75th Hamlyn Lecture Series

LAWS FOR A NATION AND LAWS FOR TRANSNATIONAL COMMERCE

SPEAKING NOTE for LECTURE 1

LAWS FOR A NATION – WALES

NOTE: This is abstracted from the full lecture which will be published in book form in due course, together with the remaining lectures in the series, by Cambridge University Press; missing paragraphs are shown by an x and all the footnotes are omitted.

Introduction: The approach to laws for a nation

11. This series of lectures considers the laws (1) that a nation, within or without a Union, needs which are best for that nation and national in their application and (2) the laws needed for transnational commerce that are best if transnational in their application. Before attempting to explain (in the terms directed by Miss Hamlyn) what appears to be the vast and hugely complex subject it may be helpful to signpost the scope of this first lecture by identifying at the outset the questions to be addressed in turn:
    a. First why does a nation need its own law? What are the factors that should govern the scope and extent of that law ?
    b. Taking the Welsh nation as a case study, what account should be taken of the development of Welsh law and its subsequent abolition? What conclusions can be drawn from the incredibly complex way in which law-making was restored in 1999 and the changes that have since occurred?
    c. Against that background and in that context what should be the law-making position of a nation within a Union?
    d. Finally, returning to the Welsh nation as the case study, what are the options as to the laws a nation should be able to make through its own law-making powers and on the basis of the relationship to a Union?

1. WHY DOES A NATION SUCH AS WALES NEED ITS OWN LAWS?

(i) Why is law so important to a nation?

12. It may seem superfluous to begin by explaining the centrality of law and its justice system to a nation. However experience has shown that most take law for granted and do not think about its centrality.
13. x
14. Law is the foundation of all nations, it establishes and defines the powers of the nation's governance, it regulates the relations between citizens and the state and relations between citizens and other citizens. The last is essential for the resolution of disputes and the underpinning of commerce. The nation's justice system is more than a dispute resolution service. It is a pillar of a nation's democratic government. That is because it safeguards the rule of law, maintains the certainty of the law (while allowing for its development), provides public access to the law, provides openness and accountability and makes decisions independent of interests.
15. x

(ii) The needs of a nation for its own and distinctive laws

16. Why then does a nation seek its own and distinctive laws?

17. There is a general consensus that a nation great or small should be free to maintain and develop its distinctive character. This together with its common values are expressed most clearly though the nation's law. It gives the clearest expression to the spirit of a nation.

18. However, there are laws which are universal in their application and from which nations do not and should not differ. Today the principal fields of such law are those that relate to individual liberty and other principles which are embodied in Human Rights Charters.
19. x
20. There are other laws, as I shall explain by reference to the laws that govern commerce in the second and third lectures, where the practical needs of nations are best served by law that operates transnationally and is not simply national.
21. X

22. There are, however, a large number of areas of law where the needs of a nation's people are best served by that nation being in a position to make its own laws. The question to address by reference to Wales as a case study are the factors that should influence the decision on where that line be best drawn to benefit the people of a nation.

(iii) **Wales as a nation?**

23. If Wales is to serve as a case study for nations needing their own distinctive laws, then it is necessary to refer to the question sometimes still raised as to whether Wales is a nation. I do not think today anyone doubts that Wales is a nation. However, there have been contentions that it is not. People point to the absence of any distinct legal system, its former lack of a capital city, its indistinct border and the geographical obstacles to unity.
24. x
25. Welsh identity was often characterised as linguistic and cultural rather than political and legal. This was based on ignorance of the major events in the history of Wales, the laws and justice system Wales had enjoyed and the contribution Wales had made to legal development. However the absence of its own law and a legal system was a principal factor used to justify the different treatment of Wales to Scotland at the end of the twentieth century.

26. Thus a nation's governance powers to make its own laws through its own legislature and to develop and interpret those laws through its own judiciary is a significant factor in differentiating a nation and in strengthening it.

(iv) Factors that govern choice of law for a nation

(a) The values and ambitions of a nation

27. A nation's choice of laws will outline the kind of society that it aspires to establish, its tolerance of views and conduct that are permitted, the family or other unit it wishes to foster, the nature of its education system, the extent of the health care it provides and the conduct it wishes to characterise as criminal, how it wishes to police the nation and how to punish offenders. The values will change over time.

28. **x**
29. x

(b) The distinct culture and language of a nation

30. A second factor, is that law is needed to protect or strengthen the culture of the people of the nation. In relation to Wales of primary importance has been law that protects and promotes the Welsh language, education, its cultural heritage, and its modern culture.
31. X

(c) Capacity, resources and experience

32. A third factor is the capacity and resource available to make law. Making any law entails costs, skills and resources. Some states borrow the text of some laws from other states as they do not have the resource or skills available to craft their own distinct law.
33. X
34. x

(d) The making and administration of simpler and accessible laws

35. A fourth factor is the vision and will to make law as simple and as accessible as possible and as straightforward as possible to administer, If law is to play its proper role in a nation in meeting the needs of a nation,.

36. The simplicity of law depends largely on:
    a. The skill of the makers of the law in expressing it shortly and clearly.

    b. The willingness of the maker of the law to trust the person who is going to carry it out or administer it. In a small nation it is often easier to trust and not to have to resort to constraint on discretion.

    c. The willingness of the maker of the law to systematise and codify it. UK legislation is an example of unsystematised legislation and of a reluctance to codify and restate the law, an issue relevant to English commercial law which is addressed in the third lecture. Wales is taking a different course.

d. The method of drafting and interpreting. Each nation should have a choice which often relates to the legislature's trust in the independence, ability and understanding of its judiciary.

37. It is well recognised that it is often simpler to achieve effective administration of law in a small nation and to hold to account those who have the responsibility for the governance of the nation.

38. x

(e) The capacity to develop and interpret its laws

39. A fifth factor is the capacity to develop and interpret that law by those who live in the nation, understand the laws that the nation has and can participate in the governance of the nation as I shall explain.

40. It also requires the development of a legal profession which though practising as widely as jurisdictions permit, sees as its primary objective serving the needs and developing the laws of the nation.

(f) Further factors

41. There is a sixth and key factor for a nation that is part of a Union, namely the balance between the respective powers of the Union and the powers of the nation to make law. To address that context is essential. So I turn to the context of Wales. It is necessary to correct ignorance of history and address what is described as Welsh exceptionalism.

2. THE WAY WELSH LAW WAS LOST AND THEN RESTORED TO THE WELSH NATION

(i) An explanation of the approach taken in this lecture

42. Although the events before 1997 are fairly straightforward, the events thereafter are complex and involve highly technical issues. A word about the approach taken in this lecture is therefore necessary:

(1) The Commission on Justice for Wales examined the question of whether Wales should have control of its own justice system by approaching the issue with an emphasis on the practical and pragmatic. It concluded after a detailed review set out in a Report of some 500 pages that there was a strong case that Wales should have its own justice system.

(2) This lecture, although encompassing the issues relating to justice, approaches the much wider question of the needs of a nation and its spirit. Those needs can only be met if the nation has a government structure to make such laws. In modern times the governmental structure of a nation is best examined through the generally accepted principle that powers and responsibilities of a nation are shared between three branches of government - the Executive (commonly called the government), the Legislative (the parliament) and the Judicial (the courts), each being independent of the other, but being interdependent on each other. To make this highly complex subject more "digestible", the focus in this lecture will be on these universally accepted core components of government and law making.

(3) Where a nation is part of a Union, as Wales is, the extent of the laws it should make for itself also depends on the laws that the Union should make – itself a question that involves consideration of the purpose and nature of the Union and the powers allocated to it.

(4) x

(5) As it is important to draw a distinction between a nation and other entities such as a region or cities such as London or Manchester, the application of the term "devolution" to both the allocation of powers to the nations and the entities within England (as is done in the Levelling-Up Bill) adds confusion. "Devolution" is an appropriate word where it is used historically, but it is better now to speak of the allocation of the powers of the executive, legislative and judicial branches of government to nations and to a Union rather than to use the term devolution.

(ii) The development, life and abolition of laws for the Welsh nation

43. The history of the law that developed and prospered for the Welsh nation culminating in about 945 with the Code of Hywel Dda is today much better known in Wales. There are at least seven main points.
44. X
45. X
46. X
47. X
48. X
49. X
50. Those Welsh laws were a codified and sophisticated system, administered by Welsh judges, of which it can be rightly said that they provided an identity and focus of unity for the people of Wales and defined its people as a nation.

51. The Acts of Union of 1535-1542 unified England and Wales and applied English law to the whole of Wales. Welsh law and customs ceased to have effect. English was made the language of the courts. Although the Courts of Great Sessions were created for Wales and lasted nearly 300 years, their abolition in 1830 completed the absorption of Wales into the legal system of England. Just as Wales became a world centre of the industrial revolution, Wales ceased to be a nation with its own law as a defining characteristic as there was nothing that differentiated it from the law of England. This also coincided with some English nineteenth-century views of Wales characterised in terms of the Encyclopaedia Britannica entry “Wales see England” and the attempts to supress the Welsh language.

(iii) The changes and ambitions in the nineteenth and early twentieth century

52. However, this total extinction in the first part of the nineteenth century of Welsh law and Welsh courts as a defining characteristic of Wales was only for a very short period. The late nineteenth century saw changes –

53. First the UK Parliament passed three pieces of distinct general legislation which applied solely to Wales, thereby beginning to acknowledge that Wales as a nation needed its own law

54. Second were the attempts to establish Welsh institutions of government, including a legislature that would make law and courts that would interpret and administer that law for Wales. The aspiration, although attracting only very small support, was considerable; it was accompanied by books by eminent professors and lawyers that sought to give a popular history of Wales as a nation and of the history of Welsh law. It was the basis of an ambitious vision driven by the existence of the native Welsh laws but also by memories of the Courts of Great Session.
55. x
56. Ambitious and far sighted though this vision was, it is important to contrast it with the attitude taken to commercial law at a time when Cardiff was one of the great ports of the world, Wales a significant industrial economy and there was much legal business in Cardiff.
57. X
58. Many commercial cases were heard there until the establishment of the Commercial Court in London in 1895 when it all moved to London. If there had been a separate jurisdiction with Welsh courts, it was likely that Cardiff would have developed as a venue for the hearing of disputes given the concentration of the shipping and coal industries. After all the magnificent civic court building has on its pediment "Commerce and Industry" reflecting the vision of the early twentieth century for the cases to be heard there; it is now simply used for criminal cases. However I am sure the cases would have been determined under English commercial law as that would have been the in the interests of Wales to use - the theme of the second and third lectures in relation to transnational commercial law.

(iv) The stages of rebirth in the twentieth century

59. The ambitious vision for the restoration of law-making powers to Wales died shortly after the end of the First World War. The restoration of some of the powers

to Wales over 75 years later occurred in very different circumstances. There are three salient events to note.

(a) The creation of an Executive for Wales as part of the UK Government

60. Although during the rest of the twentieth century there were renewed campaigns for Welsh Institutions, it was the creation of the post of Secretary of State in 1964 which recognised Wales as a distinct nation in terms of the executive branch of government.

61. x

(b) The transfer of the Executive power to the Assembly in 1999

62. In 1973, the Report of the Royal Commission on the Constitution chaired by Lord Kilbrandon put forward separate schemes for the governance of Wales, Scotland, Northern Ireland and the English regions. 6 of the 13 Commissioners recommended legislative devolution for Wales and Scotland; this would have given Wales the law-making power of the UK Parliament in various fields to a Welsh Assembly with Welsh Ministers and a Welsh Civil Service. They considered that it was right to do this as it recognised the national identity of Wales, even though Wales did not then have a separate legal system.

63. x

64. However, in 1975 the Labour Government chose one of the different possible schemes which the Kilbrandon Commission had considered, namely "Executive Devolution". Under this scheme the Executive powers which the Secretary of State for Wales had accumulated since 1964 would be transferred to a directly elected Assembly, but it would not be given any of the legislative powers of the UK Parliament . The essence of Executive Devolution was that the powers transferred would be those the Secretary of State held as a Minister in the Executive Government of the UK with limited powers to make secondary legislation.

65. X

66. The UK Parliament enacted legislation in 1978 to provide Wales with Executive Devolution, but was made dependent on a referendum in which it was rejected.

67. Little happened between then and 1997 to examine what Wales needed in terms of the three branches of government. What was offered to Wales in 1997 was the power of the Executive branch of government, Executive devolution of the same type as offered in 1978. Over the further years that had elapsed, the Secretary of State for Wales had accumulated more powers, success depending to a considerable extent on the influence and views of the Secretary of State for Wales and the willingness of Whitehall Departments to transfer - the two most opposed being the Home Office and what is now the Ministry of Justice. It is hardly surprising in the light of what had happened in 1978 that "Executive devolution" was taken forward without debate.

68. I would like to emphasise important features of this transfer of the Executive powers of government:

a. The powers of the Secretary of State which transferred to the National Assembly were powers which were intended to be exercised as part of the Executive Branch of Government in cooperation with the cabinet colleagues of the Secretary of State and under the principle of cabinet responsibility. As Professor Richard Rawlings memorably said " Wales has a form of government which may safely be described as like nothing else on Earth".

b. These Executive powers had been accumulated for the most part at a time of the UK's membership of the EU and therefore large swathes of certain fields were the province of the EU and not the UK government. There was therefore an EU legal framework , not a UK framework, in which many of the powers could be exercised, particularly in respect of the environment, industrial subsidies, and agriculture.

c. x

(c) The transfer of further powers

69. **i**t was soon apparent change was needed and change there has been.

70. X

71. X

72. X

73. x

Time this evening does not permit examination of the three further phases of Welsh devolution under which real legislative powers were transferred but with wide ranging restrictions. I will move to an assessment 25 years on.

3. AN ASSESSMENT 25 YEARS ON

74. I begin by emphasising how much has been achieved in the making of law for Wales in the 25 years. That achievement was reviewed by Lord Lloyd-Jones in his magisterial Cymmrodorion lecture in November 2022. In summary:
    a. There are extensive areas in which the Senedd can exercise legislative power to make law.
    b. Its powers are recognised to be plenary and as generally, but not always, needing no justification other than the legislation is the will of the legislature.
    c. Codification (building on a consolidation of legislation) has commenced through the excellent work of the Law Commission and the Welsh Government's long term plans to organise and codify Welsh law.
    d. The equality of the English and Welsh languages in legislative drafting is established; it is implemented through the work of the Office of the Legislative Counsel and the standardisation of terminology.
    e. A significant number of important laws have been passed that reflect the values that the Welsh nation regards as distinctive –
    [examples are the Future Generations Act , the Social Services and Well-being Act and the Renting Homes Act].

75. However it is necessary to return to the question posed as to whether Wales has achieved the structure of government that enables it to make the laws a nation should have and can enact those distinctive laws.

76. Given the magnitude of the achievement in winning back the restoration to Wales of some of its own law, it was tempting sometimes for us, and I count myself

amongst those, to talk up what Wales has obtained. and not to ask the difficult questions. So I will ask 5 difficult questions.:

(i) Does the nature of the powers of the executive and legislative branches of the Welsh government measure up to what a nation needs?

77. No**.**
78. The creation of a legislative branch of government was a fundamental change, but its impact was not permitted public scrutiny in relation to the scope of the powers a nation's legislature should be able to exercise based on the principles summarised earlier. Nor was any rational basis put forward for distinguishing Wales from Scotland.
79. X
80. X
81. x

(ii)Is there undue complexity?

82. Yes**.**
83. There are 17 areas of law in which the Senedd will generally make law. A list shows at first sight the scope of the matters in which it can make law. However, the legal position is much more complex. Although the Senedd has a general power to legislate on any matter, that legislative power is very substantially constrained by what is set out in two schedules which massively cut down that power by reservations and restrictions. That is highly technical, but I can cover it tonight in a short point - The Schedules run to over 40 pages compared to the 17 pages that suffice to restrict the law-making powers of the Scottish Parliament.
84. X
85. X
86. X
87. X
88. X
89. The schedules are so complex that it makes operation and understanding of the Senedd's powers very difficult, hampers proper democratic accountability and is impossible for most people who are not highly specialised to understand. As there

has been no transfer of criminal or civil law-making powers or the judicial branch of government there are further provisions which give the Senedd power to enforce its laws, but again drafted in uncertain and complex terms. There can be no doubt that this produces a severe democratic and accountability deficit as the division of responsibility between Wales and the Union Government is so defectively structured..

90. x

(iii) What is the significance of the absence of the judicial branch of government and the lack of a separate jurisdiction?

91. Considerable. There are two points – judiciary and the jurisdiction – and in respect of each Wales is unique**.**

92. It is right to emphasise that various significant steps have been taken by the judiciary to signify the separate identity of Wales within the judicial system of England and Wales.

93. There is, however, a total absence of the Welsh nation's own judicial branch of government which is a universal part of the structure of the government of a nation. There was only a tiny transfer in 1998 of Tribunals for which the Secretary of State had been responsible and a small increment in 2017 particularly by the creation of the office of President of Welsh Tribunals.

94. Wales is therefore unique in the world in not having its own judicial branch of government, for unlike any other nation with a legislature, it does not have its own judiciary. That would ordinarily be achieved by (1) judges who live in the nation and understand the way in which the law enacted by its legislature is to be interpreted and developed in context (2) who can have a close working relationship between the leadership of the judiciary and the executive and legislature as exists, for example, in London and (3) be able to provide the practicalities similar to those in Canada for bilingualism in the courts.

95. x.

96. x

97. In addition to this deficiency, Wales does not have its own jurisdiction. Each other legislature has its own jurisdiction, not least because one of the purposes of a jurisdiction is to demarcate difference in law. However, again uniquely in the world, Wales does not as a separate jurisdiction was not created on the transfer of legislative power to the Senedd; it continues to be included within the jurisdiction of "England and Wales".
98. x.

(iv) What has been the effect of Brexit?

99. There has been a failure to provide a proper governance structure to replace what was provided when the UK was a member of the EU.

100. As mentioned the context for the grant and exercise of many executive and legislative powers in Wales was the UK's membership of the EU. That provided the legal framework of detailed EU legislation in relation to the functioning of the EU internal market and on the way the UK functioned given the role of the EU Commission in so many matters.

101. Although assurances were given that leaving the EU would make no change to the powers that had been conferred on the Welsh legislature and executive, there was again no proper examination of the adjustments that were necessary in the UK. It should have been clear that workable legal mechanisms had to be created for a common approach between the national governments and for standards for the UK internal market. It was envisaged that in place of the detailed legal framework established by the EU through its institutions, the policy, rules and standards would be set by a system of Common Frameworks – unenforceable agreements between the four governments of varying lengths and complexity covering many aspects of the internal market. However, even this approach was considerably undermined by the unilateral decision of the UK Government to proceed with what became the UK Internal Market Act 2020.

102. Common Frameworks apart there is no other effective mechanism in place for the cooperative exercise of powers on a joint basis for the UK internal market. The Joint Ministerial Committee proved ineffective after Brexit and the successor arrangements established in 2022 with the Prime Minister and Devolved Heads of Government Council at its apex and the Inter-ministerial Standing Committees, Inter-ministerial Groups and different levels of mechanism for dispute resolution beneath have yet to show there has been a material change. Other necessary adjustments consequent on Brexit have not been made.

(v) Should there be concern about the operation and nature of the Union?

103. The answer to both is yes.

104. First, the unwritten constitution of the UK is dependent on governments abiding by common understandings of the way it should operate – Constitutional Conventions. A central part of the arrangements made in 1997-8 was the development of the Sewel Convention. It provides that the UK Parliament will not normally legislate in matters within the competence of the Scottish, Welsh and Northern Ireland legislatures without the consent of those legislatures. It worked well until the legislation consequent on Brexit. Since Brexit consent has been refused on occasions and changes have been imposed rather than agreed, the process beginning with the EU (Withdrawal Agreement) Act 2020 and the UK Internal Market Act. Undermining this convention has serious long term implications.

105. x

106. Second, a lack of consensus on the nature of the Union has also developed. In 2014, the Chairman this evening, when First Minister, explained Wales' perspective of the Union at the Institute of Government and that position was set out more formally by the Welsh Government in 2021 when it said that the UK was best seen as a voluntary association of nations.

Summary of the context

107. The short historical summary and the answers to these five questions make it now possible to complete consideration of the factors that should determine the laws a nation should have by considering the effect of membership of a Union of nations.

4. THE POSITION OF A NATION WITHIN A UNION

108. It should be obvious that the nature and purpose of the Union are an important factor in determining the law-making powers needed for nations within a Union. These delineate the distribution of law-making power within the Union. This point must be particularly stressed in relation to the union that is the UK, as although many often speak of strengthening the Union, it is necessary also to be clear about the nature and purpose of the Union. As has been remarked "A policy of drift will never result in united strength".

(i) What is needed for a nation within in a Union

109. In explaining this last factor for determining the laws needed for a nation within a Union, what is central is the nature and purpose of the Union and certainty as to the complex questions which arise as to the distribution and exercise of governmental powers across the Union.

110. x

111. The purpose of the Union is the central factor in determining the scope and exercise of power respectively by the Union government and the governments of the constituent nations or states. For example, where a Union has as its purpose a wide economic union, then very difficult questions arise, as experience has shown, as to the extent of issues that are said to involve economic matters, as so much can be said to involve an economic matter. In other areas where the purpose of the Union either includes or excludes a specific purpose, then the difficulties can be few. For example defence and the maintenance of armed forces was never a power allocated to the EU; and it has not been argued that defence and foreign affairs is other than a matter for the Union Government in the UK and not for its constituent nations. It is a defined subject area and not an area that gives rise to argument.

112. After determining the purpose of the Union, then there are a number of further factors including not only coherence and lack of complexity and a means of resolving disputes but in particular:

a. There will be some powers which need to be exercised in co-operation; a stable, legal, political and administrative framework and mechanism for this is essential.

b. X

c. x

d. The comparative size and economic power of the entities that comprise the Union will be relevant. In the Union that is the UK, there is the complicating factor that England is by far the biggest and wealthiest nation and that the Union government is also the government of England, often making it difficult to determine in which capacity it is acting.

(ii) The question of sovereignty

113. In resolving these questions it is not in my view helpful to conduct the debate through the lens of sovereignty. Some regard the traditional nineteenth-century view of sovereignty as central to the issues; our chairman when First Minister and the Welsh Government, as just mentioned, have put forward a different view. Some discussion is necessary, if for no other reason than to dispel myths and deal with practical issues, but there is a real danger that sovereignty can obfuscate the issues relating to a Union for four principal reasons:

a. Although in pure legal theory a nation state that is not part of a Union is traditionally treated as “sovereign” or called a “sovereign state”, because it has an unconstrained ability to make any law it wants, there are in fact real practical constraints on its ability to do what it wants arising from multilateral treaties it enters into or bilateral treaties made with specific states.

b. The use of the term ‘sovereignty’ has given rise to a confusion between what has been termed a pragmatic definition of sovereignty and an ideological one, as pointed out by my fellow native of Ystradgynlais, Dr Rowan Williams in May 2023.

c. Sovereignty has become a populist term, as was evident in the arguments over Brexit.

d. The issues are better addressed by concentrating on the pragmatic. For example, the Trade and Cooperation Agreement between the UK and the EU made in 2021 places considerable limits on the power of the UK Parliament to legislate in areas such as state subsidies as is evident from the terms of the Subsidy Control Act 2022. However, that Agreement was made on a pragmatic basis and no issue was raised as to its effect on sovereignty.

Nor is it necessary to expend energy on terms such as “Federal” “Semi-Federal” or “Quasi Federal”.

114. x

5. POLITICS AND PRINCIPLES

115. Having explained the position of a nation within a Union, it is now possible to draw some general conclusions about the law a nation needs.

(i) The practicalities

116. Accidents of history, relative political power and political wrangling will often determine the powers of government which enable a nation to make the laws it needs as a nation.

117. Wales was, as explained, allocated some powers of executive government at a time when there was no realistic alternative but to take what was on offer. Since then, as is more usually the position, argument is centred on relative power and political wrangling. However, if a nation or the Union of nations is to achieve the stability necessary to benefit the nation and the Union then the question as to the laws a nation needs and the powers to make them must be addressed by references to the principles set out.

(ii) The value of principles in enabling the peoples of a nation to secure their ambitions and their identity.

118. The question posed at the outset was why a nation needs its own laws. On the criteria identified, the promotion of the nation’s ambitions and values, the

promotion and strengthening of its distinct language and culture, its ability to create and administer simpler and more accessible laws and to address the concerns of the people of the nation are the factors that should primarily govern the question as to laws needed for a nation. Where a nation is part of a Union, the purpose of the Union is another critical factor as it is determinative of the powers that the Union needs and powers which need to be shared with the nations of the Union.

6. WHAT LAWS SHOULD WALES AS A NATION HAVE?

119. May I now finally test the principles by using Wales as a case study by asking the question - what are the realistic options for Wales, as a nation, to achieve a rational, logical, coherent, and stable system of law governed by the factors just enumerated?

(i) Option 1. The existing system

120. The acceptance of the very limited offer of the transfer of the powers of the Executive branch of government made by the UK government in 1997 achieved an initial restoration of subordinate law-making powers. As explained, when powers of the legislative branch of government were transferred in 2011, a proper opportunity to reconsider the position was not offered. In the further change in 2017, there was no justification for the extensive reservations, despite the then Welsh Government's strenuous work exemplified by the publication of its own Government and Laws in Wales Bill. Nor on either occasion was the different treatment of the Scottish and Welsh nations justified.

121. The way in which the current powers have been defined does not permit laws to be made in a rational, logical, coherent and stable way. Two examples must suffice:

a. It does not permit laws to be made to deal with basic interlocking problems as Wales cannot develop more effective and coherent laws and policies for dealing with crime relating to or fuelled by drugs, or addressing youth crime, or dealing with prisoners on release or determining how there is a coordination of law and long term policy on issues in health, education and

criminal justice which are interrelated. The people of England, Scotland and Northern Ireland have the benefits of coordination, but the Welsh nation is denied that for no reason.

b. Although health, education, ambulance, and fire services in Wales are entirely within the responsibility of the Senedd, the Strikes (Minimum Service Level) Act 2023 now enables the UK Government to set minimum service levels in Wales for these services, even though it has no responsibility for these services and therefore lacks the necessary knowledge to set minimum standards.

122. Although maintaining the existing system is an option, it, I think follows from the principles I have set out as to what a nation needs, it does not meet those principles.

(ii) Option 2: Transfer of the powers of the judicial branch of government and widening specific legislative power

123. A second option is to transfer the powers of the judicial branch of government, to add more powers of the legislative branch of government by a simpler structure so that the principal deficiencies are cured.

124. It follows from the principles factors I have set out that a much wider range of laws is needed. The restrictions on the law-making powers need to be narrowed. If that were the option pursued then I would anticipate that the following would be an example of the laws the Senedd could make and one must suffice for this evening.

125. *Criminal law and policing:* The reasons for allocating criminal justice are set out at length in the report of the Commission *Justice in Wales for the People of Wales*. The report is premised purely on the practical and pragmatic, not the wider issues canvassed in this lecture. There has been no reasoned answer to it. One illustration of why the present position is untenable is demonstrated by the fact that Wales cannot make its own dangerous dogs legislation although Wales has a very different economy, demography, geography, and traditions to England.

126. X

127. X

128. x

129. Making these changes would not be difficult. It would have the benefit of simplifying the complexity of the current system. Nor would it be difficult to transfer the judicial branch of government and create a Welsh jurisdiction as recommended by the Commission on Justice in Wales. No reason for denying to the Welsh nation its own missing branch of government has been given. It is always possible that it is believed that Wales is not capable of exercising judicial power; but this is irrational as it ignores the contribution Welsh judges have made and their originality. It is possible that it is thought that giving Wales the powers of the judicial branch of government might make it too much like Scotland and therefore have to be treated in the same way As no explanation has been given, it is probable that there is no rational explanation. In any event, it is impossible to provide an answer without the explanation for the denial.

130. However there are difficulties in principle with this option.

131. x

132. It does not address the issues relating to the Union or of the machinery necessary for a workable interrelationship of the branches of government within the Union.

(iv) Option 3: The ability to make law save where powers are reserved for the purposes of the Union

133. The easiest and simplest option is one which meets the principles I have set out and one which is likely to produce a stable system. That is achieved in the most straightforward way by starting from the premise that all powers are allocated to a nation save those which are needed for the Union government and testing the allocation against the other criteria I have set out.

134. This is again not the place for a detailed consideration of the functions that are required for a Union. One of the schedules to the Government of Wales Act sets out some of the core functions such as defence and foreign affairs, but its complex and detailed structure is not the best starting point, A better one is the Act of

Union Bill introduced into the House of Lords by Lord Lisvane in October 2018. It has 26 paragraphs over 4 pages which set out the functions of the Union. It is well drafted, concise and provides an excellent starting point for a scheme of central functions that is logical and shows that there are clear matters for the Union such as defence and foreign affairs.

135. Resolving the Union function is but part of the need. It is clear from experience that although functions such as defence and foreign policy can be clearly defined areas for a Union, there are difficult areas such as those relating to the economy which are a function of the Union and a function of the nations. It is hard to see how this can be managed without a stable legal structure of which the Union and the national governments are part. This is exemplified by issues that have arisen such as (1) provisions and machinery to ensure coordination of Welsh Government Funding and UK Government Funding from the shared prosperity fund or its successor the levelling up funds or (2) the need for powers for both the national government as well as the UK Government to have adequate powers in relation to the control of subsidies.

136. We have reached the stage where in my view it is clear that the law relating to the purpose and functions of the Union needs to be reconsidered before there can be the necessary clarity and stability in relation to the scope of the laws the nations should make

137. x.

138. It is therefore for this primary reason, option 3 is the option that needs the most careful consideration going forward.

Conclusion

139. At the beginning I asked what laws a nation needs and later asked if Wales is truly a nation? Wales is without doubt a nation, but Wales cannot make the laws that reflects its nationhood and its spirit until it is given the powers to make them and its own judiciary to interpret and develop those laws and to be part of the governance of the nation. No stability will be achieved until both those issues and the purpose and function of the Union are addressed by consideration of the

factors I have set out. The debate must centre on principle, not political wrangling and expediency, if the Union that is the UK is to be strengthened and Wales restored properly to what it should have as other nations have.