

## **Building a Welsh Jurisdiction through Administrative Justice\***

In light of the current debate around establishing a separate or distinct legal jurisdiction for Wales, the aim of this chapter is to highlight that administrative justice is an area where differences in the administration of justice are already occurring in Wales as compared to England and other parts of the UK. In particular the chapter will focus on devolved tribunals in Wales and comparable tribunal reforms in other devolved parts of the UK. I consider the ongoing development of the devolved Welsh tribunals and the place of these institutions in debates surrounding a future Welsh legal jurisdiction.

### **Background**

Devolution, and discussions regarding the appropriate constitutional settlement for Wales, have undergone considerable development since the enactment of the Government of Wales Act 1998. The 1998 Act established a National Assembly for Wales as a corporate body with executive functions over 18 devolved fields.<sup>1</sup> Subsequent developments included the introduction of a form of attenuated legislative powers devolved to the Assembly through Part 3 of the Government of Wales Act 2006, and full legislative powers through Part 4 of the same Act over 21 devolved subjects, though retaining the original conferred powers model.

Throughout the process of the reforms, there was no intention to affect the unified England and Wales legal jurisdiction. The explanatory notes to the 2006 Act state that:

[Wales] forms part of a single unified England and Wales jurisdiction with a common courts system, judges who can act throughout the two countries and lawyers who are educated and who practice in a way which does not distinguish between England and Wales. There is no intention to change this.<sup>2</sup>

However, as Sir Gary Hickinbottom has noted, despite the single legal jurisdiction, to consider justice as completely undeveloped would be rather ‘simplistic and misleading’.<sup>3</sup> In the field of administrative justice, and of devolved tribunals in particular, elements of a separate Welsh jurisdiction are already evident.<sup>4</sup>

The aims of this chapter are first, to use the Welsh tribunals as a prism through which to identify elements of a Welsh jurisdiction and second, to examine how reforms to devolved tribunals might contribute to the shaping of a broader Welsh legal system. As noted by the Administrative Justice and Tribunals Council (AJTC):

Welsh tribunals are still insufficiently recognised as part of an independent justice system and it remains to be seen how aspirations for a Welsh justice system may take shape.<sup>5</sup>

### **The jurisdiction debate in Wales**

In 2008, Carwyn Jones AM, who was Counsel General at the time, highlighted that Wales could be in a relatively unique position of having primary law making powers but no unique legal jurisdiction under which to challenge or enforce those laws.

...if a situation arises whereby the Assembly has primary law making powers, it is inevitable, in my opinion, that we will have to have a debate on whether or not to retain a single unified jurisdiction for England and Wales. I'm not aware of anywhere else in the world which has a legislature with law making powers but no corresponding territorial jurisdiction.<sup>6</sup>

Regardless of those comments, when primary law making powers were introduced to the National Assembly, through Part 4 of the Government of Wales Act 2006, the new settlement successfully bridged these jurisdiction concerns by constitutional 'sleight of hand'.<sup>7</sup> Section 108 of the 2006 Act provides that an Act of the Assembly applies to Wales, but extends over England and Wales. In turn, this gives authority to courts in either England or Wales to enforce Welsh laws, thus retaining the single unified jurisdiction.

This technical solution provided what might come to be seen as a medium-term resolution of the legal issue, but political debate regarding a separate jurisdiction for Wales continued. The Constitutional and Legislative Affairs Committee of the National Assembly for Wales launched an *Inquiry into a Separate Welsh Jurisdiction*, reporting in December 2012.<sup>8</sup> The Welsh Government also conducted its own consultation which fed into evidence to the Commission on Devolution in Wales (the Silk Commission) in 2013.<sup>9</sup>

Both consultations fell short of advocating the immediate establishment of a separate jurisdiction. The Assembly concluded that, 'changes should be made within

the current unified Wales and England model to ensure that it reflects and recognises this emerging [Welsh] legal identity'.<sup>10</sup> Similarly, the Welsh Government were of the opinion that 'it would not be appropriate' to establish a Welsh jurisdiction at the time but that it should be considered as a long term aim alongside the devolution of policing and criminal justice.<sup>11</sup> The Silk Commission did not directly answer the jurisdiction question, but reflected these opinions in its conclusion that further administrative devolution of certain justice areas could be achieved whilst full legislative devolution over justice matters should be 'reviewed within ten years'.<sup>12</sup>

Administrative Justice, and tribunals in particular, were considered as part of the consultations and responses to the Silk Commission. However, the significance of devolved tribunals was not fully appreciated at the time. For example, the Silk Commission noted that the Welsh Government had executive powers over devolved tribunals and that it should continue to be the 'authority responsible' for those tribunals, but this did not seem to impact upon its final conclusions about the devolution of justice.<sup>13</sup> The Welsh Government held strong views on fully devolving executive powers over certain tribunals to allow a coherent system of devolved tribunals in Wales to be created.<sup>14</sup> However, administrative justice was framed as an issue of 'public administration', rather than a direct justice matter, and so its impact on the jurisdiction debate was limited.<sup>15</sup> This seems to be contrary to contemporary thinking regarding the role of tribunals, for example the influential Franks and Leggatt Reports had maintained that tribunals should be seen as legal institutions rather than administrative bodies.<sup>16</sup>

The debate regarding a Welsh jurisdiction progressed significantly at the end of 2015 when the Welsh Government dramatically changed its stance and began to

advocate for an immediate distinct, rather than separate, Welsh jurisdiction, in light of UK Government proposals to reform the devolution settlement for Wales.<sup>17</sup>

In this chapter I contend that the current system of devolved tribunals should take more prominence in the debate regarding establishing a Welsh jurisdiction. In particular because the Welsh Government already administers justice functions in relation to most of these tribunals. The Welsh Government ultimately intends that additional justice responsibilities should be devolved and a Welsh jurisdiction fully recognised.<sup>18</sup> I argue that by analysing the challenges that devolved tribunals face, we can identify problems and propose solutions that may have wider implications if (or when) further justice functions are devolved.

### **What is a jurisdiction?**

The literal definition of the term jurisdiction can be separated into two distinct parts based on its latin root. The first originated from the term *ius*, for ‘the law’, and the second, *dicere*, to declare the law.<sup>19</sup> Therefore, it denotes who has authority to speak, or declare, the relevant body of law.<sup>20</sup> Thus jurisdiction is the practice of pronouncing the law; it declares the existence of law and the authority to speak in the name of the law.<sup>21</sup>

In their article, *Wales as a Jurisdiction*, Tim Jones and Jane Williams set out the main characteristics deriving from this definition. These are; a defined territory, a distinct body of law, and a structure of courts and legal institutions.<sup>22</sup> The debate in Wales has largely revolved around these three characteristics. In particular, whether any of these characteristics exist to such a significant degree in Wales as to entitle Wales to

be recognised as a separate jurisdiction.

Various statutes recognise that Wales has a distinct territory.<sup>23</sup> The main debate in Wales has instead surrounded the fact that there is a growing body of distinct Welsh law but, to a large degree, no distinct system of courts or other legal institutions to enforce it.<sup>24</sup>

Some have argued that a sufficient amount of distinct laws are required to justify establishing a separate jurisdiction so that there are enough cases to generate legal principles and to sustain the work of the courts.<sup>25</sup> However, according to the literal meaning of the word jurisdiction, it is the authority of the institutions which apply the law that is most significant, not the source of these laws. From a jurisprudential perspective, HLA Hart noted that it is possible to define important concepts such as ‘judge or court, jurisdiction and judgment’ through the secondary rule of adjudication.<sup>26</sup> Joseph Raz went a step further by claiming that a system of norms, ‘is not a legal system unless it sets up adjudicative institutions’.<sup>27</sup> As a result, Raz identifies norm-applying institutions as central to a legal system, as these institutions establish which norms are valid. Such institutions also have the last say on the behaviour of individuals and legally inferior bodies.<sup>28</sup> Raz explains:

This solution shifts the emphasis on to the law-applying institutions, and makes recognition by law-applying organs a necessary condition of the existence of laws. This in turn makes the institutionalized nature of law an indispensable part of the criteria of identity: a law is part of the system only if it is recognized by legal institutions. The emphasis is, however, on the law-applying rather than the

law-creating institutions.<sup>29</sup>

In this regard, section 108 of the Government of Wales Act 2006 ensures that the courts of England and Wales have authority to determine matters of Welsh law even though they also have authority over English law. To this extent, in its broadest interpretation, a Welsh jurisdiction does exist, although it overlaps with the England *and* Wales jurisdiction and no court has jurisdiction which extends only to Wales.<sup>30</sup>

Thomas Glyn Watkin reframes the current debate by posing two key questions:

...should courts in Wales have exclusive jurisdiction (in the strict sense) over laws which apply only in Wales; and,

...should courts in Wales have exclusive territorial competence (in the strict sense) over cases which relate primarily to Wales under the law which applies to England and Wales.<sup>31</sup>

Answering both these questions in the affirmative would effectively curtail the overlap with the England *and* Wales jurisdiction. In effect, the Welsh Government's aim of creating a distinct jurisdiction for Wales would begin this process. Under its proposals, the current single body of law and court structure would be split to create two parallel distinct legal jurisdictions of Wales and of England, but which would initially be served and administered by a common judiciary and courts service.<sup>32</sup>

I contend that Wales already has legal institutions that fulfil the literal definition of the term jurisdiction, as seen above, by having exclusive jurisdiction, and territorial

competence in Wales. These institutions are the devolved tribunals in Wales.

### **Tribunals as legal institutions**

There are several competing definitions of administrative justice. Each essentially revolving around the relationship between citizens and the state in the context of a just public decision-making process.<sup>33</sup> Administrative justice also includes a range of different redress mechanisms, including internal review within public bodies and judicial review by the Administrative Court.<sup>34</sup> In this chapter I focus on tribunals as external redress mechanisms.<sup>35</sup> The significance of tribunals increased dramatically during the latter half of the 20th Century and they are now regarded as ‘an essential’ part of the justice system;<sup>36</sup> not least because they are now regarded as judicial bodies. The Franks Report in 1957 concluded that, ‘tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration’.<sup>37</sup>

The Leggatt Report reiterated the Franks position by stating that, ‘tribunals are an alternative to court, not administrative, processes’.<sup>38</sup> This recognition required consideration of more fundamental concepts such as the necessary independence and impartiality of tribunals.<sup>39</sup> In this regard, Sir Andrew Leggatt opted to treat all tribunals within his remit as judicial bodies. He utilised Article 6 of the European Convention on Human Rights as a benchmark of judicial independence, though Article 6 is still of variable application in administrative law matters.<sup>40</sup> As a result, Leggatt recommended securing the independence of tribunals from government departments, establishing a Tribunals Service<sup>41</sup> to provide administrative support, and rationalising tribunal



jurisdictions into a new two-tier tribunal structure.<sup>42</sup>

Franks, and Leggatt, initiated reforms that have led to the apparent ‘judicialisation’ of tribunals.<sup>43</sup> It can be argued that this does not capture the complexity, and wide nature and functions of different tribunals as some may still have characteristics that are better described as administrative or executive rather than judicial.<sup>44</sup> However, the notion that tribunals are external judicial bodies has become increasingly prominent in recent years, especially following the enactment of the Tribunals, Courts and Enforcement Act 2007 (TCEA).<sup>45</sup> Constitutional guarantees of judicial independence have been expanded to the listed tribunal judiciary and tribunal members,<sup>46</sup> and both case law and statute recognise the Upper Tribunal as a superior court of record.<sup>47</sup>

Devolved tribunals were not considered as part of the Leggatt Report and, although the Report notes the potential significance of devolution, its recommendations are restricted to tribunals with jurisdiction over England, England and Wales, Great Britain and the United Kingdom.<sup>48</sup> The consequence of this is that devolved tribunals, across all the devolved UK nations, remain outside the two-tier structure established by the TCEA 2007.

### **Development of devolved tribunals in Wales**

On a territorial level, it is arguable that some tribunals have operated distinct Welsh jurisdictions even prior to devolution. For example, the Agricultural Land Tribunal has operated a Welsh unit, among other regional units, since 1982.<sup>49</sup> Similarly,

the Mental Health Review Tribunal also operated a Welsh area under section 122 of the Mental Health Act 1959.<sup>50</sup> However, more recognition of Welsh tribunals was achieved as a side-effect of executive devolution under the Government of Wales Act 1998. Executive functions over 18 devolved fields, listed in Schedule 2 of the Act, were transferred to the National Assembly for Wales. Powers over administrative tribunals within those fields were also devolved.<sup>51</sup> For example, a Transfer of Functions Order in 1999 devolved functions under the Rent Act 1977 which included responsibility for Rent Assessment Committees.<sup>52</sup> Subsequently, the Government of Wales Act 2006 provided for the transfer of executive functions from the National Assembly to the newly established Welsh Assembly Government.<sup>53</sup> This is a common pattern in the development of tribunals and redress panels that had originally been devolved under the transfer of functions process in 1999.

Other tribunals were created specifically for Wales post-devolution. For example, the Special Educational Needs Tribunal for Wales was established under the Education Act 2002 (which amends the Education Act 1996). The National Assembly for Wales also has powers to establish new tribunals for Wales. A significant addition to the tribunal scene in Wales is the Welsh Language Tribunal. This was established under the Welsh Language Measure 2011 and is the first tribunal to be created directly by the National Assembly for Wales.

Identifying a 'Welsh' tribunal is not always easy, given the complexity and range of subject matters, and the various different routes to devolution. An important tool to assist with such identification was the Administrative Justice and Tribunals Council (Listed Tribunals) (Wales) Order 2007; though this has now been repealed.<sup>54</sup>

The Order provided that listed tribunals would come under the remit of the AJTC Welsh Committee.<sup>55</sup> The Welsh Ministers would be responsible for a tribunal if all its functions were exercisable only in relation to Wales and if they had powers to appoint its members or to create its procedural rules. Fourteen tribunals met these conditions and were subsequently listed in the 2007 Order.<sup>56</sup> For the purposes of the 2007 Order, designation of the tribunals as ‘Welsh’ rested on its territorial jurisdiction rather than on the source of the laws that it applied.

The 2007 Order was repealed following the abolition of the AJTC.<sup>57</sup> Subsequent reforms in Wales, and in England, suggest that the definition utilised in the 2007 Order now has little value. The Welsh Committee of the AJTC identified three other tribunals that could be referred to as Welsh tribunals but which did not meet the 2007 Order requirements. These were the Mental Health Review Tribunal for Wales, the Agricultural Land Tribunal for Wales, and the Traffic Penalty Tribunal (when conducting hearings in Wales).<sup>58</sup> The more recent transfer of some tribunals to the First-tier Tribunal in England has had particular side-effects on these ‘Welsh’ tribunals. For example, following the transfer of mental health tribunals to the First-tier Tribunal in England, the legacy in Wales is that the original mental health review tribunal remains as a Wales only body.<sup>59</sup> As a consequence, the Welsh Government became the authority responsible for financing mental health tribunals in Wales.<sup>60</sup> Similarly, the Agricultural Land Tribunal now only has jurisdiction over Wales; the corresponding jurisdiction in England has been transferred to the First-tier tribunal.<sup>61</sup>

Other reforms also render the 2007 Order list unreliable. For example, NHS Independent Complaints Panels and the Social Services Complaints Panels have been

abolished and replaced with a two-step administrative review process involving local resolution and formal investigation, with final recourse to the Public Services Ombudsman for Wales.<sup>62</sup>

In 2010, the Welsh Committee of the AJTC conducted a review of tribunals operating in Wales.<sup>63</sup> The Committee found that devolved tribunals in Wales suffered from many of the problems highlighted by the wider Leggatt Report.

To date...the Welsh tribunals are in large part legacies of Westminster laws and policy, whereby tribunals developed in an ad hoc fashion without being underpinned by any theoretical framework. That is, they were set up to meet specific needs and not according to a rational pattern.<sup>64</sup>

The issues identified by the Committee in terms of independence and administration were similar to those raised by the Leggatt report, but its recommendations applied specifically to the Welsh context. The Committee's core recommendations included taking steps to ensure the independence and impartiality of tribunals, setting up an Administrative Justice Focal Point within the Welsh Government, and the rationalisation of tribunal jurisdictions.<sup>65</sup> Other recommendations included improving communication and co-operation amongst the Welsh tribunal judiciary and better oversight from the National Assembly.<sup>66</sup> More practical recommendations included increasing user accessibility through information, advice and user engagement; improving efficiency and effectiveness by way of better resources and support; and ensuring greater coherence in the establishment of new tribunals and appeal routes from both newly established and existing Welsh tribunals.<sup>67</sup>

Alongside the generally *ad-hoc* development of tribunals across the UK, devolution adds an extra level of complexity and challenge. It is largely in light of these challenges that the Welsh Government needed to develop its own administrative justice policy. The structure of Welsh tribunals today results primarily from the Welsh Government's implementation of many of the AJTC Welsh Committee's recommendations. In the remaining sections I consider the current structure of Welsh tribunals and examine how this could be either wholly adopted by, or adapted to suit the needs of, other areas of justice that might be devolved in the future.

### **Devolved tribunals today**

It is difficult to categorise devolved tribunals in any coherent or satisfactory way. The range of subject matters, different procedural rules and regulations, and the different ways that functions have been devolved means that there is no single way of identifying a devolved tribunal. The 2007 Order provides some guidance, but later reforms have rendered it unreliable.

One solution is to categorise tribunals according to their relationship with the Welsh Government. This leads to four categorisations. First, tribunals administered by the Welsh Tribunals Unit (WTU), located within the Welsh Government. Second, tribunals sponsored by the Welsh Government.<sup>68</sup> Third, tribunals that the Welsh Government has contracted out to specialist bodies or charities. Fourth, tribunals administered by local authorities in Wales. Whilst there remain some significant differences even between tribunals in the same category, this fourfold classification

allows for the application of some degree of structure to this diverse area.

The WTU administers eight tribunals which have been transferred to it from relevant Welsh Government policy departments, or which have been established within the unit since its creation.<sup>69</sup> I consider these in further detail below.

The Valuation Tribunal for Wales (VTW) is sponsored by the Welsh Government.<sup>70</sup> This arrangement is currently with the Local Government and Finance Performance division, though it has been suggested that responsibility for the VTW should be transferred to what is now the WTU.<sup>71</sup>

The third category of tribunals are those contracted out to external providers. One example is the Independent Review Mechanism for fostering and adoption; this is administered by 'Children in Wales'.<sup>72</sup> Lastly, some tribunals are administered directly by local authorities. For example, School Admission Appeals Panels and School Exclusion Appeals Panels.<sup>73</sup>

In light of the *ad hoc* legacy and subsequent reforms it remains difficult to conclude that the devolved tribunals actually constitute a 'system'. However, some degree of coherence has been achieved in consequence of the AJTC Welsh Committee recommendations from 2010, the creation of the WTU, and the Welsh Government undertaking a further review of devolved tribunals in 2014.

### **Devolved tribunals in the jurisdiction debate**

The previous sections have shown that Wales has legal institutions operating on an exclusively Welsh territorial basis and that it is therefore arguable that a specific Welsh jurisdiction already exists. However, devolved tribunals seem not to have received their deserved place as part of this debate. It may be telling that when the UK Government published its proposals for further devolution to Wales it reiterated its view that ‘justice is not a devolved subject’, whilst conceding that ‘some tribunals within the wider justice system are devolved’.<sup>74</sup>

Following the publication of the second Silk Commission report, the Welsh Government highlighted its commitment towards reforming administrative justice, and the tribunal ‘system’ in particular.

Turning to administrative justice, we are stepping up our capability and expertise as an integral part of our growing legislative capacity. We have consulted on a programme of fundamental reforms of the devolved tribunals in Wales, with a view to putting our arrangements on a sustainable footing for the long term, and with the possibility of primary legislation coming forward in the next Assembly. The proposed reforms will strengthen access to justice and ensure effective redress.<sup>75</sup>

The Welsh Government saw these developments as part of the ‘growing body of Welsh law’ that contributes to a Welsh ‘legal identity’ and ‘which forms part of the organic development of a Welsh jurisdiction’.<sup>76</sup>

In this section I consider how the experiences of the devolved tribunals can contribute

to the debate on further devolution of justice powers and the establishment of a Welsh jurisdiction. I focus on three particular issues; the role of the WTU as an office that administers certain devolved tribunals; the procedures for appointing tribunal judges and other members; and the rules and regulations governing the procedural aspects of Welsh tribunals.

### *The Welsh Tribunals Unit*

The Welsh Committee of the AJTC recommended the creation of an ‘administrative justice focal point’ to provide leadership across administrative justice as a whole, and more specifically, to improve the independence of tribunals from their policy departments.<sup>77</sup> Due to the size of the Welsh tribunal ‘system’ the Committee did not recommend establishing a separate executive agency, or joining the UK Tribunal Service (as it was at the time), but rather the establishment of an office within the Government sufficiently removed from the decisions under dispute.<sup>78</sup>

The Administrative Justice and Tribunals Unit (AJTU) was established in March 2010 and the responsibility for several tribunals was gradually transferred to it.<sup>79</sup> In 2015 the AJTU was re-named the Welsh Tribunals Unit (WTU). Currently, the WTU has administrative responsibility for eight tribunals; the Adjudication Panel for Wales, the Agricultural Land Tribunal for Wales, the Mental Health Review Tribunal for Wales, the Registered Inspectors of Schools Appeal Tribunal, the Registered Nursery Education Inspectors Appeal Tribunal, the Residential Property Tribunal Wales, the Special Educational Needs Tribunal for Wales and the Welsh Language Tribunal. When planning to transfer administrative responsibility over the Agricultural Land Tribunal



for Wales to the WTU it was noted that:

The new arrangements will help to protect the independence and impartiality of the tribunals, but will also enable policy to be formulated that will be in the context of administrative justice and the needs of users of the tribunals.<sup>80</sup>

Although it is arguable that the WTU does not provide the highest possible level of independence from the Government, this form of arrangement has been utilised in relation to devolved tribunals by other UK devolved administrations, at least in the shorter-term. For example, administration of tribunals in Scotland was originally conducted by an executive unit established within the Scottish Government. Recommendations were later made to increase the independence of the devolved tribunals by establishing the Scottish Tribunals Service, and subsequently, by incorporating tribunals into the new Scottish Courts and Tribunals Service.<sup>81</sup>

The AJTC Welsh Committee reform proposals had noted that merging the administration of several tribunals brings advantages in terms of economies of scale and the better use of resources.<sup>82</sup> Examples of this can already be seen with the centralisation of many tribunal staff in offices in Llandrindod, and the ability to share good practice and to develop standard business models.<sup>83</sup>

As a result, the WTU could be considered to be a nucleus containing the DNA needed to establish a broader tribunals, or even courts, service for Wales. It has been suggested that the WTU is, in effect, already a 'Welsh Tribunals Service'.<sup>84</sup> Some would welcome the flexibility that a service dedicated to Wales could provide. In 2009

Lord Justice Pill suggested that such a development was a possibility:

...speaking more generally, the scale of activities and institutions in Wales, provide opportunities for a better integrated system for courts and tribunals, and the resources they require, than is possible in the current unitary system. In other spheres already mentioned, the advantages of operations in a Welsh framework have been demonstrated.<sup>85</sup>

However, there are two key concerns when contemplating expanding the WTU. First, as the WTU takes on administrative responsibilities over more tribunals there is a need to consider how long it can remain part of the government rather than being established as an independent body. Second, the relationship between the WTU and HMCTS requires attention.

The Scottish Committee of the AJTC was adamant that the Scottish Tribunals Service should be established as an independent statutory body.<sup>86</sup> This was ultimately achieved by combining the previously separate Scottish Courts and Scottish Tribunals Services into one combined Service under the Courts Reform (Scotland) Act 2014. Establishing an independent tribunals service is something the Welsh Government should consider in future if further tribunals are created, devolved, or otherwise transferred to the WTU. This may seem a radical step considering the lack of formally devolved justice functions at the present time, however it could improve the coherence of the tribunal system in Wales and pave the way towards a more defined Welsh legal jurisdiction.

The proposals for a Scottish Tribunals Service, as drafted by the Scottish Committee of the AJTC, provide a model that could be applied to Wales. The Scottish Tribunals Service was envisaged as a body with overarching responsibility for several tribunals,<sup>87</sup> led by a Chief Executive accountable to the Board of the Tribunal Service.<sup>88</sup> Additionally, a role of Senior President of Scottish Tribunals would be established to provide judicial leadership. These characteristics could provide a blueprint for the future development of Welsh tribunals and would be a step forward in terms of the coherence and independence of the system as a whole. In turn, having a system with such enhanced status might bolster normative and pragmatic arguments for transferring-in tribunals currently outside the WTU, and for the future devolution of other tribunals and even other justice functions.

Although this seems to be a radical step, the Valuation Tribunal for Wales currently works under a similar set of arrangements; it has a Chief Executive, Governing Council and a Judicial President.<sup>89</sup> This can be taken as providing an example precedent to be adopted at a system or service wide level.

If the Welsh Government did decide to establish a similar body at a service wide level, it would then need to consider the relationship between this ‘Welsh Tribunals Service’ and Her Majesty’s Courts and Tribunals Service (HMCTS) England and Wales as it currently operates. The Lord Chief Justice, Lord Thomas of Cwmgiedd, has suggested that having two systems of court and tribunal administration operating in Wales would not be sustainable.<sup>90</sup> He pointed out that there is already co-operation between HMCTS and the Welsh Government in the management of devolved and non-devolved tribunals.<sup>91</sup> Some members of the judiciary have suggested that it may be

‘appropriate’ for HMCTS to administer the devolved tribunals in Wales now that the once separate functions of court and tribunal administration have been unified.<sup>92</sup> For example, Mr Justice Roderick Evans has argued that:

...there should be one body administering all devolved tribunals so that efficiencies of scale can be maximised. It is possible that they could be administered by the department which has overall responsibility for tribunals but we already have a body in Wales which administers on a day to day basis part of the justice system. HMCS Wales runs the courts in Wales and some judges who sit in the courts also sit on tribunals. There is, therefore, already a degree of common interest and the knowledge and depth of experience of HMCS Wales would be valuable to the devolved tribunals.<sup>93</sup>

A similar solution was roundly rejected in the early proposals to reform tribunals in Scotland as it would not be consistent with Scotland’s separate legal jurisdiction.<sup>94</sup> Allowing HMCTS to administer all Welsh tribunals may not face the same legal or constitutional objections as existed in Scotland, not least due to the current, largely centralised arrangements for administering court-based justice across England and Wales.<sup>95</sup> However, similar practical issues are evident. Changes to English law may have indirect consequences for justice in Wales, the geographical challenges may be different in parts of Wales, and the tribunal structures would be different as England and Wales jurisdictions primarily come under the remit of the First-tier tribunal, whereas Wales-only tribunals do not.<sup>96</sup> Administering devolved Welsh tribunals through HMCTS England and Wales may also hamper the devolution of further justice responsibilities to Wales and may not ‘reflect fully the constitutional

maturity of Wales'.<sup>97</sup> Interestingly, the AJTC Welsh Committee did not recommend joining the UK Tribunal Service when it originally reported, having noted that:

The increased powers of the Welsh Assembly Government and National Assembly under the Government of Wales Act 2006 allow for ever increasing divergence between policy and practice in England and Wales. Also, the small scale of Welsh tribunals means that Welsh issues could potentially be lost in such a large organisation.<sup>98</sup>

In my view this reasoning remains true. Indeed, whilst the Lord Chief Justice of England and Wales has questioned the sustainability of the current arrangements, he has also accepted the possibility of having a full Courts and Tribunals Service for Wales.<sup>99</sup> The UK Government has noted that there would be, 'no specific practical operational issues or complexities with establishing a separate courts and tribunals' administration system in Wales'.<sup>100</sup> Its reservations are largely economic, citing the estimate that a separate service for Wales could potentially cost an additional £13 million per year.<sup>101</sup> Despite financial and practical reservations, there is scope to consider what sort of courts and tribunal structure would be suitable for Wales in the future.

### *Judicial appointments*

Establishing a suitable judicial appointments procedure is essential to ensuring judicial independence and impartiality.<sup>102</sup> In a 2012 presentation to the Public Law Project's Cardiff Conference, Judge Elizabeth Arfon-Jones noted that:

The [Welsh Government] will need to be careful that it is not out of line with other parts of the UK, including the islands on this issue. Not only is the reality of judicial independence the cornerstone of a properly functioning democracy, so also is it imperative that it must be perceived as such. The [Welsh Government] needs to take steps to distance the judiciary from the danger of ministerial and departmental interference or influence. An independent and transparent process for the appointment, discipline and removal of Welsh judges is essential. The lack of any consistent and formal process or mechanism in Wales for handling any improper pressure to judicial activities is troubling.<sup>103</sup>

Reforming the judicial appointments procedure for devolved tribunals is a particular challenge in light of the mixture of appointment procedures currently operated by devolved tribunals in Wales. These variations arise partly from the *ad-hoc* development of tribunals generally and partly from the evolving devolution settlement.

Responsibility for the appointment of some tribunal presidents and legal members has remained with the Lord Chancellor.<sup>104</sup> Most such appointments are secured through the procedures of the Judicial Appointments Commission (JAC).<sup>105</sup> However, some Welsh tribunal appointments are the responsibility of Welsh Ministers, or other authorities, and these have not at all times ensured the same level of independence as JAC procedures. However, there have been some encouraging recent reforms where arrangements have been made to strengthen the independence of the appointments processes. For example, whilst the President of the Welsh Language Tribunal was appointed by the Welsh Ministers, the process was conducted under stricter independence constraints than have so far been applied to other tribunal

appointments made by the Welsh Ministers.<sup>106</sup> The Welsh Language Tribunal (Appointment) Regulations 2013 required Welsh Ministers to uphold the principles of tribunal independence and the rule of law.<sup>107</sup> There are also provisions under Schedule 11 of The Welsh Language (Wales) Measure 2011 regarding the appointment of the President and legally-qualified members; these are consistent with comparable appointments under Part 2 of the TCEA 2007.

In practice, the appointment procedure involved an independent panel which included a senior Welsh judge, a member of JAC, and an independent assessor. Once the panel selected its preferred candidate, there was a further post interview consultation with the Lord Chief Justice and Chairperson of the Judges' Council Committee for Wales. Subsequently, a recommendation was made to the Welsh Ministers who could approve or reject the preferred candidate.<sup>108</sup>

Since that appointment, JAC has undertaken further selection and recruitment exercises for members of devolved tribunals on behalf of Welsh Ministers. This is now underpinned by a formal agreement between Welsh Ministers and JAC.<sup>109</sup> So far, it has ran selection exercises for new appointments to the Adjudication Panel for Wales and the Special Educational Needs Tribunal for Wales.<sup>110</sup> This ensures that appointments made by Welsh Ministers are now consistent with the procedures for appointments made by the Lord Chancellor which JAC already undertakes.<sup>111</sup>

For appointments in Wales, to England and Wales institutions, the JAC indicates that it will ask additional questions to assess the candidate's 'understanding, or their ability to acquire understanding, of the administration of justice in Wales,

including legislation applicable to Wales and Welsh devolution arrangements'.<sup>112</sup> The JAC has demonstrated an awareness of the unique legal identity and environment in Wales, both being issues raised by previous inquiries examining the case for establishing a separate Welsh jurisdiction.

However, there are still Welsh tribunal appointments that are made outside the direct control of the WTU and Welsh Government. The level of independence in appointments made by local authorities is particularly concerning. For example, the procedure for appointing members of the Valuation Tribunal for Wales allows local authorities direct representation on the appointment panels. Further independence issues are raised because the President and Chairs are elected by other members of the Tribunal.<sup>113</sup> Similarly, Local Authorities are responsible for appointments to School Admissions Appeal Panels and School Exclusions Appeal Panels. This is an area where reforms to achieve greater coherence could be possible on a national level.<sup>114</sup>

In Scotland and Northern Ireland, appointment exercises are conducted by independent bodies already established to handle judicial appointments to the courts in those jurisdictions. There have been proposals to establish a separate Judicial Appointments Commission for Wales, or a separate panel that could take into account the nature of the law in Wales.<sup>115</sup> However, recent arrangements between Welsh Ministers and JAC show that the system can adapt to accommodate the differences in Wales. It can be argued that this sort of collaboration is in line with the Welsh Government's notion of a distinct jurisdiction where much of the administration of the justice system would initially remain across England and Wales. Establishing a separate JAC may be an ambition in the longer-term, especially if a separate jurisdiction was



created. However, for now, it shows that distinct arrangements can be made and it may be something which could be further enhanced if a distinct jurisdiction is established.

### *Rules and regulations*

Tribunal rules and regulations have a fundamental role to play in ensuring independence from Government. The harmonisation of rules and regulations can also lead to the development of a more coherent and accessible system.<sup>116</sup> Currently, tribunal rules and regulations of devolved tribunals in Wales are inconsistent and incongruous. This is partly due to the devolution settlement under which responsibility for making rules and regulations for some tribunals remains with the Lord Chancellor rather than the Welsh Ministers. This limits the potential to improve the coherence of the Welsh ‘system’.

The picture is especially complicated for tribunals that have responsibility over several matters. For example, the Residential Property Tribunal for Wales is subject to three separate sets of regulations, one for each of its different jurisdictions.<sup>117</sup> The Rent Assessment Committees (England and Wales) Regulations 1971 are particularly significant as, although they are England and Wales regulations, they now apply to Wales only after the corresponding jurisdiction in England was transferred to the First-tier tribunal.<sup>118</sup> As a result, there is a patchwork of rules and regulations created pre-devolution which are further complicated by various post-devolution transfers of functions, and reforms applicable only to England.

Achieving greater coherence across the procedures, rules and regulations of

particular tribunals reinforces the potential for developing a Welsh tribunals system. For example, The Special Educational Needs Tribunal for Wales Regulations 2012 include provisions about the general principles that should be applied to the tribunal, and more specific provisions about how the tribunal should be conducted.<sup>119</sup> Those general principles, including overriding objectives and the duty to co-operate, are incorporated under regulations 6 and 7. Research on the structure of devolved tribunals in Northern Ireland has highlighted the importance of establishing overriding objectives and the use of rules and regulations to retain the traditional expert and informal nature of tribunals.<sup>120</sup> According to Judge Edward Jacobs this is central to procedural justice, as he notes;

...the overriding objective does affect the substance of procedural justice. The legislation specifies some of the features that allow a case to be dealt with fairly and justly. It thereby gives substance to the vague but important concept of justice. It does not replace the practice of itemising individual manifestations of justice in tribunals' practices and rules of procedure; this continues. Instead, it goes beyond them, identifies the unifying and underlying principles, and elevates them to an overriding position.<sup>121</sup>

This is reflected in the Welsh Language Tribunal Rules that take inspiration from the Special Educational Needs Tribunal for Wales Regulations and include overriding objectives and obligations to co-operate.<sup>122</sup> As well as general rules of procedural justice, the Welsh Language Tribunal Rules also include provisions for treating both languages of the Tribunal equally, as expected given its jurisdiction. Together these provisions might act as a template for the future development of

specifically Welsh tribunal overriding objectives.

Even outwith the development of formal rules and regulations, the Welsh Government has demonstrated its intention to incorporate elements of procedural justice into other devolved tribunal jurisdictions. For example, the Schools Exclusion Appeal Panels and the Schools Admission Appeals Panels are currently administered by local authorities. The statutory code on Schools Admission notes that the panels, ‘are carrying out a judicial function’ and requires that they, ‘must apply the principles of natural justice’.<sup>123</sup>

Appeal panels must be, and must be seen to be, both independent and impartial. They must operate in accordance with the rules of natural justice, which means being fair to all parties at all times.<sup>124</sup>

In particular, this includes ensuring the independence of tribunal members, giving each side an opportunity to state their case, and making sure that the parties disclose written material.<sup>125</sup> These provisions have been present in the Code for School Admissions since at least 2009.<sup>126</sup> However, the Code of practice on Exclusion from Schools and Pupil Referral Units does not contain the same level of detail on the requirements of procedural and natural justice.<sup>127</sup>

Rationalising different rules and procedures could be a way of promoting a set of Welsh procedural rules that could be adapted to different jurisdictions whilst still reinforcing the sense of a specifically Welsh tribunal system.

For example, The Residential Property Tribunal for Wales could aim to harmonise the three regulations that currently govern its procedures whilst at the same time incorporating overriding objectives and enhanced protection for procedural justice. However, that the Lord Chancellor is still responsible for setting this tribunal's regulations is an example of a constitutional barrier to the development of a coherent tribunal system in Wales. The Welsh Government have called for the further devolution of powers to make rules and regulations.<sup>128</sup>

The most significant issue related to developing rules and regulations in Wales is that there is no independent body able to fulfill this function. In Scotland, the Government was concerned that using 'ad-hoc advisory groups' undermined tribunal independence.<sup>129</sup> Ultimately, this function was given to the Scottish Civil Justice Council that was already responsible for developing rules and regulations for the Scottish courts.<sup>130</sup> The TCEA 2007 established a Tribunal Procedure Committee to undertake this work in relation to the First-tier and Upper Tribunals.<sup>131</sup> Establishing a similar Welsh committee would provide a route to strengthening the independence of devolved tribunals in Wales, and to improving coherence across their rules and regulations, thus contributing to the overall sense that a Welsh Tribunals system is developing.<sup>132</sup> Such reforms would add weight to the Welsh Government's view that the rules and procedures functions currently held by the Lord Chancellor could be successfully devolved, as long as sufficient safeguards are put in place to ensure the independence of the rule-making process.

### **Future constitutional reforms**

The Welsh Government has expressed its intention in the past to establish and legislate for a coherent tribunal system in Wales. However, it faces many challenges that derive from the original, and current, devolution settlements that means that it does not have the executive and legislative powers necessary to create a coherent system.

The UK Government's St David's Day command paper, *Powers for a Purpose*, set out a vision for a new devolution settlement that would see Wales moving towards a reserved powers model; with Wales receiving further powers over issues such as energy, transport and the environment, and its own electoral and internal arrangements.<sup>133</sup> According to *Powers for a Purpose*, the Silk Commission's proposals in terms of clarifying the relationship between devolved and non-devolved tribunals was an area of consensus between Westminster and Cardiff Bay that could be taken forward.<sup>134</sup>

However, when the Draft Wales Bill was published in October 2015 it did not provide sufficient clarification on this matter. It retained the single legal jurisdiction for England and Wales, that in turn meant courts and tribunals would be reserved. An attempt was made in the definition of 'tribunal' to carve-out devolved tribunals in Wales by noting that the reservation would, 'not include a tribunal whose purpose is to make determinations in relation to matters that are not reserved matters'.<sup>135</sup> The Welsh Government expressed concern about this provision. The earlier 2007 Order listed Welsh tribunals on the basis of their geographical jurisdiction, whereas the Draft Wales Bill purported to identify Welsh tribunals based on whether the matters within the jurisdiction of the particular tribunal were devolved or not.<sup>136</sup> This could have led to a confusing situation where some of the tribunals already recognised as devolved to

Wales may no longer have been considered as such because they determine some non-devolved matters.<sup>137</sup> This particular interpretation in the Draft Wales Bill blurred the line between devolved and non-devolved tribunals and failed to recognise the unique position of devolved tribunals as judicial institutions with exclusive Welsh territorial jurisdiction.

An amended Wales Bill, that included some significant changes, was introduced to Parliament in June 2016 and received Royal Assent in January 2017.<sup>138</sup> The Wales Act 2017 defines ‘devolved tribunals’ as those having functions that do not relate to a reserved matter and which are exercisable only in relation to Wales. This emphasis on territory, rather than on subject matter alone, may bring greater clarity. The definition also appears more flexible in the case of tribunals that have functions over devolved and reserved matters.<sup>139</sup> Devolved tribunals are also listed as ‘Wales Public Authorities’ and the provisions recognising ‘devolved tribunals’ are consistent with that definition.<sup>140</sup> This means that devolved tribunals remain as public authorities (part of public administration) but they are also carved out from the general justice reservation of Tribunals so as to recognise their distinct status in Wales.

Alongside that definition of ‘devolved tribunals’ the Act goes further by expressly listing a category of ‘Welsh tribunals’. Under section 59, the tribunals under the current control of the WTU are listed as ‘Welsh tribunals’ for the purpose of the Act.<sup>141</sup> The Act also establishes the role of President of Welsh Tribunals. This seeks to address some of the challenges expressed earlier in this chapter. Particularly, the President will have powers to provide direction as to practice and procedure of Welsh tribunals which is a response to the need for an independent rule and regulation-making

process. There are also provisions to allow cross-deployment of Welsh tribunal members between Welsh tribunals themselves and cross-deployment between Welsh tribunals and the First-tier Tribunal. This is a significant step forward for a more formal Welsh tribunals system. The significance of the Wales Act giving statutory recognition to judicial bodies operating only in Wales, and providing distinct judicial leadership to them, should not be underestimated.<sup>142</sup>

## **Conclusion**

In this chapter I have sought to show that whilst justice is not a fully devolved subject-matter in Wales, some areas of justice policy and administration are already operating on a devolved basis in practice. This can be seen in particular through broader administrative justice functions and most specifically in relation to tribunals in Wales. Recognising that elements of justice policy and administration are already devolved is important to the debate regarding a separate or distinct jurisdiction for Wales.

Devolved tribunals are judicial bodies that have jurisdiction in Wales and therefore give an unique perspective to the current debate. Developing and supporting these bodies could be an important step towards the establishment of a wider legal system and a recognised distinct, or separate, Welsh jurisdiction.

It is clear that although the Welsh Government has responsibilities over devolved tribunals it does not have full executive or legislative powers to create a coherent tribunal system for Wales. Another weakness is the lack of independent structures, such as independent administration, an independent judicial appointments

body, and an independent body to establish rules and regulations. Although the Welsh Government is limited in what it can achieve under its current powers it has ensured that structures and arrangements have been put in place to improve the independence of Welsh tribunals over the last five years. Reforms in the Wales Act 2017 will further support this endeavour when those provisions come into force.

The issue of a distinct Welsh jurisdiction has been an important one during the enactment of the latest Wales Act, with clear water emerging between the Welsh and UK Government positions. The devolved Welsh tribunals ought to be an important factor in debates that will impact on the potential for immediate reform of these tribunals and other aspects of the administrative justice ‘system’ in Wales, and on the future development of a Welsh legal jurisdiction.

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<sup>1</sup> See further, Richard Rawlings, *Delineating Wales* (UWP 2003).

<sup>2</sup> Explanatory Notes to the Government of Wales Act 2006, 409 [374].

<sup>3</sup> The Honourable Sir Gary Hickinbottom, ‘Administrative Justice in Wales: A New Dawn?’ (Legal Wales Conference, Cardiff, 2009).



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<sup>4</sup> Hickinbottom (n 3) and see National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction: Consultation Responses* (March 2012) WJ 8, WJ 19, WJ 21, WJ 28.

<sup>5</sup> AJTC, *Future Oversight of Administrative Justice* (July 2013) 5.

<sup>6</sup> Carwyn Jones AM, 'The Law in Wales: The Next Ten Years' (The Law Society Annual Lecture, National Eisteddfod of Wales, Cardiff 2008) 14–15.

<sup>7</sup> C M G Himsworth, 'Devolution and its Jurisdictional Asymmetries' (2007) 70(1) *Modern Law Review* 31, 43.

<sup>8</sup> National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction* (December 2012).

<sup>9</sup> Welsh Government, *A Separate Legal Jurisdiction for Wales* (Consultation Document, WG-15109, March 2012); Welsh Government, *Evidence submitted by the Welsh Government to the Commission on Devolution in Wales* (Evidence Paper, WG-17658, February 2013).

<sup>10</sup> National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction* (December 2012) 4; This is consistent with emphasis on a Welsh legal identity, rather than a jurisdiction, which developed under the broad term 'Legal Wales' since devolution; See further, J Williams 'Legal Wales' in John Osmond and J Barry Jones (eds), *Birth of Welsh Democracy: The First Term of the National Assembly for Wales* (Institute for Welsh Affairs and WGC 2003) 291.

<sup>11</sup> Welsh Government, *Evidence* (n 9) 2-3, [17]–[18].

<sup>12</sup> Commission on Devolution in Wales *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014) [10.4.3]–[10.4.4].

<sup>13</sup> Commission on Devolution in Wales 2014 (n 12) [10.3.3], [10.3.39]–[10.3.40].

<sup>14</sup> Welsh Government, *Evidence* (n 9) [20]–[21].

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<sup>15</sup> Welsh Government, *Evidence* (n 9) 11, [20]; This may be because ‘Public Administration’ is a devolved subject under Part 1 of Schedule 7 of the Government of Wales Act 2006.

<sup>16</sup> Report of the Committee on Administrative Tribunals and Enquiries (Cmnd.218, 1957) [40]; Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for Users – One System, One Service* (HMSO 2001) [2.18].

<sup>17</sup> Welsh Government, *Supplementary Written Evidence submitted to the Constitutional and Legislative Affairs Committee* (26 November 2015), <<http://senedd.assembly.wales/documents/s46849/DWB%207%20-%20Supplementary.pdf>> (last accessed 9 March 2016); Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (WG28243, March 2016) 5.

<sup>18</sup> Welsh Government *Supplementary Written Evidence submitted to the Constitutional and Legislative Affairs Committee* (26 November 2015) <<http://www.senedd.assembly.wales/documents/s46849/DWB%207%20-%20Supplementary.pdf>> (last accessed 9 March 2016); Welsh Government, *Government and Laws in Wales Draft Bill: Explanatory Summary* (WG28243, March 2016).

<sup>19</sup> Thomas Glyn Watkin, ‘Evidence Submitted to the Constitutional and Legal Affairs Committee of the National Assembly for Wales’ in National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction: Consultation Responses* (March 2012) WJ 16 [9]; Shaunnagh Dorsett and Shaun McVeigh, ‘Questions of Jurisdiction’ in Dorsett & McVeigh (eds.), *Jurisprudence of Jurisdiction* (Routledge-Cavendish 2007) 3.

<sup>20</sup> Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge 2012) 4.

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- <sup>21</sup> Dorsett and McVeigh, *Jurisdiction* (n 20) 4.
- <sup>22</sup> Tim Jones and Jane Williams, ‘Wales as a Jurisdiction’ [2004] *Public Law* 78, 78.
- <sup>23</sup> Local Government (Wales) Act 1994 and the Interpretation Act 1978, Schedule 1. Government of Wales Act, s.158 as amended by s.43 of the Marine and Coastal Access Act 2008.
- <sup>24</sup> For the historical context of this debate see, Thomas Glyn Watkin, ‘Devious Debates and Devolution: The History of the Campaign for a Welsh Jurisdiction’, in Thomas Glyn Watkin (ed), *The Welsh Legal Triads and Other Essays* (The Welsh Legal History Society, Volume XII, 2015).
- <sup>25</sup> National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction* (December 2012) [63].
- <sup>26</sup> HLA Hart, *The Concept of Law* (OUP Clarendon Law Series 1994) 97.
- <sup>27</sup> Joseph Raz, ‘Legal Positivism and the Sources of Law’ in Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 42.
- <sup>28</sup> Joseph Raz, ‘The Identity of Legal Systems’ in Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 87–88.
- <sup>29</sup> Raz, ‘Identity’ (n 28) 87.
- <sup>30</sup> Tim Jones, ‘Wales, Devolution and Sovereignty’ [2012] 33(2) *Statute Law Review* 151, 159.
- <sup>31</sup> Thomas Glyn Watkin, ‘Evidence’ (n 19) [34].
- <sup>32</sup> Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (WG28243, March 2016) [57].
- <sup>33</sup> Sarah Nason, *Understanding Administrative Justice in Wales* (2015) [2.1]–[2.5].
- <sup>34</sup> Michael Adler, ‘Understanding and Analysing Administrative Justice’ in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing 2010) 129.

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<sup>35</sup> Linda Pearson, ‘The Impact of External Administrative Law Review: Tribunals’ (17 August 2007) p.2 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1358701](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358701)> (last accessed 15 March 2015).

<sup>36</sup> *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781 [36] (Baroness Hale); See further, Edward Jacobs, *Tribunal Practice and Procedure* (3rd edn. LAG 2014).

<sup>37</sup> Report of the Committee on Administrative Tribunals and Enquiries (Cmnd.218, 1957) [40].

<sup>38</sup> Leggatt (n 16) [2.18].

<sup>39</sup> Jacobs (n 36) [1.96].

<sup>40</sup> Leggatt (n 16) [2.17]; Genevra Richardson and Hazel Genn, ‘Tribunals in Transition: Resolution or Adjudication’ [2007] *Public Law* 116, 128; *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295; *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 AC 430, [51]–[52]; Paul Craig, ‘The Human Rights Act, Article 6 and Procedural Rights’ [2003] *Public Law* 753.

<sup>41</sup> The Tribunals Service was joined with the the Courts Service in April 2011 to create the single HM Courts and Tribunals Service.

<sup>42</sup> Leggatt (n 16) 5–14; Jacobs (n 36) [1.8].

<sup>43</sup> Gavin Drewry, ‘The Judicialisation of ‘Administrative’ Tribunals in the UK: From Hewart to Leggatt’ [2009] 28 *Transylvania Review of Administrative Sciences* 45.

<sup>44</sup> Drewry (n 43) 52; James Farmer, *Tribunals and Government* (Edenfel and Nicolson, 1974) 3.

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<sup>45</sup> Robert Carnwarth, ‘Tribunal Justice – A New Start’ [2009] *Public Law* 57–58, 68; Emma Laurie, ‘Assessing the Upper Tribunal’s Potential to Deliver Administrative Justice’ [2010] *Public Law* 288.

<sup>46</sup> Constitutional Reform Act 2005, s.3.

<sup>47</sup> TCEA 2007, s.3(5) and *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; [2012] 1 AC 663.

<sup>48</sup> Leggatt (n 16) [11.2]–[11.3] ‘The process is complex because devolution has been achieved in different ways in each country as regards jurisdiction, powers, policy responsibilities, legislation and operational matters.’

<sup>49</sup> The Agricultural Land Tribunals (Areas) Order 1982, SI.1982/97.

<sup>50</sup> Other administrative examples of devolution can be identified in particular circumstances as well. For example The Rent Assessment Committees (England and Wales) Regulations 1971 (SI.1971/1065) were made jointly by the Secretary of State for the Environment and the Secretary of State for Wales.

<sup>51</sup> Mr Justice Roderick Evans, ‘Devolution and the Administration of Justice’ (Lord Callaghan Memorial Lecture, Swansea University, February 2010).

<sup>52</sup> National Assembly for Wales (Transfer of Functions) Order 1999, SI.1999/672

<sup>53</sup> Government of Wales Act 2006, Sched. 11, para.30.

<sup>54</sup> Repealed by the Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, SI.2013/2042.

<sup>55</sup> TCEA 2007, Sched. 7 para 27.

<sup>56</sup> Adjudication Panel for Wales, Board of Medical Referees, Forestry Committees for Wales, Independent Review of Determination Panels in Wales, NHS Independent Complaints Panels, Parking Adjudicators in Wales, Registered Nursery Education

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Inspectors Appeal Tribunal, Registered School Inspectors Appeal Tribunal, Residential Property Tribunal for Wales, School Admission Appeal Panels for Wales, School Exclusion Appeal Panels for Wales, Social Services Independent Complaints Panels, Special Educational Needs Tribunal for Wales, Valuation Tribunal for Wales.

<sup>57</sup> Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, SI.2013/2042.

<sup>58</sup> AJTC, Welsh Committee, *Review of Tribunals Operating in Wales* (2010) [7].

<sup>59</sup> Mental Health Act 1983, s.65 as amended by Transfer of Tribunal Functions Order 2008, SI.2008/2833, Schedule 3, para.45.

<sup>60</sup> Transfer of Tribunal Functions Order 2008, SI.2008/2833, Schedule 3, para.45(f).

<sup>61</sup> Agriculture Act 1947, s.73 as amended by Transfer of Tribunal Functions Order 2013 SI.2013/1036, Schedule 1(2), para.190.

<sup>62</sup> The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011, SI.2011/704 (W.108); The Social Services Complaints Procedure (Wales) Regulations 2014, SI. 2014/1794 (W.187); Welsh Government, *A guide to handling complaints and representations by local authority social services* (WG22088, August 2014).

<sup>63</sup> AJTC Welsh Committee (n 58).

<sup>64</sup> AJTC Welsh Committee (n 58) [13].

<sup>65</sup> AJTC Welsh Committee (n 58) 2–3.

<sup>66</sup> AJTC Welsh Committee (n 58) 4.

<sup>67</sup> AJTC Welsh Committee (n 58) 4–8.

<sup>68</sup> Welsh Government Sponsored Bodies are non-departmental public bodies which are directly funded by the Welsh Government annually under a framework agreement.

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Further information can be found in, Valuation Tribunal for Wales, *Annual Report 2014-2015* (2015) [1.4]–[1.5].

<sup>69</sup> Adjudication Panel for Wales, Agricultural Land Tribunal for Wales, Mental Health Review Tribunal for Wales, Registered Nursery Education Inspectors Appeal Tribunal, Registered School Inspectors Appeal Tribunal, Residential Property Tribunal for Wales, Special Educational Needs Tribunal for Wales, Welsh Language Tribunal.

<sup>70</sup> Valuation Tribunal for Wales, *Annual Report 2014–2015* (2015) [1.4].

<sup>71</sup> Valuation Tribunal for Wales, *Annual Report 2013–2014* (2014) [4.4].

<sup>72</sup> IRM Cymru <<http://irmcymru.org.uk/~irmcymru/en>> (last accessed 20 November 2015); The tribunal was hosted by BAAF Cymru until September 2015; The Board of Medical Referees can also be included in this category.

<sup>73</sup> There are also other decision making or appeal procedures and bodies which do not fit neatly into the categorisation as tribunals but do have adjudicative functions. For example, appeals from the Discretionary Assistance Fund for Wales and the Independent Appeals Panel for Farmers and Foresters in Wales.

<sup>74</sup> HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, February 2015) [2.9.2], footnote 29.

<sup>75</sup> Welsh Government, *Devolution, Democracy and Delivery: Powers to Achieve our Aspirations for Wales* (WG22188, 2014) [79].

<sup>76</sup> Welsh Government (n 75) [79].

<sup>77</sup> AJTC Welsh Committee (n 58) [73].

<sup>78</sup> AJTC Welsh Committee (n 58) [68], [70].

<sup>79</sup> 2011: Special Educational Needs Tribunal for Wales, the Registered School Inspectors Appeals Tribunal, and the Registered Nursery Inspectors Appeal Tribunal. 2012: Adjudication Panel for Wales, the Mental Health Review Tribunal for Wales, the

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Agricultural Land Tribunal for Wales, and the Residential Property Tribunal for Wales.  
2014: the Welsh Language Tribunal.

<sup>80</sup> Welsh Government, ‘Agriculture Land Tribunal Wales – Transfer of Programme Resources’ (27 January 2014).

[llyw.cymru/about/cabinet/decisions/2014/janmar/environment/ad4305/?skip=1&lang=cy](http://llyw.cymru/about/cabinet/decisions/2014/janmar/environment/ad4305/?skip=1&lang=cy) (last accessed 11 March 2015).

<sup>81</sup> AJTC, Scottish Committee, *Tribunal Reform in Scotland: A Vision for the Future* (2010) [2.10], [4.35]; Scottish Government, Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service (2013) [25]–[27]; Court Reform (Scotland) Act 2014, Part 10.

<sup>82</sup> AJTC, Welsh Committee (n 58) [70].

<sup>83</sup> Special Educational Needs Tribunal for Wales, *Annual Report 2010/11* (November 2011) 6. Similar advantages were seen in Northern Ireland once some tribunals were transferred to the Northern Ireland Courts Service. See further, Northern Ireland Department of Justice, *Tribunal Reform: Discussion Paper on the Future Administration and Structure of Tribunals in Northern Ireland* (December 2011) [2.11].

<sup>84</sup> Senior President of Tribunals, *Senior President of Tribunals’ Annual Report* (February 2015) 93.

<sup>85</sup> Lord Justice Pill, *Speech to the Legal Wales Conference* (Legal Wales Conference, Cardiff, 2009).

<sup>86</sup> AJTC, Scottish Committee (n 81) [2.10].

<sup>87</sup> AJTC, Scottish Committee (n 81) [4.37], The actual Scottish Tribunal Service, before its unification with the Courts Service, was established slightly differently to the Scottish Committee proposals as it was established as an executive agency.

<sup>88</sup> AJTC Scottish Committee (n 81) [4.37].



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<sup>89</sup> Valuation Tribunal for Wales, *Forward Plan 2012/15*.

<sup>90</sup> Lord Thomas of Cwmgiedd, Lord Chief Justice, ‘The State of Justice in Wales’ (Cardiff Business Club, 3 November 2014) [32].

<sup>91</sup> Lord Thomas of Cwmgiedd (n 90) [33]; For further details of co-operation see, Committee of Administrative Justice and Tribunals, Wales (CAJTW), *Administrative Justice: A Cornerstone of Social Justice in Wales* (March 2016) [32].

<sup>92</sup> Mr Justice David Lloyd Jones (as he then was), ‘The Machinery of Justice in a Changing Wales’ (Law Society Annual Lecture, National Eisteddfod of Wales, Blaenau Gwent, 2010).

<sup>93</sup> Mr Justice Roderick Evans, ‘Devolution and the Administration of Justice’ (Lord Callaghan Memorial Lecture, Swansea University, 2010).

<sup>94</sup> Scottish Consumer Council, *Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Steering Group* (2008) [91].

<sup>95</sup> HM Government, *UK Government’s Evidence to the Commission on Devolution in Wales Part II: The Welsh Devolution Settlement* (2013) [13.4].

<sup>96</sup> For some of the comparable practical challenges see, Scottish Consumer Council, *Options for the Future Administration and Supervision of Tribunals in Scotland: A Report by the Administrative Justice Steering Group* (2008) [89]. Alternative arrangements were made in Scotland through a ‘Concordat between the Scottish Executive and the Department for Constitutional Affairs’ 21 July 2005). This paved the way for the potential devolution of reserved tribunals under the Scotland Act 2016.

<sup>97</sup> Jones, ‘Wales, Devolution and Sovereignty’ (n 30) 161.

<sup>98</sup> AJTC Welsh Committee (n 58) [68].

<sup>99</sup> Lord Thomas of Cwmgiedd (n 90) [32].

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<sup>100</sup> HM Government, *UK Government's Evidence to the Commission on Devolution in Wales Part II: The Welsh Devolution Settlement* (2013) [13.30].

<sup>101</sup> HM Government, *UK Government's Evidence to the Commission on Devolution in Wales Part II: The Welsh Devolution Settlement* (2013) [13.30].

<sup>102</sup> *R (Barclay) v Secretary of State for Justice and Lord Chancellor and Others* [2013] EWHC 1183 (Admin), [2014] 1 WLR 415.

<sup>103</sup> Elizabeth Arfon-Jones, 'The Tribunal System in Wales: Map and Update on Jurisdictions' (Public Law Project Conference, Cardiff, April 2012).

<sup>104</sup> Constitutional Reform Act 2005, Sched. 14 Part 3.

<sup>105</sup> Other than President and members of the Special Educational Needs Tribunal for Wales which is not listed under the Tribunals, Courts and Enforcement Act 2007, Sched. 14, Part 3.

<sup>106</sup> Senior President of Tribunals, *Senior President of Tribunals' Annual Report 2015* (2015) 93.

<sup>107</sup> The Welsh Language Tribunal (Appointment) Regulations 2013, SI.2013/3139 (W.312), Reg. 3.

<sup>108</sup> Welsh Government, Appointment of the President and other members of the Welsh Language Tribunal: Statement of Appointment Policy and Procedure (Version 1(10.12.13)) [4.3], [4.6], [4.7]; Senior President of Tribunals, *Senior President of Tribunals' Annual Report 2015* (2015) 93.

<sup>109</sup> Welsh Government, *Committee for Administrative Justice and Tribunals, Wales (CAJTW) Legacy Report: Welsh Government Response* (July 2016) 2 <<http://gov.wales/docs/cabinetstatements/2016/160729justicetribunalsreportresponseen.pdf>> (last accessed 17 November 2016).

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<sup>110</sup> Judicial Appointments Commission, *Annual Report and Accounts 2015/16* (HC 600, 2016) 19; The JAC is not statutorily obliged to assist with these appointments, but it is possible for it to do so under section 83 of the Government of Wales Act 2006. This allows the Welsh Ministers to enter into agency arrangements enabling a relevant authority to exercise some of their functions.

<sup>111</sup> CAJTW, *Administrative Justice* (n 91) [27].

<sup>112</sup> Judicial Appointments Commission, ‘016 Information Page: Salaried Regional Employment Judge of the Employment Tribunals (England and Wales)’ <<https://jac.judiciary.gov.uk/016-information-page>> (last accessed 17 November 2015).

<sup>113</sup> Valuation Tribunal for Wales, *Annual Report 2013/14* (2014) [6.4] ‘The involvement of local authorities is an historic feature dating back to the Tribunal’s original forebears in 1948. It is now proving something of an anachronism in the 21<sup>st</sup> century: but it is still enshrined in the Tribunal’s governing statutory regulations’; Reform to the appointment process is being undertaken by the VTW but there are practical difficulties in reforming the procedure identified by the Tribunal due to the current Regulations, see further, Valuation Tribunal for Wales, *Annual Report 2014/15* (2015) [4.1]–[4.6].

<sup>114</sup> Welsh Government, *School Admission Appeals Code* (Statutory Code document no: 007/2013, WG19670, December 2013) [2.2].

<sup>115</sup> Lord Justice Pill, *Speech to the Legal Wales Conference* (Legal Wales Conference, Cardiff, 2009); R Gwynedd Parry ‘Evidence to the National Assembly for Wales Constitutional and Legislative Affairs Committee’ in National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction: Consultation Responses* (March 2012) WJ 14 [31]; His Honour Judge Wyn Rees, ‘Personal

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Response' in National Assembly for Wales, *Inquiry into the Establishment of a Separate Welsh Jurisdiction: Consultation Responses* (March 2012) WJ 17 [8].

<sup>116</sup> Jacobs (n 36) [1.103].

<sup>117</sup> Rent Assessment Committees (England and Wales) Regulations 1971, SI.1971/1065; Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI.2004/681; Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012, SI.2012/531 (W.83).

<sup>118</sup> Transfer of Tribunal Functions Order 2013, SI.2013/1036, Sched. 2 Part 1 para.1.

<sup>119</sup> The Special Educational Needs Tribunal for Wales Regulations 2012, SI.2012/322 (W.53).

<sup>120</sup> Grainne McKeever and Brian Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Law Centre (NI)) 2010) 12–13; Northern Ireland Department of Justice, *Tribunal Reform: Discussion Paper on the Future Administration and Structure of Tribunals in Northern Ireland* (December 2011) [4.6].

<sup>121</sup> Jacobs (n 36) [3.24].

<sup>122</sup> The Welsh Language Tribunal Rules 2015, SI.2015/1028 (W.76), Rules 3 and 5.

<sup>123</sup> Welsh Government, *School Admission Appeals Code* (Statutory Code document no: 007/2013, WG19670, December 2013) [1.9].

<sup>124</sup> Welsh Government, *School Admission Appeal Code* (n 123) Annex B.3.

<sup>125</sup> Welsh Government, *School Admission Appeal Code* (n 123) Annex B.3.

<sup>126</sup> Welsh Government, *School Admission Appeal Code* (n 123) Annex B.3.

<sup>127</sup> Welsh Government, *Exclusion from Schools and Pupil Referral Units* (Guidance Document No: 081/2012, September 2012).

<sup>128</sup> Welsh Government, *Evidence* (n 9) [21].

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- <sup>129</sup> Scottish Government, *Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland* (2012) 24.
- <sup>130</sup> Scottish Civil Justice Council, *Annual Report 2013/14* (May 2014) 8.
- <sup>131</sup> Tribunals, Courts and Enforcement Act 2007, s.21; Jacobs (n 36) [3.48].
- <sup>132</sup> Wales Governance Centre, *Justice in Wales: Principles, Progress and Next Steps* (September 2016) 18.
- <sup>133</sup> HM Government, *Powers for a Purpose* (n 74) 8–9.
- <sup>134</sup> HM Government, *Powers for a Purpose* (n 74) 38, 55, [2.9.5]; However, devolving reserved tribunals (as in Scotland) would not be considered for Wales [3.13].
- <sup>135</sup> Wales Office, *Draft Wales Bill* (Cm 9144, October 2015) Sched. 7A, para.6(3), 35.
- <sup>136</sup> Welsh Government, *Initial Assessment of Significant Cross Cutting Issues and Significant Reservations arising from Wales Bill Proposals* (28 August 2015) [5.26].
- <sup>137</sup> Welsh Government, *Initial Assessment* (n 133) [5.25]–[5.27]. For example, some functions of the Residential Property Tribunal for Wales relate to non-devolved matters. On the other hand, some non-devolved tribunals have jurisdiction over devolved matters such as in the First-tier Tribunal (Care Standards).
- <sup>138</sup> The pre-legislative scrutiny of the draft Wales Bill raised fundamental doubts regarding some of the main provisions in the Bill. See further, National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Report on the UK Government's Draft Wales Bill* (December 2015); House of Commons, Welsh Affairs Select Committee, *Pre-legislative Scrutiny of the Draft Wales Bill* (HC449, 2016); Wales Governance Centre and the Constitution Unit, *Challenge and Opportunity: The Draft Wales Bill 2015* (February 2016).
- <sup>139</sup> Wales Act 2017, Sched. 1, para.9(3)–(4).
- <sup>140</sup> Wales Act 2017, section 4 and Sched. 3.

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<sup>141</sup> Other tribunals will still come under the definition of a ‘devolved tribunal’ through being listed as a Wales Public Authority and included within the exception to the general reservation of Tribunals under Schedule 1 of the Wales Act 2017.

<sup>142</sup> The Secretary of State for Wales has announced the establishment of a working group, between the UK Government, the Judicial Office and the Welsh Government, to consider the administrative arrangements for justice in Wales. At the time of writing it is yet to report; HM Government, *Justice in Wales Working Group: Terms of Reference* (7 June 2016).

<[https://www.gov.uk/government/uploads/.../Justice\\_in\\_Wales\\_Working\\_Group.doc](https://www.gov.uk/government/uploads/.../Justice_in_Wales_Working_Group.doc)>

(last accessed 16 June 2016); Wales Office, ‘Amended Wales Bill will deliver a stronger devolution settlement’ (Wales Office Press Release, 29 February 2016).

<<https://www.gov.uk/government/news/amended-wales-bill-will-deliver-a-stronger-devolution-settlement>> (last accessed 9 March 2016).