



Select Committee on the Constitution

Corrected oral evidence: European Union (Withdrawal) Bill

Wednesday 6 December 2017

10.30 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Hunt of Wirral; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 3

Heard in Public

Questions 35 - 44

Witness

[I](#): Professor Gordon Anthony, Queen's University Belfast.

Examination of witness

Professor Gordon Anthony.

Q35 **The Chairman:** Professor Anthony, thank you very much for coming and for sending us a note about the area we are discussing this morning. We did not realise when we scheduled this meeting just how topical it would be.

Professor Gordon Anthony: I would not have agreed to come had I known.

The Chairman: I think that might be true. We have tried to divide our questions into three groups: on devolution; on the Good Friday agreement; and on human rights. However, in view of all that has been happening, do you want to say anything extra at the beginning, setting the scene for where you think we are now?

Professor Gordon Anthony: Not really—I do not want to prejudice anything or tie myself down. Most of the questions will lead into the current developments at some level or another, so it is probably better if I just address the questions and see what comes from those.

The Chairman: Let us start with devolution. We have heard the concerns of various people in Scotland and Wales about the implications of the Bill for the model of devolution in Scotland and in Wales. What do you think are the main implications of the Bill for the situation in Northern Ireland and the model of devolution that exists there?

Professor Gordon Anthony: The issue that ties the various devolved territories together is of course Clause 11. I can come back to that. There are some general points in relation to Northern Ireland. Before I come to these, the obvious point is that we have no functioning Executive and Assembly at the moment; they are not suspended—we do not have direct rule—but we do not have an Executive and Assembly at the moment.

I have four introductory points to make. One is that of course the Bill is going to take one limitation on competence, which is presently EU law, and replace it with retained EU law, which is another limitation—that is the Clause 11 point. I do not know whether the Committee will ask more questions about that, but the criticisms that have been made in more general public debates in relation to Scotland and Wales can be transferred over, I suggest, to Northern Ireland.

Secondly, and this is a very important point when one talks about the Belfast Agreement—there is a lot of discussion about the implications of withdrawal for the Belfast Agreement—it is possible to look at Northern Ireland and say that there is devolved government in Northern Ireland and therefore, while it is subject to asymmetry, it is the same phenomenon as devolution in Scotland or in Wales. That is one way of talking about the devolved settlement, but if you look at the Belfast Agreement it is not enough to talk about the Northern Ireland constitution in terms of devolution alone.

When I say the “Northern Ireland constitution”, that is not my phrase; the House of Lords, in the Robinson judgment, described the Northern Ireland Act, as read with the Belfast agreement, as a constitution. If you look at the Belfast Agreement, there are three strands and many points of detail, but one important aspect is North/South co-operation within the framework of, most obviously, the North/South Ministerial Council. The Bill has implications for that. There is a discrete amendment to a particular Schedule to the Northern Ireland Act: that is one point I would bring to the fore. The Bill is going to unsettle some aspects of the Northern Ireland constitution, in the Agreement and in the legislation.

The third point concerns Clause 5(4), which is on the removal of the Charter of Fundamental Rights. I can take further questions on that if the Committee has any. On the removal of the Charter, a fundamental part of the Northern Ireland constitution is the protection of rights—that was part of the Agreement. The Charter itself did not exist at the time of the Belfast Agreement—I should make that point—but it is, if you like, the codification of a process that had been going on within the European Union for many years. Removal of the Charter is not without significance in Northern Ireland. If there are further questions on that, I can give reasons for it.

The fourth point—I suspect this is where the heat is coming from at the moment in terms of broader political debates—relates to the withdrawal agreement. Most thought that there might have been an agreement at stage 1 to move on to stage 2 this week. That is potentially the most important part of the Bill as it will apply to Northern Ireland. Obviously there will be political implications, but there is one point in relation to Clause 9 that I might perhaps have the opportunity to take the Committee to later on. There is a potential question about drafting in the Bill that may be worth considering.

Those are some background points.

Q36 Lord Morgan: To quote an old Irish joke, if you wanted to have a devolution settlement you might not start from here. We are, of course, aware of the asymmetry that you allude to, Professor, which enormously complicates the devolution settlement. As far as the provisions of the Bill are concerned, how would you compare its effects on Northern Ireland to those on Scotland and Wales, bearing in mind that, as you point out, Scotland and Wales have already protested very vehemently about what they perceive as the implications of the Bill?

Professor Gordon Anthony: This is the Clause 9 point, so perhaps I can take the Committee through it by way of answering, addressing the more general differences between Northern Ireland and Scotland and Wales. I always tell other people off for doing this, but let us assume that there are not that many differences. However, this is a potentially significant difference. It starts with Clause 7—I will not take the Committee through the detail of the Bill—which is the very broad, Henry VIII power to amend retained EU law. Clause 7(6) says that, “regulations under this section may not ... amend, repeal or revoke the Human Rights Act 1998”. The

Human Rights Act is a constitutional statute. The clause also says that the regulations cannot, "be made to implement the withdrawal agreement ... or ... amend or repeal the Northern Ireland Act 1998", subject to exceptions in parentheses, which I do not think we need worry about. So under Clause 7 there is an express statement that the Northern Ireland Act cannot be affected by regulations made under that section. As I said, the Human Rights Act is a constitutional statute, as is the Northern Ireland Act. There is no mention of the Scottish and Welsh devolution legislation in that context—I do not know whether that is significant.

In Clause 9, on implementing the withdrawal agreement, again there is a Henry VIII power. Clause 9(3) says that "regulations under this section may not ... amend, repeal or revoke the Human Rights Act 1998", but the express reference to the Northern Ireland Act falls away. I genuinely do not know the reason for that, but on one reading you could say that regulations under Clause 9 could be used to amend the Northern Ireland Act to give effect to the withdrawal agreement. A number of questions relate to that. First, can secondary legislation be used to amend a constitutional statute? The other relates to the procedures that govern the making of regulations, which are in paragraph 6 of Schedule 7. That refers to resolutions in both Houses of Parliament but does not include any role for the Northern Ireland institutions. I note that point because it can be contrasted with Clause 11, about which there is a lot of debate. If the Order in Council procedure under Clause 11 is to be used to move powers to the Northern Ireland institutions, there is a role for the Houses of Parliament and the Northern Ireland Assembly. I genuinely do not know the significance of that, but there appears to be a gap—it may or may not be deliberate. That stood out to me as distinct in relation to Northern Ireland.

Lord Morgan: You make the interesting comment that the Bill's centralising tendencies may be rather more pronounced in the case of Great Britain—England, Wales and Scotland—than for the United Kingdom as whole. Is that the point you are making?

Professor Gordon Anthony: This is the problem with writing anything. I wrote that on Sunday evening, I think, but the Scottish Government have since come forward and said that if Northern Ireland is to have regulatory alignment, or whatever the phrase is, the Scots would like some of that as well. The Welsh have said that too, as has London. If I am correct in my reading of Clause 9, it suggests that discrete provision will be made for Northern Ireland. The broader criticism of the Bill is that it is centralising—or in the phrase that is sometimes used, it has a power-grabbing or power-hoarding tendency—but on that reading Northern Ireland is at one remove from that.

Lord Morgan: I understand. Thank you.

Q37 **Lord Dunlop:** May I ask about Clause 11, which you have mentioned a number of times? How do you view the compatibility of that clause with the Belfast Agreement? I was interested in your helpful written note, in which you imply that the public criticism of Clause 11 has been less

pronounced in Northern Ireland than in Scotland and Wales. Why might that be? Is it because the appetite for regulatory divergence is less in Northern Ireland or is it because, under section 26 of the Northern Ireland Act, the Secretary of State already has quite powerful powers to intervene to protect the single market?

Professor Gordon Anthony: I will start with the bottom part of your question and work backwards, because the first part is perhaps too difficult. The political parties may be looking into the Bill in considerable detail privately, but it has not attracted significant public attention, simply because of ongoing discussions to try to restore the local institutions. Those tend to focus on issues about same-sex marriage, language rights and dealing with the legacy of the Northern Ireland conflict. I am not saying that the parties have taken their eye off the ball. As I said, they may be looking at these issues in the Bill in detail in private, but this has not been in the public forum, because there are other pressure points at the moment.

One of those has this week become the border issue—I think everyone knew that it would become a particular issue. The border issue has brought into sharp focus the competing views that were brought together by the Belfast Agreement. In the Belfast Agreement and section 1 of the Northern Ireland Act, there is a statement that Northern Ireland is a part of the United Kingdom, but it is contingent on the majority of people in Northern Ireland wishing that to remain the situation. It is uncontroversial to say that, if one talks about regulatory alignment on the island of Ireland, one can see how people who prefer the maintenance of the union would regard that as potentially difficult, whereas those who would not prefer the maintenance of the union would regard it as less problematic.

To get close to the top part of your question, is Clause 11 contrary to the Belfast agreement? The reason it is a difficult question is that, although I cannot quite think that it is contrary to the Belfast agreement, in the Northern Ireland Act we have a reserved powers model—and we could have an argument about whether we have the same sort of reserved powers model as Scotland or Wales. The criticism that has been made of the clause in the Scottish and Welsh contexts is about it freezing EU law where it stands instead of allowing it to fall back into transferred matters. That criticism has not been made vocally by the political parties in Northern Ireland, but I think it can be made.

Lord Dunlop: You suggest that one way to deal with Clause 11 is to negotiate common frameworks in advance of exit. It seems that the UK Government are starting to move down that road; we will just have to see what progress is made at the JMC on 12 December. Your note rightly highlights the challenges of timescale. Do you think that it would be sufficient for the Government to agree with the devolved Administrations a process by which those common frameworks are agreed, even if they cannot agree all the frameworks in advance of exit day?

Professor Gordon Anthony: If one takes the criticism of Clause 11, I think anything that moves away from the rather robust approach in the clause at the moment would be welcome. Whether it would be welcomed by the devolved Administrations as going far enough, I would not know. I suspect that any movement away from the position that has been criticised would have to be regarded as a positive.

Q38 **Lord Norton of Louth:** As has been mentioned by Members of the Scottish and Welsh Parliaments, we know that discussions are taking place between their Executives and the British Government. In the context of Northern Ireland, there is no functioning Executive and legislature. What implications flow from that? In your note, you make the point that, even if they were in existence, the processes by which decisions are made are very different from the positions in Scotland and Wales anyway. In the absence of any mechanism for representing Northern Ireland, what are the implications?

Professor Gordon Anthony: I think that the implications are self-evident from a democratic point of view. We have a very complex system of government when it functions and, as I mentioned, there have been difficulties, but there appears to be no input from the democratic institutions—the devolved institutions—in accordance with the terms under which those institutions are meant to work.

Lord Norton of Louth: You mentioned in your note that all there is is this discussion at the mega-level, really. There is not really the engagement. Presumably that will continue and Northern Ireland will not have a distinct voice.

Professor Gordon Anthony: At the moment, I have to agree. As I said, the political parties may be looking in detail at the Bill behind the scenes, but if one thinks about power-sharing, prior to the difficulties, the First and Deputy First Minister wrote a joint letter to the Prime Minister of the United Kingdom to raise their concerns. I do not think that has happened; there tends to be more of a stand-off, particularly in relation to the border issue and the question of regulatory alignment.

Lord Norton of Louth: Formally, Northern Ireland will not have a voice, in terms of the actual process.

Professor Gordon Anthony: It certainly seems that way. It certainly has no voice in terms of the way the Northern Ireland Act is meant to work: a joint voice, one voice that brings together more than one group. That would be true.

Lord Norton of Louth: Yes, there is a problem, because that is not in existence. In your note you made the point that, even if it was, because of the complex nature that is stipulated by the Act, that itself would create problems in relation to agreeing a common framework.

Professor Gordon Anthony: Yes. Perhaps I should explain that point. On what happens within the Assembly and the Executive—this is not the phrase in the legislation—there are, essentially, ethno-national blocking

mechanisms. Ministerial power can be constrained within the executive committee. There is a mechanism called “the petition of concern” which means that cross-community support has to be used for matters that are subject to the petition of concern mechanism in the Assembly. It can become a cumbersome way of proceeding. If there were to be a disagreement about how to approach the common frameworks from within Northern Ireland, that may become a problem going forward in discussing them with central government.

Lord Norton of Louth: Can you see any way out of the conundrum?

Professor Gordon Anthony: Fingers crossed, the institutions will be up and running again, but clearly, that is not in my gift.

Lord Norton of Louth: You have no idea? Does it depend on when, really?

Professor Gordon Anthony: No, there is no indication. As things stand at the moment, there is no indication of an imminent return to the devolved institutions. Things are stagnating at the moment.

The Chairman: You mentioned the North/South Ministerial Council. When institutions were up and running, did that work well? What kind of things did it cover?

Professor Gordon Anthony: The North/South Ministerial Council was established after the Belfast Agreement and it co-operates in some areas. I do not have a list of the areas in front of me, but it is waterways, special European Union programmes’ bodies—there are implementation bodies that work underneath the North/South Ministerial Council. Does it work well? Initially, not really, because it required nomination to attend meetings and there were political difficulties. That was resolved and it was functioning. It could meet sectorally or it could meet at a plenary level with the First Minister and Deputy First Minister meeting the Taoiseach.

It did not have executive power; that is one point about the North/South Ministerial Council. It brought together executive actors from the North and the South, but they were required to work together in areas of mutual interest, including as related to the EU. In that sense there was a pronounced EU law dimension to the work of the North/South Ministerial Council.

The Chairman: I just wonder whether, if things were normal, that would have a role in the framework agreements that people are trying to think about.

Professor Gordon Anthony: That is an interesting question. The framework agreements, as I understand it, will be a matter for the Executive in Northern Ireland, but potentially it would be something that could be discussed in tandem with Ministers from Ireland in the North/South Ministerial Council. Of course, it cannot meet in the absence of the institutions.

Q39 Lord Beith: There are numerous references to the European Union in the Belfast/Good Friday Agreement. Do you think that those who are managing this process understand that these things cannot be corrected in a technical exercise—just delete "EU"—but that many of them have really fundamental consequences for another sovereign state?

Professor Gordon Anthony: The place of the European Union in the Belfast Agreement is very interesting. It is mentioned expressly, as you said, but in 1998 joint membership by the Republic of Ireland and the United Kingdom of the European Union was an assumed ongoing reality and determined a lot of the logic of the Belfast Agreement. Fluid notions of sovereignty, of citizenship and of national identity—if those are different from citizenship—all those things defined the Belfast Agreement and took place within a framework of EU membership.

I will give an example of an express mention of the EU. The Belfast Agreement is a multi-party agreement between the parties, as you know, and then there is a British-Irish Agreement, which is essentially an international agreement between the Governments, which is appended to the back. It talks about the two Governments working in partnership, and I think the word "friendship" is there as well, within the European Union. There is express mention of the European Union in relation to the North-South Ministerial Council. Insofar as the Withdrawal Bill is going to amend the Northern Ireland Act and tweak references to the EU, it definitely has a crossover into the text of the Belfast Agreement and, frankly, it does complicate things.

Lord Beith: So can these things be tweaked, or does each of them require some new political process?

Professor Gordon Anthony: Again, there are different views on this. The Belfast agreement was agreed in 1998. At that time, the Democratic Unionist Party—I hope I am correct when I say this from memory—did not support the Belfast agreement, initially. The Belfast Agreement then factored in a number of other agreements, one of which was the St Andrews Agreement. The DUP did come on board at the time of the St Andrews Agreement. I make this point because at the time of the St Andrews Agreement, some minor aspects of the Belfast agreement were, in essence, tweaked. So, in how the First Minister and the Deputy First Minister were to be elected, for example, there was a very subtle change to what we call the consociational features of the Agreement.

If the changes that are affected by the EU were to be reflected in the Agreement—I will use the word "foundational", although I am not sure what it means; it is meant to suggest something more fundamental than minor—the point has been made in a paper from two barristers in Doughty Street Chambers that it is possible, you could make the argument, that you would have to go back to referenda. The crowning achievement of the Belfast Agreement was to be endorsed by referenda, parallel referenda on the same day in May 1998, North and South. One argument is that if the Belfast agreement becomes more and more

stretched and has to be changed, maybe tweaked is okay but going beyond tweaked is not okay.

Lord Beith: But that argument was not made in relation to changes made after the St Andrews Agreement.

Professor Gordon Anthony: It was not at that time. I would say that at the time of the St Andrews Agreement—I am making myself a hostage to fortune by using the word “tweaked”—it was more in the realm of tweaking. You mentioned that this has implications for another sovereign state, where there is mention of an international agreement which is part of the Belfast Agreement. Arguably, one is moving towards something more fundamental or foundational. If that is so, there is an argument that if you start to change the Belfast Agreement—not an argument; there is a question—do you have to go back to the electorates?

Lord Beith: Is there additional leverage here in the hands of the Government of the Irish Republic, because whatever the European Union might decide, even if the European Union did not, at the last, fully support the position of the Irish Government, the Irish Government’s consent might still be required?

Professor Gordon Anthony: The Irish Government’s consent might be required—

Lord Beith: To make some change in the Anglo–Irish treaty provisions.

Professor Gordon Anthony: In terms of the relationship between the Irish Government and the EU26, that is in the realm of negotiations and politics and to-ing and fro-ing. Shall I plead that I am not qualified?

Lord Beith: I am saying that the Irish Government do not have to rely entirely on goodwill; they actually have some levers in this situation.

Professor Gordon Anthony: I would answer that by saying that the levers could be pulled in accordance with goodwill.

Q40 **Baroness Corston:** In your very helpful note to us, you assert that the British/Irish Agreement between the Governments of the UK and Ireland has status in international law. Given that, would you say that the Bill could be vulnerable to legal challenge? Could it be argued that it breaches the UK’s international obligations?

Professor Gordon Anthony: My understanding on this—I should not be equivocal—is no, because I do not know it would be challenged in the UK courts. I am trying think of how a challenge to what will become the Act would be brought forward. There was a ruling in a case called *Miller*, which Lord Pannick might have heard of, which was a very robust reassertion of Parliamentary sovereignty. It would take something to get past the reasoning of the Supreme Court in *Miller*. Internationally, the British/Irish Agreement—the agreement between the two states—is at the back of the Belfast agreement. It is lodged, if that is the correct word, with the UN but my understanding is that, on the International Court of

Justice's jurisdiction, the Irish government has essentially said they will not raise issues in relation to Northern Ireland before the ICJ. If I am correct about that, it would rule it out in that context.

I wrote an entirely speculative paragraph about whether, at some stage, there will be a reference of some kind, either from the Irish courts or courts in the United Kingdom, to the Court of Justice of the European Union. I suppose it is possible that something to that effect might happen. There was a story in the *Guardian* the other day about some SNP members looking to raise an issue about whether Article 50 is revocable. It is conceivable that there could be a reference to the European Court of Justice; it is conceivable that something could be raised about the Belfast Agreement there. I do not see an immediate way of successfully challenging. I may be wrong; I often am wrong.

The Chairman: Let us move on to human rights.

- Q41 **Lord Pannick:** May I ask you about the Charter of Fundamental Rights? You said earlier in your very helpful evidence that removal of the Charter is not without significance in Northern Ireland. The Committee is reasonably familiar with the general arguments for and against not including the Charter as part of retained EU law under the Withdrawal Bill. Are there specific Northern Ireland implications or concerns about not including the Charter within the Withdrawal Bill?

Professor Gordon Anthony: Yes and no. I am not trying to be evasive. As I said earlier, the Charter was not in existence at the time of the Belfast Agreement, so it is very different in that sense from the European Convention. A key part of the Belfast Agreement was a specific commitment to incorporate the ECHR in domestic law. The Charter is not referred to in the same way in the Agreement, but when we come to the Human Rights Act, common law and EU law in relation to equality—the broader narrative around the devolution settlement in Northern Ireland—rights form a particularly important part of that. Taking the point that the Charter was not in existence, it was adopted in non-binding form in 2000 and in binding form in 2007. To take the Charter away raises a question about a broader commitment to rights—I think I can put the point in that way.

Lord Pannick: I think it is true to say that in the rest of the United Kingdom, before we all started to think about Brexit, the Charter was perhaps not of great practical significance. I just wondered whether in Northern Ireland it is part of legal and political discourse to refer to the Charter and to rely upon it.

Professor Gordon Anthony: Yes and no again. This is purely anecdotal, but I do not think that the experience in the courts in Northern Ireland is significantly different from elsewhere in the UK. The main show in town is the Human Rights Act. The main show in town is this resurgent common law. The Charter has been referred to: I included a short quotation from Mr Justice McCloskey talking about its revolutionary and dynamic qualities. If you take something that is revolutionary, dynamic and

directly effective out of the piece, it removes something. A lawyer might argue that even if it is only one case, that makes it sufficiently important to merit a mention.

- Q42 **Baroness Drake:** We posed the question, which you helpfully answered: to what extent does the Human Rights Act allay concerns about the loss of the Charter of Fundamental Rights? You answered, in part but not in whole, that the reasons were that the HRA was a more limited tool and the remedies available under the HRA less muscular. Will you elaborate on that and perhaps illustrate what you mean by more limited and less muscular in the remedies?

Professor Gordon Anthony: Of course, the seminal moment in the reception of EU law was the *Factortame* decision of the House of Lords in 1990. *Factortame* contained some pretty esoteric points about procedure in particular application of the Crown Proceedings Act, but when push came to shove *Factortame* basically said that an Act of the sovereign Westminster Parliament can be displaced by EU law—so moving towards constitutional review of Acts of the sovereign Westminster Parliament.

I appreciate that there is a lot of discussion about the nature of the provisions on EU law and what will happen after, but if I say, for the sake of argument, that supremacy goes completely, that aspect of controlling—if that is the word—the Westminster Parliament disappears. The reason is that under the Human Rights Act the most that the courts can do—that is not quite correct; there is a very strong interpretive power under the Human Rights Act, which I can answer questions on, but making the direct comparison with EU law under the Human Rights Act, the courts cannot displace an Act of the Westminster Parliament. The term “muscular” was used in some written evidence sent to the Committee and I used that term: that is a less muscular form of remedy that is potentially available.

Parenthetically, I put the point that, in relation to the Northern Ireland Assembly, it doesn’t really matter, because Acts of the Northern Ireland Assembly in theory could have been quashed as contrary to EU law or contrary to the Convention.

Baroness Drake: In addition to the issues around the Human Rights Act and the Charter of Fundamental Rights you draw our attention to the fact that the express reference to Northern Ireland falls away in Clause 9. Are there any other issues concerning rights arising from the Bill which would cause you concern in relation to the Belfast Agreement? Is there anything else we have missed that should be brought into scope that could cause a problem to rights?

Professor Gordon Anthony: No. My only concern is the uncertainty in the Bill more generally in relation to constitutional statutes. That goes back to the earlier question about Clause 9 and the Northern Ireland Act and the Human Rights Act in the absence of the other legislation. If the Bill is going to start tipping its hat in some way towards constitutional statutes, there needs to be greater certainty and consistency. That would

have implications or potential cross-over—even a comfort blanket, if you like—in relation to the Human Rights Act.

Q43 Lord MacGregor of Pulham Market: To what extent does the Bill allow for a possible special status for Northern Ireland to be created?

Professor Gordon Anthony: That is the Clause 9 point again, and potentially relates to Clause 11. If I am correct in the way I have read it, in essence it allows regulations to be made under a Henry VIII power to change legislation, including the Northern Ireland Act. If that is the intention behind the difference between Clauses 7 and 9, that would appear to be a very ready mechanism for effecting whatever rules needs to be effected to allow, for example, administrative alignment.

The other is Clause 11, which, as I understand it, allows a trickle-down by Order of Council with the approval of Parliament and the Assembly. I suppose that is potentially another route but it sounds a more laborious way of doing it. If Clause 9 has that effect, I would go back to the concern that, under the Schedule and the procedures for making regulations under Clause 9, there is a gap in terms of any input from the Northern Ireland institutions.

Lord Beith: Can I get clarification on that? Is there a gap that prevents something having legal effect, or merely what we might call a democratic deficit? In other words, is there any absence of power during the suspension of the Executive that would prevent the process going ahead?

Professor Gordon Anthony: I made the point about Clause 9 and there being no role for the Assembly; of course, the more fundamental point is that there is no Assembly sitting, so even if there were a role, that would be a problem. It seems much neater and tidier as a democratic imperative, if that is to be the effect of Clause 9, for the Assembly to have some input at that level.

Lord Beith: The answer to my question is no, there is no gap in actual power for Ministers to do what the Assembly would otherwise have done, or would have had to consent to?

Professor Gordon Anthony: I am not sure I know the answer to that.

Q44 Lord Hunt of Wirral: Turning to the Sewel convention, I think you have indicated to us that the starting point for any discussion of that convention is the Supreme Court's ruling in *Miller*. I flipped through the judgment again and found that it mentions the Sewel convention 18 times. I was none the wiser. Can you just clarify the consequences of the Bill on the operation of the Sewel convention?

Professor Gordon Anthony: Certainly. In *Miller*, there was an attempt, primarily from the Northern Ireland references, but there were interventions from the Scottish and Welsh law officers, to give the Sewel convention legal bite, to make the argument that, in essence, it has a constitutional quality and that the courts should have a role in declaring its constitutional quality and essentially—let us call a spade a spade—

moving towards a potential veto if consent was not brought forward. That was not how it was presented in the case, but essentially that was what was being pushed.

The Supreme Court said, in pretty unequivocal terms, yes, it is constitutionally important but its enforcement is within the political and not the legal realm. As was memorably said, the courts are not the guardians of this type of convention. That is why *Miller* is now the starting point. Pre-*Miller* in Scotland, and it was in Bill form in relation to Wales, the Sewel convention had been put on a statutory footing; it is not in Northern Ireland. So it was ripe to make the argument that if it is on a statutory footing it is legal binding: the Supreme Court thought not.

Lord Hunt of Wirral: Therefore, thinking through the operation of the Belfast Agreement, which came into effect 18 years ago and was signed 18 months earlier, am I right in remembering a referendum?

Professor Gordon Anthony: There was a referendum, that's right.

Lord Hunt of Wirral: In Northern Ireland it got just about enough, whereas in the Republic there was a near 95% majority in favour. Then, fast forward to the referendum on membership of the European Union and 55.8% voted to remain. With the Assembly suspended, what is the relevance now of public opinion in Northern Ireland about this Bill and the effect it has?

Professor Gordon Anthony: If one thinks about representative democracy, and public opinion linking in to representative democracy in the Assembly, in the absence of the Assembly sitting, the public is not being given a voice. I would make one point about the 55.8% remain vote. If that is transplanted over every time, you would say there is always going to be a vote in favour of something that is more inclined towards the pro-European and retaining ties with the European Union. It has become more complex. I included in my written submissions a hyperlink to the BBC. There was a motion in favour of special status moved in the Northern Ireland Assembly in October 2016. On the 55.8% model, one would expect that that would have been carried, but it was not carried. I suppose, therefore, if I may answer the question this way, it is completely unclear where a Sewel vote would go in the Northern Ireland Assembly.

The Chairman: Even without special status, the phrase of the moment is "regulatory alignment", which I have not seen defined. There are very strange regulatory issues already: Northern Ireland politicians have been asking for a closer alignment on corporation tax. Does that play into this, making it more difficult to think things through? If the whole thing is going to function, is anyone stepping back and looking at the practicalities of all this in terms of delivery?

Professor Gordon Anthony: I am absolutely certain that people are looking at the practicalities. In any post-conflict situation, language is very important. "Special status" suggests a difference between Northern

Ireland and the rest of the United Kingdom; so notionally, if I am a unionist I will find that language difficult; if I am a nationalist, I will not have a particular difficulty with it. As to whether “regulatory alignment” does enough linguistically to narrow concerns that, notionally, unionists may have, and allow practicalities to be addressed, Monday would suggest not yet.

The Chairman: But we are in a situation where it is not the potential constitutional difficulties but a question of pure politics.

Professor Gordon Anthony: Yes, and then I am going to play semantically with language and say that constitutions are there to control politics: I suppose the two are inextricably linked.

Lord Hunt of Wirral: When you clarified whatever status was under discussion—we are not privy to the internal conversations that were taking place—you singled out special status. But another reading could apply that presumably would not affect the Bill, which is that regulatory alignment worked out between the Republic and Northern Ireland, through the UK Government, could be termed an example, not of a special status but of what could then be translated across the rest of the UK.

Professor Gordon Anthony: That is what happened with the Scottish and Welsh Governments on Monday: there was an indication that if this could work in Northern Ireland, it could potentially work in other parts of the United Kingdom, including London, which, as I understand it, could become almost like Berlin in the Cold War.

Lord Hunt of Wirral: We do not at the moment have an English Parliament, but it would not have been surprising if an English Parliament had said the same.

Professor Gordon Anthony: Indeed.

The Chairman: I am not sure how far forward that takes us.

Professor Gordon Anthony: It takes the pressure off Northern Ireland.

The Chairman: Have we any further questions? Or is there anything further you would like to say?

Professor Gordon Anthony: No. I would just like to thank the Committee for taking the time to listen to me.

The Chairman: Thank you very much. It has been very interesting.