

Welsh Policy and Politics in Unprecedented Times

Devolution and Brexit: Professor Jo Hunt and Hugh Rawlings 'In Conversation' Transcript

***Jo Hunt** is Professor of Law in the Cardiff University School of Law and Politics. She researches aspects of regionalism and devolution in the European Union and was appointed as Senior Fellow under the ESRC's UK in a Changing Europe initiative.*

Unprecedented Times indeed. Checking on Twitter this morning to see where we were and as James said we were asked to think about the biggest impacts that Brexit and further devolution will have in Wales over the next five years, and my immediate thought was 'will we have Brexit in the next five years and will we have any further Devolution in the next five years?' And first if we take Brexit I think it's likely that we will see some form of Brexit in the next five years. There's no certainty necessarily about that. If you just take this week in the way that things are vacillating. We had a moment this week where it looked as though a second referendum was part of that withdrawal agreement offer that was being made to MPs for them to give their support to the withdrawal agreement. And, of course, as far as how that second referendum will pan out, everything is open on that' we've no certainty for anything there.

But obviously it's now crashingly clear there's not going to be any movement on the withdrawal agreements. There's not going to be a withdrawal agreement bill for us to be getting our teeth into over the Bank Holiday weekend, which is what we all had planned, because it was supposed to be coming today. But we have the prospect of a search for a new Prime Minister. Some will be there very much on a hard Brexit ticket and perhaps emboldened when we see the results from European election through this weekend. As to what kind of Brexit there was a collective sigh of relief from many, but not all of course, as we passed through those No Deal deadlines in March and then in April, but we will, do doubt, find ourselves back on the No Deal precipice when October comes around.

But how we leave is only the first step in the process. We then have to work out what our new relationship with the European Union is going to be, what Wales' as place is, and the consequences for Wales in that that new relationship that we have with the EU and with the wider world. Some of those questions about that new relationship, we may just be starting out to work out what that looks like in five years' time. Will there be further Devolution? Well we know we are celebrating 20 years of this current Devolution experiment and we see that story of Wales' progress. We see Wales perhaps coming the furthest of the devolved nations. It started in a very different place from Northern Ireland and from Scotland, but where it is now is a settlement that, of course, is not identical but is very close to that which Scotland has. We've seen Wales' Devolution settlement shift closer to

that of Scotland's, that move most recently with the Wales Act 2017 to a reserved powers model for Wales. But there are still very clear differences in the different approaches, but we have recognized they started in very different places with very different histories and also very different political trajectories where these different places want to go.

So recent polling in terms of how the Welsh public are responding to Devolution and we generally see they're not entirely sure, we're not entirely sure, whether this has improved governance, or has improved outputs necessarily. But there's always a strong demand that we have at least the same powers of Scotland, that we need to have exactly what Scotland has. But I think whilst there's that demand for things to go further in some ways, we've seriously got to question whether there is any appetite over the next few years to engage in any further revision or refinement of the existing settlements. It's been in that process of constant evolution over the past 20 years, but whether it's just going to be the capacity or the bandwidth to do anything around that rather than just see how the ongoing changes are bedding in and how they are playing out within the changed circumstances of Brexit. But we may see it. There is some on the horizon, there is some on the agenda, there is the commission on jurisdictions for Wales that is set to report later this year. And we may see pressure for a resettlement in some way if we see Brexit unravelling or taking place in a way that sees the EU no longer operating as a backstop for minimum standards in areas of social rights and employment rights, and if we see policies that may be damaging to the economic and social fabric of Wales that there may be a demand for a shift to more of a role, a devolved competence, in things like employment law, in things like immigration. We know that Scotland has made some asks to have certain roles in relation to immigration and visas.

So perhaps a call for some resettlement and redefinition of what is reserved and what is default, but I think, and this is my particular point, I think looking ahead we're going to need to think differently about our ideas of what is reserved and what is devolved and think differently about categories like that and more about how we manage competence as we work together across areas where in fact these are shared, these are overlapping, these are concurrent. And I think we're going to have to try and make sense of how we work in that space because in some ways with devolution we've always pretended, almost, that we don't really do concurrent powers, we don't really do share powers. We have that self-rule in certain areas, they are devolved. We talk about a hyper dualist system - a system where we have devolved then forget in some ways. But, of course, policies being made within that context of EU membership, and that's been done within a multi-levelled cooperative framework, that architecture which the EU provides, for the exercise of those powers. The EU provides the channels for much that policy making, and it provides a particular set of guiding principles that have been broadly supportive to devolution and devolved interests. And what we're going to face quite quickly is what's going to happen when that is no longer there to intercede between central UK Government and Parliament and the devolved nations. What happens when we're no longer part of an architecture which has a commitment to

constitutional principles like subsidiarity? We have that as part of our system through our membership in the EU, it's there within the system because of that. Now when that's taken away what is left? And we're going to have to think very fundamentally about how governance is done in the future and Hugh is going to take us there.

Hugh Rawlings is the Director of Constitutional Affairs and Inter-Governmental Relations in the Welsh Government. He has worked on devolution issues since 1997, including the policy issues reflected in the Government of Wales Acts 1998 and 2006 and the Wales Act 2017, as well as the devolution aspects of the legislation giving effect to the UK's withdrawal from the EU.

When we're talking about Brexit much of the public conversation has been about the future relationship between the UK and the EU. But at least as important, on the assumption that Brexit takes place, is how the UK will be governed in a post-Brexit scenario. And if we sit that slightly in context, and please don't quote this figure with any authority, but as we all know Brexit will result, on the assumption that it takes place, in a return from Brussels to the UK of a large number of functions, which hitherto have been subject of EU regulation. And, in the Welsh context, I was talking to a colleague yesterday who talked about 5000 new functions for the Welsh Government to exercise and the bulk of those in are in what one might call the 'outdoor area'. We're talking about agriculture, we're talking about environment, we're talking about fisheries and all that sort of area. About 90% of those 5000 are there. So that clearly has very big implications for the Welsh Government. But of course the reality is that one of the reasons, one of the primary reasons perhaps, of why those functions were dealt with hitherto at the European level is that they're not easily exercisable at a nation state level, let alone at a level which, in European terms, would be regarded as a regional level.

And so the consequence of this is that while very many of those functions will be reverting to the Welsh Government, and will be exercisable by the Welsh Government with a relative degree of freedom, there will be a set of functions which will be exercisable by agreement between the various administrations of UK. And so as Jo has said, this takes us to the really important area of intergovernmental relations, and it is, I think, clearly the case that since 1999 the focus of devolution has very much been on the setting up and the operation of the various devolved administrations and focus perhaps unduly in turn within each of Wales, Scotland and Northern Ireland about how the systems should work. And there has been relatively little consideration and development of how the various administrations work together. And that is perhaps not a tenable position going forward simply because we now have this new set of responsibilities coming back from Brussels, which will need to work together.

And, of course, it is in this context that the four governments have mandated a review of the memorandum of understanding, and the existing system of intergovernmental relations. And that is a process which is ongoing. It's a very interesting process because what it has thrown in sharp focus is the differing constitutional

assumptions which the different administrations bring to the table. And those assumptions have to be made explicit so that, for example, the issue really is what is it legitimate for a devolved administration to be able to raise in particular with the UK Government. And really the answer to this question is 'what is devolution about?' Is devolution about a special set of governance arrangements for each of the devolved territories with minimal implications for the conduct of business at the UK level, or is it a more sophisticated way of governing the UK, which as the Prime Minister said (the former Prime Minister?), is now conceived of as a family of nations and the family needs to be talking to each other and working together.

But, of course, from our point of view at the Welsh Government this is, at one level, quite easy because we are simultaneously fiercely devolutionary but also committed to the future of the United Kingdom. That is a distinctive position. If you think about the position of the other administrations that is not where they are. Scotland has aspirations for independence. Northern Ireland, well it's very difficult to express in short terms how they see their relationship to the UK. And, of course, you then have a deeply ambivalent UK government so far as devolution is concerned. But so far as we are concerned this question is a rather neat example of what one might call the Lampedusa Paradox. I remember in novel 'The Leopard' the young man explains to a very concerned uncle that for everything to remain the same, everything must change. And, of course, from the Welsh Government's point of view if we want the Union to continue everything about the Union needs to change. Change its institutions, its culture, its processes to enable the governments to work together more effectively. That's the agenda on which we're developing there, and it is fair to say that there have been some developments internally, which have not really come out publicly, about establishing new mechanisms for intergovernmental relations.

The difficulty which is thrown into sharp focus by this morning is how much those new mechanisms for intergovernmental working have been dependent on personal goodwill between the ministers involved and the ministers, presumably, will now change. And so some of these arrangements have been formalised in terms of memoranda of understanding or concordats, so from that point of view we will be pressing when, for example, there is a new secretary of state at DEFRA for our new intergovernmental ministerial arrangements for the various four ministers to work together, that whoever comes in will have to be bound by those because fortunately we have managed to formalize those arrangements and have an intergovernmental arrangement in place. In other areas where the four governments will need to work together, we haven't quite got to that stage yet. It will be interesting to see if we have to start again from the beginning with new ministers to build up those relationships and get them formalised. So the future then, in terms of the Welsh Government, and of course of all this assumes that Brexit takes place, we are getting a very significant accretion of new functions but equally we will be needing to establish, and press for the establishment of, new intergovernmental relationships, which enable the four administrations to work together on matters of common interest.