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Is there a Welsh Health Law? Values, Divergence and Devolution after COVID-19

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Viruses can move the world and COVID-19 has unquestionably tested the United Kingdom's constitutional settlement. This is not simply a matter of the generic allocation of powers as between London on the one hand, and Cardiff, Edinburgh and Belfast on the other. It also concerns the content of substantive law in discrete fields. Lawmakers, practitioners and scholars might thus ask: what has been the effect of the pandemic in the field of regulation central to official responses, namely health law? In this note we introduce a research project which aims to answer this question in relation to Wales, and, thus, contribute to evaluating some of the wider legal consequences of COVID-19 and the political contexts which shape and are shaped by them.

The UK nations' [divergent responses](#) to COVID-19 highlight the interplay, interaction and negotiation between devolved governments and Westminster in legislating on public health matters. The diversity of devolved administrations has been illuminated through the regular announcement and amendment of public health regulations such as [closing](#) non-essential businesses and [requiring](#) face coverings to be worn in public indoor settings. Coordination between the four UK governments was a key aspect of the pandemic's early stages, embodied in their joint [Coronavirus Action Plan](#) published on 3 March 2020 and their collective decision to institute a UK-wide lockdown on March 23. Weekly meetings between the four Health Ministers in these early stages were [praised](#) by Northern Ireland Health Minister Robin Swann for prioritising public health over political point-scoring. Small regional differences from May 2020 led to increasing divergences in lockdown rules, duration and substantive guidance. However, co-ordination between the four governments of the UK is not an end unto itself; it is only desirable to the extent that it leads to better outcomes, and as the pandemic progressed the four governments began developing policy largely [independently](#). If the pandemic has tested the UK's devolution settlement, then the medium through which it has done so is [law](#). It has highlighted the capacity for sub-state legislatures and executives to shape distinct responses to disease outbreaks and other health problems. COVID-19 has already been a site for contests over [Welsh identity](#), [Scottish independence](#), and [Irish unity](#) pursued through health law.

Health is a devolved policy area across the UK. Wales (like Scotland and Northern Ireland) has its own distinct public health and healthcare framework, comprised of legislation passed by Senedd Cymru (the Welsh Parliament) and Regulations laid down by Ministers of the Welsh Government. As the rate of infection increased dramatically in March 2020, the UK Parliament passed the Coronavirus Act which conferred new powers on devolved administrations to pass measures specifying emergency arrangements relating to the lockdown and other measures to prevent person-to-person transmission. Devolved ministers are empowered to provide an indemnity to medical staff for criminal negligence cases related to COVID-19, to temporarily close educational establishments and to alter the employment terms of health care workers.

COVID-19 has, thus, made the fact of devolution 'present' to citizens to an unprecedented degree, producing a distinctive 'health space' defined by the border between Wales and

England. However, there has been more [public confusion](#) as regards substantive detail and scope of jurisdiction. Media sources have often neglected to indicate that measures imposed by the UK Parliament and ministers are specific to England only. This tendency is reinforced through the language of UK government ministers and in the paraphernalia of Downing Street briefings, e.g., displaying the Union flag. Given that people living in Wales are much more [likely](#) to receive information from these sources, uncertainty about operative rules has been inevitable. This confusion is troubling in terms of public health effectiveness given the need to secure general compliance across a given time and space. It also raises rule of law concerns, as Nason and Pritchard [highlight](#) in relation to administrative justice in Wales more generally. How can citizens, health workers and others know the limits placed on their basic rights and hold the devolved authorities to account legally and politically?

Looking forward, it is also worth noting that this scene of contest and confusion is likely to be [exacerbated](#) as a result of the UK's departure from the EU. Economic commentators such as McHale, Speakman, Hervey and Flear have [highlighted](#) the potential implications for health and health care presented by customs barriers to imports from the EU and likely impediments to economic growth adding to the shock of the pandemic itself. Legal scholars like Kramer, Locke and Greene have also [noted](#) the [implications](#) in this context of the Internal Market Act, passed to ensure the barrier-free movement of goods between the four UK nations at the end of the Brexit transition period. Critically, Schedule 1 of the Act fails to set out a general public health exception to the mutual recognition principle. The Secretary of State has powers in the legislation to [amend and remove](#) the limited protections for public health that do exist through secondary legislation, thus preserving free trade across the UK by [limiting](#) the autonomy of devolved governments and restricting devolved administrations' powers to raise public health standards unilaterally, for example in regard to the [pricing](#) of alcohol or level of [salt content](#) in food products. The narrow drafting of the Act undermines the ability of devolved governments to [introduce key policies](#) aiming to improve public health, potentially hindering the devolved administration's innovation. This is potentially harmful when different nations move at different speeds in terms of public health, for example when Wales introduced a bespoke [new law](#) for minimum alcohol pricing in 2018. If COVID-19 has promoted centrifugal tendencies in devolution, by contrast the Internal Market Act may be the harbinger and [agent](#) of [recentralization of power](#) in Westminster.

Though avoiding 'devolution-determinism', we can nonetheless affirm that there is a distinct body of health law in Wales into which relevant COVID-19 norms have been inserted. This is heterogenous as to source. The Labour-dominated parliament in Wales, looking to put 'clear red-water' between itself Conservative-led administrations at Westminster has legislated for a series of landmark initiatives since devolution in 1998. England functioned under an opt-in system until [recently](#), while Wales [introduced](#) a 'soft opt-out' system of organ donation in 2015, the [first](#) UK nation to do so; the legislation is governed by the principle of 'deemed consent' in Wales, meaning that, if a person has not registered a decision, they are considered to have no objection to being a donor.

More fundamentally the National Health Service has been reoriented to remove market and quasi-market features retained in England, restoring cooperation in place of competition, it is claimed. The four nations of the UK have their own NHS services, funded via a block grant from the UK central government. Health services are divided into a series of organisations working at local and national levels. The structure of the NHS in Wales underwent major

change in 2009, with a stronger [emphasis](#) now on public health and long-term planning, and a distinct [public service ethos](#), following the creation of single local health organisations responsible for delivering all healthcare services within a geographical area, rather than the Trust and Local Health Board system in place previously.

Much of the law relating to health and health care in Wales nevertheless emanates from beyond Cardiff. Case law on everything from patient consent to treatment to the definition of death forms part of the common law of the unified jurisdiction of England and Wales, as the criminal law is not devolved to Wales. International law forms another important source, for example, human rights treaties ratified by the UK and, where relevant, directly incorporated into Welsh law like the Convention on the Rights of Children. Professional licensing and regulation of health care workers in Wales is a matter for the UK General Medical Council and equivalent bodies. The norms emanating from these sources are unlikely to sit side by side, as it were, capable of being applied discretely to discrete health-related issues. We can predict interaction in dynamic, even agonistic fashion, with norms qualifying and sometimes displacing each other and advancing rival jurisdictional claims. This suggests that we should study process as well as substance.

A properly descriptive approach might lead us to adopt the label 'health law in Wales' rather than 'Welsh health law'. Nonetheless, we feel there is traction in the latter term too, in so far as it brings additional evaluative and predictive dimensions to the study. Our key question in that regard would then be: to what extent can there be principled coherence in Welsh health law? And, relatedly, where might the normative sources of such coherence lie? The practical needs of citizens, lawmakers, professionals, and administrators, for clarity and intelligibility has been made clear during COVID-19, as noted above. It will only grow in so far as the health-related output of Senedd Cymru expands in range, scope and volume. While discrete areas like the reform of organ donation rules have already been the subject of [legal commentary](#), there has to this point been no systematic treatment capable of guiding new developments. Textbooks on UK health law now provide well-informed accounts of 'divergence in the devolveds', but this is by way of a supplement to the main story. This will become still more pressing should the recommendations of the [Thomas Commission](#) on Justice in Wales in 2018 in favour of the creation of a separate, autonomous jurisdiction be implemented. Moreover, such recommendations by [Jeremy Miles](#), [Huw Pritchard](#) and [Sarah Nason](#) inform the future codification of Welsh law regarding Health and Social care.

What might provide the basis in principle for organizing an account of Welsh health law and for orienting and critiquing new developments? This challenge has been faced by health lawyers in other jurisdictions. Pioneering scholars like Brazier and Mason and McCall Smith prefaced their textbooks on UK health law with a review of relevant ethical values, for example the principles of autonomy, justice, non-maleficence, beneficence originally [laid out](#) by Beauchamp and Childress. With developing case law, dedicated legislation and the passage of the Human Rights Act 1998, some of these values and their specifications have been identified and thus grounded in positive legal material too. This UK health law made relatively little play of its 'nationality': Scots law precedents were and still are largely absorbed into a shared common law. Ethical values of the sort just mentioned are cast in universal terms.

The challenge is not to find (or more likely to invent) values which express an authentic Welsh national essence in the field of health. Rather our work needs to be wide-ranging and interpretive, drawing on legal analysis, political theory and historical scholarship to identify values which might underpin the emerging law. Many are likely to overlap considerably with principles and norms identified by the health law writers just mentioned. This is to be expected given the shared political, institutional and legal history across the UK. In other instances, though, we can expect distinct inflections and emphases. For example, the much-studied Well-Being of Future Generations Act seeks to put the UN Sustainable Development Goals and the concept of intergenerational justice into the [heart](#) of Welsh public administration. Public Health Wales and the wider NHS, through the creation of [‘hubs’ and ‘toolkits’](#) are monitoring and reporting progress in achieving strategic priorities and improving such health outcomes. Equally Aneurin Bevan’s work as founder of the UK-wide NHS was informed by the practical solidarity of mutual health provision in South Wales mining communities. We do well, however, to accept that values are plural, contingent and sometimes incompatible, and to articulate this rich Welsh, British and international corpus to highlight injustices in contemporary health law and policy. The work of Emmanuel Ogbonna and colleagues on the [disparate impact](#) of COVID-19 on black communities in Wales offers a powerful and topical impetus in this regard.

We will disseminate our findings and engage with our partners in health policymaking, professions, and academia in Wales, providing comprehensive and reliable information for policymakers and practitioners. This work will be useful currently for Welsh legislators, judges, policymakers, academics and other actors including professionals, doctors, patients, and citizens. Conducting our research will involve identifying, collating, and examining law and guidance applicable to Wales. Drawing on trends of health laws in Wales, we will source case law from Wales, the UK at large, and beyond, identifying areas where divergence is clear, and using cases from outside Wales to interpret secondary literature on these deviations in law and policy. Our analysis will be contextualised with reference to legal [debates](#) on the Welsh jurisdiction and to political science work on the impact of COVID-19 on the UK devolution settlement.

Supported by the Welsh Government’s Sêr Cymru programme, our project will construct an understanding of Welsh health law as a phenomenon which stands apart both from Westminster and its devolved counterparts. Employing a comparative and doctrine-focussed approach, we are investigating areas of clear divergence, drawing on trends in health legislation, for example in relation to organ transplantation. From our findings we will then consider the extent to which a devolved government may influence and have a say in decisions that affect the UK as a whole. We will use work in political theory to reflect on whether a set of distinct values underpins this developing legal corpus. More broadly, we aim to use our studies for reflection at another level: the question of whether devolution itself is creating a new field of Welsh health law.

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