



Select Committee on the Constitution

Corrected oral evidence: Parliamentary scrutiny of committees

Thursday 29 November 2018

11 am

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Members present: Baroness Taylor of Bolton (Chairman); Lord Beith; Baroness Drake; Lord Hunt of Wirral; Lord MacGregor of Pulham Market; Lord Morgan; Lord Wallace of Tankerness.

Evidence Session No. 3

Heard in Public

Questions 21 - 32

Witness

I: Mick Antoniw AM, Chairman, Constitutional and Legislative Affairs Committee, National Assembly of Wales (via video link).

Examination of witness

Mick Antoniw AM (via video link).

Q21 The Chairman: Thank you very much for making time to talk to us. You have given us evidence before and have been able to come to London, but with the wonders of modern technology, we are here on this link. As you know, we are conducting an inquiry into the parliamentary scrutiny of treaties. This Committee has not looked at this previously, and it will involve quite an amount of work. We wanted to touch base with you about the Welsh Government. We will start with the present time, rather than looking into the future, and ask you whether you feel that the Welsh Government have any influence when treaties are being negotiated and ratified and whether you think there is effective engagement with the UK Government. We have talked about the Joint Ministerial Committee previously. Obviously, this would be one potential area for you to have some influence. Overall, how do you feel about your involvement?

Mick Antoniw AM: There are two parts to that. Of course, there is a devolution memorandum of understanding that where international treaties and agreements have an impact on devolved areas, there should be engagement and consultation. It has not been a major issue, because overwhelmingly those sorts of agreements and treaties have been coming through the EU. Within the EU, although the UK is the member state, there has been a growing practical recognition of the role of sub-state bodies.

In practice, on agriculture, for example, where the UK has been engaged with the EU on agricultural agreements or trade agreements that affect agriculture, where there is a Welsh dimension to that—because there is no UK policy on agriculture because it is a totally devolved matter—representatives from the Welsh Government have met UK Ministers and have even participated per se in negotiations and discussions at European level. That has been a very practical arrangement, which has developed because there is a recognition that in many European countries there are various decentralised and federalised systems, and for it to work, that has had to be the case.

The problem now, of course, leading up to a post-Brexit situation is that we move into an area where treaties and international agreements continue to be the sole responsibility of the UK but are specifically reserved matters under the Wales Act 2017. Those agreements will depend on what arrangements can be put in place to ensure that the devolved interests are involved in that. At the moment, it has not worked very well through the JMC. The JMC really is regarded, almost on an intra-parliamentary basis, as dysfunctional and in need of substantial reform. There are grave risks to the devolution settlements and how those devolved responsibilities would operate unless there is quite significant reform. Up to now, the problem has been looking to the future and what will happen with post-Brexit arrangements and treaties and indeed the withdrawal Bill itself, when it eventually comes.

The Chairman: We will come to that in a moment. I do not want to get bogged down on the JMC because this Committee has criticised the way it works in the past. Are you saying it is the present structure of the JMC that is a problem or the fact that the UK Government have not wholeheartedly embraced what was intended at the beginning?

Mick Antoniw AM: I think it is both. The structure is prone to not working properly. It is not designed to cope with the constitutional requirements that exist at the government level. It is also very much the case that all the promises that were made that there would be engagement and consultation have not been delivered. For example, the First Ministers of Wales and Scotland got to see the draft Brexit agreement only the night before it was published. The engagement before that was limited. There has been a real issue within the UK Government in understanding the importance of that engagement process. To date, there is considerable dissatisfaction on the Welsh side that that has ever been complied with in spirit, let alone in practice.

Q22 **Lord Hunt of Wirral:** We will turn, particularly looking to the future, to the role of the National Assembly for Wales. To what extent is the Assembly able to scrutinise the actions of the Welsh Government in their engagement on international agreements? What have you found works well, and what requires improvement?

Mick Antoniw AM: The difficulty has been that if you do not have at UK level—at JMC level—an effective mechanism whereby the Welsh Government are properly engaged and consulted, all we are able to scrutinise is what the Welsh Government do and know, which obviously is very little. It goes down the chain. If it is not working at the top level, the information you have at the lower levels is not very good. There are some examples where I understand there has been improvement; for example, there are more discussions now around the Agriculture Bill, the Trade Bill and so on.

My committee, the Constitutional and Legislative Affairs Committee, has been concerned about how we hold the Welsh Government to account in these areas, particularly bearing in mind the considerable transfer of powers that is taking place to Welsh Ministers across the board. Modelling what Scotland has done, we have put in place an inter-institutional agreement between the Government and the Constitutional and Legislative Affairs Committee which sets out that the papers and advance agendas for the negotiations and discussions that take place will be made available as quickly as possible from the Welsh Government to us, and through to the relevant committee structure, to be able to scrutinise the Welsh Government as the process is ongoing. That has been quite an important step.

If you do not mind, I will read out the agreement because I think it is directly relevant. It says: "This Agreement seeks to ensure that the principles of the Welsh Government's accountability to the National Assembly for Wales and transparency with regard to these relationships are built into the revised inter-governmental mechanisms" and "Subject

to the above, the Welsh Government agrees to provide to the Constitutional and Legislative Affairs Committee and other relevant committees of the National Assembly, as far as practicable, advance written notice at least one month prior to scheduled relevant meetings, or in the case of meetings with less than one month's notice, as soon as possible ... This will enable the Committee(s) to express a view on the topic and, if appropriate, to invite the Minister responsible to attend a committee meeting in advance of the intergovernmental meeting”.

That is an important arrangement. We are just waiting to finalise it. Whether it actually works in practice will depend on whether the Welsh Government are actually in the position to be able to tell us those things. The practice to date has been that even at governmental level they have turned up to meetings without an agenda, without papers or information about the nature of the discussions, and sometimes without even a room being booked.

Lord Hunt of Wirral: Thank you. That is very helpful.

Q23 **Lord Morgan:** Bore da.

Mick Antoniw AM: Bore da.

Lord Morgan: We were also wondering about the situation after Brexit—assuming that it happens, of course. Would or should the devolved Governments be involved in treaty-making after Brexit and, if so, at what point? Would this rest on the area of devolved competences and whether or not they are relevant?

Mick Antoniw AM: That is a very important question, and one that is exercising us—and, indeed, the Government—across the board. For example, if we left the EU without an agreement and WTO rules came into place, what would the implications be? International treaties are a reserved matter. It is almost inconceivable that there will be many international agreements that do not contain elements that relate to devolved areas of responsibility. This creates the real risk that, through the international treaty process, there is an undermining of the whole process of devolution, and a recentralising of government. That is a concern that I and many on the Assembly share—and, I suspect, many within the Welsh Government. In the Agriculture Bill, for example, one of the areas of dispute is around the World Trade Organization rules. I understand that there is now more engagement.

To answer your question specifically, there has to be a mechanism for early engagement in any treaty that may have implications for the devolved areas of responsibility. Probably in the short term this will be resolved by the JMC having a specific committee that looks at international treaties and provides a mechanism for that information to be made available to the devolved Governments, and for that engagement to take place so that when it comes to those treaties there is a proper mechanism for debate and scrutiny within the various devolved assemblies.

It may also raise an issue as to whether CRAG—the Constitutional Reform and Governance Act 2010—needs to be amended to create a specific duty for that to happen or whether it can be done by an intergovernmental agreement. Because there will be issues around trade agreements and other international agreements that will clearly impact on the devolved areas of responsibility, if there is not that mechanism, that will amount to an undermining of the devolution statutes and a recentralisation of UK government. That would be totally contrary to the process of devolution and decentralisation of power.

Q24 Lord Morgan: You have spoken about treaty-making being a reserved matter for the Government in London. Do you think this should be changed?

Mick Antoniw AM: I would like to see it changed, and I would like there to be a specific role that required the devolved institutions to give approval to areas. I suspect that that is a step too far within the current politics in Parliament. The way to deal with it is to say that if we are genuinely recognising devolved responsibilities, and for them to be carried out by the devolved Governments effectively, when treaties are negotiated, there has to be a specific role of engagement and participation for the devolved institutions. To some extent, it is about developing the process, which is already happening a little, of the development of common frameworks across the UK—on areas of procurement, agriculture, fisheries and so on. For the UK to be able to operate as a single market itself needs frameworks, which means that there has to be that engagement with the devolved institutions. Expanding that to international treaties will also impact in that area.

At the moment there is no indication that there is any great enthusiasm within the UK Government for understanding this. This example really highlights the crux of the problem. When the draft Brexit agreement was published, concerns were expressed in Scotland and Wales that, first, we had only just seen the documents and, secondly, we had not been engaged in those documents. The response from the Secretary of State for Wales, for example, was, "This is a reserved matter. This is for us. We are the ones who scrutinise and if you want to have a say in this, go to the House of Lords or stand for election to Parliament".

That undermines all the trust, good faith and promises of engagement, and fails to recognise that the draft Brexit agreement and the international trade deals that will inevitably flow from it all impact on the devolution settlement. To me, it illustrates a lack of in-depth understanding of the constitutional process of devolution itself. That is why I say that there are a number of risks to devolution that need to be identified: the recentralisation of power and the undermining of the devolution settlement.

Equally, on things such as the so-called shared prosperity fund, there has been no engagement whatever with the Welsh Government, no one is really quite sure what it means—what prosperity are we talking about and what are we sharing?—or the extent to which that would impact on

the ability of the devolved Governments to carry out their functions and might amount to, for example, financial control of the exercise of devolved responsibilities and, again, a recentralisation of responsibility and power.

- Q25 **Lord Morgan:** Thank you. Finally, I gather from what you have said that you would want increased co-ordination between the devolved legislatures and the legislature here. If we extended this to scrutinising treaties that were made after Brexit, you have given us some idea already of what you have in mind, but would you like to say more about the kinds of mechanisms that might be required?

Mick Antoniw AM: First, there has to be a constitutional mechanism with clearly defined commitments and rules. It cannot be left to the ad hoc whim of the Government of the time, where engagement occurs only when the Government get into a particular crisis and need support. It needs to be defined. Certainly on a transitional basis, the reform of the JMC, which I think all the parliamentary committees have commented on at one stage, seems to be key, as is having a designated committee with proper resources and a clearly defined role to examine treaties, while also specifying the need for engagement and collaboration with the devolved Governments within that process. It has to be a process that starts from day one and is also able to be scrutinised within the respective devolved institutions. If that does not happen, it is just the exercise of very significant powers with very little accountability and input.

Lord Morgan: Diolch yn fawr. Very interesting.

- Q26 **Lord Beith:** First, I will follow up on the point about there being devolved matters which the Welsh Government and Assembly would be concerned about and then wider matters that might occur in a treaty. Do you recognise the difference between the two? In the case of devolved matters, the treaty cannot be implemented without the assistance of the Welsh Assembly—and the British Government should not be making commitments unless they have some way of ensuring that the devolved Administrations are prepared to do them—as opposed to matters which might have an impact which are not devolved. For example, an immigration treaty might have a particular impact in Wales but it might also have a particular impact in the north-east of England or in London. In those cases, the position of Wales is not that different from that of the rest of the United Kingdom. But in devolved issues the case is clear, is it not?

Mick Antoniw AM: That is absolutely right. Where treaties relate to specific devolved areas of responsibility—Wales is now on a reserved powers model as opposed to the previous conferred powers model—those matters are then raised with regard to legislative consent. There would be legislative consent Motions on those specific areas.

You are right that many areas impact on the Assembly that are not devolved responsibilities. One would hope that a process of engagement and recognition is the oil that makes the constitutional relationships work.

In relation to specific devolved responsibilities, it seems essential that there is early engagement on the impact of treaties on those responsibilities. The concern is that might not happen and treaties are formulated and signed without such proper engagement. The Welsh Government and the Welsh Assembly are required to comply with international treaty obligations.

These may become things that are imposed on the Welsh Government and that the Welsh Government and Welsh Assembly might not want to do if they were genuinely exercising their own responsibility. That is why I mention the concern that it could amount to a recentralisation of power through treaties into areas that Parliament has already devolved to devolved Assemblies and Parliaments.

Lord Beith: Have you looked at how other countries handle this when they have the federal systems or something close to them? In Canada, for example, Quebec secured a high degree of provincial involvement in the trade treaty negotiations.

Mick Antoniw AM: We have not looked at it in detail; I know that there has been consideration of it. We know, for example, that there is a sub-state process within the European Union. We know that the Netherlands and Germany, for example, have very federalised systems. I think that the Canadian system allows for vetoes of trade agreements. Individual states in Canada have all to be brought on board. It is essential that there is full engagement through that process.

The constitutional journey that the UK is on is towards a more federalised system. I am not sure that we would move to that particular position, but JMC reform might lead to a version of it. The JMC might become in effect what the Welsh Minister described as a council of Ministers, with a more clearly defined function and role between the devolved bodies in the UK. There would be proper resourcing of it and a resolution mechanism where disputes arose, although one would hope that negotiations and discussions always led to agreement. Sometimes agreements are achieved only because there is knowledge that there is a disputes mechanism. However, reform of the JMC is the journey that we are really on in terms of ensuring that our new position once we are out of the EU properly respects the devolution settlements.

Lord Beith: What about when treaty negotiations are in process? We can find an illustration, which you are probably familiar with, in the position of Crown dependencies when treaties are negotiated and their interests are affected, which may be distinct from those of the United Kingdom. The experience of getting a UK representative to represent differing points of view, frankly, has not been very encouraging. How do you see that working out?

Mick Antoniw AM: The mechanism has to be inclusive. As a treaty in a particular area is negotiated, the information should be made available, engagement should take place and it should be an inclusive process that enables proper representations to be made. The problem is that, if that

does not happen and there is no mechanism for it, we end up with processes that lead to a constitutional fight and a lot of political argument further down the road.

TTIP—the Transatlantic Trade and Investment Partnership—which was going through the European Union, was an example of the importance of engagement. Conflict arose because of the lack of openness of documentation. Eventually, the European Commission was forced to make information available to Welsh and Scottish representatives and the European Parliament at various stages of the process. Now we are talking about a trade deal with America, many aspects of which would mirror TTIP and relate to matters such as food standards. It is difficult to envisage an international agreement of that sort without there being proper engagement with the devolved Governments and their being able to provide an agreement through legislative consent.

There is no mechanism within the withdrawal agreement for the involvement of devolved institutions in dispute resolution. The process is dependent on the good will of the UK Government. Unfortunately, that good will cannot be relied on effectively.

Q27 Lord MacGregor of Pulham Market: You have partly answered this question, but I will ask it nevertheless. How should intergovernmental relations operate post Brexit in relation to the negotiation, signature and ratification of treaties? Is the Joint Ministerial Committee structure suitable for this purpose?

Mick Antoniw AM: First, it should be through the JMC. Is the JMC in a structure suitable for that? The answer is no. Can it be made suitable? Yes, it can, but it requires quite substantial reform. One of our committee's concerns is that, during all the politics and arguments around everything that is happening over Brexit, little attention has been paid to reforming the mechanisms necessary not only to make that happen but for the post-Brexit environment. Just about every constitutional and legislative committee within the various parliaments around the UK has commented in detail on that. A plethora of reports all say the same thing. Part of the concern is how we get attention paid to the need for those constitutional reforms. My committee suggested that one way might be to take it out of the immediate maelstrom of politics and for there to be a Speakers' convention to look at the constitutional issues. I understand that that might go forward to the next quadrilateral. What we have at the moment is just not good enough. The dysfunction of the existing structure contributes to the chaos around the whole Brexit process and does not inspire confidence that it will not continue into the post-Brexit process unless something happens fairly quickly.

Q28 Lord Wallace of Tankerness: I will go back to the question asked by Lord Beith. As you rightly pointed out, international treaties could be agreed by the United Kingdom which have implications for devolved responsibilities, but there is an obligation under law on the Welsh Assembly Government to implement foreign undertakings. Are we not in a similar position at this very moment, where the UK can agree things at

a European Union level, with an obligation on the Welsh Assembly and the Scottish Parliament to transpose them? On the negative side, you cannot do anything that is beyond competence, as set out by European Union law. As I understood your answer to the very first question, you thought that there were reasonable mechanisms at the moment, albeit informal, for engagement by Welsh Ministers when such decisions were taken at an EU level. Could that produce a formula for the future?

Mick Antoniw AM: It provides a working formula that is totally dependent on good will and good faith to be able to operate. The difference is that at the EU level the UK Government could decide things, but of course the EU was not the sole determinant; many other countries would be involved in that process. So it was possible to influence and have an input at subnational level and that did take place.

The difference is that the framework is very different once you take the EU out of the equation because it becomes just a UK decision; there is no other input. A treaty could be negotiated and ultimately agreed and ratified while totally bypassing the devolved structures if that is what the UK Government wanted to do, or by means of not properly engaging. You can have token consultation or haphazard and inadequate consultation. If that happens, you then have less scrutiny in the devolved parliaments and further down the chain that reduces the possibility of civic engagement, which we often want to include in some of these treaties and processes.

The concept of a new American treaty would be a good example of that. It could work very well on an informal basis, as long as that was genuine, but, in reality, without a formal basis for engagement and recognition of devolved responsibilities, it is very unlikely to happen in a proper constitutional and constructive way, and also in a way that is timely and would enable proper scrutiny of the Welsh Government as well as of the UK Government, as well as any views in terms of consultation at lower levels and civic engagement on the issues around those treaties. The whole process begins to fall apart unless there is a guarantee that these things will be conducted properly, honouring all the things that are said but often not adhered to.

Q29 Lord Wallace of Tankerness: Following on from that, there are different stages in a treaty-making process. How do you think the United Kingdom Parliament and the devolved legislatures might be involved at each stage? Specifically, should the UK Parliament have a power to authorise a mandate before negotiations even begin? If you thought that was worth while, how would you see the devolved legislatures feeding in to that?

Mick Antoniw AM: If a mandate is agreed at parliamentary level, obviously, there are processes for feeding in and expressing views. It depends where that mandate comes from and how it is arrived at. At a very early stage, at the mandate level, there would be a recognition that this was going to impact on Wales, Scotland or Northern Ireland. Once you get through the mandate process and the negotiations actually start,

you really want a mechanism right from the beginning so that there is an input. If the Government's intention is to drive their predetermined objectives through and they do not really want that engagement, the only way you can ensure that that happens is to have a formal structure to ensure that that happens. Of course, we know that the Government have their own way of doing things and their own timetables and processes, and sometimes scrutiny is considered a bit of an obstacle or a distraction. The reason for having proper structures in place—initially, through a reform of the JMC—is to ensure that that actually happens and the Government are restrained in the way that they operate.

Q30 **Baroness Drake:** Turning to the actual process of the negotiations, an issue that has evolved in our evidence sessions is that the tactical and confidential considerations that may arise as part of the negotiating process need to be set against the need for greater transparency and to reduce the democratic deficit during those treaty negotiations. My question is: what rights should committees of the UK Parliament and the devolved legislatures have to information during the process of negotiations?

Mick Antoniw AM: That is a very difficult question to answer, and one that was raised during the TTIP negotiations with the EU. Either of the parties involved in the treaty negotiations may have issues of confidentiality that they want respected. In the early stages, you would have confidentiality between Governments in terms of some of the underlying principles in order to enable those negotiations to take place. One of the obstacles is that if the parties do not feel in the early stages that they have that confidence, they may not wish to participate at all, which means that there will not be a treaty and the process does not even begin. I think there is a recognition of that.

We have included in our inter-institutional agreement between the National Assembly for Wales and the Welsh Government, which we hope will be finalised in a week or two, respect for those genuine issues of confidentiality. Sometimes there are issues about what should and should not be confidential. But once a process actually starts and the underlying principles and interests have been dealt with, the principle should be maximum transparency.

We have included in our inter-institutional agreement the three principles of transparency, accountability, and respect for and recognition of the role that confidential discussions play between Governments, particularly when developing policy. It is not one of those things that you can define in writing other than by outlining the principle and being able to challenge that principle if you think it is not being complied with.

In essence, that is what happened in the TTIP negotiations, where the European Parliament was basically saying, "There is no way we can support these negotiations unless you tell us more about them and give us more documents". What then happened was that substantial documentation was made available to be considered and seen on a confidential basis. That was one mechanism for doing that. There are

processes. The point you raise goes to the core of what we want to achieve. Confidentiality is a key issue.

Baroness Drake: Do you think it would be practical for information to be provided to Parliament and devolved legislature committees on a confidential basis so that those committees were themselves constrained by confidentiality requirements? Would that be operable?

Mick Antoniw AM: That could arise, and did arise in the example I gave of the TTIP negotiations. Welsh Assembly Members and Members of the Scottish Parliament were allowed to go to a venue to examine documents, but on a confidential basis. It has happened once or twice in other areas as well. It does not look good. It creates its own issues around why such things are being kept confidential, but we have to recognise that at certain stages there are confidential issues that bodies need to be aware of but also have to respect the confidentiality of. It is a way of enforcing good faith in the end stages of negotiations, to enable them to take place.

There are various other areas of confidentiality in parliamentary processes that are respected. The principle would be that where something can be disclosed, it should be made available and be as transparent as possible. But there has to be a recognition that from time to time there will be elements that have to be kept confidential. It is not possible to define it more than that other than by setting out the framework and the principles, which is what we have done within the scope of our intergovernmental agreement to recognise that.

Q31 **Lord Hunt of Wirral:** Apart from issues that are essentially confidential, I just wondered about the role of the public and stakeholders in the consideration of treaties. What processes might allow for their meaningful engagement with Governments and legislatures?

Mick Antoniw AM: Committee processes are very good, provided that information is open and they are able to consider matters. That is often the case with matters such as food standards, the environment and skills and training. If the information is available, the committees engage by scrutinising and calling witnesses and so on.

We have tried a number of experiments on broadening that out. They are interesting examples—there is still work to be done on them. We have set up citizens' panels; for example, on constitutional reform and environmental issues. As a committee considers legislation or scrutinises an issue, a counter panel is set up to look at the evidence. There is then engagement with the committee. Committees have found it useful to have a sounding board with the public; I think that members of the public have found it useful, too, to be able to express a view and have input in a way that goes beyond just giving evidence and perhaps being questioned on it and that allows them to engage in the formulation of the thinking and challenges around a particular issue. That is quite an important development in the way that we exercise scrutiny.

We have also done a certain amount of it online, where one can engage in a process—that has been interesting. We need to explore and develop those processes. Whether they take place will depend on there being openness and transparency at a much higher level that feed down through the process. There has to be a fundamental recognition of the importance of scrutiny, engagement, input and inclusivity in the process of negotiation on treaties and agreements.

Lord Morgan: It seems that one important aspect of this would be casting your net as widely as possible in looking for stakeholder involvement. For example, agriculture is an important reserved area. It might have implications also for the Welsh universities to develop their research in important respects. It is important that the links that we have built up among the universities and with the European institutions should be maintained creatively.

Mick Antoniw AM: I agree. I am now a representative on the Committee of the Regions. I will be attending a plenary next week where we will look at Wales's interest in the long-standing engagement between institutions on research, innovation and education and between cities. We will be discussing how we can create a mechanism for that to continue and how we can continue to have an input and a voice in the EU even if we are out of it, if that happens.

Q32 **Lord Wallace of Tankerness:** You have referred on one or two occasions to an inter-institutional agreement which you hoped would be finalised in the next two or three weeks. When it is finalised, will you be able to furnish the Committee with a copy of it? Some of the things that you were saying about it were quite interesting.

Mick Antoniw AM: Yes, we certainly will. Although there are variations within it, it is modelled on what has been done in the Scottish Parliament, which first initiated the idea. We welcomed it, because we thought it a positive way of ensuring an agreement between the Executive and legislatures in the devolved Administrations during this difficult process, with all sorts of powers being handed over. We will certainly make a copy available to you. It is also worth looking at the Scottish version.

The Chairman: Thank you very much for the time that you have given us this morning. We have covered quite a lot and have had some really useful information from you. Is there anything else that you would like to add that we have not covered?

Mick Antoniw AM: Just to thank you for inviting me, because we find such meetings very important, just as we find the growing function and role of the inter-parliamentary forum to be an interesting development. It is worth putting a marker down on that. If the JMC is reformed, there may be a broader function for such an inter-parliamentary forum.

The Chairman: That may be the direction of travel, but thank you very much for your time today.