



Select Committee on the Constitution

Uncorrected oral evidence: UK Internal Market Bill

Wednesday 14 October 2020

11.15 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Howarth of Newport; Lord Howell of Guildford; Lord Pannick; Lord Wallace of Tankerness.

Evidence Session No. 5

Virtual Proceeding

Questions 42 - 57

Witness

I: The Rt Hon Robert Buckland MP, Lord Chancellor

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Examination of witness

Robert Buckland MP.

Q42 **The Chair:** This is the House of Lords Select Committee on the Constitution. We are examining the constitution implications of the UK Internal Market Bill. Our witness this morning is the Lord Chancellor, the Rt Hon Robert Buckland QC MP. Welcome, and thank you for agreeing to meet us this morning.

Lord Chancellor, you are well aware that this is an extremely controversial Bill and that some of us at least are not sure of the necessity for this legislation. Can we focus first on your own particular role? Under your oath of office you swear to respect the rule of law. There are some clauses in the Bill, Clauses 45 to 47, which permit breaches of international law. How do you square that with the oath that you have taken?

Robert Buckland MP: Thank you very much indeed for allowing me to appear this morning. Can I remind everybody on the Committee that of course the context of the introduction of this Bill is all important? While it is right to say that the coming into force of these particular provisions creates a conflict, a breach if you like, the reasons are all important. I think they underpin everything that explains the context of this particular part of the Bill.

We have, since the introduction of the Bill, made some important qualifications and changes and helpfully set out on the GOV.UK webpage a non-exhaustive list of examples of where these provisions would be invoked. They all relate, in essence, to a demonstration of bad faith on the part of the EU with an important, negative, effect not just on the operation of the internal market but, we argue, on the Northern Ireland Good Friday/Belfast agreement process itself.

I am therefore already illustrating the fact that there are conflicting issues here that give rise to a range of issues that confront me, because frankly I have a duty to uphold the rule of law, as does every other member of the Government, and that of course applies across the piece. It applies equally to the United Kingdom's integrity, to the peace process itself, and indeed to the operation of the withdrawal agreement and the demonstration of good faith, not just by the United Kingdom but by the EU.

Therefore it comes to this: that these provisions will not be used unless we are in a position of breakdown in the relationship between ourselves and the EU, a breakdown that is the result of a failure by the joint committee set up under the provisions of the withdrawal agreement to come to terms with the operation of the east-west issues between Great Britain and Northern Ireland and the operation of the protocol.

I would argue that we have been up front about the problem that might occur at the end of the year, and rather than avoiding the situation and

pretending that all was going to be well, and then finding in the New Year that we were in potential breach of contract, we have decided at an appropriate moment, bearing in mind the passage of time and the fact that we are getting closer and closer to the end of the year, to introduce legislation that protects the integrity of the internal market in a way that is entirely consistent with a sovereign Government asking Parliament to approve a particular piece of legislation that in my judgment is entirely consistent with the position that I hold and the oath that I took.

You quite rightly said, Chair, that the matter is controversial. I absolutely accept that without hesitation. It has given rise to quite heated and often steamy debate, but I think it is important that we do not elide issues of the rule of law with matters of policy and politics. Fundamentally, while noble Members are entitled to question the policy and the wisdom or otherwise of the approach being taken, I think that, with the greatest respect, it is unfair and wrong to automatically elide those issues with ones that deal with the question of constitutional issues or the rule of law. I think the two are distinct and that the context of these provisions is all-important.

The Chair: You acknowledge that the purpose of Clauses 44 to 47 is to permit the breach of international law.

Robert Buckland MP: Yes, the purpose is to disapply a direct effect, which of course creates a conflict in particular with Article 4 of the protocol, but that particular issue would arise only if there was bad faith on the part of the other party, the EU. The examples that we set out on the GOV.UK webpage are, I think, a very helpful illustration of when we would invoke these provisions. We have not reached that stage yet. The negotiations in the joint committee are, I am informed reliably, proceeding in a professional and appropriate way.

There is a legitimate concern that we will run out of time, which is why the Government, using this last legislative opportunity, have decided to front-up about it, to be honest, and to seek to deal with a potential problem that we judge could damage not just the peace process but the integrity of the UK itself.

Q43 **Lord Beith:** If the powers in these clauses were about to be used and a difference of opinion arose between the Lord Chancellor and one or more of the law officers, how would it be resolved?

Robert Buckland MP: That is a very good question. First, it allows me to draw what I think you would regard as an appropriate distinction between my role and that of the law officers. It is for the law officers alone—the Solicitor-General, the Attorney-General and the Advocate-General for Scotland—to advise the Government on legal matters. It is not my function to provide legal advice to the Government.

That delineation is vitally important in the context of your question. Their advice has to be the conclusive source of the legal position of the Government. My role is, first, the formal role of guardian of the judiciary

and upholder of the rule of law, but that is not something that I do alone. All Ministers have a collective duty to uphold the rule of law. I am the person who is called upon constitutionally, I suppose, to head that duty. That means that in situations where there will be concerns that need to be expressed, I will readily, freely and proactively do that.

As to your question about whether there would be a disagreement, you know I am going to say that it is difficult for me to answer a hypothetical question. Secondly, I have to be careful, because I would not want it to be thought that the Lord Chancellor goes about second-guessing the views of the law officers. That would be wrong, and not in accordance with the Lord Chancellor's role.

What I can say is that the Lord Chancellor has a mixed legal political role, which does mean that he or she can use the power of their office to advise, to warn, to encourage. I am sounding a bit like Walter Bagehot talking about Queen Victoria, but what I am trying to get across is that the role of the Lord Chancellor is somewhat more nebulous than that of the giver of formal legal advice. Drawing that distinction is vitally important if we are to understand the extent of the influence of the Lord Chancellor and what he or she can do in circumstances where there are legitimate concerns about the rule of law.

I can say to you, without going into the whys and wherefores of what may or may not have been happening over the last month, that I have been a very activist Lord Chancellor on these issues.

The Chair: Did it concern you that one of the people you mention, the Advocate-General, who gives advice to the Government and was a Minister, resigned, as did Jonathan Jones, who was head of the Government Legal Department at the time? There was clearly a lot of concern about these provisions from the people that you the Government were taking advice from. Does it not concern you that two people in such senior positions have tendered their resignations?

Robert Buckland MP: First, I pay tribute to Lord Keen, who served with distinction as Advocate-General and as Ministry of Justice spokesman on England and Wales matters for a significant number of years. I deeply regret his resignation from government, as does the rest of government. Of course they are matters of concern.

Can I deal with the position of the Treasury Solicitor? It would be wrong of me to comment on reported issues that he may have had, because those matters are not in the public domain. He was a senior civil servant, and of course somebody who I know well and have worked with closely over the years, so I do not think it would be appropriate for me as Lord Chancellor to start imputing reported views that he may or may not have.

Having said that, he decided to leave his post, of course, which perhaps is a very clear statement of the position and the concern that he had. Of course these are matters that concern me. I have described in general terms in my answer to Lord Beith my activism and activity on this issue,

and I can assure the Committee that I have been extremely engaged in these issues, but in a way that has, I hope, not just assisted, improved and refined the measures themselves but better explained the context or potential context in which they could be used.

While I regret the departure of the Minister and the senior civil servant, it does not mean that I am necessarily bound by their actions. I feel, in the light of the information that I have before me and having assessed the situation very carefully indeed, that I am able to continue in my role and to discharge my functions properly as Lord Chancellor.

The Chair: We have some background interference there, but I will ask Lord Wallace to come in at this stage.

Q44 **Lord Wallace of Tankerness:** When you referred to the provisions in the Bill, which prima facie look like a breach of international law, you sought to justify it by referring to conditions. Without conceding that these conditions would legitimise what is in the Bill, why would I have to look to a government website to find these conditions? Why can I not find them on the face of the Bill if they are so fundamental?

Robert Buckland MP: It is really important to make this fundamental point about the question—sorry, there is quite a lot of interference on the line. I am having difficulty.

The Chair: Yes, I think we all are. Most people seem to be on mute, so I am not sure it is coming from any Committee members. Maybe the technical people can sort this out. Lord Chancellor, try to go ahead, please.

Robert Buckland MP: Thank you very much indeed. In response to Lord Wallace's question, I would say that there are significant issues and problems in outlining in the Bill the examples that are given on the GOV.UK website. First, the list is by necessity non-exhaustive. It is a series of examples of scenarios where clearly bad faith has been determined. Further to that, if we start enshrining those examples in legislation and setting out particular criteria, we create huge potential uncertainty.

Why? Because all those matters would be justiciable, and my concern is that it would give rise to a spate of satellite litigation as to the interpretation of the particular provisions—litigation that might involve the United Kingdom Government as an applicant but which would not involve the major other party to all this, namely the EU. Domestic courts could be faced with having to interpret what is an international treaty, an international contract, and it could, most importantly, second-guess or upstage the arbitral process.

Let us not forget that the Government are absolutely committed to using the arbitral processes. We have said time and time again that the processes that are set out in both the withdrawal agreement and the protocol will be invoked and we will respect, abide by and use them. Frankly speaking, putting all this on the face of the Bill would not just be

confusing but damaging to that process, and it is for those reasons that I would not support incorporation of the content of the webpage into the Bill itself.

- Q45 **Lord Dunlop:** Following up on that, in the House of Commons you said that Clauses 44, 45 and 47 would be justified in circumstances where the EU has acted in material breach of its own treaty obligations. Is there any reason to suspect that a breach by the EU of its obligations is imminent? If not, could you explain why it is thought necessary to enact these provisions?

Robert Buckland MP: First, it is the Government's sincere wish and will to carry on negotiating in good faith and to seek an agreement. I am not going to start today imputing bad faith on the part of the EU, but the fact remains that we have not yet reached agreement, either within the joint committee or between Taskforce Europe and the EU Commission team led by Commissioner Barnier.

Therefore, the Government have to be realistic about these things. We are now in mid-October, two and a half months from Brexit day. Time is ticking by, and it would be irresponsible of the Government just to fold their arms, sit back and do nothing, and then be presented with a situation where we would end up in a conflict. There could be a material breach by one of the parties and we would have done nothing to prepare ourselves in domestic law to protect the internal market and the integrity of the peace process.

Frankly, that would be irresponsible, and as I have said I am not going to start impugning or imputing every eventuality, however unpalatable, difficult and controversial that may be. That is precisely why these clauses are included at the outset of this Bill rather than first being brought in later, which I think would have caused huge concern, or not included at all.

- Q46 **Lord Howell of Guildford:** Building on Lord Dunlop's question, you have said, rightly I think, that context is everything, and you have spoken about the material breaches and the undermining of the treaty protocol by the EU, or the EU seeking to do so. Can you give us more substance? Is it your view that the EU has indicated that it is going to undermine what has been called the "subtle ambiguity" and the delicacy of the protocol, which everyone agreed was open to ambiguous interpretation?

Can you explain above all why it was not possible to resolve these things in the joint committee or in the arbitration panels under the joint committee? What happened? Did the EU refuse to come to an agreement? Can you tell us why we had to move into this situation with these parallel clauses?

Robert Buckland MP: That is a very fair question. As I think I alluded to earlier, it is right to observe, from all the information I receive from colleagues in Taskforce Europe and from the Chancellor of the Duchy of Lancaster, who leads for the United Kingdom in the joint committee, that

negotiations continue and that they are being conducted in a professional and appropriate way by both sides.

However, time is running out, and the legitimate concern of the British Government is that despite the best efforts of everybody concerned we will reach the end of the year without resolution and without clarification of the ambiguities that you have properly described in your question.

The truth is, and we all know it, that there are ambiguities within the protocol. I know that noble Lords are asking, "Why did the British Government sign it?" The British Government signed that treaty because they believed in the power of good will in politics, bearing in mind the close relationship with the EU that we had and will continue to have, and because that power would drive forward the negotiations in the right spirit and we would complete them in a timely way.

If a week is a long time in politics, nine months is an eon. We reached the situation in the late summer where we had to make choices. We were legitimately concerned that we would reach the end of the year without a resolution in sight and would therefore face exposure on a number of key issues.

I think it was right for Lord Frost to make the point that, for example, the lack of agreement on third-party status between us and the EU was going to have a potential knock-on effect on the tariff regime between Great Britain and Northern Ireland, or Northern Ireland and Great Britain in particular, and that because of the lack of an agreement we were becoming increasingly exposed to potential consequences that could be really damaging for businesses in Northern Ireland. That damage is directly relevant to the Good Friday agreement.

Therefore we were, quite responsibly I think, looking at the bigger picture, at a worst-case scenario, and then equally responsibly owning up to that potential problem and deciding to do something about it, which was the genesis of these particular provisions.

Having said that, I remain confident that we can reach the appropriate agreement to resolve those ambiguities, and this particular controversy, strong and sharp though it has been, has focused minds on all sides about the desirability of avoiding such a conflict and resolving those outstanding issues. That is the will of the British Government. That is our primary purpose, and I will say this: it must not be forgotten that even if these provisions have to be invoked, we will in parallel pursue all the other mechanisms that are open to us under the withdrawal agreement and the protocol. We will respect those provisions as a responsible member of the international community.

There are times in our national life when we face extraordinary sets of circumstances. This is one of those moments, and in extraordinary times sometimes seemingly extraordinary measures have to be taken. That is why we are doing what we are doing.

Q47 **Lord Faulks:** It would not be unfair to characterise your answers about the Belfast protocol by saying that when it was negotiated the feeling was that it would be all right on the night and that in due course we would be able to have a satisfactory relationship. We have now reached the position where there are potential problems on state aid, tariffs, export declarations, regulatory barriers and so on, which is why, as I understand it, the Government have taken the very unusual step of potentially breaching international law.

If we get to the stage where it is not all right on the night, there is no deal and there are all these potential problems with our relationship with Northern Ireland, how do you think that would leave the Good Friday agreement?

Robert Buckland MP: That is what I was trying to allude to in some of my previous answers. The Good Friday agreement is more than just an agreement between politicians. It is an agreement that supports communities within Northern Ireland, and a community is formed of many things. It is a community of interests, a community of organisations, but also a community of businesses and a local economy that, if it is allowed to thrive and grow, will lead to the long-term benefits of all the people of Northern Ireland.

Many businesses in Northern Ireland conduct their trade with Great Britain and should be allowed to do so freely and not in a way that causes them damage, decline and potential closure, which would be disastrous for many people living in Northern Ireland. There are food processing businesses that will send product to and from Great Britain as part of one process. It becomes therefore extremely concerning if those particular businesses have to demonstrate on more than one occasion their compliance with particular rules and regulations that really have no benefit to the EU.

Let us not forget that we are already setting up mechanisms and infrastructure within Northern Ireland in direct compliance with obligations to the EU which we have entered into under the withdrawal agreement. We have agreed to protect the integrity of the single market. That is absolutely fine, that is absolutely right, but I cannot see for the life of me how the integrity of the European single market will be enhanced by checks between Northern Ireland and Great Britain. It is just nonsense, so we need to resolve those matters because they are internal matters for the United Kingdom.

The passage of domestic legislation is entirely consistent with our sovereignty and with the rule of law, but it will be done only in the context of that threat to the way of life of people in Northern Ireland, a way of life that we have undertaken as one of the parties, to uphold by way of the Good Friday agreement.

Q48 **Lord Beith:** A simple question, Lord Chancellor. If these powers were to be exercised so as to create a breach of international law and of treaty obligations, what does the Vienna convention allow the other party, the

EU, to do in those circumstances?

Robert Buckland MP: The particular position under the Vienna convention is, of course, that it allows the other party to make its own arguments about termination or suspension, because then we would be in a position where there would be a really important argument about breach—who was responsible for that material breach and whether there was a fundamental change of circumstances.

It would unfortunately, regrettably, undesirably be an international dispute that would be resolved by the mechanisms which the United Kingdom would abide by and adhere to. None of us wants to get into that position. None of us believes that would be desirable. I believe that it is eminently avoidable. There is the will on both sides to avoid it, and that is what we will strive to achieve.

Q49 **Lord Pannick:** The Committee would welcome your assistance on what Clause 47 means. It says, as you know, that any regulations that are made under Clauses 44 or 45 have effect “notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”, and for good measure the clause adds that relevant international or domestic law includes “any legislation, convention or rule of international or domestic law whatsoever”.

My question is: does this mean that the court is prevented from exercising its normal power to declare regulations null and void, for example if they lack basic certainty or they purport to impose criminal offences without justification, or they purport to impose retrospective penalties on persons?

Robert Buckland MP: First, can I reassure you and the Committee that while Clause 47 has important qualifications within it, it does not exclude the court’s ability to judicially review these regulations. There was never any intention or effect for there to be a general ouster of judicial review, and that was confirmed, I think, by the Office of the Parliamentary Counsel, which is responsible for drafting these provisions. These provisions themselves were amended by the Government, which I think demonstrates the care and thought that has gone into making sure that there was no inadvertent breadth to this particular provision because of the sensitivities that naturally exist around it.

First, with regard to the drafting, clear words were certainly required to prevent the courts’ jurisdiction to judicially review the regulations, and the regulations made under Clauses 44 and 45 are of course capable of being judicially reviewed under ordinary public law grounds. That includes what I think everybody is familiar with—grounds of vices, rationality, and legitimate expectation. All those questions are entirely legitimate questions that can be raised by applicants who seek to challenge these particular provisions.

I accept that Clause 47 goes that bit further by providing that courts cannot find the regulations to be unlawful by reason of their incompatibility or inconsistency with a rule of domestic or international

law, and that includes inconsistency or incompatibility with the EU's own interpretation of the application of the state aid rules, for example, in Article 10.

I think all of us would agree that inconsistency with international law is not what we would regard as a standard ground for judicial review, but I felt, and the Government felt, that it was important that that position was clarified so that there was increased certainty when it came to these particular provisions and to the time limits. Bearing in mind the different jurisdictions that of course we have in the United Kingdom, it was important that there was consistency there as well.

As a result of the qualifications and amendments made by the Government, I think there is greater clarity about the human rights aspects of the "notwithstanding" clause. It does not mean that the courts will not be able to take into account relevant European Court of Human Rights judgments, for example, and it obliges a Minister when making regulations to make a Section 19 statement as well.

Public authorities that act pursuant to these particular regulations will remain under the duty to act compatibly with convention rights. Therefore, while there are qualifications in this particular clause, they are not of a type that it could be reasonably argued create either a fundamental ouster or even a significant ouster to the rights of individuals and groups to challenge by way of judicial review.

Lord Pannick: I have some difficulty with that, Lord Chancellor. I entirely understand your point that the domestic court should be prevented from considering compatibility with international law, but this clause goes much further than that. It purports, as I said, to prevent the court from finding these regulations unlawful because they are incompatible or inconsistent with any rule of domestic law. Why is it, then, that these regulations could be challenged for uncertainty, retroactivity, matters of that sort? Surely that falls plainly within the language of this very broad exclusion. That is my difficulty.

Robert Buckland MP: I absolutely understand the point. There needs to be a balance with making sure that the fundamental right to judicial review is not ousted. I reassure the Committee and everybody listening that that is definitely the Government's intention. We do not seek to oust JR, but there also has to be some degree of certainty with these regulations.

Again, I go back to the context within which they might be used. They would be used in order to achieve and to safeguard a position of unity within the United Kingdom internal market, the position of Northern Ireland within the union of the United Kingdom, and the fundamental questions and issues that I think a responsible Government have to face up to.

I make no apology for seeking to see this particular provision obtain as high a degree of certainty as possible. We will probably return to this

argument over the next few weeks and months, Lord Pannick, but what I want to convey to you is that there is no fundamental philosophical divide between us.

There is a more subtle argument here as to where the balance should lie between the right to have unfettered access to judicial review and the national interest—we would say as a Government—in obtaining as much certainty as possible with regard to the application of these regulations. I think that is where the argument will lie, and I look forward to hearing the debates ahead in your Lordships' House.

Lord Pannick: There is a philosophical distinction between us, with respect. I cannot see how you can claim credit for not excluding judicial review while at the same time Clause 47 immunises any regulations from any challenge by reference to any principle of domestic law. That is my difficulty.

Robert Buckland MP: As I have said, I do not think in all earnestness that the difference is that dramatic. While I certainly do not suggest that you have used any language that could perhaps be described as romantic or emotional about this issue, there are others who have. Can I just put it on the record that we will not, and I as Lord Chancellor will not, tolerate any unintentional or intentional slide into tyranny as a result of the potential passage of these measures? This is all about balance. That is all we are trying to achieve, and I am sure that through the debate in your Lordships' House we will learn more and have the sort of detailed debate that I think this particular clause deserves.

The Chair: That was a very interesting phrase, "unintentional slide into tyranny", but I am going to call Lord Wallace now.

Q50 **Lord Wallace of Tankerness:** I hear loud and clear what you are saying: that this is not intended to be an ouster clause. However, I hope I am not misrepresenting this—I do not think I am—but when we took evidence from Sir Stephen Laws, he seemed to describe the provisions in this as being a belt-and-braces plus-plus-plus effort to draft an ouster clause, because judges have never looked kindly on an ouster clause in the past.

From your experience and knowledge, are you aware of any case where the courts have upheld an ouster clause as effectively excluding the jurisdiction of the courts?

Robert Buckland MP: No. Those of us who have taken an interest and have professional experience in these matters know that the history of ouster clauses is a fraught one. It is not the first time we have seen this type of approach. Your question illustrates the delicacy of the balancing act which the Government have to undertake in this instance. We are in a situation where we are facing a potential breakdown, a very difficult set of circumstances, if there is no agreement under the joint committee.

Therefore, trying to create as high a degree of certainty for businesses and individuals as possible within the United Kingdom, Great Britain and

Northern Ireland is clearly a legitimate and appropriate policy objective. It is in the context of that appropriate policy objective, safeguarding, as we view it, the national interest, that this step is taken. It is not taken lightly; it is not taken without a high degree of thought. It has already been the product of government amendment, which is a demonstration of the care that we are taking on this. It is in that spirit that we intend to proceed.

Q51 **Baroness Corston:** Does the Bill confirm ministerial powers that are at odds with the duties as set out in the Ministerial Code and the *Cabinet Manual*?

Robert Buckland MP: The Ministerial Code is a matter for determination by the Prime Minister on the advice of the Cabinet Secretary. In this instance, the Cabinet Secretary has determined that Ministers and civil servants are acting in accordance with their obligations under both the Ministerial Code and the Civil Service Code. That allowed the parliamentary counsel office to draft the relevant clauses, which has allowed them to be introduced in the way they have. I view that that decision is conclusive when it comes to that issue.

Q52 **Lord Wallace of Tankerness:** When we were both law officers in the coalition Government, we operated under a Ministerial Code that said there was an overarching duty on Ministers to comply with the law, including international law and treaty obligations. Post the 2015 election, David Cameron produced a Ministerial Code which omitted the words "including international law and treaty obligations", but our colleague Lord Faulks told the House of Lords that, notwithstanding the omission of these words, it still was part of the Ministerial Code with reference to international law and treaty obligations? Does it remain part of the Ministerial Code?

Robert Buckland MP: The Cabinet Secretary's determination in this case was very important. It would not be appropriate for me to make comments that could be construed as some sort of formal advice about the impact of the code. I was a member of the Government at the time of the revised code. All the comments that were made then stand on the record.

The Government have relied upon that interpretation. It is in the light of all that that here we are in 2020 with the Cabinet Secretary having made the determination that he has. That is what is important here. Having had that determination made enables both Ministers and civil servants to act in a way that is consistent with our duties under domestic and international law.

Q53 **Baroness Fookes:** I had assumed, before you gave evidence earlier today, that you had a pivotal role in deciding whether any potential action by the Government would be unlawful. You told us that it was for the law officers to give advice to the Government and not for you. I am unclear now about what your role is and where it fits in in deciding whether something is lawful or unlawful.

Robert Buckland MP: I am glad you asked that question, because it does seem that in the course of this debate there has been an elision between my world and that of the law officers. Even the Shadow Justice Secretary described me in the House of Commons as a law officer. I was a bit surprised, because I have a great deal of respect for the right honourable gentleman—he was a Minister in the Ministry of Justice—but if that basic error was made by him, I am legitimately worried about how my role is being described.

I am and remain Lord Chancellor, responsible primarily for guarding the interests of the judiciary in government and making sure that our independent judges are supported by resources through the court system and with regard to their position in the constitution. For example, at the time of the prorogation controversy last year and the important ruling of the Supreme Court, I unilaterally jumped into action and defended the integrity and independence of all judges, most notably those justices of the United Kingdom Supreme Court.

That is not just part of my oath; it is instinctively what I believe is the Lord Chancellor's role. That is how I behave in my day-to-day actions within government. I am not shy of or slow to make strong representations internally if lines are being crossed.

While it would be wrong of me in this instance to go through every step of the actions that I took with regard to the United Kingdom Internal Market Bill, I can assure the Committee that the changes that were made to the relevant parts of the Bill—in particular, the government amendments relating to enhanced power for the House of Commons before commencement of the relevant statutory instruments and the refinements made to notwithstanding clauses—were as a result of work that I engaged with, together with officials and Ministers from other departments, to ensure that the context and position of these clauses were fully and properly understood.

I described myself earlier as an activist. Yes, I am, and I will continue to be active within government if we are at risk of causing unnecessary difficulty or if aspects of our action would cross a line that I would regard as unacceptable. That is my job, and apart from being Secretary of State for Justice, which is a major operational and strategic departmental responsibility, I take my role and position as Lord Chancellor very seriously. It is an ancient office and much more than a ceremonial role. It is one that I feel equipped to do, and I am ready to step in wherever appropriate if issues relating to judicial independence or the rule of law itself are being called into serious question.

Baroness Fookes: As a Minister of the Crown, in addition to being Lord Chancellor, you are obliged to uphold the rule of law as an overriding, overarching responsibility. May I take it that you are satisfied that what you are doing now does not break the rule of law?

Robert Buckland MP: Yes, because the particular provisions that have caused great concern to your Lordships and others are contingent upon a

set of circumstances happening that I hope and believe we will not get to. If we do get to that unfortunate state of affairs where there is, in summary, bad faith on the part of the EU causing us real prejudice, those clauses will have to be invoked in the way I have described.

Q54 Lord Hennessy of Nympsfield: When you last came to see us in July, I was struck by the personal passion with which you replied to my question about the ingredients of an independent judiciary and about the Lord Chancellor representing that in person at the Cabinet table.

I believed then and I believe now that you are a sincere and good man, but could I put to you a point made in evidence to us by the former Cabinet Secretary Lord Wilson of Dinton about the Royal Assent stage of the Internal Market Bill? He said, "The Queen will have to sign an unlawful Bill", adding with what I thought was an exquisite understatement, "This is all novel".

Could you come with me, in your imagination, to the meeting of the Privy Council at which the Queen will be asked to give her Royal Assent to an Act that may, in certain circumstances, allow her Government to intentionally break international law? Can you, the custodian of the Lord Chancellor's oath, see yourself without a quiver of conscience asking the Sovereign to remove her kingdom from the list of rule of law nations?

Robert Buckland MP: I am always grateful for the [*Connection lost.*] and I will say this about the essence of your question. It is all about the moment when a breach might come. When is the operable moment? Is it at the point of Royal Assent or is it the coming into force of the statutory instruments that would then give effect to these particular clauses? It is a two-stage process. I have to concede that the coming into force of the relevant provisions would create a situation of conflict. An actual active breach or conflict would not have occurred at that point, but the circumstances would be being set up for that potential breach to occur. It is then through the operation of the statutory instruments themselves that you would get that active breach.

Here is the important thing: if I felt that we were seeking passage of those clauses and then invoking them in circumstances where there was no demonstrable bad faith by the EU, that would cause me a big problem. I have alluded to that in television interviews that I gave some weeks ago. That is why the examples that we have given on the website are more than illustrative—they are vitally important—in explaining the context of all this. I do not think there is any way in which any responsible Minister would ask the Sovereign to give her Royal Assent to a Bill that was being passed in a way that defied the reality and the truth of the situation between us and the EU.

We are a long way from the scenario where I have to nervously face my Sovereign in a way that we can all imagine. The circumstances in which the House of Commons passed the affirmative resolution necessary for the commencement of the SI would be so grave and egregious that any reasonable person would think that a Lord Chancellor, a Minister or an MP passing these particular divisions was only doing what they genuinely,

properly thought was in the national interest, and in accordance with our own domestic law conventions.

Lord Hennessy of Nympsfield: Where would the line be that, if you crossed it, you would have to go; you could take no more?

Robert Buckland MP: If this Government were acting in a way that was clearly in breach of our own domestic law, whether it was statute law, clear convention, or independence of the judiciary—let us say that the UK Government decided to pass legislation that clearly trampled over the independence of the judiciary—I would be the first person to lie in front of the proverbial bulldozer in order to prevent that from happening.

That scenario, your Government wilfully breaching their own domestic and constitutional laws, is a world away from the scenario that we are currently facing. Ultimately it would be all about an international dispute. With the best will in the world, the greatest democracies across the globe will, from time to time, end up in dispute with each other or with other countries with perhaps less of a glorious rule of law record. The United Kingdom is no exception to that.

Having extricated ourselves after nearly 40 years from an unprecedented relationship with other sovereign states on the continent of Europe, this was never going to be easy. I do not think you can criticise me, my having been a strong remainer, from shying away from the fact that the process of Brexit was going to be akin to political brain surgery. Here we are at the end of that enterprise trying to anticipate the last threads, the last complications, that could upset things in quite a dramatic way for the operation of the United Kingdom itself. I think we are to be forgiven for seeking to anticipate those problems and to cover all potential eventualities, including ones where there has been demonstrable bad faith on the part of the EU.

Coming back to the question, this Lord Chancellor would not hesitate to lay down his wig and walk away from what has to be, at the moment, a metaphorical Woolsack if he thought that the domestic law and our constitution within the United Kingdom was under serious threat from his own Government.

- Q55 **Lord Howarth of Newport:** It has long been expected of the holder of your ancient office that they should uphold not only the rule of law but the constitution—a nebulous role perhaps, as you suggested just now, but a very important one. Do you accept that actions of a Government may be legal while being unconstitutional? Do you accept that constitutionality consists in respecting the conventions of the constitution, which although not codified are valid and should be binding in exercising restraint borne of respect for other elements of the constitution, such as the devolved Administrations and the judiciary, in manifesting respect for the rule of law and therefore refraining from any threat to defy it in demonstrating trustworthiness, for example, towards treaty partners? Are you satisfied that in these senses this Bill is constitutional?

Robert Buckland MP: I agree with the way in which you have couched not just my role but the way in which the unwritten British constitution operates. It is more than just statute law. It is a series of conventions, of checks and balances that have evolved as a result of sometimes bitter experience but more often than not the—happily for this country—sensible, organic evolution of custom and the tried-and-tested approach backed up by our collective institutional memory and a proper reverence for and support of meaningful tradition. That is fundamentally what I believe in. It goes to the heart of my politics and it is why this particular role is one that I take incredibly seriously.

We all need to be on our guard against any Government who without a good reason or clear rationale embarks upon courses of action that could threaten that. I genuinely think that in this instance we are not in that position, for all the reasons that I outlined earlier—[*Connection lost.*]—the integrity of the union of the United Kingdom and the Good Friday agreement process itself. We judge it prudent and responsible to seek the passage of these particular provisions, which are to be used only in the emergency scenario that I described some weeks ago.

The Government cannot just reach in and use these provisions and merrily pass statutory instruments by the negative procedure. There is a very strong sheet of glass between the Government and the invocation of this emergency button. That is an important check and balance upon the use of these powers. For those two reasons, the context within which these powers are sought and the way in which they cannot be used without the assent of the elected House, however politically controversial these measures might be they are not outwith the spirit of our unwritten constitution.

Q56 **Lord Faulks:** Clause 38 of the Competition and Markets Authority Bill gives that body various information-gathering powers, but it does not include any provisions about legal professional privilege. Do you think it ought to be amended so that we can protect the confidentiality of communications between lawyer and client?

Robert Buckland MP: I know from your ministerial experience, and my previous Bill experience, that the issue of LPP often arises in the context of new legislation. I have been extremely anxious to protect and preserve it and to make sure that it is properly understood by legislators. Very often it does not seem to be fully understood and one is left having to re-explain it every time the issue arises. I do not believe that further amendment of this Bill is necessary in order to protect LPP.

The information-gathering powers in this Bill are based upon provisions in the Enterprise Act 2002, which already make it very clear that LPP is excluded from being required to be produced or provided to the Competition and Markets Authority. A notice from the CMA requiring documents or other information to be produced or provided by a person does not extend to any document or information that a person could be compelled to produce or give in evidence in civil proceedings, either before the High Court in England and Wales or the Court of Session in

Scotland. So, in my view, the confidentiality of communications between lawyers and their clients is already protected by Section 174(8) of the 2002 Act, and we do not believe that an amendment is needed.

Q57 **Baroness Fookes:** You have sought to play down the impact of the Bill if it became law and the likelihood of international law being breached. Can you tell me how you balance out the idea that Parliament, as a sovereign entity, can do this and still have this breach of international law? Is there not a tension between the two?

Robert Buckland MP: In any healthy democracy, tensions will exist between various parts of the constitutional structure. That is not something that we should shy away from or think is automatically a problem. Healthy tension is a vital part of our vibrant constitutional democracy, because it is very often through tension that we refine, improve and enhance our institutions.

I do not fundamentally think that there is a tension, because we are entitled, as a domestic Parliament, to legislate on matters that affect the United Kingdom, and the devolved Assemblies are entitled to legislate on matters that have been devolved to them or, in the case of Scotland, that have not been reserved to the United Kingdom.

Therefore, what we do on a domestic level is separate from our actions on the international stage. The dualist concept is well known to most of us and it is shared by similar legal systems across the world, in particular in the Commonwealth. It in no way detracts from or undermines questions relating to the rule of law.

People often say to me that there is a fundamental dichotomy between parliamentary sovereignty and the rule of law. Not so. Parliament is the primary law-making body in our country, together with the devolved Assemblies. Laws that we make can be unmade. That is the simple way of describing parliamentary sovereignty.

Going back to Lord Howarth's question, we all work within an overarching framework. That framework has been built upon fundamental principles like the rule of law. That means that domestically and increasingly internationally we have had a leading role in developing adherence to and respect for the rule of law. Getting an understanding of that dualist position is important and helpful, in the context of this particular Bill, when analysing what we are talking about here when concerns are raised about potential breaches of rule of law.

For all the reasons that I have outlined in the series of answers I have given to this Committee today, I am satisfied that although we are in a position where high political controversy has been caused by these clauses, we are not in a position where this country has started down the slope to tyranny and disregard for the conventions and principles that we have all upheld in our various roles in public life, or that we are at some sort of turning point away from the principles that I hold dear and which

the Government believe in, and indeed which every respectable parliamentarian and member of society would adhere to.

Baroness Fookes: When it comes down to it, what you are saying is the end justifies the means.

Robert Buckland MP: No, I am not. What I am seeking to outline is that, because of a particular potential emergency situation that could arise, and which we hope will not arise, we are having to take unusual, even extraordinary, measures. It is in those unusual circumstances that these particular clauses could operate. We are not there yet. The Government hope that we never get to that situation, but you would be right to criticise us if we had failed to prepare for every eventuality.

The Chairman: We have had some very interesting discussions here this morning. We can agree with you that it is an extraordinary situation. I do not think we have ever had a situation where legislation is planned to give permission for a breach of international law. That will be discussed over the next few days and weeks. We will look at your answers again with a great deal of care. Thank you for agreeing to meet us this morning. The timescale of this Bill is such that it was today or not at all, and we wanted to make sure that we had the opportunity to listen to you before we reach our final conclusions. Thank you for giving your time.