

## **Making justice and rights work in Wales: the case for ground up constitutional change**

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## Making Justice and Rights Work in Wales: the Case for ‘Ground up’ Constitutional Change

The Welsh Government taking office in 2021 was elected on commitments to work for a new and successful United Kingdom based on far-reaching federalism; to seek devolution of responsibility for the administration of justice; to establish an independent standing commission on the constitutional foundation of Wales; and to develop Codes of Welsh law making it easier for people to understand their legal rights.<sup>1</sup> In addition to constitutional reform commitments, Welsh Government has noted its determination to create a fairer and more equal Wales through strengthening and advancing equality and human rights.<sup>2</sup> In autumn 2021 an Independent Commission on the Constitutional Future of Wales (‘Constitutional Commission’) was established with a first objective to “consider and develop options for fundamental reform of the constitutional structures of the United Kingdom, in which Wales remains an integral part”. Its second objective is to “consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales”.<sup>3</sup> At the heart of this proposed constitutional conversation is the need to empower the people of Wales with respect to decisions that impact on well-being of their communities and the nation. The Commission is Co-Chaired by Dr Rowan Williams, former Archbishop of Canterbury, and Professor Laura McAllister, Professor of Public Policy and the Governance of Wales at Cardiff University’s Wales Governance Centre and former international footballer. It is due to report at the end of 2023.

In the “land of commissions, conventions and panels”<sup>4</sup> this Commission follows not long after the 2019 report of the Commission on Justice in Wales (also referred to as the ‘Thomas Commission’).<sup>5</sup> Among its 78 headline recommendations, the Thomas Commission recommended full executive and legislative devolution of powers over the administration of justice to Wales, accompanied by transfer of necessary financial resources. UK Government has not formally responded, but continues discussions with Welsh Government.<sup>6</sup> Whilst the Covid-19 pandemic slowed the pace of implementing various Thomas Commission recommendations not requiring structural constitutional change, progress has been made.<sup>7</sup> The pandemic has also increased public awareness of devolution, and highlighted the scope of potential divergence especially as concerns public health regulations and criminal law.

In a July 2021 speech to the Wales Governance Centre, the Counsel General for Wales and Minister for the Constitution, Mick Antoniw MS, noted; “if the UK means anything and is to have a future it must be based on principles of partnership, justice, the rule of law, of greater

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<sup>1</sup> *Moving Wales Forward: Welsh Labour Manifesto 2021*

<sup>2</sup> <https://gov.wales/written-statement-publication-strengthening-and-advancing-equality-and-human-rights-wales-research> [Accessed 9 December 2021].

<sup>3</sup> <https://gov.wales/independent-commission-constitutional-future-wales> [Accessed 9 December 2021].

<sup>4</sup> Independent Commission on the Constitutional Future of Wales, Hansard 17 November 2021 Vol 816, col289, per Baroness Bloomfield.

<sup>5</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) ‘Thomas Commission’.

<sup>6</sup> Commission on Justice in Wales, Hansard 22 January 2020 Vol 670, cols138WH-160WH.

<sup>7</sup> Mick Antoniw MS, Written Statement: Update on the development of the justice system and the legal sector in Wales (30 September 2021): <https://gov.wales/written-statement-update-development-justice-system-and-legal-sector-wales> [Accessed 9 December 2021].

equality and a fairer distribution of wealth between all the nations and regions of the UK”.<sup>8</sup> Against this background, our article focuses on four matters constitutionally protected within democracies, namely: the rule of law, access to justice, equality, and human rights. We examine some of the current structures and practices for protecting and strengthening each of these matters specifically in Wales, and from a Welsh perspective within the UK, analysing the potential impacts of further reform, and outlining limits on what might be achieved within existing constitutional architecture.

The Thomas Commission’s methodology was from the ‘ground up’ guided by the principle that justice is at the heart of any system of democratic governance. We argue that an ongoing constitutional conversation for Wales should also follow a ground up methodology, focusing on the diverse voices of people across Wales, whilst also accounting for evidence on how constitutional values are being shaped and protected particularly through administrative justice. Whilst needing to look outwards and top down to a structurally reformed UK, the Constitutional Commission, and any future standing committee, should still focus inwards on Wales and on the ground up experiences of people and communities.

We argue that Welsh institutions are already using the powers open to them to advance constitutional matters of access to justice, the rule of law, equality, and human rights. The means to achieve this include, developing leadership, oversight, and accountability; funding for justice and advice, and raising awareness; progressing constitutional values through administrative justice; and promoting the rule of law and the principle of legality. Whilst structural and institutional reform is important, the risks of such being more symbolic than real should also be borne in mind. The matters of principle and structure addressed in this article will be of broader interest to other parts of the UK, as well as to other nations with decentralised governance, and we examine each in turn, after first giving some background to justice in Wales.

## **Devolution and justice in Wales**

The Wales Act 2017 introduced a reserved powers model, confirmed the permanence of the Senedd, and conferred powers to make provisions for the organisation and conduct of elections. These powers have been used to extend the voting franchise in Senedd elections, and to rename the National Assembly for Wales, Senedd Cymru/the Welsh Parliament.<sup>9</sup> Nevertheless, the 2017 Act has been criticised, with Plaid Cymru voting against legislative consent. Professor Rick Rawlings stated that it ‘claws back’ powers and “carries the seeds of its own destruction”.<sup>10</sup> As Thomas Watkin and Daniel Greenberg explain:

There has been much debate over whether the move to a reserved-powers model has enhanced the Assembly’s powers or contracted them, and even greater doubt as to

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<sup>8</sup> M. Antoniow MS, A National Civic Conversation about our Constitutional Future (5 July 2021): [https://www.cardiff.ac.uk/\\_data/assets/pdf\\_file/0003/2532405/Counsel-General-Speech.pdf](https://www.cardiff.ac.uk/_data/assets/pdf_file/0003/2532405/Counsel-General-Speech.pdf) [Accessed 9 December 2021].

<sup>9</sup> Wales Act 2017, s.16 and Senedd and Elections (Wales) Act 2020 Part 2.

<sup>10</sup> R. Rawlings, ‘The Strange Reconstitution of Wales’ [2018] P.L. 62, 82.

whether the new settlement has delivered the promised clear devolution settlement that would stand the test of time.<sup>11</sup>

Justice reservations in the 2017 Act include: the prevention, detection, and investigation of crime; maintenance of public order; policing and police and crime commissioners; anti-social behaviour; rehabilitation of offenders; courts, judges, civil and criminal proceedings; legal profession, legal services; legal aid; prisons and offender management; family relationships and children. In relation to equality and human rights, whilst Welsh Government and the Senedd can direct and influence equality and human rights practices through legislation and policy, these powers are asymmetrical. Legislation on equal opportunities is largely reserved, whereas the Senedd has competence to ‘observe and implement’ international human rights in devolved areas, giving at least the scope to embed human rights through primary legislation.<sup>12</sup>

It is through devolved functions in areas including health, education, local government, housing, and economic development, that Welsh Government and the Senedd make their biggest contributions to justice. This situation causes and perpetuates what have been described as ‘jagged edges’, where devolved social justice policies and legislation butt awkwardly against reserved justice policy and legislation, leading to a complex landscape that is hard to navigate and to oversee.<sup>13</sup>

In relation to human rights, the Welsh approach to incorporation of international treaties has been piecemeal and limited to indirect incorporation of international children and disabled people’s rights, and UN principles which promote the interests of older people. Research on the legislative framework shows that well-being, equality, and human rights are dealt with as discrete aspects of public policy with no overarching co-ordinated approach.<sup>14</sup> The Thomas Commission noted that Welsh policies on future generations, sustainability and human rights are far sighted, but that legislative frameworks and institutions being developed to promote and protect such values and rights are not well aligned or integrated with the broader justice system.<sup>15</sup> The Commission had a wide remit to explore criminal, civil and administrative justice, alongside legal education, the professions, advice services, law and technology, and the Welsh language in the justice system. It unanimously found that people in Wales are being let down by present arrangements,<sup>16</sup> and concluded that this disservice can only be remedied by legislative and executive devolution of responsibility for justice.<sup>17</sup> This article does not aim to evaluate the Commission’s recommendations, but we commend its method, principles-based approach, and breadth and depth of engagement with the people of Wales.

Welsh Government has endorsed the Thomas Commission’s recommendations, calling for devolution of responsibility for justice and policing, and arguing that the current situation

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<sup>11</sup> T.G. Watkin and D. Greenberg, *Legislating for Wales* (University of Wales Press 2018) 24.

<sup>12</sup> Wales Act 2017, Sched 7A, para 10.

<sup>13</sup> R. Jones and R. Wyn Jones, *Justice at the Jagged Edge in Wales* (Cardiff University, Wales Governance Centre: March 2019).

<sup>14</sup> S. Hoffman, S. Nason, R. Beacock and E. Hicks, *Strengthening and advancing equality and human rights in Wales* ‘SAEHR’ (Welsh Government Social Research Number 54/2021) paras 2.9 and 12.5

<sup>15</sup> Thomas Commission, Para 12.21.

<sup>16</sup> Thomas Commission, Executive Summary, para 1.

<sup>17</sup> Thomas Commission, Recommendations 58 and 59.

breaches the principle of subsidiarity.<sup>18</sup> This principle “requires that legislative and governmental responsibilities should be allocated to the most local level at which they can be performed efficiently and effectively”.<sup>19</sup> Welsh Government also reiterates that no other decentralised system of government in the common law world contains a primary legislature without a separate legal jurisdiction over which to exercise enforcement powers.<sup>20</sup>

Giving evidence to the Senedd, in February 2021, Robert Buckland MP, then Lord Chancellor, stated his opposition to devolving justice to Wales and to the case for a separate Welsh legal jurisdiction. Whilst accepting that the scale of legislative divergence between Wales and England continues to increase, he reiterated the view that the single England and Wales jurisdiction has “immense strengths” for the people of Wales, including opportunities for sharing best practice, alongside international success.<sup>21</sup>

### **Developing leadership, oversight, and accountability**

Despite the legislative landscape, Wales is being taken increasingly seriously as a site in which justice is done. Welsh Government has established a Cabinet Sub-Committee on Justice, providing strategic leadership for justice functions currently devolved to Wales, directing activity in response to the Thomas Commission, ensuring synergy across portfolios, agreeing Welsh Government positions on justice initiatives arising from the UK Government, and leading discussions on further devolution. The more recent portfolios of Welsh Government Ministers also indicate a clear focus on justice and rights. Namely, the Counsel General and Minister for the Constitution, with responsibility for justice and tribunals policy, and responding to the Thomas Commission; and the Minister for Social Justice with responsibility for equality and human rights, youth justice and female offending, relations with police and criminal justice agencies, advocacy and advice services, and relations with administrative justice institutions.

The Thomas Commission recommended that with legislative devolution, a Senedd justice committee, and a justice department in Welsh Government, should be created; current arrangements are a step in that direction. It also recommended the Senedd scrutinise justice in Wales, and in January 2020 its Constitutional and Legislative Affairs Committee became a Legislation, Justice and Constitution (LJC) Committee reflecting this expanded remit. From March 2020 to March 2021 the LJC Committee conducted an inquiry into “Making Justice work in Wales” (Justice Inquiry). Its conclusions are reported as part of its Fifth Senedd Legacy Report, also covering the Committee’s other inquiry, “Wales’ Changing Constitution” examining relationships between the Senedd and UK Parliament, and between Welsh and UK Governments.<sup>22</sup>

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<sup>18</sup> Welsh Government Reforming our Union: Shared Governance in the UK (June 2021) Proposition 18 ‘Reforming our Union’.

<sup>19</sup> Reforming our Union, 8.

<sup>20</sup> Reforming our Union, 36.

<sup>21</sup> Welsh Parliament, LJC Committee, 22 February 2021, para 60: <https://record.assembly.wales/Committee/11065> [Accessed 11 July 2021].

<sup>22</sup> Welsh Parliament, LJC Committee, *Fifth Senedd Legacy Report* (March 2021) (‘Legacy Report’)

The LJC Committee Justice Inquiry concluded that Welsh Government should report annually to the Senedd on its work on justice, and that the Committee should hold an annual evidence session with the Lord Chancellor.<sup>23</sup> Consultation and co-operation between Welsh Government and the Ministry of Justice have improved somewhat, including through a Justice in Wales Strategy Group bringing together operational and policy officials from Welsh Government, the Ministry of Justice and other justice bodies.

In relation to equality and human rights, research recommends that Welsh Government shows further leadership including by establishing a human rights taskforce, similar to that established in Scotland, to examine options and bring forward detailed proposals for incorporation of human rights in Wales.<sup>24</sup> It also recommends: “Welsh Government and public authorities in Wales should develop a common, single, clear and consistent statement setting out a commitment to respect, protect and fulfil human rights and equality, and to take steps to prevent discrimination and advance equality and human rights”.<sup>25</sup> Other matters being progressed by Welsh Government include improving implementation of law and policy, strengthening monitoring, accountability, and enforcement, and raising public awareness.

The division between policy development and implementation in relation to justice, and to a lesser degree in relation to equality and human rights, remains problematic, and institutions and services largely decentralised from a delivery perspective can find themselves reacting and responding to central UK Government initiatives.<sup>26</sup> Within Wales, a proliferation of Boards, Committees and Networks designed variously to report on the performance of legal and social justice systems and to ensure coordination between stakeholders has been problematic, with questions raised around whether such institutions are working efficiently and effectively, alongside concerns that most lack collective accountability.

In relation to equality and human rights, there remains a lack of clarity around priorities and responsibilities under the current legislative framework, especially on equality and human rights objectives and how these relate to action on flagship well-being policies. There is also misalignment of timescales for planning and reporting on equality and well-being duties, and lack of confidence in current monitoring mechanisms including the extent to which they lead to specific action to ensure compliance.<sup>27</sup>

The impacts of Welsh and UK Government policy initiatives, strategies, and legal reforms in the justice, equality, and rights spaces in Wales are not always subject to sufficient longer-term evidence-based monitoring and evaluation. This includes in areas such as youth justice, female offending, reforms to expand access to advice and advocacy, and some reforms in areas of human rights, equality, and well-being. Evaluation can be hampered by limited research as to how particular aspects of justice operate in Wales, and insufficient understanding of the views of ‘users’ of the justice system, as well as of the people working within it. The Constitutional Commission, and any future standing committee, must, we argue, make the

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<sup>23</sup> Legacy Report, Conclusion 16.

<sup>24</sup> SAEHR, para 5.25 and Recommendation 1.

<sup>25</sup> SAEHR, Recommendation 2.

<sup>26</sup> S. Nason, *Justice in Wales* (March 2020) (‘Justice in Wales’)

<https://business.senedd.wales/documents/s500007077/Adroddiad%20Cynghorydd%20Arbenigol%20y%20Pwyl%20Mai%202020%20Saesneg%20yn%20unig.pdf> [Accessed 9 December 2021].

<sup>27</sup> SAEHR, paras 4.11, 8.21 and 12.11.

views of people and communities in Wales central when evaluating how well existing structures promote and protect constitutional values. In grounding further analysis, it should draw on various sources of data, such as that contained in the Welsh Government backed SAIL databank<sup>28</sup> storing anonymised person-based data for research to improve health, well-being, and public services. However, data relating to court-based justice and policing remains limited, and lack of access to dis-aggregated Wales-only data hampers policy development, research, and oversight. Correspondence and evidence to the LJC Committee suggests that the progress is being made towards improving data collection and transparency.<sup>29</sup> Welsh Government could also develop more bespoke equality and human rights indicators and collect more qualitative data on people's lived experiences of equality and human rights issues.<sup>30</sup>

Impact Assessments are an important part of the data sourcing and analysis process, as well as providing tools for examining the variable impact of policy and legislation on equality, human rights, and justice. Impact Assessments support implementation, but are too often seen as 'tick box' exercises not completed early enough in policy processes, with particular concerns expressed around the fate of Impact Assessments when they were needed the most during the Covid-19 pandemic.<sup>31</sup> Concerns over the successful development of an Integrated Impact Assessment, covering matters as diverse as justice, rurality, equality and the Welsh language, suggest that reaching the appropriate balance between promotion and protection of a wide range of rights and values, and efficiency in the context of government capabilities, requires further work.<sup>32</sup> There also seems to be practical inequality in assessing impact across the 'jagged edges' of devolution. For example, Justice Impact Assessments are mandatory for proposed Senedd legislation impacting on the England and Wales justice system.<sup>33</sup> However, there is no similar obligation on UK Government to explain the impacts of its proposed legislation in areas of justice and policing on matters devolved to Wales. Just one example is that whilst sentencing policy is reserved, matters such as the mental and physical health of prisoners, their education, and their housing on release, are devolved. In July 2021, the House of Commons rejected a motion from Plaid Cymru MP Hywel Williams to add a clause to the Police, Crime, Sentencing and Courts Bill that would have required the Secretary of State to issue a Justice Impact Assessment for any provision of the Act as passed, or of regulations made under it, that impacts on matters devolved to the Senedd.<sup>34</sup>

We conclude that whilst there have been improvements in leadership and oversight of justice, equality, and human rights in Wales, progress must continue especially as concerns transparent and evidence-based policy-making, implementation, evaluation, and inter-governmental co-ordination.

### **Funding justice, advice, access, and awareness**

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<sup>28</sup> <https://saildatabank.com> [Accessed 9 December 2021].

<sup>29</sup> Noted in Legacy Report, para 185.

<sup>30</sup> SAEHR, para 8.19 and Recommendation 24.

<sup>31</sup> Welsh Parliament, Children, Young People and Education Committee, *Impact of Covid-19 on children and young people* (8 July 2020) para 4.

<sup>32</sup> SAEHR, para 7.9 and Recommendation 18.

<sup>33</sup> Government of Wales Act 2006, s.110A.

<sup>34</sup> Hywel Williams MP, HC Deb 5 July 2021, vol 698, col 661-680.



There are ideological differences between UK and Welsh Governments as concerns funding for justice, and the combined impacts of austerity policies and the decline of legal aid cut against Welsh social welfare and social justice policies. According to the Thomas Commission, the devolution settlement provides little opportunity for targeted and coherent use of resources.<sup>35</sup> In 2017/18 almost £1.2 billion was spent on the justice system for Wales,<sup>36</sup> equating to approx. £370 per person in Wales (compared with £560 to £666 per person in Scotland and Northern Ireland respectively).<sup>37</sup> This constitutes around 3.6 per cent of total identifiable public spending for Wales, but almost 40 per cent of this expenditure is contributed through the Welsh budget and taxation. Revenue expenditure on court and tribunal services and legal aid in Wales are below what would be expected given population share. The Thomas Commission recommended full devolution is necessary to enable the proper alignment of justice policy and spending with devolved policies in education, health, and economic development. In a January 2020 Westminster Hall debate, the then Parliamentary Under-Secretary of State for Justice Chris Philp MP responded that the costs of devolving justice would be disproportionate given the comparative volume of devolved and reserved legislation.<sup>38</sup>

Spending on legal aid in both civil and criminal justice has suffered a higher real terms reduction in Wales than in England.<sup>39</sup> Making the case for a different approach in Wales, Counsel General and Minister for the Constitution, Mick Antoniw MS, regularly invokes Viscount Simon's 1948 description of legal aid as an NHS of advice and support for the people. In June 2021, he expressed concern that "the ethos of the purpose of legal advice and support is being reduced to an issue of cost rather than it is about the fundamental empowerment of people within a democracy".<sup>40</sup> Welsh Government has funded the continued provision of services by Citizens Advice and Shelter Cymru (Wales' two biggest advice providers) that would have been discontinued due to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Evidence of the First Minister to the Thomas Commission was that cuts to legal aid had placed additional demand on public services.<sup>41</sup> The Commission concluded that "current provision does not look at what is working well on a local level, is not focused on the beneficiaries and lacks a systematic and strategic approach".<sup>42</sup> It recommended bringing together funding streams for legal aid and third sector advice provision, and that this should be driven by an independent body tasked to ensure complete coverage and sustainability.<sup>43</sup> However, further research is required to understand the impacts of advice provision on the well-being of diverse communities in Wales. From a co-ordination perspective, the National

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<sup>35</sup> Thomas Commission, para 12.11.

<sup>36</sup> G. Ifan, *Public Spending on the Justice System for Wales* (Cardiff University Wales Governance Centre 2019).

<sup>37</sup> The Independence Commission, *Towards an Independent Wales* (Ceredigion: Lofa, 2020) 63 'Independence Commission'.

<sup>38</sup> Westminster Hall debate (n 6).

<sup>39</sup> G. Ifan, *Public spending on the justice system for Wales* (Wales Governance Centre, Cardiff University: May 2019).

<sup>40</sup> M. Antoniw MS, paras 90-96: <https://record.assembly.wales/Plenary/12320#A66142> [Accessed 9 December 2021].

<sup>41</sup> Reported in Thomas Commission, para 3.29.

<sup>42</sup> Thomas Commission, para 3.39.

<sup>43</sup> Thomas Commission, recommendation 1.



Advice Network and Regional Advice Networks across Wales are making progress, especially as concerns efficient referrals, and such may indeed eventually form the foundation for a national advice service, modelled on free at the point of use universal healthcare provision. Gaining the perspectives of the National and Regional Advice Network members, and advice service users, will be an important task for the Constitutional Commission and any standing committee established.

The Thomas Commission considered the Ministry of Justices' post-LASPO Legal Support Action Plan<sup>44</sup> insufficient to redress the scale of Wales' access to justice problems, and the Fifth Senedd LJC Committee concluded that its successor "should put access to justice at the heart of its consideration"<sup>45</sup> when scrutinising legislation and policy. A broader constitutional conversation for Wales should have access to justice at its heart, and should examine research recounting the difficulties people in Wales face in accessing legal aid.<sup>46</sup> These access problems include a reduction in the number of solicitors able to offer legally aided advice on matters impacting individuals in their daily experience of public services, especially social welfare, community care, discrimination, and housing. The conversation should reference "advice deserts" in Wales, a worrying development noted by expert stakeholders and people with lived experience alike, alongside concerns about the sustainability of specialist advice services. This is particularly true in relation to public administrative law advice services, which are central to ensuring public body compliance with constitutional principles. Indicating Welsh Government's cognisance of this matter, former Counsel General, Jeremy Miles MS wrote to the Chair of an Independent Review of Administrative Law (IRAL) (Lord Faulks) stressing that in Wales there is "a clear barrier to people legitimately accessing judicial review through lack of means. Any further limitation on the availability of judicial review would serve only to exacerbate this obstacle to redress".<sup>47</sup>

Research demonstrates that there has been some decrease in judicial review litigation relating to Wales in recent years, corresponding with a decline in availability of publicly funded advice, with concerns that the advice needs of the most vulnerable, especially in relation to equality and human rights, are not being met, and that such problems have been exacerbated by the Covid-19 pandemic.<sup>48</sup> Rates of judicial review per head of population remain low in Wales, especially as compared to parts of southern England, and also compared to Northern Ireland as a smaller devolved nation.

There is a lack of awareness among the people of Wales as concerns equality, human rights, and the legal and administrative mechanisms available to hold government and other public bodies to account.<sup>49</sup> Further awareness raising initiatives could be developed, including through school curricula, and by improving public legal education. This is particularly important to counter misunderstandings about human rights. Limited awareness and some misunderstanding in relation to rights and justice issues suggests those leading constitutional

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<sup>44</sup> Ministry of Justice, *Legal Support: The Way Ahead - An action plan to deliver better support to people experiencing legal problems* (February 2019).

<sup>45</sup> Legacy Report, Conclusion 23.

<sup>46</sup> L. Edwards and S. Nason, *Reviewing Judicial Review in Wales* (Bangor University 2021) 'JR Wales' and SAEHR, Chapter 9 'Accountability and Enforcement'.

<sup>47</sup> Quoted in JR Wales 12-13.

<sup>48</sup> JR Wales and SAEHR.

<sup>49</sup> SAEHR, Chapter 10 Raising Awareness and JR Wales.

conversations in Wales will face challenges in reaching people who have become disengaged from politics or who are sceptical about the ability of politics, and indeed law, to make a difference to their own and their family's well-being.

### **Progressing constitutional values through administrative justice**

Administrative law is “where the rubber meets the road for constitutionalism”,<sup>50</sup> and a distinctive Welsh approach to administrative justice has emerged, emphasising reformed institutional hierarchies (including bodies such as ombudspersons and commissioners, as well as courts and tribunals) so that they work more harmoniously across various tasks of enforcement, regulation, and value promotion.<sup>51</sup>

In terms of getting things ‘right first time’, research finds that public bodies in Wales are increasingly proactive in conscientiously seeking to ensure the lawfulness of their policies, strategies, and decisions from the outset, including through seeking external legal advice in the policy and implementation stage. This proactivity stems at least partially from public service culture and is viewed as contributing to the avoidance of disputes. Comparative ease of communication between public bodies in Wales, notably shorter lines of communication as compared to England, and closeness of public bodies to the third sector, are associated with greater knowledge sharing and a more consistent approach to administrative decision-making. However, challenges remain around appropriate training and resources for officials in local authorities and other public bodies who make initial administrative decisions, and ensuring that cases requiring independent judicial determination make it into the court or tribunals system.<sup>52</sup> The size of governance in Wales has provided opportunities for innovation, including the grant of own initiative powers of investigation to the Public Services Ombudsman for Wales through Senedd legislation.<sup>53</sup> In general, this chimes with a more preventative approach that is also enshrined in the Well-being of Future Generations (Wales) Act 2015 (WFGA). However, the complexity of the overall network is problematic, and Thomas Commission recommendations for administrative justice focused on promoting and co-ordinating elements and processes, including more prominence and funding for alternative dispute resolution mechanisms.<sup>54</sup>

A constitutional conversation should, we argue, continue to explore the ‘jagged edges’ between devolved social justice powers and reserved justice powers, and the extent to which such limits capacity to develop innovative solutions to justice issues, including the resolution of disputes.<sup>55</sup> Sometimes it clearly is the limitations of the devolution settlement preventing Wales from developing unique solutions, especially in the context of funding and capability limitations. However, in other contexts development is hampered by *perceptions* of devolved competence rather than detailed analysis, by limited awareness and understanding of justice

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<sup>50</sup> T. Ginsberg, ‘Written constitutions and the administrative state: On the constitutional character of administrative law’ in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010).

<sup>51</sup> S. Nason, A. Sherlock, H. Pritchard and H. Taylor, *Public Administration and a Just Wales* (Bangor University/Nuffield Foundation 2020).

<sup>52</sup> *Ibid.*

<sup>53</sup> Public Services Ombudsman (Wales) Act 2019, s.4.

<sup>54</sup> JR Wales 32 and ‘Public Administration and a Just Wales’ (n 52) para 5.15.

<sup>55</sup> Justice in Wales, 38-39.

across the Welsh political branch and civil society, and/or by the absence of sufficient Wales-specific evidence to support innovation. There is evident frustration that savings generated by prevention in Wales are being used to subsidise the operation of reserved institutions (including dispute resolution mechanisms).<sup>56</sup>

The Thomas Commission concluded that Welsh administrative law has considerable scope for divergence from English law even in the short term.<sup>57</sup> Academics continue to investigate whether positive legal sources can be read with Welsh values, including values of communal solidarity and welfare, to yield a normative underpinning capable of giving to coherence to various areas of administrative law including in education, housing and health. This could also guide future legislative initiatives and shape common law development, with potential to improve standards of public body decision-making.<sup>58</sup>

Analyses of particular Welsh administrative laws suggests that drafting can border on constitutional in character, seeking, as Professor Thomas Glyn-Watkin puts it, “to accommodate within the legal system an approach to law making which belongs and fits within a legal system operating under a written constitution but which strains to fit into one in which there is no hierarchy of primary legislative enactments”.<sup>59</sup> A specific example is WFGA, which requires public bodies to “act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs”.<sup>60</sup> Public bodies are also placed under a duty to carry out sustainable development and must set and publish Well-being Objectives, which they must then take all reasonable steps to meet.<sup>61</sup> WFGA can be seen as an example of ‘responsive’ and ‘reflexive’ law. Responsivity refers to a law in which “the emphasis is on making institutions supportive of social goals that are valued by citizens so that injustice is rectified, or better still avoided, before it leads to individual cases”.<sup>62</sup> The reflexivity element is that such law “does not seek to impose greater regulation, but seeks to guide institutions, through ‘regulated autonomy’ to reflect on their practices so they might bring about the redistribution of resources”.<sup>63</sup> Responsive legislation then intends to catalyse systematic change. In a similar vein, the administrative law ‘due regard’ model has emerged as a Welsh approach encouraging close attention to equality and human rights in policy development. However, ‘due regard’ is seen as failing to provide strong accountability or legal enforcement of rights.<sup>64</sup> Likewise, the future generations regime under WFGA may lack sufficient clarity to attract even the normal paraphernalia of administrative

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<sup>56</sup> Justice in Wales, para 9 and para 150.

<sup>57</sup> Thomas Commission, para 6.15.

<sup>58</sup> J. Harrington, E. Thomas and B. Hughes-Moore, <https://www.lawandglobaljustice.com/health-law-in-wales> [Accessed 9 December 2021].

<sup>59</sup> T. G. Watkin, *From Obligations to Aspirations: A Legal-Linguistic Adventure* (Institute of Advanced legal Studies).

<sup>60</sup> WFGA, s.5(1).

<sup>61</sup> WFGA, s.3.

<sup>62</sup> H. Conley, ‘Gender equality in the UK: Is reflexive and responsive legislation the way forward?’ in C Bauschke-Urban and I Jungwirth (eds), *Gender and Diversity Studies in European Perspectives* (Verlag Barbara Budrich 2016).

<sup>63</sup> A. Parken, *The report of the Well-being and Equality Working Group: Improving Well-being and Equality Outcomes: Aligning processes, supporting implementation and creating new opportunities* (July 2019): <https://chwaracteg.com/wp-content/uploads/2019/09/Aligning-and-Improving-Outcomes-for-Well-being-and-Equality.pdf> [Accessed 9 December 2021].

<sup>64</sup> SAEHR, para 12.12.

law procedures and remedies. After his tenure as Justice Commission Chair, Lord Thomas questioned the enforceability of aspirational legislation, and whether its lack of precision might be an affront to the rule of law.<sup>65</sup> The Senedd has debated the joint Public Accounts and Public Administration Committee, and Equality and Social Justice Committee, scrutiny of implementing WFGA. Mark Isherwood MS, Chair of the Public Accounts and Public Administration Committee, noted that “inconsistent leadership and slow cultural change were failing the aspirations of the Act”.<sup>66</sup> Other Members raised concerns about variable coverage across public bodies, insufficient funding for implementation and accountability, and the limitations of legal enforceability. It is important that WFGA’s continued implementation be scrutinised across subject-matter committees, given its cross-cutting themes of public administration, social justice, and the implications of particular drafting styles.

Regardless of formal drafting, it has been argued that judges determining claims under Welsh law nevertheless ought to take a more ‘activist’ attitude to matters of social welfare, especially in the context of equality and human rights policy.<sup>67</sup> However, such unique Welsh administrative law barely features in substantive judgments of the Administrative Court in Wales, and the majority of claims raising these points have been refused permission.<sup>68</sup> On our interpretation, we conclude that judges determining substantive judicial review claims both in Wales and in the English regions outside London, show deference/respect to the expertise and constitutional position of initial decision-makers and to the plain wording of the legislation by which they are bound, and the same appears to be true of the judicial ethos in Scotland and Northern Ireland.<sup>69</sup> There is no evidence that regionalisation of the Administrative Court has led to any blurring of boundaries between public law appeals on the merits, and legality review, as some had feared.<sup>70</sup>

The Thomas Commission suggested innovations in Welsh administrative law supported its recommendation that: “The law applicable in Wales should be formally identified as the law of Wales, distinct from the law of England”.<sup>71</sup> It will be important, we argue, for the Senedd LJC Committee to oversee the evolution of Welsh administrative law, ensuring it develops in a clear, consistent and coherent manner; that duties laid down are capable of performance by public bodies; that legislation provides for objective oversight of duties by appropriate accountability bodies; and that there is continuing post-legislative review of the impacts of new duties on public bodies, compliance rates and outcomes. We also propose that the Constitutional Commission, and any standing committee, use their public engagement platforms to develop a better understanding of how such law actually impacts on the well-being of people and communities in Wales.

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<sup>65</sup> Lord Thomas, ‘Thinking policy through before legislating – aspirational legislation’ (Statute Law Society, Renton Lecture 2019): <http://www.statutelawsociety.co.uk/home/lord-thomas-text-aspirational-legislation-21-11-19/> [Accessed 9 December 2021].

<sup>66</sup> Public Accounts and Public Administration Committee and Equality and Social Justice Committee Debate: Well-being of Future Generations Act 2015: Scrutiny of implementation (24 November 2011) para 282.

<sup>67</sup> S. Hoffman, Swansea University, Submission to the Commission on Justice in Wales (2018) paras 3-6: <https://gov.wales/submission-justice-commission-dr-simon-hoffman-swansea-university>

<sup>68</sup> JR Wales 34-35.

<sup>69</sup> *Report of the Independent Review of Administrative Law* (March 2021) para 5.13.

<sup>70</sup> S. Nason and M. Sunkin, ‘The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law’ (2013) 76(2) MLR 223.

<sup>71</sup> Thomas Commission, Recommendation 73.

Relevant too is the form of Welsh law. In 2016 the Law Commission recommended bringing together legislation whose subject matter is within Welsh competence, but which is scattered across various sources.<sup>72</sup> The subsequent Legislation (Wales) Act 2019 requires that Welsh Ministers and the Counsel General prepare a programme of activities to improve the accessibility of Welsh law. This must include actions “intended to – (a) contribute to an ongoing process of consolidating and codifying Welsh law; (b) maintain the form of Welsh law (once codified); and (c) facilitate the use of the Welsh language”. Codes will constitute a digest of Welsh law, retaining existing distinctions between primary and secondary legislation, being organised by subject matter rather than date of enactment. A Welsh Code will not be a legal instrument in its own right, and whilst Senedd Standing Orders introduce a degree of code discipline, changes to the law-making process are less ‘ground-breaking’ than might have been originally perceived. Codification is about the accessibility of Welsh law, to practitioners and, it is hoped, to the general public. The constitutional principle at play is the rule of law (transparency and clarity) as opposed to constitutional entrenchment through some higher legal source. The comparative success of codification could provide important lessons for legislative drafting across the UK legal jurisdictions.

Specifically in the context of human rights, researchers have recommended that Welsh Government introduce primary legislation to consolidate rights currently incorporated piecemeal into Welsh law, and to give further effect to international human rights by way of a Human Rights (Wales) Act, strengthening selected rights by drafting sufficient to render duties enforceable in an appropriate court or tribunal.<sup>73</sup> The Supreme Court *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention of the Rights of the Child (UNCRC) (Incorporation) (Scotland) Bill*<sup>74</sup> suggests that care needs to be taken in drafting such an Act, but the Judgment casts no doubt on the Senedd’s general competence to legislate for the incorporation of international rights instruments into Welsh law. Codification provides an opportunity to bring together Welsh human rights law, with laws enshrining values of sustainability, well-being, and equality, into a form of social justice code.

### **Promoting the rule of law and the principle of legality**

Most people’s main experience of justice will be in the context of public power, administrative justice reforms then have constitutional implications, and this is especially true for judicial review of administrative action, a reserved matter. Reforms can have specific impacts on the well-being of people in Wales particularly via their (in)ability to challenge government and other public body decisions.

The IRAL Panel, established to consider judicial review reforms, confirmed that ‘Wales only’ activity was outside its terms of reference. It took this to mean review of powers that may be exercised only in Wales, including powers exercised by either Welsh Ministers, UK Government Ministers, or both concurrently. IRAL recognised that its recommendations would nevertheless apply equally to ‘Wales only’ judicial review. It also stressed that a two-tier

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<sup>72</sup> Law Commission, *Form and Accessibility of the Law Applicable in Wales* (Law Com No 366, 2016).

<sup>73</sup> SAEHR, Recommendation 1.

<sup>74</sup> [2021] UKSC 42.

system of devolved and reserved judicial review would be undesirable;<sup>75</sup> this more likely refers to the devolved judicial review procedures of Northern Ireland and Scotland. In a Foreword to the UK Government's response to IRAL, the then Lord Chancellor stated that additional reforms are intended to apply to the jurisdiction of England and Wales only, whilst also voicing concern about risks of fragmentation across the UK.<sup>76</sup> The restrictions contained in the Judicial Review and Courts Bill passing through the UK Parliament at the time of writing, whilst less significant than might have been expected, are still contrary to Welsh Government's view that any reforms restricting judicial review should be rejected. Welsh powers to take a different route are limited, whilst the Senedd can create new legality review avenues in devolved areas, the reservation of judicial review of administrative action likely prevents the development of a broader Wales only judicial review procedure crafted, for example, without the restrictions on remedies proposed at Westminster.

Running parallel to IRAL, research focusing on judicial review in Wales found that, at least from the Welsh practitioners' perspective, the procedure's symbolic constitutional value as a check on government 'legality' may be its most significant purpose, over and above its impact in individual cases. Participants in the research associated a focus on legality with the comparative youth of Welsh governance institutions.<sup>77</sup> In this sense, legality is synonymous with the rule of law, that government and other public bodies should not be above the law. However, Welsh Government's support also extends to a more specific principle of constitutional legality, as evidenced by its use of judicial review to challenge the United Kingdom Internal Market Act 2020. The is on grounds that the Act purports to impliedly repeal areas of Senedd competence and confers powers that could be used by UK Ministers to substantively amend the Government of Wales Act 2006 cutting down the devolution settlement. Both grounds are based on the constitutional principle of legality; if Parliament intends to legislate contrarily to fundamental constitutional norms, in this case the norms of devolution, it must do so expressly and not impliedly. This pleading of the principle of legality in a live judicial review case coincided with UK Government's criticism of judicial development of that very principle, and further proposals that could limit its effectiveness.<sup>78</sup> Whilst Lewis LJ initially found the claim premature absent the context of specific legislation made or purported to be made under the Internal Market Act 2020, the Court of Appeal disagreed, and found important issues of principle to be considered going to the constitutional relationship between the Senedd and UK Parliament.<sup>79</sup> On the matter of this relationship, Welsh Government, and the Senedd LJC Committee, have noted that the UK Government and devolved governments hold different interpretations of the Sewel Convention, and without further clarification the Convention will be rendered "obsolete and of little practical value".<sup>80</sup>

Welsh Ministers have also shown more support for another constitutional principle, judicial independence. A former Counsel General was quick to defend both the rule of law and

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<sup>75</sup> IRAL, 127-128.

<sup>76</sup> Ministry of Justice, *Judicial Review Reform: the Government Response to the Independent Review of Administrative Law* (March 2021) para 6 ('Judicial Review Reform').

<sup>77</sup> JR Wales 5.

<sup>78</sup> Judicial Review Reform, paras 27-33.

<sup>79</sup> *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*

<sup>80</sup> Legacy Report, Conclusion 8 para 34.



judicial independence when the Daily Mail published a frontpage article referring to senior members of the judiciary as “Enemies of the People”; the UK Secretary of State for Justice offered no similar defence. Welsh Coronavirus legislation has also generally been published in a timely fashion, including showing updates in tracked changes, and with focused guidance for particular groups, an approach going beyond that taken by other UK nations and central Government. As Lord Thomas put it in evidence to the Senedd LJC Committee: “I think nothing could show more the difference between the law of England and the law of Wales than the way legislation was handled during the pandemic”.<sup>81</sup>

The challenge for the Constitutional Commission, and any continuing conversation about Wales’ constitutional future, will be linking what can appear as abstract constitutional concepts, to people’s daily lived-experiences, and it may be that differences between the Welsh and English/UK approach to the Covid-19 pandemic provides some examples, or at least serves to highlight the extent of devolved justice powers. During the pandemic Welsh Ministers created criminal offences wide-ranging in their effect, whilst responsibility for policing and enforcement remained with the UK Home Secretary. Though time-limited, the response to Covid-19 was, as Welsh Government puts it, “a very public illustration of how the law which applies in Wales can diverge from the law that applies in England”.<sup>82</sup> Particularly striking have been announcements on public transport when crossing the border, that facemasks remained a legal requirement in certain public places in Wales, when they did not in England. Perhaps more striking still, that the First Minister had some legislative power to prevent people from parts of England with high Covid rates travelling into Wales.<sup>83</sup> Relevant too, but more abstract to most people, is that whilst UK Government seeks to restrict ordinary people’s access to challenge the lawfulness of such regulations and decisions impacting on rights, through judicial review, Welsh Government does not.

### **Institutional and structural reform, more symbolic than real?**

In examining constitutional structures, the Constitutional Commission may look to the organisation of courts and tribunals. At the highest level, Wales does not have formal representation on the bench of the UK Supreme Court. The Constitutional Reform Act 2005 has been interpreted as requiring representation from each of the three UK legal jurisdictions as opposed to from each of the four nations. ‘Welsh’ judge, Lord David Lloyd-Jones, was appointed to the Supreme Court in 2017, being the first Justice to take the judicial oath in Welsh and English, but this appointment is not explicitly based on recognition of Wales as a legal entity.

With further legislative devolution, the Thomas Commission recommended the Senedd could legislate to provide for a High Court and a Court of Appeal for Wales, and that a Welsh Courts and Tribunals Service “should be developed from the base of a Welsh Tribunals Unit reformed on the model of the Scottish Courts and Tribunals Service”.<sup>84</sup> As the Senedd does

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<sup>81</sup> Lord Thomas, Senedd LJC Committee (22 November 2021) para 5.

<sup>82</sup> Reforming our Union, 37.

<sup>83</sup> The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 19) Regulations 2020.

<sup>84</sup> Judicial Review Reform, paras 27-33.

<sup>84</sup> Legacy Report, Conclusion 8 para 34.

not currently have the constitutional power to create new courts, devolved Welsh tribunals have become a ‘test bed’ for further devolution of responsibility for the administration of justice, with Welsh Government asking the Law Commission to examine the case for reform.

Reporting in December 2021, the Law Commission makes recommendations for a single First-tier Tribunal for Wales, which could then be subdivided into chambers; that legislation should create an Appeal Tribunal for Wales; that the President of Welsh Tribunals be given a judicial role and become presiding judge of the First-tier Tribunal and Appeal Tribunal for Wales; and reforms are made to procedural rules, appointments, complaints and discipline, and judicial independence. The Commission also recommends the establishment of a Tribunals Service for Wales as a non-ministerial department.<sup>85</sup>

Whilst the Law Commission emphasised the importance of amalgamation into a single structure to the identity of tribunals, it found little empirical evidence to support the proposed benefits for users, even after drawing on a range of comparative research.<sup>86</sup> This admission, coupled with research into the effects of establishing an Administrative Court in Wales,<sup>87</sup> causes us to question whether the impact of structural tribunal and court reform is more symbolic than real when it comes to the constitutional value of access to justice, but also in the context of other values that affect well-being, such as sustainability, socio-economic equality, and legal enforcement of fundamental rights.

The Thomas Commission concluded that minimal use of devolved Welsh tribunals as forums for redress under Welsh law was anomalous given their specialist competence and capacity, and recommended: “Welsh tribunals should be used for dispute resolution relating to future Welsh legislation”.<sup>88</sup> The Law Commission found the lack of a single system of Welsh tribunals was a partial cause of Welsh Government and the Senedd’s ad hoc approach to legislating for redress mechanisms.<sup>89</sup> The combined impact of Thomas Commission recommendations on rights of appeal, and the Law Commission recommendations for a single structure, will have significant resource implications for tribunals in Wales that should be carefully monitored.<sup>90</sup>

The Law Commission rejected the option of directing appeals from devolved Welsh tribunals to the Upper Tribunal because as the Senedd continues to pass new legislation increasingly divergent from England, “it may be that the expertise of existing judges becomes less relevant in Wales”.<sup>91</sup> On the matter of expertise, research finds that inconsistent decision-making in judicial review in Wales, including at the permission stage, is associated with less experienced local circuit judges/deputy judges, more likely to be listed to determine claims outside London. On the other hand, the approach of the more junior local judges has been praised as demonstrating greater understanding of Welsh values and context.<sup>92</sup> The Law

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<sup>85</sup> Law Commission, *Devolved Tribunals in Wales* (Law Com No 403, 2021).

<sup>86</sup> Law Commission, *Devolved Tribunals in Wales* (Consultation Paper No 251, 2020) para 3.38.

<sup>87</sup> S. Nason and D. Gardner, ‘Ten Years of the Administrative Court in Wales: Success or Failure?’ (UKAJI, October 2019); <https://ukaji.org/2019/10/15/ten-years-of-the-administrative-court-in-wales-success-or-failure/> [Accessed 9 December 2021].

<sup>88</sup> Thomas Commission, Recommendation 27.

<sup>89</sup> Devolved Welsh Tribunal Report, Chapter 3 A tribunals system for Wales.

<sup>90</sup> Legacy Report, Conclusion 22.

<sup>91</sup> Devolved Welsh Tribunals Consultation, 4.46.

<sup>92</sup> JR Wales 24.

Commission notes that as the caseload of an Appeal Tribunal for Wales is likely to be low, members could be appointed based on a range of experience gained from other courts and tribunals, and there could be cross-deployment of High Court and/or Upper Tribunal Judges.<sup>93</sup>

In addition to the possible advantages of consistency and coherent structure, the Law Commission concluded that an Appeal Tribunal for Wales could facilitate development of distinctive case law at an appellate level; increase the public profile of tribunal decisions at an appellate level; and could, especially through sitting only in Wales, be responsive to the needs of the tribunals of Wales (contingent on resourcing and the availability of specialist judges).<sup>94</sup> Noting that some respondents, particularly the Mental Health Review Tribunal for Wales and the Adjudication Panel for Wales, strongly supported maintaining existing appeal routes, the Commission nevertheless decided, along with a narrow majority of respondents (including the President of Welsh Tribunals) that a new Appeal Tribunal for Wales should be established.<sup>95</sup>

Whilst professional stakeholders in fields of justice, equality, and human rights, support local and informal access to justice, there is some scepticism about whether this could be achieved by creating additional appeal or review rights to devolved Welsh tribunals.<sup>96</sup> Scepticism relates to the status of tribunals as compared to the Administrative Court, and concerns that legal aid funded advice and representation would not be available in devolved tribunals. Whilst the Law Commission proposes that an Appeal Tribunal for Wales might have more local resonance, translating into greater awareness of, and compliance with judgments by public bodies, research finds evident concern that a tribunal, even an appellate tribunal as a superior court of record, might lack the gravitas associated with the Administrative Court.<sup>97</sup> There is also little evidence that more localised access to public law redress catalyses increased public law activity ultimately benefitting community well-being. There is some concern that creating new institutions could further complicate an already hard to navigate redress environment, and that focus should instead be on improving the accessibility and effectiveness of existing mechanisms.<sup>98</sup>

The Administrative Court in Wales has been a symbolic ‘constitutional success’ given that claims turning on matters of constitutional principle and importance to Wales are now largely issued and heard in Wales.<sup>99</sup> It has been a ‘jurisdictional improvement’, with the proportion of claims against Welsh public bodies issued outside Wales generally decreasing over time; a trend cemented by reforms to the Civil Procedure Rules.<sup>100</sup> However, on the question of whether establishing an Administrative Court in Wales has improved access to justice for the people of Wales, the evidence is more equivocal. Research finds that people in certain areas of Wales are less likely than people in most areas of England to seek to use *legal* methods to resolve disputes with public bodies. In seeking justice in public administration there is at least a perception, backed up by evidence on “political efficacy”, of greater trust and confidence in the political branch of state in Wales, with political representatives more visible

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<sup>93</sup> Devolved Welsh Tribunals Report, 4.73-4.79

<sup>94</sup> Devolved Welsh Tribunals Report, Chapter 4 Appeals.

<sup>95</sup> Devolved Welsh Tribunals Report, Recommendation 11.

<sup>96</sup> JR Wales 35-36, SAEHR Chapter 9.

<sup>97</sup> JR Wales 35-36.

<sup>98</sup> Public Administration and a Just Wales (n 51).

<sup>99</sup> Nason and Gardner (n 87).

<sup>100</sup> Civil Procedure (Amendment No. 3) Rules 2020 amending Part 7.1A and 7.1B.

and accessible as compared to their English counterparts.<sup>101</sup> However, it has also been suggested that reluctance to bring legal challenges stems from a culture of deference to authority, and to the proportion of the Welsh population receiving some form of state benefit and/or care services, with related concern that legal challenge causes problems for continuing support.<sup>102</sup> That said, the most common legal problems giving rise to a judicial review Letter Before Action involving a local authority in Wales have been in relation to social care, with the majority of claims resolved to the benefit of the individual.<sup>103</sup>

The Administrative Court in Wales has contributed to some increased awareness of Welsh public administrative law, and increased opportunities for lawyers in Wales, nevertheless there is little evidence that individuals and communities in Wales are accessing the public law system in a way that differs markedly to before the Court was established.

### **Further constitutional reform**

We have focused on areas of justice in Wales that impact most on the lives of individuals and communities, but which also disclose constitutional values in action. Such Welsh distinctiveness in underpinning values, policy and legislation is not always matched with effective implementation and this ‘implementation gap’ cannot be solely attributed to the limits of devolution. Nevertheless, the Thomas Commission was resolute in its conclusion that the ‘jagged edges’ of justice cannot be sufficiently redressed by improved inter-governmental relations and/or by better communication and co-ordination across agencies. This may indeed prove to be the case, and the pandemic has further highlighted divergence, as have the consequences of Brexit (including the UK Internal Market Act 2020), and variable approaches to constitutional reform. In relation to the latter, also relevant is IRAL’s sister review, the Independent Human Rights Act Review established in December 2020 to look into the relationship between domestic courts and the ECHR, and the impact of the HRA 1998 on the relationship between the judiciary, the executive and the legislature.<sup>104</sup> Evidence to equality and human rights research in Wales was unequivocally supportive of the HRA 1998, and neither the Welsh nor Scottish Government<sup>105</sup> accepts the UK Government’s view that domestic courts have been unduly drawn into matters of politics or policy in either ordinary judicial review or claims under the HRA 1998.

Welsh Government proposes that the UK is “best now seen as a voluntary association of nations taking the form of a multi-national state”<sup>106</sup> and that such an association must be based on recognition of popular sovereignty in each constituent part. It also argues that the concept of parliamentary sovereignty “no longer provides a sound foundation for this evolving

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<sup>101</sup> A. Henderson and R. Wyn Jones, *Englishness: The Political Force Transforming Britain* (Oxford University Press 2021) ‘Englishness’ Chapter 6.

<sup>102</sup> JR Wales 18.

<sup>103</sup> JR Wales 20-22.

<sup>104</sup> Independent Human Rights Act Review: <https://www.gov.uk/guidance/independent-human-rights-act-review> [Accessed 9 December 2021].

<sup>105</sup> Scottish Government, *UK Independent Human Rights Act review: our response* (March 2021): <https://www.gov.scot/publications/scottish-government-response-uk-independent-human-rights-act-review/> [Accessed 9 December 2021].

<sup>106</sup> Reforming our Union, Proposition 1.

constitution”.<sup>107</sup> Aspects of Welsh Government’s approach align with ‘radical federalism’,<sup>108</sup> which includes a new constitutional settlement for local government and a presumption that the centre would only perform strategies and tasks that could not be performed locally. The House of Commons Housing, Communities and Local Government Committee’s 2021 report of its inquiry into ‘Progress on Devolution in England’ includes conclusions that: government should work with local government and other stakeholders to produce a devolution framework including principles committing government to an evolving devolution process; devolution should be the default option in the absence of compelling policy reasons; and that a reserved powers model should be explored for English devolution.<sup>109</sup> This suggests that devolved authorities in England may also learn from the approaches to equality, rights, well-being, and access to justice explored in this article.

For Wales there is also the prospect of independence. In 2019 an Independence Commission was established to produce recommendations on how a Plaid Cymru Government should prepare for holding an independence referendum.<sup>110</sup> Political arguments for independence are largely beyond the scope of our article, but matters such as the fiscal reality for an independent Wales inevitably impact on what could be achieved as concerns justice, equality, and human rights; the potential for new relations with other nations and supranational organisations is also relevant. The Independence Commission favoured a confederal ‘League of the Isles’ rather than a federal UK. On this approach England, Scotland, Northern Ireland, and Wales would form a confederation with aspects of federal-type control established in key policy portfolios, said to reflect principles of equality and solidarity shared by the nations. Here “[e]ach nation has a distinct jurisdiction and holds all constitutional powers and rights which are not by treaty delegated to joint institutions”.<sup>111</sup> Various members of Welsh Government, and Commissioners of the Constitutional Commission, have not ruled out the case for an independent Wales.<sup>112</sup> The seriousness with which academics now address the constitutional and political developments that would be required to effect the lawful secession of Wales also demonstrate the gravity of challenge to the Union.<sup>113</sup>

In terms of national identity, social values, and political voting affiliations, Wales may be more fractured than it has been in its recent past.<sup>114</sup> In response to this fragmentation, as well as in the hope of adopting a new form of co-operative politics, Welsh Government and Plaid Cymru have signed a Co-operation Agreement.<sup>115</sup> This is said to build on shared values of social solidarity, sustainability, and vibrant democracy, as well as responding to so-called

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<sup>107</sup> Id.

<sup>108</sup> <https://www.radicalfederalism.com/> [Accessed 9 December 2021].

<sup>109</sup> <https://publications.parliament.uk/pa/cm5802/cmselect/cmcomloc/36/3602.htm> [Accessed 9 December 2021].

<sup>110</sup> *Towards and Independent Wales: Report of the Independence Commission* (Y Lolfa 2020).

<sup>111</sup> *Ibid* 136-140.

<sup>112</sup> L. McAllister, A chance to grasp control of our own destiny: How you can help shape Wales’ future (6 November 2021): <https://www.walesonline.co.uk/news/news-opinion/a-chance-grasp-control-destiny-22068892> [Accessed 9 December 2021].

<sup>113</sup> G. Evans, ‘Debating Welsh Independence: The Political and Constitutional Pathways to a Referendum’, U.K. Const. L. Blog (29th July 2020).

<sup>114</sup> ‘Englishness’ Chapter 6.

<sup>115</sup> Welsh Government and Plaid Cymru, *The Co-operation Agreement 2021*: <https://gov.wales/sites/default/files/publications/2021-11/cooperation-agreement-2021.pdf> [Accessed 9 December 2021].

‘muscular unionism’ of the UK Government. Welsh Government and Plaid Cymru will work together over three years to deliver various policy commitments including on education, social care, second homes, and responding to the climate crisis. There is also a commitment to Senedd reform, based on increasing the number of Members, but no specific agreement on a reformed voting system, other than that it should be more proportional. Both sides pledge to assist the work of the Constitutional Commission, and express support for further devolution of powers over justice. UK Government Welsh Secretary Simon Hart has denounced this agreement, noting that it could allow Plaid Cymru to claim credit for Welsh Government policies while continuing to call itself an opposition party, and that this has implications for collective responsibility, and proper scrutiny of Welsh Government. There is a further “mechanisms document” setting out governance and accountability frameworks that will require close attention.<sup>116</sup>

In October 2021, WalesOnline asked its readers what they thought to be the biggest issues facing Wales, with the most popular answers being healthcare, transport, and housing.<sup>117</sup> Any constitutional conversation for Wales will need to connect the dots between concerns about the practical delivery of public services, and the suite of governance levers available to Wales across different constitutional structures. In this article we have sought to show how distinctive approaches to constitutional matters, namely the rule of law, access to justice, equality, and human rights, are already emerging in Wales, alongside a distinctive administrative justice system with significant, if as yet not fully explored, impacts on the well-being of people in Wales. Administrative justice “touches the political fabric and fashions its design”,<sup>118</sup> and we have argued that constitutional reform in Wales can emerge as much from people’s daily experiences of public administration and redress as it can from wider ‘horizon scanning’ conversations about whether Wales has the full set of tools needed to make both strategic and street level administrative decisions in a different way.

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<sup>116</sup> <https://gov.wales/co-operation-agreement-mechanisms> [Accessed 9 December 2021].

<sup>117</sup> ‘People in Wales set out the biggest issues facing the country’ (WalesOnline 18 October 2021): <https://www.walesonline.co.uk/news/wales-news/biggest-issue-wales-facing-now-21888935> [Accessed 9 December 2021].

<sup>118</sup> M. Doyle and N. O’Brien, *Reimagining Administrative Justice: Human Rights in Small Places* (Palgrave Pivot 2020) 132.