

A Research Agenda for the Age of Tribunals

The creation of the Upper and First-tier Tribunals and the establishment of the Administrative Justice and Tribunals Council present public lawyers, both within and beyond the academy, with an exciting and diverse array of opportunities for research. Since the recognition of ‘administrative law’ as a discrete area of law and legal research in the middle of the last century, scholars in the UK have paid much more attention to courts and judicial review than to administrative tribunals and their adjudicatory functions. The partial consolidation and significantly increased judicialisation of administrative tribunals brought about by the Tribunals, Courts and Enforcement (‘TCE’) Act 2007 may encourage interest in this vital set of governmental institutions. The modest aim of this short article is to outline some important issues and questions that deserve sustained scholarly attention.

Much work remains to be done on the history of what is sometimes called ‘the modern administrative tribunal’ – a phrase that refers to the sort of court-like adjudicatory body with relatively narrow, specialized jurisdiction that became increasingly common from the early-twentieth century onwards. Chantal Stebbings has laid excellent groundwork in her *Legal Foundations of Tribunals in Nineteenth Century England* (2006). However, partly because of the sheer size of the tribunal sector and the absence of anything resembling a planned tribunal ‘system’, we lack a coherent understanding of the development and operation of administrative tribunals in the past 100 years. More has been written on the history (and politics) of thinking and policy-making about tribunals – represented, for instance, by the works of Dicey, Hewart and

Robson and the reports of the Donoughmore and Franks Committees – than about the history of administrative tribunals themselves.

A second area that cries out for scholarly attention is the juridical nature of adjudication by administrative tribunals. There is an extremely large and highly sophisticated analytical and theoretical literature about judicial review of administrative action by courts to which judges, lawyers and scholars have all made significant contributions. There is almost no equivalent literature about what we might generically call ‘tribunal review’ or ‘non-judicial review’. One result of the establishment of the Administrative Appeals Tribunal in Australia more than 30 years ago has been the development and elaboration of the concept of ‘merits review’, which is the counterpart, for tribunals, of judicial review. Two of the factors that led to this development – the creation of an administrative tribunal with wide, ‘general’ jurisdiction, and formal reporting of its major decisions – are now aspects of the regime established by the TCE Act. On the other hand, in Australian federal law, tribunals and courts are categorically different institutions, and merits review is a function categorically different from judicial review. In English law, by contrast, courts and administrative tribunals are understood as species of the same genus. It remains to be seen whether a generic concept of tribunal review will develop in English law; and if it does, in what respects it will resemble and differ from judicial review.

A third area of research is more policy-oriented. The concepts of the ‘administrative justice system’ and ‘proportionate dispute resolution’ (PDR) have been central to recent thinking about tribunals in the UK. Just as the growth of the tribunal sector in the 20th century lacked an overall plan or direction, so in more recent years has

the proliferation of mechanisms and institutions that provide the citizen with opportunities to contest and challenge public decision-making and action – what some Australian writers have called ‘the accountability branch’ of government. Improving ‘access to justice’ has been a prime motivation and justification for much of this growth and proliferation. Attempts to inject order into the tribunal sector have been accompanied by calls for a wider systematization of the accountability sector. Assessing the feasibility and desirability of PDR, for instance, will require sustained and detailed study and analysis.

Systematic empirical investigation – the fourth area of research I will mention – will be crucial for the success of policy-making in the area of administrative justice. The Administrative Procedure Act 1946 – which has been dubbed ‘the Magna Carta of the American administrative state – was preceded by the report of the Attorney-General’s Committee on Administrative Procedure (1941), appended to which were detailed empirical studies of the operation of 27 federal agencies. Neither the Donoughmore Committee nor the Franks Committee commissioned such research. However, in England since the 1970s, administrative tribunals have probably been the subject of more empirical study than any other component of the administrative justice system. Still, the remaining opportunities for empirical research are legion, of which one may be mentioned. Prominent in recent thinking about administrative tribunals in Australia has been the idea that they can perform a ‘normative’ function of improving the quality of primary administrative decision-making. This proposition is susceptible of and, indeed, demands rigorous empirical investigation. Predictably, perhaps, more effort has been put into investigating the ‘impact’ of judicial review on bureaucratic decision-making (see,

e.g. S Halliday, *Judicial Review and Compliance with Administrative Law* (2004) than into studying the normative effect of tribunal review despite the fact that the decision-making of the typical bureaucrat is much more likely to be subjected to scrutiny by a tribunal than by a court.

These are four examples of the issues I discuss in my recent book *Administrative Tribunals and Adjudication* (Hart Publishing, 2009). There I also undertake a comparative analysis of tribunals and their functions in Australia, the UK and the US. In Australia and the US, the tribunal systems are currently relatively stable and, for that reason, somewhat easier to study than the UK tribunal scene, which is in a state of radical and rapid flux. However, in all three jurisdictions, tribunals and tribunal review are, relative to courts and judicial review, significantly under-researched. It is to be hoped that the changes underway in the UK will stimulate scholars and lawyers to start the process of bringing tribunals out of the shadows.

Peter Cane
Australian National University