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Administrative justice is the justice of relationships between individuals and the state. It covers 'how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them'.[1] In this article we examine some of the synergies between Phil Thomas' work and our research into administrative justice in Wales. Like Phil, we have examined the impact of new rights-based legislation on access to justice, including in rural and deprived areas of Wales. We also share an interest in connections between politics, social policy, and access to justice. We argue that Wales is not yet taken seriously as 'a site in which [administrative] justice is done',[2] and that there remains an 'implementation gap' when it comes to putting innovative social policy into practice, including gaps in the provision of accessible redress for individuals. 'Jagged edges' (between devolved and reserved matters) impact on delivering administrative justice in Wales, but these are not the only considerations. The limited development of an administrative justice culture, both in legislation, policy and practice can hamper the achievement of social and economic justice in Wales. We recommend that an administrative justice culture could be fostered with leadership from Welsh Government and the Senedd, alongside improved training for administrators, and the potential addition of 'a just Wales' to the well-being goals contained in the Well-being of Future Generations (Wales) Act 2015.

The Methods of Our Research

Our methods are in the tradition encapsulated by Phil Thomas in his editorial to the first edition of the British Journal of Law and Society (now the Journal of Law and Society) in 1974:

> We do not subscribe to the view that the social scientist is to be cast in the role of handmaiden to the lawyer, the lawyer being in the dominant position…We reject that socio-legal studies is to be an arena in which the lawyer solves the problems of society on his own terms.

In our research we have sought to use socio-legal methods to examine the connections in Wales between 'administrative justice', 'administrative law', devolution and people's daily lives. Phil Thomas noted that stepping outside the legal world constructed by lawyers provides for distance but also produces isolation. To avoid isolation, the research has followed a reflexive or constructive methodology, laying principles over practice, and drawing connections between and across two specific case-studies, in social housing and homelessness, and education.

There were three parts to our most recent research. Our general research and related report, *Public Administration and a Just Wales*,[3] examined the key laws, institutions,

[1] UK Administrative Justice Institute: https://ukaji.org/what-is-administrative-justice/
[2] *Submission to the Justice Commission from Dr Daniel Newman*: https://gov.wales/submission-justice-commission-dr-daniel-newman
[3] S. Nason, A. Sherlock, H. Pritchard and H. Taylor, *Public Administrative and a Just Wales* (Nuffield Foundation 2020), online at: https://www.nuffieldfoundation.org/project/paths-to-administrative-justice-in-wales

structure, design, oversight, policy and political context of administrative justice in Wales. In addition, we conducted more detailed case-studies examining public administration and justice in Wales in relation to; social housing and homelessness, and primary and secondary education.[4] In the development of our methods, and in our research conclusions, we argue that the architecture of administrative justice can be best understood from the ground up, by detailed mapping on a subject-matter specific basis, focusing significantly on peoples' experiences, both people subject to and seeking to challenge administrative decisions, and those who make decisions and operate redress mechanisms. In order to conduct this research, we have engaged with policy makers, practitioners and academics in fields including public law, social sciences, politics, public administration, education and housing.

Our research included documentary analysis, identifying, collating and examining law and guidance applicable to Wales. We analysed legal sources alongside various policy documents, previous research reports (especially relating to public administration), and statistical data (on court and tribunal caseloads (where available) and on the use of various other dispute resolution mechanisms). We also presented at conferences in administrative justice, housing and education law and policy, and advice services. Research team members engaged with comparative European and international projects on administrative law and justice, including on law reform and codification. We held an expert meeting of ten academics within the fields of Welsh law and administrative justice shortly following publication of the Report of the Commission on Justice in Wales, examining the Commission's recommendations, and how these might be implemented.

For each case study we held two main day-long stakeholder workshops, each of approx. 30 professionals including; judges, private and third sector lawyers and other advice providers, Welsh Government officials, academics, restorative justice practitioners, representatives from the Welsh Tribunals, from the Public Services Ombudsman for Wales and from some Welsh Commissioners; and more specialist participants from each field such as charities, local authority staff, housing association staff and bodies representing school governors and head teachers. During these workshops we heard presentations from professionals and discussed the key administrative justice issues affecting each sector; from legislation, to avoiding disputes, early resolution and different formal methods of dispute resolution, as well as what gives rise to disputes and how to learn from them, and what reforms could be proposed. We also conducted specific activities in each sector. Overall, we engaged with over 200 people and organisations.

Administrative Justice in Wales: Nature and Awareness

We found an obvious lack of awareness of the concept of administrative justice amongst our research participants - very few had heard the term before. In order to recruit participants for our case-study research, we had to frame our project as exploring 'law and dispute resolution mechanisms', as opposed to using the specific terminology of 'administrative justice'. When we mentioned the phrase potential participants assumed that they did not have relevant experience or competence, or told us that we had misunderstood the devolution settlement where 'justice is not devolved to Wales'. They assumed our project was about courts, judges and lawyers, not the broader notion of justice between individuals and the state which includes first instance administrative decision-making and organisational learning from disputes. Some of these assumptions are not unique to Wales, and in general there seems to be a stark contrast between awareness of administrative justice and the millions of people

[4] S. Nason, A. Sherlock, H. Pritchard and H. Taylor, *Public Administration and Justice in Wales: Social Housing and Homelessness*, and *Public Administration and Justice in Wales: Education* (Nuffield Foundation 2020), online at: https://www.nuffieldfoundation.org/project/paths-to-administrative-justice-in-wales

throughout the world whose central experience of justice will be in the context of public administrative power.

Administrative justice should be especially important in Wales, given its comparatively large public sector, high rates of income poverty, and the proportion of people legally entitled to receive various forms of state support. The Commission on Justice in Wales (Justice Commission), which reported in 2019, acknowledged that: 'Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales'.[5] The Justice Commission also stated that substantive Welsh administrative law is the area with the most potential for short-term divergence from English law. Yet this aspect of the Justice Commission's work has received little attention outside a small cluster of academics and professionals. The political and media focus in Wales has centred almost entirely on the fact that large aspects of criminal justice are not devolved, and the case for and against full devolution of responsibility for prisons, police, probation, courts and legal aid. There is far less awareness of the powers over justice, and most especially administrative justice, already exercised by the Senedd and Welsh Government.

We argue that this is significantly due to a shared characteristic of administrative justice and the Welsh devolution settlement; both are complex concepts, they exist in various shades of grey, and include principles, institutions, mechanisms, and divisions of functions that can often be difficult for non-specialists to understand or to navigate in a meaningful way. There are clearly overlaps between Senedd and Welsh Government social justice activities in areas such as housing, health and education, and reserved functions over what we can call 'legal justice' (courts, tribunals, prisons, police etc). 'Mapping' exercises have begun to highlight where devolved and reserved matters interact within the social justice and 'legal justice' spaces in Wales.[6]

A problem for administrative justice is that it is uneasily characterised as 'system' of justice alongside criminal, civil and family justice, particularly as many mechanisms and institutions of administrative justice are not part of traditional 'legal justice' and are not organised hierarchically. There is also a sense, perhaps especially in Wales, that lawful, fair and reasonable administration, is more as a matter of collective good or collective justice, than individual legal rights and entitlements.

As Phil Thomas has noted about disciplines of research, these 'are not absolutes but territories. They are capable of being created, negotiated, conquered, exploited, developed and lost. Like nation states they are in constant danger, flux and territorial uncertainty'.[7] This is certainly true of the 'discipline' or at least the 'concept' of administrative justice; which has expanded its frontiers, yet has also followed a 'rise and fall' trajectory.[8] The 'rise' of administrative justice has been followed by a significant 'fall' (at UK, and England and Wales level). The 2010 UK General Election is seen as a watershed. Subsequently, academics and practitioners have argued that administrative justice has been undermined for the following, non-inclusive reasons: reforms to judicial review that have made the procedure more difficult to access for ordinary people limiting access to redress and insulating administration from challenge; cuts to legal aid; removing existing rights of appeal including in immigration and asylum and social security decision-making; new bureaucratic redress routes which the UK Government both designs, operates and is the main defendant in;

[5] Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.1.
[6] R. Jones and R. Wyn Jones, *Justice at the Jagged Edge in Wales* (Wales Governance Centre 2019).
[7] P. Thomas, 'Socio-Legal Studies: The Case of Disappearing Fleas and Bustards' in P. A. Thomas (ed), *Socio-Legal Studies* (Dartmouth Publishing 1997) p.13.
[8] See e.g., T. Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in E. Palmer, T. Cornford, A. Guinchard and Y. Marique (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016) 91.

restricting access to tribunals through insertion of compulsory administrative review procedures (which evidence suggests are of variable quality);[9] and failing to address areas of social policy where remedies were already inadequate.

In Wales, since 2013, the Committee for Administrative Justice and Tribunals Wales (CAJTW) was set up to ensure that expert advice remained in place in Wales and that the needs of users of the system continued to be paramount. The Welsh Government disbanded CAJTW in 2016. CAJTW's work facilitated the development of a community of stakeholders, including academic researchers, to continue providing evidence-based research and advice on administrative justice in Wales. However, we argue that this community, and the more recently established UK-wide Administrative Justice Council (AJC),[10] cannot replicate the same level of oversight and accountability achieved by CAJTW, and its forebear. CAJTW's capacity to observe tribunal proceedings (and tribunal-like proceedings such as local authority School Exclusions Appeal Panels) was particularly important and is not replicated elsewhere. Although the President of Welsh Tribunals exercises oversight, this is not the same as the independent monitoring that was provided by CAJTW.

Despite what we see as a backwards step on oversight, and despite the challenges of the 'fall' of administrative justice in reserved matters, devolution has enabled Welsh Government and the Senedd to take a different approach in some contexts that may well have improved the quality of administration and with it administrative justice. Our research highlights examples of good practice in Wales; the recent legislative grant of 'own initiative' powers of investigation to the Public Services Ombudsman for Wales (PSOW) can also be seen as part of a broader movement to ensure systematic injustices in administration are addressed for the longer-term.

Aside from those recent activities of the PSOW, however, our general point is that in practice, very little, if any of the good work in relation to law and administration in Wales is specifically being referred to as part of a 'justice' agenda, competence, or policy. For example, the 2014 Williams *Commission on Public Services Governance and Delivery*, addressed audit and accountability institutions in Wales, and legislation governing public body decision-making, but did not use the phrase administrative justice anywhere in its 353-page report. There is no specific Welsh Government policy for administrative justice and mentions in the Senedd are also rare, though increasing as a result of our research.[11] In its 2016 Report CAJTW suggested 'it may be that elected members sometimes regard administrative justice as an issue for lawyers and theorists, divorced from the day to day concerns of their constituents'.[12]

In our case study areas we were able to drill-down into specific issues of law, policy and practical implementation, to see how administrative justice affects constituents in their day to day lives in Wales. But we were also interested in the 'fit' between this evidence and the broader conceptual questions. In particular, whether the Welsh approach to promoting good administration has value as a conception or ideology of administrative justice, even if the terminology of administrative justice is not used? Second, whether, if there is a need for more specific reference to 'justice' in administration, how should that be understood; should it be in the traditional hierarchical sense of judicial institutions and leadership, as collective

[9] See e.g., R. Thomas and J. Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) *Journal of Social Welfare and Family Law* 380.
[10] With a wide membership of judges, practitioners, academics and third sector representatives, but each acting voluntarily and with no statutory basis for the Council's work: https://justice.org.uk/ajc/
[11] E.g., in a question to the Counsel General in September 2018 following a workshop on *Public Law and Administrative Justice in Wales* which the Counsel General hosted: https://cofnod.cynulliad.cymru/Plenary/5352#C117843
[12] CAJTW, *Administrative Justice: A Cornerstone of Social Justice in Wales – reform priorities for the Fifth Assembly* (March 2016) para 77: https://gov.wales/administrative-justice-cornerstone-social-justice-wales

social justice, or the more individual notion of ensuring effective enforcement of rights and entitlements through clear and accessible redress procedures.

Welsh Administrative Law

The complexity of administrative law and its application was a major theme of our research. Our participants in workshops, focus groups and surveys, noted that legal complexity is a significant reason why people find it hard to challenge administrative decisions which may be unlawful and/or unfair. Participants also noted that a general reluctance of people in Wales to challenge also makes it hard for professionals to identify and progress claims that could help to clarify law and practice for the longer-term. Our analysis of caseload data from tribunals and courts suggested that, where information is available, claims per head of population from people in Wales are slightly lower that claims per head of population from people in England. On the other hand, this reluctance to challenge does not appear to extend to other, non-legal, redress mechanisms such as the PSOW and Commissioners with individual case-work functions.

Education law in Wales in particular is extremely complex and fragmented across a broad range of devolved and non-devolved sources. We received feedback that education law is hard to find. There are many statutes, regulations and guidance documents, complicated by the fact that statutes must be looked at 'as amended'. Despite this complexity we regularly encountered a better understanding of the *devolved* law on certain issues such as special educational needs, contrasted against a weaker understanding of *reserved* law relating to, for example, discrimination; overall there was a general lack of awareness of public sector equality duties despite their longevity in UK law.

There are opportunities to better consolidate aspects of education law in Wales, yet such seems to have been missed in the current Curriculum and Assessment (Wales) Bill. As it stands, instead of bringing together what were chapters 2 and 3 of the Education Act 1996, which formed a fairly comprehensive code on the law relating to the curriculum, this Bill leaves the provisions on religious education and worship (ss 375, 390-392, 394-399) in the 1996 Act and makes amendments or inserts new Wales-only sections to the 1996 Act (e.g. s375A, s391(1A), s396A). Similarly, the provisions on collective worship remain part of the School Standards and Framework Act 1998 subject to amendments or additions of Wales-only provisions. Given the general moves towards making the law more accessible in Wales, we consider that a failure to consolidate all the legal provisions on the curriculum in one Senedd Act would be an unfortunate lost opportunity.

In relation to more general Welsh law, the 2014 Williams Commission recommended that the Senedd review existing legislation imposing duties on public bodies to try and simplify and streamline public sector decision-making. Here the Commission was referring not to subject-area specific administrative law relating to education, health, housing and so on, but to more general legislation, policy and guidance, tending to apply across sectors and/or subjects of public administration. As Sarah Nason has noted, much of this 'new administrative law' affecting public sector decision-making in Wales is concerned to promote sustainability, well-being, rights, and equality.[13] Sustainability is a central organising principle of public administration in Wales, and is expressed as a duty on public bodies in light of the Well-being of Future Generations (Wales) Act 2015 (future generations regime). Key public bodies in Wales are under a duty to practice sustainable development, and specifically to set well-being objectives showing how the body will maximise its contribution to seven well-being goals. These goals are; a more prosperous Wales, a resilient Wales, a

[13] S. Nason, 'The "New Administrative Law" of Wales' [2019] PL 703.

healthier Wales, a more equal Wales, a Wales of cohesive communities, a Wales of vibrant culture and thriving Welsh language and a globally responsible Wales. Public bodies must then 'take all reasonable steps' to meet the objectives they have set as a means to maximise their contribution to the goals.

Together much of the more recent legislation, including the future generations regime, constitutes what Emyr Lewis has called 'high-level soft law regulation', and there is as yet little clarity about how, if at all, this is intended to affect the decision-making of so-called 'street level bureaucrats', and how relevant these new duties on public bodies are to the work of most lawyers in Wales.[14]

In this regard there are some parallels between our research and Phil Thomas' work on the impact of the Human Rights Act 1998 in the Cynon valley, a major sector of the Rhondda Cynon Taff local authority, and one of the most deprived areas of England and Wales.[15] Our research suggests that the 'new administrative law' of Wales, including the future generations regime, is so far not especially well understood amongst generalist solicitors, or people making decisions within the administrative justice system such as local authority staff. This chimes with Costigan and Thomas' findings on the impact of the HRA 1998 on solicitors in the Cynon valley in the early years after the Act's coming into force.

Costigan and Thomas' research found limited awareness of the pervasive nature of the HRA 1998 among solicitors in the valley, and a reluctance to use it as a cause of action. Solicitors noted their concerns that lower courts would not be particularly receptive to HRA 1998 arguments, and that defence solicitors also expressed a preference for more familiar legislative provisions. Although the comparison is not perfect, our research tended to disclose similar views around use of the 'new administrative law' of Wales, including sources such as the Rights of Children and Young Persons (Wales) Measure 2011, the Social Services and Well-being (Wales) Act 2014, and Welsh Specific Equalities Duties (contained in the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011). Even in the Administrative Court in Cardiff it was suggested that these sources are rarely cited, and where they are this tends to be as weaker strands of a case also containing more traditional grounds. Only one of our participant solicitors had sought to make use of this legislation and considered themselves somewhat notorious for their lack of success in doing so.

Unlike section 6 of the HRA 1998, many of the duties in the 'new administrative law' of Wales are not directly enforceable at the suit of individuals. The duties are variously expressed as to have 'due regard', or to 'take into account' certain matters, or to 'take reasonable steps' to achieve particular objectives. Training about what these different terms of legal art are likely to mean is then especially important. Phil Thomas noted that training on the HRA 1998 was patchy in the Cynon valley, whereas we would argue there have been comparatively more opportunities for training on new Welsh administrative law including online training. However, the nature of the new duties and their variable expression means that targeting appropriate training to relevant individuals within public bodies (especially 'street level bureaucrats') can be more difficult; and improving awareness and increasing practical use in litigation is even more challenging than might have been the case with the HRA 1998.

Even where it is practically possible to access litigation, judicial review in particular, litigants may well find that the 'new administrative law' of Wales does not assist. Refusing permission in a case based on well-being duties under the future generations regime Lambert

[14] 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-a4f3b4fbeea7/public_health_wales_act_2017making_wales_a_leader_in_public_health.pdf

[15] R. Costigan and P.A Thomas, 'The Human Rights Act: A View from Below' (2005) 32(1) *Journal of Law and Society* 51.

J did 'not find it arguable that the 2015 act [future generations regime] does more than prescribe a high-level target duty which is deliberately vague, general and aspirational and which applies to a class rather than individuals'. As such she concluded that 'judicial review is not the appropriate means of enforcing such duties'.[16] In 2004 Costigan and Thomas noted that HRA 1998 arguments might of their nature be more 'creative', it may well take a high degree of ingenuity to persuade the courts that some aspects of the 'new administrative law' of Wales are even justiciable.

Welsh Government has committed to 'commencing' section 1 of the Equalities Act 2010. This requires that public bodies taking strategic decisions are to have due regard to the need to reduce the inequalities of outcome that result from socio-economic disadvantage. It will not apply to the day to day decision-making of 'street level bureaucrats', but rather to medium and longer-term matters like corporate plans, Welsh language and well-being strategies. This seems to be yet another shade of duty, it is not as concrete as the section 149 Public Sector Equality Duty and does not go as far as making socio-economic inequality a protected characteristic (that would give more protection to individuals). There is no duty to actually resolve any inequalities of outcome. Whilst further guidance on what is a strategic decision might give more of a steer as to whether, and to what extent, the duty is intended to be justiciable, the ability to use the provision as a ground for practical legal challenge may still be unlikely.

We argue that promotive and strategic duties alone are not enough to ensure justice in relationships between citizens and the state in Wales, though the value of the societal and organisational cultural change they encourage should not be underestimated. Welsh Government's Gender Equality Review has already begun to look at how these strategic and promotive duties can be better aligned, including by rationalising and specifically 'de-layering' some of the frameworks of policy, legislation and guidance. There is at least some potential for expressing some of these principles, especially those that can be translated into concrete human rights and entitlements, into more specific duties with rights to individual redress.

Our case-study areas show that the actual and potential impacts of rights-based administrative law and policy are mixed. In June 2019 Tai Pawb, CIH Cymru and Shelter Cymru recommended direct incorporation of the right to housing including a specific route to legal challenge on breach, arguing that this allows for 'strong enforcement if the right to housing is breached'.[17] The current Welsh Government approach is of either a policy framing duty or 'due regard' duty in guidance that would be largely promotive and/or procedural. Whilst our research participants recognised the potential value of a 'right' to adequate housing as a means to establish a framework for policy, many were concerned that it could lead to unrealistic expectations on social housing providers, and that it would have little practical impact unless coupled with an extensive increase in social housing stock; and that a duty on local authorities in an environment where much stock is now held by housing associations would add another layer of complexity.

In education, the Rights of Children and Young Persons (Wales) Measure 2011 incorporated the UN Convention on the Rights of the Child (UNCRC) indirectly into Welsh law. Article 28 UNCRC recognises 'the right of the child to education' at different levels, and Article 29 provides direction on the appropriate aims of education in order to ensure the maximum development of the child's potential, preparation for participation in society, and the inculcation of respect for family, culture, national values and other civilizations and the

[16] See Nason et al, *Public Administration and a Just Wales* (n 3) Chapter 6.
[17] S. Hoffman (Swansea University) for Tai Pawb, CIH Cymru and Shelter Cymru, *The Right to Adequate Housing in Wales: Feasibility Report* (June 2019): https://www.taipawb.org/wp-content/uploads/2019/06/RightToHousing-ExecSummary-ENG.pdf

environment. While the new curriculum planned for Wales (Curriculum and Assessments (Wales) Bill) aligns with many of the aims expressed in Article 29, the extent to which the new curriculum has been directly influenced by the UNCRC is unclear. The Children's Commissioner expressed disappointment in January 2020 that the Bill was not to include an obligation to have regard to the UNCRC.[18] In contrast, the Additional Learning Needs and Education Tribunal (Wales) Act 2018 includes the duty for certain bodies to have regard to the UNCRC, and in addition the Convention on the Rights of Disabled Persons. While many issues such as exclusions, performance and the curriculum are often referred to in the context of the right to education, a key driving force behind the different policies is the commitment to equality. Whether this driver is a consequence of the expressed commitment to the UNCRC, or the commitment to the UNCRC is itself a consequence of a desire to further a more equal Wales is difficult to answer. And, while there is an expressed commitment to the UNCRC, this has not always translated into successful delivery in practice, especially where resources are required. 'Policy rich but implementation poor' was a description of Wales used by a Senedd Committee in 2011; it remains a challenge in today's Wales.[19]

Rather than the substantive provisions on education, it is perhaps easier to see the direct influence of Article 12 of the UNCRC on the participation rights of children and young people. This focus on the participation agenda in the early years of devolution in particular is unsurprising since it was perhaps more easily accommodated, than changes to substantive education law would have been, within the limited depth and breadth of the Senedd's powers until 2011. For example, school councils became compulsory in Welsh schools in 2005,[20] a move which Estyn regarded at the time as having 'enabled the participation agenda to make progress and gain support quickly in schools'.[21] Also in pursuance of greater participation, the right to complain about an exclusion and appeal against a permanent exclusion was given to children over 10 and young people in 2003:[22] in contrast, it remains the case in England that the 'relevant person' who may complain or seek review of an exclusion is the parent unless the learner is 18 or over.[23] The Education (Wales) Measure 2009 provided for an extension of appeal rights to the Education Tribunal for children and young people.[24] In contrast, the position in England restricts the right of appeal to parents and young persons over compulsory school age.[25] Of course, the provision for participation rights in legislation does not guarantee that they will be enjoyed in practice: the evaluation of the pilot scheme extending tribunal appeal rights to children and young people found only one case which had been taken by a child.[26] Academic comparative research on Wales and Northern Ireland

[18] Children's Commissioner for Wales, Quarterly Update, January 2020, 11-12: https://www.childcomwales.org.uk/wp-content/uploads/2020/02/Quarterly-Updates-January-2020.pdf
[19] *Legacy Report of the Children and Young People Committee,* March 2011, para 179: https://www.assembly.wales/Laid%20Documents/CR-LD8509%20-%20Children%20and%20Young%20People%20Committee%20Legacy%20Report-29032011-213805/cr-ld8509-e-English.pdf
[20] School Councils (Wales) Regulations 2005, SI 2005/3200. They are not compulsory in England but most schools there have one: Whitby and Wisby, *Real Decision Making? School Councils in Action* (Institute of Education, 2007).
[21] Estyn, *Young people's participation in decision making 2005-2006*, para 34.
[22] The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) 2003, SI 2003/ 3227, reg 2 regarding the definition of 'the relevant person'.
[23] School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012/1033, reg 2.
[24] By amending the Education Act 1996. These provisions are now part of the ALN Act 2018.
[25] Children and Families Act 2014, s51.
[26] D. Holtom, S. Lloyd-Jones and J. Watkins, *Evaluation of a Pilot of Young People's Rights to Appeal and Claim to the Special Educational Needs Tribunal for Wales* (Welsh Government, 2014).

concluded in a similar vein.[27] On the other hand, the President of the Education Tribunal stated in her 2014-15 Annual Report that although there had been only one appeal received from a child at that point, the 'very nature of the legislation around children's rights to appeal has improved the culture of listening to and hearing the voices of our children and young people'.[28] Our feedback from parents was that the Education Tribunal was very receptive to listening to the children and young people whose cases were being examined. However, owing to financial and knowledge constraints, many will not be aware of, or able to access, the Education Tribunal or judicial review. It may be that the human rights agenda has improved the experience of those who can and do access these redress systems, but the barriers to accessing these systems in the first place clearly remain.

Paths to Justice

In general, when Welsh Government and the Senedd have exercised powers to create new substantive law, the redress mechanisms they have selected are largely carbon copies of those in existing England and Wales legislation and guidance, including redress through reserved courts and tribunals. Welsh Government and the Senedd have so far been reluctant to make greater use of the devolved tribunals operating in Wales, and both our research, and the Commission on Justice in Wales, recommended that when new duties are created under Welsh administrative law, redress should generally be to a devolved Welsh tribunal. The housing context provides an example, as reforms to housing dispute resolution, proposed both by UK Government, and a Working Group of the Housing law Practitioners Association, would, if progressed, each have a distinctive impact in Wales. Welsh Government and the Senedd may soon be forced to decide whether to continue to align their approach to resolution of housing disputes with that of England, despite the growing differences in policy, regulation and substantive law.

In education, the Special Educational Needs Tribunal for Wales is re-named as the Education Tribunal Wales, and there is at least an implicit assumption that the jurisdiction of the Tribunal may expand in time to cover other educational matters such as school exclusions. Some of our participants thought there was little 'justice' to be had in school exclusions decision-making and redress processes. We propose that there should be a review of governing body level exclusion challenges, and that this should consider: the independence, actual and perceived, of school discipline committees from the head teacher whose decision they are considering; the training available to, required for, and taken up by, members of school discipline committees; whether there is an alternative to these decision being made by governing bodies; or whether the decisions of discipline committees could be reviewed by an external body such as the PSOW or the Education Tribunal (whether in all cases or in cases of more lengthy fixed term exclusions). We also recommend that Welsh Government should consider whether appeals against permanent exclusions should be brought within the jurisdiction of the Education Tribunal; or that if the current system of exclusion appeals to independent panels remains in place, it is considered whether, by way of exception, permanently excluded learners with special educational needs should be given the right to appeal to the Education Tribunal.

The Commission on Justice in Wales concluded that the 'current system of challenging public bodies in Wales is complex', and more explicitly that the 'system of administrative justice [is] undoubtedly difficult for individuals to understand and use'. We

[27] O. Drummond, 'When the Law is Not Enough: Guaranteeing a Child's Right to Participate at SEN Tribunals' (2016) 17 (3) *Education Law Journal* 149; https://ukaji.org/2016/11/30/child-participation-at-special-educational-needs-tribunals/

[28] SENTW, Annual Report 2014-15 (October 2017), p 3.

certainly found this to be the case. The Commission recommended that as 'a short term measure there is a need for better coordination in relation to administrative justice so that the public have a clear understanding on where to go to have their disputes resolved'.[29] Our research shows that this co-ordination would benefit from being from the ground up, through better training for public officials, improved quality of, and access to, information, advice and assistance, and continued comity within the administrative justice sector (whilst recognising that closeness in itself can cause some problems for ensuring effective monitoring and accountability). Although there are genuine attempts, including those required or encouraged by legislation, to engage people as users of services, this is often through, and mediated by, representative organisations, rather than through direct engagement. There are very limited opportunities for individuals to engage in any meaningful way in the design and co-ordination of routes to redress in the administrative justice system. Further ways to engage 'users' should be explored, but again our concern is that the focus on 'user' perspectives could well be lost in the absence of a dedicated oversight body such as CAJTW.

Our research highlighted the extent to which partnership and collaborative working, including contracting out, shared services and framework agreements, make it difficult for individuals to know who is actually taking administrative decisions that affect them, and thus which routes to redress they should follow if they are dissatisfied. The fact that redress routes can differ, often without much justification, depending on the type of body/individual making a decision, and the specific legislation underpinning that decision also further complicates this picture. Much of this is due to the way the administrative justice landscape has built up 'ad hoc', and a lack of longer-term leadership and oversight in relation to these developments.

Administrative Decision-Makers and the Law

Phil Thomas counselled expanding 'down' and 'out' from traditional doctrinal and legal institutional approaches to research, and for us this also means paying closer attention to the internal workings of administrative decision-making processes. Our workshop and focus groups discussions with street-level bureaucrats in housing and education departments of local authorities, for example, demonstrated that it is not uncommon for guidance and policies laid down by the authority to be treated by decision-makers as if such were law, with officials not appreciating or acknowledging the extent of their own discretion, or the extent of internal culture as influencing their decision making.[30]

More thought needs to be given to whether appropriate training is being provided, and the impacts of the decision-making role on those conducting it. We heard examples of a perennial problem for administrative law, namely how to understand distinctions between law and policy, and between rule-governed and discretionary decision-making, and particularly how increases in the volume of soft-law (such as guidance and various new frameworks), that are tools to support decision-making, can lead to confusion about the appropriate space for discretionary judgement. This demonstrates how changes in administrative law legislation (not just in substance but also in the approach to administration promoted) have a knock-on effect at individual decision-making level, and this needs to be better understood, and those taking decisions better supported.

We also heard the view that it is not being made clear to people exactly 'when' formal administrative decisions have been made (rather than when they are being given general information about their situation). There also seems to be some lack of clarity between

[29] Justice Commission, para 6.60.
[30] S. Nason et al, *Administrative Justice in Wales (Housing and Education Reports)* (n 4).

information giving conversations and informal dispute resolution, with individuals feeling that they are pressured to 'take what is on offer' through an informal (but pressured) conversation, whereas a more formal review would have had more safeguards. This lack of clarity might be a product both of insufficient training and/or organisational culture relating to disputes and avoiding disputes.

On the whole, local authorities do not collect the full range of data on the use of their internal administrative dispute resolution mechanisms, including informal resolution, and the outcomes of these mechanisms. When data about dispute resolution is kept, this can be across a range of systems, not easily accessible as a means to future learning about the 'quality' of administrative decision-making.

We also heard that some, perhaps even a large proportion, of those taking, or otherwise involved in, many decisions in the administrative justice sector in Wales are unpaid (such as school governors) and there is a need to balance training, especially on complex issues, with people's willingness to volunteer. The knowledge of school governors was regarded as variable by our participants, including some who have served as school governors themselves. We recommend that training generally, especially for local authority staff, should use clear practical examples in order to help decision-making staff understand the differences between mandatory legal requirements, discretionary powers and 'due regard' duties. In addition, it should be clear what is the local authority's own policy as to how the law is implemented and what is legally required.

Sometimes a shortage of resources can lead to problems. This was felt to be the case in education when schools struggle to provide for special educational needs or disability, and in housing in the context of available social housing stock. It was also felt by our participants that sometimes issues regarding resources are more to do with a lack of understanding of what the law requires: access is being 'gate-kept' through the use of policies and thresholds. We heard that some issues concerning discrimination are down to the fact that funding is scarce but at other times down to ignorance about what the law requires. Problems with capacity and resources in the education sector were seen as combining with problems concerning access to advice, understanding of law and policy to create a 'perfect storm.' There was the view that 'problems are not always down to funding, but funding is often in the mix'. In general, there appeared to be a feeling that scarce resources frame the context in which everything else has to be made to work. Where disputes concern the provision of resources, it is easier to see how the effects of austerity can escalate problems. However, some disputes about the adherence to procedures are less directly associated with the scarcity of resources.

The landscape as a whole then needs to be adequately resourced to enable decision-makers to be supported to make good decisions, to understand applicable law with practical examples, and to take a range of factors into account. This will also help ensure that the whole process operates compassionately, fostering a broader administrative justice culture.

Challenging Decisions and Access to Administrative Justice in Wales

Thomas, Costigan and Sheehan's 2004 report on the impact of the Human Rights Act 1998 on the Cynon valley in South Wales, was premised on 'the belief that social justice can be promoted through law' but with the caveat that certain preconditions, such as awareness and financial capacity, must be met in order to realise this objective.[31] Our research respondents noted that even when legal rights to seek review or appeal of particular administrative

[31] R. Costigan, J. Sheehan, P.A. Thomas, *The Human Rights Act 1998: An Impact Study in South Wales* (Cardiff Law School, 2004) [15].

decisions (in both housing and education) are stated clearly in legislation, and/or in guidance, or even expressed specifically in a decision letter addressed to an individual, lack of access to advice is still a major barrier to accessing and navigating routes to redress. In order for advice services to be effective, people must be able to access them, but also be able to access broader support (mental health, debt advice, physical health etc) even when they might not be inclined to do so. Our respondents thought that often information about advice, support and advocacy is available, but 'you have to know where to look' and how to frame the issues was a common refrain.

Our research respondents considered that legal advice is difficult to access due to restrictions on legal aid, the resulting lack or patchiness of provision, and that third sector services are over-stretched. Limited access to advice outside the main urban areas of South Wales remains a problem. Respondents also noted the complexity of the landscape, where public funding is available to challenge some aspects of administrative decision-making but not to challenge other aspects with little justification as to why. There was a feeling that more could be done to provide clear and easy read information to people about their rights, including their rights to independent legal advice, as early on as possible.

Phil Thomas' work looking at legal services in Dyfed in South West Wales recognised the predominance of private practice solicitors in Wales, and this seems still to be the case. The 2019 the LSB 'Legal Needs of Individual in England and Wales' Report found a statistically significant difference between the populations of Wales and England in terms of the proportion of respondents whose main source of advice was a solicitor (this was 36% for Wales, compared to 29% for England).[32] The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) led to a disproportionate reduction of legal aid expenditure in Wales. The real terms reduction in England between 2011/12 to 2018/19 was 28%, in Wales it has been 37%.[33] There are geographical areas in Wales with sparse provision (so-called 'advice deserts') and a larger proportion of firms in Wales have reported changes to legal aid as being a significant problem as compared to firms in England.[34] Newman concludes that legal aid cuts may well have resulted in more harmful impacts in Wales in light of higher rates of income poverty. He also finds that it is the people less able to pay for legal services in Wales who are most likely to need them, concluding that 'to expect payment to achieve fair treatment is a de facto tax on the poor'. This was certainly reflected in the views of our participants. Many considered there to be an imbalance, especially in the education context, between parents who could pay for expert legal advice, and those who could not. Also in the education context, access to advocacy as early on as possible was felt to be important. The all-Wales approach to statutory advocacy is regarded positively but it is the non-statutory side (for children who do not have a social worker) that might fall down. The view shared by many was that the earlier advocacy support can be offered, the greater the chance of avoiding problems arising or escalating.

It is clear from Phil Thomas' writing that he recognised the pressures on sole practitioners and small firms in Wales, and their dedication to provide for the direct needs of their clients, many of whom might be receiving benefits, and dependent upon legal aid. In his work in 1986, Thomas concluded that legal support, information and advice, are not services that can be provided for exclusively by private practitioners. A better approach is a tripartite process involving solicitors, general advice agencies such as Citizens Advice and specialist

[32] https://www.legalservicesboard.org.uk/online-survey-of-individuals-handling-of-legal-issues-in-england-and-wales-2019

[33] G. Ifan, *Public spending on the justice system for Wales* (Wales Governance Centre, May 2019).

[34] S. Harper and Public Law Project, 'Submission from Public Law Project of evidence to the Commission on Justice in Wales' (June 2018) https://gov.wales/sites/default/files/publications/2018-08/Submission-from-public-law-project.pdf

agencies such as Law Centres. Welsh Government is working towards a more holistic approach to advice services, with the development of a National Advice Network, a Single Advice Fund (administered by Citizens Advice) and Regional Advice Networks (RANs). The RANs are mapping local advice services and seeking a more coordinated approach to provision and referrals, including through the use of technology.

Whilst our research participants were generally in favour of a more co-ordinated approach to advice services, they expressed some concerns about local authorities who are responsible for initial administrative decisions, also being encouraged, or required, to arrange for the provision of information and advice, and in some cases to make arrangements for alternative dispute resolution. There are genuine concerns here about independence and impartiality, and that local authorities appeared to be cutting back on their funding for external bodies and taking more advice roles in-house.

A Pathology of Legalism or a Just Wales?

Phil Thomas encouraged scholars to look beyond disciplinary boundaries and focus on the frontiers; the edges of a legal system help us to better understand that system 'in the pathological case rather than the normal'.[35] Scholars of administrative justice have identified what they term a 'pathology of legalism',[36] (otherwise referred to as 'Law's Empire'[37]) prioritising court-based protection of social and economic rights, as against other mechanisms for improving social justice by the promotion of good administration, and less formal and relational methods of dispute resolution. This pathology of legalism seems quite the opposite to the current position in Wales, and we would warn against seeing it as a panacea.

In recent years the Welsh Government is focussing its efforts in response to the Justice Commission on a Law Commission project to reform and rationalise the set of devolved Welsh Tribunals. This is an important task, but also a notable emphasis on the judicial dimension of administrative justice, whereas CAJTW's broader 2016 recommendations about administrative justice culture, internal review, training for administrators and elected representatives, clarity of redress routes (outside courts and tribunals) and so on, are not being progressed at this time. The more traditional 'legal justice' (pathology of legalism) or judicial dimension also seems to have been the focus of the Justice Commission. It recommended that, in the longer-term: 'Dispute resolution before courts, tribunals, alternative dispute resolution and ombudsmen, as well as dispute resolution in respect of administrative law, should be promoted and coordinated in Wales through a body chaired by a senior judge'.[38] The Commission gives an impression that improving the administrative justice 'system' in Wales requires repositioning it more in the image of a traditional 'legal justice' system overseen by a senior member of the judiciary. This perception is further bolstered by the Commission's recommendation that:

> All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh Tribunals, should be brought under the supervision of the President.[39]

[35] P.A. Thomas, 'Introduction' in P.A. Thomas (ed.) *Legal Frontiers* (Dartmouth Publishing Company Ltd. 1997) 7.
[36] J. King, *Judging Social Rights* (Cambridge University Press 2012).
[37] M. Doyle and N. O'Brien, *Reimagining Administrative Justice: Human Rights in Small Places* (Palgrave Pivot 2020).
[38] Justice Commission, Recommendation 21.
[39] Justice Commission, Recommendation 25.

This recommendation has been quietly dropped, we suggest, because it misunderstands the pathology of administrative justice in Wales. The PSOW responded that its independent jurisdiction should not be subject to oversight by a member of the judiciary. The juxtaposition of judicial and non-judicial might well be seen as arcane, and the oversight role anticipated for the President of Welsh Tribunals may go beyond that which is contemplated in the Wales Act 2017 and related Regulations establishing the post.

Instead of a pathology of legalism for administrative justice in Wales, we recommend that at least some of the foundations for an alternative pathology of 'a just Wales' are already evident. First Minister Mark Drakeford AS has in the past, described good administration as the first principle of social justice in devolved Wales, proposing a set of core principles including the value of good governance, an ethic of participation, and improving equality of outcome.[40] Many of the principles he set out are encapsulated in the future generations regime, but this may not go far enough at present to set out a comprehensive agenda for social justice, which we believe should have, as CAJTW put it, administrative justice as its 'cornerstone'.

We questioned at the outset whether the Welsh approach to promoting good administration has value as a conception or ideology of administrative justice, even if the terminology of administrative justice is not used, and we suggest that indeed it does. However, we argue that there is a need to further develop a justice culture at all levels of public administration in Wales. A positive development since we completed our research is that a Cabinet Sub-Committee on Justice has been created within Welsh Government. The Senedd Constitutional and Legislative Affairs Committee has also changed its name, and remit, to the Legislation, Justice and Constitution Committee, and has commenced an inquiry into 'Making Justice Work in Wales'.

In determining how 'justice' should be understood in Wales, we conclude that aspirations towards rights, equality and good administration must be more explicitly recognised as matters of justice for individuals, and that ensuring proper access to administrative justice redress mechanisms can help bridge the gap between social justice policy and implementation. This *does* require more emphasis on the provision and effectiveness of rights to individual redress, but such should not be achieved at the expense of less formal structures of collective justice advocated within the future generations regime. UN Sustainable Development Goal 16 relates to Peace, Justice and Strong Institutions, with targets to ensure equal access to justice for all, and to develop effective, accountable and transparent institutions. Most ambitiously perhaps, we suggest that the goal of 'a just Wales' could be added to the future generations regime, with guidance used to articulate administrative justice principles (such as fairness, transparency, proportionality and a right to redress), that could be promoted across all aspects of justice devolved to Wales.

[40] M. Drakeford, 'Social Justice in a Devolved Wales' (2007) 15(2) *Journal of Public Finance and Public Choice* 171.