ribunals: social court?

ulian Fulbrook,
osalind Brooke, Peter Archer

abian tract 427 20p

ociety of Labour lawyers report

fabian tract 427
tribunals: a social court?

contents

Fabian Society, 11 Dartmouth Street, London SW1H 9BN.
December 1973 ISBN 7163 0427 9

1. introduction

One hundred years ago, a famous Royal Commission on the Judicature delivered a broadside at the chaos and injustices which they had investigated in the English court system. In 1973 we may smile with amused superiority at the tortuous maze of competing and overlapping courts which existed then; and which were consolidated by the 1873 Judicature Act into the existing High Court structure.

But one hundred years later it could be argued that we still have a similar muddle. The problem is largely unrecognised, because it exists in a particular corner of the legal world not normally regarded as part of the court structure, but merely as a "system of tribunals."

"System" is perhaps a misnomer. Tribunals have proliferated often without any regard to rational planning. Recent reports of the Council on Tribunals have lamented this disorganised growth, and the failure of Government to consult them over the setting up of new types—for example, on attendance allowances—which could be dealt with effectively in the existing system.

There exists a bewildering maze of tribunals: different tribunals for differing social security benefits; industrial tribunals, which in the past nine years of existence have been given one jurisdiction after another; rent tribunals, land and rating tribunals; and a multitude of others, all existing in jumbled disorganisation.

Yet the importance of tribunals is often minimised; the majority of lawyers concern themselves only with the courts. What must be stressed is that for many in our society, these tribunals are the immediate point of contact with the law. They have become, in many instances, "poor people's courts" (Henry Hodge, "The Solicitor's place in welfare law," *Bulletin,* Legal Action Group, February 1973, p 7).

The tribunals have, however, just growed like Topsy . . . with little attempt to work out systematically the division of jurisdiction between them and the courts, and even less attempt to assess whether there *should* be any division and for what reasons. Fundamental questions on the nature of appeals were asked by an influential *Justice* Report twelve years ago —but the underlying principles have never been clearly enunciated ("The Citizen and the Administration; the redress of grievances," *Justice* 1961.

The man from Mars, as necessary to the reformer as the man on the Clapham omnibus to the lawyer, might regard our civil judicial system in the 1970's as being as much in need of reform as in the 1870's.

1873 judicature act

Legislation following the Royal Commission which reported in 1869 swept away the irrational maze of courts which had previously administered the legal system at its highest levels, with names, jurisdictions and procedures developed over six centuries according to the vagaries of history, the demands of particular events, and the chance relationships between specific individuals. They had competed for jurisdiction (and the consequential status for their members and financial rewards for their practitioners) not scorning in the process to encourage blatant fictions. The procedural rules which had developed were frequently inconsistent, so that a plaintiff who was able to take his cause of action into more than one court could choose the rule which best suited his book. And since no one court had power to make every order which might be required, the same dispute might shuttle back and forth between a series of courts before it could be resolved. To bring a claim in the wrong court, or initiate the wrong procedure (a trap frequently avoidable only by those gifted with second sight) would lead, at best, to substantial delay, at worst to the total loss of one's claim. The channels for appealing were no less chaotic.

The Judicature Act replaced this jungle by a single superior court, the Supreme

Court of Judicature, consisting of the High Court and a single Court of Appeal. And while the High Court was divided into Divisions for the purpose of ensuring a degree of expertise in special kinds of work, each Division could exercise any power necessary for disposing of a problem.

Of course, it is possible to point to shortcomings and omissions in the Judicature Act, but the system of superior courts was designed for the future according to a conscious decision, and no longer appeared to be something imposed upon the human race by a process beyond its control.

The Act related to justice at the centre. It remained to subject the provinces to a similar rationalisation, an achievement which had to await the appointment of the Beeching Commission in 1966, and the consequent passing of the Courts Act in 1971.

But such measures apply only to the courts. And in the century since the passing of the Judicature Act, a growing number of disputes have been decided by institutions which hear evidence, apply legal rules, and give rulings in much the same way, but are not dignified with the name " court." No satisfactory criterion has ever been formulated to distinguish a tribunal from a court. Usually, its jurisdiction will be more specialised ; often its procedure will be less formal. But the National Industrial Relations Court has a specialised jurisdiction and a procedure which, according to its first President, Sir John Donaldson, aimed at informality, while the Lands Tribunal has acquired a wide range of subjects, and is no less formal than many courts.

Whether an institution is known as a court or a tribunal depends chiefly upon the whim of those who initiated and drafted the statute which established it.

And once in being, its jurisdiction will increase when some new kind of decision is required, and it appears the instrument most ready to hand. Consequently the overlapping jurisdictions, the procedural inconsistencies, the human situations which no one tribunal has power to resolve, and the technicalities on appeal, reproduce the state of the superior courts a century ago.

why tribunals ?

All needs are the needs of individuals. But some require a single undivided provision, such as a motorway, a police force or a sewage disposal system ; while others require the making of separate financial payments, or the availability of a separate service (such as a medical consultation) to numerous individuals. It is the latter kind of provision which is normally referred to as " welfare," and which gives rise to the question who shall, and who shall not, receive the benefit of the provision.

The question may be answered by either of two methods. It is possible to confer on the officials who arrange the provision a discretion to decide who shall benefit, and possibly, who shall be called upon to make the sacrifice entailed in providing it. Or it may be done by drafting rules, specifying those to whom they apply. The latter method leads to a vocabulary of " rights " and " duties." It will sometimes lead to the refusal of help because some situation fails to fall neatly into the categories envisaged by the rules. But it guarantees to the public a means of answering back when confronted by an official demand, or an official refusal. And it removes the appearance of " charity " from public welfare.

Whichever method is used, and most systems of social administration make use of both, some way is required, when an official remains obdurate, of enabling the citizen to insist upon a second opinion. And this may often entail the assistance of someone more articulate, less personally implicated, and more likely to command attention than himself.

The appeal may be to public opinion, by enlisting the aid of the press, or of a sympathetic politician, and may be initiated

either by a protest, or by direct action. And this is certainly necessary from time to time, in order to establish standards. For these will apply not only to the particular instance, but to the numerous other cases which in the future will fall to be considered. It may lead to a new Act of Parliament, to new regulations, or simply to a common recognition that a particular problem requires a particular solution.

But for the bulk of cases, justice is more likely to ensue if there is some means of looking at the merits in greater detail than is attainable by the mass media. One possibility is to enlist the aid of a constituency M.P., who is prepared to make a close study of the facts, pointing out matters which were not elicited by a busy interviewer at an earlier stage, and seeking publicity for a problem only occasionally, in order to establish himself as a serious force. As an ultimate resort, he may refer the problem to the Parliamentary Commissioner, who has both the machinery and the power essential for detailed investigation.

Access to a friend at court, who will listen patiently and sympathetically, and act on occasion by means of an informal telephone call, is of great importance. But no less important in many cases is the right personally to present one's case to the individuals who will actually take the decision, to hear and, if necessary, challenge what is said to them by way of counter-argument, to argue the matter formally and publicly, and to hear the reasons for the decision from their own mouths. These are the attributes of a judicial procedure, and in many cases, there can be no satisfactory substitute.

However, " formal procedures for resolving disputes have not been set up for many areas of social welfare legislation. No formal machinery exists for disputes about council house allocation, non-admission to an old people's home, temporary accommodation or the school of parental choice. There are, of course, arguments on both sides about setting up formal machinery of this kind, but in how much of this area of decision-making could the three virtues of the Franks Report on administrative tribunals—openness, fairness and impartiality—be said to operate?" (Rosalind Brooke, " Civic rights and the social services " in W. A. Robson and B. Crick (ed), *The Future of the Social Services,* 1970, p 44). Parliamentary Commissioners for Local Government are to be established but their jurisdiction will be modelled on the existing Parliamentary Commissioner's. and so restricted to maladministration : not to the merits of the decision which has been made.

And where public administration rests on a system of rights and duties rather than upon discretion, it becomes particularly important. For if it is the application of certain rules to a specific situation which is in issue, this essentially requires a judicial process. For example, in the Soviet system, the Procurator, the official with overall responsibility for legality in the administration, is at once the ombudsman, the district auditor, and the personal advocate for the citizen. In Britain, it is felt that personal rights are best safeguarded by conferring on the citizen the power personally to institute proceedings before the authority which ultimately decides, and there to present his arguments.

2. social security tribunals

In the introduction we discussed the maze of courts and tribunals. We propose concentrating on one group of tribunals—social security—in order to highlight some of the present problems in the tribunal system. There can be no doubt as to the crucial importance to the community of social security tribunals. The introduction of administrative tribunals " as a result of the creation of the Welfare State (led to) what had previously been an unobtrusive and rarely used piece of machinery (developing) into an ubiquitious and immensely influential means of settling conflicts between government departments and private individuals." (*Law Society Gazette,* Dec. 1959, quoted in the *First Annual Report of the Council on Tribunals* HMSO 1960.)

But more important than their stimulus to the historical development of administrative law is their vital effect on the lives of ordinary citizens. The system has permeated our national life, so that the administrative complex of National Insurance is concerned with the individual lives of over 50 million citizens, from the pooled resources of the community, the number of benefits and allowances paid each week by the Department of Health and Social Security totals 17 million (Department of Health and Social Security *Annual report for 1971* HMSO 1973, p 110). Although disputes are unlikely to arise in the vast majority of these payments, it is nevertheless important to realise the sheer scale of the administrative apparatus.

Financially it has been estimated that one in eleven of the population are dependent in some way on Supplementary Benefits —equivalent to the total population of Wales (F. Field and M. Grieve, *Abuse and the Abused,* CPAG Poverty pamphlet 1971 p 10). In 1971 the cost to the country of this was £372 millions. Expenditure on National Insurance benefits, of which two-thirds are retirement pensions, was £3,370 millions, and the amount spent on the administrative machinery alone amounted to £134 millions (*Annual report,* for 1971, *op cit*).

Impressive as these figures are, one must also remember the small scale financial aspects ; the vital significance of the social security benefit to the individual, and often just as important, the timing of its payment to him. When a claimant's whole life style and health may depend on social security, eradicating delays is not simply a matter of administrative efficiency.

At the same time, however, it is important to understand the relationship between legal jurisdiction in the courts and in the administrative tribunals. For example, a dismissed worker will be far more concerned with obtaining his social security benefits than with bringing an action in the High Court for wrongful dismissal. It is also important to realize that the tribunal adjudication may very well involve a far greater cash flow.

tribunal system

At present there are 194 local tribunals in Britain adjudicating National Insurance cases. They handle 29,000 appeals each year (including 4,661 cases of industrial injury benefit) which is a fraction of the 22 million claims handled by local officers each year. Above this local appeal structure there is a further secondary appeal to one of the nine Commissioners, who handle just over 2,000 appeals each year DHSS (*Annual Report for 1971* and *Council on Tribunals Annual Report 1971-72* HMSO 1972).

National Insurance Commissioners are senior legal appointments, and the great majority of local tribunal chairmen have legal qualifications. Two " wingmen " are drawn in at the local tribunals, one from a panel of " employers " and one from those representing " workpeople." Precedents are built up in the form of Commissioner's decisions, of which the most important (in the view of the Chief Commissioner) are published. However, unpublished decisions are occasionally relied on ; these are called " numbered " decisions and are available in the court anteroom at the Commissioners' headquarters in London. Where a case turns on one of them, a provincial appellant is

effectively barred from full access to the law on his appeal.

The "poor relation" of this system is that of Supplementary Benefits Appeal Tribunals, which have been aptly described as a "backwater of British justice" (T. Lynes Review of the SB *Handbook* in *New Society*, 10 September, 1970). There are 120 of these in Britain, having had a recent reduction from a peak of 151. The chairman is rarely a lawyer; one wingman represents "workpeople," the other is appointed by the Department.

Nearly 30,000 appeals are heard each year, the vast majority of which are Supplementary Benefit cases. A new category is that of appeals on the Family Income Supplement—a matter which has apparently caused "dissatisfaction among chairmen and members . . . There is of course little room for the exercise of any discretion in the implementation of the Scheme" (*Council on Tribunals Annual Report op cit*, p 23).

A phenomenon of all tribunals seems to be their capacity to attract further jurisdiction. New mechanisms are patched on to the old structure—for example, Family Allowances into the National Insurance system, and now Family Income Supplement into the Supplementary Benefits Appeal systems. The best example is the Industrial Tribunal set up under the 1964 Industrial Training Act which now has an unwieldy jurisdiction under 25 Acts of Parliament.

The decision of Supplementary Benefits Appeal Tribunals is final. The only challenge is an application to the High Court for an order of certiorari to quash a decision on the grounds that it was *ultra vires*, in error of law or contrary to the requirements of Natural Justice. The latter is a flexible indeterminate long-stop against what the High Court deems to be injustice. Its two basic principles are that the tribunal members "must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made" (per Viscount Haldane in *Local Government Board* v. *Arlidge*, 1915, AC, p 120 at p 132). It is certainly open to question whether the Supplementary Benefits system can stand up to examination on the second tenet.

developments of social security tribunals

The dead hand of the past not merely slaps but shapes the living body of social security administration. Despite the changing nomenclature and the Beveridge innovations, many of the adjudicatory tests and much of the background philosophy can be seen in direct historical development from the Poor Law machinery. For instance, the stigma of its legal and social barbarities remains today an important factor in the refusal to take up benefits given by the State as a legal right. (See for one of numerous examples, the 1966 survey by the Ministry of Pensions and National Insurance, *Financial and other circumstances of retirement pensioners* HMSO 1966.)

The development of the system has been a sporadic and often a blindly panicked retreat. In the debates on the 1948 National Assistance Act, whose first section somewhat optimistically purports to abolish the Poor Law, Bessie Braddock perhaps examplified this attitude when she summed up her position by declaring: "I think of what we are repealing more than of what we are proposing" (House of Commons debates, *Hansard*, 24 November, 1947).

Furthermore, the Beveridge watershed had only minimal effect on the administrative machinery of social security. In other areas of health and social welfare the effect of the post-war legislation was clearly immense. But in the field of tribunal adjudication, little more was done than to change the sports-derived name of "Courts of Referees" and "Umpires" to Local Appeal Tribunals and Commissioners. All the fundamentals of the original 1911 National Insurance structures remain with us today. (The Supplementary Benefits tribunals have their origin in the tribunals set up alongside the Unemployment Assistance Board in 1934, but these were themselves

modelled on the 1911 National Insurance Act tribunals.)

The great divide in the legal administration of social security is between benefits given on an insurance basis and those on the basis of need. There is theoretically an absolute cleavage between the two. In practical terms their interrelation is vital. For example, a claimant may be temporarily disqualified from unemployment insurance benefit because he was sacked for " misconduct." He will be immediately entitled to apply for Supplementary Benefits as Society's " safety net " for his family, although even this will usually be scaled down.

Whatever the legal semantics about onus of proof, the claimant will have to undergo the appeal process to gain his full entitlement by disproving the allegation of " misconduct," first to the National Insurance Local Appeal tribunal; and failing this, to the Supplementary Benefits Appeal Tribunal. It is important to realise that a number of other entitlements may depend on these decisions—for instance, evidence before the tribunals may be adduced to disqualify the claimant from receiving a redundancy payment before an Industrial Tribunal.

The overlapping and complexities involved are a measure of how little care has been paid to the structure—" legislation about tribunals tends to be shaped by the short term exigencies of political and administrative convenience rather than by any long term policy " (*Council on Tribunals Annual Report* 1969-70, HMSO 1970, p 10). And perhaps this is hardly surprising in a social policy area traditionally neglected in an attempt to keep it discreetly hidden from public view. The present chaos is a derivative of the origins of the structures. Professor Tawney illustrated their schizophrenia when he stated: " The services establishing social rights can boast no lofty pedigree. They crept into apologetic existence, as low-grade palliatives designed at once to relieve and to conceal realities of poverty " (R. H. Tawney, *Equality*, p 127).

Beveridge saw " assistance " (since 1966, Supplementary Benefits) as a residual system. He believed firmly that his integrated social insurance scheme would be " designed of itself when in full operation to guarantee the income needed for subsistence in all normal cases " (Beveridge, *Social insurance and allied services* HMSO 1942, Cmd 6404, para 27). But as a long-stop for those failing to meet the contribution requirements, " national assistance " would be " administered with sympathetic justice and discretion taking full account of individual circumstances" (*ibid*). His view permeated the subsequent legislation, but his prophecy of " assistance " withering away has proved decisively wrong. The Supplementary Benefits/National Assistance " Plimsoll line " of poverty has been consistently above flat-rate National Insurance benefits since the war.

But the insurance principle, pioneered by Lloyd George in 1911 has remained. One commentator has described the continued use of this principle as explicable " on historical and social psychological reasons but not for actuarial reasons" (V. George, *Social Security; Beveridge and After*, 1968, p 45). Its direct contributory aspect has become a national myth, for example, the average pensioner will have paid only a fraction of his pension costs through the stamp system, although he may well have paid most of it in direct or indirect taxation. Social insurance cannot be tritely equated therefore with the terminology of commercial insurance.

right to benefit

Yet this dogma of " insurance "—perhaps useful in terms of practical politics—influences the system in multitudinous ways. Its most fundamental consequences concern the notion in the public consciousness of a " right " to benefit. With an insurance scheme, however fictional, welfare clients seem to exhibit less fear of claiming—indeed cases are frequently occurring where an appellant is disqualified from insurance benefit for " *voluntarily* leaving work without just

cause " when they decide to take a " rest " feeling entitled to do so after paying their stamps dutifully over a period of time.

There is a legal " right " to Supplementary Benefits, but the " feeling " of claimants is in general very different. Tony Lynes sums up the difficulty by stating: "Supplementary Benefits, unlike the old National Assistance, are a right. The Act says so. But there is a wide gap between the working of the Act and the spirit in which it is administered. And that gap has very little to do with the viciousness of officials, most of whom are neither more nor less vicious than the rest of us. The fact is that *nobody*—except a few cranks in the Child Poverty Action Group—really thinks of Supplementary Benefits as a legal right as, for example, wages or even National Insurance benefits are a legal right. Certainly the average British lawyer doesn't " (T. Lynes, *Welfare rights,* Fabian Tract 395, p 5, 1969).

The tribunal adjudication of social security benefits in this country is a quagmire. Its administration involves a myriad of diffuse legal technicalities. The element of " discretion " theoretically involved in deciding cases at a local level adds greatly to the confusion of both appellants, tribunal members and social security officers. More important, the fundamental question of whether the tribunals should fulfil the role of an independent appeal court or should be an integral part of the benefit administration machinery, has never been satisfactorily resolved.

current issues in the tribunals

The fundamental question of how cut-price justice should be run in the tribunals had never been answered, and not often asked. In the High Court, Britain has favoured a gladiatorial contest between two professionally articulate representatives of opposing viewpoints. This accusatorial approach is the legacy of centuries ; but the continental system of patient inquiry by the whole court to ascertain the facts, the inquisatorial approach, is the theoretical *basis* of our tribunal system. Yet the *practice* is a different matter. The views of Dicey still rumble on, and the present tribunal system, staffed by those brought up on the Rule of Law, is an uneasy mixture of the two legal streams of thought.

The 1932 Donoughmore Committee on Minister's Powers, set up in the aftermath of Lord Chief Justice Hewart's outburst of fury in " The New Despotism," roundly condemned the inquisatorial approach as " wholy inapplicable in the United Kingdom, with its flexible unwritten constitution under which there is no clear-cut separation of powers and the administration is subject to the almost daily supervision of Courts of law, as every reader of the daily law reports in *The Times* newspaper knows."

In the opinion of the Donoughmore Committee there was an essential distinction between a judicial and a quasi-judicial function lying in the element of discretion. Their view was of the High Court mechanically weighing precedents to distil a new precedent devoid of external considerations. This myth is being constantly exploded, but still persists. In a recent survey of the judicial function of the House of Lords, the authors conclude that : " There is no such thing as depersonalised adjudication, particularly in the Anglo-Saxon legal system which gives so much scope to its judges to indulge in individual pyrotechnics " (Louis Blom-Cooper and Gavin Drewry, *Final Appeal* 1972 p 152).

procedure : formal or informal

The great benefit of a tribunal, so we are repeatedly told, is its informality. But as the Franks' Committee pointed out : " Informality without procedure may be positively inimical to right adjudication " (*Report of the Committee on administrative tribunals and enquiries* HMSO 1957 Cmnd 218 p 14 (the Franks' Report)).

And the procedure utilised is invariably determined by the Chairman. The decision is the tribunal's. But the chairman by reason of his status and continual ap-

pearances naturally comes to dominate the tribunal. Deciding legal disputes is an expertise, acquired by legal training and experience. It entails presiding over orderly proceedings, listening to evidence, noting what is relevant and excluding what is prejudicial, formulating and deciding those questions of fact which arise, and applying general rules to a particular situation. Lawyers do not always perform these functions impeccably ; a legal training is not always a guarantee of a judicial mind. But a well-intentioned common sense is no substitute for expertise.

It follows that any institution which has to exercise these functions requires the services of a lawyer. He may be the Clerk who advises the tribunal, a function long familiar to the public in the Clerk to lay magistrates. Or he may be the Chairman, and since one of his functions is to ensure that the procedure follows an orderly and a logical sequence, this is often a convenient arrangement.

In most courts, a single judge sitting alone will exercise all these functions of the Chairman. But there are valid reasons for including laymen on the tribunals. First, the situation with which a welfare tribunal has to deal relates to a human problem, upon which the reaction of a sympathetic heart may be as valuable as an analytical mind. And while there is nothing in a lawyer's training to exclude such an asset, his whole social background may be less conducive to an imaginative sympathy than in the case of a sensibly selected panel of laymen. Secondly, a lawyer who has " heard it all before " may be gifted with a healthy scepticism, but this may need to be balanced by a more receptive ear. Thirdly, if the public is to assume a proper responsibility for the functioning of its judicial system, it will require a critical interest fostered by participation. These are the arguments for retaining the jury in the criminal courts. They are no less valid in welfare tribunals.

So it is important that the lay public should be represented upon the tribunal, preferably not as assessors, to assist the legal Chairman in technical matters, but as part of the tribunal itself. And provided that the chairman controls the procedure, and points out the legal provisions entailed, there seems no reason why he should exercise a veto over the views of his colleagues. If the lay members outvote the Chairman, that may on occasion represent a victory for common sense.

But if the lay members are appointed both because they represent " the common touch," and because they possess a measure of experience in the activities with which the tribunal deals, they should have sufficient understanding of the rules which they are applying, and of judicial procedure, to understand how a particular argument, or a specific piece of evidence, applies to the issues. It follows that upon appointment, and before he sits, a lay member should undergo some training in such concepts as " Natural Justice." The object would be not to make him into a lawyer manqué, but to offer some insight into the difference between an " inquisatorial " and an " adversary " approach, and into the requirements of fairness.

For example, lay members should be encouraged to confront parties or advocates with any point upon which they are unconvinced, in order to give them an opportunity of arguing it further. One of the authors recollected appearing of the authors recollects appearing expressed himself as completely satisfied upon a particular submission, indicating clearly that it was unnecessary to develop the argument further. The two lay members indicated no dissent, and the advocate left the matter there. The parties withdrew, and after a long recess, they were recalled, to be informed by a red faced Chairman that the Tribunal " had decided by a majority to reject the submission." In our view the active and informed participation of lay members in decisions on social matters is a vital prerequisite to the administration of justice.

But equally it is of importance that a lawyer involved in such a jurisdiction should undergo some training into

his duties. At present, he may never at any stage in his career have undertaken a systematic study of welfare law. And we would hope that in future, law students will be offered at least an opportunity, as optional examination subjects, to qualify in the fields with which so many tribunals deal, and which at present are not really thought of as "law at all."

But it is even more startling to reflect that normally our judges in any subject are offered virtually no training upon appointment. Since 1967, judges in the criminal courts have been summoned periodically to "sentencing conferences," where they discuss methods of dealing with offenders, though this is intended more to ensure a measure of uniformity than as instruction. In such matters as assessing damages, there is no equivalent of the sentencing conferences, nor does it exist in the area of welfare tribunals. The Franks Committee thought that "Objectives in the treatment of cases and the proper sifting of facts are most often best secured by having a legally qualified chairman" (*Franks Report* 1957, *op cit*, p 12). The caution here is that the tribunal will become excessively formal and inflexibly legalistic. Certainly many lawyer-chairman run their tribunals on High Court lines, but experience shows that perhaps worse than that, non-lawyer chairman are often more inflexible in keeping to what they regard as legal standards, and frequently wingmen feel obliged to behave as they imagine Lord Justices of Appeal would.

Commenting on his experiences of procedures before Supplementary Benefits Appeal Tribunals, a former Secretary of CPAG sums up the practical situation as follows: "The Chairman, who is usually not a lawyer, conducts the proceedings according to his personal whims and fancies, with some very odd results—such as the occasion when the Appellant's representative was asked to withdraw while his witness gave evidence. Even more indefensible is the lack of any system of case law. Each case is decided without reference to any previous decisions, with the result that different local tribunals—or even the same tribunal—can make inconsistent decisions in similar cases" (Tony Lynes, *New Society, loc cit.*)

The need here is perhaps not for a rigid demarcation dispute between lawyers and non-lawyers, but for mutual education of existing tribunal members. It is quite scandalous that no meetings are organised for either chairman or wingmen of National Insurance tribunals to exchange ideas and experiences. Following a lengthy campaign by the Council on Tribunals, such conferences have now been introduced for chairmen of Supplementary Benefits tribunals, but not wingmen (*Council on Tribunals Annual Report 1971-2 op cit*, p 6).

Very little is known about the crucial area of appointment and selection of tribunal members. Furthermore, no systematic method seems to exist for the evaluation of their work once appointed. One study found that some chairmen of Supplementary Benefits tribunals "speculate, perhaps incorrectly, that their appointments or reappointments may be affected by perceptions of them by clerks and presenting officers" (Melvin Herman, *Administrative Justice and Supplementary Benefits* 1972, p 21). The truth is that while the functions of such tribunals play a vital role in our society, little is known about the personalities or even the competence of those involved (some research on this vital subject is at present being done by Ruth Lister of the Child Poverty Action Group). An immediate reform would be to extend the social composition of those at present appointed as wingmen. From personal observation it is clear that their average age is well above that of many claimants and they often come from a totally different section of the community. Selection could be made for example, to include members of minority groups, social workers rather than "charity" workers, and others active in community work or legal advice in this field. It would represent a considerable change from the present selection policy which seems to appoint in the main only

" those people who can be counted on not to rock the boat too much " (Tony Gould and Joe Kenyon, *Stories from the dole queue* 1972, p 156).

Basic facts on the tribunals seem often scarce or difficult to obtain. It appears from answers to parliamentary questions that payment for chairmen's duties reflects whether or not they are lawyers, as shown by the sliding scale for chairmen's fees. In industrial tribunals this is a daily fee of £30; in rent tribunals a daily fee of £27; in National Insurance a half day fee of £11 (£22 full day)—whereas for Supplementary Benefits Appeal Tribunal Chairmen, who are predominantly non-lawyers, the half day fee is £9.45. It is clear that the numbers involved in the lower end of this jurisdiction are considerable: in National Insurance tribunals there are 244 Chairmen and 4,563 lay representatives on the panels; in Supplementary Benefits Appeal Tribunals, 213 Chairmen and 1,229 wingmen. And the number of half day sessions conducted in the last year were 6,660 for National Insurance and 5,717 for Supplementary Benefits, as compared with 2,550 day sessions for rent tribunals and 4,666 day sessions for industrial tribunals (Rosalind Brooke, *New Society* 22 March, 1973, from Parliamentary questions asked by Peter Archer QC, MP, on Monday, 19 February, 1973).

Certainly there is a need for a great deal more research in this area, and not just into the decision-making process of the tribunals but also into the administrative machinery from whose initial decision the appeal is made. As one study has shown, the pre-hearing administrative treatment of appeal cases " may well be much more important than the hearing itself" (Robert Coleman, *Supplementary Benefits and the administrative review of administrative action,* Poverty pamphlet No. 7, p 3).

role of the clerk and the presenting officer

One curious feature of the informality of tribunal proceedings is the lack of a clear role, in practice, for the clerk to the tribunal. The Franks' Committee was quite emphatic that " the duties of a clerk should be confined to secretarial work " and that " like a magistrate's clerk he should be debarred from retiring with the tribunal when they consider their decisions " (Franks' Report 1957 *op cit* p 14).

Of practical importance here is that social security tribunals don't usually " retire," but empty the room in which they are sitting—except for the clerk. The indiscretions of some clerks have on occasions led to flagarant breaches of Natural Justice.

Although this is a problem recognised by the parties concerned, little seems to be done about it. Clerks are still drawn directly from the regional office of the Department, although in National Insurance tribunals, they are sometimes recruited from a DHSS office in a neighbouring town. The Franks' Committee rejected the idea of a central corps of clerks to service *all* tribunals, largely on the grounds of career prospects, but with the huge increase in social security administration we believe this position should be reviewed. The obvious and clear impartiality of the clerk is a fundamental principle of justice, and all possible steps should be taken to ensure that this is upheld in practice.

The role of the officer representing the DHSS at the tribunal can also lead to difficulties and ambiguities. Theoretically he is present to " assist " rather than to act as " prosecutor "—the confidential guidance notes given to Chairmen of National Insurance tribunals state, hopefully perhaps, that the officer " does not act in the capacity of an advocate." But because of the vagueness and inconsistancies of the present system, ministry officials sometimes feel the personal need to chalk up tribunal successes—they invariably deny this emphatically, but admit it by their actions. And with the absence in the majority of cases of any representation for the appellant, there is often an observable inequality between the " sides." Professor Bell states that in

such a situation "The tribunal's responsibility is to help an inarticulate claimant" (Kathleen Bell, *Tribunals and the social services* 1969 p 50), but too often tribunal members seem happier to see an adversary situation develop, even if patently unbalanced as it often is, rather than demand an orderly procedure or step in to investigate themselves.

Our argument is not that condemnation should be made of individuals, but that the system as a whole should be regularised in accordance with basic tenets of justice. Every lay advocate who has had dealings with these tribunals has his own anecdotal evidence of irregularities. But it is important to recognise, as Professor Herman says, that "The ambiguity surrounding the relationship of the tribunals and their personnel to the Department places great strain upon all persons within the system who are sincerely committed to make these tribunals into effective instruments of administrative justice" (Herman, *op cit,* p 29).

legal representation ?

The chief advantage of informality in the tribunals as usually argued is that apellants will feel more at ease. Lord Reading, the first Chairman of the Council on Tribunals, stated that: "Many people find the unaccustomed experience of attending at one of these tribunals a considerable ordeal and things must be made as easy as possible, especially if they are not represented but have to put their own case" (Lord Reading, "A public watchdog," *The Listener* 12 November 1959 p 811).

Professor Bell's answer to the problem is also an extension of legal representation, though she adds, revealingly, that "it would probably not be the most appropriate form of help, except in a minority of cases" (Bell, *loc cit*). But beyond this picture of the technically-briefed, well-adjusted ministry official on one side and the inarticulate claimant on the other side are further more subtle inequalities.

For example, the first Annual Report of the Council on Tribunals paid considerable attention to the seating arrangements of the tribunal—they felt that where the official sits "to one side of the tribunal . . . this arrangement could give an unfortunate, though unjustified, impression that (he) occupies a privileged position" (*Council on Tribunals First Annual Report* 1960 p 20). Yet this is still the standard plan for most tribunals.

The fear of many who wish to "keep the lawyers out" is that this "informality" will be threatened. Certainly the inept mindless legalism of some lawyers when appearing before tribunals has justified this view. Professors Abel-Smith and Stevens, in examining an extension of legal aid and advice, comment wryly on the ability to irritate of some lawyers who "can do more harm than good to their client's interests when appearing before tribunals" (Brian Abel-Smith and Robert Stevens, *In search of Justice* 1968 p 320).

Some lawyers still exhibit an attitude of contemptuous disdain for the administrative tribunal process. This is the legacy of Dicey's concept of the Rule of Law—a phrase which it has been said has "a valuable emotive content so long as its use is not too closely examined" (J. A. G. Griffith and Harry Street, *Administrative Law,* 4th edit 1967, p 21). The modern extension is the dangerously false assumption, seen from on high, that, apart from a few minor faults, the tribunal system is on the whole serving its lowly purpose rather well. Ignorance is the explanation for most of those who hold this view now. Sir Carleton Allen writing in 1959 put the thinking lawyer's view when he stated: "It seems to me impossible any longer to think of the 'administration of justice' as being merely the justice dispensed by courts of law, as many of us were brought up to believe. To be ignorant of our extensive and extending supplementary justice is to be unaware of half the legal issues which are affecting the rights and liberties of innumerable lieges every day" (Sir Carleton Allen, *Courts and Judgements* 1959 p 25).

Even the normally neutral reports of the

Council on Tribunals can only give the qualified verdict that " Members . . . who have attended hearings have on the whole been favourably impressed " by social security tribunals. (*Council on Tribunals First Annual Report* 1960 and succeeding Annual Reports). And one of its more prominent members. Professor Bell, states that " in spite of the (new) developments, there are still problems remaining unsolved and inadequacies untackled " (Bell, *op cit* p 92). Certainly there is no room for complacency. But can these problems and inadequacies be solved by advancing the boundaries of legal aid and advice?

Numerous critics of the present system see the lack of adequate legal assistance as a prime cause of many of its existing defects. Professor Whitmore, a visiting Australian lawyer, wrote after attending a number of social security tribunals that: " The commonest situation before tribunals—very common indeed—is that the claimant or party is completely inarticulate. Sometimes he or she is literally trembling before the tribunal. How justice can be accorded to someone who fails to say anything, or merely mumbles a few words, I fail to see " (Harry Whitmore, " The Lawyer in administrative justice," *Modern Law Review* 1970 vol 33 p 485). Whitmore is " convinced that proper legal aid is absolutely essential " (*ibid* p 486), but asks the more important question, " What kind of a lawyer ?" His answer is " Certainly not the ' above it all ' type who is at pains to establish to the tribunal, and to his audience if any, that administrative jurisdiction is really beneath his dignity " (*ibid* p 488).

First there may be the problem caused by a lack of solicitors in the locality (Rosalind Brooke, *Information and advice agencies* 1972, p 110-113) while even if lawyers are available they may not have any knowledge or experience of social welfare legislation (*Report of the Committee on Legal Education*, HMSO 1971, Cmnd 4595, para 9).

Secondly and perhaps one of the more crucial problems, is the simple fact of people's ignorance of legal remedies and of the fact that lawyers might be a potential source of help (Brian Abel-Smith, Michael Zander and Rosalind Brooke, *Legal Problems and the Citizen*, 1973, p 210-226). At present, agencies like citizens' advice bureaux and other types of advice centres, may give some advice, but few have the time and resources to provide lay advocacy in tribunals (Brooke, *op cit* Chapters II and III).

But in the light of the extreme legal complexity of much tribunal work, and the benefit entitlement which can in some long-term cases involve a capital value of many thousands of pounds, can the system rest still on well-intentioned amateurism ? More important, can the legal rights of a large proportion of the population be left to the activities of a few shoestring pressure groups and ill-equipped voluntary law centres ?

And yet, if the law is to be brought more fully into the tribunal process, can the excesses which are the traditional associates of the High Courts—delay, endless technicality, pompous rigidity—be avoided ? This is the crucial dilemma which has to be faced.

3. conclusions and recommendations

Our main argument has been that the present proliferation of tribunals, particularly in the social services, cannot continue unchecked. Otherwise an already chaotic structure will even more resemble the civil court situation before the 1873 reforms.

We consider that lawyers (at their best) have a beneficial effect on the proper hearing of social security appeals, by imposing fair standards on the procedure, evaluation and discussion of the social issues dealt with. It has been the basis of our argument that the distinction between courts and tribunals has been an historical accident, and a potentially dangerous one for the claimant seeking justice. Our chief proposal is therefore that social security tribunals should be brought into the mainstream of the legal world by the setting up of a Social Court at the existing level of the County Court. This would take over the jurisdiction of all claims at present handled by the National Insurance and Supplementary Benefits Appeal Tribunals.

Evidence given by the Society of Labour Lawyers to the Franks' Committee recommended the amalgamation of these tribunals because of their comity of interest. But this was rejected by the Commission on the grounds that in regard to Supplementary Benefits appeals, there was a "danger that public preceedings would so deter applicants that the purpose of the legislation would be frustrated" (Franks' Report, *op cit*, p 20). This need for *in camera* proceedings is a continuing theme of the Supplementary Benefits Commission, but we believe this "danger" to be in most situations an unnecessary fear. Furthermore, we believe that many of the corollaries of this secretiveness are positively inimical to the demands of justice and the rights of the appellant. It is our experience that a tiny proportion of claimants have regarded the secrecy of proceedings as in any way important. At present, the Chairman of a National Insurance Appeal Tribunal may exclude the public at his own discretion, and we believe that this point can be overcome in the new Social Court by a right of exclusion at the express request of the appellant in Supplementary Benefits cases. A notice of this right would appear on the papers for the hearing given to the appellant, and the Court in such situations would ask at the start of the case if the appellant wished to have the case heard in private.

There seem to us to be two principal objections to our proposal. First the lack of specialised judicial manpower; and secondly, the potential infusion of "legalism" into the jurisdiction of these issues.

We do not propose a career judiciary, as in Continental countries, but we emphasise the need to provide a judicial promotion structure. We believe that judges would be helped in the understanding of their work if appointed first to the bench at a low level, before proceeding to the High Court. Our proposed Social Court, in conjunction with the County Court, would provide a sieving mechanism. We feel it important to continue the practice of lay wingmen assisting the judge; and furthemore, we believe this principle should be extended to other court situations where applicable. As a matter of course, we believe that solicitors should be eligible for judicial appointment to the Social Court. But it is not envisaged that full-time judges would hear every case, in that some matters would be handled by career administrators analogous to the county court registrar, where the parties agreed. Judges would be assigned to localised circuits to give flexibility in the sitting of Social Courts, in the same way as at present with the County Court.

To avoid the dangers of "legalism" in decision making—which we feel often to be a spectre blocking reform rather than a potential reality—we advocate the setting up of judicial training schools. These would be run on the lines of the present conferences organised for the discussion of sentencing policy, but would be of wider scope. It goes without saying that judges in the Social Court would not be in court dress, nor would counsel appearing before them.

It follows from these proposals that social security jurisdiction would come fully within the ambit and control of the Lord Chancellor (in Britain, our *de facto* Minister of Justice). This would avoid any ambiguity as to the role of the Department of Health and Social Security in relation to the appeals process, and by the use of central direction, differences in procedures and standards could be controlled. At the same time, a re-organisation under the Lord Chancellor would avoid the anomalous practice of having clerks seconded from the Department whose decisions are being questioned, rather than having clerks as servants to the Court.

As the Social Courts pass under the full control of the Lord Chancellor, the Council on Tribunals would have no further role to play. It has played a useful part in drawing public attention to some of the anomalies in tribunal jurisdiction and procedure, but it has not had the power to alter fundamentally some of the dilemmas in the tribunal area.

At present there is a second tier right of appeal in National Insurance cases to the Commissioners. These Commissioners are senior legal appointments. We believe this process to have worked effectively, and to contrast most favourably with the present Supplementary Benefits structure where there is no second appeal. We propose that in all social security cases there should be a right of appeal on law to a newly constituted Social Division of the Court of Appeal, and a limited right of appeal on matters of fact. We say this advisedly, knowing that it would be inappropriate in some instances to have appeals on discretionary items of supplementary benefits. However we would hope that the supplementary benefits levels will in future be made more generous, and that allied to an expansion of other social security benefits, it could once again revert to its role as envisaged by Beveridge of being a safety net, rather than being vital to millions of recipients.

If this were achieved, then there would be far less likelihood of disputes over comparatively minor discretionary additions.

We believe that legal aid should necessarily be available before the Social Court, as it was always intended since 1945 that it should be, eventually, for the tribunals. However, we would again emphasise that this would make imperative the re-organisation of university and professional law courses. As well as the traditional intellectual training, a wider realization of social situations will be needed. However, many lay advocates and social workers have been developing legal expertise in this area, often to fill a vacuum, and they should continue to have a full right of audience.

In conclusion, it is our belief that order should be introduced into the structure and the procedure of the present system of tribunals. In our view this can be best accomplished by bringing tribunals more fully into the administration of justice, by recognising them as courts in function and powers. However, we do not wish to see the extension of unnecessary formality into the new Social Court ; the re-orientation of jurisdiction will demand a change of approach on the part of lawyers playing a part in the reformed system. To follow traditional attitudes may endanger the flexibility and efficiency of the Court, and worse, might lead to the potential intimidation of appellants. But our fundamental belief is that a greater degree of orderliness will lead to greater justice for the individual appellant.

conclusions summary

1. There exists in Britain a twilight legal world of tribunals outside the structure of the courts, which have proliferated often without any regard to rational planning. One hundred years ago, the 1873 Judicature Act reformed a similar muddle by amalgamating a plethora of courts into the existing High Court system.

2. For many in our society, these tribunals form the immediate point of legal contact. They have become in effect " poor people's courts."

3. Tribunals hear evidence, apply complex legal rules and have vitally important

jurisdictions and powers; but they are not dignified with the name "court." Whether an institution is known as a court or a tribunal depends on the whim of those drafting the legislation.

4. With a complex welfare system giving rise to a vocabulary of "rights," the mechanism of tribunals allows the citizen to insist upon a second opinion. Other avenues of complaint exist, such as the aid of the press or advice from an MP, but the most satisfactory form of procedure is the right to a full fair hearing and an opportunity to challenge by cross-examination and counter-evidence.

5. The introduction of administrative tribunals as an integral part of the Welfare State has provided the major impetus to their development. By concentrating in this study on social security tribunals it is hoped to outline some of the present problems and difficulties.

6. It is important to realize the scale of welfare benefits: one in eleven of the British population are dependent in some way on supplementary benefits (Department of Health and Social Security, *Annual Report 1971*, Table 3).

7. A phenomenon of all tribunals seems to be their capacity to attract further jurisdiction. This is attached piecemeal and leads to unwieldiness and overlapping, and in some cases to a denial of Natural Justice.

8. The development of social security tribunals has been sporadic. The original 1911 insurance appeal structure still remains, and little attention has been paid to any reform of the administrative machinery in the intervening period, despite the post-Beveridge innovations. The concept of "assistance" as a residual system has not been realized.

9. Often rights before tribunals are not seen as "legal rights" but merely as the exercise of charitable discretion. Cut-price justice and a confusion over the underlying philosophy of tribunals has led to a legal quagmire. The Franks' Committee made clear that "Informality without procedure may be positively inimical to right adjudication."

10. Where detailed legal points are at issue, as they frequently are in tribunals, well-intentioned common-sense is no substitute for expertise. Trained and competent lawyers are a necessity. However, this is not to exclude the valuable participation of non-lawyer "wingmen" who are clearly an asset when deliberating social questions.

11. It is scandalous that at present no meetings are organised for either chairmen or wingmen of insurance tribunals to exchange ideas and experiences. This has only recently been instituted for chairmen of supplementary benefits tribunals.

12. Theoretically Ministry officials present are there to "assist" rather than to act as the "prosecution." The practical situation of tribunal clerks also occasionally gives cause for concern. The role of such officers must be made quite clear, and a lawyer's presence would help in the maintenance of proper conduct.

13. The argument against full legal aid and advice before tribunals is usually conducted on the lines of the need for informality. Certainly the inept mindless legalism of some lawyers appearing before tribunals helps to confirm such a view. But without effective representation, the claimant is under a severe disadvantage.

14. Part of the debate must centre on the need for a new "type" of lawyer, with knowledge of the practical issues of welfare and social security. At present, there exists a serious legal vacuum causing a great deal of injustice, and only partially filled by the activities of a few shoestring pressure groups and voluntary law centres.

recommendations summary

15. The distinction between courts and tribunals has been a historical accident. Our main proposal is the setting up of a Social Court at the existing level of the

County Court, to take over all the work of social security tribunals.

16. The Social Court would sit with a full-time judge and lay wingmen, and would be based on a localised circuit. A judicial training school and regular conferences would be provided for the new judges and wingmen.

17. The reorganisation of the administrative machinery would be under the ambit of the Lord Chancellor. Registrars who would act as independent clerks to the Social Court would also be entirely separate from the DHSS.

18. Legal aid and advice would be fully available before the Social Court. as it was always intended to be before the tribunals. There would be an immediate need for the re-organisation of University and professional law courses to cater adequately for this new demand on legal services.

19. There would be a right of exclusion of the public and the Press in supplementary benefits appeals at the request of the claimant.

20. Our fundamental belief is that a greater degree of orderliness will lead to greater justice for the individual appellant.

fabian society

The Fabian Society exists to further socialist education and research. It is affiliated to the Labour Party, both nationally and locally, and embraces all shades of Socialist opinion within its ranks—left, right and centre.

Since 1884 the Fabian Society has enrolled thoughtful socialists who are prepared to discuss the essential questions of democratic socialism and relate them to practical plans for building socialism in a changing world.

Beyond this the Society has no collective policy. It puts forward no resolutions of a political character, but it is *not* an organisation of armchair socialists. Its members are active in their Labour Parties, Trade Unions and Co-operatives. They are representative of the labour movement, practical people concerned to study and discuss problems that matter.

The Society is organised nationally and locally. The national Society, directed by an elected Executive Committee, publishes pamphlets, and holds schools and conferences of many kinds. Local Societies—there are one hundred of them—are self governing and are lively centres of discussion and also undertake research.

Enquiries about membership should be sent to the General Secretary, Fabian Society, 11 Dartmouth Street, London. SW1H 9BN; telephone 01-930 3077.

the authors

Julian Fulbrook is Barnett Memorial Fellow at the Harvard Law School 1973-1974. He read law at Exeter University and did research for a PH.D in social security law at Cambridge University where he was Chairman of the University Labour Club.

Rosalind Brooke is a lawyer and social administrator. She was a lecturer in social administration at LSE 1968-72 and is currently a research fellow at the Centre for Studies in Social Policy. She has written and researched on the legal system, information and advice services, welfare rights and is now working on a study of the legal and administrative aspects of English and French social security.

Peter Archer, QC, MP, is Chairman of the Society of Labour Lawyers and the author of a previous Fabian pamphlet on Human Rights. He is also Chairman of the British Section of Amnesty International and a member of the Council of Justice.

Cover design by Dick Leadbetter. Printed by Civic Press Limited (TU), Civic Street, Glasgow G4 9RH.

ISBN 7163 0427 9

recent fabian pamphlets

research series

297	Della Adam Nevitt	Fair deal for householders	25p
300	Christopher Foster	Public enterprise	30p
303	Felicity Bolton, Jennie Laishley	Education for a multi-racial Britain	20p
304	Tessa Blackstone	First schools of the future	25p
305	O. Kahn-Freund, Bob Hepple	Laws against strikes	85p
306	Nicholas Deakin (ed)	Immigrants in Europe	40p
307	Paul Singh	Guyana: socialism in a plural society	25p
308	Peter Coffey, John Presley	Europe: towards a monetary union	25p
309	Brian Showler	Onto a comprehensive employment service	30p
310	Jim Skinner	Fair wages and public sector contracts	20p
311	Deepak Lal	New economic policies for India	40p
312	Bruce Douglas-Mann	The end of the private landlord	20p
313	Elizabeth Young, Brian Johnston	The law of the sea	50p

tracts

399	R. H. S. Crossman	Paying for the social services	20p
410	Anthony Crosland	Towards a Labour housing policy	20p
411	Dennis Marsden	Politicians, equality and comprehensives	30p
412	Jeremy Bray	The politics of the environment	25p
416	an informal group	Emergency powers: a fresh start	30p
417	Trevor Fisk, Ken Jones	Regional development	40p
418	Geoffrey Hawthorn	Population policy: a modern delusion	30p
419	Stephen Hatch (ed)	Towards participation in local services	50p
420	Colin Jackson (ed)	Labour in Asia: a new chapter?	40p
421	Malcolm Wicks	Rented housing and social ownership	25p
422	David Lipsey	Labour and land	20p
423	Wayland Kennet	Still no disarmament	25p
424	a Fabian Group	New attitudes in secondary education	30p
425	Peter Shore	Europe: the way back	30p
426	John Garrett, Robert Sheldon	Administrative reform: the next step	20p

young fabian pamphlets

17	Colin Crouch (ed)	Students today	30p
24	Elizabeth Durkin	Hostels for the mentally disordered	15p
30	James Bellini	British entry: Labour's nemesis	25p
31	James Goudie	Councils and the Housing Finance Act	30p
32	Tony Klug	Middle East conflict: a tale of two peoples	40p
33	Larry Hufford	Sweden: the myth of socialism	40p
34	Graham Child, John Evans	Britain, Europe and the law	60p
35	a study group	A policy for public ownership	30p

books

R. H. S. Crossman and others	New Fabian Essays	cased	£1.75
Margaret Cole	The story of Fabian socialism	paper	£0.75
Brian Abel-Smith and others	Socialism and affluence	paper	£0.60
Peter Townsend and others	Social services for all?	paper	£0.75
Peter Townsend and others	The fifth social service	cased	£1.50
George Cunningham (ed)	Britain and the world in the 1970s	cased	£3.00
P. Townsend and N. Bosanquet (eds)	Labour and inequality	paper	£2.20