RISW ST. David's Day lecture 2018

WALES AND BREXIT

Emyr Lewis

Noswaith dda

First of all, diolch yn fawr to RISW for the kind invitation to speak here this evening. The opportunity inspires me and daunts me in equal measure.

I want to talk about two things – Brexit and Wales. These are both words whose meaning and significance have been examined, debated and played with ad nauseam. There has, however, been comparatively little public discourse focused on both of them together. This is hardly surprising given the relative insignificance of Wales within the UK news and political context, whose metropolitan focus is, paradoxically, testament to its parochialism.

Both Brexit and Wales share a history of public disagreement about their meaning and significance, even though the timescales involved have been very different. They are both slippery concepts. While the disagreements have largely been framed in terms of what they are ("Brexit **is** the restoration of UK sovereignty", "Wales **is** a nation"), in reality they have been about what the various protagonists think they **should** be.

So I would like to begin by moving back to what they, Brexit and Wales, actually are. I can sense the ripples of unease caused by such a categorical statement of intent, but please bear with me. There is a frame of reference in which it is legitimate to come to a precise formulation of what things are, and that is the admittedly reductionist framework of the law.

But before I get started on the law, please indulge me while I get my prejudices out in the open and out of the way.

First of all Wales. Until I was six, I was living in London, speaking Welsh with my parents and sister in a North Walian accent, and English with everyone else in a cockney accent. We often used to go on holiday to Aberystwyth. Once we went on the narrow gauge railway to Devil's bridge. I was extremely excited, and our fellow travellers in what I remember to be a rather stuffy and cramped carriage, were subjected to my buttonholing them each in turn and explaining to them in no uncertain terms "this is Wayuls y' know, it's no' England, it's Wayuls". That is still pretty much my attitude, really. In my heart, I am still that fervent read-headed child in a stuffy railway carriage proclaiming the distinctiveness of Wales to a largely indifferent world.

Now for Brexit. There is a story about the US President Calvin Coolidge having come home from Church being asked by Mrs. Coolidge what the sermon was about. The characteristically terse

answer was "Sin". Asked what the preacher had to say about sin, the President replied "He was against it". This sort of sums up my own feelings about Brexit. I am against it. I dislike the word Brexit. It is a rather brutal little portmanteau word, made up of Britain and Exit. It is all about us the Brits, and going out. The image is of leaving a building, through a door. There is no reference to the people we are leaving, the colleagues and friends. It is an image which both simplifies and depersonalises a complex process, and makes it so much easier to be hard and uncompromising.

But as a lawyer, addressing this august institution, I need to try to set my prejudices to one side.

It helps that Brexit does have a rather simple and precise legal meaning. It means that the United Kingdom leaves the European Union. The legal context, however, is far from simple.

To understand the legal nature of the European Union, it is useful first to consider the nature of international law.

International law is a system which governs the relationship between states. It is a relatively recent development which has emerged from the growth of nation states, and it both enshrines and reinforces the concept of nation states as independent legal entities which have rights and duties in relation to each other.

This concept is expressed in what the late Professor Ian Brownlie called “the basic constitutional doctrine of the law of nations”, namely sovereignty and the equality of states. According to Brownlie, three corollaries follow from sovereignty and equality of states, namely:

(1) jurisdiction, prima facie exclusive, over a territory and the permanent population living there

(2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and

(3) (to paraphrase) that whether a state complies with international law obligations depends on whether it consents to do so

Because of this final point, international law is described as relying on convention or practice. This contrasts of course with domestic law. Under the law of England and Wales, for instance, the citizen, and indeed the Government, has no choice but to comply with the law. If that does not happen, there are processes and institutions in place which have both the legal authority and physical power (if necessary) to ensure that the law is observed. International courts exist, of course, but they cannot compel states to succumb to their jurisdiction nor to be bound by their decisions. Life at the international law level, therefore, can be seen as a state of anarchy, regulated by the willingness of states to concur in a legal system, but only to the extent that it suits them.

One method of imposing order within this state of anarchy is through agreements between states. By entering into agreements with each other, states can formally regulate the relationship between them. As a matter of formal law, the European Union is, first and foremost, the creature of a multilateral international agreement. The current instrument which brings the various international agreements together is known as the Lisbon Treaty. It states the constitution of the European Union. In many ways, it resembles the constitution of a club or society. It says who can be a member, what its purposes are, what its rules are, who can vote for what, how to count the votes

and how to resolve disputes. In order to do this, it creates specific organs of government. Each state which is a party to the Treaty, agrees to keep to these rules.

There is however one fundamental difference between the EU and most institutions created by multilateral international treaty, namely that, in order to be a member of the club, a state must ensure that European law and the rights and duties flowing from it, are also part of domestic law. For this reason, it seems to me that the metaphor of the EU as a club is not entirely apposite, and that religious sect is maybe a better one, since the rules bind you in every aspect of your daily life, not just when you are in chapel. By adopting the club rules you have yielded your freedom to govern your domestic life as you see fit.

In the case of the UK, this transcendence of EU law was achieved through passing the European Communities Act 1972. Section 2(1) of that act has the effect that the EU treaties and law made on the international level by the EU are part of domestic law in the UK, and that domestic law cannot trump EU law. Where there is inconsistency, EU law prevails, not only as a matter of international law, but also domestic law.

This of course brings us back to sovereignty. We recall that two of the corollaries of sovereignty in international law are exclusive jurisdiction over a specific territory and population, and freedom from external interference. The UK's agreement *that at the domestic level*, EU law transcends domestic law can be seen as yielding up these two aspects of sovereignty. Laws made by the EU and the judgments of its Court of Justice have direct effect within the UK. For this reason, the EU is described as "supranational" as opposed to "international" organisation, to distinguish it from, for instance, the Council of Europe, where neither the organisation nor its rules trespass formally on domestic sovereignty.

The feeling of lost sovereignty has caused significant unease and indeed anger to many people, especially to those whom we might call British or English nationalists. For example, the famous words of Lord Denning in 1974 in the case of *HP Bulmer Ltd v J Bollinger AS (No 2) [1974]* where he described European law as being “like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back”. The image and the rhetoric convey precisely the panic-stricken mind-set of the nationalist, the fear of being conquered and defiled by a foreign power which is beyond its control. This concern for regaining lost sovereignty, which had its contemporary expression in the slogans “I want my country back” and “taking back control” was, and remains, a significant aspect of Brexit. Those of us who were, and remain, opposed to Brexit should be careful not to write this off superciliously as simply the product of xenophobic racism. It is perfectly possible to be concerned about the sovereignty of your nation without being a xenophobe, and absolutely legitimate to hold that point of view.

What the point of view fails to acknowledge, however, in my opinion, is that, to the extent that the UK has given up elements of sovereignty, the same is true for all other EU member states. It is this voluntary agreement by everyone to be bound by the laws of the club that enables free trade to happen.

To return to Brexit's legal meaning. It means the UK no longer being part of the EU, so no longer bound by the international treaties which create and govern the EU. In order to achieve this, two legal things need to be done, one on the international plane, and the other on the domestic plane.

I shall come back to the domestic plane in due course. On the international plane, it means taking the formal steps required by the EU Treaty, i.e. the by now famous Article 50 of the Treaty on the functioning of the European Union, which states that

"any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements".

Once a decision to leave has been made, the member state must notify the European Council of its intention. Then there is a two-year period to negotiate an agreement of the terms of the withdrawal. The agreement must get the consent of the European Parliament before the Council (acting by a QM) can conclude it.

Article 50(3) says that the EU "Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

The Prime Minister gave the notification required by Article 50(2) on 29th March 2017.

So on 30th March 2019, all else being equal, all European law will cease to have effect in the UK. This, put crudely, is the legal meaning of Brexit.

Now for Wales.

It is quite remarkable that, lacking any history as an independent modern state or much by way of distinct governance, Wales, or at least the idea of Wales, has nevertheless persisted somehow, lodged between romantic assertions of continuous nationhood, iconoclastic dismantlings and post-modern reimaginings. In marked contrast to Scotland, whose distinct laws and courts continued after the union of the English and Scottish Parliaments in 1707, the experience of Wales in the field of governance, at least until the twentieth century, has been one of total assimilation with England. The so-called Acts of Union of 1535/6 and 1542/3 incorporated the whole of Wales into England. They provided for the law of England only to apply in Wales. In order to secure this, the 1543 Act established a special system of courts for Wales, namely the Court of Sessions. English became the only official language of law, government and administration. The Court of Sessions continued until 1830, when Wales came under the same court system as England, where it remains.

This lack of a foothold in either international law or domestic law has made it meaningful and possible to ask the question "What is Wales", and indeed the question "Is Wales"? Or, as two of our most prominent 20th Century historians have put it, Gwyn Alf Williams' "When was Wales?" and more bluntly Dai Smith's "Wales! Wales?" The absence of a distinct legal or political identity for Wales has meant that the obvious answer available in the case of Scotland ("there it is") is not available, so we find ourselves stranded in an often fascinating but rarely fruitful landscape, caught between essentialist assertions of what Wales is and relativist denials that it is at all, with all points of existential doubt in between.

When New Labour came to power in 1997, it went about fulfilling its manifesto commitments to bring about democratic devolution in Scotland and Wales. Scotland's pre-existing legal system provided a ready conceptual frame of reference into which the devolution of legislative and executive powers to new democratic institutions could comfortably and confidently fit. Wales had no such frame of reference. Whereas Scotland voted overwhelmingly in favour of a Parliament, Wales voted for devolution by the narrowest of margins. It is small wonder therefore that the very existence of Wales as any kind of distinct legal or political entity was called into question, and that the steps taken in that direction have been tentative ones, as can be seen in the history of Welsh devolution since 1998. By 2018, however, Wales has a very clear, if rather over-complicated, foothold within the UK's constitutional arrangements.

So, what, in legal terms, is Wales? There are two potential answers to this.

The first answer is the banal but necessary statutory provisions which define the territory of Wales, namely bits of Section 158 of the Government of Wales Act 2006.

The second answer is to point to the National Assembly, the Welsh Ministers and the other organs of governance in Wales and say "there it is". It is these two aspects: a defined territory and a degree of autonomous governance arrangements within it, which give Wales its modern legal meaning.

Lest it should be thought by any sceptics that I am overstating the case about the existence of Wales, here is part of the new Section 1A of the 2006 Act, introduced by section 1 of the Wales Act 2017. The section is headed "Permanence of the Assembly and Welsh Government"

.(1) The Assembly established by Part 1 and the Welsh Government established by Part 2 are a permanent part of the United Kingdom's constitutional arrangements.

.(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.

(3) In view of that commitment it is declared that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum.

The journey here has not been straightforward. The original assembly set up in the wake of the 1997 referendum was an executive body, with defined powers to do certain specific things. The first functions transferred were previously functions of the Secretary of State for Wales within 18 categories. Clearly defining the limits of delegated power is useful in a democracy to ensure that the executive government can be properly accountable to the elected legislature. Since the original Assembly was itself a democratically elected body, however, it could did not make sense for it to be considered accountable to Parliament in the same way as the Secretary of State had been, and the idea of collective responsibility was similarly meaningless for all Assembly members. So, quite soon, the original Assembly developed a separation of powers of its own accord, with people who called themselves (and were called) ministers being increasingly held to account by elected members. At the same time, it acquired increasingly broad framework powers, including powers to make secondary legislation, but still within the 18 categories.

The law needed to catch up with reality, and the 2006 Government of Wales Act formally created the Assembly as a law-making body, and the Welsh Government as a constitutionally distinct entity. The Assembly also acquired law-making powers, analogous to those of the Scottish Parliament. The previous categories of delegated executive power then formed the basis for the “fields” and then “headings” of legislative competence under the 2006 Act. The “fields” were the (largely empty) categories of law-making powers which the Assembly originally had in 2006. The process of filling those fields, through getting consent from the UK Parliament was, however, painful. The degree of scrutiny employed and type of language used by certain influential MPs in relation to requests from Cardiff for devolution of powers betrayed a mind-set which still thought of the Assembly as an executive body whose (delegated) powers needed to be circumscribed and narrowly defined, rather than a legislature in its own right. Fed up with this, in 2011, the government in Cardiff called a referendum, the result of which was that the Assembly acquired what were called "full law-making powers" over what were now called subjects rather than fields.

While this was an improvement, what it did was create a new set of complex and uncertain legal boundary lines between England and Wales. That led to tensions and indeed litigation between administrations and legislatures in Cardiff and London.

Perhaps the most fundamental of those boundary lines marked out the subjects about which the Assembly could make Acts, its “subject-matter competence”.

Briefly, an Assembly law had to relate to one of the list of subjects in Schedule 7 of the Government of Wales Act 2006, and not fall within any exceptions in Schedule 7. The effect of this was to create two lists. The first is the list of subjects, and the second is the list of exceptions. That in turn meant that there were some topics which were not contained in either list. That is hardly surprising, given that:

(1) it would be an impossible task to describe comprehensively in two lists all aspects of the world, or even Wales, about which legislation might be made;

(2) the categories into which we classify things, the ways in which we choose to describe the world, are not closed (100 years ago, for instance, there was no such category as “broadcasting”); and

(3) because there are different ways in which we classify things (e.g. according to what colour they are, or what size they are), subjects can belong in more than one category.

So we ended up with a number of subjects neither expressly included in, nor expressly excluded from, the Assembly’s subject-matter competence. They were in limbo.

The inadequacy of how these powers were defined puts me in mind of the fictitious ancient Chinese encyclopaedia the "Celestial Emporium of Benevolent Knowledge" described by the Argentinian writer Jorge Luis Borges in his essay "The Analytical Writings of John Wilkins". The Emporium classifies all animals into 14 categories:

Those that belong to the emperor

Embalmed ones

Those that are trained

Suckling pigs

Mermaids (or Sirens)

Fabulous ones

Stray dogs

Those that are included in this classification

Those that tremble as if they were mad

Innumerable ones

Those drawn with a very fine camel hair brush

Et cetera

Those that have just broken the flower vase

Those that, at a distance, resemble flies

Anyhow, back to Wales. The legal status of matters in limbo took centre stage when Parliament decided to pass an Act abolishing the Agricultural Wages Board which ensured fair wages for farm workers. The National Assembly passed its own Act (Agricultural Sector (Wales) Act) which among other things preserved regulation of wages in the agricultural sector in Wales. Before it received royal assent, the Bill was challenged by the UK Government in the Supreme Court. The Bill, they said, was about employment law. Employment law was not a devolved subject, so the Assembly could not legislate about it. The Supreme Court disagreed. Employment law was indeed not devolved, but neither was it in the list of exceptions, so it was a limbo or "silent" subject. Since the bill could be fairly said to relate to one of the devolved subjects (in this case agriculture), it made no difference that it also related to a silent subject. It was still valid.

This created a bit of a shocked reaction in Westminster and Whitehall. Suddenly the Welsh Assembly had the ability to legislate in respect of all sorts of areas which were in limbo, including for instance immigration and the armed forces, so long as they related to a subject which was within competence. That couldn't happen in Scotland, because the superficially stronger settlement there had proceeded on the basis not of devolving specific powers, but rather of devolving everything, while being very clear about what was reserved – the no-go areas. Those previously most fiercely opposed to the introduction the Scottish model for Wales underwent a Damascene conversion, the consequence of which was the Wales Act 2017 which, when the relevant provision comes into force on the 1st of April this year, will give Wales a more Scotland-like settlement. The 2017 Act is not however the devolutionist's dream that it might seem at first sight. Because of the twin requirements to preserve the unified legal jurisdiction of England and Wales, and to preserve as much executive power in Whitehall as possible, the latest Welsh constitutional settlement contains

mind-bogglingly complex layers of cross-referring provisions which will give endless hours of innocent and not-so-innocent fun to lawyers and bureaucrats for years to come.

So, over the period that the European level of territorial governance has become increasingly significant for the UK, within the UK, there have been significant alterations in territorial governance. While it is tempting to see these as equal and opposite reactions, that would be a mistake. The main differences relate to the nature of the relationship between the centre and the component parts. The European Union is a union of and constituted by sovereign states which have voluntarily come together, each of which has a say in what happens, and each of which, despite the immanence of European law within its legal system, retains its legal sovereignty. The devolution settlements within the UK on the other hand are based on the fundamental principle of the supremacy of Parliament. That doctrine means that Parliament can legislate for absolutely anything and, crucially, cannot bind itself. So the statements in section 1A quoted above are capable of being overruled by Parliament. Unlike a federal constitution, where the respective legal positions of the federation and the state are more or less clearly set out in a document which is legally inviolable, the legal position of Wales remains always contingent on the will of Parliament.

So what of the EU in all of this? Throughout all the shapes of the Welsh devolution settlements, there have been certain constants. One of these is the how European law is treated. There are two aspects to this. First of all, the Welsh Government has had the power and responsibility for implementing EU laws. This in turn means several things: from making regulations implementing EU legal frameworks, facilitating and enforcing compliance and management of structural funds, which have been ever-present throughout the Assembly's existence. Secondly, neither the National Assembly nor the Welsh Government can do anything which is incompatible with EU law. So the Welsh Assembly cannot pass any laws which are not compatible with EU law.

I mentioned earlier that I would return to the other legal thing that needs to be done for Brexit to happen. Even though the triggering of Article 50 by Mrs. May means that EU law will no longer apply to the UK on 30th March next year (all else being equal), that is only part of the story. That is only at the international treaty level. At the domestic level, in line with the doctrine of the supremacy of Parliament, what makes EU law apply in Wales and the rest of the UK is section 2(1) of the European Communities Act 1972. Unless that is repealed, then we shall be in the paradoxical situation of being outside the EU, but still subject to its laws. So let's repeal it then. Except it won't be so easy. Since the UK became a member of the European Common Market in 1972, a huge number of EU laws and EU-derived laws have been at work in the UK. Everything from working time and data protection laws which protect citizens, through to fair competition and state aid laws which are intended to ensure free trade. We could of course ditch these, and some have I believe suggested that we do just that, but such a reckless year zero approach has not been the path chosen by the UK Government, at least not in this context. Instead, it is introducing a series of bills. The first of these, the European Union (Withdrawal) Bill is intended to preserve, within domestic law, all European law. It repeals the 1972 Act, but converts EU law into domestic law. There is one significant omission, namely the Charter of Fundamental rights, currently part of UK law, will not be part of retained EU law. The Bill also gives UK Government ministers wide-ranging powers in connection with doing this, including powers to amend and repeal Acts of Parliament, the so-called Henry VIII provisions. It also gives certain analogous powers to ministers of the devolved administrations.

Significantly for Wales, Clause 11 of the Bill also creates a new fetter on the legislative competence of the National Assembly (and other devolved legislatures), namely that they cannot legislate so as to modify so-called "retained EU law". The definition of retained EU law is not confined to the law of the EU which is transferred to domestic law after Brexit, it includes any future modifications of or additions to that body of law, which can only be made by Ministers or Parliament.

One implication of the decision of the Supreme Court in the Gina Miller case is that, after Brexit, the EU law constraint on devolved legislatures would be meaningless. So if it wasn't for this new proposed constraint relating to retained EU law, the Welsh Assembly would be free to legislate about things which are "returning" from the EU, where they are within devolved competence, such as agriculture, the environment and fisheries. So the new retained EU law constraint stops these things from coming to Wales.

One of the new provisions deriving from the Wales Act 2017 is the following new section 107(6) of the Government of Wales Act 2006

…it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.

This brings into statute the so-called Sewel convention which has operated in Westminster since the start of legislative devolution in the UK. The Supreme Court in the Gina Miller case made clear that it does not operate so as to bind Parliament – it remains a non-justiciable convention. Nevertheless, in political terms, it has proved to be very strong, and Legislative Consent Memoranda ("LCM") are regularly sought by Westminster, and usually given but occasionally refused by Cardiff and Edinburgh.

In the context of the EU Withdrawal Bill, this provision, and the corresponding Scottish provision, have been invoked by the Welsh and Scottish governments. The 'retained EU law' constraint to which I refer above has been described as a "power grab" by politicians and commentators alike. Legislative powers which belong in Cardiff and Edinburgh, they say, will be intercepted in London on their way from Brussels, and will form a body of law which can be "modified" and "added to" by Whitehall and Westminster, which creates a risk of further removing powers. The Welsh Government created an LCM in which it sets out which provisions of the EU(W) Bill will in its opinion require consent from the National Assembly. That was laid before the Assembly on 12th September last year. In respect of many of the areas requiring consent, the UK government agrees that legislative consent is needed. It has in fact recognised this from an early stage, but it has done remarkably little to adjust its position to reflect the points of view of the devolved governments where there is disagreement, especially over Clause 11. It appears rather to have assumed that the consent would be forthcoming. "Trust us" they appear to be saying "we are the UK Government". The Constitutional and Legal Affairs Committee of the Assembly's rather acid comment was: "The Bill in its intention to revive the supremacy of the UK Parliament, appears to do so at the expense of devolution".

This failure to adjust has led most recently to the Welsh and Scottish administrations putting forward their own legislation, to pre-empt the EU Withdrawal Bill - the so-called "continuity bills". In the case of Wales, the level of political frustration across the political spectrum felt was reflected in

the unanimous vote in the National Assembly supporting Steffan Lewis AM's legislative proposal for a Welsh continuity bill.

Last week, the Welsh Government published its rather prosaically named Law Derived from the European Union (Wales) Bill, and it has this week started its journey through the Senedd. Its main purpose is to enable Welsh Ministers to create a body of law called "EU derived Welsh Law", which will come into force on leaving the EU. In doing this, it will in effect pre-empt the so-called power grab by Westminster. It also will give Welsh Ministers the powers to ensure that Welsh legislation keeps up with developments in EU law post-Brexit and guarantees a place for the Charter of Fundamental Rights in the context of EU derived Welsh law. If it becomes law, the challenge will be there to the UK Government to repeal it. The same, of course, is true in respect of the equivalent Scottish bill. Interestingly, the Llywydd has confirmed that the bill is within competence while her Scottish equivalent has taken a different view about the Scottish Bill. The race will now be on to get the Bill passed. Here, the unicameral nature of the Assembly will help. It will be treated as an emergency bill, which can pass through all stages in virtually no time. It is likely that if passed, the UK Government will challenge its validity in the Supreme Court on the ironic ground that it is not compatible with EU law.

Lest it be thought that this is merely squabbling, knowing where post-Brexit powers lie has political relevance now. Michael Gove has promised to farmers in England that the same level of support as has been received from the EU will continue until at least 2022. He can make this promise because, regardless of what happens, he will be in charge of agriculture in England because he will be both the England and the UK agriculture minister. He has not made a similar unequivocal promise for Wales. While the Treasury has confirmed that it will "match" funding for Wales, what this means is not entirely clear. Nobody is making an unequivocal promise, because no-one knows where the powers will lie, nor of course whether the money will be there for Wales, but that is another story.

I have focused on the political and constitutional background and jockeying for position partly because it has been only tangentially discussed, if at all, on the UK mainstream media, but also because it is the area with which I am most familiar. It is not of course, however, the full picture, when considering the impact of Brexit on Wales nor in many respects the main area of concern.

Within the default position of anarchy in international affairs to which I referred above, it is a matter of everyone for themselves when it comes to international trade. Before the modern period, several prominent Welsh people took advantage of this absolute freedom of international trade. I could name for instance Captain Henry Morgan and Bartholomew Evans of Casnewy' Bach, aka Black Bart. In a week when we have seen the President of the United States threatening to apply huge tariffs on steel imports and motor cars, while extolling the virtues of trade wars, this has been put into stark perspective. Trade wars can lead to real wars.

The core mission of the EU since it started as a common market can be seen as an attempt to counter this anarchy by getting rid of barriers to trade across the borders of the states which are members of the Union, and so preventing trade wars and worse. The EU has done this through its legislation in favour of the four freedoms, against unlawful state aid to industry, its removal of tariffs and other barriers to cross-border trade, its regulation of anti-competitive behaviour and its opening

up of competition for public contracts. The overall jurisdiction of the EU organs of government and courts has meant (at least in theory) that common standards and rules have been applied across the territory of the Union.

While at times the zeal of some European Commission officials in favour of free trade can seem dedicated to the point of being fanatical, the EU is not entirely captive to the dogma of free trade. It does not regard as mere "externalities" things which restrict the efficient operation of markets. It factors in social costs, not just economic costs. So it regulates things in a way which free market dogmatists would say get in the way of trade, such as environmental protection.

In terms of the Welsh economy, the superficial, perhaps Henry Morgan, view is that Welsh businesses will be free to trade without being held back by the constraints of EU law. That is certainly the kind of thing that I have heard from friends and colleagues who voted for Brexit. It seems to me, however, to be a misunderstanding of the nature of sovereignty at the international level. The foundation of trade is contract, which is based on a mutuality of obligations. In every contract, the parties give up some freedom in order to gain some benefit. What keeps international trade going is as much about pragmatics, negotiation and compromise as it is about freedom. Even outside the rules of the EU, your ability to trade will depend on some sacrifice of freedom. It is easier to declare "we are sovereign and free" than it is to live it.

Of greater significance in the case of Wales are the specifics of how the Welsh economy depends on the EU. In February the Welsh Government published its paper "Trade Policy: the Issues for Wales", much of which was based on research by Cardiff University's School of Business. It reported that 61% of goods exported from Wales are exported to the EU (39% UK). It describes the interdependency of Welsh businesses with counterparts in the EU, especially those which are Wales-based subsidiaries of larger organisations. It indicates how much of Welsh manufacturing depends on complex pan-European component supply chains which the customs union and single market facilitate (in 2016, 54% of total goods exports from Wales were machinery and transport exports). It contains a sector-by-sector analysis of what the potential impact of Brexit could be on the Welsh economy, evaluating different risks as low, medium and high. It paints a rather gloomy picture.

But of course, in the case of Wales, the economic significance of the EU is not only about trade. Wales gets money from Europe. In May 2016, shortly before the referendum, the Wales Governance Centre at Cardiff University produced a research paper called *Estimating Wales' Net Contribution to the European Union.* Its conclusions: -

- In 2014, European Union funding for Wales from the Common Agricultural Policy and European Structural Funds totalled £658 million. Wales also receives other funding from the EU that goes directly to Welsh beneficiaries and is less straightforward to quantify.
- Wales' estimated contribution to the EU budget, after accounting for a share of the UK's rebate, was around £414 million in the same year.
- This means that the estimated net benefit from the EU for Wales in 2014 was around £245 million.
- This was equal to around 0.4% of Welsh GDP.
- The UK as a whole made a net contribution of £9.8 billion in the same year.

- Wales' net benefit from the EU equated to around £79 per head in 2014. This compares with a net contribution of £151 per head for the UK as a whole.

One of the significant ways in which the EU diverges from free market dogma is in regional policy. Free markets can create situations where wealth becomes concentrated in particular areas within the market's territory, and this creates and magnifies inequality, which in turn leads to greater social costs through welfare, policing, social services and health provision. This is a particular problem in areas which may have been relatively prosperous, but have declined. EU regional policies and structural funds (as well as associated legislation such as the state aid general block exemptions) are designed to address these issues. They enable funds to be diverted to areas which are in need, and they relax state aid laws so as to facilitate government loans and grants to and investments in businesses.

The UK, however, has no UK-wide equivalent of the EU's regional policies, aimed at increasing economic prosperity within less prosperous areas. The UK welfare system does something to alleviate this, but there is no strategic programme for diverting resources from prosperous areas in order to invest in areas where economic development is needed. The money transferred to Wales under the Barnet formula still does not fully acknowledge the difference in need between Wales and England.

The current round of structural funds comes to an end in 2020. Brexit looks like happening in March 2019. The UK Government has committed effectively to guaranteeing this round of structural funds. It has also announced that there will be a fund called the "UK Shared Prosperity Fund", but it is at this stage not clear how this will work. A particular concern is the extent to which it will be a London-driven fund, as opposed to one whose operation is entrusted to local authorities and/or devolved administrations, so enabling areas of particular need to be addressed.

Add to this the lack of clarity about agricultural funding, there is uncertainty for the Welsh economy.

What both the agricultural and regional policy issues show is the significance of the EU policy and legal frameworks in shaping how things are done in Wales and the rest of the UK. Politicians acknowledge that new frameworks will need to come into place in the UK, following Brexit, in respect of what is, after all, an internal market and customs union between its constituent territories. Before democratic devolution to Wales and Scotland, that could not really have been said but now it can, and it is another factor why the Welsh and Scottish governments are so determined to ensure that the "power grab" does not happen. To be fair to the UK Government, it has indicated that the provisions of the EU Withdrawal Bill which freeze devolved competences are intended to be transitional only, while new frameworks are worked out, but that is not what the legislation says. Even if it did say so, however, Carwyn Jones has made it clear that it would not be acceptable as a matter of principle. His argument is based on the principle that the governments of the UK should come together to agree frameworks. Whitehall cannot be seen as an honest broker in this arrangement, since it is both de facto and de jure the English government as well as the UK government.

It is not only common economic frameworks which the EU has in place. I have already mentioned issues such as data protection and the environment. Increasingly, as it has developed, and in particular as it has started to acquire members from the former Soviet bloc, the EU has emphasised

principles of inclusivity, democracy and tolerance within its governing frameworks. Part of this has been the introduction of the Charter of the Fundamental Rights of the European Union which forms part of the EU's constitution. The UK's relationship with the Charter has been rather complex. Nevertheless, the Charter is part of domestic law as things stand. The EU Withdrawal Bill is clear, however, that it will not form part of domestic law after Brexit. It will not be part of EU retained law.

As well as the Charter, all kinds of initiatives and institutions are involved in more than simply promoting the economy. In the cultural field, there are initiatives to promote joint working between creative people cross the EU, and in education EU policies and funds have been instrumental in promoting research collaboration and student exchanges, all of which lead to better understanding and greater tolerance. Wales has benefitted immensely from these initiatives.

In this context of encouraging tolerance and diversity, I would like to focus on linguistic diversity in Europe, and the Welsh language.

One of the most challenging aspects of being in a linguistic minority is that the potential for suspicion and "othering" is particularly high. It is not just a question of belonging to a group which is 'different' from the norm. The defining characteristic of the group is one which stands in the way of understanding, namely its own language. The outgroup of "X language speakers" is the most intractable. Now every group will have its own lect, as linguists call it, its own way of speaking and expressing things. Each family has its stock expressions and words that only make sense to other family members. But such words and expressions are capable of being explained to outsiders who speak the same language. Someone who does not speak that language at all will find it impossible to penetrate what is going on.

This factor, and the (in many respects understandable) suspicion which has grown from it, have in my opinion been a practical, psychological and political barrier to the flourishing of Welsh within the UK. The same is true of other languages of course, both indigenous and more recently arrived. In the case of Welsh, this is particularly so, because the vast majority of Welsh speakers are competent English speakers. Welsh is often portrayed as a secret code whose purpose is to shut people out, conspire against them or to secure privileges such as jobs for the in-group. And it must be acknowledged, of course, that such things have happened. Every community, after all, has its bigots. But, as I am sure I need hardly explain to anyone in this room, those are not the reasons people speak Welsh.

The UK is of course at least in official terms largely a monolingual territory, and that language, English, has been the only language of commercial, political and legal power for centuries, even in those small areas where other indigenous languages have been spoken. The same is true of course about a number of other EU states, in particular those which have been in their time imperial powers. One of empire's main strategies is suppression of linguistic diversity, in order to impose uniformity.

But on the territory of Europe, taken as a whole, it is not practically possible to operate in this way. Despite (or possibly because of) the emergence of English as a lingua franca across Europe, linguistic diversity is a persistent defining characteristic of Europe as a territory, and one which is celebrated. The Lisbon Treaty and the Charter of Fundamental Rights expressly acknowledge that "the Union shall respect…linguistic diversity". So linguistic diversity is “enshrined” in the EU constitution.

Furthermore, EU laws (for instance in the fields of media and copyright) recognise linguistic diversity as something to be protected where it is threatened by economic activity.

The EU is multilingual because its territory is multilingual, and while the UK remains part of the EU, Welsh and other minority languages with no kin state exist in that multilingual context.

Welsh has “Co-official” status in EU institutions. While in practical terms, this is not much different from the UK context, the EU's constitutional commitment to linguistic diversity gives Welsh (and indeed other languages in the UK, even those which are not co-official) a formal recognition in the whole territory of Europe which it does not have within the territory of the UK, other than in Wales.

This has two significant consequences. First of all, at the EU level, Welsh exists in a governance context where multilingualism is the norm, not the exception: people are not odd or "othered" because they speak another language apart from English. Secondly, it offers a political and legal space for joint action with other minority languages – as does the EU in so many other areas of minority rights

Within many EU states, multilingualism is a matter which is politically more complex than a small minority who are a bit of a pain. A minority language in one state is frequently a majority or official language in another. There are the Italian speakers in Croatia, the Finnish speakers in Sweden, and the speakers of Hungarian, German and Ukrainian throughout central Europe. Oppressing the speakers of the language of a powerful 'kin state' is dangerous. Even within the EU, for instance, the scant formal language rights of half a million Hungarian speakers in Slovakia have been the subject of serious political friction.

The EU's commitment to linguistic diversity can be seen also in its requirement that former Soviet bloc countries joining the EU should ratify two instruments of the Council of Europe: the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages. Despite the hypocrisies and inconsistencies involved here (e.g. France has resolutely resisted ratifying the ECRML), here is the EU showing itself willing to insist on an international level of minority language protection and promotion as one of the conditions of membership.

Why should I worry about this, you may ask. After all, Welsh has greater official status in Wales than at any time since the fifteenth century, and plenty of political support and goodwill.

I warned earlier against the unfair characterisation of people wishing to restore British sovereignty as racists or xenophobes. Having said that however, it cannot be denied that much of the rhetoric in the Brexit campaign was racist and xenophobic. After the referendum, it seemed to me that things have got worse. It appears that people felt they had a licence to express a level of aggression and hatred towards foreigners of all kinds, which would not have happened before the referendum. Mainstream politicians, including Ministers of the Crown made statements about the future of foreign workers in the UK which they would not have dreamt of making previously. This all seems part of a polarised discourse, in both social and mainstream media, where strident aggression is acceptable. Women are threatened with rape for expressing an opinion, those who disagree with the Government's line on Brexit are traitors, and judges who uphold the law are enemies of the people. It is as if irrational, and anti-rational, anger has become the idiom of our age.

It is this kind of context that minorities need to be vigilant. They are the easiest outgroups to oppress and to blame, since they are often politically weak and sufficiently "different" to enable them to be othered and dehumanised. I have a concern in this context about the Welsh language. I don't want to overstate this - in many ways, Welsh is a fortunate minority language in Europe, but as a minority, we are well aware of prejudice and myth-making. Much good work has been done by politicians to counter this, but the haters are still there, and they appear to be becoming more vocal. It is not that long ago, after all, that attacks on the Welsh speaking elite were part of the everyday arsenal of populist politicians of the right and left in Wales.

Less worrying, but no less insidious, is what appears to be the marginalisation of Wales within certain elements of cultural discourse post the Brexit vote. Now, there is a bit of "you would wouldn't you" about this of course (recall the four year-old boy on the train to Devil's Bridge). Nevertheless, it comes to something when Dr. Simon Thurley, the author of a report commissioned by the Welsh Government about museums in Wales can say this:

Wales played a crucial role in the British century [the 19th century] and its raw materials and know-how made a major contribution to the industrial revolution and the empire. Of course the human story in Wales is interesting and compelling, but so is the big picture of how Wales, as part of Britain, changed the face of the globe. This story will help make the Museum more compelling for tourists who come from outside Wales, for whom the human story of Welsh men and women is interesting but, perhaps, less compelling than an international narrative.

There is Wales's significance in this most post-Brexitian of "narratives" – a bit player in the international grandeur of the British Empire, with little otherwise to commend it. A narrative in which, as Andrew Green has noted, "whether deliberately or not, Thurley seems to place himself in the neo-Tory tradition that insists on the essential beneficence of the Empire and the duty to celebrate its achievements", before adding "He seems to be unaware that this idea might have little resonance in Wales." Such a mind-set is not uncommon. Wales remains, despite all that has happened, very much "and Wales" - an appendage rather than a place with its own tale to tell.

Now, lest all be seen as doom and gloom, I should say that I have sufficient faith in the reasonableness of most people and the robustness of Wales' institutions of governance, to look after Wales and its image, but if there is a single thread which runs through all of the issues that I have raised, it is what follows. Britain after Brexit is not the same place as it was before it joined the EU. Neither is Wales. The new fact of Wales' political existence requires more than lip service. Carwyn Jones, even before the Brexit referendum, had been calling for a constitutional convention to set out how the UK should work as a territory of plural governance. Now that the mould of EU law which kept us all together in a single market looks like it has been broken, the need for new frameworks, new understandings and new relationships governed by mutual respect and parity of esteem is even greater. My hope is that, if Brexit does indeed happen, Wales can be a catalyst for that.

But we mustn't let the etymology of Brexit (Britain + exit) define our approach in Wales towards it. Wales has benefitted in many ways from being part of the EU. It cannot be good for Wales simply to focus on the internal dynamics of the UK. Even outside the EU, Wales needs to remain European.

(NOTE: this lecture was delivered on 8th March 2018, and refers to what were then some very recent developments, which, given the pace at which events are moving, may well have been superseded by the time you read this.)