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Peter Cane, Administrative Tribunals and Adjudication

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> "In aggregate, administrative tribunals deal with many more disputes between citizen and government than do courts... [but] in-depth and book-length analysis of tribunals has been notable by its absence" (p 21).

What is distinctive about how tribunals resolve citizen-state disputes, compared with courts? Some say the elemental difference is that tribunals can interfere much more profoundly than courts with the decisions they examine. Peter Cane, however, has been known for some time for the view that judicial review is not a fundamentally different thing from the 'merits review' practiced by many first tier tribunals in Britain, Australia and the USA. This argument is expanded with great clarity, balance and success in Administrative Tribunals and Adjudication, Cane's book-length treatment of a 'heretical' idea first advanced by him ten years ago (p 179; Cane 2000).

Those wanting merely to dip a toe into the waters might like to start with Cane's article in Public Law last year, 'Judicial review in the age of tribunals', which discusses most of the same themes and utilises the same comparative perspective (Cane 2009b). However, in the book, there is also ample space for Cane to develop his argument into a discussion of the difference between the ways government officials make decisions and the ways tribunals 'merits review' them when granted jurisdiction to stand in the shoes of an original decision maker: "[The] basic purpose of [governmental] implementation is to promote social goals consistently with according due respect to individual interests [... whereas that of tribunal] adjudication is to protect the interests of individuals without unduly hindering the promotion of social goals" (p 13).

A conceptual, comparative approach

Cane had originally considered writing an empirical study, but upon finding that impracticable, decided to produce this conceptual and comparative analysis of the way tribunals function in Australia, the UK, the USA and (to a very limited extent) also France. He was particularly concerned to bring to international attention the workings of the Australian Administrative Appeals Tribunal, which has a well-developed but apparently slightly obscure literature.

This book will therefore be a valuable reference tool for anyone seeking an international survey of administrative adjudication systems. The structures, functions, histories and purposes of the three countries' systems are systematically explained and Chapter 2 is particularly impressive, in taking an unusually historical perspective, for reminding us that the English legal system has a long tradition of the participation of the courts in the administration of government. The 'separation of powers' discourse is in some ways a departure from, rather than a founding narrative of, the English constitutional tradition.

Tribunals' shortcomings in improving government decision making

Having located the apparatus of tribunal justice within a governmental, administrative context, Cane writes very interestingly about the role of American 'embedded' adjudicators, defending their capacity for practical independence. On the other hand, he doubts the capacity of any merits review system to execute a particularly effective normative role in decision making. Judicial review, he says, is better at this because it is crafted precisely to look at the decision-making process, rather than to form its own view about an individual case's facts (p 185). Indeed, one wonders whether decision making quality may actually be threatened by the availability of tribunals: hard-pressed government departments may be tempted to 'outsource' difficult and expensive decision making to tribunals. For example, in the UK social security and child support tribunal, where costs orders are not made and central government typically sends no representatives to argue its case, the 'cost' (to the decision making department) of tribunals is a fraction of the actual overall cost of the process. Might the quality of initial decision making improve if decision makers' departments were subject to equivalents of the huge expense of losing judicial review cases?

Cane's analysis therefore possibly adds force to the argument that the High Court ought at least to retain the breadth of judicial review power it had over the Social Security Commissioners in the Commissioners' new guise as the Upper Tribunal. This is a topical issue, for in R (C) v Upper Tribunal [2010] EWCA Civ 859 the Court of Appeal decided that changes to the tribunals system effected in the UK by the Tribunals, Courts and Enforcement Act 2007 had in fact considerably narrowed the scope for judicial review of Tribunal decisions.

Gap between theory and practice

As an avowedly conceptual work, this study may sometimes describe what should happen rather more closely than what does. For example, Cane draws a distinction between the mode of government 'implementation' decision making and the mode of tribunal 'adjudication' review, subtle even in theory. In real life, perhaps governmental planning decisions or high-status determinations about tax might exemplify the "judgmental processes of finding facts, identifying norms and applying norms to facts... adjusting individual and social interests in various ways" (p 161). However, nine in ten citizen-state tribunal hearings relate to immigration or social security (Tribunals Service 2010, Fig 2). Those occupy a different world.

At his first ever social security tribunal, this reviewer represented a client who had fallen victim to a government decision that he was able to walk because he managed daily to walk his dog. It had proved impossible to avoid the need for a tribunal. The government decision maker simply could not be persuaded that there was anything even slightly awry with his decision - even when it was demonstrated that the client did not actually possess a dog!

Sadly, anyone practising social welfare law will have a similar stock of amusing stories about the poor quality of government decision making. It is even periodically criticised in the courts: for example in *R (Wiles) v Social Security Commissioners* [2010] EWCA Civ 258 [84],

> "The quality of decision-making recounted... leaves a great deal to be desired. It is only by reading the material decisions as if they said what they should have said rather than what they actually said that they become defensible."

More seriously still, external reviews show some of these traits to be systemic: an independent inspection of the UK Border Agency's settlement visa processing in early 2010 found that

> "decision making was poor, to such an extent, that it was almost impossible in some cases to determine why visas had been issued, when others had been refused on identical or very similar evidence... [visa refusals in 42% of the sample] were not made in accordance with the evidence... none of the customers [in the sample] had been interviewed, nor had any attempts been made to refer supporting documents for verification checks" (Independent Chief Inspector of the UK Border Agency 2010, p 18-21).

It appears rather artificial to explain consequential differences - between original decision makers and the tribunal 'standing in the decision maker's shoes' - in terms of an 'adjudicatory' rather than 'implementative' approach. Rather, tribunals (in the UK at least) are commonly obliged to stand in unworn shoes, because a decision maker has simply failed to execute their expected function.

These comments are no criticism of Cane's work; but the student (or librarian) of administrative law will hopefully remember that a conceptual perspective is necessarily only part of the story.

The jurisdictional limits of tribunals

There is some extraordinarily thought-provoking material in Chapter 5 on how 'proportionality' and 'legitimate expectation' arguments have persuaded English courts into 'merits review' type analyses of government decisions even in contentious policy areas, for example *Huang v SSHD* [2007] UKHL 11. This provides plenty of justification for Cane's monocular view of judicial review and merits review. He makes the point that the Australian constitutional distinction between the modes of conduct of tribunals and courts has partly obstructed such a development there.

One might however ideally wish to have seen more in Cane's book about the comparative jurisdictional scope of the different tribunal systems. He notes that "it seems odd that the job of merits review should (and constitutionally [in Australia] must) be entrusted to bodies - tribunals - that have lower legal (and social) status than courts that conduct judicial review" (p 181). But this - in the UK at least - is deprived of much of its oddness by the fact that most tribunal hearings are to decide mundane questions of fact. Many contentious areas of social policy - homelessness law, or the Social Fund - are not subject to tribunals' decisions at all. In asylum and immigration law, where a tribunal does exist, its role is, as Cane notes elsewhere (p 197), carefully circumscribed.

Conclusion

Following the 2007 Act tribunal system changes, it is indisputable that this book tackles an area of great contemporary interest in the UK, and it does so with vigour and ability. Its assured defence of the specialist role of tribunals adds to the sense that tribunal justice is coming of age. However, the tribunals system's adulthood appears in the UK to be bringing not only the positive opportunities of a dedicated appellate layer to "develop a more extensive supervisory role, which may cross the traditional boundaries between law and fact... selecting appropriate cases in which to give general guidance" (Carnwath 2009) but also the predictable dangers of an overstretched system, run on the cheap for the poor and socially excluded. So if Cane were at some point to produce an empirical counterpart to this conceptual work, it too would be a fascinating read.

Bibliography

Legislation

Tribunals, Courts and Enforcement Act 2007

Cases

Huang v SSHD [2007] UKHL 11

R (C) v Upper Tribunal [2010] EWCA Civ 859

R (Wiles) v Social Security Commissioners [2010] EWCA Civ 258

Other materials

Cane, P (2009a) Administrative Tribunals and Adjudication (Oxford: Hart).

Cane, P (2009b) 'Judicial review in the age of tribunals' PL 479.

Cane, P (2000) 'Merits Review and Judicial Review: The AAT as Trojan Horse' 28 *FL Rev* 213.

Carnwath, R (2009) 'Tribunal justice - a new start' *PL* 48.

Independent Chief Inspector of the UK Border Agency (2010) An inspection of the UK Visa Section: Pakistan settlement applications (London: ICI UKBA) <http://icinspector.independent.gov.uk/wp-content/uploads/2010/07/An-inspection-of-the-UK-Visa-Section_Pakistan-settlement-applications.pdf> accessed 27 July 2010.

Tribunals Service (2010) Annual Statistics for the Tribunals Service 2009-10 (London: Tribunals Service) <http://www.tribunals.gov.uk/Tribunals/Documents/Publications/TS_AnnualStatisticsReport0910.pdf> accessed 27 July 2010.