Losing appeal? The changing face of redress

Losing Appeal? The changing face of redress

Hartley Dean, London School of Economics

Abstract

This article is, in part, an editorial introduction to the three other articles that will be addressing the commissioned theme of this issue of *Benefits*, which is concerned with social security appeals and redress. It briefly outlines the context and substance of those articles. In part, however, this article is also an historical and conceptual introduction to the theme as a whole. Although it would seem that impending reforms to the social security appeals system hold out the prospect of a reinvigorated and more independent form of tribunal, this article points to a deeper trend: a trend away from adjudication and appeals and towards forms of redress based on complaints procedures and technical reviews.

This issue of *Benefits* focuses on matters relating to appeals and redress within social security. It appears at a time when, in Britain, a government White Paper is expected; a consultation document that is likely to propose further reforms of the British system of social security appeals tribunals. However, such reforms follow hard on the heels of a set of reforms introduced barely four years ago. Roy Sainsbury's article critically discusses the recent reforms, Mike Adler's anticipates the forthcoming reforms and Nick Wikely's considers the way the appeals system is having in any event to adapt to the introduction of a radical new system of tax credits. The purposes of this short introductory article are twofold: first to set current and anticipated changes in a broader historical context; second, to outline a speculative analysis – that may additionally have some relevance in a global or comparative context – as to the ways in which mechanisms of redress in relation to the administration of social security are likely in future to develop.

I have previously argued that, in general, redress in relation to social policy and welfare provision has been moving away from adjudicative forms to consumer

complaints-based redress, and back from what I have called ‘declaratory’ or ‘petitionary’ forms to older forms of case-based redress (Dean, 1996; 2002: ch. 9). At first glance, recent and impending developments do not necessarily support such a contention, but I should like here to re-present my original argument in a simplified and slightly modified form. I would argue that it is possible to identify three broad types of social security administration – decentralised discretionary relief systems, centralised bureau-juridical systems and contractualised managerial-consumerist systems – in relation to which there are corresponding types of redress mechanism. These three types of social security administration are overlapping ‘ideal types’: they do not represent wholly discrete historical phases, nor is any of them likely to exist other than in conjunction with elements from other types of system. Distinguishing the three types helps us, none the less, to understand broad trends in social security administration and what, therefore, may be happening to appeals and redress.

Decentralised discretionary relief systems

The Victorian Poor Laws provide an example of a decentralised discretionary relief system, but so too do the locally administered social assistance schemes that continue to operate in several continental European countries. Under the Victorian Poor Laws benefits were administered on the basis of judgements about whether a supplicant was deserving or undeserving. The only right of redress (other than in Scotland, where there was a right of appeal to the Sheriff and the Court of Session) was to the Relief Committee of the Board of Guardians, which could review its previous decisions or decisions taken on its behalf by officials. Under the contemporary social assistance regimes that are to be found, for example in France or Germany, safety-net benefits are administered on the basis of professional judgements by social workers (e.g. Mabbett and Bolderson, 1998); judgements which may be professionally reviewed. Redress, therefore, under decentralised discretionary relief systems is characteristically by way of **case review**, either by lay committees or by professionals. In the British case, even after the Poor Laws had given way to a centrally administered social security system and until 1984, the mechanism of redress in relation to means-tested social assistance benefits – as opposed to contributory social insurance benefits – continued to function more like a case review than an appeals procedure (see Adler and Bradley, 1982).

Centralised bureau-juridical systems

The principal component of the social security systems of most developed countries is likely to approximate to a centralised bureau-juridical system, though the degree of centralised control will vary depending on the extent to which, for example, social insurance schemes are administered by autonomous organisations. None the less, the primary basis of decision making within such systems is a rule-bound process of 'bureaucratic justice' (cf. Mashaw, 1983) that is underwritten by legal and democratic guarantees

In Britain, in the course of the twentieth century social security administration was brought firmly under parliamentary control through the development of centrally administered national insurance and, later, other benefits schemes, and the eventual replacement of locally administered Poor Law provision. The bureaucratic decision making processes associated with the emergent social security system were not necessarily susceptible to review in the way that discretionary and professional decision making had been and new forms of **adjudicative redress** were introduced, based on rights of appeal to tribunals. The first tribunals – set up under the 1911 unemployment insurance scheme – had been sportingly entitled 'courts of referees' and were overseen by 'umpires'. But as more and more tribunals were created to deal with different kinds of social security benefit, the serious quasi-judicial nature of their function came to be accepted. By stages, the different kinds of tribunal were then merged until in 1999, under the reforms described in Roy Sainsbury's article, The Appeals Service (TAS) was established.

The range and numbers of appeals with which TAS deals is illustrated in Table 1. It may be seen that the largest numbers of appeals currently relate to benefits for disability and incapacity for work. It remains to be seen whether the numbers of appeals relating to the new and potentially controversial tax credit schemes discussed in Nick Wikely's article – which were only just beginning to appear in the statistics from which Table 1 is drawn – will in time increase and whether, for example, they may exceed or displace the numbers of appeals relating to more conventional forms of means-tested benefit.

[insert Table 1 about here]

Tribunals provided a legalistic form of redress in relation to the decision making of centralised authorities. In other countries – notably the Nordic countries – there has been a long tradition of what might be called **petitionary redress**: a form of redress by which citizens might declare their grievances, for example, to an independent ombudsperson or people's champion who was empowered to investigate and to call the authorities to account. In Britain, we have done little more than flirt with the idea of ombudspersons. In 1967 the post of Parliamentary Commissioner for Administration (PCA) was created. The PCA, though described as an ombudsperson, is empowered to investigate complaints of 'maladministration' against government departments and agencies referred to her on behalf of constituents by individual MPs. Unlike Nordic ombudspersons, her jurisdiction is narrowly defined and she is able to challenge neither the substantive merits of administrative decisions, nor the efficacy of government policy, and she is unable to entertain complaints directly from citizens. In 2002/3 the PCA received 743 complaints relating to the Department for Work and Pensions (DWP) (including complaints relating to the Child Support Agency), but conducted only 64 statutory investigations (PCA, 2003). This compares, as may be seen from Table 1, with the 233,710 appeals lodged with TAS in 2002/3. Petitionary redress – insofar that it exists in Britain – does not play a major role.

Contractualised managerial-consumerist systems

It has been widely recognised, as we were moving from the twentieth to the twenty-first century, that the role of the nation state and the nature of governance began to change: away from the ethos of welfare professionals and welfare bureaucrats towards an ethos of new public managerialism (e.g. Clarke and Newman, 1997). A new form of 'contractualism' began to enter the business of social security administration (Carmel and Papadopulos, 2003).

In the British context one of the key elements to this process may be traced back to *The Citizen's Charter* (Prime Minister's Office, 1991) a central government initiative that sought to introduce a new 'consumer-oriented' culture across the public services

and the idea of **consumer redress**. Central to this was the introduction of complaints procedures, initially in local government social services departments and in the NHS, but eventually to social security administration. Claimants dissatisfied with the service they receive from any of the DWP's agencies may lay a formal complaint to a local customer service manager and, if the complaint should remain unresolved, may take the matter further – via a district manager – to an independent panel. Because of the information they generate, complaints procedures may be regarded as a valuable management tool (Pfeffer and Coote, 1991) as much as an avenue of redress for the individual. They can form part of a contractualised performance monitoring system. They also help to re-constitute the claimant as a 'customer' rather than a client of the system. They re-constitute claimants' grievances as complaints about poor service, rather than as appeals against unfair or incorrect decisions. In the event, the profile of the complaints procedure in the social security system has been far lower than that for the equivalent procedures in the personal social services and the NHS, and little seems to be known about its functioning.

In addition to this trend towards complaints procedures, the other trend that appeared to be emerging towards the end of the twentieth century was a move in favour of internal review. When housing benefit and the discretionary social fund were introduced in the 1980s, mechanisms for internal review by local authority review panels and by Social Fund Inspectors were created rather than extending the jurisdiction of what was then called the Social Security Appeal Tribunal. This appeared at the time to be a step back towards the kind of case review procedures that characterise decentralised discretionary relief systems. In the event, although there is still no independent right of appeal against decisions relating to the discretionary social fund, housing benefit appeals were transferred to the jurisdiction of TAS when it was created. At the same time, however, the changes introduced to decision-making and appeals in 1999 were intended to reduce the number of appeals reaching the tribunals and therefore formalised the internal review or reconsideration process that precedes the referral of appeals to TAS. In a sense, the process of internal review has been further institutionalised, albeit that this is *not* in fact the same kind of lay committee or professional review that characterise decentralised discretionary relief systems. It is more in the nature of a **technical review**, a 'second look', or quality check, as is consistent with a contractually managed service.

Reading the runes

As Mike Adler's article makes clear, it is expected that the British government will broadly accept the proposals of the Leggatt Review (LCD, 2001) and establish a single tribunal service to deal not only with social security appeals, but, for example, immigration, employment, mental health, criminal injuries compensation and tax appeals. The new tribunal service would be unequivocally independent since it would be organised not by any of the government departments against whom appellants might be seeking redress, but under the auspices of the Lord Chancellor's Department (or its successor). On the face of it adjudicative redress and the appeal tribunal are to be reinvigorated. However, there is another interpretation.

I am not proposing that there is any conscious conspiracy here, merely that the logical consequences of a gathering shift towards a contractualised managerial-consumerist system of social security administration are likely to marginalise adjudicative redress (and to continue to bypass petitionary redress) in favour of consumer redress and technical review. Assuming that the new tribunal service is eventually established, the DWP will no longer be responsible for sustaining mechanisms of adjudicative redress. Many *Benefits* readers, no doubt, will hope that the new service will continue to ensure an effective, even improved, mechanism for adjudicative redress against the decisions of social security and tax credit administrators. But the organisational focus of the DWP agencies will be upon complaints procedures (which may become more prominent) and technical review/quality assurance procedures. Possibly, the DWP agencies and the Inland Revenue will have an even greater incentive to promote and to manage their complaints and review procedures in ways that divert or forestall claimants from lodging appeals to the new tribunal service. Although the appeal tribunal will without doubt survive, it may yet be eclipsed by newer mechanisms of redress.

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Table 1
Appeals lodged to The Appeal Service, April 2002 to March 2003, by type of benefit

Disability living allowance	80,765
Attendance allowance	10,200
Severe disablement allowance	110
Care allowance/invalid care allowance	1,405
Incapacity benefit and/or personal capacity assessment	60,680
Industrial injuries scheme benefits	17,920
Retirement pension	1,570
Widow's benefit	1,020
Maternity allowance	125
Jobseeker's allowance	17,250
Income support	20,430
Social fund (regulated)	3,395
Housing benefit/council tax benefit	6,420
Disabled person's tax credit	200
Working families tax credit/family credit	2,645
Working tax credit	10
Child tax credit	45
Child benefit (including one parent benefit)	1,210
Child support scheme appeals	5,285
Miscellaneous (e.g. vaccine damage, compensation recovery and other appeals)	2,605
TOTAL	233,710

Source: calculated from DWP, *Quarterly Appeal Tribunal Statistics*, June 2002, September 2002, December 2002 and March 2003, London: Information Centre, Information and Analysis Directorate [© Crown Copyright].