



The 'New Administrative Law' of Wales

Nason, Sarah

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The “New Administrative Law” of Wales

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Wales and England share a legal jurisdiction, yet commentators regularly refer only to “English administrative law” deploying the old adage, for Wales, see England. This focus on common law principles as the “greatest achievement”¹ of modern administrative law sidelines the contribution of the respective legislatures, in particular the National Assembly for Wales (Assembly). Since 1999 the Assembly has used its secondary and later primary law-making powers to create distinctive administrative procedure laws applicable to devolved public bodies in Wales.² These laws increasingly differ from Westminster legislation applying only to English public bodies.

The jurisdiction debate has been extensive, but at a basic level a legal jurisdiction requires a distinct body of law, applying to a defined territory, and administered by a separate set of institutions with competence over that body of law.³ There is already a corpus of law applying only to devolved Welsh public bodies, and although significant responsibility for the administration of justice is reserved, a set of separate institutions of justice have been established for Wales in the field of administrative justice.

In this paper I argue that the emerging Welsh approach to administrative justice is characterised by administrative procedure legislation and “integrity” institutions,⁴ grounded in a political consensus that good administration is a civic good. Welsh administrative law is ostensibly designed to further social and economic equality, with public bodies required to collaborate, to integrate their activities, and to involve the general public in their decision-making. This stress on public involvement is also evident in proposals to codify Welsh law, to improve its accessibility and to cement its distinctiveness from English law. Wales has also taken a leadership role in furthering norms of global administrative law, whilst attempting to site its local administrative justice system in an increasingly “righted” international context.

¹ As Lord Diplock put it in *R. v IRC ex parte National Federation for the Self Employed* [1982] AC 617, 641; “progress towards a comprehensive system of administrative law...having been the greatest achievement of the *English courts* in my judicial lifetime” (emphasis added).

² The Government of Wales Acts provide that Assembly legislation applies in relation to Wales, but extends over England and Wales, giving the courts in both countries authority to interpret and enforce Assembly legislation.

³ See e.g., R. Percival, “How to do things with jurisdictions: Wales and the jurisdiction question” [2017] P.L. 249; National Assembly for Wales Constitutional and Legislative Affairs Committee (2012). *Inquiry into the Establishment of a Separate Welsh Jurisdiction: Consultation Responses*.

⁴ Including innovative un-elected methods of administrative state accountability, such as ombudsmen, commissioners and regulators.

27 In presenting this distinctive Welsh approach, I also outline some challenges; not least
28 the difficulty of pursuing Welsh socialist legislation alongside a capitalist neo-liberal agenda
29 at Westminster. The historic lack of primary legislative power, and continued reservation of
30 the single legal jurisdiction, has seen Wales favour procedural regulatory tools to improve
31 administrative decision-making, but often without correlative primary legislative rights
32 enabling individuals to enforce these duties through the courts. Enforcement is largely the
33 preserve of quasi-political institutions with varying powers to promote and encourage
34 compliance through systematic investigations often on self-chosen themes, and with remedial
35 recommendations that are usually not legally binding. This approach relies heavily on
36 catalysing cultural change within public bodies and broader civil society. The role of the
37 courts has so far been peripheral; there have been few, if any, judgments of the
38 Administrative Court in Wales turning directly on Welsh administrative procedure duties,
39 and little judicial or practitioner commentary. However, recent developments suggest that
40 Wales is gearing up to a more “juridified”⁵ approach. These developments include; reforms
41 to increase the coherence, professionalism and independence of the set of devolved Welsh
42 tribunals,⁶ codification of Welsh law,⁷ establishing a Commission on Justice in Wales,⁸
43 proposing a human rights act for Wales,⁹ and an overall harder line that devolution of justice
44 and the break-up of the single legal jurisdiction are inevitable.¹⁰ These developments could
45 see tribunals, courts and the Assembly in Wales become more directly engaged with
46 delivering and scrutinising administrative justice.

47 Whilst the integrity architecture in Wales requires further reform, and the tide of a
48 more juridified approach is incoming, the Welsh experiment with administrative justice
49 provides lessons for other jurisdictions, particularly at a time of growing dissatisfaction with
50 traditional legal and political mechanisms of administrative state accountability.

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⁵ “Juridification” is an ambiguous term. In this context it is taken to mean greater emphasis on specific individual rights to redress against public bodies, associated with a more formalistic approach including increased use primary legislation, and a significant role for the legislature in scrutinising such legislation and for the courts in interpreting it.

⁶ Wales Act 2017, Pt.3.

⁷ Draft Legislation (Wales) Bill 2018 and Law Commission, *Form and Accessibility of the Law Applicable in Wales* (Law Com No. 366, 2016).

⁸ Established in 2017 concerned with “ensuring that the jurisdictional arrangements...address and reflect the role of justice in the governance and prosperity of Wales as well as distinct issues that arise in Wales”, online at: <https://beta.gov.wales/commission-justice-wales>

⁹ J. Miles AM, *A Human Rights Act for Wales?* annual Eileen Illtyd Memorial Lecture on human rights (Swansea University 15 November 2018).

¹⁰ J. Miles AM, Legal Wales Conference (Aberystwyth University 12 October 2018); <https://gov.wales/newsroom/improvingpublicservices/2018/181012-a-welsh-legal-jurisdiction-and-a-devolved-justice-system-is-inevitable/?lang=en>

Welsh Devolution

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Devolution to Wales is a process not an event. The First Assembly created under the Government of Wales Act 1998 had no primary legislative power, being a “carefully constructed compromise”¹¹ between politicians opposed to devolution and those wanting a Welsh parliament. The arrangements were not practical, or widely supported. The Assembly was originally established as a “body corporate” containing an executive (the Government) and a legislature (the Assembly) with no separation between them. This body took over functions of the UK Government Wales Office, gaining only minimal secondary law-making powers, the use of which had to be authorised by the UK Parliament.

The Government of Wales Act (GoWA) 2006 replaced the original design with a separate National Assembly (legislature) with powers to enact laws, known as Measures, in specific fields.¹² These powers were conferred piecemeal under Legislative Competence Orders negotiated between the Welsh Ministers and the UK Government, confirmed by the Assembly and UK Parliament. The process was complex, time-consuming, dependent upon good inter-governmental relations, and largely impenetrable to the public. Welsh Government had policy responsibilities in areas including health, education, local government and transport, but limited legislative power to pursue its objectives. This position of responsibility without power added to public dissatisfaction with the Assembly, and the limits to its law-making powers were not widely understood.

The policy underpinning GoWA was to transfer specific functions in areas where the Secretary of State for Wales had pursued distinctive policies. This was in contrast to the Scotland Act 1998 which extended “over all aspects of Scottish life and society other than those reserved for the UK Parliament”.¹³ Following a referendum held in 2011, primary legislative powers were transferred in areas of devolved Welsh competence, but the devolution settlement overall remained one of conferred powers and Westminster continued to be Wales’ other Parliament. Some executive functions covering devolved matters could be exercised by Westminster or Whitehall with little Assembly scrutiny.

Influential bodies recommended moving to a reserved powers model to provide greater clarity about devolved functions.¹⁴ In the political climate following the referendum

¹¹ UCL Constitution Unit, *Commentary on the Welsh White Paper* (September 2017) 1.

¹² GoWA 2006, Pt. 3 and Sched 5.

¹³ House of Commons Justice Committee Fifth Report of Session 2008-09, *Devolution: A Decade on* [12].

¹⁴ The Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (reporting in 2004):

82 on Scottish independence, the UK Government committed to delivering this model, now
83 enacted in the Wales Act 2017. The 2017 Act has been criticised for its complex framework
84 of general reservations, specific reservations, and exceptions to reservations.¹⁵ Rick Rawlings
85 refers to the 2017 Act as “carrying the seeds of its own destruction”,¹⁶ lacking constitutional
86 vision, representing an elite form of constitution making, and leading to an excessive
87 fragmentation of powers.¹⁷

88 The Welsh Government proposed its own Government and Laws in Wales Bill,
89 expressing a more simplified settlement and longer-term constitutional vision, what Rawlings
90 describes as a written constitution for a sub-state polity. The Welsh Government Bill
91 included provision for immediate recognition (on enactment) of a distinct Welsh legal
92 jurisdiction, and for establishing a separate legal jurisdiction in the longer-term. The 2017
93 Act, on the other hand, states that there is a body of Welsh law including laws made by the
94 Assembly and Welsh Ministers.¹⁸ This section was a political compromise; the product of
95 UK Government resistance to breaking up the combined England and Wales legal
96 jurisdiction.

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98 **A Principles-based Approach to Administrative Law**

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100 Despite the practical-political compromises, a principles-based approach to good
101 administration has infused the work of bodies reporting on the devolution of further
102 legislative powers to Wales, and on jurisdictional arrangements.¹⁹ Such principles include
103 accountability, clarity, coherence, collaboration, efficiency, equity, stability and
104 subsidiarity.²⁰ Rawlings attributes this interest in principles to a desire to revitalise the UK
105 territorial constitution in light of fragmentation pressures, and to increase Wales’ political
106 leverage.²¹ This understanding focuses primarily on how Wales is perceived as a

<http://webarchive.nationalarchives.gov.uk/20100404200945/http://www.richardcommission.gov.uk/content/final-report/report-e.pdf> and the Silk Commission (2001-2014) with Silk Part II being concerned with Welsh legislative power, online at: <https://www.assembly.wales/en/bus-home/research/Pages/research-silk-commission.aspx#Silk%20Part%202>

¹⁵ R. Wyn Jones, “Is it our fate to be governed on the basis of this nonsense?” Wales Online October 2016 (criticising the Wales Bill): <https://www.walesonline.co.uk/news/politics/richard-wyn-jones-wales-bill-12091891>

¹⁶ BBC News online, 5 March 2017, ‘Wales Act carries seeds of own destruction, says Rawlings’: <http://www.bbc.co.uk/news/uk-wales-politics-39159133>

¹⁷ R. Rawlings, “The Strange Reconstitution of Wales” [2018] P.L. 62.

¹⁸ GoWA s.A2.

¹⁹ See sources at fn.14.

²⁰ Specifically noted in Silk Part II fn.14.

²¹ fn.17.

107 constitutional player within the UK, missing the centrality of principles to the development of
108 a specifically Welsh approach to its domestic administrative law. Welsh administrative law
109 can be seen as anchored in a political consensus that good governance is ‘good for you’.²²
110 This sentiment is especially evident in administrative justice. For example, soon after its
111 formation, the Committee for Administrative Justice and Tribunals in Wales (CAJTW)
112 considered it a priority to develop *Administrative Justice Principles for Wales*. The *Principles*
113 designate administrative justice as a fundamental right and as cornerstone to social justice,²³
114 noting the link between administrative justice and state accountability through means other
115 than the ballot box.

116 A possible benefit of this principles-based approach is that it could bolster the
117 legitimacy of Welsh administrative law at an apparent time of crisis for more traditional
118 hierarchical conceptions.²⁴ Administrative state “legitimacy crises” are a global phenomenon;
119 the context in each nation is distinct, but a shared theme is of clashes between technocratic
120 expertise needed to deal with the complexities of modern governance, and the response to
121 reinstall citizen statesmen serving the populace through common sense and moral values.²⁵ In
122 the UK this is perhaps best captured by the refrain that people have “had enough of
123 experts”.²⁶ In Wales public satisfaction with Government, and with public services provision,
124 tends on the whole to be higher than the UK average;²⁷ but when coupled with patchy public
125 understanding of devolution, and Wales effectively being a “one party state”, this can lead to
126 political complacency.²⁸ Wales may still be better placed than many nations to take
127 advantage of the traditional state-centric account of administrative law. However, as a
128 relative newcomer Welsh administrative law is emerging in a challenging era of

²² M. Drakeford, “Social Justice in a Devolved Wales” (2007) 15(2) *Journal of Public Finance and Public Choice* 171.

²³ CAJTW, *Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Assembly* (2016): <https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf>

²⁴ See e.g., JB. Auby, “La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif” (2001) 57(11) *Actualité Juridique droit Administratif* 912.

²⁵ P. Wallach, “The administrative state’s legitimacy crisis” *Center for Effective Public Management at Brookings* (April 2016): https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf

²⁶ M. Gove (then Lord Chancellor and Secretary of State for Justice) June 2016.

²⁷ L. Carter-Davies and S. Martin, *Improving Public Services: Existing Evidence and Evidence Needs* (Public Policy Institute for Wales 2016). That said, the 2018 National Survey for Wales shows satisfaction with health services (GPs and NHS hospital care) has been falling, as has satisfaction with education (with a marked decline in people’s satisfaction with secondary education provision): <https://gov.wales/docs/statistics/2018/180620-national-survey-wales-2017-18-headline-results-en.pdf>

²⁸ Labour has dominated Welsh Government since its inception. In “Wales, a one-party state, prepares for a transition of power” *The Economist* (26 April 2018), R. Wyn Jones is reported as commenting, “a long period in power unchallenged can cause a ‘living decay’, with little incentive for the incumbent to come up with new ideas”: <https://www.economist.com/news/britain/21741161-carwyn-jones-unexpected-resignation-leaves-labour-looking-new-first-minister-wales->

129 globalisation, constitutionalisation, destatisation, decentralisation, and privatisation (the latter
130 being something even Wales is not immune to). Administrative law has had to evolve to
131 survive, and in some ways Welsh administrative law aligns with characteristics of so-called
132 “new administrative law”.²⁹ This includes favouring approaches (to practice and scholarship)
133 that are multi-disciplinary, pluralistic (in principles, institutions and methods), and that
134 emphasise horizontal collaboration (inter-institutional collaboration) and citizen engagement.
135 For Wales, this begins with the political foundations of administrative law.

136 In 2007, Mark Drakeford (formerly a Welsh Government policy advisor, now a
137 Welsh Minister and contender for the First Ministership) proposed a Welsh commitment to
138 social justice anchored in a set of core principles including the value of good governance, an
139 ethic of participation, and improving equality of outcome.³⁰ This connection to substantive
140 equality has remained evident since former First Minister Rhodri Morgan’s 2002 “clear red
141 water” speech where he argued that Wales should take a different approach to the politics of
142 Westminster, noting: “Our commitment to equality leads directly to a model of the
143 relationship between the government and the individual which regards the individual as a
144 citizen rather than as a consumer”.³¹ The 2007-2011 “One Wales” / “Cymru’n Un” coalition
145 agreement between Labour and Plaid Cymru, reinforced this approach with a ‘progressive
146 consensus’ committing to “social justice, sustainability and inclusivity.”³² The political
147 majority in Wales continues to back state provision of public services and “progressive
148 universalism” supporting those most in need.³³

149 Equality features prominently in Welsh politics, including in speeches of the current
150 Counsel General for Wales, Jeremy Miles AM. In his address to the *Public Law Project*
151 *Wales Conference* 2018 he stressed that substantive equality remains at the heart of Welsh
152 public law being “one of our most basic moral obligations”.³⁴ In his 2018 National

²⁹ S. Cassese, “New paths for administrative law: A manifesto” (2012)10(3) ICON 603.

³⁰ fn.22.

³¹ R. Morgan, speech to the National Centre for Public Policy (Swansea December 2002), online at:
<https://www.sochealth.co.uk/the-socialist-health-association/sha-country-and-branch-organisation/sha-wales/clear-red-water/>

³² Welsh Assembly Government (2007), *One Wales: A progressive agenda for the government of Wales: An agreement between the Labour and Plaid Cymru Groups in the National Assembly*:
<http://www.manifesto.com/wp-content/uploads/2014/07/onewalese.pdf>

³³ M. Wall and S. Williams, “Seeking Evidence for a Welsh Progressive Consensus: Party Positioning in the 2016 National Assembly for Wales Election” (2017) *Parliamentary Affairs* 1.

³⁴ PLP Wales Conference, *Promoting Equalities for a fairer and more equal Wales* (26 March 2018):
<http://www.publiclawproject.org.uk/data/resources/284/Public-Law-Wales-Project-final-speech-for-publication.pdf>

153 Eisteddfod speech, he explicitly connected the potential for further devolution of
154 responsibility for the administration of justice, with a social equality agenda,³⁵ speaking of:

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156 “A journey to realise a vision of Wales where justice – in the sense of a system of
157 rights and redress – reflects the values and particular characteristics of Welsh society,
158 but also a fuller vision of justice, which embraces also, social and economic justice
159 and a journey the next leg of which will surely feature prominently, as part of a
160 compelling vision of a just Wales, the development of a distinct justice system for our
161 nation”.³⁶

162
163 Arguing that such developments are “about much more than the simple accumulation of
164 powers for its own sake”, the Counsel General reinforced Welsh commitment to fundamental
165 values inherent in a just society, at a time when such values are in global retreat. Welsh
166 politics generally encourages a principled approach to international rights instruments and
167 global governance; seeking a unique place for Wales in the world, as a comparatively
168 committed unionist, but with aspirations of global responsibility, which have become central
169 to its domestic administrative law.³⁷

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171 **Welsh Administrative Law and Proceduralism**

172

173 The clearest example of a commitment to principles of global resonance is in the Well-being
174 of Future Generations (Wales) Act 2015 (WFGA). This places public bodies under a duty to
175 practice sustainable development. WFGA defines seven well-being Goals; (1) a more
176 prosperous Wales,³⁸ (2) a resilient Wales,³⁹ (3) a healthier Wales,⁴⁰ (4) a more equal Wales,⁴¹

³⁵ Bevan Foundation at the National Eisteddfod, 4 August 2018: <https://41ydvd1cuyvlonsm03mpf21pub-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Eisteddfod-2018-final-E.pdf>

³⁶ *Ibid* 5.

³⁷ J. Hunt and R. Minto, “Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the Regions” (2017) 19(4) *The British Journal of Politics and International Relations* 647; Bangor/SLSA, *Devolved Nations and International Law* (June 2017) http://www.slsa.ac.uk/images/2017spring/SLSA_Devolved_Nations_and_International_Law_Programme.pdf

³⁸ An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.

³⁹ A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).

177 (5) a Wales of cohesive communities,⁴² (6) a Wales of vibrant culture and thriving Welsh
178 language⁴³ and, (7) a globally responsible Wales.⁴⁴ Public bodies are required to carry out
179 sustainable development, to be achieved by setting and publishing Well-being Objectives
180 which show how the body will maximise its contribution to achieving the Goals.
181 WFGA is an example of Welsh administrative procedure law centred on principles of social,
182 economic and inter-generational equality. Such new legislation seeks to control and influence
183 administrative decision-making, but it rarely endows individuals with explicit legally
184 enforceable rights against public bodies. The approach has been to develop procedural duties
185 requiring public bodies to show they have taken rights and other values into account,
186 alongside a set of ‘integrity’ branch institutions with varying powers to promote and enforce
187 compliance through systematic investigations. In this section I examine some relevant
188 legislation, and the courts’ comparative lack of reaction to it, in the next section I consider
189 the role of the integrity branch.

190 Equality is an early example where Welsh Government was the first UK Government
191 to bring in specific regulations in order for public bodies to better perform their public sector
192 duties under the UK Equality Act 2010. In 2011 the Welsh Ministers enacted Regulations
193 identifying public authorities in Wales for the purposes of imposing additional planning,
194 monitoring and reporting duties.⁴⁵ Listed public bodies are required to publish “equality
195 objectives” or to provide reasons for not doing so.⁴⁶ Authorities are also required to comply
196 with “engagement” provisions and have due regard to “relevant information” when
197 considering and designing their equality objectives.⁴⁷ WFGA Well-being Goal of a more
198 equal Wales is also said to bring into force (in Wales only) a requirement similar to that of,
199 currently not in force, section 1 of the UK Equality Act 2010. This requires relevant
200 authorities to “have due regard to the desirability of exercising [functions] in a way that is
201 designed to reduce the inequalities of outcome which result from socio-economic
202 disadvantage.” To date, whilst some general duties under Welsh equality law have been

⁴⁰ A society in which people’s physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.

⁴¹ A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio-economic background and circumstances).

⁴² Attractive, viable, safe and well-connected communities.

⁴³ A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.

⁴⁴ A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.

⁴⁵ Equality Act 2010, Pt.2, Sched.19 (supplemented and amended by the Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011).

⁴⁶ The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011.

⁴⁷ *Ibid*, Regs 4 and 5.

203 raised in judicial review applications, this has been a secondary, and apparently poorly
204 argued ground.⁴⁸ There has been no substantive judicial review hearing or reported
205 permission decision examining Welsh equality duties.

206 Another example is children’s rights, where a distinctly Welsh approach has been
207 evident from the first Assembly. This approach is based on the language of rights and
208 entitlement, as opposed to the UK Government’s focus on welfare. Under the Rights of
209 Children and Young Persons (Wales) Measure 2011 (Children’s Rights Measure) Welsh
210 Ministers and social services bodies are required to have “due regard” to relevant provisions
211 of the UN Convention on the Rights of the Child (UNCRC). The Additional Learning Needs
212 and Education Tribunal (Wales) Act 2018 extends the due regard duty to bodies exercising
213 relevant functions in the education context.

214 The due regard duty was born from a range of factors, including political impetus for
215 significant use of enhanced legislative competence, whilst also rushing the legislation
216 through before the outgoing First Minister was due to stand down (leaving little time for
217 consultation). Had there been further consultation, the due regard duty could potentially have
218 been extended to all devolved Welsh public bodies. Aside from due regard, other available
219 options were a light touch requirement to “take into consideration” the UNCRC, later enacted
220 in Scotland, or the stronger individual right to public body compliance (for example as
221 concerns ECHR rights under the Human Rights Act 1998 sections 6 and 7). This latter
222 approach was felt to be too radical a departure given the combined legal jurisdiction – though
223 more for pragmatic reasons than lack of legislative competence. Even if such provisions were
224 definitively within competence, the Secretary of State could still intervene to prevent the Bill
225 going for Royal Assent if he had reasonable grounds to believe that the divergence would
226 have an adverse effect on the operation of the law as it applies in England.⁴⁹ As enacted, due
227 regard functions as an upstream preventative provision designed to generate systematic
228 changes; it does not confer new legal rights on individuals.⁵⁰

229 The Children’s Rights Measure makes no provision about what an individual can do if
230 they believe the due regard duty has been breached. During legislative scrutiny, it was argued
231 that an explicit new route would be unnecessary given other avenues, including: complaining
232 to the Welsh Government; contacting the Children’s Commissioner for Wales; complaining
233 to an Assembly Member or seeking judicial review. However, there is yet to be any reported

⁴⁸ Administrative Court Lawyer for Wales, to PLP Wales Conference (March 2018).

⁴⁹ GoWA 2006, s.114(10(c)).

⁵⁰ J. Williams, “Implications for Administrative Justice of Wales’ Unique Child Rights Law”, in S. Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff, UWP, 2017) p.33.

234 judgment finding breach of the children’s rights due regard duty. Practitioners have spoken of
235 difficulties in seeking permission to raise breach of the duty as a ground of judicial review
236 before the Administrative Court in Wales.⁵¹ This is concerning given evidence of variable
237 quality; the Children’s Rights Measure introduces regulatory tools known as Children’s
238 Rights Impact Assessments (CRIAs), and research has found their implementation to be
239 inconsistent, with expectations of good practice departed from.⁵²

240 Another example of new administrative procedure legislation is WFGA, under which
241 public bodies are required to carry out sustainable development, to be achieved by setting and
242 publishing Well-being Objectives showing how the body will maximise its contribution to
243 achieving the Well-being Goals. WFGA makes no reference to rights; the definition of well-
244 being is less rights-focused than that contained in other Assembly legislation such as the
245 Social Services and Well-Being (Wales) Act 2014 which defines well-being as including
246 “securing rights and entitlements”.⁵³ WFGA also makes no direct reference to international
247 norms such as the EU and UN sustainable development standards, yet the UN refers to the
248 legislation as “world leading”.⁵⁴ Under WFGA, public bodies are required to “take all
249 reasonable steps” to meet Well-being Objectives, but there has so far been no reported
250 litigation alleging breach of this duty.

251 Another example is the Public Health (Wales) Act 2017 which empowers Welsh
252 Ministers to introduce regulations providing for Health Impact Assessments (HIA).
253 Regulations are not yet in force, but eventually relevant bodies will have to publish their
254 HIAs and take them into account when exercising functions in connection with which the
255 assessments were carried out, while also acting in accordance with the sustainable
256 development principle.

257 Of these new procedural duties, the most onerously worded is the requirement to
258 “take all reasonable steps” to meet Well-Being Objectives under WFGA, whereas the Public
259 Health legislation rows back to the ostensibly less demanding requirement to “take into
260 account” HIAs. Whether this is any more or less extensive than the duty to “have due regard”
261 to children’s rights contained the Children’s Rights legislation, is hard to foresee. Leading

⁵¹ Michael Imperato (Watkins and Gunn) PLP Wales Conference (March 2018).

⁵² S. Hoffman, *Evaluation of the Welsh Government’s Child Rights Impact Assessment procedure under the Children’s Rights Scheme pursuant to the Rights of Children and Young Persons (Wales) Measure 2011* (Swansea University 2015).

⁵³ Social Services and Well-being (Wales) Act 2014, s.2(2)(f).

⁵⁴ Nikhil Seth, Director of Division for Sustainable Development, United Nations Department of Economic and Social Affairs, comments made ahead of an international Sustainable Development event held in Cardiff in 2015. *Welsh Government Press Release*: <https://gov.wales/newsroom/environmentandcountryside/2015/150429-future-generations-act/?lang=en>

262 practitioner Emyr Lewis notes that HIAs introduce “a further layer of high-level soft law
263 regulation governing the activities of public authorities in Wales, which could further
264 complicate the processes of decision-making”.⁵⁵ These procedural duties can be seen as part
265 of a global trend towards proceduralisation of administrative law. They are coupled with
266 tools to regulate public body decision-making, including increased use of impact
267 assessments such as CRIAs and in future HIAs. The difficulty comes in ensuring that these
268 instruments are more than tick-box exercises, adding to bureaucracy without providing any
269 greater practical protection for individual rights. In order to achieve this there ought also to
270 be strong and effective rights to individual redress, but the devolution context makes this
271 particularly challenging for Wales. The courts enforcing Welsh legislation are the courts of
272 England and Wales, staffed by the judges of the England and Wales judiciary, applying
273 general principles of English and Welsh common law, and judicial review of administrative
274 action is a reserved matter. Since 2009 Wales has had a local Administrative Court, ending
275 previous London-centricity. However, the Court is not explicitly a Welsh institution, it is a
276 satellite managed by HMCTS England and Wales. Unlike the other England and Wales
277 Administrative Courts (in Birmingham, Leeds, Manchester and London), the Cardiff
278 Administrative Court is responsible for administering claims originating from two Court
279 Circuit Regions, the Wales Circuit, and the geographical Region covered by the Western
280 Circuit (South West England). Up to half of all claims issued and determined in Cardiff
281 concern the South West of England. Since the Court opened there has been some slight
282 increase in the number of judicial review claims issued pertaining to Wales, but much of this
283 increase comes from a rise in unrepresented litigation. There has been no discernible increase
284 in the administrative law litigation activities of lawyers based in Wales.⁵⁶ Recent England
285 and Wales wide reforms have also had a significant impact on administrative law litigation.
286 Since around 2013 there has been a drop in judicial review applications across the England
287 and Wales Administrative Court coinciding with reforms to judicial procedure, and to costs
288 and legal aid payment regimes. Legal aid cuts imposed by the Legal Aid Sentencing and
289 Punishment of Offenders Act (LASPO) 2012 have had a disproportionately negative impact
290 in Wales, including on Welsh public lawyers.⁵⁷ In terms of broader constitutional justice,
291 difficulties accessing judicial review can negatively impact on the rule of law as well as the

⁵⁵ E. Lewis, *Public Health (Wales) Act 2017 – making Wales a leader in public health* (Lexis 26/07/2017)
https://www.blakemorgan.co.uk/media/filer_public/80/ec/80ece5c2-1556-4d44-bfb8-a4f3b4fbee7/public_health_wales_act_2017making_wales_a_leader_in_public_health.pdf

⁵⁶ Submission from PLP and S. Nason to Commission on Justice in Wales.

⁵⁷ Submission from PLP of evidence to Commission on Justice in Wales (June 2018):
<https://beta.gov.wales/sites/default/files/publications/2018-08/Submission-from-public-law-project.pdf>

292 legitimacy of administration, yet the nature of devolution limits Wales' capacity to address
293 this problem. It is not surprising then that Wales has found alternative means to bolster the
294 legitimacy of its administrative state, including by developing its integrity branch.

295

296 **The Integrity Branch**

297

298 Welsh administrative procedure law often contains no explicit legal rights to redress for
299 individuals, but it does provide alternative means of enforcement, deploying the quasi-
300 political power of integrity branch institutions to incentivise systematic change. A plethora of
301 such institutions have been established in Wales, each created at different stages in the
302 devolution process, underpinned by different types of legislation and with varying degrees of
303 accountability to the Assembly.

304 There is a Public Services Ombudsman for Wales (PSOW) initially created by
305 Westminster legislation, appointed by and accountable to the Assembly, and various
306 Commissioners, some created by Westminster legislation, others by Assembly legislation, all
307 of whom are appointed by Welsh Government. The Commissioners perform variable roles
308 and are subject to different methods of external accountability and internal governance.⁵⁸
309 There are principled reasons for at least some divergence, however, as Mike Shooter put it in
310 his review of the Children's Commissioner for Wales, the "uncertainty breeds confusion and
311 misconception".⁵⁹ One common misconception, for example, is that the Welsh Language
312 Commissioner functions as a language ombudsman, whereas in fact the role is more
313 regulatory.

314 The Welsh Language (Wales) Measure 2011 was Wales' first fully home-grown
315 attempt at devising an administrative justice regime and provides a cautionary tale. The 2011
316 Measure created a system of Welsh Language Standards, a Welsh Language Commissioner
317 and a Welsh Language Tribunal.⁶⁰ The regime has since been criticised as excessively
318 bureaucratic, it is said to focus on administrative procedures for protecting the language by
319 detailing the role and functions of the regulator (the Commissioner) and the regulator's
320 regulator (the Welsh Language Tribunal) at the expense of outlining the content of language
321 rights. The Measure rarely addresses individuals as beneficiaries of rights and public bodies

⁵⁸ A. Sherlock, J. Williams and E. Royles, "A Welsh Model of Commissioners?" (2014) *Cambrian Law Review*

⁵⁹ M. Shooter, "An Independent Review of the Role and Functions of the Children's Commissioner for Wales" para.1.3(d).

⁶⁰ C.F. Huws, "Administrative Justice and the Welsh Language (Wales) Measure 2011" and D. Mac Giolla Chriost, "Language Commissioners and their Independence" both in S. Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff, UWP, 2017).

322 as duty bearers, contradicting expressed Welsh concern for public involvement.⁶¹ The
323 Measure also does not refer to the European Charter for Regional or Minority Languages, and
324 has subsequently been described as an “incomplete or immature version of an emerging
325 international norm”.⁶² Individuals cannot directly challenge the content of Welsh Language
326 Standards developed by the Welsh Language Commissioner. However, if a complainant
327 considers there has been a flaw in the Commissioner’s investigation into compliance with its
328 own Standards, they can appeal to the Welsh Language Tribunal.

329 The bureaucratic nature of the regime is not its only flaw, the Commissioner is also
330 insufficiently independent from Government, being a regulator on behalf of Welsh
331 Government but also legally bound to monitor Government compliance with Welsh
332 Language Standards.⁶³ A 2017 White Paper has since proposed reforms aimed at “reducing
333 bureaucracy” and ensuring “value for money”.⁶⁴ The hope is to strike a more proportionate
334 balance between promoting the Welsh language and regulating compliance with Standards.
335 The Welsh Language Commissioner will be abolished and replaced with a Welsh Language
336 Commission. Under the new structure Welsh Government will be responsible for making and
337 imposing Standards, and the Welsh Language Commission will enforce compliance with the
338 Standards and promote language use. However, the new Welsh Language Commission will
339 continue to monitor Welsh Government compliance with Standards, despite being a
340 Government appointed body, and if anything, individual rights to redress will be watered
341 down. In its earlier consultation, Welsh Government rejected a proposal for enacting a right
342 to use Welsh in primary legislation. This was seen as too costly given the limited extent of
343 Welsh language skills in the workforce; it was said that a large list of exceptions, where the
344 right would apply in an attenuated form or not at all, would be “inevitable”.⁶⁵

345 The new proposals emphasize internal processes, with individuals being required to
346 complain first to the public body before taking their complaint to the Welsh language
347 Commission. This may be an improvement on the previous situation where the Welsh
348 Language Commissioner sometimes had to investigate despite a public body having resolved
349 the issue before the required investigation could be completed. Nevertheless, the reforms

⁶¹ Huws, fn.60. pp.85-90.

⁶² C. Williams, *Minority Language Promotion, Protection and Regulation: The Mask of Piety* (Palgrave Macmillan, 2013).

⁶³ Mac Giolla Christ, fn.60.

⁶⁴ Welsh Government, *White Paper Consultation Document: Striking the right balance: proposals for Welsh Language Bill* (WG32353 October 2017) para.4.

⁶⁵ *Ibid* paras.13-14 rejecting ‘Option 5: right for individuals to use Welsh set out in primary legislation’.

350 have been described as a step backwards by language campaigners and Plaid Cymru.⁶⁶
351 Individual rights could be diminished; first, by the provision that the Welsh Language
352 Commission should only investigate complaints in serious cases; second, by watering down
353 the content of the Standards;⁶⁷ third, introducing a permission requirement into some appeals
354 to the Welsh Language Tribunal. The proposals emphasise upstream promotive and
355 preventative measures to protect the language, whereas other options would have also given
356 stronger downstream rights to individuals. For example, the PSOW could potentially have
357 been given power to handle all Welsh language complaints, with the new Commission taking
358 on regulatory and promotive roles.⁶⁸ The PSOW already acts as an independent complaint-
359 handler with regards to the Assembly Commission, which is responsible for the day-to-day
360 running of the Welsh language services of the Assembly. This proposal was rejected on the
361 basis that it would require further legislation to increase the PSOW's powers and jurisdiction
362 that could have implications extending beyond Welsh language policy.⁶⁹ Another option
363 would be a primary legislative right to use Welsh, combined with a right of appeal to the
364 Welsh Language Tribunal. This latter proposal is also non-starter in practice, given Welsh
365 Government's rejection of a legislative right to use Welsh.

366 Whilst the Welsh Language Commissioner is primarily a regulatory body, other
367 Welsh Commissioners are more akin to National Human Rights Institutions responsible for
368 monitoring the observance of international human rights obligations. Whilst UK legislation
369 establishing the Children's Commissioner for Wales and Older People's Commissioner for
370 Wales makes no mention of rights, the more detailed Assembly Regulations flesh out the
371 Commissioners' roles and responsibilities with explicit reference to promoting compliance
372 with international human rights. These two Commissioners are primarily responsible for
373 identifying and reviewing systematic issues in public administration impacting on rights.
374 They also have some powers of inquiry into individual complaints, though many such
375 complaints are practically dealt with by sign-posting to another institution, or by providing

⁶⁶ M. Shipton, "Reaction to plans to scrap the Welsh Language Commissioner" (WalesOnline 10 August 2017): <https://www.walesonline.co.uk/news/politics/this-would-big-step-backwards-13457824>

⁶⁷ Removing or amending Standards that do not contribute directly to improving services, removing Standards which are costly but deliver little public benefit, and giving public bodies more power to exercise reasonable judgment in their performance of the Standards.

⁶⁸ PSOW response to the Welsh Government Consultation at fn.64.

⁶⁹ Written Statement - The Public Services Ombudsman for Wales' response to the White Paper on a proposed Welsh Language Bill, the Minister for the Welsh Language and Lifelong Learning <https://gov.wales/about/cabinet/cabinetstatements/2018/PSOW/?lang=en>

376 advice, rather than a full inquiry.⁷⁰ Such sign-posting can plug gaps in the administrative
377 justice system, but raises questions about the effectiveness and accessibility of early dispute
378 resolution. The power of the Commissioners, and also the PSOW, to “name and shame”
379 public bodies regularly seems to make the difference, and these integrity institutions tend to
380 be seen as more accessible than the Administrative Court.

381 There are increasingly blurred boundaries between the roles of the PSOW and the
382 Commissioners, including the extent to which each institution acts a “fire-fighter”
383 (determining individual complaints) and a “fire-watcher” (conducting investigations to
384 address systematic issues often on an “own initiative” basis⁷¹ without the need for an
385 individual complaint). How the Commissioners chose which individual complaints to
386 investigate can cause particular dilemmas with respect to political independence and public
387 perception. Not least because the Commissioners are seen as quasi-political institutions and
388 there have been allegations of political bias and cronyism in the appointment of most of the
389 Commissioners to date.⁷²

390 The newest Welsh Commissioner, the Future Generations Commissioner for Wales
391 established by WFGA has no individual complaint handling jurisdiction. The main
392 responsibility of the Future Generations Commissioner is to monitor and report on how well
393 Local Authority Public Service Boards are complying with their duties to promote well-
394 being.⁷³ Under WFGA public bodies are also required to act in particular ways when
395 carrying out sustainable development, and the Future Generations Commissioner has a role in
396 promoting these “Five Ways of Working”. The Ways of Working emphasise inter-
397 institutional accountability, enabling citizen participation and furthering opportunities for
398 deliberative democracy. They are; (1) long-termism,⁷⁴ (2) integration,⁷⁵ (3) involvement,⁷⁶ (4)

⁷⁰ A. Sherlock and J. Williams, “The Children’s Commission for Wales and the Older People’s Commissioner for Wales and the Administrative Justice System” in S. Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff, UWP, 2017) pp.125-146.

⁷¹ A power which the Children’s and Older People’s Commissioners already have, and which is proposed for the PSOW in the new Public Services Ombudsman (Wales) Bill.

⁷² See e.g., BBC Wales, “Labour insider gets Future Generations Commissioner job” (3 November 2015): <https://www.bbc.co.uk/news/uk-wales-politics-34709434>; Wales Online, “Questions raised over appointment of first Welsh Language Commissioner” (6 October 2011): <https://www.walesonline.co.uk/news/wales-news/questions-raised-over-appointment-first-1804046>

⁷³ WFGA, s.80 and Pt.4.

⁷⁴ Balancing short-term and long-term needs.

⁷⁵ Considering how the public body's well-being objectives may impact upon each of the well-being goals, on their objectives, or on the objectives of other public bodies.

⁷⁶ Involving people with an interest in achieving the well-being goals, and ensuring that those people reflect the diversity of the area which the body serves.

399 collaboration,⁷⁷ and (5) prevention.⁷⁸ Other Welsh initiatives on the theme of public
400 engagement include co-operation, co-decision and co-production⁷⁹ in the design of the
401 administrative state and the services it provides.

402

403 **Towards “juridification”?**

404

405 Extensive evaluation of the impact of new Welsh administrative procedure duties is beyond
406 the scope of one paper. But even assuming that there has been significant “soft” impact in
407 terms of cultural change with knock-on improvements to public body performance, there has
408 clearly been less hard-law bite, as evidenced by the lack of case law. Aside from costs, and
409 the seemingly limited litigation practice of public lawyers based in Wales, minimal
410 juridification may also be due to the difficulties of accessing Welsh law.

411 The law applicable to Wales is fragmented over Welsh, English and Welsh, British,
412 and UK sources. Following Consultation, the Law Commission recommended bringing
413 together legislation whose subject matter is within Welsh competence, but which is scattered
414 across various sources, and reforming that law where appropriate. Consolidation with reform
415 is not unusual for England and Wales, the innovation is in the recommendation that “the
416 ultimate goal of the Welsh Government and the National Assembly should be the
417 organisation of primary legislation into a series of codes dealing comprehensively with
418 particular areas of Welsh law”.⁸⁰ In response, Welsh Government’s Draft Legislation (Wales)
419 Bill 2018, places the Counsel General for Wales under a duty to keep the accessibility of
420 Welsh law under review. For each Assembly term, the Welsh Ministers and Counsel General
421 must prepare a programme of what they intend to do to improve the accessibility of Welsh
422 law. This must include proposed activities “intended to – (a) contribute to an ongoing process
423 of consolidating and codifying Welsh law, (b) maintain the form of Welsh law (once
424 codified); (c) facilitate use of the Welsh language”.⁸¹ During the 2018 Legal Wales
425 Conference the Counsel General announced his intention to introduce the Bill to the
426 Assembly before the end of 2018, and that a proposed taxonomy of Codes of Welsh Law

⁷⁷ Acting in collaboration with any other person (or different parts of the body itself) that could help the body to meet its well-being objectives.

⁷⁸ How acting to prevent problems occurring or getting worse may help public bodies meet their objectives.

⁷⁹ Wales Audit Office; co-production is “the concept of genuinely involving people and communities in the design and delivery of public services, appreciating their strengths and tailoring approaches accordingly... (it) is fundamentally about doing things ‘with’ rather than ‘to’ people”. *A Picture of Public Services* (2015).

⁸⁰ Law Com No. 366, fn.7. para.2.55.

⁸¹ Draft Legislation (Wales) Bill cl.1 and 2.

427 would be Annee to it. Welsh Codes will eventually constitute a digest of Welsh law,
428 retaining existing distinctions between primary and secondary legislation (and guidance) but
429 organised by subject-matter rather than date of enactment.

430 Whilst accessibility is the main goal, the pull towards codification may partially relate
431 to a relative lack of judicial, practitioner and academic commentary (in effect to limited
432 juridification). Anna Bargenda and Shona Wilson-Stark have recently suggested:

433
434 “In Wales, the case for codification to carve out a national identity is more compelling
435 because it could be said that Wales now has its own ‘living system of law’ after losing
436 its legal identity centuries ago. In addition, Welsh lawyers have a dearth of textbooks
437 to look to for guidance when the law is unclear. Having ‘so many excellent textbooks’
438 has been cited as a reason why codification is not needed in Scotland. The best
439 textbooks provide accessible digests of the law which cut down the time needed to
440 wade through all the primary sources”.⁸²

441
442 As the authors conclude, however, codification does not negate the need for commentary.
443 The Counsel General also recognises this, stressing that the Law Wales website (currently the
444 main repository for Welsh law and commentary) will continue to fall short of expectations
445 without the collective engagement of practitioners, legislators, academics and other
446 commentators.⁸³

447 So far academic and practitioner commentary concerning codification in Wales has
448 focused on whether Wales’ distinctive administrative procedure duties could be best
449 articulated through an Administrative Procedure Code.⁸⁴ A Code of this cross-cutting nature
450 could tackle the complexity of multiplying procedural duties.⁸⁵ Most legal jurisdictions
451 across the world have an administrative procedure Code or Act of some kind, but with
452 variations in the degree of specificity with which administrative procedure duties are
453 expressed. A Code for Wales could consolidate existing duties, perhaps with some additions

⁸² A. Bargenda and S. Wilson Stark, “The Legal Holy Grail? German lessons on codification for a fragmented Britain” (2018) 22(2) *Edinburgh Law Review* 183.

⁸³ J. Miles AM, fn.10.

⁸⁴ D. Gardner, “An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome” (2018) *Statute Law Review*.

⁸⁵ The 2014 Williams Report on *Public Service Governance and Delivery in Wales* recommended that the Assembly: “Review existing legislation to ensure that it simplifies and streamlines public-sector decision-making rather than imposing undue constraints on it or creating complexity; and either repeal such provisions or clarify their meaning and interaction”, para.2.37:
<https://www.lgcplus.com/Journals/2014/01/21/d/r/x/Commission-on-Public-Service-Governance-and-Delivery-Wales.pdf>

454 such as extending the duty to have due regard to the UNCRC to all devolved Welsh public
455 bodies, and adding a similar duty to have due regard to the UN Convention on the Rights of
456 Persons With Disabilities, and UN Principles for Older Persons. Whether such a Code should
457 also include *Administrative Justice Principles for Wales* and/or WFGA Ways of Working is a
458 more complex matter; much would turn on phraseology and legislative balance between
459 promotive duties and concrete rights, and how each is envisaged to be enforced.

460 Despite the growth of Welsh administrative procedure legislation, the majority of
461 administrative law doctrines applying to Wales are still found in the common law of Wales
462 and England. There are a number of issues for Wales here. One is simply the volume of
463 administrative law principles stemming from common law. Another is the relationship
464 between common law and statute, rarely will an administrative law case turn on a statutory
465 procedural duty alone without common law precedent run either as vehicle to interpret the
466 meaning and extent of the statutory duty, or as an additional legal ground. In the majority of
467 judgments of the Administrative Court in Wales, aspects of the law applicable to the UK, the
468 law applicable to England and Wales, and the law applicable to Wales only (as well as related
469 policy/guidance), might all be considerations relevant to the lawfulness and/or reasonableness
470 of the public body decision(s) being challenged. This is before one considers relevant
471 regimes of EU and international law. In other cases, central issues of reasonableness and/or
472 procedural fairness turn on careful examination of England and Wales common law
473 precedent, with the specific Welsh statutory context having little impact.

474 It is possible that a distinct jurisprudence could eventually grow up around Welsh
475 statutory duties, including the duty to have “due regard” to children’s rights or to “take all
476 reasonable steps” to meet Well-being Goals. Welsh statutory requirements could also colour
477 existing common law duties, for example what constitutes sufficient consultation in some
478 Welsh contexts might be more extensive than in analogous English circumstances due to
479 WFGA, and other Welsh legislation, requiring individuals to be “involved” in decision-
480 making. However, aside from the fact that it would take many years, and a much higher
481 caseload, for such jurisprudence to develop, the willingness of the judiciary to engage in this
482 process and the harmonising role of the higher appellate courts is crucial. Were the advent of
483 a separate Welsh legal jurisdiction to lead to the establishment of a Welsh Court of Appeal,
484 this would still be subject to the jurisdiction of the UK Supreme Court, which adopts a

485 harmonising approach to administrative law principles, including for Scotland despite its
486 separate legal jurisdiction.⁸⁶

487 In terms of developing a “Welsh common law” to date, it is less the development of
488 statutory Welsh administrative law, and more the contribution of individual judges that could
489 have some significance. The small caseload in Wales means that particular judges, especially
490 those having served as Administrative Court Liaison Judge for Wales, have special influence.
491 The most prolific judge so far has been Lord Justice Hickinbottom, who takes a cautious
492 approach to the development of more contentious areas of precedent such as substantive
493 review, having regularly affirmed that public bodies should be allowed significant
494 discretion.⁸⁷ There is evidence that Welsh judgments show sensitivity to the factual context
495 of Wales, in terms of geographical and demographic characteristics, respect for culture and
496 Welsh language,⁸⁸ but there is no indication that Welsh substantive judgments depart, even
497 incrementally, from general principles of administrative law applicable to England and
498 Wales.

499 The Administrative Court in Wales, is however, not the only judicial piece of the
500 administrative justice puzzle. Recent activity, such as Part Three of the Wales Act 2017, and
501 a proposed Law Commission project for 2019,⁸⁹ seek to endow the body of devolved Welsh
502 tribunals with greater coherence, professionalism and independence. The 2017 Act defines
503 devolved Welsh tribunals as having functions that do not relate to reserved matters, and
504 functions which are only exercisable in Wales. It creates a President of Welsh Tribunals to
505 provide leadership, ensuring tribunals are accessible, fair, efficient, that their members have
506 sufficient expertise, and having regard to “the need to develop innovative methods of
507 resolving disputes”.⁹⁰ The 2017 Act makes provision for “cross-deployment” of judges
508 between various devolved Welsh tribunals (with the consent of the President of Welsh
509 Tribunals).⁹¹ An aim here is to enhance the status of the Welsh judiciary, making it a busier
510 and more attractive profession for home-grown talent. Judges have now been authorised for

⁸⁶ See e.g., *R (Cart) v The Upper Tribunal and R (MR (Pakistan)) (FC) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28 and *Eba v Advocate General for Scotland* [2011] UKSC 29.

⁸⁷ Sir G. Hickinbottom, “*And Still The Children Sing*”, *The Rehabilitation of Children’s Rights*, Lecture to the Wales Observatory on Human Rights of Children (Swansea 2014) quoting from Lord Hoffman in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] UKHL 22.

⁸⁸ E.g., *R (Diocese of Menevia and other) v City and County of Swansea Council and others* [2015] EWHC 1436 (Admin).

⁸⁹ The Law Commission is examining the coherence and consistency in provisions governing appointments to Welsh Tribunals, and their practices and procedures, potentially leading to a Welsh Tribunals Bill: <https://gov.wales/about/cabinet/cabinetstatements/2018/welshtribunalsproject/?lang=en>

⁹⁰ Wales Act 2017, s.60(4)(d).

⁹¹ Wales Act 2017, s.62.

511 cross-deployment, for example between the Residential Property Tribunal for Wales and the
512 Special Educational Needs Tribunal for Wales. It has been argued that how Wales manages
513 the development and operation of its tribunals system is an important test for how it might
514 cope with further devolution of responsibility for the administration of justice.⁹²

515 In this context it is somewhat surprising that when creating new administrative law
516 duties, Welsh Government and the Assembly have continued to choose reserved tribunals and
517 courts as institutions of redress, largely on the basis that devolved Welsh tribunals currently
518 lack the resources, in terms of finance and expertise, to handle significant additional
519 caseloads.⁹³ Yet it is Welsh Government which funds devolved Welsh tribunals, and central
520 UK Government which funds courts and reserved tribunals.

521 It has been recommended that Wales adopts a presumption that new administrative
522 law duties enacted by the Assembly should be subject to enforcement procedures in the
523 devolved Welsh tribunals, as opposed to in reserved tribunals or courts.⁹⁴ Adopting such a
524 presumption would mean more cases being determined in Wales, and could eventually lead
525 to greater juridification of Welsh administrative justice, especially alongside other reforms to
526 enhance the status of the Welsh judiciary. In this regard, a leadership steer from the
527 Administrative Court in Wales would also be significant, though dependent on who occupies
528 the post of Liaison Judge.

529

530 **Lessons from the “New Administrative Law” of Wales**

531

532 At a global level “new administrative law” is a response to concerns over the legitimacy of
533 the evolving administrative state. The emergent Welsh version is grounded in a vision of
534 good administration as a civic good. This is evident in the political ideal of ‘progressive
535 consensus’, in the current Counsel General’s vision of a just Wales, and in CAJTW’s
536 expression of administrative justice as a “fundamental right”.⁹⁵ The notion of the good here is
537 an Aristotelian account of doing the right thing, anchored in consensus through civic

⁹² HT Pritchard, “Building a Welsh Jurisdiction Through Administrative Justice” in S. Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff, UWP, 2017).

⁹³ S. Nason, *Administrative Justice: Wales’ First Devolved Justice System: Evaluation and Recommendations* (Bangor/ESRC IAA October 2018).

⁹⁴ See e.g., submissions to the Commission on Justice in Wales by K. Bush QC https://beta.gov.wales/sites/default/files/publications/2018-06/submission-commission-justice-wales-professor-keith-bush-qc_0.pdf para [22] and Public Law Wales

<https://beta.gov.wales/sites/default/files/publications/2018-08/Submission-to-the-justice-commission-from-public-law-wales.pdf> para [18].

⁹⁵ CAJTW, fn.23.

538 participation. Such an account of the good is echoed in recent conceptions of European good
539 administration across Council of Europe member states.⁹⁶ It also seems to be a feature of
540 WFGA Well-being Goals, which are not envisaged to require a trade-off (*qua* utilitarian
541 calculus), but rather working incrementally towards ‘win-win’ solutions. On this
542 understanding the goodness (or legitimacy) of the administration is not (or at least not only)
543 quantified by reference to whether its actions comply with some pre-determined legal
544 standards, but by reference to whether it exhibits the characteristics of a good person. In
545 Wales, the integrity institutions combine to promote and enforce this sense of goodness. The
546 Welsh experience then also seems to embody Nick O’Brien’s view that “administrative
547 justice can be viewed, in essence, as a set of ‘bridging institutions’ whose cultivation of the
548 ‘habits’ of trust and civic virtue are made possible by the adoption of design principles and
549 operational practices that in turn are shaped by human rights values and principles”.⁹⁷ Wales
550 already has a bridging infrastructure largely in place, more problematic is its lack of a
551 separate justice system in the traditional sense of courts, tribunals, and the judiciary; there are
552 only two branches of state (executive and legislative) for administrative justice institutions to
553 bridge across.

554 Attempts to bridge between integrity institutions and the non-devolved courts have
555 come up against the practical barriers of devolution; one example is the relationship between
556 the PSOW and the courts. It has been proposed that the Law Commission’s 2011
557 recommendations relating to the relationship between courts and ombudsmen could be
558 implemented in Wales. These proposals include removing the statutory bar to ombudsmen
559 investigations where a complainant has recourse to a remedy through a court or tribunal,
560 giving the ombudsman power to refer a point of law to the Administrative Court, and giving
561 the Administrative Court an express power to “stay” actions before it to allow an ombudsman
562 to investigate. These proposals were considered by the Assembly Finance Committee, but
563 rejected due to unease about altering the relationship between a UK ombudsman and the
564 courts on a Wales-only basis.⁹⁸

565 More progress has been made, in theory, to bridge between the integrity institutions in
566 Wales. For example, there are statutory duties and powers in place encouraging the
567 Commissioners to work together and with other institutions. However, it is not clear how

⁹⁶ S. Nason, “The Impact of Council of Europe Pan-European General Principles of Good Administration on the Administrative Law of Member States: Report of the United Kingdom” (*forthcoming*); T Fortsakis, “Principles Governing Good Administration” (2005) 11(2) E.P.L. 207.

⁹⁷ N. O’Brien, “Administrative Justice in the Wake of I, Daniel Blake” (2017) *The Political Quarterly* 9.

⁹⁸ National Assembly Finance Committee: *Consideration of Powers of the Public Services Ombudsman for Wales* (May 2015) pp.58-68

568 well these provisions are functioning in practice. Similarly, there is a Memorandum of
569 Understanding between the Commissioners and the PSOW, but little evidence of its practical
570 effectiveness, and few successful examples of joint-working.

571 Bridging can also lead to conflict; one example is an apparent “Facebook spat”
572 between the PSOW and Welsh Language Commissioner.⁹⁹ In response to proposals to reform
573 the Welsh Language protection regime, the PSOW postulated that his office could take over
574 responsibility for complaints. This was described as a ‘power grab’ and breaching an
575 agreement between the PSOW and the Commissioner that they would not comment on each
576 other’s work. Sensational reporting aside, concerns remain that whilst Wales has at least three
577 types of integrity institutions – regulators, citizen’s champions, and complaint handlers –
578 confusion remains over their functions and accountability and where they ought to sit within
579 the broader administrative justice system. This has significant financial as well as access to
580 justice implications. For example, the Director of Policy, Legislation and Innovation for the
581 Future Generations Commissioner has noted that one of the most resource intensive
582 challenges for the Commissioner has been responding to the enormous number of enquiries
583 raising individual complaints that the Commissioner has no jurisdiction to investigate.¹⁰⁰

584 Welsh administrative justice is also affected by bigger political challenges. The
585 administrative justice culture of the current UK Conservative Government is individualistic; a
586 market-based conception in which the user is seen as a consumer of public services and
587 related redress. The growth of individualist conceptions of administrative justice is a global
588 phenomenon, also linked to the marketisation of welfare.¹⁰¹ This conception does not fit with
589 the Welsh progressive consensus, and the continued reservation of responsibility for social
590 security inhibits delivery of Welsh initiatives designed to improve substantive equality.¹⁰²
591 Another example of different perceptions around the public-private divide and market context
592 is the Renting Homes (Wales) Act 2016. This replaces the majority of tenancies and licenses
593 in Wales with two types of contract (one for the private sector and one for social housing).

⁹⁹ BBC News, “Facebook spat sparks row over Public Services Ombudsman for Wales” (11 October 2017)
<http://www.bbc.co.uk/news/uk-wales-politics-41581470>

¹⁰⁰ M. Brousseau-Navarro, to PLP Wales Conference 2018.

¹⁰¹ fn.29.

¹⁰² Economic concerns, and the perceived importance of maintaining a social union with England, render the devolution of social security a complex issue. However, it has been argued that the poor fit between policies on benefits and devolved issues such as housing and support services for job seekers in Wales, demonstrate a need for further consultation on changes to reserved benefits that affect devolved responsibilities; *Sefydliad Bevan Foundation, Making welfare work for Wales: Should benefits for people of working age be devolved?* (June 2016); <https://41ydvd1cuyvlonm03mpf21pub-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/Final-Report-Low-Res.pdf>

594 The legislative changes are modelled on Law Commission recommendations which were
595 rejected in England for being out of line with the Government’s deregulatory priorities.

596 Marketisation of administrative justice is also occurring during a period of austerity
597 and integrity institutions have been described as providing access to justice on the cheap
598 when the Rolls-Royce of judicial justice becomes too expensive.¹⁰³ Of the small judicial
599 review caseload stemming from Wales, many cases concern austerity-related cuts to public
600 services.¹⁰⁴ Welsh Government’s reluctant to divert a higher caseload into the devolved
601 tribunals is likely also related to the costs of running these devolved institutions for which it
602 has financial responsibility.

603 The Welsh promotive approach relies significantly on engaging public servants and
604 broader civil society. For procedures such as impact assessment processes to be legitimate,
605 civil society actors should be engaged in interpreting the rights and goals that must be taken
606 into account. There is, however, a risk of creating more limited “interpretive communities”¹⁰⁵
607 comprised mainly of government and civil society actors who take a community or personal
608 interest in the issue at stake. Without the widest possible participation of a range of interests,
609 interpreting rights and goals can be “colonised by dominant institutional forces”.¹⁰⁶ As is
610 likely the case for civil society conglomerates globally, the main challenges for Wales stem
611 from comparative levels of citizen engagement with societal challenges, and the available
612 sources and quantum of funding for civil society organisations. There is, however, an evident
613 movement to engage people with justice in Wales in its broadest sense, from the recent
614 Commission for Justice in Wales, to the outreach activities of the Counsel General and the
615 proposed Draft Legislation (Wales) Bill on legal accessibility.

616 Despite the approach constructed in this paper, in truth Welsh administrative law and
617 the Welsh system of administrative justice have developed in a largely uncoordinated
618 fashion. Oversight is limited, with no Assembly Committee having responsibility for
619 administrative justice and tribunals in Wales, though the subject has been discussed in the
620 Assembly.¹⁰⁷ The Welsh approach evidences potential to achieve incremental improvements
621 to good administration through a degree of progressive consensus around equality, social
622 justice and rights. Through its new administrative procedure law, and the work of its integrity

¹⁰³ S. Nason, *Understanding Administrative Justice in Wales* (Bangor 2015).

¹⁰⁴ See e.g., *Menevia*. fn.88; *R (Flatley) v Hywel Dda University Local Health Board* [2014] EWHC 2258 (Admin); *R (Bestway National Chemists Ltd) v Welsh Ministers* [2017] EWHC 1983 (Admin).

¹⁰⁵ J. Tobin, “Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation” (2010) 23 HHRR 1.

¹⁰⁶ fn.50.

¹⁰⁷ Counsel General’s Questions 26 September 2018: <http://record.assembly.wales/Plenary/5352#A45564>

623 institutions, Wales has begun to better engage people with their administrative law rights, the
624 next step will be to see whether and how successfully, Wales develops a clearer, and perhaps
625 more juridified, structure to ensure those rights are fully respected.

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