HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: UK Internal Market Bill

Wednesday 23 September 2020

10.20 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 Sherbourne of Didsbury; Lord Wallace of Tankerness.

Evidence Session No. 1 Virtual Proceeding Questions 1 - 10

Witnesses

I: Sir Franklin Berman QC, Essex Court Chambers; Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law, University of Cambridge; Sir Stephen Laws QC, former First Parliamentary Counsel.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Sir Franklin Berman, Professor Mark Elliott and Sir Stephen Laws.

Q1 **The Chair:** The House of Lords Select Committee on the Constitution is taking evidence this morning on the UK Internal Market Bill. Our witnesses are Sir Frank Berman QC, Professor Mark Elliott and Sir Stephen Laws QC. Good morning to you all.

Can we start with a general question on your approach to the Bill? We have seen some of the comments that you have been making over the last few days or couple of weeks. Could you start by summarising your views on the constitutional implications of the Bill, in particular Clauses 42 to 45?

Professor Mark Elliott: I can summarise my views quite briefly. My view is that in two senses those clauses, taken together, are a significant assault on the rule of law. The rule of law requires a number of things, among them two. First, it requires respect for international law and that the UK and UK Ministers conduct themselves consistently with international law. Secondly, it requires that independent courts have the opportunity to oversee and to adjudicate on the lawfulness of ministerial action.

Clauses 42 and 43 authorise Ministers to make secondary legislation that would clearly be in breach of the UK's international obligations under the withdrawal agreement and the Northern Ireland protocol. That breaches the rule of law in the first of my two senses.

Clause 45, although we can come on to the details of it because there have been some amendments, on its face appears to be an attempt to exclude entirely any judicial oversight of the lawfulness of those regulations. That is a clear breach of the second of my two senses of the rule of law, which requires independent courts to oversee the lawfulness of ministerial action.

The Chair: Thank you. Sir Stephen, would you like to add your general thoughts?

Sir Stephen Laws: Yes. I disagree. What I think the clauses do, coupled with the statement the Government have made in the meantime, is to provide the machinery by which the Government would implement their view that they were entitled to step outside or set aside parts of the withdrawal agreement and act independently. That is the first thing they do. The second thing they do is to ensure that the question whether the UK Government were entitled to do that should be determined, as it should be, at international level, rather than in the domestic courts.

That means, of course, that I have some doubts about whether or not the clauses necessarily lead to a breach of international law. Assuming that they do, what is my view? My view is that there are powerful arguments in favour of a UK approach to foreign policy that we will not conduct ourselves in a way that might cause other countries to doubt our capacity

to keep our word, but I think it is a principle of foreign policy, so it is not without the possibility of exceptions. If the Government can make the case for an exception in this case and persuade Parliament to enact something in that sense, it is something they are entitled to do.

This is the same approach that I have adopted and published on. I do not think I have yet published anything on this current controversy, so there are not yet any statements of mine in the public domain. I took a public approach to the statement in chapter 4 of the Chequers White Paper, which people may remember although lots of people seem to have forgotten, that the proposals for alignment proposed in that White Paper would be consistent with parliamentary sovereignty because it would always be open to Parliament to reject the alignment that was proposed and take the consequences.

I thought that was a very bad argument, not least because it did not create a situation different from being a member of the European Union, but I did not quarrel with the analysis, which is that Parliament is able, if it wishes, to enact provisions that are not compatible with international law but has done so on a number of—maybe numerous—occasions, and we will come on to that.

The reasons for that are two established constitutional principles. The first is that we have a dualist system: that international law is not automatically part of our law and, indeed, must cede to national law because, if it were otherwise—I disagreed with it on some other grounds, but it was part of the decision in the *Miller* case—without the dualist system, Ministers would be able to reach agreements with foreign countries that changed common law or statute without the consent of Parliament, and that should not be allowed. The other principle is, of course, the principle of parliamentary sovereignty, which is that Parliament can do what it chooses. That does not mean that it should. It means that the argument as to whether it should is a political argument and not a legal argument.

The Chair: That raises some very interesting points that I think we will wish to follow up. First, Sir Frank, would you like to give some general views?

Sir Franklin Berman: I do not think there is much that I need or want to add. I simply make the general remark, first, that it is a pleasure to be back before your Committee, and, as I commented to your clerk the other day, there is at least a noticeable connection between the things we were talking about last time and the situation that you have asked me to appear on today.

I do not think this is essentially a question about international law. It is a question about constitutional propriety, and a question about the place that law takes in governmental policy-making, which of course affects international law, because, for some curious reason, international law always seems to be regarded as in some precarious position, although

there is no reason why it should be. Those, I think, are the main issues that the Bill forces us to come face to face with.

The other reason why I say it is not about international law is that treaties are of course part of international law when they take effect within the system of international law. To put the question in terms of international law in that general sense obscures an important fact: we are not talking about prescriptions, obligations and rights in general international law, the content of which might be doubtful and subject to some possibility of dispute. We are talking about a treaty, a bilateral engagement between the United Kingdom and a treaty partner, a treaty which is therefore clear and determinate, and one that was approved by the United Kingdom after a full-scale process involving the creation, by statute, of the necessary internal rules and powers.

What we are talking about is not an abstract question of international law; it is a question about the attitude that the United Kingdom, or the present Government or Administration, takes towards commitments clearly and formally undertaken and intended to be binding, and commitments of a very recent sort that were undertaken with the co-operation and collaboration of Parliament in its legislative capacity.

Beyond that, I have nothing to add to what Professor Elliott has said about the rule of law implications. It has nothing whatsoever to do with the fact that international law operates on the international plane, domestic law on the domestic plane, but the two interpenetrate with one another from time to time.

Lord Howell of Guildford: Welcome to this distinguished panel. We heard different views in the answers and, indeed, different views about what the question should be. It is puzzling for the non-lawyer, but my question is a simple, practical one.

The Lord Chancellor of England was saying the other day that these clauses were preparing for the worst at some future time. I think many people are utterly puzzled as to why that could conceivably be a violation of a treaty or a violation of international law. Surely it is, as one of you said, a political judgment. Why do we have to go beyond that?

Professor Mark Elliott: It may well be a political judgment, but political judgments have legal consequences. The consequence of this judgment is that it places the UK in breach of its international legal obligations. It lays the groundwork for that by authorising Ministers to make regulations that breach treaty obligations, but, arguably, the enactment of the legislation itself amounts to a breach of the requirement of good faith in the EU withdrawal agreement. It is possibly wrong to suggest that it is merely preparatory.

Certainly, a political judgment can be made about whether or not this is a sensible thing to do. Personally, I see no serious scope for arguing that the consequence of that political judgment is a legal consequence that places the UK in breach of its treaty obligations.

Q2 **Lord Pannick:** Can I seek Sir Stephen's assistance in particular on Clause 45(2)(a), which, as you know, says that the regulations "are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law"?

Leave aside international law for a moment, if you would, and concentrate on domestic law. Sir Stephen, do you understand that provision to immunise the regulations from any challenge, as it purports to say—for example, on the ground of lack of clarity or unreasonable discrimination, or because the regulations purport to act retroactively, or purport to create criminal offences or confer special advantages on donors to particular political parties? That is what it purports to say. Is that not a flagrant and outrageous breach of the rule of law?

Sir Stephen Laws: As I said, what I think the clause is doing is moving the question of international law: whether, under the withdrawal agreement itself or under wider treaty law, the Government are allowed to act independently and they are moving that question, as it should be, from the domestic courts into the international courts, because any question of domestic law would depend on the answer to the international law question.

I readily concede that Clause 45 is a sledgehammer and that it may be bringing down things that it would be nice to keep in place in the process, but the courts have been perfectly clear that, if you are going to exclude their jurisdiction, a sledgehammer is all that will do the job. This is it. But it is absolutely clear that it is lawfully possible—not that it is a good idea—for the courts to exclude the jurisdiction of the courts.

In the Simms case, Lord Hoffmann's statement makes it very clear that it would be possible for Parliament to derogate from fundamental rules of human rights. It is not something I would approve of, but it is possible. The condition is that Parliament must have considered it and must do so in a way that is perfectly clear. As I think Professor Elliott said, it cannot be clearer what Clause 45 is intended to do, and that is what Parliament has to do if it wants to achieve this objective.

Lord Pannick: You say that it deals with matters that it would be nice to keep in place. Is it not fundamental to our constitution to have a judiciary with the power to assess whether or not regulations made by the Executive are clear, and that they are not retroactive and do not create criminal offences? I entirely accept your theoretical point that Parliament is sovereign, but surely the question for us is whether it is constitutionally desirable for such legislation to be enacted.

Sir Stephen Laws: Constitutionally desirable I could go along with. Whether it is unlawful or whether there are any rules that require enforceable rules or rules of convention that force Ministers to behave in this way, that is what I am disputing.

Sir Franklin Berman: Nobody has sought to answer Lord Howell's very pertinent question, which needs an answer, and of course I agree with him entirely that one does not need to get hysterical about the

international law implications. International law is only concerned with what states and Governments do, not what they are thinking of doing and not what they might dream to be in a position to do. The same is true in domestic law; it is actions that are in breach or not in breach of the law, not thoughts and desires.

The significant thing about this Bill is that it is extremely overt. Poking a finger in the eye of legal obligation gets people on the raw, and one can understand why. I am glad that Lord Pannick made the points that he has made, because the objectionable elements of these articles, as I heard the former Prime Minister say in Parliament yesterday, are their enormous sweep. It is not simply international law that Ministers are entitled to disregard in making regulations; it is all domestic law as well, and domestic law includes the judgments and decisions of the courts. It is a Henry VIII clause of massive proportions—enormous proportions—and that is something we all need to take note of when we look at the potential significance of the wider sense of these particular clauses.

About the Bill as a whole, I have nothing to say. I can see that there is a reason behind having a Bill of this kind. The question is whether these particular clauses are objectionable in a way that goes well beyond the contours of an internal market regime.

Q3 **Lord Howarth of Newport:** There seems to have been some degree of confusion within the Government as to whether or not the Bill breaches international law, or at any rate when it might breach international law. Brandon Lewis stated in plain terms to the House of Commons that the Bill breaks international law in a specific and limited way, but Lord Keen, when he was a member of the Government, said that the Bill does not of itself constitute a breach of international law or the rule of law.

Perhaps the issue is when, if it is a breach of international law, it becomes so. Is it at the moment when the Government table the Bill in Parliament? Is it as and when Parliament chooses to enact the legislation, or is it actually only when the Government exercise the powers that Parliament may have conferred on them under the legislation in Clauses 42, 43 and 45? I would be grateful for your commentary on those matters.

Sir Stephen Laws: I think there are two arguments about whether those clauses would be in contravention of international law. The first is about what would happen if the powers were exercised, and the statement of the Government that they would only exercise them when in international law they felt they were entitled to—for example, because the EU was insisting on something that was incompatible with the Belfast/Good Friday agreement. The second question is whether or not the enactment of the clauses—I do not think the question can arise before that—would be in breach of the withdrawal agreement.

I leave aside Professor Elliott's point about Article 5; I do not feel in a position to express any view on whether or not the Government are acting in good faith, because I do not think the evidence is there. There is

an issue around Article 4, which is the rather strange provision that tries to enforce a form of entrenchment on the withdrawal agreement in UK law, —which is a constitutionally very difficult thing to do—but says that the provisions of the withdrawal agreement must be enforceable under primary legislation when they are directly effective. I paused then to choose between "effective" and "applicable" because I do not have the text in front of me, but I think it is "effective" and that therefore, the provision in Section 45 would be incompatible with that.

There may be an argument there, and I think maybe that is what Mr Lewis was talking about. I am not sure whether it gives rise to anything practical, because I have been trying to puzzle out—I have not seen anybody else produce an example, although somebody may—an example of where someone had a right enforceable by virtue of Article 4 that could be derogated from by regulations under clause 42 or 43 and where they would be unable to enforce that right in UK law, and where the issue, when they tried to enforce it, would not be whether—if that was the Government's grounds for making them—the requirements that the EU was saying should have been imposed were incompatible with the Good Friday/Belfast Agreement. If that is the only ground on which they could be challenged, it should be a matter to be decided under the agreement at international level, not in the domestic courts. I hope that clarifies things a bit.

The Chair: Lord Faulks, I think this comes into the area you wanted to ask about. Would you like to come in now?

Q4 **Lord Faulks:** Yes, thank you, Chair. One thing is the position in international law, and I would particularly like to ask Sir Frank about that, although I take on board what he said about it. It seems on the face of it that we have pretty clear recent treaty obligations actually reflected in an Act of Parliament; we cannot get out of those, it seems to me—correct me if I am wrong—unless there has been some fundamental change of circumstances that would only apply in exceptional cases.

Throughout the debate about the European Union and leaving it, we have been told that there are a number of possibilities for the final position, including the possibility of no deal, so it does not seem to me, on the face of it, that it is remotely arguable that, if we were to get no deal and therefore it might be necessary to try to use some of these powers, there would be a fundamental change of circumstances, with the result that we would be in plain breach of our treaty obligation. Is that a misunderstanding of the position?

Sir Franklin Berman: Those are key questions. I think Lord Howell's question also deserves a straight answer, not a technical one.

The straight answer is that it is very difficult to say when the breach might happen. These are complicated situations. We are talking about circumstances in which there could be a serious dispute between the parties to a serious international treaty. International disputes of that sort are never absolutely clear-cut, but international law recognises, for

example, that responsibility, obligations and liability under the law can arise in circumstances in which a breach is a complex thing. It consists of a whole series of acts and actions over a period of time. The breach may not be completed until fairly well down the track, but there is a clear international law answer, which is that the breach begins with the first of the actions that led down the track to the situation that is adjudged to be held to be a breach of an international obligation.

The question raised by Lord Faulks goes on from there, I think, because we are thinking of the development of a complex situation. It is very hard to see what could in practice happen if there were a serious argument between our Government and the EU over the way in which the EU was seeking to implement the terms of the withdrawal agreement, but that would take place through a series of different processes happening in different bodies. They would build up to a situation that I do not think any of us can foresee at the moment. I simply wanted to comment on the idea of a fundamental change of circumstance.

To argue, as has been argued in the past, I regret to say, that there is some fundamental change of circumstance that could suddenly free the United Kingdom of its treaty obligations is a monstrosity. The only changes of circumstance that could conceivably be thought to lead to a consequence of that sort are those that were unforeseen by the parties to a treaty at the time they negotiated. Nothing we are talking about now is in the remotest sense unforeseen. It was all too foreseeable and was actually foreseen in the terms of the treaty.

The Chair: Lord Faulks, do you wish to follow up at all?

Lord Faulks: No. It is also a maxim that pacta sunt servanda underlines the whole nature of our obligations under treaties to other countries, and it seems to me, as you say, Sir Frank, that this could in no way begin to come within the fundamental change of circumstances.

Sir Franklin Berman: I do not think so at all. The simple answer is that I do not see that, and I would hate to see our Government resorting to a legal argument that is hugely discredited. When the Vienna Convention on the Law of Treaties was drawn up, it was drawn up in such a way as to indicate that that is the last resort of the scoundrel, which is not available except in the most extreme of circumstances.

Sir Stephen Laws: There are two different aspects of what the Government might do in this case. I think I was party to an article that referred to the Vienna convention change of circumstances possibility when what was in issue was whether or not there was any way out at all of the first withdrawal agreement. I think I was arguing it in the context I mentioned before, which is that it is preferable to find a lawful way out rather than to follow what the then Prime Minister was suggesting in relation to her Chequers agreement, which is that you could break the law and take the consequences.

The more pertinent question in this context is how you resolve any incompatibilities—foreseen incompatibilities, because I, among others, have referred to them before—between what the withdrawal agreement actually requires and the Belfast/Good Friday agreement. It has always seemed to me that the longer any equivalent of the protocol went on, the more likely it was to fall into conflict with the Good Friday/Belfast agreement, because they are stitching old cloth to new. Somebody recently wrote an article about the Belfast agreement, describing its contents as constructive ambiguity. The problem with constructive ambiguity is that it only lasts until you remove it.

The withdrawal agreement tries to remove the ambiguities, the need to settle matters by consensus, partnership and mutual community respect, which underlie the whole thinking behind the Good Friday/Belfast agreement and replace them with firm rules that, put brutally, eventually give the European Union the final say. I think there is a real possibility of a conflict between the withdrawal agreement and the Belfast/Good Friday agreement. The Government have referred to it. The withdrawal agreement itself says that it must not be incompatible with the Belfast Good Friday agreement, so the Government would need to act if they found they were being asked to act inconsistently within another proposition that is part of international law, which is their obligation to adhere to the Good Friday/Belfast agreement.

The Chair: But that implies that the Government did not know what they were doing when they actually signed up to it in the first place.

Sir Stephen Laws: It may, yes, but it does not change the fact that what is in the withdrawal agreement requires what is done under it to be compatible. The difficulty is there; it is probably there because it is in the nature of international obligations that those sorts of uncertainties arise, but it does not mean that you do not have to solve them when they produce a real problem. Maybe everybody thought it would not produce a real problem.

Professor Mark Elliott: The whole suggestion or argument that this is all somehow about equipping Ministers to do things that the UK is entitled to do in international law, as distinct from allowing them to breach international law, simply cannot withstand a moment's scrutiny for two reasons.

First, it is perfectly obvious even to me, a British constitutional lawyer, not an international lawyer, that no credible legal argument whatever can be made in relation to the change of circumstances provisions under the Vienna convention. That is simply for the birds. Even if that argument were sustainable, there is a fundamental dissonance between what the Bill says and those provisions in international law, because there is nothing whatever in the Bill that attempts to constrain Ministers' authority so that it can only be exercised in the very particular circumstances that international law provides for.

The Government have now published a statement giving undertakings about the circumstances in which they will and will not exercise the powers. That is all very well. If the Government have a serious intent as to limiting the circumstances in which they will exercise the powers, if they are serious that they would only exercise them where that would be permissible under international law, there is a very simple solution, which would mean that we could end this meeting now: they could simply write that into the Bill and say, "These will be the conditions for the exercise of the power". Instead, all that has been offered is an extra-statutory assurance as to when the powers will and will not be exercised.

There is a fundamental mismatch between the argument that is being made about the permissibility of doing these things in international law and, on the other hand, the powers that Ministers are seeking to acquire in domestic law.

Sir Stephen Laws: It is not a simple solution at all. It would be nice if the Government could write it into the Bill, but the Government cannot write it into the Bill, because writing it into the Bill subjects the question of international law to adjudication in the domestic courts, rather than in the international forum in which it is required to be resolved, according to the terms of the withdrawal agreement itself. It would then become a question about whether the powers could be exercised, and the domestic courts would have to decide whether or not the Government had exercised them in the conditions that they had set out in the primary legislation. It would move the jurisdiction away from the international tribunal and require a preliminary decision in the domestic courts.

Sir Franklin Berman: I want to start with the obvious point. The reason we are all floundering about in the way we have been is that we have never seen anything like this before. It is hardly surprising that we are all at sea in trying to grasp what the real implications are or why these provisions were put into the Bill in the first place. We can all make our guesses and hypotheses, but we have not seen anything like it before; I certainly have not in my experience.

I want to talk about the withdrawal agreement itself. This is not the kind of international agreement that is cast in vague and general terms and is therefore an invitation to alternative disputes and interpretations: it is an extremely detailed, minutely drafted agreement, but more important than that, it is one of those rather remarkable agreements that has a proper, continually functioning institutional mechanism for dealing with its implementation, and for dealing with problems that might arise in the implementation. Those are the institutional provisions that you find in Article 164, and following, about the Joint Committee.

The Joint Committee is there as an organ to ease the smooth and continuing implementation of an agreement that is full of implementation implications, but it is also the organ to which difficulties in the interpretation or administration of the agreement are to be brought. Those are the main institutional provisions of the agreement, even before you get to some sort of formal dispute settlement. That is why I said it

was extraordinarily difficult to see how a situation might eventually arise in which the Government thought it was right or necessary to make use of provisions such as those in the Bill. One would expect that issues of the kind that have been spoken about would be thrashed out in the Joint Committee, solved there by agreement, or, if not solved by agreement, would then move in a carefully organised way into a formal process for the settlement of the disagreement, with nothing involving a sort of unilateral lashing out either by one side or the other.

Lord Pannick: I want to come back to the dispute between Professor Elliott and Sir Stephen. Professor Elliott, as I understood it, said why not put on the face of the Bill the circumstances in which the powers can be exercised. Sir Stephen's answer to that was, no, you cannot do that, because that would then leave it up to the domestic courts to interpret it. Surely the answer to that is that you could have a Clause 45 that was much narrower and excluded the power of the court to address that question. What is wrong with that, Sir Stephen?

Sir Stephen Laws: I put myself in the shoes of the drafter. If the drafter is required to exclude domestic jurisdiction in relation to any matter, he has a bit of a problem because the courts really do not like that. That is why I say it is a bit of a sledgehammer. It is a sledgehammer, but the courts have said that, in order to exclude their jurisdiction, a sledgehammer is what is required. Any attempt to gloss it, to nuance it, is only likely to open a door, the drafter would think, to the wider question being considered by the domestic courts, the question that you are trying to exclude.

Lord Pannick: Surely, that just ignores the approach of the domestic courts, which are normally exceptionally reluctant to pass judgment on any question of international law.

Sir Stephen Laws: As I think the question in this case would be a question of international law, it would be what the Government are entitled to do under the agreement, and, as Sir Frank rightly says, that should be determined in the procedures set out in the withdrawal agreement. It seems to me that the whole question should be decided in that way.

Q5 **Lord Beith:** Whereas the position of the UK Government is hugely questioned as to whether there are circumstances that could justify the action they propose to take, the converse is much clearer, is it not, Sir Frank? The material breach of the bilateral treaty under the Vienna convention entitles the other party to suspend any or all provisions of that treaty. In other words, there is no ambiguity about that at all; it is perfectly clear. If they choose to do so, to interpret it in that way, the whole withdrawal agreement goes down the plughole, and of course it has wider implications for how other states would view our suitability to make treaties with anyway.

Sir Franklin Berman: We have to be careful not even to bandy around too generally the idea of a material breach. A material breach is defined

in the Vienna convention, and I will quickly read out the definition, as it is nice and clear-cut and lapidary: "A material breach … consists in … A repudiation of the treaty not sanctioned by the present Convention; or … The violation of a provision essential to the accomplishment of the object or purpose of the treaty".

A material breach is not just a serious failure to comply; it is something absolutely fundamental to the rationale of the treaty. The Vienna convention goes on to remind us that provisions entitling a state to a remedy in the case of material breach "are without prejudice to any provision in the treaty applicable in the event of a breach". In other words, they channel what is to happen in the first place to the treaty itself, so that, even in the case of some allegation that there were a material breach, it is quite clear that international law expects treaty parties to follow in the first instance what they themselves have provided for in the treaty for those circumstances.

Lord Beith: But there would be no question. If the UK Government carried out what, on that description, would be a material breach of what they have in mind, the other party to the treaty would be free to abandon many other provisions of that treaty.

Sir Franklin Berman: The remedy is clear, as Lord Beith has suggested. The remedy, if there is a material breach that can be established, is either to set aside the treaty completely or to set aside parts of the treaty completely. It is not straightforward as to how that would be applied, and there would undoubtedly be some dispute between the parties as to what one or the other was entitled to do, but the effect, as Lord Beith says, is dramatic; it is explosive.

Lord Howell of Guildford: We can all see what a legal quagmire the whole of this is when discussed at this level. It seems to me that Sir Frank has put his finger on the practical question, which is worth discussing, whereas all these other questions are disputable. Is the fundamental change of circumstance for the birds, as Professor Elliott says, or is it actually seriously arguable? I think, personally, it is, but that is another matter. Has there been a material breach? What does "material" mean?

The practical question is just a mystery. Why on earth, Sir Frank, do you guess that the Government have not managed to contain this within the disputes procedure clearly laid down in the original withdrawal treaty allowing for items such as this? When they come down to it, they are quite narrow: what is unfettered access to UK markets and what is not, and so on, and who shall have what powers to stop it. Why have they not succeeded in keeping that in the disputes procedure? Has something come from Brussels to prevent it? Is it something in London? It is a mystery. I feel that is really what we should be discussing.

The Chair: Sir Frank, do you want to try to assess that?

Sir Franklin Berman: It sounds like a cup of hemlock, which I ought to push away from me; it is a poisoned chalice.

I am not here, and I would not dream of trying, to place myself in the mind of whoever in the Government gave parliamentary counsel instructions to draft those clauses in the Bill. We can at least compliment the draftsman—here I join Sir Stephen—that he has been absolutely brutally, blatantly honest. He has said to Ministers, "If that's the kind of provision you want, here it is, warts and all". That is what we have.

Why the Government thought to do things that way is, I am afraid, beyond me. If it was conceived of as a clever negotiating tactic in a continuing negotiation, I would have my views about that, but they are not views as a lawyer; they are the views of a former diplomat who played his own part in negotiation at the time. Beyond that, I simply cannot speculate, but I am impressed by the fact that this treaty, like other admirable treaties in which I have been involved, has such a detailed mechanism to facilitate, to lubricate, co-operation between the parties even when difficulties arise in the operation of the treaty.

Sir Stephen Laws: I do not want to repeat myself, but I think the real issue is about the tension between what Sir Frank rightly says is extremely detailed provision in the withdrawal agreement, which has to be compatible with the extremely vague provisions in the Good Friday/Belfast agreement. That I think has been a persistent, irreconcilable problem with this exercise and is probably the source of the current difficulties.

Q6 **Baroness Corston:** Is there any precedent at all for introducing legislation that grants ministerial power to breach international law, or otherwise expressly legislates for non-compliance with international law?

Sir Stephen Laws: I have been involved in a number of examples; some of them I can talk about and some I cannot. A number of them are examples of occasions when the Government acted in legislating in contravention of international law and you have to infer that they were not unaware of the risk when they did so.

There are two at least very obvious examples, the first of which was something I did myself. The Communications Act 2003 introduced a statutory ban on political advertising in the media, which at the time it was introduced into Parliament was thought to be contrary to a judgment of the European Court of Human Rights. It was subsequently held not to be, but, because there had been a judgment of the European Court of Human Rights against a blanket ban on political advertising, the Government put on the front of the Communications Bill a Section 19(1)(b) statement under the Human Rights Act saying that it could not guarantee—I have forgotten the exact wording—or could not say that it was compatible with the European convention. What that meant was that the Government thought that they had less than a 50% chance of arguing that it was, a chance that they actually succeeded in.

The other Bill that received a Section 19(1)(b) statement was the House of Lords Reform Bill, which, of course, included an electoral system that was incompatible with the prisoner voting judgment. The whole history of the prisoner voting judgment is an example of the UK Government defying international law with a view to reaching what was eventually a compromise that left our law more or less, for practical purposes, where it was.

I was involved in the drafting of the Consumer Protection Act 1986, which implemented European law on product liability. In that case, the Government and Parliament insisted on having a provision in the Bill that introduced a no-fault defence, when the whole point of the product liability regime was that there should be no fault liability. The European Court of Justice of the European Union, as it now is, eventually decided that that provision was incompatible with the directive and read it down, effectively. That was another case where the Government went with open eyes into a provision that was contrary to international law.

I found a case called *Padmore v Inland Revenue Commissioners* about double taxation treaties, where the court held that the Government had deliberately, in a provision of the Finance Bill, enacted a provision that was incompatible with the Jersey double taxation treaty, which had been incorporated into UK law. I may be doing someone an injustice, but I infer and suspect that when the Government are legislating, as they do at least annually on tax, they do not check all their double taxation treaties to discover whether or not what they are doing is compatible with them, but wait for the problem to arise and deal with it, often by a renegotiation, when it happens.

I have a whole range of other examples that that are no less convincing, but that is probably enough. If I take your question literally, almost every power, except one that is specifically limited by international law, implicitly includes—I do not make much of this point—a power to act in contravention of international law, because it is established law that people on whom discretions are conferred are not required to exercise them in accordance with international law. The case of *Brind*[1] and the case of *Hurst*[2] decide that, and are referred to in a recent lecture by Lord Mance[3] about the *Miller* judgment.

The Chair: Professor Elliott, are those examples comparable to establishing a treaty and then changing it on this timescale?

Professor Mark Elliott: No, for two reasons. While what Sir Stephen says is of course factually correct, I think it is irrelevant.

First, the fact that there are occasions on which the UK has breached its international law obligations does not change the acceptability or otherwise of another occasion on which it breaches those obligations. The

1 [1991] 1 AC 696
2 [2007] UKHL 13
3 13 December 2017, at King's College London

Government regularly breach domestic law and are found to have done so in judicial review proceedings in our own courts. The fact that that sometimes happens does not mean that we meet future breaches of the law with equanimity.

Secondly, there is a huge difference between situations such as those that Sir Stephen describes, in which, by and large, there was a risk that a particular piece of legislation might or might not be compatible with, for example, a judgment of the European Court of Human Rights, and a situation such as the one we face now in which the Government are deliberately and intentionally setting out with the purpose of equipping Ministers to breach international treaty obligations. Those two things seem to me to be of different orders of magnitude entirely.

The Chair: Thank you. We need to move on or we will not get through the range of issues that we want to discuss.

Q7 **Baroness Fookes:** I want to look at the role of individual Ministers and the Ministerial Code and the *Cabinet Manual*. Does the Bill confer ministerial powers that are at odds with those duties?

Professor Mark Elliott: The Ministerial Code until 2015 explicitly required Ministers to act compatibly with international law; in 2015, the reference to international law was removed. The Government gave assurances at the time that in fact the removal of the reference to international law was not intended to make any substantive change and they gave assurances that the reference to "law" in the Ministerial Code was still intended to encompass international law. That view was upheld when the Court of Appeal had occasion to consider the question two or three years ago, I think.

Of course, the Ministerial Code is not legally binding, as I think the Attorney-General pointed out, and made a good deal of, recently, but the fact that the Ministerial Code is not binding does not, I think, change the fact that it is an important statement of Ministers' obligations; it is an important statement of the standards to which Ministers are expected to adhere, including standards in public life and the requirement to act in accordance with the law.

The suggestion that it is compatible with Ministers' political obligations to treat international obligations in this very cavalier fashion is concerning. Either that is not right and in fact the Ministerial Code still requires respect for international law by Ministers, or, if it does not, it should prompt us to reflect on whether those obligations on Ministers are appropriately framed.

The Chair: We are going to take evidence from former Cabinet Secretaries later on some of these specific points.

Lord Dunlop: There has been a lot of focus on the roles of the law officers and their legal advisers. I want to ask Sir Stephen a generic question. How should parliamentary counsel approach a request from Ministers to draft legislation that breaches, or potentially breaches,

international law, or which appears contrary to the principles of the Ministerial Code and the Civil Service Code?

Sir Stephen Laws: I look at this as a drafter, and in some ways in this context the law officers are in a similar position. Most government legal advisers are in a position where the Minister says, "Can I do this?" and the legal adviser can say, "No you can't. It's illegal, Minister".

Parliamentary sovereignty means that parliamentary counsel are very seldom, if ever, in that position. They are always in the position of saying, "Yes, Minister, you can do it, but there are these risks that you need to take into account before you do". Lots of lawyers hate that position, because the minute they get to the word "but" they have abandoned their authority to be deferred to. It is a situation that drafters are always familiar with; they are the tools by which Ministers exercise parliamentary sovereignty, and it is a fundamental principle that parliamentary sovereignty can be exercised for any purpose and that the people who take responsibility for the political decision about how parliamentary sovereignty is exercised are Ministers. Rather like lawyers who are asked why they defend people they know are guilty, we are used to that—and the law officers when they advise on legislation have to do the same.

Sir Franklin Berman: Of course it is true that the Ministerial Code is not a legally binding code of conduct and is not enforceable, but one important point needs to be made. At the time of the debate after the tampering with the Ministerial Code, the argument was made, "Ah well, international obligations fall on the State, on the United Kingdom, not on individual Ministers". That is a fatuous point, because of course the obligations fall on the State, but the State is an abstraction. The State does not think and act for itself; the State thinks and acts through its organs, and the organs include yourselves in Parliament, the courts and, of course, the Executive. What the Executive do towards the United Kingdom's international obligations engages the international liability of the United Kingdom as a state eventually. Thus it is a serious question whether Ministers are encouraged to set aside, not to have regard to, the UK's international obligations. It is a serious question that ultimately, down the road, can lead to important consequences for the UK on the international plane.

Q8 **Lord Wallace of Tankerness:** The introduction of the Bill shone a light on the duties of the law officers and of the Lord Chancellor, who, of course, swears an oath of office to respect the rule of law. In evidence to this Committee back in 2006 a former attorney, Lord Mayhew, said: "The Attorney-General has a duty to ensure that the Queen's ministers who act in her name, or purport to act in her name, do act lawfully because it is his duty to help to secure the rule of law, the principal requirement of which is that the government itself acts lawfully".

Could you reflect on what you think the implications are of what we have learned about the role of the law officers and the Lord Chancellor by the events that we have seen unfold in relation to the Bill?

Sir Franklin Berman: During all of my time in the Foreign Office and then as FCO legal adviser, we regarded the existence of the law officers as a crucially important backstop, because in circumstances in which a policy Minister was inclined to, or being driven to, do something of dubious legality, particularly in the international sphere, there was always the possibility, and indeed the obligation under the code, of referring an issue to the law officers. The law officers, we would expect, would think carefully not just about domestic law but about the international implications in international law too, and would advise, and the Government would then automatically find themselves obliged to follow the view of the law officers. That is a crucially important safeguard. I am a little worried about the way in which it has been, arguably, not operating on this occasion, but it is very important that we maintain it.

Lord Hennessy of Nympsfield: Swirling through this entire business is a question of what trumps which. Is statute law an act preparatory to breaking the law in this case, which I think is an entirely novel concept for the UK? Is it the thing that trumps everything else? The Ministerial Code, the *Cabinet Manual*, the Civil Service Code and even the Lord Chancellor's sacred oath of office can be put into a carrier bag of nice things, to borrow Sir Stephen's metaphor; it does not really matter in the end, because everything is trumped by that.

The Lord Chancellor's oath is very potent: "Respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible". It is a statement of immense potency, and I cannot see, as an outsider, a non-lawyer, how that can be compatible, say, if the Cabinet invited the Lord Chancellor to go down to the House of Commons to activate the clauses that are in question, and how he could bring himself to take those steps to do something that would guarantee him infamy in history for ever more.

I am putting it perhaps in rather an inflamed way, but it is absolutely fundamental to the question that all the elements that go into the proper conduct of the Government, the expectations as well as the legal expectations, are held to account and brought into account in this question, because it involves all of them. I do not think we can go for a hierarchy of what trumps which without damaging our entire system of government and the way the rest of the world looks at us.

Professor Mark Elliott: That is a really critical point. Although I have disagreed with Sir Stephen on a number of points, I agree with him that if Parliament is sovereign, at the end of the day it can do those things. Doing those things may then have the consequence of putting the UK in breach of its international obligations, but as a matter of domestic law it is entitled to do them.

However, the British constitution has worked tolerably well for a long time because everybody involved in operating it recognises that there are things they can do that they should not do. That goes for Ministers and it

goes for Parliament. Parliament has immense power; it has unlimited power in domestic law because it is sovereign.

The reason why our constitution works, or has worked, acceptably well is that parliamentarians have been prepared to exercise a degree of self-restraint. They have been prepared to say, "Although we have the power to enact legislation that might have all kinds of draconian consequences, we choose not to". There are various incentives that encourage that kind of mindset, whether that be the electoral consequences for MPs or the broader moral considerations that might apply.

What I am concerned about in relation to this Bill, but also in the broader political context in which it now sits, is that that degree of restraint, and the mutual respect of the different branches of government for each other, seem to me to be closer to a breaking point than is comfortable. That is true of how the Bill treats international law and true of how the Bill treats the courts. Clause 45 does not exhibit any kind of mutual respect as between the political branches and the courts. Clauses 42 and 43 do not exhibit respect for international law.

If we cannot recapture the idea of not doing things, even though they are permissible, as a matter of constitutional doctrine, it is not clear how we continue to have a constitution that functions tolerably well, unless we begin to think about dramatic changes such as the introduction of a written constitution.

Q9 **Lord Sherbourne of Didsbury:** I would like to follow up on the particular question of parliamentary sovereignty.

We recently heard a government Minister say in Parliament, without any hint of apology, that the Bill as currently drafted would break international law, albeit in a limited and specific way. Is there anything in the rule of law in the UK that would ever constrain Parliament passing legislation that the Government believe and openly admit is a breach of international law?

Sir Stephen Laws: No. I agree with a lot of what Professor Elliott says. I am very fond of the British constitution because it is built on a system where people have to be persuaded to do the right thing, and not forced to.

My main point is that it can be done. I am not saying that "it should be done because it can be done". I am saying that it can be done, so people need to be persuaded not to do it if that is the way the argument goes. There is some evidence that that system is actually working. Whatever the Government were thought to be saying two weeks ago, they are now saying that they will only exercise these powers in circumstances where they would have some argument that it was something they were entitled to do under international law.

I think the system works. I do not agree with Professor Elliott that it does not work, but I agree about the way it is supposed to work.

Sir Franklin Berman: I noticed that Lord Sherbourne's question was in terms of "constrain" and Sir Stephen interpreted that as meaning "prevent". I think the question was intended to say constrain, and indeed, there are certainly constraints, as there ought to be. One of the constraints is that I have always understood the Attorney-General to have a role advising Parliament, not simply a role advising ministerial colleagues within government.

There is a danger in assuming that legal obligation is just a matter for the lawyers. That is dangerous. Legal obligation is a matter for all of those who are involved in the question of compliance and potential non-compliance. It is a dereliction of duty for all those concerned in the process, including in Parliament itself, not to take account of the potential implications, not simply for the United Kingdom's international obligations but for its international standing. One would hope that all of those elements come together to produce a rational approach, but we are, I can only repeat, all of us, floundering against the background of something the like of which we have never seen before.

Sir Stephen's earlier examples of contraventions by statute of an international obligation were telling, because they were so scattered and so limited. What is more, they were all particular situations. This is a general, prospective indication of behaviour, and I recall the point I made earlier, which is that what Parliament does is as capable of engaging the international liability of the UK as all of the other branches of government in this country.

Q10 **Baroness Drake:** We have discussed at some length when and if a breach of international law could or would take place, but the Government themselves, on 17 September 2020, stated that the provisions in Clauses 42 to 45 of the Bill will be used only where the EU materially breaches its duties of good faith and thereby undermines the fundamental purpose of the Northern Ireland protocol. Does that statement help to allay concerns about the potentially detrimental constitutional implications of the Bill?

Sir Stephen Laws: I think I have already indicated that I think it does. I do not want to repeat myself.

The Chair: Sir Frank, would you like to add anything in conclusion?

Sir Franklin Berman: The statement of exculpation helps in a sense, because it may indicate to us on the practical real-world level that the Government are not likely to breach our obligations except in the most extreme circumstances. Perhaps that is a good thing, but the constitutional implications remain, do they not? That Ministers are prepared to put to Parliament something that foresees consciously a breach of obligations is a fact in itself that cannot be denatured by an indication that the powers are going to be used in very limited circumstances.

May I go back to the point that I made at the very beginning? This is an agreement concluded by the UK after getting the involvement of Parliament. It is not your classic international relations agreement. Now we have Ministers saying, yes, we asked Parliament for the mechanism to enable this agreement to be complied with, but we would like to take back to Ministers, not to Parliament, the right to override anything, including things that Parliament has enacted. That is why I say that I do not think this is simply a matter of international law; its implications are obviously, as Lord Hennessy indicated, much wider than that.

The Chair: Finally, Professor Elliott. We are going over time slightly, but I think we will be okay.

Professor Mark Elliott: Article 16 of the Northern Ireland protocol makes perfectly clear what the UK can do if there are particular issues that arise, such as economic difficulties. That covers the issue, as far as I can see. If the Government would feel better, or if the Government's MPs would feel better, if they could also write that into domestic statute, they are perfectly welcome to do so. It would make no difference, but it would also be unobjectionable. However, Clauses 42 and 43 go well beyond what Article 16 allows, and that simply takes us back to the basic problem that the Bill is authorising Ministers to do things that would put the UK in breach of its international obligations.

The Chair: I am under pressure from two of my colleagues who would like to ask supplementary questions very briefly. Perhaps we could have very brief responses.

Lord Howarth of Newport: We have been helpfully reminded this morning that, with an unwritten constitution, actions that may be legal may also be unconstitutional. Do we conclude that Clauses 42, 43 and 45 of the Bill are unconstitutional?

Lord Faulks: If it is a breach of the rule of law to bring in this legislation, do any of our experts draw any distinction between the preparation or introduction of the legislation as opposed to the enactment?

The Chair: Sir Stephen—preparation.

Sir Stephen Laws: No. First, I do not think it is unconstitutional. It may be unwise, but it is not unconstitutional.

Secondly, I do not think there can be any breach until Parliament has enacted the provision, if there is any breach then, it is because that is what puts it into the law, not the Government proposing it to Parliament. It does not happen until Parliament has agreed to it, so that is when I think the question might arise. Maybe it does not arise until the power is actually exercised, but certainly not before enactment.

Sir Franklin Berman: I do not think there is anything I can usefully add, except that it sounds a bit like saying that a co-conspirator inciting co-conspirators to commit an offence is just inciting, and the offence has

not been committed yet. I do not find it a very tasteful way to approach this thing.

Clearly, Ministers can bring before Parliament whatever they think it right to do and Parliament must respond, but when you can see a chain of events leading, as it were, inexorably towards an unacceptable solution, you have to ask whether the first steps down that chain were really proper to take from a constitutional point of view.

Professor Mark Elliott: In answer to Lord Howarth's question, an Act of Parliament, by definition, is lawful as a matter of domestic law. An Act of Parliament can, and this one would, place the UK, at least if the powers were exercised, in breach of international law. Is it unconstitutional? It breaches two fundamental aspects of the rule of law: the availability of independent judicial oversight and respect for international law. To my mind, an Act of Parliament that is lawful will still be unconstitutional in that sense if it breaches fundamental constitutional principles. Yes, it would be lawful, but it would be unconstitutional.

The Chair: Thank you, all three of our witnesses for the detail and the information that you have given us. It is quite useful when witnesses disagree because it gives us more to think about, so it has been very helpful. Thank you in particular for agreeing to this session at short notice, but we were landed with the Bill at quite short notice, so it was inevitable. Thank you all very much indeed.