

## The 'New Administrative Law' of Wales

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## The “New Administrative Law” of Wales

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

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

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

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

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

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

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

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

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

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

<sup>6</sup> Wales Act 2017, Pt.3.

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

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

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

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

## Welsh Devolution

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

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

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

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

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

<sup>12</sup> GoWA 2006, Pt. 3 and Sched 5.

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

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

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

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

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

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

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

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

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

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

<sup>18</sup> GoWA s.A2.

<sup>19</sup> See sources at fn.14.

<sup>20</sup> Specifically noted in Silk Part II fn.14.

<sup>21</sup> fn.17.

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>30</sup> fn.22.

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

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

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

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

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

155  
156 “A journey to realise a vision of Wales where justice – in the sense of a system of  
157 rights and redress – reflects the values and particular characteristics of Welsh society,  
158 but also a fuller vision of justice, which embraces also, social and economic justice  
159 and a journey the next leg of which will surely feature prominently, as part of a  
160 compelling vision of a just Wales, the development of a distinct justice system for our  
161 nation”.<sup>36</sup>

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

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## 171 **Welsh Administrative Law and Proceduralism**

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

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<sup>35</sup> Bevan Foundation at the National Eisteddfod, 4 August 2018: <https://41ydvdlcuyvlonsm03mpf21pub-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Eisteddfod-2018-final-E.pdf>

<sup>36</sup> *Ibid* 5.

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

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

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

177 (5) a Wales of cohesive communities,<sup>42</sup> (6) a Wales of vibrant culture and thriving Welsh  
178 language<sup>43</sup> and, (7) a globally responsible Wales.<sup>44</sup> Public bodies are required to carry out  
179 sustainable development, to be achieved by setting and publishing Well-being Objectives  
180 which show how the body will maximise its contribution to achieving the Goals.  
181 WFGA is an example of Welsh administrative procedure law centred on principles of social,  
182 economic and inter-generational equality. Such new legislation seeks to control and influence  
183 administrative decision-making, but it rarely endows individuals with explicit legally  
184 enforceable rights against public bodies. The approach has been to develop procedural duties  
185 requiring public bodies to show they have taken rights and other values into account,  
186 alongside a set of ‘integrity’ branch institutions with varying powers to promote and enforce  
187 compliance through systematic investigations. In this section I examine some relevant  
188 legislation, and the courts’ comparative lack of reaction to it, in the next section I consider  
189 the role of the integrity branch.

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

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

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

<sup>42</sup> Attractive, viable, safe and well-connected communities.

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

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

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

<sup>46</sup> The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011.

<sup>47</sup> *Ibid*, Regs 4 and 5.

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

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

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

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

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<sup>48</sup> Administrative Court Lawyer for Wales, to PLP Wales Conference (March 2018).

<sup>49</sup> GoWA 2006, s.114(10(c)).

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

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

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

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

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

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<sup>51</sup> Michael Imperato (Watkins and Gunn) PLP Wales Conference (March 2018).

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

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

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

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

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<sup>55</sup> E. Lewis, *Public Health (Wales) Act 2017 – making Wales a leader in public health* (Lexis 26/07/2017)  
[https://www.blakemorgan.co.uk/media/filer\\_public/80/ec/80ece5c2-1556-4d44-bfb8-a4f3b4fbee7/public\\_health\\_wales\\_act\\_2017making\\_wales\\_a\\_leader\\_in\\_public\\_health.pdf](https://www.blakemorgan.co.uk/media/filer_public/80/ec/80ece5c2-1556-4d44-bfb8-a4f3b4fbee7/public_health_wales_act_2017making_wales_a_leader_in_public_health.pdf)

<sup>56</sup> Submission from PLP and S. Nason to Commission on Justice in Wales.

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

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

295

296

### **The Integrity Branch**

297

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

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

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

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<sup>58</sup> A. Sherlock, J. Williams and E. Royles, “A Welsh Model of Commissioners?” (2014) *Cambrian Law Review*

<sup>59</sup> M. Shooter, “An Independent Review of the Role and Functions of the Children’s Commissioner for Wales” para.1.3(d).

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

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

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

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

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<sup>61</sup> Huws, fn.60. pp.85-90.

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

<sup>63</sup> Mac Giolla Christ, fn.60.

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

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

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

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

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

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

<sup>68</sup> PSOW response to the Welsh Government Consultation at fn.64.

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

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

381         There are increasingly blurred boundaries between the roles of the PSOW and the  
382 Commissioners, including the extent to which each institution acts a “fire-fighter”  
383 (determining individual complaints) and a “fire-watcher” (conducting investigations to  
384 address systematic issues often on an “own initiative” basis<sup>71</sup> without the need for an  
385 individual complaint). How the Commissioners chose which individual complaints to  
386 investigate can cause particular dilemmas with respect to political independence and public  
387 perception. Not least because the Commissioners are seen as quasi-political institutions and  
388 there have been allegations of political bias and cronyism in the appointment of most of the  
389 Commissioners to date.<sup>72</sup>

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

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

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

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

<sup>73</sup> WFGA, s.80 and Pt.4.

<sup>74</sup> Balancing short-term and long-term needs.

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

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

399 collaboration,<sup>77</sup> and (5) prevention.<sup>78</sup> Other Welsh initiatives on the theme of public  
400 engagement include co-operation, co-decision and co-production<sup>79</sup> in the design of the  
401 administrative state and the services it provides.

402

### 403 **Towards “juridification”?**

404

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

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

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

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

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

<sup>80</sup> Law Com No. 366, fn.7. para.2.55.

<sup>81</sup> Draft Legislation (Wales) Bill cl.1 and 2.

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

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

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

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

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

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

<sup>83</sup> J. Miles AM, fn.10.

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

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

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

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

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

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

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

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

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

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

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

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

<sup>90</sup> Wales Act 2017, s.60(4)(d).

<sup>91</sup> Wales Act 2017, s.62.

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

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

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

529

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

531

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

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

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

<sup>94</sup> See e.g., submissions to the Commission on Justice in Wales by K. Bush QC [https://beta.gov.wales/sites/default/files/publications/2018-06/submission-commission-justice-wales-professor-keith-bush-qc\\_0.pdf](https://beta.gov.wales/sites/default/files/publications/2018-06/submission-commission-justice-wales-professor-keith-bush-qc_0.pdf) para [22] and Public Law Wales

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

<sup>95</sup> CAJTW, fn.23.

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

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

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

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

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

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

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

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

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

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

<sup>100</sup> M. Brousseau-Navarro, to PLP Wales Conference 2018.

<sup>101</sup> fn.29.

<sup>102</sup> Economic concerns, and the perceived importance of maintaining a social union with England, render the devolution of social security a complex issue. However, it has been argued that the poor fit between policies on benefits and devolved issues such as housing and support services for job seekers in Wales, demonstrate a need for further consultation on changes to reserved benefits that affect devolved responsibilities; *Sefydliad Bevan Foundation, Making welfare work for Wales: Should benefits for people of working age be devolved?* (June 2016); <https://41ydvd1cuyvlonsm03mpf21pub-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/Final-Report-Low-Res.pdf>

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

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

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

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

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<sup>103</sup> S. Nason, *Understanding Administrative Justice in Wales* (Bangor 2015).

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

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

<sup>106</sup> fn.50.

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

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

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