

## **THE DIFFERENCES BETWEEN COURTS AND TRIBUNALS**

- 1.1 This note examines the what have been argued to be the differences between what are often called the “ordinary courts” and tribunals and to what extent these are valid. Note that it is concerned in the main with adjudicatory tribunals rather than policy tribunals (see below) or public inquiries (for example planning inquiries and ad hoc inquiries).
- 1.2 Some think there are significant differences between courts and tribunals (eg Justice report), some that there are some differences and that the question depends on a proper classification of tribunals (Farmer) and others that there is no material difference (Abel-Smith and Stevens). The trend is to compare tribunals to “the ordinary courts” to attempt to ascertain how the tribunals differ from what is seen as standard dispute resolution, despite the fact that tribunals dispose of many more times the number of cases resolved in the county courts and High Court.<sup>1</sup>
- 1.3 This document does not represent the Law Commission’s official view of the matters discussed, nor is it an authoritative statement of the law.
- 1.4 It was completed on 7 November 2003.

### **Emergence and development of tribunals**

- 1.5 The history of tribunals helps to shed some light on the reasons for their creation. This has historically been linked both to the creation of the welfare state and to state regulation which opened up new areas of dispute, often adjudicated by tribunals.

### ***First tribunals***

- 1.6 The first tribunal to emerge was the General Commissioners of Income Tax. It emerged from the use of local gentry to collect taxes from at least the fourteenth century. The General Commissioners were used for the collection of the first income tax under the Income Tax Act 1799. In 1803 the General Commissioners were the sole appellate body in relation to objections to tax assessments (this had been carried out by a tribunal of Commissioners of Appeal). The Special Commissioners were introduced in 1805 to reduce the workload of the General Commissioners. The General and Special Commissioners became in law an independent tribunal in 1964 under the Income Tax Management Act 1964.
- 1.7 The Board of Railway Commissioners was set up in 1946 and as the Railway and Canal Commission in 1873 was designed to have a procedure that was “as simple and inexpensive as possible.” It consisted of three members, comprising both lawyers and experts. After many different incarnations it now operates as the Transport Tribunal.

<sup>1</sup> Already six times as many cases when the Royal Commission on Legal Services reported in 1979.

***The start of the modern tribunal system***

- 1.8 The modern system of administrative tribunals started in the early twentieth century. An early example were the local committees set up to arbitrate disputes under the Old Age Pensions Act 1908. Under the National Insurance Act 1911 appeals from unemployment benefit decisions taken by insurance officers (employees of the Board of Trade) were dealt with by local Courts of Referees. These consisted of a chair appointed by the Board of Trade, and a member from each of the employers and workmen's panels. A further appeal could be made to the Umpire, a lawyer appointed by the Crown. The idea was of the Courts of Referees as a free local non-legal forum for the settlement of particular disputes.
- 1.9 The adoption of the early tribunal system was in part due to problems caused by the county courts' increased workload when they were given jurisdiction to hear cases under the Workmen's Compensation Acts 1897 and 1906. There were also concerns that access to the courts was too expensive for most of the population and concerns over the courts' poor performance in general in carrying out more "regulatory" functions.
- 1.10 The first pensions tribunal was set up in 1919 to deal with war pensions claims. It was designed to deal with claims as informally and inexpensively as possible. Tribunal panels consisted of a lawyer, a medical practitioner and a service member. The Industrial Court, set up in 1919, allowed legal representation only with the court's consent.
- 1.11 In 1929, tribunals were criticised by the then Lord Chief Justice, Lord Hewart in his book "The New Despotism". This and other criticism of the new tribunals sought to argue that tribunals were a threat to the independent and impartial adjudication of disputes by the courts and that arbitrary power was being concentrated in the hands of bureaucrats (there appears to have been a considerable amount of criticisms of tribunals as dispute resolution mechanisms particularly from traditionalist lawyers and judges who saw the role of the courts as being usurped). As a result, tribunals were considered by the Committee on Ministers' Powers (the Donoughmore Committee) in 1932.<sup>2</sup> The report (which had narrow terms of reference) did not find these criticisms to be made out. The report otherwise had little impact.
- 1.12 Tribunals proliferated following WWII. The post war tribunals were usually either linked to social security or to increased regulation. Tribunals were also introduced at this time to deal with relationships between private citizens, for example the control of rents under the Furnished Houses (Rent Control) Act 1946.

<sup>2</sup> Report Cmd 4060, April 1932 (reprint 1966).

***The Franks Committee Report***

- 1.13 The Franks Committee was set up in 1955 following the Crichel Down Enquiry in 1954. The Committee reported in 1957. It was firmly of the view (in the face of opposing views) that tribunals should now be seen as part of the adjudicative machinery, not as part of the machinery for administration. The report stated that the advantages of tribunals were “cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject”.<sup>3</sup> The Committee’s view was that a decision should be entrusted to a court rather than a tribunal in the absence of these special considerations which made a tribunal more suitable. The Council on Tribunals was created in 1958 as a result of recommendations of the Franks Committee. The effect of the Franks Committee, according to the Council on Tribunals, was in general to make tribunals more like courts.<sup>4</sup>
- 1.14 The Justice Report, *The Citizen and the Administration* (the Whyatt report) of 1961 primarily examined the means for investigating administrative acts of public bodies where no tribunal or other statutory procedure was available and considered new procedures to examine such complaints, including ombudsmen. The Report approached tribunals from the question of whether discretionary decisions should be subject to appeal by a tribunal or kept within ministerial control. There was support for the role of tribunals and the right of the individual to have impartial adjudication of his dispute with authority. They suggest a role for the Council on Tribunals in suggesting new tribunals. Interestingly, it was considered in the report that some difficulties could be avoided if a General Tribunal was set up to deal with disputes where there was no special tribunal to deal with the area in dispute (like the Supreme Administrative Court or Tribunal set up in Sweden in 1909 whose jurisdiction is revised annually).
- 1.15 In 1975, Professor Kathleen Bell published a research study on Supplementary Benefit Appeal Tribunals which led to reform of the supplementary benefit system.
- 1.16 The Council on Tribunals wrote in 1980 that administrative tribunals “are bodies set up to adjudicate between the State and the individual, or between one individual and another, on specified matters arising under statutory schemes.”<sup>5</sup> They argue that “parliament’s selection of subjects to be referred to tribunals and inquiries does not form a regular pattern... the choice is influenced by the interplay of various factors – the nature of the decisions, accidents of history, departmental preferences and political considerations – rather than by the application of a set of coherent principles.” The Council notes that tribunals are becoming more formal, expensive and procedurally complex.

<sup>3</sup> Report of the Committee on Administrative Tribunals and Enquiries (Cmnd. 218), para 38.

<sup>4</sup> The Council on Tribunals comes to this conclusion in their report on the functions on the Council of Tribunals.

<sup>5</sup> The Functions of the Council on Tribunals: Special Report by the Council (Cmnd. 7805, 1980).

- 1.17 In 1988 Justice considered tribunals and their reform in *Administrative Justice: Some Necessary Reforms*. The report's key concern was of access to tribunals and assistance for people involved in tribunal proceedings. The report also commented that "the existence of every tribunal is the result of deliberate parliamentary choice based on a number of reasons which, when examined disclose no consistent principle", although the intention was that tribunals should be cheap and accessible. Arguments were considered that there should be more selectivity in the allocation of dispute resolution to tribunals rather than to courts. The report notes the pragmatic argument that there "is a limited supply of skilled legal services" and that too great a workload for the courts would lead either to long delays or to lowering of standards.

### ***The Leggatt Report***

- 1.18 The Leggatt report in 2001 focused on two advantages of tribunals. Firstly, in tribunals decisions are made by people who can pool legal and other expert knowledge. Secondly, the procedures and hearings can be simpler and more informal, which encourages direct participation by users.<sup>6</sup> The report suggests three tests which should be used as a guide as to whether courts or tribunals should decide cases.<sup>7</sup>

- (1) Participation: tribunals should be used where the factual and legal issues raised by the majority of cases are unlikely to be so complex as to prevent users from preparing and presenting their own cases, if properly helped. Direct participation is especially important in citizen and state disputes.
- (2) Special expertise: tribunals should be used if expertise or accessibility to users is a major issue in the resolution of disputes. Some users said that having more members and non-lawyers on the panel made it easier for them to present their case.
- (3) Expertise in administrative law: tribunals can be useful in dealing with the mixed questions of fact and law which often arise in the context of administrative decisions.

### **Justifications for tribunals: standard justifications and critiques**

- 1.19 The starting point for the original list of the differences between tribunals and courts is the Franks Committee. The traditional justifications for tribunals have developed from this. Some arguments rest on advantages of tribunals over courts, for example speed, accessibility, informality, expertise, cheapness and so on. Others rest on defects found in the court system, for example the inability of courts to deal with the large number of cases heard in tribunals and a lack of specialist expertise in courts given courts' generalist approaches (as discussed on more detail below). There are some elements of justification of tribunal adjudication for disputes that would not only swamp the courts, but for which court adjudication is not necessary.

<sup>6</sup> Leggatt Report, para 1.2.

<sup>7</sup> Leggatt Report, para 1.10.

- 1.20 Critiques of the traditional view are discussed in chronological order to gain an overview of any change in thinking about tribunals over time.
- 1.21 Abel-Smith and Stevens (1968) “found no coherent theory which explained why some responsibilities were exercised by courts and others by tribunals.” They argue that different types of weakness in the courts have given rise to different types of tribunals: for example social security tribunals being used in place of the courts because the courts are too expensive, formal and technical in their procedure; or because of a lack of expertise, doctrinal flexibility or policy consciousness in courts (for examples matters connected to land use, industrial expertise and so on.)
- 1.22 They argue that there are no fundamental differences between courts and tribunals, only differences of degree. Specialisation, the key hallmark of tribunals, is also found to some extent in the courts. They point to the usual advantages of tribunals as cheapness, speed and efficiency, privacy and informality. The informality of tribunals has been less of a marked difference since 1958 with the increase in legal chairmen and legal representation. It is not the case that courts administer rules of law while tribunals administer both law and policy; properly understood, tribunals are a “more modern form of court”. The policy-oriented tribunals in particular may exercise more discretion than courts, but, say the authors, no more so than the Chancery Division of the High Court has in handling trusts, wards or companies. In fact the authors urge a merging of courts and tribunals, and that the special advantages of tribunals should be extended to the hearing of matters dealt with in the courts.
- 1.23 Wraith and Hutchesson (1973) drew a distinction in that the “ordinary courts of law” had broad and general jurisdictions, with tribunals having jurisdictions that were narrower and more specific.<sup>8</sup> They suggest that perhaps the wider the jurisdiction of a tribunal, the more it takes on the attributes of a court, citing the examples of the Lands Tribunal and the (then) Industrial Tribunals. Another difference is that (specialised) tribunals may also be temporary or sporadic. They make the point that the nomenclature may be confusing, for example the local valuation “court” (as it then was) being inferior to the Lands “Tribunal”. They note that the courts do not want to become involved in many areas dealt with by tribunals which could be said to be “policy oriented matters”, for example claims for benefits. Alternatively, there may be cases that do not require a judge’s training, knowledge and experience. Broadly speaking, they note the special attributes that distinguish tribunals to be:
- (1) The greater use of expert adjudicators rather than judges who are “all rounders”. It is, however, noted that in specialist courts, for example the Commercial Court, the judges become experts in the specialist subject matter. This is therefore a difference of degree rather than of kind.

<sup>8</sup> R.E. Wraith and P.G. Hutchesson for the Institute of Public Administration, *Administrative Tribunals* (1973). See chapter 10.

- (2) The greater reliance on independent investigation to supplement the adversarial presentation of the case, for example examining properties in land disputes, with the visit frequently being the determining factor. On the other hand, some of the most important tribunals adhere to the adversarial principle.
  - (3) A general difference in atmosphere. The clearest comparator for most tribunals are the county courts, which are relatively informal, however few lay people feel comfortable in the county court. Tribunals are less formal and aloof, for example in their layout and their lesser use of formal forms of address.
- 1.24 Farmer (1974) provides an interesting analysis of the place of tribunals. He argues that, contrary to the Franks report, not all tribunals should be regarded as “machinery provided by Parliament for adjudication.” He gives the example of the Transport Tribunal which, although described as a court of record in legislation, resembles administrative bodies more closely in the sorts of considerations and criteria to which it has regard in making decisions. He discusses Abel-Smith and Stevens’ distinction between court-substitute tribunals and policy-oriented tribunals, as a useful starting point. Given that many policy-oriented tribunals are subject to provisions enabling ministers to issue directions, are they true tribunals? (for example the Transport Tribunal, the Civil Aviation Authority and also supposedly independent agencies like planning inspectors, whose decisions can be overridden by ministers). The difficulty is that tribunals are so diverse that it is difficult to find any comprehensive definition of what a tribunal is.
- 1.25 Farmer notes the problem that there is not a satisfactory definition of an ordinary court, and that there are many variations between courts, for example the Commercial Court bears little resemblance to a Crown Court. The Abel-Smith and Stevens argument is that tribunals “are a more modern form of court” (see para 1.22 above), but says Farmer, while this may be true of court-substitute tribunals, it is not so for policy-oriented tribunals. The key difference is the ability of ministers to issue directions to policy-oriented tribunals, so that in some cases it is the minister rather than the tribunal who determines policy.
- 1.26 Farmer asks whether, having made this distinction between tribunals, the differences between court-substitute tribunals and courts are material. Some have argued that they are distinct because the tribunals do not regard themselves as bound by precedents or by the rules of evidence, leading to a different decision-making process. Farmer concludes that the differences in decision-making have been greatly exaggerated. However, there are some differences in procedure, for example site inspections (rent tribunals), informal extra-hearing investigations (national insurance tribunals) and so on.

- 1.27 White (1985) argued that “there are no common characteristics of tribunals which distinguish them from adjudication in the courts. Once adjudicatory tribunals are distinguished from other tribunals and from enquires, it is in fact possible to discern a surprising number of common features shared by these tribunals and the courts.” He quotes Abel-Smith and Stevens’ view that tribunals are not fundamentally different from courts and can be regarded as a “more modern form of court.” Robin White argues that of the desirable qualities for tribunals noted by the Franks Committee, “openness, fairness and impartiality” are vague and meaningless, and “cheapness, accessibility and freedom from technicality, expedition and expert knowledge of the particular subject” are not qualities that are exclusive to tribunals. He contends that the cost of going to a tribunal may be more to the applicant than going to court as the applicant cannot (usually) recover costs and legal aid is not available. Accessibility: is said to be hindered by the difficulty of substantive law and the need to know details of procedural rules, while in contrast court rules generally have become less complex. Expertise is not limited to tribunal members; judges acquire expertise and the increasing number of full-time lawyer chairmen has narrowed the gap between judicial appointment as a judge and as a tribunal chair. Although tribunals are more informal, the process is not inquisitorial as the tribunal itself undertakes no fact-finding.
- 1.28 Genn (1994) examines the way in which tribunals concerned with welfare benefit and immigration operate in practice, and challenges some of the traditional claims made for tribunals. She examines the arguments that court-substitute tribunals are different from ordinary courts and that they are somehow better for dealing with the matters allocated to them. Some of the arguments that are used to justify the tribunals system, according to Genn are constitutional arguments concerned with a division between “policy” and “legal” questions and practical arguments relating to the difficulties of creating new areas of jurisdiction for the courts (ie large volume of cases; lack of specialisation of judges) and also the supposed advantages of tribunals (informality, speed, accessibility, speed, cheapness). She notes that there is a tendency for commentators to present the usual justifications not just as reasons for the establishment of tribunals or as objectives for tribunals to achieve, but as descriptive characteristics of the system.
- 1.29 Genn’s reply is as follows:
- (1) There is no real distinction between law and policy. The perceptions of tribunals is that they must act judicially, using judicial values such as legal accuracy, impartiality and fairness.
  - (2) Tribunals are as much bound by precedents as are courts. Although tribunals may strive for flexibility, it is almost inevitable that over time principles will emerge and that decision-making will be guided by a desire for consistency.

- (3) It has been argued that tribunals are in fact chosen for dispute adjudication for political and costs reasons, not on a belief that they offer greater access to justice. On this argument, tribunals are intended to protect government policies with a cloak of legitimacy and give the impression of a right of appeal which had no real effect.<sup>9</sup> It has been argued that “informal” equates to “inferior” and represents a downgrading of the problems of the poor.<sup>10</sup>
  - (4) The reason in reality why governments prefer tribunals to courts is their relatively modest cost and the increased speed that comes with largely dispensing with lawyers.
- 1.30 Based on empirical evidence, Genn finds that the overall impact of procedural informality and simplicity in physical surroundings can be overestimated: the tribunal’s decision must still be based on an analysis of the facts and interpretation of the law. A little less accuracy in pursuit of simplicity and speed can render serious injustices on matters which may have a far greater impact of applicants’ lives than many county court or High Court claims. Genn argues that attention must be paid to the conflicting demands of procedural simplicity and legal precision.
- 1.31 Roger Smith (1995) noted that although tribunals were “intended to be informal, accessible and open to individuals without the need for lawyers, some of their early promise has been lost.”<sup>11</sup> He criticises the industrial tribunals (as they then were), for being dominated by legalism and lawyers. He points out that even in the Independent Tribunals Service (as it then was, now The Appeals Service), research has shown that representation significantly affects the chances of a claimant’s success.<sup>12</sup>
- 1.32 Lord Archer of Sandwell QC (1996) commented that “the name tribunal evokes a culture which differs in important respects from that of the courts.”<sup>13</sup> These are said to be the differences:
- (1) Tribunals are more informal than courts, and aim to “induce a user-friendly ethos, which does not discourage people from pursuing their entitlements, and which helps them to articulate their case.”
  - (2) Tribunals frequently consist of three or more members, of whom at least a majority are not lawyers. This may encourage confidence in the tribunal among tribunal users.
  - (3) There is “at least an aspiration to decide cases expeditiously.”

<sup>9</sup> Note T Prosser, “Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and their Predecessors” (1977) 4 British Journal of Law and Society 39, 44.

<sup>10</sup> See R L Abel, “The Contradictions of Informal Justice”, in R L Abel (ed), The Politics of Informal Justice (New York 1982).

<sup>11</sup> Legal Action Group, Shaping the Future New Directions in Legal Services, Roger Smith (ed) (1995).

<sup>12</sup> H Genn and Y Genn, The Effectiveness of Representation at Tribunals, LCD, 1989.

<sup>13</sup> Law Reform for all, David Bean (ed), Blackstone Press 1996.

- (4) Those who appear are less at risk of orders for costs.
  - (5) Tribunals deal with a specific subject or group of subjects, “and so acquire an expertise with which no all-embracing jurisdiction could or should seek to compete.” The point is made that not only would the courts not have the necessary expertise to deal with the issues now considered in tribunals, but the bulk of cases would mean the courts could not cope.
- 1.33 Harlow and Rawlings (1997) note in passing that tribunals that deal with disputes between private parties are genuinely “court-substitutes”, that is machinery for the resolution of disputes akin to county courts (these types of tribunals are not usually discussed in any detail by commentators). They state that empirical research shows the traditional justifications may not be descriptive characteristics of tribunals (as argued by Genn – see above); this has been noted by the Council on Tribunals in several annual reports that criticise tribunals for inaccessibility and delay.
- 1.34 A case study of social security tribunals is used to show the increasing judicialisation of tribunals and, the authors argue, a move now (at least before the most recent reforms in the Social Security Act 1998) back away again from judicialisation. The Bell report in 1975 recommended, for example, legally qualified chairs, better provision for representation and a higher calibre of members. Further judicialisation was brought in by the Health and Social Services and Social Security Adjudication Act 1983 which amalgamated the two previous tribunals, provided for an appeal to an appeal tribunal and set up a presidential system. This marked a change from a discretionary to a more rigidly legal system. [Note that there are now no lay members in the Appeals Service under the Social Security Act 1998]. The authors argue there has been a move away from judicialisation of tribunals with the establishment of the Social Fund in the Social Security Act 1985, with a more discretionary approach and no independent appeal rights (but internal reviews).

- 1.35 Smith, Bailey and Gunn (2002) write that generally tribunal proceedings are cheaper, speedier and more expert than the courts.<sup>14</sup> However, they note that the Council on Tribunals has frequently noted the problem of delay in Annual Reports; that accessibility is hindered by the large number of tribunals and lack of publicity about their work; and repeat the comments of the Council on Tribunals that tribunals are becoming more formal, expensive and procedurally complex.<sup>15</sup> They also note the comments of Farmer that tribunals have moved to an informal de facto system of precedent. More pragmatic reasons for tribunals include the need not to overburden the judiciary. They discuss whether tribunals are more inquisitorial: tribunal members are more involved in the direct questioning of each side than a judge would be and informal structure of proceedings allows points to be followed through once raised. But there are limits: the tribunal is not expected to question facts presented by claimant just in case after further investigation they might prove to be materially different. The lesser rules of evidence in tribunals is noted.
- 1.36 Bradley and Ewing note the need for specialist knowledge if certain disputes are to be resolved fairly and economically.<sup>16</sup> They note that there are some complex systems of regulation and that, as they are now organised, the courts could not deal with the mass of appeals from such decisions. They note that nowadays there is a “striking overlap” between the types of decisions made by courts and tribunals. The examples given are that employment tribunals make decisions that in other systems are dealt with in a specialised court. Homelessness appeals are heard by the county court, whereas the authors argue that such appeals could well have been entrusted to a housing tribunal, if one existed. They note that tribunal procedures are not always less formal than in a comparable court, eg the county court’s informal procedure in dealing with small claims through arbitration. They point out that in 2001 many tribunals (eg immigration and social security tribunals) took the form of one lawyer sitting alone. They argue that “today, leaving aside questions of organisation, it is impossible not to describe the function of tribunals except in terms that also apply to courts.”

### **Conclusions**

- 1.37 Widely varying views have been taken about how far tribunals are different from the “ordinary courts.”
- 1.38 A feature of tribunals is that it is difficult to generalise about the many different tribunals that exist. Although tribunals not always cheaper, more informal etc they can be these things – different tribunals can have different attributes which make it successful as a tribunal. some eg Employment Tribunal and Lands Tribunal are more like courts.

<sup>14</sup> Smith, Bailey and Gunn on the Modern Legal System by SH Bailey, JPL Ching, MJ Gunn and DC Ormerod (4th ed 2002) (Sweet & Maxwell).

<sup>15</sup> In the Council on Tribunals special report on functions of Council on Tribunals.

<sup>16</sup> Constitutional and Administrative Law, A W Bradley and K D Ewing (13th ed, 2003)

- 1.39 There are some subject areas where it is clearer that a tribunal will be the appropriate forum – eg welfare matters/regulation. In other areas it is not so clear that a tribunal will be appropriate, particularly in disputes between private parties. The role of inspectors is one clear advantage that property tribunals have over courts in property disputes.
- 1.40 It is important not to forget the role of ombudsmen as another mechanism for investigating and deciding disputes, particularly involving public or administrative bodies: see “Ombudsman or tribunal? The ombudsman as an adjudicative mechanism” in Harris and Partington (eds) *Administrative Justice in the 21st Century* (1999).

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