to meet in the middle? Does this raise the question of what it is that might be distinctive about tribunals and their jurisprudence? Employment, immigration, and social security tribunals still constitute the vast majority of the first tier case load. Is the inquisitorial and enabling tradition of the social security appeals tribunal more at risk of following the adversarial track not only of the other 'big two' but of some of the smaller tribunals (special educational needs, information rights and so on)?

- **Research questions**

  There is a place for more generic work on tribunals, comparing the way different models work when arguably they might adopt similar models or methods. And there is scope for low-cost work, much of it using administrative data, about the effect of changes such as the new appeal routes in criminal injuries compensation, mental health and so on. Other wider questions include studies of how to use first-tier tribunal decisions (and decision-makers) to improve the chances that first-tier adjudicators will get it right first time, and the need to examine issues (like social care appeals) where currently there is no formal structure for independent resolution of disputes.

Professor Peter Cane (discussant)

- A first set of questions is why there is so little research capacity for studies in this area, especially since tribunals have seen such change in the past few years. This is a long-term issue in the UK, which the Nuffield Inquiry of course examined, but also a shorter-term issue, when the political importance of objective empirical research in administrative justice is perhaps not sufficiently appreciated. There were further comments about the need for proactive agendas, and the need to be clear that it is not the case that in empirical or 'applied' research policy-makers set the agenda. If academics are doing their jobs, this should not be the case.

- There are some issues where we desperately need large-scale research. One example might be the 'premium' achieved by having legal representation. In the 1980s Professor Hazel Genn established that in many areas there was quite a large advantage in having representation; more recently, Professor Michael Adler has suggested that the representation premium might have substantially reduced. Do we really know what may be the case for different tribunals? This would require large scale statistical empirical work but it is a fundamental issue. It might also help if we started from testable and competing hypotheses, derived from analytic theory,

such as Hart's work. We should also deploy administrative data more fully, though this may require sorting out data access requirements.

Other points raised in discussion

- While the Nuffield Foundation's past role has been invaluable, there is much that needs researching in future, especially with the possible demise of the AJTC. Tribunals will face increasing work-loads and targets for saving money but there are issues of access to justice and impact on administrative decision-making that require independent evidence – and thinking.

- Can we do some work comparing mediation, settlement and the informal end of proportionate dispute resolution? What do formal mechanisms add? How would we take account of 'selection issues' (that different sorts of people for instance may choose mediation rather than litigation)?

- We know most about employment tribunal workings and outcomes and rather less about other tribunals, even purely descriptively. And we know very little about pathways or the ways that claims fall out at various stages – the so-called 'complaint pyramid'.

- Some comparative work looking at the way that, even with supposed judicialisation and single judge tribunals, greater efforts are made in tribunals to support claimants without representation might be helpful. Is there merit in comparing the small claims jurisdiction with some other comparable tribunal to examine the degree of user-friendliness or help provided for those without representation?

- Are immigration tribunals and mental health tribunals really courts partly because of the seriousness of the issues with which they deal?

- Are there lessons in the way that medical claims and complaints are now being handled? What about after the legal aid changes?

- It used to be possible to consider whether legal aid should be given to tribunal claimants, but in the current climate, calls to extend legal aid will have little purchase. Can we do a better job of assessing, across courts and tribunals, the types of issues or cases or claims which might merit legal aid, and those that might not?

- The current proposals on employment tribunals, and the results of the consultation, will be ripe for research; the proposals may result in some substantial reform, and not all of it will be pro-employer. This may give us a chance to do some serious research, and even to consider generic issues like mediation, where the introduction of a compulsory mediation stage might have implications for other areas of dispute.

- The role of Strasbourg also needs to be approached – will current parliamentary discussions on the 'margin of appreciation' result in any easing of the pressure for judicial procedures?

- One of the paradoxical effects of the unification of the tribunal service might have been to reinforce the importance of distinct tribunal jurisprudence in specific areas. As different judges have been brought together, the specialist substantive jurisprudence has perhaps been more appreciated, rather than less. The Judicial College is now well aware of this too.

- In the area of small claims, there is some evidence that the climate of opinion about the need for proportionality has had an effect, and in this area too, the use of 'on line' claims is now advancing. This may force the pace of those who want advances in information technology to be taken more into account.

- There was also some discussion about the need for larger-scale studies of outcomes and 'what happens' after adjudications in various cases.

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