

Welsh Affairs Committee

Oral evidence: [Brexit: Agriculture, Trade and the Repatriation of Powers](#), HC 402

Tuesday 17 October 2017

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Members present: David T. C. Davies (Chair); Tonia Antoniazzi; Chris Davies; Geraint Davies; Glyn Davies; Paul Flynn; Simon Hoare; Ben Lake; Anna McMorris.

Questions 1 - 39

Witness

Professor Richard Rawlings, Professor of Public Law, University College London

Examination of Witness

Witness: Professor Richard Rawlings.

Q1 **Chair:** Good afternoon, Professor Rawlings. Thank you very much indeed for coming along to the Welsh Affairs Select Committee today. As you know, we are focusing on the European Union (Withdrawal) Bill and the impact on the Welsh devolution settlement. I imagine this will be a slightly longer answer than the other questions, but perhaps you could just briefly, if possible, highlight the areas and the provisions of the Bill that you think are necessary and any shortcomings to it. That is a leading question.

Professor Rawlings: Sure. I think perhaps the best way to open the discussion, Chair, is to think broadly about the different jobs or tasks that the Bill is attempting to perform but looking at those very much from a territorial perspective.

It seems to me that the Bill essentially is trying to do five big things. The first is, obviously, to repeal the European Communities Act 1972. The second one is to stabilise the legal situation. The third one is to reprogramme some constitutional fundamentals for a post-Brexit world. The fourth one is to empower legislative changes by UK Ministers. Then the fifth one is to occupy legislative and Executive space at the expense of the devolved authorities. The so-called devolution clauses, clauses 10 and 11, concern that last aspect. In particular, they involve diverting powers that are being repatriated to this country, or will be in the context

of Brexit, that might otherwise have gone to Belfast, Cardiff and Edinburgh. They are being diverted to London.

Then at one with the concept of building a domestic single market, UK Ministers speak of a holding pattern whereby they will hold the repatriated competencies with a view to then reregulating through common frameworks on the basis of discussions with the devolved Administrations. If we look at the explanatory notes and the delegated powers memorandum on the Bill, they refer to, "A transitional arrangement giving space for intergovernmental discussions as well as certainty after exit". That, however, is not made clear on the face of the Bill.

Q2 **Chair:** In that case, if the Government did what I think you are suggesting, which is not to divert those powers from the devolved legislatures to London, would it be possible legally for the Welsh Assembly, for example, to end, effectively, the UK single market by adopting measures and regulations that would not allow things to be compatible? I am not asking whether they are likely to do that or whether they would want to. I am asking whether they would have the legal right to effectively end the UK single market.

Professor Rawlings: Sure, yes. If there was no diversion, then the situation would be that in their different ways all four Parliaments and Assemblies of the UK—Westminster, Stormont, Holyrood, Cardiff Bay—could take that form of action to disrupt the construction of a common market if that is what they wished to do. Of course, the scope for doing that would depend very much on the scope for devolved competence.

Q3 **Chair:** But they could?

Professor Rawlings: Well, in strict legal terms they would be empowered. For example, if we are talking about the National Assembly, powers would come back to them in the areas of agriculture or the environment, and if they wished to take action, to give an unthinkable example, if, for example, they wanted to have radically different rules on protection against animal disease, that would be within competence.

Q4 **Geraint Davies:** Can I interject, sorry, Chairman? I am interested in your choice of words, Professor. You say the powers would go back to them, but in my understanding over the last 20 years they have never had those powers. How do you define that powers would go back to them?

Professor Rawlings: I was talking about repatriation: where would the powers coming back from Brussels come from; where would they go to?

Q5 **Geraint Davies:** They went from a Westminster Government at the time, 40 years ago or over the last 40 years, and we are talking about your language and use of language here. Going back to Wales or going back to Scotland, where they have never been, in my eyes is not going back.

Professor Rawlings: The way in which I would look at that is as a lawyer: I would look at the wording of the devolution statutes around the

UK. I would look at that and I would say if all that happened was that we repealed the 1972 Act, then where would the powers coming back from Brussels go to? Some would go to Scotland, some would go to Belfast, some would go to Cardiff, and—I think this is a point that really needs stressing—the vast majority of the powers would come back to Westminster. That is because of the fact that the EU does so much by way of regulation around the area of the four fundamental freedoms, things like competition law, things like state aid. Those powers would be coming back to Westminster.

Geraint Davies: Okay, we will leave it there, Chair.

- Q6 **Chair:** Okay. In general terms, if one wants to create a single market either over one nation, four nations or 27 nation states, does one have to have one central authority overseeing the rules and regulations or are there precedents perhaps elsewhere in the world whereby different constituent parts of that single market can all be doing their own thing?

Professor Rawlings: What you see with the EU single market is no single model. Indeed, in a recent book, the EU single market was described as an ambiguous legal concept because it takes so many different forms according to different sectors. For example, if we take competition law, if we go back in time, the European Commission essentially was a monopoly player when it came to the enforcement of competition law. With the growth of the European Union to the 28 states that it now is, much enforcement of competition law became decentralised so that although the Commission still has a key role in competition, so do all the national competition agencies around the European Union.

- Q7 **Chair:** But do they have to comply with what the EU say?

Professor Rawlings: Again, if we look at the question of must they comply, we need to unpack what we are talking about in terms of what it is they must comply with. Some sectors show very high levels of regulation harmonisation. Other sectors are much more flexible, much more generous, if you like, to the member states and authorities within the member states. I think this is a further point that I really want to stress: it is not simply here a question of what lawyers like to call hard law, legislation and case law. It is also about guidelines, benchmarking, peer review, co-operation, negotiation, communication.

- Q8 **Chair:** I had better end this because it is not fair on everyone else, but my point is that there is one central authority deciding shall we be generous, shall we give flexibility or shall we enforce quite strictly. There is one body that is making that decision.

Professor Rawlings: That is not really how the European Union works because what makes up the central body? One of the key central bodies is the Council of Ministers, which consists of the Governments of the 28 member states.

- Q9 **Chair:** But it is still an entity, isn't it? The Council of Ministers becomes one single entity.

Professor Rawlings: There is an entity but it is not right, I think, with respect, to think in terms of a single body. That is not the nature of the European Union.

Chair: Okay. Forgive me, everyone else.

Q10 **Glyn Davies:** Clearly, what is happening with the Bill is that we are creating the EU retained law under the responsibility of the UK Government. I guess that will be corrected—I think that is the phrase that is used—over time. The UK Government will be able to correct that, but the devolved authorities will not be in a position to correct that. That level of unfairness, is that unreasonable or is it reasonable? Are there benefits and disbenefits of that?

Professor Rawlings: If we look at the provisions of the Bill, what we see under the different headings that I was talking about is very much focused on two of them. The first one is the area of empowerment of UK Ministers. This is clauses 7, 8 and 9 respectively dealing with correcting deficiencies, international obligations, and then the ability for implementation of any withdrawal agreement that we have at the end of the day with the EU.

As colleagues will know—and I am sure there are colleagues here who have been involved in proposed amendments—the ambit of those powers of UK Ministers is very wide. In particular, the powers involving so-called Henry VIII powers. We are talking about wide powers to amend, repeal and modify primary legislation. A further point I want to make before I counterpoint that, as it were: I think it is very important, colleagues, to bear in mind that we are not just talking here about the UK Government in this sense. We are talking about the UK Government, which also operates as the government for England. I think that that duality is something that we need to keep in mind throughout the discussion. So, that is that situation.

If we come to the situation with the devolved institutions, we are looking at clause 10 and clause 11. If we start with clause 11, which is the legislative competence one, there are very sharp restrictions on the competence of the devolved legislatures imposed under clause 11. Instead of the current general restriction that you cannot do something that is incompatible with EU law, there is essentially a basic test of incompatibility with retained EU law. The contrast is very stark. In a sense, what we are seeing is quite a significant constitutional rebalancing between the position of central Government and the government for England on the one hand and the devolved Administrations and the devolved legislatures on the other. Perhaps I could put that another way.

Glyn Davies: There are probably about 25 different ways you could put it, I think.

Professor Rawlings: Well, I will pass then.

Glyn Davies: No, I do not think you should pass. I would just like to hear all 25 of them.

Professor Rawlings: All right, if you want to hear me out, that is fine.

Glyn Davies: The thing is this is such a complex area, especially the duality of the UK Government position in terms of being responsible for England and also—

Professor Rawlings: Yes, absolutely, I agree. Let me put it this way because it is a point that is glossed over. It is a difficult point. It is an inconvenient truth, and I should be open with the Committee and explain that my personal take on this is a pro-Union take. I want the Union to survive and prosper. At the same time, I am a devolutionist and I believe that the devolution settlements have been a good thing in terms of the UK constitution. That is where I am coming from.

Q11 **Chair:** What do you think about the EU and Brexit, just so that we can have everything on the table? What did you make of the referendum?

Professor Rawlings: I am not going to disclose to you the way in which I voted. You are perfectly entitled to ask that question, but as I always say—and it is not just about Brexit, it is about general elections—those of us who are not signed up to a particular political party should be allowed to enjoy what generations fought for, which was the secrecy of the ballot box. That is what I always stand on in any context when I am asked that particular question. What I will say to you, because this is a constitutional point, is my own view is that the people of the UK have spoken, that it was an open and free referendum, and that we will Brexit.

Glyn Davies: You diverted me there, Chair.

Chair: Sorry, I did.

Professor Rawlings: No, that is fine.

Q12 **Glyn Davies:** This is an area whereby you can perceive that the UK Government acting as an English government is able to do an awful lot of things that the Welsh Government or the Scottish Government are not going to be able to do. It looks like an inherent unfairness and imbalance in that system. How long would that last, how long would the EU retained powers remain? If it is a temporary position and is eventually sorted that might disappear, but it certainly looks to be a bit imbalanced at the beginning.

Professor Rawlings: Sure. I agree with that, but I want to project it forward because this is, from my Union perspective, an inconvenient truth that England stands to benefit constitutionally from Brexit in a way that the devolved Administrations cannot, irrespective of how one draws common frameworks. Clearly, one can have more common frameworks, one can have fewer common frameworks and whatever, but put that to one side. Why do I say that? Ultimately, Westminster legislates for England and the logic of Brexit—and, of course, this is why many people would have voted for Brexit—is because Brexit brings back parliamentary sovereignty in a real sense of that term. Of course, we could have long arguments about quite what had been given away while we were within the European Union, but all colleagues sitting around this table will know

that the day to day reality was, or has been, that as long as we have been within the European Union, UK legislation has to play according to EU rules so that, in practice, Westminster was constrained on a day-to-day basis. There are extremist arguments one can make, but on a day-to-day basis Westminster was constrained.

That constraint is now being removed for the UK. That also means that it is being removed for England. Because Westminster exercises legislative power in respect of England, parliamentary sovereignty will apply in respect of England. That is where we are constitutionally. The devolveds will not be in that position because by definition, however many common frameworks we do or do not have, the devolveds cannot be in that position because they are devolved authorities, which means that they have devolved powers but that there are also reserved powers. That is the nature of devolution.

Q13 **Chair:** That is not entirely correct, because Cornwall will have less power than Wales in this.

Professor Rawlings: Yes, but I am talking about the four constituent nations of the United Kingdom.

Q14 **Chair:** But Wales will have a lot more influence than any particular part of England.

Professor Rawlings: My comparator that I am using is the four constituent nations of the UK, and the key point that I am trying to get over is that in our system, Westminster not only legislates for the United Kingdom but it also legislates for England. Both of those obviously with the moving from Brexit will be covered by parliamentary sovereignty in a way that cannot be the case when it comes to the devolved Administrations.

Q15 **Glyn Davies:** We have established, I think, where we are and we have established the potential unfairnesses in the system, if you can call them unfairnesses, the disparities or the differences. Somebody could turn round to me in conversation and say, "What do you want to do about it? How do we resolve this?" How do we go forward to remove those things—with a very short period for retained EU law to remain in place, or never bringing it in at all and finding some way of dealing with it beforehand? What is your answer?

Professor Rawlings: Okay. That allows me a little bit of advertising, if I may.

Glyn Davies: A consultancy job.

Professor Rawlings: In this place tomorrow I am launching a pamphlet on these very issues. What I am arguing for is a set of initiatives. I do not believe that the answer is purely legal. I believe that it is partly legal, partly political and partly administrative. I think we should probably keep focused on the legal, but I do not know whether colleagues have had a chance to look at the communique from yesterday's Joint Ministerial Committee, which I regard as a really significant step forward.

What you see there is the First Secretary of State for the UK Government sitting down with Ministers from Scotland and Wales, and also, of course, the territorial Secretaries of State, and they have agreed that, yes, there is a case for some common frameworks in areas of otherwise devolved competence. They have set out a working definition of what common frameworks are and they have begun to establish some principles for when those common frameworks might be created and what they might consist of. I am all in favour of that. To be frank, that is where I think we should have been six months ago, but we are there now and we have got there, and in my view that is a very good thing.

What we now have to do is to flesh out what those common frameworks might look like. One of the things that I am trying to do in my pamphlet tomorrow is to explain what the possibilities of different common frameworks might be and how colleagues in the civil service might begin to write them. I am very happy, if it would help the Committee, to provide Clerks with that pamphlet if that would be useful.

Chair: I think we would appreciate that.

- Q16 **Anna McMorris:** I just wanted to ask your opinion. For me, it seems that we are on the path to a bit of a constitutional crisis with devolved powers at risk and UK Ministers or English Ministers taking decisions on Welsh matters that at the moment Welsh Ministers decide upon. I would like to hear your views on that, but also about how we will be locked into a framework, an outdated framework perhaps, that the Welsh Government or the Welsh Parliament would like to change or update or take policy and legislative decisions on and it will not be able to do that because Wales is not having the powers repatriated.

Professor Rawlings: Just quickly to finish with Mr Davies's question because I did not get the other side, clearly, then, we have very wide powers in clauses 7, 8 and 9 for UK Ministers, and then we have a clamping down in 10 and 11. We can look in a bit more detail at that. Coming to your point, from my pro-Union perspective, I do not want this constitutional smash-up to happen. That is what I am trying to avoid.

- Q17 **Anna McMorris:** Do you think we are heading for that, then?

Professor Rawlings: I think we are quite some way from the ultimate constitutional smash-up. If by that you mean the Scottish and Welsh Assemblies refusing legislative consent, is that what you had in mind when you asked that question?

- Q18 **Anna McMorris:** That is one outcome, or it is just the power grab from UK Ministers potentially taking, then, decisions as English Ministers on matters that are currently devolved to Wales.

Professor Rawlings: Okay. I think we should be clear about this. As the Bill stands, the Scottish Parliament is not going to consent. The Welsh Assembly is not going to consent. I have not talked about Northern Ireland because Stormont is not sitting, so it is difficult to talk about legislative consent in relation to Stormont when it is not sitting. I will keep focused on Scotland and Wales. That seems to me something one

has to work into the equation. I will be blunt about this as a pro-Union person. I do not think that it is realistic and responsible statecraft on behalf of the UK Government to bring forward clauses that everybody must know the First Ministers of Scotland and Wales and their Governments and the Scottish Parliament and Welsh Assembly are not going to consent to. From a pro-Union perspective, my perspective, I do not think that that is proper statecraft.

What I am interested to do is on the one hand develop ways in which we can move the common frameworks discussion forward, which is what I have been talking about, but also ways in which we get away from that constitutional smash-up because I do not think that does the Union any good at all.

Q19 Anna McMorris: Do Wales and Scotland actually have the power? Although much has been said about this, in your opinion do they have the power to veto this?

Professor Rawlings: To veto, no, because it is quite clear from the Supreme Court judgment in the Miller case that when it comes down to issues of legislative consent those are political matters. That seems to me to be entirely right in our parliamentary tradition that those are political matters, they are not legal matters, so that the Scottish Parliament and the National Assembly for Wales and Stormont could all say, "We are not consenting". In those circumstances, it would be for Westminster to decide whether it wished to proceed with the Bill notwithstanding that refusal of legislative consent. Clearly, as a matter of law, Westminster could do that.

Perhaps I should add that I would not assume that Westminster would go down that route. Clearly, there would be discussions in the House of Commons. I think there would be particular discussions about that in the House of Lords. Indeed, I would be very surprised if the House of Lords would accept this Bill without legislative consent from the Scots and the Welsh. That is, if you like, a constitutional and political call, but I think the House of Lords would see itself as having an important role in the protection of the Union. Going down the route of overriding refusals of legislative consent—to repeat, from my Union perspective—is not where one wants to go.

Chair: Well, you have successfully asked Geraint's question.

Anna McMorris: Oh, sorry.

Chair: He has done that before to people, but I will call him next.

Q20 Geraint Davies: I do not mind; I did not really like my question. Can I ask you a different question, bringing you back to some of your assumptions? What you seemed to say to us was that the Bill will essentially bring sovereignty back to Westminster from Brussels. What I say to you is under the current drafting of the Bill, what happens is that MPs are not given more sovereignty. Instead, the power essentially goes to Ministers, who can strip away the rights and protections that we enjoy from Europe and just make these changes willy-nilly. In the case of

devolution, the Welsh Assembly works within the framework of a settled set of directives on water quality or whatever, and works in a subsidiarity way and devolved way within that.

Now we will have a situation whereby Ministers, without reference to Parliament can, as appropriate, remove rights and protections, and those rights and protections do not have enforcement mechanisms. The legislation is so broad that the courts cannot bring effective judicial review either. I put it to you that what you said earlier is wrong—namely that MPs like me, or English MPs rather, will not have more power. The Executive will have more power, as well as the problem of Wales having even less.

Professor Rawlings: What I said was that it will be central Government that will be the big winner here. Central Government through Westminster has the power on a day-to-day basis of parliamentary sovereignty at its disposal. You are absolutely right to make the point that the way the Bill is constructed is that, first up, it will be UK Ministers who are making many of these key decisions under clauses 7 and 9.

That is why, wearing another hat because I am also involved in the Bingham Centre for the Rule of Law, we are very concerned about the width of the drafting in favour of ministerial powers because that, to me, is not the parliamentary way. To me, the parliamentary way would be much more through primary legislation, but given the amazing workload involved in Brexit my view would be that, yes, we are going to have to have large amounts of ministerial order-making power, but that it is crucial that we have firm parliamentary controls over the exercise of those ministerial powers. I happen to be a big believer in the idea of triage and filtering.

Just to end, the point that I was making in relation to Westminster and parliamentary sovereignty was about the future. I think it is very important to think not only in terms of the withdrawal Bill now but what it is going to look like after Brexit. After Brexit, we will be dealing with a situation of parliamentary sovereignty. That is the point that I was trying to make. There is a danger, because the Bill is so important that we only focus on the Bill, but it is important to look beyond the Bill and think about what the constitutional situation will be like. In England, it would be parliamentary sovereignty and for the UK parliamentary sovereignty but, of course, it cannot be for the devolveds.

- Q21 **Geraint Davies:** My point was that there would be less parliamentary sovereignty for England and Wales because the power would go to Ministers, so there will not be more. Finally, if you take normal people in my constituency in Swansea enjoying clean beaches, clean water, recycling and clean air to a certain extent through directives that support our environment, as well as directives on clean food and non-hazardous chemicals, all these things, those can just be stripped away with a stroke of a pen by a Minister, be it an English Minister, without any consent from Parliament. How is that passing sovereignty to Parliament?

Professor Rawlings: As I have said, I am trying to talk about both the situation under the withdrawal Bill and then after the withdrawal Bill. Coming back to the Bill, as I said, I would advocate sharper restriction of those powers. I think they are too widely drawn. I am particularly interested in the idea of triage, because it seems to me that it cannot be beyond the wit of man or woman to assemble a Committee of senior parliamentarians backed up, as this House can do, with really good parliamentary staff going through the multitude of draft instruments we are now going to have and saying, "Okay, that is technical, that is technical, that is technical, that has to be done, no problem. These are important. They have to be debated in the House". That cannot be beyond the wit of man or woman to go down that route and that, to me, is the best parliamentary solution we can manage in what is an unprecedented situation where at the end of the day we do have to have legal certainty.

Q22 **Geraint Davies:** But that is not the plan, is it? That is just your—I will stop there.

Professor Rawlings: No, but you are asking me. I have made it pretty clear, I think, that I am unhappy with major aspects of the withdrawal Bill. I can only explain to you my position on how the withdrawal Bill should be constructed.

Q23 **Simon Hoare:** Professor, like you I am a Unionist and concur very much with your prediction that the House of Lords will put on the cape of constitutional probity, as it were, a sort of guardian of the Union, of that sacred flame. Can I ask you the "so what" question? Edinburgh and Cardiff do not vote to agree—ie they do not give consent. Westminster as an Executive Government say, "That is very interesting, but we are going to crack on". Now, clearly there would probably be a ramping up of nationalist feeling in both Scotland and Wales. That might very well translate into results in some ballot boxes at some point, but with the exception of that—and often that flows with the natural vagary of the popularity or otherwise of political parties—so what if they do withhold? This may be an inelegant metaphor, but is there a loaded revolver that they can use, that either could use?

Professor Rawlings: I am a lawyer so I cannot pontificate on the political situation.

Q24 **Simon Hoare:** That is the job of lawyers, isn't it?

Professor Rawlings: No, I can pontificate on law but pontificating on the political situation in Scotland is not one that I would want to do.

Simon Hoare: Yes, let us restrict ourselves to Wales.

Professor Rawlings: Sure. I would make a negative and a positive response. The negative response would be, okay, so Westminster could do that, but do not expect too much by way of co-operation. Do not expect harmonious relationships in future. Further, when it does come to Scotland, as a pro-Union person it seems to me that what you are

suggesting will simply flow into a narrative that I do not particularly wish to see constructed.

Q25 **Simon Hoare:** Yes, I agree, but there is not a gun?

Professor Rawlings: There is not a gun at the end of the day because—

Q26 **Simon Hoare:** There may be a frostiness of relations.

Professor Rawlings: There may be a frostiness of relations, and at the end of the day we may get to a situation where Scotland has a second independence referendum.

Q27 **Simon Hoare:** Which we would have to give consent for.

Professor Rawlings: Yes, absolutely—I said we may get to that position. I have to remind colleagues that when the independence referendum was allowed by the then Prime Minister it was not said that that was the only one that would ever be allowed. That was just not said. I am not suggesting that we are looking at a Scottish independence referendum next year, the year after or whatever. I am neutral on that, but if Westminster goes down this route, in a situation in particular where Scotland voted to remain in the EU, we are feeding a narrative and I think that that is very significant.

I want to put this a positive way round. I was struck when I read the Prime Minister's speech in Florence when she said this. She said that part of our job here is to engender a tone of trust, which is the cornerstone of any relationship.

Paul Flynn: Who said that?

Professor Rawlings: This is the Prime Minister in her Florence speech.

Paul Flynn: Really? Oh, well, I will have to listen more carefully.

Professor Rawlings: She said leaders should attempt to engender a tone of trust and that this was the cornerstone of any relationship. I would say that, frankly, trust begins at home. It is not just a question of trust with European partners for the purposes of negotiations. It is about trying to build confidence and trust with other people—other colleagues around the United Kingdom. I am not naïve, and I know that can be difficult, but that for me is the starting point.

Chair: Professor, I had better bring in a non-Unionist now, I think, and then perhaps I could turn back to Paul Flynn for the fifth question.

Q28 **Ben Lake:** Professor, you mentioned that there is a constitutional rebalancing in terms of the power. I wonder if I could ask two questions on that. The first is about the delegated powers that are granted to UK Ministers in the Bill as it is currently drafted. Is there a precedent or perhaps any useful comparisons we can draw so as to give us a little bit of context in terms of the depth and breadth of them? The second one is more related to a comparison of the delegated powers between UK Ministers and the devolved Ministers. It is certainly fair to say that those

given to devolved Ministers are far more constrained. I realise that legal and political arguments may differ, but from a legal perspective are there any justifications for this discrepancy?

Professor Rawlings: In terms of precedent, it is difficult to think of a precedent. I cannot think of a precedent and I do not think colleagues can. This is Brexit. Suddenly, Parliament, Ministers, MPs are faced with this extraordinary set of demands upon them. I think we should approach it on that basis.

In terms of the relationship between the UK Government and the devolveds, let me put it this way. It seems to me that the UK Government's approach is essentially a sequencing approach and this is what concerns me. Essentially, the UK Government are saying in clauses 10 to 11, "We are going to take control and these powers will not go to Belfast, Cardiff and Edinburgh; they will come back to us. We will have wide powers to rejig things but you guys are going to be constrained". It is a freezing situation. Secondly, they are saying, "Then we will talk". Thirdly, and I think this is important because colleagues have not mentioned it yet, the mechanism in I think clause 11(3), maybe 11(2), the Order in Council mechanism whereby you can release competence back to the devolved Administrations. That sequencing idea concerns me, because in a sense you come along and you have this legislative blunderbuss and you say, "We are doing all this, and we are going to stop you doing all this, and now we will talk".

Coming back to my point about trust, that to me is not the best way of engendering trust between colleagues. The way in which I would like to see it done is that instead of parliamentary sovereignty being used like that as a first resort, it should be there as a last resort if agreement cannot be forthcoming. There may be a time, there may be a case, and it comes back to your initial question, Chairman: what would happen if we take an absurd example about the Welsh Government not agreeing to common rules on protecting against animal disease? Ultimately, and this I think is where parliamentary sovereignty can have its value, Westminster can say, "That is simply not acceptable. Of course there have to be common rules on animal disease. We are here and we have the reserved power at the end of the day to say yes, there will be common rules".

My approach would be instead of, in a sense, putting parliamentary sovereignty out there first in their face, which seems to me to cut against building confidence and trust, to go much more along the Joint Ministerial Committee route, and enhanced machinery for joint intergovernmental workings is one of the themes I develop in my pamphlet tomorrow. I want to go down that route, emphasising the idea of co-operation and co-ordination, but at the end of the day, Westminster still has this reserved power to say, "You could not agree. You were being impossible and unreasonable and we are going to have to have common frameworks in that situation".

My suspicion is that—no, it is more than a suspicion. I look at the communiqué, and I invite all colleagues to do this. That communiqué indicates that there is common agreement across the UK that, yes, common frameworks in particular areas are going to be necessary and important. It seems to me that that is the way forward. Let us work through that and at the end of the day, as I say, if we get stuck, if we get a block, at that point parliamentary sovereignty can come in. To do it in people's faces seems to me to be the wrong way round.

Chair: May I turn to Paul Flynn? We have asked the questions that we are trying to ask in a slightly less organised way, but that is fine.

- Q29 **Paul Flynn:** We were diverted by our witness's evidence, which is captivating. I think the referendum result deserves the same respect as the vote on naming a boat Boaty McBoatface—if you remember, a frivolous vote. I said during the referendum campaign that the vote would go to whichever group the country found were telling the most plausible lies because the campaigns on both sides were deeply dishonest. Nobody suggested we would have the mess that we are in now. Nobody suggested that we would have all the complications on this. Boris Johnson has already promised 150% of the British cheque to the health service and Michael Gove has promised 40% of the British cheque to the farmers. There must be a point at which we take this snapshot of public opinion on one day and decide that second thoughts are necessary before we jump off the cliff. We found that in previous referendums—the ones on devolution in Wales—we have had three referendums and eventually you get it right. In Denmark, they had two. I think all the evidence now, when we see a new Brexit horror almost on a daily basis coming out, of a jobs hell developing, all these complications, we should look to, as a positive patriotic move, delay Brexit as long as possible so the country can come to its senses and realise that second thoughts are always better than first thoughts.

Professor Rawlings: I will allow members of the Committee and Members of the House to debate that.

- Q30 **Paul Flynn:** Take the Sewel Convention. What has happened to that? That does not count for anything now. You mentioned the trust that the Prime Minister tried to engender. You do not engender trust while provoking both the Welsh Government and the Scottish Government to say that they are about to become victims of a power grab, which is what they say.

Professor Rawlings: That is my point, Mr Flynn. It seems to me that the approach in the Bill when it comes to devolution is the wrong way round.

- Q31 **Paul Flynn:** I take your point; it was well made. It is another blunder. It is another part of the mess. We are in a situation, I believe, of great turmoil. As far as this House is concerned, we will have a vote on this, I believe, eventually. Three-quarters of the Members of this House voted to remain, virtually all of the Labour party and a very substantial number of Conservative MPs. The position is much more fragile than I believe

anyone is presenting, and the Government will find themselves going deeper and deeper into this sinkhole that is appearing in front of us when our jobs go to Ireland and elsewhere. Public opinion will change. There are already indications that there is a change, a 7% change among a certain group of voters since the election. The further this goes on, as more and more horrors appear, the public opinion will be there.

Could I ask you the question I am supposed to ask you? Can the restriction on the Assemblies' ability to legislate, contrary to EU retained law, be justified as a practical and necessary mechanism during negotiations as a transitional deal? This is effectively emasculating the devolved Assemblies during this period. I am not a Unionist, I am a Federalist. I would ideally like to see a federal system in the British isles, but we have another way of antagonising the devolved Administrations.

Professor Rawlings: In relation to the point that you have made about the devolved part of the legislative policy, that is very much the burden of my evidence today. I think that the model chosen in the withdrawal Bill—in clauses 10 and 11—is a poor choice. I think it is possible to think of alternative approaches that would ensure the proper construction of common frameworks where they are necessary and—I cannot stress this often enough to colleagues—would proceed first up on the basis of colleagues sitting down and working together and trying to work out common frameworks and then, secondly, with the reserved power of Westminster in the background. That seems to me to be the right approach. I think that the devolution clauses have got this fundamentally wrong and cannot, from my Union perspective, stand. They have to be replaced.

Q32 **Chair:** On the back of that question, if I may turn it round a bit, isn't it the case that if we leave the European Union and at some point in the future Britain wants to rejoin the European Union, if the devolved legislatures have had the right to legislate in a way that is against EU rules and continue to maintain that right, it would be impossible for us to ever go back in? Because the DUP, for example, in Northern Ireland or perhaps even a UKIP Government in Wales might have decided that they wish to have the right not to change and amend laws in a way that is compatible with future EU legislation.

Professor Rawlings: You see, Chair, this is where I think parliamentary sovereignty comes into play again because at the end of the day parliamentary sovereignty is there. What I am trying to get over—

Q33 **Chair:** You accept the principle that as a last resort Parliament should have the right to legislate even in devolved areas?

Professor Rawlings: I am a firm believer in the Sewel Convention that politically what we try to do is to get respect—

Chair: Consensus and respect and all the rest of it.

Professor Rawlings: True, respect, and recognise that we have established devolved institutions that have their own political legitimacy.

Q34 **Chair:** Yes, but twice now you have said in response to a question that parliamentary sovereignty is there. On animal health regulations, on my perhaps rather ludicrous hypothetical suggestion, none the less you have said parliamentary sovereignty is there, so you do appear to be accepting the principle that parliamentary sovereignty exists with the right to override the Welsh Assembly or Scottish Parliament.

Professor Rawlings: What I am saying is that there are two rather different points you are making, with respect, Chair. The first is when should parliamentary sovereignty—well, let us do it the reverse way round. Does parliamentary sovereignty exist in the situations that you have posited? The legal answer is yes, it exists. The second question is—and this again is really driving this whole session—when should parliamentary sovereignty be exercised? Parliamentary sovereignty may exist, but when do you use it? What I would say is that within devolved competence Parliament should be respectful of the competencies and representative democratic systems in the devolved countries.

Chair: Okay. Did you want to come back again on that?

Q35 **Paul Flynn:** No. If you take the Sewel Convention, which was the question I asked, this is something precious. If we went along on a sunny day in June, on the 23rd, and said, "Do you want to get rid of the Sewel Convention?" nobody would understand it anyway, but here we are reversing something that was an immense gain for Scotland and Wales over the years. That convention, if we had continued down that way, was giving them a supreme power. But we did not vote on that. There is a whole series of dreadful consequences of that vote in June that were not anticipated. That continues, surely, and isn't it a duty on all sensible politicians to stop the country from damaging itself in this way? Because that is what we feel. My views are very much the same as Ken Clarke's views. I believe there is a great majority in this House and we must intervene, once we know what sort of horrors we have from Brexit, to vote against it.

Professor Rawlings: Well, we should see what the—

Paul Flynn: The implication you mention is one that suggests we should do that. I think many of us thought that in order to respect the democratic vote we had to allow the process to start. When it is revealed in its terrible state, the country can quite legitimately reject it because I believe we would be in line with changed public opinion by then. No?

Chair: We will see what happens. Can I bring in Tonia Antoniazzi? Were you signalling me?

Q36 **Tonia Antoniazzi:** Yes, I was signalling because if, as you say, the devolutionary clauses are flawed, will you be able to provide the Committee with draft amendments that work for Wales and the United Kingdom?

Professor Rawlings: Well, fortunately you have some interesting amendments with which to wrestle, don't you? You have four packs of amendments in the Welsh and the Scottish Governments. You have six

objectives for amendments in front of you from the External Affairs Committee. I have my own idea. If it would be helpful to the Committee, we can briefly go through the packs of amendments and the six objectives and my own views that are out there. Would that be helpful to the Committee?

Chair: Well, maybe not now. I am looking slightly nervously at the time. You have very helpfully answered a lot of the questions we had, but one of Tonia's is not answered yet on the common framework.

Tonia Antoniazzi: Do you want me to go on to that? Was that number 8, Chair?

Chair: That would be helpful.

Q37 **Tonia Antoniazzi:** Okay, sorry, it was my fault for digressing. The Scottish and Welsh Governments have suggested that the common frameworks should be jointly agreed by four Governments with equal decision-making power. What mechanisms would be needed to make such arrangements work?

Professor Rawlings: There is a lot of merit in the paper that the Welsh Government produced called "Brexit and Devolution". If you read that paper, it is very much about co-operative forms of working between the different parts of the United Kingdom. What I always say to colleagues from other parts of the United Kingdom is this. Whatever one's party politics, the Welsh Government are interesting and significant because they are the only devolved Government that are fully pro the Union. The Scottish Government clearly are not, and the parties in Stormont are divided, with the Unionists by definition in favour of the Union and the nationalists favouring becoming part of an all-Ireland. The Welsh Government I always think are very interesting because they see things from a devolved perspective but in a pro-Union way. If one reads that document, I think there are some very good things about, as I said, the need for co-ordination and co-operation.

My sense is that the idea put forward by the Welsh Government of a UK Council of Ministers will not have traction in Whitehall. It is too threatening to Whitehall and, frankly, is a bit too grand for Whitehall. I think that the way forward is through a reinvigorated intergovernmental machinery. I have been very disappointed with the lack of working of the Joint Ministerial Committee since last February and, frankly, I think it has been quite disgraceful that the JMC on European Negotiations has not met since February until yesterday.

At this absolutely crucial moment in our history, it seems to me that that multilateral body should have been out there working, bringing colleagues together, and it has not been. Again, to be frank, the Scots and the Welsh have consistently called for that body to be up and running. UK Ministers have not wanted to do that and they have insisted on bilateral discussions and bilateral arrangements. I think that is a mistake. In answer to your question, it is there that I think we need to go forward.

What I would say to colleagues is this. If we stand back and think about the logic of common frameworks, it is about multilateral forms of working, with everybody having a say in what the common framework might look like, making sure that it works for all colleagues. The idea that you can go round constructing a single domestic market in the UK by the UK Government talking to the Welsh and then talking separately to the Scots seems to me to fly in the face of the whole idea of establishing underlying common frameworks. That is where I am.

Chair: Chris, do you want to add anything further to that?

Chris Davies: I would have to say there has been a great deal that I have not agreed with, Professor, but I will give way on your opinion on this. I tend to feel that it is very much your opinion that we are having on this, not a particularly legal definition on some of the things that we have been having. Forgive me, that is the way it has come over, so I am probably not going to ask any more questions, Chairman.

Chair: I think there is one more that we have not covered at all, which happened to be Simon's so I will go back to him.

Q38 **Simon Hoare:** Professor, the proposed restriction is that the Assembly cannot legislate contrary to EU retained law while the negotiation for the transitional deal is ongoing. It is justified in the explanatory note that there is no sunset clause. Should there be and, if there should be, what are the benefits?

Professor Rawlings: Sunset clauses have their uses, but they also have their downside. To give you a colourful analogy, a sunset clause can be a bit like saying to Burglar Bill, "By all means rob my property, subject to one condition: do it quickly". I make that point because, to me, the issue here is not about a sunset clause for a poor choice of model, it is changing the nature of the model. That is where we need to go.

Q39 **Simon Hoare:** Chairman, can I just come back? I wanted to pick up on a point that you were discussing just a moment or so ago, and I do not want to detain the Committee.

You said it was perverse not to have multilateral discussions between Scotland, Wales and Westminster, and instead the Westminster Government have decided to do bilateral. I take entirely your point as an academic argument, which one can perfectly well justify, but given the fact that there are different competencies devolved to Scotland as there are to Wales, rather than wasting the time of the Scots or, indeed, the Welsh officials and politicians, in the initial stages has it not been more sensible to say, "Let us talk to Scotland and have a bilateral there and work out if there is any common ground. Let's talk to Wales and work out if there is any common ground"? Then working slightly as a Venn diagram we can see where there needs to be an overlap and whether it is there. Then we can park those things almost as issues of agreement that do not need to be discussed. Now we can crank up into the detail of where we disagree. While you might not think it is the preferred model to do bi rather than multi, there is nothing intrinsically wrong with doing bilaterals at this stage, is there?

Professor Rawlings: My approach to that would be to say what has happened is that the UK Government have said we are only going to do bilaterals. Of course, it makes sense to do that where you are dealing with things, we will say, that only the Scots have and nobody else has, but when you are talking about things like agriculture, fisheries, environment—fisheries, for example, common resources; fish do not know boundaries—to say we are only going to do bilateral, we are not going to do multilateral, that seems to me to fly in the face of the logic of building a domestic common market. I would have wanted to see UK Government colleagues, if you like, going down both routes rather than simply going down one. Again, this is partly about trust building and confidence building, and it is about getting on with the job.

Having made those points, as I said, I am very pleased to see that the JMC on European Negotiations has now met. I do not want to be curmudgeonly. I think we should have been where we are yesterday six months ago, and we should have been getting on with it on that basis because there are some really important common frameworks on a pan-UK basis, and we do not just need a, “We are going to do it”. You have to flesh this out because it is important for individual citizens, it is important for business. I know that next week colleagues are going on to talk about agriculture. It seems to me that by now we should have had a clear statement from the UK Government about where they think common frameworks may be required and they might usefully have put out some draft common frameworks for consultation so that in areas like agriculture and fisheries people can get involved.

Simon Hoare: I take the point, thank you.

Chair: Right. Well, I suppose it is going to be slightly more complicated than we first thought, but there we are. Thank you very much indeed for coming along, Professor Rawlings, and giving us your thoughts on this. No doubt we will continue the discussions for quite some time to come. Thank you.

Professor Rawlings: A great pleasure, Chairman, thank you.