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Recent interest in the harmonizing potential of European administrative law stems in part from the view that administrative states are facing a 'legitimacy crisis' and that administrative law must evolve to survive. Emergent 'new administrative law' no longer recognizes the state as a centralized leviathan, but rather as promoter, facilitator, regulator, and helmsman of domestic social and economic progress.

In this paper I argue that articulating shared 'European' principles of good administration and administrative law only goes part of the way to understanding this re-positioned administrative state, and that a better approach also focuses on the architecture of administrative justice. I outline various UK conceptions administrative justice and European conceptions of good administration and examine, for the first time, the impact that European principles of good administration have had on UK administrative justice.

I argue that UK approaches to administrative justice help to meet the challenges of new administrative law by focusing on incorporating principles of good administration and human rights into the design architecture of institutions, as well as into administrative law itself. I conclude that there is potential to develop, through further comparative analysis, European conceptions of administrative justice, overlapping with and complementary to, European principles of good administration.

KEY WORDS: good administration, administrative justice, Council of Europe, European administrative law, right to good administration

1 INTRODUCTION

Various recent projects have sought to delineate a set of European norms regulating the procedures (and to an extent) the substance of administrative decision-making. The most well-known is the Research Network on EU Administrative Law (ReNEUAL). ReNEUAL addresses the need for simplification of EU administrative law as the body of rules and principles governing the implementation of EU policies by EU institutions and Member States.[1] A second project aims to investigate the Common Core of European Administrative Law (CoCEAL). CoCEAL utilizes a ground-up methodology examining what would be the outcome of applying various norms of EU Member State administrative procedure laws to particular scenarios.[2] The third 'Speyer' project goes beyond administrative procedure law, and beyond the EU, being concerned with the broader impact of Council of Europe principles of

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1 http://www.reneual.eu/

2 https://cordis.europa.eu/project/rcn/204844_en.html

good administration on Member State administrative law; this project seeks to understand how coherently notions of good administration play out across States.[3]

This interest in the harmonizing potential of supranational administrative law stems in part from the view that administrative states are facing a new 'legitimacy crisis', besieged by the forces of globalization, constitutionalization, destatization, privatization, and decentralization.[4] Administrative law, and with it administrative law scholarship, must evolve to survive. Emergent 'new administrative law' then, no longer recognizes the state as a centralized leviathan, but rather as promoter, facilitator, regulator, and helmsman of domestic social and economic progress.

In this paper I argue that articulating shared 'European' principles of good administration and administrative law only goes part of the way to tackling this re-positioned administrative state, and that a better approach also focuses on the architecture of *administrative justice*. Administrative justice is a contested concept and one that has so far rarely been approached from a comparative European perspective. In its broadest sense it can be understood as a system of principles, law, redress institutions and procedures, designed to facilitate good administration in the interest of citizens.

Whilst the structuring and legitimacy of administration has long been contested, new administrative law's embrace of multi-disciplinarity, and pluralism (of methods and principles) is a more recent development, and one which chimes with administrative justice as a concept that has long been examined from sociological, political and psychological perspectives, as well as from traditional legal perspectives. New administrative law is characterized by an understanding of the need for inter-institutional collaboration between players within an administrative law and justice system, including across national borders, and a high level of citizen engagement with such laws and institutions. Other attributes include law, administration, and individual redress, that is increasingly 'righted', regionalized, specialized, transparent and digitalized. These are also attributes of UK approaches to administrative justice.

In the UK, the early emergence of new administrative law coincided with a broad conception of administrative justice. This includes not only the laws governing administrative decision-making, but also the institutions (courts, tribunals, ombudsmen and others) with responsibility for administrative redress, how these institutions are structured to form a system, and how administrative decision-makers learn from redress procedures; a 'virtuous circle' designed to meet users' needs.[5] Whereas across Europe the focus has been less on institutions and systems, and more on articulating general European values that can be expressed as shared principles of good administration amounting to blue prints for EU, and to an extent domestic, administrative law. The notion of a virtuous circle of administrative justice, including law, institutions, systematic learning and feedback, is fairly distinct to the UK. Even in the UK this

3 Ulrich Stelkens and Agnė Andrijauskaitė, 'Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and Their Impact on the Administrative Law of Its Member States' FÖV Discussion Paper No. 86: 2017.

4 Sabino Cassese, New paths for administrative law: A manifesto, 10(3) ICON. 603 (2012).

5 AJTC, The Developing Administrative Justice Landscape (London: AJTC, 2009).

aspiration has tended to 'rise and fall'.[6] Administrative justice, as a policy objective and as an area of research, is broad and multi-disciplinary, with pursuit heavily dependent on practical political support.

In contrast to the UK's still relatively popular broad account, in its narrowest sense administrative justice includes only the specific set of courts and judges determining public law disputes. This seems to be a common understanding of the concept among continental European jurisdictions. Europe has witnessed the expansion of autonomous systems of administrative justice, understood as specialist courts and judges distinct from ordinary or general civil courts. To an extent the UK has tracked this trend, with the creation first of an Administrative Court for England and Wales, and the later systematization of diverse tribunals. However, there are other considerations that render the UK a relative outlier in Europe. It is one of few jurisdictions of common law tradition and the first Member State to be leaving the EU. The UK is a country in constitutional crisis, including; rolling back European constitutional protection for human rights, destabilizing territorial arrangements, and withdrawing considerable support for supranational public law. Much of this is precipitated by Brexit, which though a complex and multi-faceted situation, highlights some shared European concerns about the perceived 'externalization' of rights and redress, and an apparent retreat from globalization and constitutionalization of administrative law. Below these headline constitutional developments, a similarly dramatic reorganization of domestic administrative justice is evident. This includes devolution of law and redress, regionalization of the Administrative Court, tribunalization of judicial review,[7] digitalization of tribunals,[8] the growth of internal administrative review, and reducing judicial review and tribunal appeal rights (in favour of a so-called more bureaucratic rationality approach).[9] Justifications for these developments are familiar to other jurisdictions; bringing administrative laws closer to the people they affect, the need for specialization given increasingly technical and fragmented government and governance, austerity and marketization of public services (even marketization of aspects of the justice system).

The newest UK approach is to suggest repositioning the concept of administrative justice itself; arguing that it should not be seen as a fourth system of justice (alongside private civil, criminal and family counterparts), but rather as a set of values amounting to a common law constitutional principle, or even a right to good administration. This brings UK administrative justice, in terms of content and underpinning philosophy, closer to the search for European general principles of good administration. However, I argue that this emphasis on administrative justice as a matter of principle alone would be a retrograde step, as it misses the broader contribution that has been, and continues to be made, by studying the architecture

6 Michael Adler, The Rise and Fall of Administrative Justice – A Cautionary Tale, 8(2) Socio-Legal Review. 28 (2012).

7 Sarah Nason, Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review, PL. 440 (2009).

8 Public Law Project, The Digitalisation of Tribunals: What we know and what we need to know (London: Public Law Project, 2018): https://publiclawproject.org.uk/resources/the-digitalisation-of-tribunals-what-we-know-and-what-we-need-to-know/

9 Robert Thomas and Joe Tomlinson, Mapping current issues in administrative justice and the 'more bureaucratic rationality' approach, 39(3) JSWFL. 380 (2017).

of institutions designed to deliver administrative justice as forming a coherent and inter-connected system.

In this paper I outline UK conceptions of administrative justice and European conceptions of good administration respectively. I then examine, for the first time, the impact that European principles of good administration have had on UK administrative justice, historically, and in terms of common law precedent, political consideration, and on the enterprise of ombudsmanry. The European approach to good administration has helped catalyse a more rights-based culture, where citizens are understood to have administrative rights, that include a positive obligation on the state to properly protect and give effect to these rights. On the other hand, European principles of good administration have yet to teach us much about developing the architecture of an administrative justice system. Using the examples of tribunals, administrative courts and administrative review I explain how the UK has rarely referenced the practices of other European nations in developing its own system, though I highlight some important missed opportunities to do so.

I argue that, despite the unique context of the UK in Europe, UK approaches to administrative justice can help to meet the challenges of new administrative law. These approaches focus on incorporating values and principles of good administration and human rights into the design architecture of institutions of administrative justice, as well as into administrative law itself. I conclude that there is distinctive conceptual space for both good administration and administrative justice, with potential to develop European conceptions of administrative justice, which both overlap with and are complementary to, European principles of good administration.

2. EUROPEAN GOOD ADMINISTRATION AND UK ADMINISTRATIVE JUSTICE

I begin by surveying some approaches to administrative justice; this includes the changing UK legal framework, Anglo-American conceptions, and accounts reflective of EU member state experiences.

Since the early 2000s, the UK began to experiment with developing more coherent structures for redress against public body decision-making. In a 2004 Government White Paper Transforming public services: complaints, redress and tribunals, the Lord Chancellor concluded, 'the institutions which are there to safeguard justice in administration … lack systematic design and are poorly organised'.[10] The White Paper aimed to improve 'the whole end-to-end process for administrative justice',[11] focussing on proportionate dispute resolution. Following this White Paper, and the later Leggatt Review of Tribunals,[12] the Tribunals Courts and Enforcement Act (TCEA) 2007 defined an administrative justice system as:

> The overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including – (a) the procedures for making such decisions, (b) the

[10] Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (London: DCA, Cm. 6243, 2004).

[11] Ibid.

[12] Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for Users: One System – One Service* (2001).

> law under which such decisions are made, and (c) the systems for resolving disputes and airing grievances in relation to such decisions.[13]

Having this definition alone was not sufficient to overcome the difficulties associated with fragmentation of redress and poor system design, and the TCEA also created an Administrative Justice and Tribunals Council (AJTC) with a statutory duty to keep the system, so defined, under review. It would be the job of the AJTC to consider how various parts of the system could be better integrated to ensure more proportionate dispute resolution. It was the AJTC that conceptualized administrative justice as a virtuous circle of good initial administrative decision-making, appropriate avenues for redress, and seeking continuous improvement through feedback.[14] The structural definition of administrative justice provided by the TCEA says nothing of any common core of principles, however, one of the AJTC's earliest self-set tasks was to develop Principles of Administrative Justice. In doing so the AJTC drew inspiration from the Council of Europe's work on good administration. The AJTC expanded the idea of administrative justice, from being primarily about systems and structures, extending it to the processes and substance of administrative decision-making.

Anglo-American conceptions of administrative justice have also gone beyond systems and structures to focus on the nature of administrative decision-making in particular spheres. Jerry Mashaw's tripartite account splits public body decision-making into bureaucratic, professional and legal dimensions,[15] with different redress mechanisms being more appropriate for each type of decision-making. For bureaucratic decisions, internal administrative review within the public body may be the better method of pursuing administrative justice, for decisions requiring professional judgment redress should be sought from an ombudsman, and for 'value-defining' decisions of a legal character redress should be via courts and tribunals.

European work specifically referencing administrative justice does not appear to have addressed links between the range of decision-making and redress institutions, their processes, and the nature of their substantive decisions, to the same extent as Anglo-American commentary. The 2005 Administrative Justice in Europe project was expressed to be the first comprehensive study of the administrative justice systems of the then twenty-five EU Member States.[16] It was a joint initiative between the French public interest group Mission de Recherche Droit et Justice and the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA Europe). Its research tool was a survey of top Member State administrative courts. The four-part questionnaire covers the organization and role of bodies competent to review administrative acts, specifics on judicial review procedures and remedies, the non-judicial settlement of administrative disputes, and statistical data about the quality of access to justice in Member States. Up to date answers for all ACA Member States are presented in an online 'Tour of Europe'.[17]

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13 TCEA, sched 7(14).

14 AJTC (n 5).

15 Jerry Mashaw, Bureaucratic justice: managing social security disability claims (Yale: Yale University Press, 1983).

16 Observatoire des Mutations Institutionnelles et Juridique, *La Justice Administrative en Europe* (Presses Universitaires de France, 2007).

17 http://www.aca-europe.eu/index.php/en/tour-d-europe-en

The ACA identified two trends across the countries surveyed; specialization and professionalization. These trends are evidenced by a concern to account for the distinctiveness of administrative justice. Specifically, whether administrative laws, and the institutions through which individuals seek redress against administrative decision-making, cohere as a system which if not entirely separable from general law and redress, is nevertheless distinctive from it. This latter distinction has become known as a divide between monism (redress against administrative bodies through ordinary courts under general law) and dualism (a separate system of administrative law and separate courts providing administrative justice). In practice, most states fall somewhere on a continuum between these extremes, and the ACA rejected the binary analysis as failing 'to account for both the diversity and the convergence of the jurisdictional systems handling government-administrative matters in Europe.'[18]

The majority of information provided in response to the questionnaires concerned administrative court organization and procedure, and judicial review of administrative decision-making. Despite the constitutional significance of judicial review in the UK it is only the tip of the iceberg of administrative justice. Whilst its impacts[19] can be wide-ranging in specific cases, it provides only peripheral and sporadic influences on administrative decision-making. Far more important numerically are internal reviews within public bodies, and the decisions of tribunals, ombudsmen and other complaint handlers. The ACA analysis refers to these mechanisms as alternative channels for dispute resolution viewed as a means of controlling access to the courts. It notes that in all states surveyed, administrative bodies themselves have an initial role in conflict resolution, that most states (though not all) have independent complaint handling bodies (such as ombudsmen or mediators), and that alternative channels for dispute settlement remain under-developed but were seen to be proliferating at the time of the survey. However, there is no mention of any states attempting to develop an integrated virtuous circle system of administrative justice.

Academic commentary from Europe also associates administrative justice with administrative court structures. For example, a 2016 edition of the BRICS Law Journal has contributions on the administrative justice systems of France, Spain, Italy and Poland, and each considers administrative justice as either entirely, or largely, synonymous with judicial organization, jurisdiction and remedies.[20] Most European scholars trying to map contemporary systems of administrative justice focus primarily on the design of courts structures.[21] Whilst increasing reference is made to access to justice, the intensity of judicial review and remedies, administrative justice is seen as largely synonymous with what administrative courts do.

As the UK has generally lacked a separate system of administrative courts, we are used to the refrain that domestic administrative justice developed ad hoc in comparison to continental systems with their more dualistic approach often accompanied by administrative procedure legislation. However, contributing to a 2015 Administrative Justice in Europe symposium, Giacinto della Cananea argues that across Europe: 'Administrative justice was not the product of an architect's design but, rather, the consequence of deep social and institutional

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18 (n 16).

19 Varda Bondy, Lucinda Platt and Maurice Sunkin, The Value and Effects of Judicial Review: The nature of claims, their outcomes and consequences (London: Public Law Project, 2015).

20 Various contributions in BRICS Law Journal. 3(2) (2016).

21 Giacinto della Cananea, Public Law Disputes in Europe, 7 IJPL. 102-156 (2015).

changes. Accordingly, it had a limited systematic nature, or none at all'.[22] This conclusion provides at least two lessons; first that ad hocery - fragmentation and limited systematic coherence - is not unique to the UK, and second that the social context may make comparing the reasons for ad hoc growth, its consequences and methods to improve the situation, a difficult area for drawing comparisons between states.

The symposium demonstrates how many different, and potentially contradictory ways there are to understand administrative justice. In his contribution, Jeffrey Jowell uses the terms administrative justice and administrative law interchangeably, in both instances referring to a compass of principles articulated from rule of law requirements, noting that these principles have international reach.[23] In that regard Jowell may be using administrative justice in much the same way as the European projects use the term principles of good administration. Carol Harlow's symposium contribution is concerned with administrative procedure law, though her skepticism of the Europeanization of procedures centers on implementation and enforcement and necessarily invokes the pluralism of national redress institutions.[24] Harlow and Rawlings are perhaps known for their concern that administrative justice may be too broad a subject matter for useful analysis – preferring instead to speak of law and administration, drawing a sharper divide between hard-law principles of legality and soft-law principles of good administration. Gordon Anthony's paper, on the other hand, maps key developments on the UK's path from a traditional administrative law conception of administrative justice (concerned largely with courts and tribunals) to an integrated conception (the virtuous circle of law, redress, and learning including initial decision-making, internal review, and external judicial and non-judicial avenues of redress).[25] He notes how austerity risks damaging the practical pursuit of systematic administrative justice and its associated values. However, he does not address the extent to which these developments might also be experienced in other European jurisdictions.

3 EUROPEAN PRINCIPLES OF GOOD ADMINISTRATION IN THE UK

In this paper I draw on the broadest conception of European good administration, namely that developed by the Council of Europe. In this section I examine what impacts the Council of Europe work in this field has had on the UK administrative justice system. In particular, I analyze the extent to which the UK has been receptive to Council of Europe influences, and what might have been (and continue to be) sticking points between the national and supranational regimes. This enables me to expose the similarities, and the differences, between European good administration and UK administrative justice and what each can learn from the other.

Since the 1970s the Council of Europe has promulgated a 'package of good administration' reflecting common European heritage, including approximately 20 Committee

[22] della Cananea (n 21) 134.

[23] Jeffrey Jowell, All Roads Lead to Rome: The International Convergence of Principles of Administrative Justice, 7 IJPL. 94-101 (2015).

[24] Carol Harlow, At Risk: National Administrative Procedure Within The European Union, 7 IJPL. 60-93 (2015).

[25] Gordon Anthony, Administrative Justice in the United Kingdom, 7 IJPL. 9-33 (2015).

of Ministers Recommendations; the first being Resolution 77(31) on the protection of the individual in relation to acts of administrative authorities. From 1989 the Council has worked in the realm of administrative law, influencing Member States and guiding transition countries in reforming their public administration following the fall of the Berlin Wall. From 1977 to 2008 a Project Group on Administrative Law (CJ-DA) worked under the authority of the European Committee on Legal Co-operation (CDCJ) and was responsible for the Council of Europe activities in the field. It was assisted by a Working Party consisting of Member State experts in administrative law.

The CJ-DA's Handbook, The Administration and You, sets out principles governing the relationship between public administration and individuals. The CJ-DA completed work on general principles of good administration, judicial review, the execution of administrative decisions in administrative law, alternatives to litigation between administrative bodies and individuals, and the status of public officials in Europe. The standards across these fields were consolidated into Committee of Ministers CM/Rec(2007)7 which provides a Code of Good Administration. The Recommendations are complemented by three Conventions that have a bearing on the core of Member State administrative law, relating to local self-government (regionalization), freedom of information and data protection (transparency, digitalization and privacy). The European Court of Human Rights (ECtHR) has developed a line of case law deducing general principles of administrative law from the European Convention on Human Rights (ECHR), often referring to other Council of Europe sources to elaborate the content of such principles.

Council of Europe Recommendations on good administration were first referred to in the UK by the JUSTICE-All Souls Committee 1978-1988.[26] The sources considered were Resolution(77)31 on the protection of the individual in relation to acts of administrative authorities, and Recommendation(80)2 concerning the exercise of discretionary powers by administrative authorities. JUSTICE All-Souls resolved to build on the work of the Committee of Ministers to 'produce an updated and comprehensive set of Principles of Good Administration to which the public would have access and which could be communicated to all administrators'.[27] Aside from the right to a financial remedy for maladministration and the right to reasons, JUSTICE did not recommend that these principles be the subject of legislative enactment, rather they would be enforced by the Parliamentary Commissioner (now the Parliamentary and Health Services Ombudsman (PHSO)).[28]

In its final report, published in 1988, JUSTICE-All Souls concluded that no action had been taken domestically in relation to the Council of Europe work. The question of implementation was addressed in the House of Lords in 1995 when Lord Lester asked the Government whether it considered the UK had given effect to Resolution77(31).[29] Lord Chancellor Mackay, responded:

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26 JUSTICE-All Souls, *Administrative Justice: Some Necessary Reforms* (Oxford: Clarendon Press, 1988).

27 Id.

28 JUSTICE-All Souls (n 26) 21.

29 HL Deb 20 July 1995 vol 566 col 39-40WA.

> The United Kingdom has over a very long time developed a careful network of arrangements for ensuring fairness and good government which is wider and more flexible than the principles by which governments of Member States are invited to be guided by the resolution, and which is continuing to develop.

Lord Mackay similarly opined that the principles of Recommendation(80)2 were already encompassed by domestic law.[30] Lord Lester asked what steps had been taken in relation to the Recommendation that where administrative acts adversely affect individual rights, liberties or interests that the person should be informed of the reasons behind relevant decisions. Lord Mackay responded that provision was to be found in the code of practice on access to government information,[31] in the Citizen's Charter principles of increased openness, and in common law jurisprudence.

Council of Europe principles of good administration have rarely been directly referred to in common law judgments. In *R v. Secretary of State for Transport ex parte Pegasus Holdings*[32] a Romanian aircraft company was granted a permit to take on board and discharge passengers at points in the UK, provided its crews complied with the requirements of the Romanian Civil Aviation Authority. Five Romanian pilots also undertook UK Civil Aviation Authority examinations, failing some aspects. The Secretary of State expressed concern about the pilots' capacity to comply with relevant Romanian requirements, provisionally suspending the aircraft company's permit. It was argued that the Secretary of State had not given the aircraft company a sufficient opportunity to state its case against the suspension. Schiemann J concluded that whilst the Secretary of State had been bound to exercise his power reasonably and with regard to the proper balance between the adverse effects of his decision and the purpose it was sought to achieve, he had not acted irrationally. However, Schiemann J also noted:

> It would, perhaps, be difficult for anyone appearing for the Government to take issue on the principle of proportionality being applied by administrative authorities, bearing in mind Recommendation No. R(80)2 of the Committee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities that was adopted by the Committee of Ministers of the Council of Europe … and that recommends governments of Member States to be guided in their law and administrative practice by the principles annexed to that recommendation, one of which basic principles is that an administrative authority when exercising a discretionary power should maintain a proper balance between any adverse effects that its decision may have on the rights, liberties or interests of persons and the purpose that it pursues.[33]

Despite Schiemann J's confidence in the principle of proportionality, its adoption as a legal standard across the full range of administrative decision-making remains contentious in the UK.[34] On the other hand, proportionality is widely accepted as a principle of good

30 HL Deb 20 July 1995 vol 566 col 40WA.
31 Now superseded by the Freedom of Information Act 2000.
32 [1988] 1 WLR 990.
33 *Pegasus Holdings* (n 32) [1001].
34 See e.g., *Pham v. Secretary of State for the Home Department* [2015] UKSC 19.

administration contained in standards such as those developed and enforced by Ombudsmen with responsibility for remedying maladministration. Despite the largely legalistic terminology of much of the Council of Europe's Code of Good Administration, it has been of more relevance to UK Ombudsmen than to courts and tribunals.

The UK Ombudsmen's collective approach to Council of Europe sources is one of complementarity, accepting the importance of European norms whilst stressing the need to develop a distinctive domestic body of principles. The standards most explicitly linked to Council of Europe work stem from the Local Government Ombudsman (LGO) Guidance on Good Administrative Practice, published in 1993 (reprinted 2001).[35] The first edition responded to increased political concern for customer satisfaction and efficiency in public services provision, informed by consultation with local authority associations, and the LGO's own investigations. Council of Europe sources influenced its content concerning relevant considerations, proper purposes, non-discrimination and proportionality.

In March 2007, the PHSO published Principles of Good Administration, drawing on the Office's experience of investigating complaints (hereinafter 'PHSO Principles').[36] The PHSO Principles do not reference the Council of Europe Code despite being published three months before it was adopted. It has been suggested that this was an attempt to avoid convergence with European standards (Council of Europe and EU) particularly in the context of human rights.[37] But there is a more likely explanation. The two documents overlap, yet appear to perform different roles. The Code reflects UK general administrative law (aside from article 5 – Proportionality). Only its preamble refers to matters domestically considered as part of broader good administration, not necessarily enforceable through courts and tribunals, such as the organization, efficiency and effectiveness of public authorities. The PHSO Principles are a mixture of matters actionable at common law in the courts, and those that might only be redressed by complaining to an Ombudsman. In simplistic terms this follows the adage that illegality necessarily constitutes maladministration, whereas not all examples of maladministration are legally actionable before courts and tribunals. The Code seems more focused on illegality, whereas the PHSO Principles are concerned with promoting good administration.

In the PHSO Principles, being open and accountable includes being open and clear about policy and ensuring that information is clear and accurate, it also includes handling information appropriately and keeping proper records. In the Code this is covered by legalistic terminology of respect for privacy and transparency. The PHSO Principle of being customer

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35 https://www.lgo.org.uk/information-centre/reports/advice-and-guidance/guidance-notes

36 Available online: https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf

37 A pressure group petitioned the European Parliament, arguing that the principles of CM/Rec (2007) 7, 'create legitimate expectations the protection of which is at the root of the UK constitutional principle of the rule of law, which requires regularity, predictability, and certainty in dealing with the public. Yet, in March 2007, with presumptive knowledge that the Council's Principles and Code would be adopted three months later, the Parliamentary Ombudsman published a distinct set of 6 Principles of Good Administration in respect to which all public bodies in the UK are expected to comply'. The Group argued: 'There is a sufficient body of evidence to show that the Ombudsman does not practice what it preaches. It systematically breaches rights guaranteed by the European Convention on Human Rights'. Online at: http://phsothetruestory.com/report-into-reform-of-the-ombudsman/ and: http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/4751.

focused includes dealing with people helpfully, promptly and sensitively, and acting fairly requires treating people impartially, whereas Code article 14 refers to the right of private persons to be heard with respect to individual decisions. The PHSO Principles encompass treating people with respect and courtesy, acknowledging mistakes, apologizing where appropriate, and putting mistakes right quickly and effectively. They also cover continuous improvement, reviewing policies and procedures regularly, asking for feedback and using it to improve services and performance, ensuring that public bodies learn lessons from complaints. These are matters that would be difficult, and perhaps not advisable, to enshrine in judicially enforceable administrative law. They are not directly about rights or entitlements for citizens, they do not affect the citizen's legal position in a clearly identifiable way, but are more concerned with the overall organization of administration.

From a UK perspective, the Council of Europe Code may then be somewhat of a 'lawyers charter'. Rather than being directly addressed to administrators, it emphasizes the subjective rights of individual citizens in more explicit terms – whereas in the UK such legal rights are anchored in the gradual evolution of common law precedent. Somewhat ironically, it may be the UK with its seemingly more individualist, liberal and consumerist approach to administration, that actually provides fewer subjective individual rights to good administrative practices, than more collectivist nations, particularly France and Germany. This can also be seen when comparing domestic common law rights touching on good administration, to the broader protection offered by the ECHR.

4 EUROPE AND THE UK: RIGHTS FOR CITIZENS

The UK's relationship with the 'two Europes' (the EU and the Council of Europe) in the context of citizen's rights is well documented.[38] Both are seen as influential in the apparent transformation of the UK legal and political system from one of Parliamentary sovereignty, to a modern constitutional democracy based on a balanced relationship between Parliament and the Courts with each having a degree of responsibility for upholding constitutional principles and rights.[39] It is said that the UK has been 'constitutionalized' and administrative law 'righted' by European influences.[40] The transition from the British tradition of negative liberties initially sat uncomfortably with the reality of ECHR rights imposing positive obligations on states. As Paul Craig explains: 'The real importance of the change to talking openly of rights was that it signified both that duties could flow from the rights and that any limitations of the rights would not simply be acknowledged, but be rigorously scrutinized.'[41]

Despite a developing jurisprudence of common law rights, the protection afforded by the ECHR is still more extensive than domestic law in many areas of good administration. Simply as a numbers game, the ECHR contains more rights than the current list of common

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38 E.g., Katja Zeigler, Elizabeth Wicks, Loveday Hodson (eds), *The UK and European Human Rights - A Strained Relationship?* (Oxford: Hart Publishing, 2015).

39 Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing 2009).

40 Jeffrey Jowell, Beyond the Rule of Law: Towards Constitutional Judicial Review, PL. 671, 674-80 (2000); Thomas Poole, The Reformation of English Administrative Law, 68(1) CLJ. 142 (2009).

41 Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge: Cambridge University Press, 2015)

law rights that have developed in a 'haphazard and leisurely fashion'.[42] Many of the domestic common law rights are still expressed as privileges, values and liberties as opposed to conferring positive obligations on the state. ECHR rights may provide greater clarity (and therefore more protection) in virtue of being written down officially, rather than existing only in the contestable form of precedents that can be distinguished and departed from. The ECtHR has also interpreted the ECHR as incorporating implied procedural rights. For example, a measure can be lawful, but may still interfere with rights in a way that is beyond necessary in a democratic society if the individual is not 'involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests'.[43] Paul Bowen then argues that 'procedural rights available under the Convention [ECHR] go at least as far as, and further, than those protected at common law.'[44]

From an administrative justice perspective, the ECtHR's implied positive rights impose correlative duties on the state to ensure that proper laws are in place, but also a 'systems duty' to take positive measures and an 'operational duty' to protect individuals against human rights breaches including by third parties. There are also implied duties to investigate, prosecute and afford a judicial remedy, which have a bearing on the domestic administrative justice system including on the relative powers and duties of branches of state.[45]

Although the UK is regularly seen as the 'best pupil in the class' in terms of compliance with the ECHR, continued skepticism around the role of the ECtHR and its living instrument approach to Convention rights leads to domestic suspicion of the view that the ECtHR could, and should be, developing a general right to good administration as a blue print for swathes of domestic administrative law. More recent UK conceptions of administrative justice have focused less on concrete universal rights, and more on the values of institutional decision-makers,[46] localized or regionalized codes that depend significantly on the voluntary involvement of participants in the system, good will and political incentives.[47]

5 EUROPEAN GOOD ADMINISTRATION, UK ADMINISTRATIVE JUSTICE AND THE ARCHITECTURE OF REDRESS

In this section I turn from explicit rights to the second strand of administrative justice, the architecture of systems designed to redress grievances. In seeking to understand this architecture I draw on models of administrative adjudication [administrative justice] developed by Michael Asimow, including the French and German specialized court model and the UK tribunal model.[48]

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42 Lord Neuberger, The role of judges in human rights jurisprudence: A comparison of the Australian and UK experience, Supreme Court of Victoria, 8 August 2014, quoted in Paul Bowen, Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary? EHRLR. 361, (2016).

43 In relation to art. 8 see, *TP and KM v. United Kingdom* (2002) 34 EHRR 2, [72].

44 Bowen (n 42) 368.

45 See e.g., *Savage v. South Essex Partnership Foundation Trust* [2009] 1 AC 681.

46 Nick O'Brien, Administrative Justice in the Wake of, I Daniel Blake, PQ.1 (2017).

47 See e.g., Bangor University, Administrative Justice: Wales' First Devolved Justice System (2018): http://adminjustice.bangor.ac.uk/documents/AJWalesReportESRCDec18.pdf

48 Michael Asimow, Five Models of Administrative Adjudication, *Stanford Public Law Working Paper No 2632711*.

Under Asimow's specialized court model, the administrative body that makes the initial decision is also responsible for an internal administrative review process, either carried out at the same level by a different person or team, or at a higher level within the same body, using an inquisitorial method. The next step for a dissatisfied individual is judicial review in a specialized administrative court separate from the general court system, again through an inquisitorial method. Asimow proposes that under the alternative tribunal model there is no internal administrative review process, but rather review is conducted by tribunals who have the power to determine questions of fact and law. Judicial review then takes place in a generalist court and is closed to the extent that the court cannot take into account new evidence, arguments or reasons. The method both in the tribunals and the court is adversarial.

Asimow admits that these models are over-simplifications, and the UK provides a good example of this. The internal administrative review mechanisms said *not* to exist in the UK tribunal model are in fact numerous and expanding. The current structure of UK tribunals has edged closer to that of specialized administrative courts, with elements of inquisitorial as well as adversarial procedure depending on the nature of the subject matter. Some tribunals undertake judicial review (limited to questions of law), as well as hearing appeals (on fact and law). The England and Wales Administrative Court which determines the broadest range of judicial review claims, though not the largest number,[49] is a specialized jurisdiction with expert judges,[50] even though formally within the Queen's Bench Division of the generalist High Court. According to the ACA Europe the UK's top administrative court is the UK Supreme Court, but at least one Justice admits that the court barely hears any administrative law claims.[51] Its dominant caseload concerns human rights, international law and EU law, though some of these cases have administrative law dimensions, their overarching nature is constitutional.

A more useful point may be Asimow's view that each country tends to invest more in one of three specific phases of administrative justice; initial decision-making, reconsideration or judicial review. As a matter of efficiency states must make this choice as they could not afford to invest resources equally in two let alone three stages.

5.1 TRIBUNALS

The phase that has received the most attention in the UK recently is tribunals. It might be thought that European good administration had a central role to play in the reform of UK tribunals, given that the most significant recent Review of Tribunals (the Leggatt Review) was specifically tasked with ensuring that practical arrangements for any new structure, and the decision-making procedures of tribunals themselves, complied with ECHR article 6.[52] However, the Committee which reported was scathing about the ECHR's relevance, noting:

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49 The largest number of claims are determined by the specialist Upper Tribunal Immigration and Asylum Chamber which hears most judicial review claims that relate to immigration decision.

50 There are approximately 45 High Court Judges 'ticketed' to hear claims in the Administrative Court – although they also hear different types of claims (including in other courts) they are 'ticketed' based on specialist expertise in administrative law and listed to hear cases based most often on sub-sets of expertise such as in planning or taxation.

51 Lord Reed, Keynote address, SLS Seminar, *50 Years of Modern Administrative Law* (University of Sussex, May 2018).

52 Leggatt (n 12).

'The more we have endeavoured to do so the greater our doubts have become about the practicality of offering clear advice on the best arrangements for the future development of tribunals based narrowly on ECHR issues'.[53] Nevertheless, the Committee noted that article 6(3) had already been interpreted as requiring procedural 'equality of arms' between parties to some civil proceedings,[54] and this continues to have implications for immigration and asylum, and mental health tribunals. It was also recognized that whilst article 6(1) is primarily concerned with criminal and private law, it extends to administrative proceedings such as aspects of social security. The Committee felt that article 6(1) would not apply to the subject matter of the majority of tribunals, concluding that applying an ECHR-based approach to domestic tribunals would lead to an 'absurd result' where the standard of fairness would be lower in citizen-state disputes, than in private law disputes.[55]

The Committee considered that 'the ECHR is not a particularly helpful guide in attempting to review the overall workings of a complex collection of judicial bodies'.[56] Concerns included the breadth with which particular rights are framed, the resultant need to refer to case-law for elaboration, the 'living instrument' principle, and unpredictability of how case law under the UK Human Rights Act 1998 would develop. The Committee noted that the most obvious application of article 6(1) is to tribunal hearings themselves, but their view was that the requirements of independence and impartiality were equally to be found in domestic law.[57] This view is echoed in more recent Tribunal Procedure Rules.[58]

The Committee were aware of aspects of the UK administrative justice system that had been found to breach the ECHR because the adjudicative process *taken as a whole* was inadequate.[59] These cases have been significant for the UK at Strasbourg both pre and post the Human Rights Act 1998, and post reforms to UK tribunals. An early case was *Findlay v. UK*[60] which involved a court martial process where all members were directly subordinate to the convening officer who also performed the role of prosecuting authority. The lack of legal qualification or experience in the officers making the original decision, and at the later review stages, meant their decisions did not satisfy requirements of independence and impartiality.

Later cases have scrutinized planning redress systems, with the ECtHR concluding that decisions of non-independent Planning Inspectors, and in some circumstances the relevant Secretary of State, do not breach article 6 if legal review/appeal is available. It is sufficient that the reviewing courts can subject the initial factual conclusions to rational scrutiny. The ECtHR has concluded that a limited approach is expected in specialist areas of law and common across Council of Europe Member States.[61] The same rational scrutiny approach has also been found article 6 compliant in relation to local authority Homelessness Review Officers and the duty to provide 'suitable' accommodation.[62] However, the UK Supreme Court maintains that such

53 Leggatt (n 12) [2.11].
54 Referring to *Airey v. Ireland* (1979) 2 EHRR 305.
55 Leggatt (n 12) [2.17].
56 Leggatt (n 12) [2.15].
57 Leggatt (n 12) [2.16].
58 The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2698/2008) rr.22, 30 and 40 and Tribunal Procedure Rules (London: Council on Tribunals, 2003) p. 143.
59 *Bryan v. UK* (1996) 21 EHRR 342 and *Weeks v. UK* (1987) 10 EHRR 293, Leggatt [2.16].
60 [1997] ECHR 8.
61 *Bryan* (n 59) [47].
62 *Fazia Ali v. UK* [2015] ECHR 924.

decisions do not engage article 6 as they are not properly regarded as determinations of civil rights. In *Poshteh v. Royal Borough of Kensington and Chelsea*,[63] the Supreme Court criticized the earlier ECtHR decisions for not taking into account sufficient UK case law, and for failing to address concerns over the risk of judicializing welfare services decisions, with resultant implications for local authority resources. In an earlier case Lord Millett had suggested that in comparison to the UK, 'most European states possess limited judicial control of administrative decisions', and that therefore if article 6 did not apply such decisions might be entirely outside judicial supervision.[64] In *Posteh*, Lord Carnwath remarked that it would have been instructive to hear informed ECtHR views on whether Lord Millett's proposition was indeed true. The Speyer European good administration project, among others, suggests that Lord Millett's assumption is likely incorrect.

The Leggatt Review ultimately led to the rationalization of England and Wales, Great Britain and UK tribunals into a two-tier structure, with each tier divided into chambers based on subject-matter. A two-tier structure has been introduced for the Scottish tribunals and is proposed for Northern Ireland tribunals. Such has not yet been proposed for the smaller set of devolved Welsh tribunals, but reforms have been enacted to enhance their status as a distinct system and service with its own President.[65] The trend is towards devolution, rationalization and systematization of jurisdictions. The two-tier structures are self-contained, providing for internal review and appeal, and the Upper Tribunal has been given its own statutory jurisdiction to undertake judicial review on the same grounds, and with powers to award the same remedies, as the England and Wales Administrative Court.[66]

Although there is no specific system of judicial precedent within the new structures, the Upper Tribunal has developed a mechanism by which to ensure that the First-tier follows its decisions. Given their membership and repeated consideration of specialist subjects including immigration, social security and taxation, tribunals are generally closer to the policies of the administration than the Administrative Court. They are also more likely to adopt inquisitorial methods than the Administrative Court. This picture led Sedley LJ to conclude that the Upper Tribunal has 'potential to develop a legal culture which is not in all respects one of lawyers' law – a system, in other words, of administrative law'.[67]

Structural reforms are not the only changes to UK tribunals. Robert Thomas argues that there is a perceptible 'old model' of tribunals primarily engaged in dispute resolution, whereas 'new model' tribunals are also concerned with dispute avoidance and containment (as bridging institutions linking the judiciary and administrators). In the old model, paper-based systems were used for assembling case files, there was potential for oral and paper appeals with some legal aid available. Under the new model legal aid is a thing of the past for most claimants and there is increasing use of ICT and online processing of appeals.

63 [2017] UKSC 36.
64 *Begum v. London Borough of Tower Hamlets* [2003] UKHL 5 [93].
65 Wales Act 2017, Pt. 3.
66 TCEA 2007, ss.15-21.
67 *R (Cart) v. Upper Tribunal* [2011] 2 WLR 36 [42].

No other country in the world is undertaking such an extensive process of digitalizing justice as that currently underway in the UK.[68] Most tribunals will eventually be digitalized to varying degrees, including online lodging and determination of appeals, a process currently being piloted in the Social Security and Child Support Tribunal.[69] This raises a range of questions around ensuring that principles of good administration are complied with, not least in relation to procedural fairness.[70] There is still limited empirical evidence concerning the use of digital technologies in justice systems. Current conceptions of procedural fairness may need to be revisited and adapted to the digital justice context before the comparative success of reforms can be evaluated. In this context, UK conceptions of administrative justice and European accounts of good administration, likely require updating to face modern challenges.[71] Notably UK scholarship is leading the way here, with pioneering work by Joe Tomlinson, *Justice in the Digital State: Assessing the next revolution in administrative justice*.[72]

5.2 ADMINISTRATIVE COURTS

The UK tribunal edifice is subject to the supervision of the Administrative Court on judicial review, but usually only in cases raising important matters of legal principle or practice, or which are otherwise compelling.[73] This restriction is a pragmatic compromise given rising caseloads, especially in the field of immigration. However, the remaining jurisdiction of the Administrative Court is eclectic. Administrative Court procedures, grounds and remedies vary across different subject matters (e.g., public procurement, review of the Upper Tribunal, cases involving EU law and the ECHR, and cases seeking review of lower civil and criminal court judges). Some cases are so constitutionally significant that the Administrative Court in effect acts as a constitutional court of first instance.[74] The grounding of the Administrative Court's judicial review powers in the inherent 'Royal' prerogative of justice also gives it characteristics similar to European Councils of State. Yet a large chunk of its caseload concerns basic errors by junior administrative officials that could be determined by a lower tribunal, or by establishing an administrative division within local county courts (an institutional arrangement

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68 Ministry of Justice, Transforming Our Justice System By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (September 2016); Public Law Project, The Digitalisation of Tribunals: What we know and what we need to know (2018).

69 Robert Thomas and Joe Tomlinson, Remodelling social security appeals (again): the advent of online tribunals, JSSL (2018).

70 Joe Tomlinson, 'Designing Digital Administrative Tribunals: A New Analytical Framework for A New Frontier' *Cambridge/Melbourne Public Law Conference* (July 2018).

71 In the context of information and data rights generally, robust rules on the transfer of personal data including across borders, are included in the EU General Data Protection Regulation (GDPR). A separate Data Protection Directive (DPD) relates to personal data being processed for law enforcement purposes. The new regime is elaborated in the UK Data Protection Act 2018, Part 4 of which introduces a regime specifically applicable to the intelligence services whose activities fall outside the scope of the GDPR. The UK Government has explicitly based Part 4 on the modernised version of the CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, showing that there is continued interplay between the UK and the two-Europe's in this context.

72 Forthcoming, Policy Press, May 2019.

73 *R (Cart) v. Upper Tribunal, R (MR) v. Upper Tribunal (Immigration and Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28.

74 See e.g., *R (Evans) v Attorney General* [2013] EWHC 1960 (Admin).

common across European jurisdictions). Nowadays the UK has a rationalized and systematized tribunal structure, but an increasingly fragmented Administrative Court jurisdiction.

The Administrative Court was 'regionalized' in 2009, relaxing the hitherto centralized system of judicial review. Aside from reducing pressure on London, the objectives were to improve access to justice in the context of decentralizing public administration.[75] However, the reforms also conveniently reduced the backlog of cases that had been building up at the Royal Courts of Justice in London; at one stage so severe that a domestic NGO issued a letter before claim alleging breach of article 6 ECHR alongside common law rights of access to justice. Nearly ten years on concerns remain that regionalization has threatened the authority of judicial review (the constitutional power associated with an elite procedure involving an elite and centralized cadre of judges and lawyers); that common law administrative law is becoming fragmented; and that the quality of adjudication, legal advice and representation is poorer outside London. The Regional Administrative Courts determine less than a quarter of cases, and access to justice problems are exacerbated by a legal aid system largely designed to meet the needs of southern England.

Balancing between specialization, access to justice, legal consistency and authority is familiar to European jurisdictions. Such issues have been experienced as part of the process of Federalization in Belgium, creating a plethora of sub-state administrative courts, and moves towards regional administrative law in the form of proposed sub-national general administrative procedure legislation and judicial development.[76] In the Netherlands there had been proposals to amalgamate various administrative appeal courts to ensure greater consistency and transparency. This has not been achieved to the fullest extent envisaged by the Netherlands Council for the Judiciary, particularly given the Council of State's concern to safeguard its own role (reflecting a similar sense of elitism as seen in England and Wales judicial review).[77] In developing their systems of administrative courts, Balkan and former Soviet states have also had to address structural questions such as whether to create administrative divisions within ordinary courts, or to create a specialist administrative court system, how many levels of appellate court are appropriate, where should these be located, and what should be the relationship between the country's top administrative courts and the top constitutional court (if there is one). Most states have chosen to create relatively separate systems of administrative courts, and the UK development of two-tier specialist tribunals (which are courts in all but name) echoes this trend. However, the UK approach to administrative justice continues to reject a fully dualist model. The Administrative Court in England and Wales draws no sharp distinctions between administrative law, human rights law and constitutional law, with its jurisdiction largely determined by a principle that is both part of the rule of law and a basic facet of good administration; that no alleged wrongs should be without access to a remedy.

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75 Sarah Nason and Maurice Sunkin, *The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law*, 76(2) MLR. 223 (2013).

76 Yseult Marique, 'The Shaping of Federal Administrative Justice in Belgium: Recasting Citizens–administration Relationships' in Sarah Nason (ed) *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press 2017) 283-315.

77 Sarah Nason and David Gardner, 'The Administrative Court and Administrative Law in Wales and Comparative Perspective' Sarah Nason (ed) *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press 2017) 245-282.

5.3 ADMINISTRATIVE REVIEW

Asimow's UK model is incorrect in its conclusion that administrative review is not a significant part of UK administrative justice. Most UK public bodies operate some form of internal review mechanism. In social security, administrative review is a compulsory first step (after which appeal to a tribunal is available). In immigration claims (not involving human rights), administrative review has replaced tribunal appeals - though judicial review is still possible.

Administrative review is common across Europe, providing proportionate dispute resolution, reducing costs, and resolving issues quickly and straightforwardly, but recent UK reforms are controversial. New mechanisms have been under-resourced, with officials lacking sufficient training, expertise, support and time to conduct the reviews, error rates are high and the insufficiency of systematic oversight of the process has also been criticized.[78]

It has been argued that increased compulsory resort to administrative review, especially in areas of central government decision-making, is leading to the 'de-tribunalization' of administrative justice and a resultant insultation of government from challenge.[79] Of specific concern is the unique place occupied by central government as responsible for the design of redress mechanisms, as provider of mechanisms, and often as the mechanism's main defendant. The increased bureaucratization of administrative justice associated with administrative review and diminishing the day-to-day role of courts and tribunals is combined with the marketization of initial administrative decision-making, an evident trend of new administrative law. As Cassese puts it: 'With the emergence of the enabling state, the focus of public activity has shifted toward measures aimed at financing benefits through the market. Therefore, a large part of social welfare has become lucrative, privatised, commercial and for-profit activity'.[80] Such can extend to marketization of aspects of the justice system itself, though the UK Supreme Court has recently fought against this.[81]

Approaches to the marketization of administrative decision-making and related redress are likely variable across European nations, but there are opportunities for cross-jurisdictional learning.[82] More concerning in the context of administrative review, is how significant small terminological differences can become in practice. In 2007 the Council of Europe Working Party of the Project Group on Administrative Law reported on the possibility of drafting a recommendation on 'administrative appeals', its definition of administrative appeals covered what is referred to in the UK and administrative review. The Working Groups noted the value

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78 Thomas and Tomlinson (n 9).

79 Robert Thomas, 'Current Developments in UK Tribunals: Challenges for Administrative Justice', in Sarah Nason (ed) *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press 2017) 184217.

80 Cassese (n 4).

81 When quashing regulations introducing fees into Employment Tribunals Lord Reed stated: 'The constitutional right of access to the courts is inherent in the rule of law: it is needed to ensure that the laws created by Parliament and the courts are applied and enforced. Tribunals are more than merely the providers of a service which is only of value to those who bring claims before them'. *R (UNISON) v. Lord Chancellor* [2017] UKSC 5, paras [65-85].

82 See e.g., Albertjan Tollenaar, 'Maintaining Administrative Justice in the Dutch Regulatory Welfare State', in Sarah Nason (ed) *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press 2017) 373-386.

of such internal processes in terms of respect for discretionary judgment of administrators, speed and cost effectiveness, and capacity to reduce the workload of courts. It proposed minimum standards relating to lodging applications, how they should be processed, and decisions that could be made. Whilst the UK was the only common law country that replied to the relevant questionnaire, its response could not be used as its author had misunderstood the term 'administrative appeals' (as defined by the Working Party). The UK response examined appeals to tribunals not appeals to internal administrative mechanisms (because in the UK the latter are commonly referred to as 'administrative reviews'). A reason for this error may have been that, at the time, some UK tribunals were commonly still referred to as administrative tribunals, despite for the most part being independent judicial bodies. This example shows how the potential of comparative administrative justice can be weakened by legal cultural traditions, and basic terminological differences.

5.4 EUROPEANIZATION AND LOCALISM

An important issue for administrative justice system design is to determine at what level of locality redress should be available. Regionalization of the England and Wales Administrative Court provides one example of the difficulties here, and though article 6 ECHR (a back log of cases in the centralized Court damaging access to justice) was part of the context, European principles of good administration appear to say little about the provision of local redress. The Council's Charter of Local and Regional Democracy commits parties to applying basic rules guaranteeing the political, administrative and financial independence of local authorities. It also requires state parties to incorporate a right to local self-government in domestic legislation. However, this right does not extend to the creation of redress mechanisms at local level, and the domestic Constitutions of some Council of Europe Member States expressly prohibit sub-national governments from creating local administrative justice systems. In the UK, Scotland, Wales, Northern Ireland and England, each have slightly different legal relationships with the UK Government and Westminster Parliament. From the perspective of administrative justice, each nation operates its own distinctive system of Commissioners, Ombudsmen, Tribunals and Regulators. There has been little resistance to the devolved nations, and to a lesser extent the English regions, developing their own systems of administrative justice.

Despite progress in regional administration, the UK has not transposed the Charter of Local and Regional Democracy into domestic law, leading a Monitoring Committee Rapporteur to state:

> Constitutional or legislative recognition and entrenchment of (the right to) local self-government does not exist in the UK. Nor are the principles expressly incorporated into domestic legislation. In the Rapporteurs' opinion, compliance with the Charter means more than implicit compliance with its spirit.[83]

[83] Monitoring Committee, Local and regional democracy in the United Kingdom, CG(26)10FINAL, March 2014; https://rm.coe.int/168071a826 Para. [78].

The UK has also been found in breach of article 9(1)-(4) of the Charter (provision of adequate financial resources to local authorities), due to the control central government exercises over local government in England, and the reduction of central government grants. This control is exercised largely to ensure implementation of budget cuts following austerity policies. The UK experience shows that sub-state polities can experiment with administrative justice system designs suited to their particular local characteristics, and that this provides a hot bed for cross-jurisdictional learning often towards a consensus on best practice, but that limited financial power and the still 'jagged' edges of the various devolution settlements can hinder progress.

6 A RIGHTS-BASED SOLUTION: ADMINISTRATIVE JUSTICE OR GOOD ADMINISTRATION

In the UK there has been a relative decline of government interest in policies seeking to promote a virtuous circle approach to administrative justice. The AJTC was abolished in a 2013 Coalition Government 'bonfire of quangos'[84] and the TCEA definition of an administrative justice system was repealed. The current Administrative Justice Council (AJC), hosted by the NGO JUSTICE, and funded by the Ministry of Justice and charitable sources, ostensibly views its role as overseeing the entire UK administrative justice system, and the overlapping systems of its devolved nations. This seems a mammoth task in light of the AJC's limited resources, and the non-statutory, voluntary activities of its members. However, it has begun to do good thematic work especially in the fields of monitoring tribunal and court reforms, and ombudsmanry (at England and UK level).

Given the difficulties of pursuing an integrated systematic approach to administrative justice, the UK Administrative Justice Institute had suggested repositioning administrative justice as a set of principles amounting to a fundamental right; in effect a right to good administration.[85] This conception of administrative justice is closer to European conceptions of good administration. However, it may be a retrograde step to conflate administrative justice with good administration, as it appears to eschew focus on institutional and systematic practical challenges, and centres instead on softer issues of principles.

It is notable that earlier UK attempts to develop principles of administrative justice were specifically influenced by the Council of Europe Code of Good Administration. The AJTC proposed a right to administrative justice that would be 'founded not only on the rule of law and the general principles of legality and legal certainty but also on the principles of good administration, democratic accountability, equality of treatment and citizen empowerment'.[86] In 2016 its successor body, specifically in Wales, repeated this call for a 'fundamental right' to administrative justice.[87] The nature of this proposed right is extensive, drawing connections

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84 House of Commons Justice Select Committee - Eight Report Scrutiny of the Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 (March 2013).

85 UKAJI, *A Research Roadmap for Administrative Justice*, (University of Essex, Nuffield Foundation 2018) 9.

86 AJTC, British Bill of Rights and Responsibilities: A Right to Administrative Justice.

87 Committee for Administrative Justice and Tribunals Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales; Reform priorities for the Fifth Assembly* (20016): https://gov.wales/docs/cabinetstatements/2016/160729cornerstoneofsocialjustice.pdf

between legal values, principles of good administration, and the broader work of the Council of Europe in the context of human rights and democracy.

Other domestic proposals have been narrower. Andrew Le Sueur has argued that tensions between legal constitutional values (openness, independence and impartiality) and more administratively flavoured values (expediency, informality and privacy) may be addressed by recognizing a constitutional right to administrative justice.[88] But under Le Sueur's proposal, the content of such a right would only include the legal grounds of judicial review, in effect legal values would trump administrative values. Elliott and Forsyth have argued that a right to administrative justice already exists, 'embedded deep within the common law constitution and reflects a wide range of principles of good administration that condition the relationship between the individual and the state'.[89] It is likely that Elliott and Forsyth also conflate 'principles of good administration' with 'grounds of judicial review', and the content of this right mirrors that advocated by Le Sueur.

From the EU perspective, article 41 of the Charter of Fundamental Rights (CFR) provides a 'right to good administration'. On its face this is limited to where individuals deal with EU institutions, however, the right combines general principles of EU law, and may be capable of enumerating principles of good administration not specifically listed in the text. Its status as a fundamental right has been hailed as 'revolutionary'[90] as such a right has rarely been constitutionalized in Member States.[91] The presentation of good administration in the form of a right derives from the case law of EU courts articulating rule of law requirements, again a legalistic interpretation of good administration. Margret Vale Kristjansdottir concludes that Member States must 'respect the right to good administration, not because of article 41, but in spite of its wording'.[92] This conclusion may be of some use to the UK as the EU CFR will not be incorporated into domestic law post-Brexit, but the general principles of EU law will be (under the status of 'retained EU law'). The difficulty for individuals trying to enforce administrative rights is the European Union (Withdrawal) Act 2018 provision that there will be 'no right of action in domestic law … based on a failure to comply with any of the general principles of EU law.'[93]

At UK level a more comprehensive account of administrative rights can be found specifically in the work of Ombudsmen. In his attempt to classify the hybrid legal-political position of UK Ombudsmen, Christian Gill concludes that Ombudsmen are *sui generis* institutions, not necessarily aligned to a particular branch of state, rather they, 'complete an administrative justice system that is predicated on executive, judicial and political controls each

88 Andrew Le Sueur, 'Administrative Justice and the Resolution of Disputes' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 7th edn, 2011) 260.

89 Mark Elliott and Christopher Forsyth, 'A Right to Administrative Justice?' UK Const. L. Blog (10th October 2012) (available at http://ukconstitutionallaw.org

90 Jill Wakefield, The Right to Good Administration (Kluwer International, 2007) 3.

91 Xavier Groussot and Laurent Pech, *Fundamental Rights Protection in the European Union post Lisbon Treaty*, 173 Foundation Robert Schuman/European Issue, 5 (2010).

92 Margret Vale Kristjansdottir, Good Administration as a Fundamental Right, 9(1) Icelandic Review of Politics & Administration. 237, 251, (2013).

93 European Union (Withdrawal) Act 2018, sched 1 cl 3(1).

fulfilling core tasks in pursuit of the fundamental constitutional goal of achieving administrative justice'.[94]

In evidence to the Parliamentary Joint Committee on Human Rights, former PHSO Abraham reinforced the relationship between ombudsmanry and rights noting that the PHSO Principles 'stand as proxy in an administrative context for the human rights principles of fairness, respect, equality, dignity and autonomy'.[95] Her broader comment is that this connects the Ombudsmen to ethical discourse that is both European and international, but it is not immediately clear why the use of a 'proxy' is necessary. Why not refer directly to the ECHR? It seems this was not done in the PHSO Principles as it was felt to privilege one source of human rights law over others. Another reason may be that the PHSO was trying to avoid overly legalizing and formalizing her role (characteristics more common among other European Ombudsmen). Such legalism would not have gone down well when the PHSO was experiencing a number of high-profile battles with Government.[96]

Abraham has also argued that the most effective way of giving force to principles of good administration is through a right to good administration policed by Ombudsmen rather than courts. The remedies provided by the UK Ombudsmen are not legally enforceable, and it may be conceptually awkward to have a right to something that depends on political and administrative will for its enforcement. However, it is argued that the non-binding nature of Ombudsmen remedies, and the power to address systematic failures, is an institutional strength. This technique takes the complaint as a means to an end rather than an end in itself, the end being institutional reform and prevention of future harm.[97] Here remedies are exhorted rather than imposed; this requires moral persuasion and that both parties 'buy in' to the outcome, helping to restore trust. This fits more with an Aristotelian notion of rights being defined by civic engagement and the common good, than by individual interests or choices. Such also tracks the underpinning philosophy of European good administration proposed by Fortsakis when he asked:

> Is a 'good administration' one that makes 'good decisions' (i.e. legal decisions) or will we eventually come round to the view that 'good acts' are ones that are produced by a 'good administration', without the need for any other reference to some predefined legality? In other words, are 'good' acts to be defined objectively in their own right or should they, as Aristotle suggests, more properly be regarded as the acts of a 'good' person?[98]

From the UK perspective Nick O'Brien argues that 'administrative justice can be viewed, in essence, as a set of "bridging institutions" whose cultivation of the "habits" of trust and civic virtue are made possible by the adoption of design principles and operational practices that in turn are shaped by human rights values and principles'.[99] There is promise in further

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94 Christian Gill, The evolving role of the ombudsman: a conceptual and constitutional analysis of the 'Scottish Solution' to administrative justice, PL. 622 (2014).

95 Ann Abraham, Making sense of the muddle: the ombudsman and administrative justice, 2002-2011', 34(1) JSWFL. 91 (2012) p.96.

96 Her Report on occupational pensions where her recommendations were largely rejected by Government, and members of a pressure group subsequently sought judicial review.

97 O'Brien, (n 46) 9.

98 T. Fortsakis, Principles Governing Good Administration, 11(2) EPL. 207 (2005).

99 O'Brien (n 46) 9.

comparative analysis of these 'bridging institutions', and how they operate in tandem with the more formalistic sphere of administrative law and administrative justice (when the latter is understood as a system of administrative courts). Administrative justice as a set of bridging institutions protecting and promoting a multi-dimensional right to good administration fits with the characteristics of new administrative law as concerned with inter-institutional collaboration and civic engagement. This is where a reconceptualized 'new' UK account of administrative justice is distinct from the European notion of good administration, yet adds an important dimension of attention to and respect for institutional design; not just laying down principles but considering who (institutionally) should perform which roles to ensure that these principles are promoted, respected and enforced.

The Council of Europe Working Party on Good Administration considered a right to good administration to be 'a third generation right … of general scope but acknowledged with difficulty as an individual right … its implementation can be broken down into individual rights which can be applied against the administration'.[100] It further noted that some of these rights can be safeguarded by judicial review, whereas others might be better protected by ombudsmen processes. This reflects the UK position in which some European principles are protected (or protected to a degree) by courts and tribunals, and others by the Ombudsmen. For example, though some thirty years ago JUSTICE All-Souls recommended legislation to secure the right to reasons for administrative decisions, in 2018 there remains no general right either in legislation or at common law. The default 'no right to reasons' has been re-endorsed by the Supreme Court[101] despite some judicial attraction to,[102] and academic support for,[103] a general common law duty to give reasons. UK Ombudsmen then have a crucial role in promoting reason-giving as a general standard of good administration. The same is true of proportionality, a European principle applied in various forms in domestic cases turning on EU law and the ECHR, but not recognized as a legal standard applicable to all administrative decision-making. As with reason-giving, proportionality is a principle of good administration promoted by UK Ombudsmen, and capable of enforcement through their exhorted remedies. That these principles exist is one thing, but only a broader conception of administrative justice helps us determine who should be responsible for enforcing them and why.

7 ADMINISTRATIVE JUSTICE AND GOOD ADMINISTRATION, EQUIVALENT OR COMPLEMENTARY CONCEPTS?

Although UK conceptions of administrative justice have moved closer in content and underpinning philosophy to European conceptions of good administration, I conclude that each has something distinctive to offer to new administrative law.

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100 CJ-DA-GT, *Meeting Report*, December 2007, p.9 [2].

101 *Dover District v CPRE Kent* [2017] UKSC 79

102 *Oakley v. South Cambridgeshire District Council* [2017] EWCA Civ 71, [42] Elias LJ.

103 Mark Elliott, 'Oakley v. South Cambridgeshire District Council: The maturing of the common law duty to give reasons' Public Law for Everyone (22 February 2017) online at: https://publiclawforeveryone.com/2017/02/22/oakley-v-south-cambridgeshire-district-council-the-maturing-of-the-common-law-duty-to-give-reasons/

New administrative law has an important role to play in ensuring that human rights and democratic values are recognized from the ground-up, particularly when the legislature and executive may be failing to protect the same from the top-down. As Cassese puts it, we 'must develop a fresh view of statutes and statutory instruments governing administrative procedures, seeing them not only as regulations of proceedings … but as charters of citizens' rights vis-à-vis administrative authorities…'[104] European conceptions of good administration go a long way to articulating the content of subjective citizen's rights. For example, the ECHR 'systems duty' to take positive measures and 'operational duty' to protect individuals against human rights breaches, and implied duties to investigate, prosecute and afford a judicial remedy, do not have a domestic analogue in UK law. Other examples are the legalistic wording of the Council of Europe Code of Good Administration, including a legal right to reasons and proportionate decision-making, and the Charter of Local and Regional Democracy, a right to local self-government that has not been transposed into UK law. However, on the contrary, it is not clear to what extent principles around institutional organization and system-design are evident, either expressly or impliedly, in European principles of good administration. UK conceptions of administrative justice extend to principles of system design with the aim of improving the proportion of decisions made 'right first time' and the capacity of relevant organizations to learn from their mistakes. Such conceptions also provide insights into which administrative justice institutions might be better placed to provide system-design advice in various contexts. This is where modern rights-based conceptions of administrative justice may begin to fill the gaps. If the notion of an administrative justice system including collaborative bridging institutions united by values underpinning their design and operation, rather than their place in a monistic or dualistic model, were equally transferable to other European nations, such can provide the germ of a European conception of administrative justice, overlapping with and complementary to a European conception of good administration.

104 Cassese (n 4).