



Select Committee on the Constitution

Corrected oral evidence: UK Internal Market Bill

Wednesday 23 September 2020

11.40 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. 2

Virtual Proceeding

Questions 11 - 19

Witnesses

I: Lord Butler of Brockwell, former Cabinet Secretary; Lord O'Donnell, former Cabinet Secretary; Lord Wilson of Dinton, former Cabinet Secretary.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Lord Butler of Brockwell, Lord O'Donnell and Lord Wilson of Dinton.

Q11 **The Chair:** The Select Committee on the Constitution is looking at the Internal Market Bill. Our witnesses for this session are Lord Butler of Brockwell, Lord O'Donnell and Lord Wilson of Dinton. Welcome to you all.

This is, as everyone acknowledges, a pretty controversial Bill, at least in some parts, and we have had a situation where at least one government Minister said that the Bill breaks international law, or makes provision to do so. We would like to start by asking you for your general views on the Bill's provisions, in particular the idea that they provide explicitly for Ministers to break international law. You all have significant experience of the Ministerial Code and working with Ministers at the most senior level, so we are very interested in your thoughts on this matter.

Lord Butler of Brockwell: My view is that the Bill is like the curate's egg: no doubt, parts of it are excellent, but the clauses relating to Northern Ireland are not. I believe that whether or not they are legal, and you have had evidence from other witnesses on that, no convincing justification has been produced for departing from the agreement with the EU, and the threat to do so is both dishonourable and unwise.

Lord Wilson of Dinton: I would go along with what Lord Butler said. We have to look at it through different lenses. At a legal level, it seems extraordinary to have provisions, particularly those such as Clause 45, which would allow Ministers to act in direct contradiction of the rule of law. I can accept that perhaps unlawful acts would not happen until regulations were actually made, but the conception itself seems to me wholly unacceptable and very unusual. It is a remarkable Bill.

Secondly, we have to look at it through a constitutional lens at a time when we are testing the unwritten constitution more and more to its limits, beyond where anyone has ever stressed it before. This adds a challenge both to the courts and to—what I always think of as Peter Hennessy's phrase—the good chaps agreement, where people know the limits of what is acceptable, particularly if it is illegal, a point that came out of the previous session.

There is then the political level. We have to look at this as part of a negotiation. It may be very unwise and it is certainly very radical, but we have to ask, "Is this going to work?" None of us knows what is going on in the negotiation. Is this a move that will produce an outcome that would otherwise not be there for the United Kingdom? I do not know the answer to that, but my own view is that, even if it does, it is so challenging, both legally and constitutionally, that it is unwise.

Above all, the damage it does to the country is remarkable. During the previous session, I was looking at the Conservative Party manifesto. I think there are clues or hints there that people knew that something like this was going to be needed in relation to Northern Ireland. If we look at the phrase retrospectively, Boris Johnson's new deal "takes the whole

country”—notice that it is the whole country, including Northern Ireland—out of the EU “as one United Kingdom”. It takes us, “the whole of the UK”, out of the customs union, allowing us to set our own tariffs and do our own trade deals.

The seeds of this are buried in those phrases. It is not difficult to see that either you have a hard border with the Republic, or you have it with the rest of the United Kingdom, or you try to negotiate something acceptable in the Irish Sea. It is not hard to see that that was buried in the withdrawal agreement, but the withdrawal agreement was a deal and it should be stuck with. It seems to me hugely damaging not to stick with it. That is my view.

The Chair: That implies duplicity in the way the deal was actually presented at the time, but perhaps we will come back to that.

Lord Wilson of Dinton: Calculation is the word I would use, Chair.

Lord O'Donnell: I definitely agree with my two former bosses on everything they have said. I would add that the previous session showed you that within our system there are various checks and balances, and the law officers are part of that. Their duties and oaths have been brought up. When those checks and balances are seen to fail, what is really relevant for this Committee is the fact that the next check and balance is Parliament itself. Parliament has a significant role to decide whether it is appropriate for things such as Section 45 to be enacted in law. I hope the Lords will play their part in deciding that issue.

The Chair: That is a really important point and we will come on to that a little further on.

Q12 **Lord Wallace of Tankerness:** Lord O'Donnell has just mentioned the role law officers play as part of the checks and balances. From the very extensive experience of each our three witnesses, how do you view the responsibilities of law officers and the Lord Chancellor in circumstances such as this, and where do you think their ultimate responsibility lies? Is it to government, to Parliament, or to the rule of law?

Lord Butler of Brockwell: The role of the law officers is to advise the Government of their rights and obligations under domestic and international law, and, as was said in the last session, they have a role in advising Parliament. The role of the Lord Chancellor, who these days need not actually be a lawyer, is to oversee and support the administration of justice. Again, as was brought out in the last session, he swears an oath on taking up office to uphold the rule of law, and that is material to this situation.

Lord Wilson of Dinton: The position has always been a pillar of our legal system and of the legality of government. The former Lord Chancellor used to sit in Cabinet, in the Lords and in the Supreme Court. That was symbolic both of the position's neutrality and of its central importance in holding the different parts of our constitution in their proper place.

The law officers, in my career, were always hugely able, clever lawyers, deeply versed in the law, whose advice you would always accept because you always trusted it. It is about trust. You trust them to be very good at their job and very fair, objective and non-party political in the advice they give. It again worries me that that is another bit of the constitution that is being shaken.

Lord O'Donnell: It is the job of the Attorney-General to advise Cabinet on whether something it is considering is consistent with the law, for example. It is then for the Prime Minister and Cabinet to make the decision as to what to do. They cannot hide behind that advice. It is their decision. If they decide to do something knowing that it is in violation of the law, they have to be accountable for that decision.

Lord Howell of Guildford: All three of our enormously experienced witnesses agree that the inclusion of these clauses is pretty bad news, and that it was an unfortunate Cabinet decision to decide to put them in the Bill. I was fascinated by Lord Wilson's point about tracing back to the seeds of all this and how we got to this situation.

Do our witnesses have any views on how the decision arose to put the provisions in a Bill rather than deal with them in the disputes mechanism clearly set out in the withdrawal agreement Bill? If it was a question not merely of views in London but views in Brussels, and if Brussels lawyers have been pretty vocal on what should or should not have gone into the dispute mechanism and so on and there was a blockage in Brussels, would our witnesses look on the issue slightly differently?

Lord Wilson of Dinton: I would look on it a bit differently. One can only guess. We are all guessing, but it is so remarkable to have them in a Bill that one can only assume that the wish is to startle the other side of the negotiation and make them realise they are dealing with people who will stop at nothing, and that this is not like—forgive me—Mrs May's Government, where they were trying to be reasonable; this is a Government who mean business and are prepared to do the unthinkable. The only way of doing that is to put it in a Bill and not go through something more conventional.

Q13 **Lord Faulks:** I would like to ask you all about the role of the Attorney-General and the advice that he or she gives. Let us suppose that the Attorney-General were to give advice that something was unlawful, and the Cabinet and the Prime Minister decided, "Thank you very much for your advice, but we propose to go on our own particular way and we reject your advice".

Lord Pannick and I are familiar in the private sector with having our advice rejected by clients. That is perfectly acceptable and that is their privilege. But is the situation not rather different when you have an Attorney-General or Solicitor-General giving advice that something is unlawful? What then is the position either of the Attorney-General, resignation presumably being an option, or of the remainder of the Cabinet and the Prime Minister?

Lord Butler of Brockwell: The Cabinet of course has a right to reject the advice of the Attorney-General, but it would carry a heavy responsibility for doing so, and it could not be concealed, in my view. Parliament would ask what the Attorney-General's advice was on a matter and the Attorney would, I think, be obliged to answer that question. The normal situation of confidential legal advice would not apply in such a case. The Cabinet could reject the Attorney-General's advice, but it would have then to defend itself for doing so.

Lord Wilson of Dinton: This is where you will find Cabinet Secretaries slightly differ. I had always understood, certainly until Iraq, that the advice of the Attorney-General to the Government, or to the Cabinet, was always kept private and never published, or indeed even acknowledged. It was only over Iraq and the publication of the summary that that began to be eroded. I do not know whether the Cabinet was bound to accept the advice. Can my colleagues think of any occasion when the Cabinet rejected the Attorney-General's advice or the law officers' advice?

Lord Butler of Brockwell: I cannot think of one.

Lord O'Donnell: That is what makes this case very unusual.

Lord Wilson of Dinton: I can think of occasions when they have possibly thought, "We'll have to do something else and find a way round it", but that is different. I do not think any Government have ever taken the dread step of going against advice from the Attorney-General.

Q14 **Lord Sherbourne of Didsbury:** This raises the whole question about the peculiarity of the role of the law officers in our system, because, of course, they are elected politicians and they are appointed at the whim of the Prime Minister. I am talking in general terms rather than about the particular officers who hold the posts today. There may be times when they are tempted to offer the advice that they think the Government or the Prime Minister would like.

Where do they go for their advice? Although I understand there are panels appointed officially to give advice to the law officers, I presume there is nothing to stop a law officer going to other legal sources for advice, perhaps to give them the kind of answer that they would like to be able to give to the Prime Minister. I would like your views on where the advice comes from.

I have a very short second question. If a Minister of the Crown, as happened recently, gives a statement to the House of Commons about something being legal or illegal, can I assume that was given on the basis of law officers' advice?

Lord O'Donnell: On the first point, Attorney-Generals can and do go outside for external advice. There is nothing to stop them doing that, and I think that may well have happened in this case. I am going by a rather indirect source. Richard mentioned whether the advice should be published or not, but we have seen extensive leaks of what allegedly the advice was. If those leaks are accurate, it looks as though the external

advice was much the same as the internal advice: "This is not compatible with international law". The second half of that advice was, "But don't worry, because Parliament is sovereign and therefore that trumps it", to put it very crudely. That is the point.

I have always been puzzled in this case, given the legal arguments you heard in the first session, because, from a political point of view, you might have thought that the Attorney-General might create some nuances and say that she was not sure whether it broke the law or not. But that is not the case. Ministers have been admirably clear, Brandon Lewis specifically, that there is no question about whether it breaks the law or not: it does. That is the question. Sorry, I lost your second point, Stephen. Could you repeat it?

Lord Sherbourne of Didsbury: Is it fair to assume that if a Minister, as happened recently, gives very clear legal advice to Parliament, it has been done on the basis of what he has been told to say by the law officers?

Lord Wilson of Dinton: If the Minister gives a clear statement of the law, he or she may have been advised by the Treasury Solicitor. It does not necessarily have to have gone to the Attorney. It depends whether it is a major issue or not. If it is a big issue, you can be pretty sure that the Minister has been to the Attorney. If it is a small issue, such as taking a Bill through, he would not go to the Attorney on that.

Lord Butler of Brockwell: Chair, you and I will recall the advice given by the Attorney-General in respect of the Iraq war. Initially, the Attorney-General said, "You will be on firmer ground if you can get a second UN resolution justifying military action". That UN resolution was not obtained and the Attorney-General was put on the spot and asked, "We do not have a further resolution: are the Government none the less justified in taking military action?", and he said that they were. There are times when the Attorney is forced to modify his advice.

Q15 **Lord Beith:** The Government have three law officers, or they had; it is down to two as a result of resignation. It appears that the Attorney-General's view is that a breach of international law is somehow in a different category from a breach of domestic law. The Lord Chancellor's view is that the problem has not arisen yet, and would only arise at a later stage, and he will tell us then whether he finds it acceptable or not. In a theoretical case, assuming that all three were lawyers, whose view trumps? If the Lord Chancellor takes a different view from the Attorney-General, what kind of outcome should there be?

Lord Butler of Brockwell: The Cabinet would have to decide.

Lord Wilson of Dinton: My reaction would be to get them together in a room and try to get them to sort it out between themselves. There is no rule.

As with so much else in our constitutional unwritten way of doing things, there is nothing black and white; there is nothing written down. I think

my colleague Lord Butler, in an unwise moment, told a Select Committee when he was in the job, "The truth is sometimes we make it up as we go along". If I may say so, the situation you described is one of those. It is obviously untenable. You need to get them together, and in the end I think the Attorney is probably the senior one, but I am not sure.

Lord Beith: Do you mean by virtue of office?

Lord Wilson of Dinton: Yes.

The Chair: All law officers have to be held accountable for whatever decision is made if they stay in government.

Lord Wilson of Dinton: Before they get to a disagreement this stark, I would try to get them to talk to each other.

Lord Butler of Brockwell: The way I interpreted Lord Keen's position was that he argued that there were circumstances in which the Government would be justified in seeking powers to override the agreement and breach international law, but he had not been persuaded that the reasons were good enough. He felt that he therefore could not justify it in Parliament, and that was the reason for his resignation. It was not that he thought it would necessarily in all circumstances be illegal. If the circumstances were convincing enough, it could be legal, but he did not think the circumstances as so far explained rose to that standard.

Lord O'Donnell: You have to look at their oaths. I find it very odd for people who have taken oaths about upholding the rule of law. That is why I think Jonathan Jones, in his position, did the honourable thing. That was the right thing to do, whereas, as Stephen Laws pointed out, parliamentary counsel are required to put together something that gives effect to the instructions they have been given. It is perfectly reasonable for them to do that. They do not have to do it, they might find it distasteful, but I think that, when you are in Jonathan Jones's position, it is a question of whether you go along with it or not. To my mind, he made the right decision.

Lord Wilson of Dinton: I agree.

Q16 **Lord Dunlop:** I want to move on to ask about the role of the Cabinet Secretary in relation to the Ministerial Code and the *Cabinet Manual*. We can certainly see that the new Cabinet Secretary, Simon Case, has had a lively first few days in the job. As we have already heard this morning, the Ministerial Code states that there is "an overarching duty on Ministers to comply with the law". The *Cabinet Manual* makes it clear that it includes international law and treaty obligations, something I think the courts have confirmed. What is the role of the Cabinet Secretary in advising the Prime Minister about the requirements of the Ministerial Code and the *Cabinet Manual*?

Lord Butler of Brockwell: The role of the Cabinet Secretary is admirably and explicitly set out in section 1.4 of the Ministerial Code. I think this was added after my time, probably by one of my colleagues

here. Section 1.4 says: "It is not the role of the Cabinet Secretary or other officials to enforce the Code". The role of the Cabinet Secretary is to advise the Prime Minister if he thinks that there is a prima facie breach of the code. If the Prime Minister, on the advice of the Cabinet Secretary, sees need for further investigation, he may ask the Cabinet Office or an independent adviser to investigate. I cannot improve on the words in the Ministerial Code.

Lord Wilson of Dinton: My recollection is that it is the Prime Minister who decides whether the code has been breached. There is a sense in which, if he wants to say this is all right, it is all right. Peter Hennessy had students who wrote books that tried to prove that the code was more binding than that and was a set of rules, but I do not think it has changed that much. I think it is still the case that it is for the Prime Minister in the end. It used to be guidance for Ministers, did it not? This is about guidance to Ministers from the Prime Minister about how to behave themselves and how to do the job. In essence, it is still that.

Lord O'Donnell: The *QPM*, the *Questions of Procedure for Ministers*, was first published by John Major when he was Prime Minister. I go back to when I was press secretary and I remember it vividly. The Ministerial Code is what it says on the tin. It is for Ministers. The Prime Minister could rip the thing up and write a different code in which he said, "You can break the law as much as you like". Politically, that might be unwise, and I think there would be all sorts of questions about it, but this Prime Minister has this Ministerial Code and this *Cabinet Manual*. The *Cabinet Manual* is a product of Cabinet, and it could change these things, but as they stand at the minute they tell them to uphold the rule of law.

I completely agree, to be clear, with Lord Butler and Lord Wilson that that part of the Ministerial Code is absolutely crucial. It is not the Cabinet Secretary's job to enforce the Ministerial Code. There are times when we have all been asked to facilitate the Prime Minister looking into issues, but decisions about whether a Minister, because of their behaviour, should resign or be sacked, or whatever, are for the Prime Minister, and are his responsibility.

Lord Wilson of Dinton: Civil servants are hired out of money voted by Parliament to support the Executive, to advise them and to implement their policies. It is not the job of civil servants to hold the Executive to account. That is the job of Parliament.

The Chair: Indeed.

Lord Wilson of Dinton: It is very important to keep that firmly in view in some of this discussion.

The Chair: This is an appropriate point at which to bring in Lord Hennessy.

Lord Hennessy of Nympsfield: When I was teaching undergraduates about the job of Cabinet Secretary, I would say to them that the key to it

is something Mr Gladstone said in 1879, that nowhere in the wide world is there a constitution that presumes more boldly than the British one “the good sense and good faith of those who work it”. Notice the verb “work”. The Cabinet Secretary’s job is as the guardian of the *Cabinet Manual* and the two codes, the Ministerial Code and the Civil Service Code, as the Prime Minister’s principal adviser. The problem that always arises with those documents is when an expectation hardens or morphs into a convention, when it toughens up in that sense. It might be a matter of time or a matter of experience. It is a very fluid area.

Do you agree that what I was telling undergraduates all those years ago is right? Secondly, when it comes to keeping the law and not breaking the law, domestic or international, it is the hardest form of convention, at the very least, in all those documents. That is the holy grail embedded in those documents. Nothing has more force in those documents than the section dealing with law-keeping.

Lord Butler of Brockwell: Yes, but I think that the position is still correctly set out in section 1.4. Ultimately, it is for the Prime Minister to decide, even if the Prime Minister accepts that there has been a breach of the law. The Cabinet Secretary may advise the Prime Minister that it is very difficult to deny that there is a breach of the law, but it is still only advice, and in the end it is the role of the Prime Minister to decide.

In the past, I got into trouble while I was Cabinet Secretary when I was asked to investigate the role of Jonathan Aitken. Subsequent to that, an independent adviser was appointed, Sir Alex Allan. The Prime Minister can go to that independent adviser to look into things, and, in my view, that will very often be appropriate.

Lord O'Donnell: Going back to Lord Hennessy’s statement about the Ministerial Code and Civil Service Code, it is worth remembering that they are very different beasts. The Ministerial Code could be ripped up by the Prime Minister and rewritten. The Civil Service Code is contained in law in the Constitutional Reform and Governance Act—CRaG. In that sense they are different, and for a Cabinet Secretary that makes a difference because there are some things he has to do statutorily. The current Cabinet Secretary will have had to deal with certain things that were decided—let us be absolutely clear—by the previous Cabinet Secretary under the provisions of this rule. Simon Case has arrived with a very tricky inbox.

The Chair: I do not think anybody would dispute that.

Q17 **Baroness Corston:** May we turn to the Civil Service? What is the role of the Cabinet Secretary and of the Civil Service Commission when the Government propose a course of action that is potentially unlawful?

Lord Butler of Brockwell: If a civil servant feels that he or she is being asked to do something that is unlawful, or even contrary to their conscience, the code says that they should refer it to their senior management. If they cannot resolve it that way, they have a right of

appeal to the Civil Service Commission. I think the hope is that, if the Civil Service Commission adjudicates, it will be accepted by all sides. If the Civil Service Commission finds against the civil servant and says, "You are actually being asked to do something that is perfectly proper and legal", the civil servant has the right to ask to be moved to another job, or to resign. There is a series of steps clearly laid down in the Civil Service Code.

Baroness Corston: I was asking about the role of the Cabinet Secretary particularly, rather than civil servants.

The Chair: And the Civil Service Commission.

Lord Butler of Brockwell: The Cabinet Secretary is the head of the Civil Service. I remember a case when a civil servant was troubled about something that the Government were doing. I ultimately heard it. He was not in the Cabinet Office nor in my department, but I was asked to see him and reach a view, and I did. There is no formal role for the Cabinet Secretary in that situation, except generally to be the head of the Civil Service and to oversee the Civil Service Code.

Baroness Corston: And the Civil Service Commission.

Lord Butler of Brockwell: I think I mentioned that. There is a right of appeal to the Civil Service Commission. It is independent and outside the Executive, and it has the advantage of being able to reach an independent view.

The Chair: Baroness Fookes, I think you wanted to follow up on this subject.

Baroness Fookes: What I had in mind has partly been answered already, about the individual civil servant who finds himself or herself in difficulties. Have there been any instances where a civil servant has actually been sacked when the difficulties could not be resolved? We have already had explained to us what the situation is, but has that ever happened?

Lord Wilson of Dinton: The question was whether a civil servant was unhappy about the course they were being asked to take and were sacked because they were unhappy about it. I do not think so, not if they were behaving within reasonable bounds.

Baroness Fookes: It has usually been resolved.

Lord Wilson of Dinton: I think it is usually resolved.

Lord Butler of Brockwell: You can imagine theoretical circumstances in which the Civil Service Commission said, "What you have been asked to do is entirely proper and you must obey the instructions", and the civil servant said, "I won't". In those circumstances, it would be reasonable for the civil servant to be dismissed, but certainly I have never known such a situation.

Lord Hennessy of Nympsfield: What does the Cabinet Secretary do if he is worried about the propriety of something he is required to do? Who does he go to see? Did it ever occur in your time? Did you ever think of resigning over something?

Lord Butler of Brockwell: Yes, I did think of resigning over something, and indeed the circumstances have been published. I went to see the Prime Minister. The Prime Minister did not find in my favour, but in the end I decided I would not resign. I was persuaded that what the Prime Minister wanted to do was within the Prime Minister's rights, so I withdrew my threat to resign. It was a very unusual situation.

Lord Wilson of Dinton: I, too, have been in a situation of beginning to murmur about resigning, and the person I talked to was the Prime Minister. I made my position clear, and we sorted it out—my way.

The Chair: Lord O'Donnell, you are nodding in agreement.

Lord O'Donnell: There is only one person you can talk to in those circumstances, and that is the Prime Minister, although you can also get extremely good advice from your predecessors.

The Chair: I am sure they welcome that comment.

Lord Wallace of Tankerness: I follow what Lord Butler was saying; if a civil servant does not like what he is doing and he has gone through the process, he is told, quite properly, to get on with it. If you are in a circumstance where the civil servant does not want to do it because it is breaking the law, and a member of the Cabinet has stood up in the House of Commons and said it is breaking the law, albeit in a limited way, what is the duty of the civil servant then, if what he or she is being asked to do is knowingly breaking the law?

Lord Butler of Brockwell: I make a distinction between the drafting of the Bill and the implementation of the Bill. I do not think there is anything illegal about drafting a Bill. If the civil servant is instructed to draft a Bill, the civil servant should do it, but if, like Sir Jon Jones, the civil servant finds that so personally distasteful, despite the fact that it is not actually illegal, he has a right to resign. That is what Sir Jon Jones did. If it was somebody who was not quite as senior, I would expect the civil servant to say, "I can't draft this bill consistently with my conscience, so I would like, please, to be moved to another job", and that is what I think the management would do.

Q18 **Baroness Drake:** That question partly anticipated mine. It would be helpful if you could explain the responsibilities of parliamentary counsel when asked to draft measures of the nature of those that occur in the UK Internal Market Bill, specifically where it includes equipping Ministers with powers to breach international law. This was discussed in the previous session. It would be helpful if you could give us your views on their duties and the specific circumstances of this Bill and preparing the Bill for equipping Ministers with powers to break the law.

Lord Wilson of Dinton: I was thinking about this interesting discussion. Every player will be tested to a degree they have not been tested before. Members of the House of Lords will have to think very carefully on how far they press their view, assuming that there is a view that these clauses should be dropped. It might come to ping-pong and the 1911 Act might be triggered. The Queen will have to sign an unlawful Bill. This is all novel.

The basic point about civil servants is that they can be sure that if they are unhappy they can ask to be moved, or they can resign, or they can write very strong advice for the record, so that history will know what their view was. I think those are the only remedies, other than soldiering on and doing what is the discipline of the profession, which is to provide the best service you can to the Government, however much you may disapprove of what they are doing.

Lord Pannick: I want to put to our witnesses my surprise at what I understood Sir Stephen Laws to say in the last session, which, essentially, was that parliamentary draftsmen simply draft what they are instructed to draft, and, if it is enacted, it is lawful. I had always understood that it is part of the role of parliamentary draftsmen to say to Ministers, "What you are asking me to put in this Bill breaches fundamental constitutional principles". Clause 45 is a very good example. Their advice may not be taken, but surely it is their responsibility to draw attention to the unusual, perhaps unique, nature of what they are being asked to draft, and the legal and constitutional problems that it is going to cause. Do you disagree with that?

Lord Butler of Brockwell: No, I agree with it. It is indeed their duty to give advice, but it is the Minister's role to decide. A Minister might say, "I am asking you to do something that is entirely legal in itself"—to draft a Bill. "Please get on with it". If the civil servant, as was the case with Sir Jon Jones, says, "I'm sorry, it is not that it is illegal—it is distasteful to me. I can't square it with my conscience and my responsibilities for the rule of law and, therefore, I shall resign", that is an entirely honourable thing to do.

Lord O'Donnell: Could I add, dare I say it, a bit of politics? It is exactly right that they should give their advice, and if they are required to carry on regardless, they should get on with it. What Jonathan Jones has done is say very publicly he is not happy with this. That goes back to my point about checks and balances.

The Lords have a crucial role, because under the Parliament Act the Lords can delay this getting through, certainly beyond what one assumes is the timetable for the negotiations. That may suit everybody, because it may be—I have no idea—that the Government introduced these provisions simply as a negotiating tactic, and they are just going to be hanging around. I think that is disreputable, but it is their choice. In the Lords, we also have a choice as to whether we say that Section 45 and the like are appropriate. I shall be voting to make it clear that I do not.

The Chair: We will come to that side in a minute. Baroness Drake wants to come back to the specific point about parliamentary counsel.

Baroness Drake: A lot of people are interested in the detail of this issue and they are not necessarily all lawyers. Lord Butler made a point about parliamentary counsel having responsibilities for the rule of law. On the one hand, parliamentary counsel have a duty to give advice, and it is the Minister's right to decide, but what are the specific duties that parliamentary counsel hold as regards responsibility for upholding the rule of law in that post? At the end of the day, are the responsibilities of the post that the ministerial decision trumps the view of parliamentary counsel, or is there another level of responsibility impinging on parliamentary counsel when it comes to drafting something that they believe is a breach of the rule of law?

Lord Butler of Brockwell: There is always the right, which Sir Jon Jones exercised, of saying, "You, Minister, have the right to instruct me to draft this Bill, but I don't regard it as compatible with my loyalty to the rule of law. I therefore give you my resignation".

The Chair: That is the nuclear option.

Lord Wilson of Dinton: It is central to remember that Ministers are elected and civil servants are not elected. Ministers have the right to decide. Civil servants can argue, advise, write their protests, and so on, but in the end it has to be the Minister who decides, because it is the Minister who is accountable to Parliament. All these things hang together.

Q19 **Lord Faulks:** This probably brings together quite a number of the issues we have already been discussing. There is no doubt that the Bill involves the breach of international law, whether or not one draws a distinction about when it is put forward. If the Bill were passed, it would be in breach of international law.

I fail to understand how promoting this Bill would not be a breach of the Ministerial Code, because the Prime Minister has not amended the original Ministerial Code. It seems to me plain that Ministers promoting it would be in breach of the Ministerial Code. Parliament is being asked to pass a Bill that is in breach of international law and promoted by Ministers in breach of the Ministerial Code. Is it appropriate for Parliament in those circumstances to pass legislation that, on the face of it, is contrary to the rule of law?

The Chair: Lord O'Donnell, you have already expressed some concerns.

Lord O'Donnell: Yes. I think it is a matter for Parliament and for every individual involved to decide. My personal view is very clear, that it is not appropriate, but others will have to come to their own conclusions.

Lord Butler of Brockwell: I take the view that it is dishonourable and contrary to the interests of the UK even to make the threat, and for that reason I will vote against the provisions in the Bill.

Lord Wilson of Dinton: I will too. I think it is disgraceful to have such extraordinary Henry VIII powers proposed to the House. It is intolerable that we are being asked to take them through. I draw a distinction between legality and the damage they do. In legal terms, listening to the arguments in the last session, you can argue, as they were doing, that it is only when a regulation is made that something unlawful actually happens. It seems to me that the Bill is unlawful, but that may not be correct.

Whatever the legal position, the constitutional position is that it is an outrage, and the political position is that it is hugely damaging to our reputation internationally. It is not difficult to see that it is objectionable, but whether that is because it is actually illegal or not I am not sure after the earlier discussion.

Lord Butler of Brockwell: May I come back to the ministerial position and the job of Ministers? Let us accept that the Bill breaks the law. The justification of the Attorney-General and the Lord Chancellor, as I understand it, is that it breaks the law in certain respects, but there are circumstances in which that is justified. They have to stand or fall on whether that argument survives and is accepted. If they hold it in good conscience, they are perfectly right and justified in proposing the law and supporting it in Parliament. Lord Keen felt he could not. The other Law Ministers feel they can, and that is their right.

Lord Howell of Guildford: The overwhelming assumption in this whole discussion, and indeed of this particular question, which has just been confirmed by Lord Faulks, is that these clauses do, or I think he said would—we can have an argument about that—break international law, and any suggestion that that is not so is spitting into the wind, although occasionally one has to do even that. There are very strong opinions to the contrary that have been put publicly and to us. Two QCs wrote a paper, circulated to the Committee, on whether the Government violate international law with these clauses. Their answer was that, whatever the practical and political merits or demerits of such clauses, the short and inevitable answer is no. They go on to elaborate. They are not alone. There is a very widespread set of views, often from legal authorities, to say the opposite.

If one is left in the position that even though the assertions and fairly strong views of our experienced witnesses are that there has been a break, or is about to be a break or is a break, where should we stand? The withdrawal agreement treaty specifically states: “Nothing in this protocol”—I repeat nothing—“shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom”. Nothing shall impede.

Chair, you said it was duplicitous. I think ambiguous would be a happier word. It is ambiguous. Now the ambiguity is coming out and now the arguments are raging, but where is the solid basis for the assumption that international law has been broken and, therefore, the code is in question and other matters are in question, and it is an outrage and so

on? I am sorry to sound the lone voice of another view, and I do not align myself necessarily with all the political views behind this, but there is another side to things. There really is.

Lord Butler of Brockwell: I rather throw up my hands, particularly having heard your earlier session, about whether it is illegal or not. It may be illegal and yet it is justified in certain circumstances. Put that aside. My view, as I said, is that these provisions, even publishing them in a Bill, are dishonourable and unwise, and that is the reason that I will vote against them.

Lord Wilson of Dinton: That is what I was trying to say. I am left unsure about the precise point at which an unlawful act takes place, but, whatever the answer on that, I think these clauses are constitutionally improper, and it is an act of bad faith to have entered the withdrawal agreement and then to take this action. On both those grounds, they are wholly unacceptable.

Lord Howarth of Newport: What are your views as to the implications of the propositions in the Bill for the coherence of the constitution, and for trust and consent in the democracy of the United Kingdom? The defiance of the rule of international law by the Government of the United Kingdom, let us remember, is overlaid by challenges in the rest of the Bill to the sense among the devolved Administrations of their proper competence within the internal market of the United Kingdom.

May there not be a case of what is sauce for the goose being sauce for the gander? If London can challenge the rule of law, what about Holyrood and Cardiff, which may indeed see United Kingdom law as analogous to international law? Is it a responsibility of the Cabinet Secretary to advise Ministers on the constitutional validity and implications of the policy?

Lord Butler of Brockwell: You have just given another reason why these clauses are very unwise. It is the job of officials, including the Cabinet Secretary, to bring those things to Ministers' attention. In the end, Ministers must decide whether that game is worth the candle.

Lord Wilson of Dinton: I agree.

Lord O'Donnell: That is right. I agree.

The Chair: In that case, I thank our witnesses. You have a wealth of experience on these issues, and we have a pretty clear indication of how you think the situation should have been handled and of some of the problems that are arising.

We are grateful to you for giving up your time, especially at short notice. I am very pleased that you were able to see our earlier session, because obviously, that affects all our thinking on these issues. I thank our witnesses and remind members of the Committee that we now need to log out of Zoom and go back to MS Teams to continue our private discussion.