Transnational Environmental Law (2024) 1–19
doi:10.1017/S2047102524000219

TEL CAMBRIDGE UNIVERSITY PRESS

SYMPOSIUM ARTICLE

Hope-Bearing Legislation? The Well-being of Future Generations (Wales) Act 2015[Ψ]

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Abstract
The Well-being of Future Generations (Wales) Act 2015 is a landmark piece of sustainable development legislation and marks a significant development in the emerging legal identity of Wales. Despite the Act's significance and ambition, it has been criticized as merely 'aspirational' – as 'non-law-bearing' and unenforceable by legal means. The Act is not without difficulties. However, it also has notable legal and other qualities that are often not captured within the standard justiciability-enforceability frame of analysis. Our aim here is to broaden the context for examining the Act and other 'aspirational' legislation like it. To that end, we identify three sets of questions that help to bring out different ideas around the Act's varied enforceability, its possible constitutional status, and its potential role as a bearer of hope.

Keywords: Well-being of Future Generations (Wales) Act 2015; Aspirational legislation; Enforcement and justiciability; Constitutionalism; Futures and hope; Sustainable development

1. Introduction

The Well-being of Future Generations (Wales) Act 2015 (the Future Generations Act)[1] has been heralded as a landmark piece of sustainable development legislation – a 'world's first'[2] – and marks a significant development in the emerging legal identity of Wales. Under the Welsh devolution settlement, which has undergone steady and progressive change in the last 25 years,[3] the Senedd (the Welsh Parliament) has powers to legislate on matters that are not reserved to the United Kingdom (UK) Parliament. The Future Generations Act represents an ambitious use of those powers and indicates

[Ψ] This contribution is part of a collection of articles growing out of the ELTE-Aarhus Joint Workshop on 'Future Generations Litigation', held at the ELTE University in Budapest (Hungary) on 8–9 June 2023.

[1] Well-being of Future Generations (Wales) Act 2015, received Royal Assent 29 Apr. 2015 (Future Generations Act).

[2] Future Generations Commissioner for Wales, 'Wales – Where Well-being Isn't Just a Buzz Word, It's the Law – Reflects on Seven Years of its World-leading Future Generations Act', 2 Dec. 2022, available at: https://www.futuregenerations.wales/news/wales-where-well-being-isnt-just-a-buzz-word-its-the-law-reflects-on-seven-years-of-its-world-leading-future-generations-act.

[3] Between 1998 and 2017, the United Kingdom (UK) Parliament enacted two Government of Wales Acts (1998 and 2006), and two Wales Acts (2014 and 2017).

the strength of the Welsh legislative agenda on sustainability generally. The Act, however, is subject to criticism. One common criticism is that it does not give rise to norms that can be enforced, – and, as a result, it provides an example of 'legislation which bears no law'.[4]

Legislative measures are described as 'non-law-bearing' when they are regarded as merely 'aspirational' or 'symbolic' in nature.[5] Such measures may express political or moral commitments but are too broadly framed to impose specific obligations.[6] The term 'aspirational' is not used in its positive sense, but rather to describe high-level standards that are not properly enforceable by legal action. Emphasis is placed on what is missing. It might be that the legislation fails to generate legal norms, is non-justiciable or is otherwise devoid of legal character. Aspiration and symbolism, in this context, signal a level of ambiguity and idealism that does not translate into hard-edged legal requirements. Aspirational or symbolic legislation is legislation that is wanting.

Questions of legality and enforceability are familiar in environmental law, particularly in relation to environmental principles the legal implications of which have been vigorously debated and meticulously analyzed.[7] Less has been said, however, about other legislatively ordained aspirations and values as an 'unconventional' source of legal norms, especially those which, like environmental principles, can be legally elusive but are not without legal significance.[8] With that in mind, our aim here is to consider the analytical value in going beyond the 'standard picture'[9] of enforcement and

[4] See, e.g., Lord Thomas of Cwmgiedd, 'Thinking Policy through before Legislating: Aspirational Legislation', Statute Law Society, The Lord Renton Lecture, Institute of Advanced Legal Studies, 21 Nov. 2019, available at: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fsites.create-cdn.net%2Fsitefiles%2F74%2F4%2F3%2F744393%2FLord-Thomas-text-Aspirational-Legislation-21.11.19.docx%26wdOrigin=BROWSELINK; Lord Thomas of Cwmgiedd, HL Deb 25 June 2021, vol. 813, col. 479.

[5] Note that Feldman has developed a more extensive categorization which also includes examples of declaratory and promissory legislation: D. Feldman, 'Legislation which Bears No Law' (2016) 37(3) *Statute Law Review*, pp. 212–24. See generally J. Newig, 'Symbolic Environmental Legislation and Societal Self-Deception' (2007) 16(2) *Environmental Politics*, pp. 276–96; B. van Klink, 'Symbolic Legislation: An Essentially Political Concept', in B. van Klink, B. van Beers & L. Poort (eds), *Symbolic Legislation Theory and Developments in Biolaw* (Springer, 2016), pp. 19–35.

[6] Feldman, ibid. On the statutory embedding of the Sewel Convention see, e.g., *R (Miller & Another)* v. *Secretary of State for Exiting the European Union & Others* [2017] UKSC 5, esp. paras 144–51.

[7] See, e.g., E. Fisher, *Risk and Administrative Constitutionalism* (Hart, 2007); E. Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart, 2017); N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2nd edn, 2020).

[8] Notable exceptions include C.T. Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' (2012) (Oct) *Public Law*, pp. 749–67; A. McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2(4) *Climate Law*, pp. 469–84; L. Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law*, pp. 337–58; L.K. Weis, 'Environmental Constitutionalism: Aspiration or Transformation?' (2018) 16(3) *International Journal of Constitutional Law*, pp. 836–70; A. Hellner & Y. Epstein, 'Allocation of Institutional Responsibility for Climate Change Mitigation: Judicial Application of Constitutional Environmental Provisions in the European Climate Cases *Arctic Oil*, *Neubauer*, and *l'Affaire du Siècle*' (2023) 35(2) *Journal of Environmental Law*, pp. 207–27.

[9] L.K. Weis, 'Constitutional Directive Principles' (2017) 37(4) *Oxford Journal of Legal Studies*, pp. 916–45, at 917. Weis's work has been especially instructive and inspiring in encouraging us to reflect on the narrowness of conventional critiques of the Future Generations Act.

https://doi.org/10.1017/S2047102524000219 Published online by Cambridge University Press

justiciability, to account for provisions of the Future Generations Act which are often seen as 'aspirational' or 'symbolic', and no more than that.

The purpose of this article is to explore other ways of thinking about the Future Generations Act and similar 'aspirational' legislation, to promote a greater sensitivity to the legal and institutional grip that such legislation can have, notwithstanding issues arising from lax or missing enforcement, by judicial or other means. It stresses the need to disentangle different strands of the debate, so that 'aspirational' or 'symbolic' legislation does not become a field loaded with foregone conclusions – of unenforceability, lack of practical utility, and failure.

As the example of the Future Generations Act highlights, there can be a complexity that is not always captured in the generic treatment of such legislation as non-law-bearing. The Act creates a variety of legal duties, which, if they were to be relied upon in legal proceedings, would play different roles in argument and reasoning.[10] It is not the case that the Act, for all its symbolic or aspirational elements, is necessarily 'performative'[11] or legally defective.[12] In order to bring out different angles from which to consider this, we identify three further sets of questions to get at the peculiarities, and possibilities, of legislation containing 'aspirational' goals. Using the Future Generations Act to help to ground the discussion, we focus on the Act's varied enforceability (Section 3), its possible constitutional significance (Section 4), and its potential role as a bearer of hope (Section 5). We begin by outlining the main features of the Act (Section 2).

2. An Ambitious Piece of Legislation

The Future Generations Act is described as 'an ambitious piece of legislation – the first of its kind in the world'.[13] Its primary purpose is to establish a duty on public bodies to carry out actions which accord with sustainable development (labelled 'the well-being duty').[14] There are currently 48 public bodies with duties under the Act. Public bodies are listed in section 6 and include the Welsh Ministers, 22 unitary local authorities in Wales, and Welsh local health boards. They are required, by the well-being duty, to 'carry out sustainable development'.[15] Sticking close to the definition in the 1987 Brundtland Report,[16] the Act expresses the sustainable development principle as

[10] For detailed analysis see H. Davies, 'The Well-being of Future Generations (Wales) Act 2015: Duties or Aspirations?' (2016) 18(1) *Environmental Law Review*, pp. 41–56.

[11] For related discussion see T. Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16(2) *International Journal of Constitutional Law*, pp. 389–420; E. Lees & O.W. Pedersen, 'Performative Environmental Law' (2024 forthcoming) *The Modern Law Review*, available at: https://doi.org/10.1111/1468-2230.12918.

[12] See, in a different context, J. Usman, 'Non-Justiciable Directive Principles: A Constitutional Design Defect' (2007) 15(3) *Michigan State Journal of International Law*, pp. 643–96.

[13] Senedd Cymru/Welsh Parliament, Public Accounts Committee, 'Delivering for Future Generations: The Story So Far', 2021, para. 13.

[14] Future Generations Act, n. 1 above, s. 3.

[15] Ibid., s. 3(1).

[16] World Commission on Environment and Development (Brundtland Commission), Report of the World Commission on Environment and Development: Our Common Future, UN Doc. A/42/427 (Oxford University Press, 1987).

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follows: 'that the needs of the present are met without compromising the ability of future generations to meet their own needs'.[17] Sustainable development is further defined as 'the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the well-being goals'.[18] A unique element of the Future Generations Act is that it adds a cultural pillar to the 'standard' environmental, social, and economic pillars.

Sustainable development under the Act is aimed at achieving 'the well-being goals'. These are:

1. A prosperous Wales.
2. A resilient Wales.
3. A healthier Wales.
4. A more equal Wales.
5. A Wales of cohesive communities.
6. A Wales of vibrant culture and thriving Welsh language.
7. A globally responsible Wales.[19]

The public bodies governed by the Act are each required to publish well-being objectives 'designed to maximise [their] contribution to achieving each of the well-being goals and taking all reasonable steps to meet those objectives'.[20] Additionally, in order to act in accordance with the sustainable development principle, public bodies must take account of the Act's five ways of working under the general headings: long-term thinking; integration; involvement; collaboration; and prevention.[21] The four sustainable development pillars, the seven well-being goals, and the five ways of working are embedded in the duty on public bodies and in the two bodies established by the Act: the Public Services Boards and the Office of the Future Generations Commissioner for Wales.

The Act establishes a Public Services Board (PSB) for each local authority area in Wales, made up of representatives from local authorities, health boards, the Natural Resources Body for Wales (the environmental regulator), and the Welsh Fire and Rescue Authority.[22] A PSB is required to contribute to the achievement of the Act's well-being goals in several ways. For example, it must undertake a local well-being assessment[23] to inform a local well-being plan, detailing how its area will contribute to the Act's well-being goals in accordance with the sustainable development principle.[24] Furthermore, the PSB must invite relevant voluntary organizations and other persons (such as the Welsh Ministers, and the local Police and Crime Commissioner) to

[17] Future Generations Act, n. 1 above, s. 5(1).
[18] Ibid., s. 2.
[19] Ibid., s. 4.
[20] Ibid., s. 3(2).
[21] Ibid., s. 5(2)(a)–(e).
[22] Ibid., s. 29. There are 15 PSBs and 22 local authority areas because some of the PSBs have merged.
[23] Ibid., ss. 36(2)(a), 37(1).
[24] Ibid., ss. 36(2)(b), 39(1).

https://doi.org/10.1017/S2047102524000219 Published online by Cambridge University Press

participate in its activities.[25] The idea is that PSBs encourage collaboration among board members and other partners in taking steps to meet their well-being objectives.

The Act also creates a statutory Future Generations Commissioner for Wales, whose general duty is to promote the sustainable development principle and to assess the extent to which well-being objectives set by public bodies are being met.[26] The Commissioner may provide advice or assistance to public bodies and to 'any other person who the Commissioner considers is taking (or wishes to take) steps to contribute to the achievement of the well-being goals'.[27] The Commissioner's functions also include encouraging best practice and collaboration among public bodies, and promoting awareness of the need to take steps to meet their well-being objectives.[28] The Commissioner has powers to conduct a review of the extent to which a public body is safeguarding the ability of future generations to meet their needs,[29] and to make recommendations to the Welsh Ministers about the well-being goals and measures of progress at the national level.[30]

The Office of the Future Generations Commissioner for Wales fits the trend of institutions being designed to act in the interests of future generations.[31] This has proven to be one of the most influential aspects of the Act, having been cited in other jurisdictions and legal contexts as a key example of the legal institutionalization of future generations governance.[32] The novelty of the Act, however, lies not so much in the Office of the Commissioner, as in the combination of the duty on public bodies to carry out sustainable development, and the framework – the four pillars, the seven well-being goals, and the five ways of working – through which the duty is embedded and reinforced. In other words, the significance of the Act is a result of its full infrastructure, rather than by any one of its elements operating in isolation.

3. Varied Enforceability?

The first set of questions we wish to explore relates to the judicial enforceability of aspirational legislative acts. So far, the Future Generations Act has not been enforced by the courts and this seems to have contributed to concerns about its overall practical legal application.[33] The view of three High Court judges in two cases has been that the

[25] Ibid., s. 30(1).
[26] Ibid., s. 18.
[27] Ibid., s. 19(1)(d).
[28] Ibid., s. 19(1).
[29] Ibid., s. 20.
[30] Ibid., s. 21(1).
[31] See, e.g., the Office of the Parliamentary Commissioner for Future Generations in Hungary created in 2007 (later subsumed by a unified ombudsman institution, the Commissioner for Fundamental Rights), and the Commission for Future Generations established in Israel in 2001 (abolished after one parliamentary term).
[32] See, e.g., Wellbeing of Future Generations Bill (2021–22), a Private Members' Bill (starting in the House of Lords); Baroness Garden of Frognal, HL Deb., 25 June 2021, vol. 813, col. 482; and Commission for Future Generations Bill 2023, a Private Members' Bill in Ireland, Dáil Deb. Tuesday 31 Jan. 2023, vol. 1032, no. 4.
[33] Lord Thomas, n. 4 above.

https://doi.org/10.1017/S2047102524000219 Published online by Cambridge University Press

Act is not enforceable through judicial review,[34] with Mrs Justice Lambert reportedly commenting:

> I do not find it arguable that the 2015 Act does more than prescribe a high-level target duty which is deliberately vague, general and aspirational and which applies to a class rather than individuals … As such, judicial review is not the appropriate means of enforcing such duties.[35]

Lord Thomas of Cwmgiedd, previously Lord Chief Justice of England and Wales, is similarly of the view that '[a]s presently interpreted, it should be characterised as aspirational legislation'.[36] Others have been quite scathing, describing the Act as having 'more bark than bite, more rhetoric than reality', as 'more aspirational than enforceable',[37] as 'toothless' and 'virtually useless'.[38]

Beneath the surface of those criticisms is a more varied and nuanced picture – one that presents 'aspirational' legislation not as a generic category of 'law without legal effect' but as potentially comprising a diverse mix of obligations of different legal/non-legal character and form.[39] Aspirational legislation need not be *either* unenforceable *or* enforceable; it can be both (and more) simultaneously. As we seek to show, it is not straightforwardly the case that the Future Generations Act is non-law-bearing. It depends on which of the Act's many provisions are being considered.

For example, certain provisions of the Act create a type of duty that the courts in judicial review are well used to addressing: a duty to have regard to a series of mandatory relevant considerations. Section 5(2) requires public bodies to 'take account of' the five ways of working (long-term thinking, integration, involvement, collaboration, and prevention).[40] Similarly, the duty in section 14(2) is on public bodies to 'take … into account' guidance published by the Welsh Ministers. These provisions look to be 'enforceable' in the sense that, if a public body failed to have regard to the listed considerations or guidance when required to do so, its decision would be unlawful. Such duties are not 'substantive' duties that mandate a particular outcome. They are

[34] S. Nason, 'Ensuring Fair and Lawful Administration in Wales: The Role of Administrative Justice', Senedd Cymru/Welsh Parliament, 21 Oct. 2019, available at: https://research.senedd.wales/research-articles/ensuring-fair-and-lawful-administration-in-wales-the-role-of-administrative-justice.

[35] P. Martin, 'Law to Protect Future Generations in Wales "Useless"', *BBC Wales Live*, 15 May 2019, available at: https://www.bbc.co.uk/news/uk-wales-48272470#:~:text=A%20law%20aimed%20at%20protecting,the%20law%20was%20%22toothless%22 (reporting on *R (Blackmore)* v. *Neath and Port Talbot CBC* [2019] EWHC (Admin). Lambert LJ reportedly cited *R (on the application of G)* v. *Barnet LBC* [2004] 2 AC 208).

[36] Lord Thomas (2019), n. 4 above, para. 5.

[37] Senedd Cymru, Y Cyfarfod Llawn/Plenary 08/12/2021, 9. Short Debate: The Well-being of Future Generations (Wales) Act 2015: Envy of the World?, Rhys ab Owen AS, para. 474.

[38] Senedd Cymru, Y Cyfarfod Llawn – Y Bumed Senedd/Plenary – Fifth Senedd 15/05/2019, The Well-being of Future Generations (Wales) Act 2015, Neil McEvoy AM, para. 259.

[39] For insightful analysis of the Paris Agreement, which distinguishes between 'hard', 'soft' and 'non' obligations, see Rajamani, n. 8 above. Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[40] Future Generations Act, n. 1 above, s. 5(2)(a)–(e).

https://doi.org/10.1017/S2047102524000219 Published online by Cambridge University Press

'procedural' duties, creating an expectation that a public body can illustrate the process through which the relevant mandatory considerations were taken into account.

Procedural duties of this kind are routinely relied upon in court, and enforced at the suit of aggrieved parties by way of judicial review.[41] The courts have made clear that in such circumstances the scope for judicial review is limited, as it is a basic principle of public law that 'in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight'.[42] This means that, provided a public body has not failed to give *any* consideration to a matter which it is explicitly required by the Act to take into account, the court could intervene only if satisfied that the approach was 'irrational'. However, that is true of many familiar provisions of environmental and other areas of law. The environmental impact assessment regime, for instance, includes requirements that a decision maker has regard to a number of considerations expressly identified by the legislation – requirements that have long been accepted as amenable to judicial review.[43]

Still, the sticking point for the Future Generations Act seems to be its section 3, which does create a legally unusual duty to 'carry out sustainable development'.[44] The extent of its enforceability in the courts is complex, and not without ambiguity and tension, as has already been observed. However, not all aspects of the duty are so unconventional that they can be dismissed as easily as some critics suggest. The action that a public body takes in carrying out sustainable development must include 'setting and publishing [well-being] objectives'[45] and 'taking all reasonable steps'[46] to meet those objectives. The first component, the duty to set and publish objectives, appears to be an entirely ordinary, hard-edged obligation with scope for judicial challenge.[47] It is unqualified: either the public body did set and publish objectives, or it did not. By contrast, the duty to take 'reasonable steps' creates a softer obligation, framed in broad and non-prescriptive terms, giving a public body considerable latitude in such matters. A likely consequence is that the courts will not interfere unless the public body, in exercising its discretion, has acted unreasonably in the *Wednesbury* sense, which is a notoriously difficult standard to meet.[48] It is said to require 'something overwhelming'.[49]

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41 For discussion see, e.g., M. Bell, 'Judicial Enforcement of the Duties on Public Authorities to Promote Equality' (2010) (Oct) *Public Law*, pp. 672–87; Davies, above n. 10, pp. 48–9.

42 *R (on the application of Friends of the Earth Ltd and Others)* v. *Heathrow Airport Ltd* [2020] UKSC 52, para. 121.

43 See, e.g., *R (on the application of Squire)* v. *Shropshire Council* [2019] EWCA Civ 888; *R (on the application of Sarah Finch on behalf of the Weald Action Group)* v. *Surrey County Council and Others* [2022] EWCA Civ 187.

44 Future Generations Act, n. 1 above, s. 3(1).

45 Ibid., s. 3(2)(a).

46 Ibid., s. 3(2)(b).

47 Davies, above n. 10, p. 46.

48 *Re W (an Infant)* [1971] AC 682, 700E, per Lord Hailsham LC ('not every mistaken exercise of judgment is unreasonable'). See generally A. Perry, '*Wednesbury* Unreasonableness' (2023) 82(3) *Cambridge Law Journal*, pp. 483–508.

49 *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 KB 223, 230, per Lord Greene MR.

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This might explain the absence of judicial intervention in the enforcement of the Act to date. It is not impossible, however, to imagine a situation in which a public body is in breach of the section 3(2)(b) duty to take 'reasonable steps' to meet its well-being objectives, by failing to do anything at all or by doing something that egregiously violates or is wholly incompatible with that duty. It is also striking that a public body is required to publish statements setting out how it proposes to meet the well-being objectives, keep them under review and ensure that resources are allocated annually, and specifying the time periods for meeting those objectives.[50] If the public body were to make a decision flagrantly against the steps prescribed in its own published statement, then this might show, at least presumptively, a breach of section 3(2)(b). In other words, in assessing whether the duty to take 'reasonable steps' is breached, it is arguable that the public body's published statement would provide a clear benchmark for determining what is and what is not reasonable.

All of this is to say that, despite claims that the Future Generations Act is non-justiciable or otherwise unsuitable for judicial review, it is important not to generalize or to treat different parts of the Act as equivalently (un)enforceable. As the discussion so far has sought to show, certain provisions of the Act could well be the subject of review proceedings given the right set of facts; or, at least, there seems to be no cogent reason why the courts should show restraint in respect of the Act generally. However much the Act is 'aspirational' and involves matters of policy (rather than law), certain provisions could conceivably be 'made' justiciable and therefore open to challenge in the courts,[51] through the functions and duties of public bodies – in setting and publishing well-being objectives (s. 3(2)(a)), publishing statements on the objectives (s. 7(1)), and taking reasonable steps to meet them (s. 3(2)(b)). If nothing else, it indicates that the enforceability of different parts of the Act is open to a degree of variation.

There may also be variation in how the Act is enforced over time. Even if its provisions have not so far been subject to judicial review, that may not be the case forever. Given the 'aspirational' tenor of the Act, it could be expected to have a stronger note of provisionality than other statutes. In this respect, parts of the Act might bear some similarity to 'directive principles' which, as Lael Weis points out, are an increasingly common way of entrenching state constitutional obligations to promote social and environmental values.[52] Directive principles are said to operate in temporally interesting ways, including as 'deferral mechanisms'[53] which postpone the full realization of the directed goal until a future date.[54] Weis explains that they can be used 'to entrench social values that the state is thought to have an obligation to pursue but that represent unrealistic ideals at the time of enactment, making them unsuitable for *immediate* enforcement'.[55] This offers a different way of thinking about certain duties

[50] Future Generations Act, n. 1 above, s. 7(1).
[51] A. Sachs, 'Social and Economic Rights: Can They Be Made Justiciable?' (2000) 53(4) *SMU Law Review*, pp. 1381–91.
[52] Weis, n. 9 above.
[53] Ibid., p. 928.
[54] See also T. Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' (2019) 82(4) *The Modern Law Review*, pp. 603–32.
[55] Weis, n. 9 above, p. 928 (emphasis in original).

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in the Future Generations Act. It suggests that their enforceability is not simply absent, but latent – still in process, and not yet fully developed. The right circumstances for direct judicial enforcement may have yet to emerge.

One issue here is the potential difficulty in determining whether the requirement to carry out sustainable development is ever fully realized. The duty is never 'spent', so to speak. It is ongoing, and evolving. The Act leaves enough room for various of its aspirations – of a prosperous Wales, a resilient Wales, a healthier Wales, and so on – to become a source of legal norms in the future, if not at the very moment they appeared on the statute books. At least, there are several questions about how certain provisions should be interpreted, which can only really be resolved over time as the Act 'beds in'. The Act appears implicitly to allow for a 'partial deferral' of these questions to future politics.[56] For example, it is unclear what would happen if a public body were found to have satisfied some of the well-being goals but not all of them. Such issues can be expected to become clearer, with constructive dialogue around 'regime change'[57] under the Act and further attempts to translate its foundational precepts into firmer legal boundaries.

Even if, from a conventional perspective, the likelihood of judicial enforcement of certain provisions of the Act appears slim, the role of the courts cannot be overlooked entirely. Experience has shown that courts will often find ways 'to do something'[58] with such provisions – for example, as interpretive aids and justificatory arguments[59] – even if they exercise restraint on questions of rule definition and content. Another reason not to neglect the potential for the courts to clarify, interpret or indeed enforce the well-being duty is that the Act does not provide any express provision to exclude the jurisdiction of the courts, when it could have done.[60] This might be taken to mean that there is intended to be a role for the courts.[61] It is just that the role has not been fully tested, or perhaps it leaves open the possibility of unconventional judicial roles in this context.[62]

The context, as Sarah Nason and Huw Pritchard note, is of a distinct and emerging legal culture in Wales – one that is markedly different from the legal culture of 'England

[56] Khaitan, n. 54 above, p. 615. See also R. Dixon & T. Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design' (2011) 9(3–4) *International Journal of Constitutional Law*, pp. 636–72.

[57] McHarg, n. 8 above, p. 471.

[58] Khaitan, n. 11 above, p. 396.

[59] E. Scotford, 'Environmental Principles Across Jurisdictions? Legal Connectors and Catalysts', in E. Lees & J. Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019), pp. 651–77.

[60] Similarly, see Reid, n. 8 above, p. 758.

[61] Or a role for Welsh courts. The Act can be seen as a constitutive force within the emerging Welsh legal culture, aligning with recommendations in the Commission on Justice in Wales Report that 'justice should be determined and delivered in Wales so that it aligns with its distinct and developing social, health and education policy and services and the growing body of Welsh law': Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Commission on Justice in Wales, 2019), p. 9.

[62] On the creative possibilities of a limited and politics-supporting judicial role in other contexts see, e.g., C. O'Cinneide, 'Legal Accountability and Social Justice', in N. Bamforth & P. Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013), pp. 389–410; A. Kavanagh, 'What's So Weak about "Weak-form Review"? The Case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law*, pp. 1008–39.

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and Wales'.[63] An awareness of this wider context is important; otherwise the focus on enforceability risks being overly narrow and limiting as a means of assessing the impact of norms of government conduct. Focusing on litigation may even be beside the point, if what the Act is really about is facilitating the development of legal and administrative norms in other ways, which might not involve external enforcement mechanisms at all. Together the duties, which are largely reporting duties, and the Commissioner's functions, which include conducting performance reviews and making recommendations, build a platform for political accountability.[64] In a legal context like that of Wales, this may have merits beyond judicial compulsion and arguably is better suited to resolving the priority of well-being objectives as part of sustainable development strategies. Thus, whether or not it is directly enforced or enforceable, the Act may nonetheless be regarded as an important feature in the changing political and constitutional landscape of Wales.

4. Constitutionalism and the Well-Being of Future Generations?

This next set of questions relates to the constitutional significance of the Future Generations Act. Wales, like the UK as a whole, does not have a codified constitution, meaning that there is no single official document or set of official documents setting out the rights of individual citizens and how the government should act. Even without any one legal text that identifies itself as a 'constitution', however, it is possible to identify statutes of constitutional importance in Wales – statutes that contribute to Wales's identity as a distinct constitutional and legal unit, and to the development of Welsh constitutional law. The Government of Wales Act 2006 provides an obvious example of this, as it represented a significant transfer of power from Westminster to Wales, enabling the (then) National Assembly for Wales to enact primary legislation on devolved matters and fundamentally reshape the Welsh polity as a result.[65] Yet, because there is no exact or generally agreed distinction between constitutional statutes and other 'ordinary' legislation,[66] it remains a grey area that resists neat division and gives rise to much debate.[67]

It has been recognized in various parliamentary settings and in the courts that in specific contexts there is something qualitatively different about constitutional statutes compared with other forms of law and public policy.[68] It has further been suggested

[63] S. Nason & H. Pritchard, 'Administrative Justice and the Legacy of Executive Devolution: Establishing a Tribunals System for Wales' (2020) 26(4) *Australian Journal of Administrative Law*, pp. 233–54.

[64] For discussion see Davies, n. 10 above, pp. 53–55.

[65] While the Government of Wales Act 1998 created the National Assembly for Wales and devolved powers to the Assembly, the devolved administration in Wales was highly constrained, and lacked capacity to create primary legislation.

[66] See, e.g., A. Blick, D. Howarth & N. le Roux, *Distinguishing Constitutional Legislation: A Modest Proposal* (The Constitution Society, 2014), p. 9.

[67] See, e.g., *Attorney General* v. *National Assembly for Wales Commission* [2012] UKSC 53; *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3.

[68] For discussion see Blick, Howarth & le Roux, n. 66 above. See also Constitution Committee, Wales Bill (HL 2016–17, 59) para. 40.

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that constitutional statutes might, in principle, be subject to special treatment. Lord Justice Laws famously stated (*obiter*) in *Thoburn* v. *Sunderland City Council*[69] that the common law had come to recognize a new category of 'constitutional statute' that is immune from implied repeal. A constitutional statute, according to Lord Justice Laws, 'is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.[70]

This formulation is not problem-free.[71] There is even the question of whether 'constitutional statute' has become a legally redundant concept after the Supreme Court in *Re Allister and Others*[72] appeared to have little appetite for engaging with debate on the constitutional character of certain Acts of Parliament when it might have been expected to do so. Such debate was 'academic' according to Lord Stephens, giving the judgment of the Court.[73] Some commentators see this as a rejection of the entire doctrine of constitutional statutes.[74] Others are more sceptical that the doctrine could be undone in that way and by that case alone.[75] The common ground seems to be that the judgment raises more questions than it answers.[76] Certainly, its implications for the status and significance of constitutional statutes remain unclear.

In the absence of any statutory definition and with little guidance, there has been intense scholarly interest in what exactly makes a statute 'constitutional'. It has been suggested, for example, that a constitutional statute 'establishes state institutions and confers functions, responsibilities and powers on them'.[77] Alternatively, a constitutional statute is said to be 'a statute that is about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do'.[78] It has further been argued that such statutes need not be 'constitutional' in their entirety, for even the paradigmatic examples contain parts that have no bearing

[69] *Thoburn* v. *Sunderland City Council* [2003] QB 151.
[70] Ibid., para. 186.
[71] See, e.g., D. Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129(3) *Law Quarterly Review*, pp. 343–58, at 357; F. Ahmed & A. Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies*, pp. 461–81, at 466.
[72] *In the matter of an application by James Hugh Allister and Others for Judicial Review (Appellants) (Northern Ireland)* [2023] UKSC 5.
[73] Ibid., para. 66, per Lord Stephens.
[74] C. Murray, 'Maybe We Like the Misery: The Culmination of the Northern Ireland Protocol Litigation', *EU Law Analysis*, 8 Feb. 2023, available at: https://eulawanalysis.blogspot.com/2023/02/maybe-we-like-misery-culmination-of.html; K. Majewski, '*Re Allister*: The End of "Constitutional Statutes"?', *UK Constitutional Law Blog*, 21 Feb. 2023, available at: https://ukconstitutionallaw.org/2023/02/21/kacper-majewski-re-allister-the-end-of-constitutional-statutes; J. Bell, 'The Supreme Court Judgment in *Re Allister et al*: Constitutional Statutes, Quo Vadis?', *Brexit Institute News*, Feb. 2023, available at: https://dcubrexitinstitute.eu/2023/02/the-supreme-court-judgment-in-re-allister-et-al.
[75] E. Robinson, '*Re Allister* and the Entrenchment "Road Not Taken": A Rejoinder to Kacper Majewski', *UK Constitutional Law Blog*, 1 Mar. 2023, available at: https://ukconstitutionallaw.org/2023/03/01/edmund-robinson-re-allister-and-the-entrenchment-road-not-taken-a-rejoinder-to-kacper-majewski.
[76] L.C. Whitten, 'On Orthodoxy and Unanswered Questions: The Allister Ruling and Why It Matters', *The Constitution Society Blog*, 21 Feb. 2023, available at: https://consoc.org.uk/the-allister-ruling-and-why-it-matters.
[77] Feldman, n. 71 above, p. 350.
[78] Ahmed & Perry, n. 71 above, p. 471.

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on the institutions of the state, the relationship between those institutions, or the relationship between the state and the individual.[79] This suggests that constitutional legislation is a larger category than some might expect, because it encompasses statutes which do not necessarily look 'constitutional' and which are 'constitutional' only in part.

The question here is whether the Future Generations Act might be described in constitutional terms, as a measure that substantively, not just symbolically, embodies a set of values regarded as fundamental in the governing system in Wales. There is nothing in the Act to indicate that it enjoys such special status. Moreover, it is difficult to see how the Act could be subject to repeal only by express or specific provision. Therefore, the Act does not seem to fit the narrowly defined idea of constitutional statute. Yet, there does appear to be something qualitatively different about the Act, which makes it anything but 'ordinary'. 'Landmark statute'[80] or 'super-statute'[81] would seem a more apt description. Indeed, from a broader perspective of political or administrative constitutionalism, it might be argued that the Act has some measure of constitutional significance because it was intended to effect a fundamental change in governance structures and the culture of Wales.

It is useful to draw a link here with the UK's Climate Change Act 2008,[82] which has also been described as having constitutional significance. Aileen McHarg examines this claim to the constitutional status of the 2008 Act, concluding that 'as a pre-commitment strategy designed to promote the long-term public interest … by constraining short-term political and economic imperatives', the Act 'can reasonably be described as a constitutional measure'.[83] Although there are clearly differences between the Climate Change Act and the Future Generations Act, they might be understood as having certain characteristics in common. The well-being duty under the Future Generations Act,[84] while a very different type of duty from the Climate Change Act's emissions-reduction targets,[85] possesses a similar 'simplicity and intelligibility', which could make it 'particularly difficult to remove or dilute'.[86] The Future Generations Act, like the Climate Change Act, establishes a new institutional framework for state policy. Both Acts seek to have a broad effect on government activity; both contain norms designed to 'stick' in the public culture.[87]

This brings to the fore what Athanasios Psygkas calls the 'life of the statute', meaning 'the treatment of the statute by the relevant institutional actors and the people after its enactment'.[88] It suggests that constitutional commitments can be entrenched through a variety of means, not just episodic legislative events and judicial pronouncements

[79] Ibid. p. 466.
[80] A. Psygkas, 'The United Kingdom's Statutory Constitution' (2020) 40(3) *Oxford Journal of Legal Studies*, pp. 449–81, at 456.
[81] W.N. Eskridge Jr. & J.A. Ferejohn, 'Super-Statutes' (2001) 50 *Duke Law Journal*, pp. 1215–76.
[82] Climate Change Act 2008, received Royal Assent 26 Nov. 2008.
[83] McHarg, n. 8 above, p. 483.
[84] Future Generations Act, n. 1 above, s. 3(1).
[85] Climate Change Act 2008, n. 82 above, ss. 1(1), 5(1).
[86] McHarg, n. 8 above, p. 476.
[87] Eskridge & Ferejohn, n. 81 above, p. 1216.
[88] Psygkas, n. 80 above, p. 463.

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but also more gradual, incremental processes of administrative implementation.[89] As McHarg observes, a different method of entrenchment is involved: 'Instead of relying on judicial enforcement, fundamental values are expressed and protected through institutional design and practices and the attitudes of constitutional actors'.[90] The emphasis is on what 'happens' with the legislation,[91] and on how various political institutions and agencies go on to implement and administer it.

The Future Generations Commissioner plays a significant role in this regard in exercising functions or discharging duties under the Act. The Commissioner's general duty, for example, is to 'act as a guardian of the ability of future generations to meet their needs' and 'encourage public bodies to take greater account of the long-term impact of the things that they do', and for that purpose to 'monitor and assess the extent to which well-being objectives set by public bodies are being met'.[92] One issue here is whether the Commissioner's Office qualifies as what Mark Tushnet calls a 'fourth branch institution',[93] and Tarunabh Khaitan calls a 'guarantor institution'.[94] A guarantor institution is defined as 'a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof)'.[95]

There is other evidence of the normative weight of the Future Generations Act and its reshaping of institutional practices across a range of governance settings. Much of the rhetoric surrounding the Act's introduction centred on its transformative potential; for example, the Minister for Natural Resources at the time described it as requiring 'real culture change: a fundamental change to how we plan and operate as organisations'.[96] The Act is said to create 'a framework for thinking',[97] setting in law 'a common national vision'[98] to enable the Welsh government and public bodies to embed the principle of sustainable development and the well-being duty in all that they do. While sustainable development has long been an organizing principle of Welsh government,[99] it has

[89] W.N. Eskridge Jr. & J. Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press, 2010), p. 14 (as cited by Psygkas, n. 80 above, p. 457).

[90] McHarg, n. 8 above, p. 475.

[91] Psygkas (n. 80 above, p. 458) describes this as a part of 'a biography of constitutional statutes'.

[92] Future Generations Act, n. 1 above, s. 18(a)(i).

[93] M. Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021).

[94] T. Khaitan, 'Guarantor Institutions' (2021) 16(S1) *Asian Journal of Comparative Law*, pp. S40–59.

[95] Ibid., p. S42.

[96] Carl Sargeant, in 'The United Nations Goals and the Well-being of Future Generations (Wales) Act 2015', Deb 24 Nov. 2015, 15:21 hours. Although, as Feldman points out, the constitutional status 'is the result of what Parliament enacts, not an aspect of Parliament's "intention" in enacting it': D. Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty', *UK Constitutional Law Blog* , 8 Nov. 2016, available at: https://ukconstitutionallaw.org/2016/11/08/david-feldman-brexit-the-royal-prerogative-and-parliamentary-sovereignty.

[97] Future Generations Commissioner for Wales, 'Advice from the Future Generations Commissioner for Wales to Bridgend PSB', 27 Oct. 2017, available at: https://www.bridgend.gov.uk/media/3659/advice-from-the-future-generations-commissioner-english.pdf.

[98] Future Generations Commissioner for Wales, 'A Government Fit for Future Generations: A Review into Welsh Government's Implementation of the Well-being of Future Generations Act', 12 Dec. 2022, p. 3.

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arguably become, or has the potential to become, a governing norm – *the* governing norm – in Wales as a result of the Act. To borrow from William N. Eskridge Jr and John Ferejohn, it is being allowed to 'sink deeply into our normative consciousness'.[100] There are signs of this in different branches and at various levels of public administration, including the Welsh civil service, where it is reported that 'the Welsh Government has matured because of the Act. It has provided a framework for how we develop and deliver policy. It's so interesting that internally, as well as externally … it is just … part of the DNA'.[101]

Other examples can be found in land-use planning and place-making, which have been particular areas of focus for the Future Generations Commissioner.[102] The Commissioner's Office has sought to instil the Act's main aim and ethos in the planning system, through various educational initiatives and the provision of training to Planning and Environment Decisions Wales[103] and the Royal Town Planning Institute Cymru.[104] The Act has clearly had influence on key planning policy documents, such as 'Planning Policy Wales' and 'National Development Framework for Wales'.[105] Although sustainable development has been at the heart of planning since the publication of the first edition of 'Planning Policy Wales' in 2002, the Act introduces a more expansive and integrated approach that requires an improvement in the delivery of all four aspects of well-being: social, economic, environmental, and cultural. This is reflected in the most recent edition of 'Planning Policy Wales', which makes clear that giving consideration to the Act's 'five ways of working' has become 'an intrinsic part of the planning system'.[106]

This begins to give a sense of the Future Generations Act not as self-contained but as more widely 'programmatic' – in the sense that it demands a 'sustained, multi-pronged and multi-stepped effort'[107] and 'requires the state to "roll out" its programme progressively over time'.[108] Perhaps this is the most significant way of using devolved powers, given the recent history of Westminster's exertion of sovereignty over otherwise

[99] Government of Wales Act 2006, s. 79; Welsh Assembly Government, *One Wales: One Planet: The Sustainable Development Scheme of the Welsh Assembly Government* (Welsh Assembly Government, 2009), p. 44. See also V. Jenkins, 'Placing Sustainable Development at the Heart of Government in the UK: The Role of Law in the Evolution of Sustainable Development as the Central Organising Principle of Government' (2002) 22(4) *Legal Studies*, pp. 578–601.

[100] Eskridge & Ferejohn, n. 81 above, p. 1217.

[101] Future Generations Commissioner for Wales, n. 98 above, p. 26.

[102] They were priorities under the former Future Generations Commissioner, Sophie Howe. Derek Walker replaced Sophie Howe as the Future Generations Commissioner in Mar. 2023: 'Future Generations Commissioner for Wales' (Comisiynydd Cenedlaethau'r Dydfodol Cymru/Future Generations Commissioner for Wales), available at: https://www.futuregenerations.wales/about-us/future-generations-commissioner.

[103] The part of the Welsh government that handles all aspects of planning appeals, examination of local plans and any other planning-related and specialist casework.

[104] Future Generations Commissioner for Wales, 'Land Use Planning and Placemaking', available at: https://www.futuregenerations.wales/wp-content/uploads/2020/06/Chap-5-Planning.pdf.

[105] Ibid.

[106] Welsh Government, *Planning Policy Wales – Edition 11* (Welsh Government, 2021), p. 8, para. 1.16.

[107] Khaitan, n. 11 above, p. 397.

[108] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), p. 103.

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devolved areas and the restrictive consequences that this can have on the regulatory capacity of devolved legislatures.[109] Understandably, with (relatively) newly devolved power, a government might wish to enshrine in law statements of intent about the underpinning values, which might drive further lawmaking.

'Programmatic acts', observes Khaitan, often use verbs such as 'strive', 'take steps', 'promote' and 'make effective provisions for', to signal the direction of the desired transformation.[110] Such language appears in the Future Generations Act. For instance, the Commissioner is under a general duty '*to promote* the sustainable development principle'.[111] It is usually the case that programmatic acts are designed to be given effect not by judicial enforcement but by political organs of the state.[112] They are regarded as matters more appropriately addressed by the executive or legislature, backed by political accountability for the mandate proposed.[113] As Haydn Davies says of the Act's well-being duty, it is 'a collective endeavour spread across all the institutions of Welsh government'.[114]

The Act establishes clear mechanisms for ensuring that compliance with the well-being duty is overseen (monitored, assessed, reviewed, and reported on) by political branches of government – principally the Future Generations Commissioner and the Auditor General for Wales, as well as (to a lesser degree) Welsh Ministers, public services boards, overview and scrutiny committees of local authorities, and the public bodies themselves.[115] With the Act's emphasis on proactive, multi-agency and partnership working, and its provision of various governance and accountability safeguards, we might question the extent to which formal enforcement is even needed. It is also worth keeping in mind that the duties in the Act fall largely on public bodies, which may be subject to other controls more immediate than legal action, such as audit and funding allocations to further their work. These distinctive features might further explain the lack of formal legal redress. They are also, however, important for generating a framework for legality, for constitutionality, and perhaps even for hope.

5. An Act of Hope?

The third and final set of questions we wish to introduce in this context relates to hope, and the capacity of the Future Generations Act to create the structural conditions for hope – even if it ultimately fails to produce judicially enforceable norms or have constitutional significance. The aim here is simply to suggest that the Act, and 'aspirational'

[109] M. Dougan et al., 'Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020' (2022) 138(Oct) *Law Quarterly Review*, pp. 650–76, at 651.
[110] Khaitan, n. 11 above, p. 397.
[111] Future Generations Act, n. 1 above, s. 18 (emphasis added).
[112] Weis, n. 9 above, p. 917.
[113] Ibid., p. 922.
[114] Davies, n. 10 above, p. 47.
[115] See, e.g., Future Generations Act, n. 1 above, ss. 15, 19–24. See also Nason & Pritchard, n. 63 above, pp. 250–1.

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legislation more broadly, might have a relationship with hope that is important and worth further consideration.[116]

In many ways, the current political and legal emphasis on the Future Generations Act's non-enforceability has been a distraction from its other features, including its potential to bring about meaningful change in the processes, discourses, and cultures of governance in Wales. These are features that do not necessarily come through when the analysis is narrowly and forensically legalistic. Although standard questions of enforceability and legal status provide important and stable points of orientation, they are not the only questions that can be asked about the Act. Arguably, the force of the Act is not just (or even) in its capacity to generate categorical legal tests but also (or rather) in its dispersion and integration of new ways of working, new processes, and new priorities, and in the legitimizing effects of these new frames of conduct.[117] The Act might be better imagined not in isolation but rather across time, networked within broader, complementary legislative and policy moves that give impetus to the Act's normative aims while also gaining reciprocal momentum.[118] It raises issues about the extent to which legal instruments act as a mediating institution, informing people of values seen to be held dear, and about whether 'legislation as statement' has a worth in itself – which some might regard as a subversion of the purpose of law, while others might accept as its didactic and organizing force. So, while parts of the Act might not 'bear law' in the narrow sense of the term, there may be mileage in considering what else is at play here, and how the Act might achieve governing effects otherwise – for example, by bearing hope.

Hope has been studied over time from a range of different disciplinary perspectives – including theological, philosophical, psychological, sociological, and anthropological[119] – but it has received relatively little attention in legal scholarship.[120] This is intriguing, especially in a field like environmental law, which is so clearly infused with hopes for

[116] Note that Feldman (n. 5 above, p. 214) comments that aspirational legislation 'embodies a hope', although 'hope' is not a point of focus and appears to be used in a narrower sense than is found in the wider literature.

[117] A. Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition' (1985) 9(1) *Legal Studies Forum*, pp. 23–31, at 30.

[118] J. Coggon, 'Smoke Free? Public Health Policy, Coercive Paternalism, and the Ethics of Long-Game Regulation' (2020) 47(1) *Journal of Law and Society*, pp. 121–48.

[119] See, e.g., H. Miyazaki, *The Method of Hope: Anthropology, Philosophy, and Fijian Knowledge* (Stanford University Press, 2004); L. Kretz, 'Hope in Environmental Philosophy' (2013) 26 *Journal of Agricultural and Environmental Ethics*, pp. 925–44; M.W. Gallagher & S.J. Lopez (eds), *The Oxford Handbook of Hope* (Oxford University Press, 2017); R. Bryant & D.M. Knight, *The Anthropology of the Future* (Cambridge University Press, 2019), pp. 132–57; S. Jansen, 'The Anthropology of Hope', in *Oxford Research Encyclopedia of Anthropology* (Oxford University Press, 2021); E. Pleeging, J. van Exel & M. Burger, 'Characterizing Hope: An Interdisciplinary Overview of the Characteristics of Hope' (2022) 17 *Applied Research Quality Life*, pp. 1681–723; G. Gili & E. Mangone, 'Is a Sociology of Hope Possible? An Attempt to Recompose a Theoretical Framework and a Research Programme' (2023) 54 *The American Sociologist*, pp. 7–35.

[120] Notable exceptions include A. Riles, 'Is the Law Hopeful?', in H. Miyazaki & R. Swedberg (eds), *The Economy of Hope* (University of Pennsylvania Press, 2016), pp. 126–46; K. Abrams and H. Keren, 'Law in the Cultivation of Hope' (2007) 95(2) *California Law Review*, pp. 319–81; K. Mickelson, 'Hope in a TWAIL Register' (2020) 1 *TWAIL Review*, pp. 14–27; B. Morgan and A. Thorpe, 'Place-based Pedagogies of Hope' (2022) 18(4) *International Journal of Law in Context*, pp. 427–39;

an alternative and better future, as well as with contrasting states of hopelessness and despair. In other social sciences and humanities subjects, the study of hope has been used as a way of reimagining disciplinary traditions in order to build more 'hopeful' research agendas.[121] To that end, hope studies have become associated with efforts to develop modes of analysis and engagement that are not based solely on 'deconstruction' and 'debunking', but that also embrace a more positive and constructive approach, as an antidote to critique.[122] Some studies, for example, focus on the capacity of academic disciplines to take an affirmative, hopeful stance by 'uncover[ing] hope where others might not find it'.[123]

Hope in this sense is not just an emotion, a mood, a disposition or trait; it is also a method – an 'orientation to knowledge',[124] or a 'reorientation of knowledge'.[125] Les Back sees this as all part of '*hope's work*',[126] which entails 'fostering a different kind of attentiveness to the world'.[127] He invites us to consider:

> What might a hopeful orientation to knowledge be in our current moment? Where might we look and listen for hope? … Our work may be of value precisely because it documents remarkable things that are not remarked upon and in so doing creates an archive of emergent alternatives, directions or possibilities.[128]

'Hope's work' may equally help in bringing to light 'emergent alternatives, directions or possibilities' in contexts of law and legislative aspirations. To be clear, a 'hopeful' study of the Future Generations Act is not an exercise in unrealistic optimism or wishful thinking. Likewise, to study hope is not to look for what one is sure will happen. Hope is, by definition, disappointable.[129] It 'holds … the condition of defeat precariously within itself'.[130] Eskridge and Ferejohn allude to this when they say that '[s]ometimes, a law just gets lucky, catching a wave … Other times, a thoughtful law is unlucky, appearing at the time to be a bright solution but losing its luster due to circumstances beyond the foresight of its drafters'.[131] For Isabelle Stengers, hope

S. Trotter, 'Hope's Relations: A Theory of the "Right to Hope" in European Human Rights Law' (2022) 22(2) *Human Rights Law Review*, pp. 1–21.

121 See, e.g., Gili & Mangone, n. 119 above; Jansen, n. 119 above.

122 See, e.g., M. Morgan, 'The Responsibility for Social Hope' (2016) 136(1) *Thesis Eleven*, pp. 107–23; L. Back, 'Hope's Work' (2021) 53(1) *Antipode*, pp. 3–20; L.T. Nichols, 'Editor's Introduction: Hope, Theory and Positive Sociology' (2023) 54 *The American Sociologist*, pp. 1–6. See generally B. Latour, 'Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern' (2004) 30(2) *Critical Enquiry*, pp. 225–48.

123 Jansen, n. 119 above, p. 12.

124 Back, n. 122 above, p. 4.

125 Miyazaki, n. 119 above, p. 5.

126 Back, n. 122 above, p. 4.

127 Ibid., p. 4.

128 Ibid.

129 See, e.g., J. Davidson, 'A Dash of Pessimism? Ernst Bloch, Radical Disappointment and the Militant Excavation of Hope' (2021) 22(4) *Critical Horizons*, pp. 420–37.

130 G. Richter, 'Can Hope Be Disappointed? Contextualizing a Blochian Question' (2006) 14(1/2) *Symplokē*, pp. 42–54 (citing E. Bloch, 'Can Hope Be Disappointed?', in W. Hamacher & D.E. Wellbery (eds), *Literary Essays: Ernst Bloch* (Stanford University Press, 1998), pp. 339–45).

131 Eskridge & Ferejohn, n. 81 above, p. 1216.

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operates in this space 'between *probability* and *possibility*'.[132] Hence the focus is often on how hope is tied to futurity, as a site of potentiality and as a projection into the not-yet.[133] This gives the study of hope a dynamic quality, which could open up space for a more ambivalent or nuanced exploration of the workings of the Future Generations Act as both aspirational and in-the-making.

The study of hope is also about being attuned to how hope appears and is made to appear, and to the different types and intensities that hope might take. While hope as an analytical object is often positively charged, hope can, of course, also have negative connotations and detrimental effects. For example, hope can be dangerous if it becomes 'a tool of manipulation, an emotional opiate that political actors use to dull critical treatments of decisions and policies that serve private rather than social interests'.[134] Hope can be 'empty'.[135] Hope can be 'doubtful'.[136] Therefore, it cannot be assumed that whatever hope is engendered by the Future Generations Act will straightforwardly intersect with conceptions of the public good.[137] It also raises questions about which, and whose, hopeful visions of what is attainable under the Act prevail, and about whether and how the Act, 'infused by the energy of hope',[138] cultivates a sense of individual or collective agency.

Although hope is often conceptualized as an individual attribute or experience, it can also be understood as a collective undertaking or as having 'collectivising' effects,[139] and as part of a broader political economy in which hope is positioned as both target and technology of government.[140] In this respect, hope has an important institutional dimension, encompassing the organizational structures that support the interaction of different actors and decision makers, and the institutional frameworks that define the functions of particular individuals and groups. Hope is 'not an autonomous disposition, springing entirely from within persons'.[141] Its conditions of possibility rest on all manner of structures, organizations, and other social formations. This prompts questions about how the Act creates infrastructural support for different degrees of hopefulness and different types of hope.

[132] I. Stengers, 'A "Cosmo-Politics": Risk, Hope, Change', in M. Zournazi (ed.), *Hope: New Philosophies for Change* (Routledge, 2003), pp. 244–73, at 245 (emphasis in original).
[133] R. Coleman, 'A Sensory Sociology of the Future: Affect, Hope and Inventive Methodologies' (2017) 65(3) *The Sociological Review*, pp. 525–43.
[134] P. Drahos, 'Trading in Public Hope' (2004) 592(1) *The Annals of the American Academy of Political and Social Science*, pp. 18–38, at 33.
[135] For discussion see G. Hage, 'On the Side of Life – Joy and the Capacity of Being: A Conversation with Ghassan Hage', in Zournazi, n. 132 above, pp. 150–71, at 151.
[136] See, e.g., G. Weszkalnys, 'A Doubtful Hope: Resource Affect in a Future Oil Economy' (2016) 22(S1) *Journal of the Royal Anthropological Institute*, pp. 127–46.
[137] Jansen, n. 119 above, p. 13.
[138] V. McGeer, 'The Art of Good Hope' (2004) 592(1) *The Annals of the American Academy of Political and Social Science*, pp. 100–27, at 108; K. Nairn, 'Learning from Young People Engaged in Climate Activism: The Potential of Collectivizing Despair and Hope' (2019) 27(5) *YOUNG*, pp. 435–50.
[139] V. Braithwaite, 'The Hope Process and Social Inclusion' (2004) 592(1) *The Annals of the American Academy of Political and Social Science*, pp. 128–51.
[140] Jansen, n. 119 above, p. 4.
[141] Ibid., p. 3.

https://doi.org/10.1017/S2047102524000219 Published online by Cambridge University Press

Certainly, it entails a broadening of conventional analysis of what it might mean for legislation to be 'aspirational'. It shifts the focus from the Future Generations Act's limitations to its creation of new potentialities. There is not only the question of whether certain provisions of the Act are (un)enforceable or have particular legal significance. There are also questions about how the Act sets in train a momentum that alters the material conditions of public sector decision making[142] and makes new spaces of hope, of possibility negotiated between the different stakeholders. Moreover, simply by its existence, the Act creates a forum in which the very notion of hope and conversations about hope are expected to be taken seriously. Such perspectives offer an opportunity to expand the scope of inquiry to questions about the communicative functions of the Act, to allow a fuller understanding of how the Act's aspirational norms are developed in an ongoing interaction between various legal, political, and social actors.[143] These are questions that might otherwise remain unasked, and yet they have the potential to reveal more about the on-the-ground processes of legally, even constitutionally, embedding commitments to the well-being of future generations than is captured by a justiciability-enforcement paradigm.

Acknowledgements: We are grateful for constructive comments on earlier drafts from Barbara Adam, John Coggon, Robert Craig, Bob Lee, Amanda Perry-Kessaris, Margherita Pieraccini, and Lael Weis; participants in the Joint Workshop of ELTE University and Aarhus University on 'Future Generations Litigation and Transformative Changes in Environmental Governance', 8–9 June 2023, Budapest (Hungary); and the three anonymous *TEL* reviewers. Responsibility for all views, errors, and omissions remains our own.

Funding statement: Not applicable.

Competing interests: The authors declare none.

[142] N. Brown & M. Michael, 'A Sociology of Expectations: Retrospecting Prospects and Prospecting Retrospects' (2003) 15(1) *Technology Analysis and Strategic Management*, pp. 3–18.
[143] Van Klink, n. 5 above, p. 24.

Cite this article: E. Stokes & C. Smyth, 'Hope-Bearing Legislation? The Well-being of Future Generations (Wales) Act 2015' (2024) *Transnational Environmental Law*, pp. 1–19. https://doi.org/10.1017/S2047102524000219