

Welsh Affairs Committee

Oral evidence: Implications for Wales of the EU Referendum Result, HC 590

Monday 20 February 2017

Ordered by the House of Commons to be published on 20 February 2017.

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Members present: David T. C. Davies (Chair); Byron Davies; Chris Davies; Glyn Davies; Craig Williams.

Questions 1 - 38

Witness

I: Professor Alan Page, Professor of Public Law, University of Dundee.

Examination of witness

Witness: Professor Alan Page.

Chair: Would Byron Davies like to start off?

Q1 **Byron Davies:** Good afternoon. The first question I have for you, Professor Page, is this: you have argued that following withdrawal from the European Union, relatively few competencies would be devolved; can you explain the basis for your position? Has the complexity of repatriating powers been perhaps over-exaggerated?

Professor Page: Certainly; perhaps the best way to do that is to take you back to the work that I did shortly after the referendum last summer. This was work for the Scottish Parliament when, as you can well imagine, there was a great deal of interest in what this would mean for the powers of the Scottish Parliament. Essentially, the question was: what new powers will they get as a result of this process?

What I did, therefore, was take the EU competencies and map on to these schedule 5 to the Scotland Act, which sets out those powers that are reserved to Westminster. Scotland, as you know, has a reserved powers model, which is the model now embodied in the Wales Act 2017, in contrast to the transferred powers, which was the original basis of the Welsh devolution settlement. What I discovered as I went through that exercise, rather to my surprise, was that most of the EU competencies turned out, in fact, to be reserved. I did not start with any expectation or preconception as to what I would find, but I was, nevertheless, surprised that as I went through—and the appendix to this paper sets it all out very clearly—it was reserved, reserved, reserved, reserved, reserved.

Q2 **Byron Davies:** Reserved to?

Professor Page: Westminster. The question is why, and I think the answer, or my explanation at the time, which I think is right, is that the devolution settlement—this feature is not particular to Scotland but applies to devolution settlements generally—is predicated on and based on an economic union throughout the United Kingdom. Therefore, the powers that are reserved are in large measure UK single market rather than EU single market related.

The picture that emerged from that work then was that relatively few competencies would devolve to the Scottish Parliament. I think the ones I picked out were justice and home affairs, agriculture, fisheries and the environment, and the rest, a great slew of powers—all those relating to the free movement of goods, persons, services and capital, and the negotiation and conclusion of international agreements—would all accrue to Westminster. That does not mean, of course, that the devolved Administrations do not have an interest in those powers and the manner of their exercise, but that was not part of the exercise that I was engaged



in. I was simply trying to work out what the implications were for the Scottish Parliament's legislative competence.

I could perhaps make one additional point in relation to that. Talking about those areas that I have identified—justice, agriculture, fisheries and environment—the point I made was that unless the Scotland Act was amended, nothing would automatically change. The devolution settlement would be the same five minutes after, to use the language that is now being used, the UK's withdrawal as it was five minutes before, but the big difference in terms of those areas would be that what were at the time—I used the expression—notional competencies in relation to, for example, agriculture would become real competencies, in the sense of a power to take decisions, including legislative decisions, in those particular areas. Since then, I have used other language in an attempt to capture basically the same ideas: full-fat competence, as opposed to no-fat or low-fat competence; or competence max as opposed to competence light.

These were the two main conclusions that I came to: most would go to Westminster, but in respect of those that would go to Holyrood—the Scottish Parliament—then you were talking about a freedom to take decisions that had previously been taken in Brussels.

Q3 **Chris Davies:** Please do not take this in any bad way, but these are your conclusions. Have your conclusions been supported by anybody else?

Professor Page: I have not come across anybody who has dissented from them. I was rather flattered to discover at a meeting, I think last week, that the Scotland Office—that is to say, the UK Government—is in the habit, when people say ask, "What does this mean?", of saying, "Have a look at Professor Page's excellent paper." I think there is general agreement about my analysis. I am not claiming it is dead right in each and every detail, but broadly it is right.

Q4 **Chris Davies:** As you can imagine, you get a room full of economists and you get 100 economists with 100 different answers.

Professor Page: Right, yes.

Chris Davies: I am just wondering, with legal interpretation, whether—

Professor Page: No, I don't think so.

Chris Davies: You don't; okay. Thank you.

Q5 **Chair:** Can I come back? This has put me in a slightly difficult position, because somebody in the room who is unable to speak at the moment was just giving us a bit of a summary, which I felt one could have interpreted in a slightly different way. Two of the big areas that are currently under the control of Brussels are agriculture and the environment. These are areas that, under the conferred model for Scotland and the model that is coming in for Wales, would imply that Wales—and Scotland, but let's concentrate on Wales for now—will have full powers in those areas. Therefore, if these are the two biggest areas



HOUSE OF COMMONS

of European legislation that impact on us day to day, then one could perhaps argue that this is going to mean a lot more power is being devolved to Cardiff. Is that not fair?

Professor Page: In saying what I said and what I have said elsewhere, I did not for a moment intend to diminish the significance of those areas—agriculture, fisheries and environment. All that I was simply saying was that in relative terms, the powers that would be repatriated to London were more significant, taken in their entirety, than those that would go to the devolved legislatures—the devolved Administrations—which is not to say that those powers are not in and of themselves important. Clearly, they are.

Q6 **Chair:** Brexit would mean that a significant amount of extra power would accrue to the devolved legislatures in Cardiff and Edinburgh. Is that a fact? Is that a fair statement?

Professor Page: That takes us really to the heart of the matter, because that would be my starting point, my assumption: that because those areas were already devolved, full-fat competence would go to Cardiff Bay or to Holyrood. I did this analysis way back last August. Come forward five months and you have the Prime Minister's Lancaster House speech and you have the White Paper, which say on the one hand, if I can recall exactly how the Prime Minister put it in her speech, "I should be equally clear that no decisions currently taken by the devolved Administrations will be removed from them", but at the same time, the White Paper—I think it is paragraph 3.6—puts forward the principle that the repatriation of competencies must nevertheless not lead to new trade barriers within the United Kingdom, which is saying something slightly different. The question then becomes one of how you reconcile these two principles. Can you reconcile these two principles?

Q7 **Craig Williams:** A quick one on this. To understand this—you are putting it very clearly, which is helping—the EU competencies they currently have on areas such as agriculture: the Assembly enforce those competencies. When they dissolve in Europe, they are just going to transition automatically, in your opinion, to the four Parliaments, because they have those competencies at the moment?

Professor Page: Yes, the responsibility at the moment is essentially an administrative and implementing one, rather than taking decisions about the shape of agricultural policy, the key principles that underpin it and so on.

Q8 **Craig Williams:** But it is an interesting way of putting it that you are not repatriating powers; you are simply getting them because you have given or lent them to—

Professor Page: Yes, I think that is right. We use the language of repatriation but, as I say, under the existing devolution settlements those competencies are devolved, and unless we change the settlements that is not going to change.



Craig Williams: Yes, it is a different way of putting it, although it is exactly the same thing. It was much clearer, I think.

Q9 **Chair:** I think you have answered our second question, which is whether you envisage that EU competencies that are devolved will automatically transfer to the devolved Governments on withdrawal, because I think what you are saying is that they definitely will, although you are not so sure that that is giving them a great deal more power in the scheme of things than they already have.

Professor Page: I can go a little bit further if you wish. As I said, the question becomes one of whether you can reconcile these two principles: principle No. 1, we are not going to be taking any powers back; principle No. 2, there should not be new barriers to trade within the UK. We will obviously need to wait and see the Great Repeal Bill to see how, if at all, these principles are to be reconciled.

I think one possibility starts from the recognition that what is currently devolved is less than full competence—the point that I was making at the outset. Add to that the fact that one of the purposes of the Great Repeal Bill is to convert EU law into domestic law. In areas such as agriculture, that is not going to work; existing law is inoperable because it is predicated on the involvement of EU institutions and so on, which will not be a feature of the system or the regime once the UK leaves.

I think what you may be looking at—I am crystal-ball gazing here, since I don't know—is, rather than an EU common agricultural policy, a UK common agricultural policy, which allows the devolved Administrations as much freedom, or possibly more freedom than they currently have, to tailor that policy to their circumstances, but which at the same time ensures that there are no barriers to trade within the UK. That is one way I can envisage of squaring that particular circle.

Q10 **Chair:** Which would imply giving Government at Westminster the ultimate say, because somebody would have to decide whether or not a policy applied by Edinburgh or Cardiff might lead to a trade barrier of some sort.

Professor Page: Yes. I suspect what you would have to do is hammer out a UK-wide formal agricultural policy to which all the devolved Administrations were agreed and signed up.

Q11 **Glyn Davies:** But wait a minute; what happens if they are not? I don't think it is completely fanciful, to be honest.

Professor Page: No.

Chair: I think your question is spot on. I cannot imagine now they would be all signed up or agreed.

Q12 **Glyn Davies:** I am listening to you, and I think it is massively interesting. It depends who the personalities are who are dealing with all this in the end, and you may well find that on the Westminster side there



is some tendency to take the one principle a bit more seriously than the other, if you like. Then on the devolved side, clearly maximising the devolved competencies would be the objective, whereas perhaps on this side it might not be. It is a silly question, really: is there scope there for dispute? I suspect there is, yes.

Professor Page: Yes, unquestionably. All I am suggesting is that instead of regarding agriculture as one single entity, if you aggregate the different elements of it, then it might be possible to reconcile these two positions. The other element, of course, to remember is money—finance. Who is going to pay for this?

- Q13 **Glyn Davies:** Can I throw in one point where I see this sort of problem? It is perfectly easy that one devolved Administration might take up a policy relating to agriculture, say, that would cause severe damage to another, and if there is no overarching power—the one example I have heard about, and you will have heard about, Chris, is the Scottish Government's desire to have a suckler cow subsidy that would transfer all the suckler cows to Scotland, because that is where it is profitable; in the rest of Britain it is not. How would we envisage that sort of issue being resolved? One devolved Administration following the interests that are sensible from its own point of view could have a pretty negative impact on another.

Professor Page: Addressing or avoiding these potential spill-overs would be a key consideration.

- Q14 **Chris Davies:** We have heard a great deal, certainly in the agricultural industry, about the four devolved Governments looking at a—that wonderful word—framework to work within. How would you recommend that a framework be put together in legal terms?

Professor Page: I think you are talking about a framework that is enshrined in legislation—an agricultural Act.

- Q15 **Chris Davies:** You think it would have to be, though?

Professor Page: Yes, I think so. I suspect what we will end up with is the Great Repeal Bill flanked by separate, bespoke legislation in areas such as agriculture, where I think you are effectively starting afresh, because, as I say, the EU common agricultural policy simply will not translate across. You cannot just continue to administer that.

- Q16 **Craig Williams:** How do you think those Acts would interact with the devolution statutes? I am thinking of the recently passed Wales Act 2017. Do you think they will need amending in those overarching—

Professor Page: Yes.

- Q17 **Glyn Davies:** Does that mean amending the Wales Act? Not another Wales Bill, surely?

Professor Page: Yes, I think the implication is that there would need to be some adjustment of competencies under the devolution legislation and



HOUSE OF COMMONS

that, therefore—and there is no getting away from this—the devolved Administrations, the devolved legislatures, would need to agree to it.

Q18 **Craig Williams:** You have started a great deal of fun with that answer.

Professor Page: Well, it would have to be thrashed out and agreed across the UK. I am not saying that that will inevitably happen. It might not happen, but I cannot see how you can get from where we are now to a post-Brexit agricultural policy except on that basis.

Q19 **Craig Williams:** But to amend those Acts you would need the consent.

Professor Page: Yes, I think so. If you did that as part of an agreed, “This is the legislative framework that we are all agreed on”, then the consequential amendments become less controversial than if you are simply saying, “We are taking back this power and you will just have to lump it”.

Chair: This is quite fascinating, but I think we will have to plod on with these questions, if that is all right.

Q20 **Craig Williams:** I suppose we touched on it, but it would be interesting to ask about the existing legal framework and how you think that is equipped for repatriating powers to domestic law.

Professor Page: The simple answer is that it isn’t equipped. We obviously have the devolution legislation, but that is why we are talking about a Great Repeal Bill, and why we are also talking about other individual pieces of legislation. I think immigration and customs have been identified as two subjects for legislation. I can see agriculture and fisheries being another two, and then all of the secondary legislation that is going to be part of this immense amount of work.

Q21 **Chair:** The Welsh and Scottish Governments have stated what they want from the withdrawal process. What impact do you think their demands might have on the UK Government’s negotiating position? It might be better asked as: what impact should they have? I am not sure that the UK Government can negotiate efficiently if they feel that they have to meet certain demands from other parts of the United Kingdom.

Professor Page: I think the UK Government have to be conscious of where competencies lie under the existing settlements, because if you negotiate without regard to where power lies in the United Kingdom, you could run into all sorts of problems when it came to actually implementing whatever had been agreed because of the need for the devolved legislatures’ consent. The UK’s negotiating position has to be informed by a very clear awareness of where power lies within the United Kingdom and what it is that the individual devolved Administrations want in relation to those negotiations. That is not to say that what they want will be uppermost or, at the end of the day, decisive, but it would not be possible to embark on this process without an awareness, if only because without that you would run into all sorts of difficulties later on.



HOUSE OF COMMONS

Q22 **Chair:** What capacity do you think Whitehall but also, perhaps more importantly for us, Cardiff has to take on the extra powers that are going to accrue to the different Parliaments as a result?

Professor Page: I think there is a real issue, and it is not just an issue for the devolved Administrations, it is an issue for the UK Government as well. If you take the example of the negotiation of international trade agreements, where I think it is generally recognised that whatever expertise the UK had in that respect disappeared a long time ago because these things are now all negotiated by Brussels, there is a question about capacity and capability. I think you might end up with transitional arrangements that take account of that. If you take the current Scottish devolution settlement, the Scottish Parliament is acquiring powers on welfare very much on an unfolding, gradual basis, in recognition of the simple impossibility of taking on a whole slew of powers and administering them effectively on a particular day or appointed day.

Q23 **Chair:** Okay. Have we finished on that kind of area?

Professor Page: Might I say something as a supplementary to that? I think a feature of the devolution settlements or of the existing arrangements is this massive disparity between the capacity of Cardiff Bay, which you mentioned, or St Andrew's House, and the capacity that there is in Whitehall. That is manifested in areas such as subordinate law-making—delegated law-making—but we tend to just follow what is done in London. Where am I going with that? There is that disparity, and in talking about what is possible, or what can be achieved from a devolved perspective in terms of EU withdrawal, one has to be conscious of the limitations of capacity and what realistically can be done. It cannot be just a case of grabbing power for the sake of grabbing power, without regard to the actual ability to exercise it effectively.

Chair: We think you have answered the next two questions that we had on our list, so we are going on to question 8.

Q24 **Craig Williams:** To what extent do you think the devolved legislatures have to introduce their own legislation to deal with Brexit? You talked about the EU going up, implementing it and then being divorced, so what kind of legislation do you think they will have to pass?

Professor Page: I would have thought none, in the sense that there is nothing they can do that the sovereign Westminster Parliament cannot do. You could argue, moreover, that in terms of legal clarity and legal certainty it would be undesirable to have different legislative projects proceeding at different paces against a rapidly approaching deadline. Therefore, there is a strong argument, I would have said, for doing it on a UK-wide basis. That said, the possibility is raised, I think in the Welsh Government/Plaid paper, of Wales legislating to protect the devolved settlement, saying, "Rather than going along with this, we will do it ourselves", but one would hope it would not come to that.

Q25 **Craig Williams:** Given that answer, Scotland has a Brexit Minister and



the Welsh Assembly has a Committee looking into Brexit; they are not, presumably, from your answer, going to need any legislation directly. What do you think their outputs are going to be?

Professor Page: I am talking at the moment about primary legislation: the Great Repeal Bill, these individual Acts that I have talked about in relation to customs, immigration and possibly agriculture and fisheries. No, I would not have seen any need for the devolved equivalents. It is obviously a very, very different story when you start talking about the secondary legislation—the secondary law-making—which will be a feature of this process. You would expect Cardiff, Edinburgh and Belfast, assuming the devolved arrangements are restored, to be making their own legislation in those areas.

Q26 **Craig Williams:** In your opinion, they should be not so much focusing on the process but what the outputs are going to be—what comes at the end.

Professor Page: Yes. To go back to my earlier supplementary, I was going to say that we can strip the politics out of it; of course, you can't, but nonetheless there is a very powerful argument for relying on the much greater resources that are available in London.

Chair: Chris, sorry, I was only jumping around there because we were having a quick discussion as to what questions might be done.

Q27 **Chris Davies:** Do you think the Joint Ministerial Committees are an adequate mechanism within which to consult with the devolved Administrations?

Professor Page: It is the only mechanism we have.

Q28 **Chris Davies:** There is a lot going on in the run-up to Brexit, so could we put something else in place? What would be the utopia?

Professor Page: We have the Joint Ministerial Committee, and then we have a sub-committee or a particular committee that is dedicated to the EU negotiations on which all the devolved Administrations are represented. It is still, I guess, in its early stages. It has met on a handful of occasions. There always seems to be quite a lag between a meeting and the communiqué, or the agreed statement of what actually happened at that meeting, being published. I think the last one that has been published goes back to November, possibly December, and there have been meetings since then. Its task, its terms of reference, if I recall correctly, require it to try to arrive at an agreed position. As we have discussed, whether that can be achieved remains to be seen.

I would draw a distinction: it is important to keep in mind that the Joint Ministerial Committee and that apparatus is not the entirety of inter-governmental relations within the United Kingdom. One of the weaknesses—this is a view that I have held for a long time—of the existing arrangements, looking at them in their entirety, is that they rely too heavily on the unco-ordinated efforts of individual Whitehall



Departments. In other words, the quality of the relationship may vary from policy area to policy area. If you take Defra, for example, it certainly in the early stages of devolution had a reputation for being a very, very difficult Department with which to do business from the point of view of the devolved Administrations. As we get into the actual implementation of Brexit, it is those relationships that need to be borne in mind and need to be made to work properly, because, going back to what I said at the beginning about the powers that go to London being more important, you could end up with an endless recipe for conflict, depending on which area you are talking about and the quality of the relationships in that area.

Yes, the JMC machinery is subject to criticism. Whether it will manage to hammer out or arrive at an agreed negotiating position, we will just need to wait and see, but that is only a part of the picture. There is that other element that will be terribly important to the actual implementation of all this; that is what I am trying to say.

Q29 Chris Davies: Just a little bit of leeway here, Chairman. This is not meant as any criticism whatsoever of your learned profession, but I remember when we were down in the Assembly on a visit, we were talking about the Wales Bill and the new legislation that was coming in. I remember talking to a learned professor there who was basically saying over a lunchbreak how he was now looking forward to getting up in the morning because of the new laws that were coming in, and that this was such an historic time. He was lecturing to his students, "This is the time to be in university. This is the time to be around". Do we have to be mindful of learned law academics in times like this? Will the Attorney General be saying the same as you, sitting there? Would he have such an appetite for what you just discussed with us, basically? As I say, this is not meant as a criticism; it is just something for politicians to be mindful of as we go through this great process that we may be looking at lawyers and academics looking to make more of a meal out of this than we need to see.

Professor Page: I think that is an absolutely fair point, and I have seen some signs of that. At the same time, I think it is important, or our common starting point has to be, that this is to be made to work. That is in all our interests, regardless of whether we are professors, lawyers, politicians or whatever.

Chris Davies: I respect your position fully.

Professor Page: In order for it to be able to work, there has to be clarity about where power lies and what the arrangements for the exercise of those powers are and so on. Yes, of course, one should not be trying to make that more complicated than it is; I would agree 100%. But that does not mean that it is not complicated, or that there will not be complicated parts to it.

Chris Davies: All right. I won't push any further. Thank you.

Q30 Craig Williams: Can I take us back to the Supreme Court judgment?



What status would the Sewel convention have with this Brexit process now?

Professor Page: My view, which I have expressed separately, is that the significance of the Sewel convention has not been in the least bit diminished by the judgment. Basically, what the Supreme Court said was that this was a matter for politicians, not for the courts, and that, therefore, they would not pronounce on it or get involved in it in any way. Therefore, the negotiations that we are talking about will be conducted in the shadow of the convention. In other words, they would need to gain the agreement of the Welsh Assembly, the Welsh Assembly Government, the Scottish Parliament and the Scottish Government, to whatever emerges from this process. I think none of that is changed by the judgment.

Q31 **Craig Williams:** You say “need to”; what would be the impact if they didn’t?

Professor Page: This is the way I put it to the House of Lords EU Committee: there is potentially a political cost attached to a failure to get the agreement of devolved legislatures. That might be a cost that you are prepared to bear—“They won’t agree; fair enough. We will go ahead anyway”—but what I would say is, and I am now talking about the Scottish experience, the Scotland Act 2012 and 2016, these were both negotiated in the shadow of the convention. People were pessimistic as to whether or not a deal would ever be done in both cases. In both cases, a deal was eventually done, and the Scottish Parliament’s consent was forthcoming. I think that is where we are on that.

It is by no means guaranteed that there will be consent, and if there is no consent, that does not mean that Westminster cannot go ahead anyway, but I would have thought every effort would be made to arrive at an agreed conclusion.

Q32 **Chair:** Following that through, let’s say we get Article 50 at the end of March, there is two years’ heavy negotiation, and some sort of deal is arrived at in two years’ time, and the Welsh Assembly and the Scottish Parliament, and lots of other people, turn around and say they do not like it. Is it really feasible to imagine that, after all that we have been through and all we are about to go through, any Government could go back to Brussels and say, “Sorry, we have changed our minds. We had it wrong. Can we come back in now, after all?” Would they even want us?

Professor Page: It would not be, I guess, a case of coming back in, in the sense that we would not have left. We would still be part of the EU.

Q33 **Chair:** It would be like your wife walking off with some other bloke down the road, or something like that, and then coming back after a couple of years and saying, “I have changed my mind. Can I move back in? We did not quite get that divorce all the way through, so—”



Professor Page: I think the technical question is: is the notice of intention under Article 50 revocable? I think it is revocable. It would be open to the UK—I say “the UK” without trying to work out who exactly might say it—to turn around at some point and say, “Sorry, we have changed our mind.” But do I think that is going to happen? No, I don’t.

Q34 **Craig Williams:** Because only the member state can say that?

Professor Page: Yes. Tony Blair could not say it, or John Major.

Q35 **Chair:** Finally then, when powers are repatriated, how do we deal with the associated funding of Wales and Scotland and Northern Ireland? Is it time to tear up the Barnett formula and come up with something else? If we just go on Barnett and allocate 5% to Wales, it will not necessarily be very advantageous, because we get slightly more than what we might expect, proportionately, through EU funding. Presumably, you would perhaps suggest we need a new mechanism.

Professor Page: This is not my area, but my understanding is that the only area that is not covered by Barnett is agriculture. One possible way forward there is to rely on what is called the parity principle, which says, essentially, “This is what we are going to do in England. We will give you the money that will allow you to do the same in Wales, Northern Ireland or Scotland. If you choose to do more than that, then you will have to find the money to do it. Equally, if you choose to do less and spend the money elsewhere, then under the existing devolution settlement, you are at liberty to do that.”

Q36 **Chris Davies:** The worry for Welsh agriculture is if they said, “It would be nice if we could put a mechanism in that did not allow that.”

Professor Page: Yes.

Q37 **Chris Davies:** Is there a mechanism that means that they would have to follow the English or British framework?

Professor Page: You would obviously have pressure from agriculture—from farmers demanding that they be treated at least as well as, and certainly not worse than.

Q38 **Chris Davies:** But no legal matter, no?

Professor Page: No, it would be political. The whole point about money and the financial aspects of the devolution settlement is that they are entirely non-statutory. They are based on the Treasury and the Treasury agreement, so there is nothing written into the legislation that says, “You are entitled to x.”

Chair: We are about to cease to be quorate so, Professor Page, may I thank you very much indeed for coming along this afternoon? That is most enlightening, and we are beginning to see what wonderful challenges lie ahead in what I think will be a glorious move towards a new future. Thank you very much indeed for coming along and showing



HOUSE OF COMMONS

us some of the issues we need to look further into.

Professor Page: Thank you.