



# Select Committee on the Constitution

## Corrected oral evidence: UK Internal Market Bill

Wednesday 30 September 2020

10.15 am

Watch the meeting

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

Evidence Session No. 4

Virtual Proceeding

Questions 28 - 41

### Witness

I: Mick Antoniw MS, Chair of Legislation, Justice and Constitution Committee, Welsh Parliament.

### USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on [www.parliamentlive.tv](http://www.parliamentlive.tv).

## Examination of Witness

Mick Antoniw MS.

Q28 **The Chair:** This is the House of Lords Select Committee on the Constitution. We are taking evidence on the UK Internal Market Bill. Our witness this morning is Mick Antoniw, Chair of the Welsh Legislation, Justice and Constitution Committee. Welcome and thank you for agreeing to this session at relatively short notice. We are grateful.

Quite a lot has been said publicly about this Bill. Indeed, the Welsh First Minister has described it as an enormous power grab. What are your general views on how this Bill affects devolved legislative and executive competence? Is it a power grab?

**Mick Antoniw MS:** In my view it is. As the UK Government have said, we can take the view that it is an economic Bill, but one that has very substantial constitutional implications. In my view, it drives a coach and horses through much of the devolution settlement.

I do not think there is any disagreement on the need for arrangements in respect of frictionless trade. I think everyone buys into that. The question is how that is achieved. It was being achieved by a series of pieces of legislation and by common agreement and discussion. That was always the plan once we came out of the European Union for dealing with these matters. I see this Bill as in some ways a constitutional ambush. I can only conclude that this is very intended. I cannot conceive that the way this is being done is not deliberate and has as part of its objective a recalibration of the devolution settlement and the centralisation of powers within the UK Government.

On the question of where it would leave the Welsh Government and probably the other devolved institutions—I will talk specifically in respect of the Senedd, or the Welsh Parliament—we do not have powers taken away from us, but the ability to exercise the powers we have will become significantly restricted and in many ways transferred to the UK Government, who will be able to exercise them without any reference to or consent with the Welsh Government or the Senedd, if they choose.

**The Chair:** Thank you, that is a very clear start.

Q29 **Lord Howarth of Newport:** What you appear to be describing is quite a serious breakdown of conventions and relationships. I want to ask how the lines of communication between Cardiff and London may have worked during the period of preparation of the Bill. The memorandum of understanding between the UK Government and the devolved Administrations emphasises good communication, consultation and co-operation between the legislatures. Has the engagement between the UK and Welsh Governments on this Bill lived up to these principles?

**Mick Antoniw MS:** We have to take the background to this in a little bit more detail. There has been a lot of engagement over the last couple of years on the issue of frameworks, because the whole basis on which legislative consent was given to the withdrawal Bill was on an

intergovernmental agreement. Some of you may recall that we had passed legislation in Wales, a continuity Bill, which effectively provided a framework and mechanism for the exercise of all powers returning from Brussels.

The basis on which legislative consent was given was a mechanism for the suspension of those powers during the transition but also for the mutual co-operation and engagement over the development of the necessary frameworks, which all the devolved nations have bought into as being a necessary step forward.

The reality is that there have been strengths and weaknesses to those negotiations. There has been co-operation in many areas, such as agriculture and fisheries. In fact, we have this legislation going through Parliament at the moment—the Fisheries Bill, Agriculture Bill, Environment Bill, Trade Bill and so on—but we were rather shocked when we saw the White Paper on the internal market Bill: first, because it came through recess; and, secondly, because it was so limited in what it contained that it was almost impossible to put any realistic submission forward on that. We wrote to the UK Government specifically on that particular point.

The Welsh Government only saw the Bill two days before it was published. I use the term “a constitutional ambush”, because when I look at the implications of the Bill and the scale at which it intervenes in the devolved settlements and the relationships, that is all I can see—the recentralisation of power, a power grab, but also a significant driving of a coach and horses through all the arrangements that had been made through Sewel and the intergovernmental agreements and discussions on the frameworks.

**The Chair:** You are saying that you gave consent in good faith to what the relationship and working out of these details would be, but you now feel somewhat abandoned.

**Mick Antoniw MS:** I am trying not to be melodramatic and pejorative about these things, but I see this as a betrayal of the basis on which legislative consent was given to the withdrawal Bill in the first place. If an agreement is based on establishing a series of principles for common frameworks, I have to say that those principles were in fact agreed. One of the key principles was respecting the competences of the devolved institutions: flexibility and recognising the increased decision-making that would naturally go to the devolved Governments.

Those were the principles on which the intergovernmental agreement was based. I do not think that, by any stretch of the imagination, the internal market Bill can be said to reflect those. As I say, it undermines the process that was under way and now creates what our First Minister described earlier in the year on other matters as a constitutional flashpoint.

Q30 **Baroness Fookes:** Mr Antoniw, you have already said that you fully

support frictionless trade, and we can all say amen to that, but is the Bill necessary to achieve this objective? What would happen if it were not passed at all?

**Mick Antoniw MS:** The answer is that, yes, we all agreed to that. We were all agreed to a process for achieving that through individual pieces of legislation and through intergovernmental agreements. That was the process that was under way. If the Bill failed, what would happen? We would revert back to the process that was always the intention, certainly between the Welsh Government and the UK Government, and was the basis of the intergovernmental agreement reached that led to the giving of legislative consent to the withdrawal Bill in the first place.

**Baroness Fookes:** You said there have been various pieces of legislation. Do you have any idea of the numbers or the complexity of these?

**Mick Antoniw MS:** Yes. The main ones that we are concerned with are obviously areas that have been there since the establishment of devolution and the Welsh Assembly, as it was then. The area of agriculture is clearly important, because there has not been a UK agriculture policy since devolution, fisheries is important, trade is important, and so is environment, because clearly these things all impact and dialectically relate to one another.

Those pieces of legislation are going through Parliament at the moment. We gave legislative consent in the Senedd yesterday to an agriculture Bill. It is a little bit unsatisfactory, because we do not yet fully know what further amendments there might be to parts of it. There is also an intergovernmental agreement or memorandum of understanding in respect of areas where there have been disputes. Those are the key pieces of legislation to make up the framework.

This Bill goes significantly further in that it increases the number of reserved powers for the UK Government because state aid is not reserved to the UK Government, but under this legislation the list of reserved powers has state aid added to it. That again is particularly significant for a whole variety of economic and constitutional reasons.

**Baroness Fookes:** I take it you were not consulted about this extension of the powers that you have just related.

**Mick Antoniw MS:** No. It was a shock and a complete surprise, because the issue of state aid itself specifically creates a particular constitutional conflict. It is a conflict where, for example, you have the UK Parliament acting as a parliament for England as opposed to occasionally acting as a UK parliament for the whole of the UK.

The economic interest that we might identify with in Wales in matters that are devolved is that state aid policy can create areas of conflict of interest. We see that in a number of areas, for example state aid in respect of airports, but there are many other areas, so there are constitutional implications to it as well.

Q31 **Lord Wallace of Tankerness:** Mr Antoniow, you indicated earlier the importance of the common frameworks in intergovernmental relations. We had evidence last week from some academics with much knowledge in these areas, and the impression I got was that these common framework negotiations were proving quite fruitful and making good progress. Was that your sense, and do you think they have now completely broken down? What remains to be done?

**Mick Antoniow MS:** The answer on the extent of the breakdown is partly dependent on what happens with this particular legislation. My committee has scrutinised Welsh Government Ministers on these key pieces of legislation, and we know that discussions have been positive; they have been very constructive in many cases, some more than others.

Areas have arisen where there have been disagreements over whether it is a matter of competence or not and over certain policy areas. Those have tended to be dealt with by means of a memorandum of understanding. Basically agreements are reached as to how they will be dealt with, but they would not necessarily go on the face of the legislation. There have been sort of escape valves to resolve those.

I do not think those have been particularly satisfactory, but they have enabled the legislation to go forward, because there was a mutual agreement and understanding of the importance of those pieces of legislation being put in place. It is because of the positive way in which those discussions have been going forward—albeit with those difficulties, which are inevitable in this new territory that we are engaging in—that the Bill has created such a shock and why I think it drives a coach and horses through that whole process, because these negotiations are based on trust.

The internal market Bill is based on mistrust. It is basically giving powers saying, “We do not trust the devolved nations of the UK to come to agreement with us, and this is therefore our insurance policy to ensure that what we say goes”. It significantly shifts the balance of power in those negotiations, because you then end up negotiating with a Government who basically say, “If you don’t agree with us, we’ll just override you”. It has massive implications for the Sewel convention, which no doubt we will come on to.

Q32 **Lord Howell of Guildford:** I had not planned to come in now, but I am prompted to ask one question. I was thinking back to the old order before devolution, with our House, the Secretary of State for Wales and so on. Were you involved in that period of government and might some of these things been handled in a better way then, when you had a Secretary of State like the late Lord Crickhowell, for instance, fighting tooth and nail for every conceivable Welsh interest and making some impact on central government? Is there some breakdown in the basic communication system now, as Lord Howarth suggested? It is very puzzling.

**Mick Antoniow MS:** We have so moved on from 1974 that the UK is not the country it was then. One of the problems prior to devolution was

there were so many things the public never knew about and had very little opportunity to ever influence. Warts and all, that has been one of the benefits of devolution. Of course we have had that period in the European Union, when there was a constitutional umbrella and framework within which so many of these things were exercised and it gave Wales and other nations of the UK a subnational role in those processes.

This Bill, I think, is an attempt to take us back into recentralised power. I see no indication that it is about increasing or improving the voice for the devolved nations or the role for the Secretary of State for Wales at all. In fact, there are real issues now over what the actual role of the Secretary of State for Wales is. This is a clear recalibration of power and a recentralisation of power without any of the checks and balances that you would now expect, bearing in mind that we still have devolved legislation and devolved powers. It is the democratic way in which those powers can be exercised that is one of the real challenges now.

**Q33 Lord Dunlop:** Picking up on Mr Antoniwi's point about the EU umbrella, during the UK's membership of the EU the devolved institutions were subject to powers exercised at an EU level to guarantee market access, mutual recognition and non-discrimination, and of course the internal market Bill adopts these principles, so why is the regime that it creates not equivalent to the previous EU regime? Can you give us some practical examples of things that the devolved Administrations have been able to do in the past under the EU regime which they will not be able to do in the future as a result of this Bill?

**Mick Antoniwi MS:** Yes, I can. As a country, the UK has been decentralising power over the past couple of decades. We are a very different type of country from the one we were then, whether we are in or out of the EU. To some extent, the Covid situation has shown that. Effectively, we have moved closer to a situation of almost shared sovereignty, a situation of four-nation government. We have almost moved beyond devolution as it was originally initiated.

When pulling out of the EU and the removal of that constitutional umbrella, which hid so many of our constitutional dysfunctions and anomalies, the solution is not to go back to where we were in 1973. In fact, Parliament devolves specific powers to the nations of the UK. If there had been no withdrawal Bill and we had automatically dropped out of the EU, those powers would have come to Wales. In fact, we made provision for that in our continuity legislation, which was passed and received Royal Assent but which we agreed to repeal on the basis of the intergovernmental agreement that I have already outlined, which I think has now being undermined by this particular legislation. The idea that suddenly those powers now return to a Westminster Government—a recentralisation of those powers—is the incorrect way to look at them. Those powers naturally return to the devolved Governments, as was intended, as Parliament gave those powers to the devolved Governments.

The issue then is how we create, among the four nations of the UK, a mutual framework within which an internal market can effectively operate. That is exactly what has been happening up until now. Again, I come back to the point that to some extent this is now a constitutional ambush that undermines all the progress, not just on what happens coming out of the EU but on the decentralisation of power that had been happening aside from that. Devolution has been under way for 20 years and it is about a decentralisation primarily of power.

The English question still remains to a large degree, and I understand that the PACAC is looking at it now. I am very interested in that, incidentally, because that goes to the nub of some of our constitutional problems. But I do not see the premise that suddenly all these things go back to the UK Government, because we have moved on as an increasingly decentralised state for two decades.

**Lord Dunlop:** Could I press you a little bit further on that? Are you concerned that the Welsh Government might wish to pursue some devolved policies that will be frustrated by this Bill?

**Mick Antoniw MS:** Yes, absolutely. I would explain it as the way in which powers can be exercised. I will give you an example. We have a different legal position in respect of genetically modified foods to England. If any trade agreement which the UK Government decides on includes a lower standard—that is, it allows genetically modified foods to be part of that agreement—it will give the UK Government the power to override decisions that we have taken in Wales, which may in fact be the subject of manifesto commitments on which we were elected.

We are obviously very keen to maintain food standards, and we have had the arguments over wanting non-regression clauses in respect of food standards in trade deals, but the UK Government have the responsibility for international trade; it is a matter reserved to the UK Government. If those trade agreements include lower standards—chlorinated chicken is mentioned, but I am sure there are many other potential examples—they will override decisions on food standards that we might take with regard to Welsh produce. That is obviously very relevant to how we are able to sell our produce abroad.

Another example is our commitments to legislation on plastic packaging and potentially taxation on it. This is in respect of our environmental powers. Lower standards would obviously undermine that.

In all these devolved areas, where we have been developing policy and in fact may have been elected on specific policies, we will not know from one day to the next whether we can legislate and can exercise those powers. We may have the power to do things, but the Bill gives specific legislative competence to the UK Government to override those, often without any consent from the Welsh Government and often with very little scrutiny by the UK Parliament. Those are some of the examples, but there are many more when you start going down this list—state aid, for example, being another one.

Part of this is about overturning the part of the Scottish judgment on the continuity Bill, where it was recognised that international trade was a matter reserved to the UK Government, but the implementation of trade deals was a matter for the devolved Governments. This is why I say that it is partly a power grab and partly a recalibration and centralisation of power.

**Lord Dunlop:** Picking up on that point about trade, it is the case, is it not, that although the devolved Administrations are responsible for the implementation of international agreements, they are obliged to implement them?

**Mick Antoniw MS:** The answer is yes. How that would work in practice where there were conflicts in the exercise of those powers is yet to be determined. Precisely how that might work is a grey area.

The point about all this is that these are issues that could be resolved and were being resolved in the various pieces of legislation going through and by intergovernmental agreement. None of us wants situations where there are restrictions. The issue comes down to the respect in such agreements for the devolved settlements. That is where the process is very much undermined.

**Lord Howell of Guildford:** I am totally in favour of the decentralisation the witness is talking about, but on this matter of international trade the UK is a gigantic trading nation. We are developing all sorts of new trade and promotion of products with new markets, which are growing bigger at the moment. That obviously has to be done centrally. One of the prime products we want to sell a lot more of is the wonderful, fabulous Welsh lamb. That is a very important product.

Is this not a case for giving pretty good freedom, a free hand, to the central negotiators in London to get the best possible deal for Welsh lamb across the planet rather than facing any additional constraints? I see the problem, but is this not a time when you should be a little more relaxed in seeing the central government take the lead?

**Mick Antoniw MS:** I think we would be relaxed if there was a process of proper engagement with the devolved nations in the achievement of those international trade deals. What might be in the interests of Welsh lamb, for example, might well be undermined by a trade deal with New Zealand or Australia, which might be beneficial to markets in England but would not necessarily be beneficial to Wales.

The problem with your proposition is that you suggested that this would be so much better if it was all done centrally. That is the exact crux of the problem here. It is best done by mutual agreement between the nations coming together and exercising joint engagement over what the common interest is. Of course, that requires a mechanism for ultimately resolving how you exercise the power if agreement cannot be reached, but I do not believe that agreement is not feasible in the overwhelming number of these areas.

Yes, a mechanism that enables any fundamental disagreements to be resolved needs to be there, but when effectively this centralises power wholly in the UK Government, it overrides the process of decentralisation. Where is decentralisation or devolution in these particular areas if there is no proper mechanism for mutual engagement, mutual respect and achieving common agreement? That is the crux of the problem. This Bill undermines that and aggressively undermines achieving mutual common agreement on common frameworks.

**Q34 Lord Beith:** Part 6 of the Bill seems to have nothing to do with the internal market. It gives powers to UK Ministers—powers brought from Europe, in fact—to provide financial assistance for economic development, infrastructure, culture, sport, education and training. Do you agree with me that it has very little to do with maintaining the internal market, but what it does do is what Kate Forbes, the Scottish Finance Secretary, described as giving “Whitehall control over the delivery of replacements for the EU funding programme in Scotland, a programme that Scottish Ministers have delivered successfully for decades”? Do you see it in the same way?

**Mick Antoniw MS:** I do. A lot of political promises were made in respect of the replacement of EU moneys—that we would not lose a penny, and so on. We were then told that there was going to be a shared prosperity fund. We tried to obtain details of what the shared prosperity fund would be and how it would relate to the devolved Governments, and we put our own views forward on that.

This is now the culmination of that process, which always concerned me right from the beginning. I was concerned that the powers would not be taken away, but that the ability to exercise those powers was dependent on money that would be recentralised in Westminster. You would therefore have to comply with the policy directive coming from Westminster in areas that were previously the responsibility of the respective devolved Governments.

It has massive implications. First, it would enable the UK Government to spend money. I have no problem with money being spent in Wales; it is a question of how it is spent and spent properly. It would presumably effectively override the planning process, it might override environmental policy, and it could override all sorts of ethical areas. I do not see the logic for this in something that we are told is an economic Bill about creating a legislative mechanism for ensuring an internal market, when effectively the UK Government will then be able to spend in economic development, which is devolved. It could spend on infrastructure, in education, in housing—those are clearly infrastructure areas—in culture and in sport.

The other question that arises is the UK Government would then be in a position to effectively say, “We’re spending the money in these particular areas and we’re taking it out of the Welsh block grant”. If that is not an undermining of devolution and the whole process we have gone through for 20 years, I do not know what is.

**Lord Beith:** Have they said anything so far that implies that it will come out of the Welsh block grant?

**Mick Antoniw MS:** They have said virtually nothing at all on these areas. The first question is whether there would be a guarantee that any of the spending money that would come would be additional. Secondly, how would it be spent in engagement with the Welsh Government? If, for example, the UK Government chose to spend an amount of money on a particular project, how would that relate to engagement with the Welsh Government, where the experience is and where the legislation is, on planning, on environment, and on so many other areas?

It undermines the whole process. If those are devolved areas, areas that are not reserved to the UK Government, why are the UK Government seeking these particular powers? It very much undermines the whole concept of subsidiarity, of decisions being taken locally as close to people as possible. It drives a coach and horses through that.

**Lord Beith:** Is this not typical of the dynamic of systems that are either federal or have strong devolution, in that the federal—or in our case UK-wide—Government want to engage in a competition with the devolved Administrations, partly as a result of the political process? All parties of government fight general elections across the United Kingdom.

In the United States it is Presidents who are competing, as we see at the moment. From Franklin Delano Roosevelt right through to Donald Trump, the characteristic of the American system, where there are constitutional protections for the states, is that the federal Government spend money and do things. If they have some money, they can effectively override the independent jurisdiction of states.

Will that not be a characteristic of the system even if you had better constitutional protection for the powers you have been talking about?

**Mick Antoniw MS:** You are spot on on that particular point. That is what this is about. That is why I say it is a recentralisation of power and a recalibration of devolution. I will give you one example; it is a controversial one. Spending £1.5 billion to £2 billion on a Newport bypass has become a political controversy between political parties. The Welsh Government decided, first, that the cost was too great, and, secondly, that the environmental impact was unacceptable, so they have declined to do this.

The UK Government have suggested that, "In that case, we'll build it, but we may build it using your money to enable us to do it, because we think it's one of our priorities". If that is not driving a coach and horses through devolution and through the planning process, the public inquiry process, the processes of consultation, and so on, I do not know what is. It gives political power which I do not think, after devolution, it was ever intended the UK Government should have.

Q35 **Baroness Corston:** What amendments to the UK Internal Market Bill are

necessary to protect the integrity of existing devolution arrangements in the UK?

**Mick Antoniw MS:** First, any amendments have to be very substantial. They have in effect to remove those powers in respect of finance and spending in particular devolved areas. There have to be amendments that would ensure that, at the very least, there is consultation with the devolved nations. There should be a mechanism for consent from the devolved nations and a dispute resolution process.

One of the biggest problems we have had with the Joint Ministerial Council and legislation going through has been that the UK Government are effectively in the position of writing the rules of the game and being judge and jury in the process—a UK Government who are often acting not as the UK Government but the Government for England. That is part of our constitutional dysfunction. We have been moving increasingly towards a situation where the concept of shared sovereignty becomes more and more important. This certainly reverses that.

I start from a point I made at the beginning: I do not think legislation is necessary. All these objectives could be achieved, as was intended, and this is a very deliberate political decision to go down a completely different route, a route that breaches a whole series of understandings and agreements that have been reached with the devolved nations over the past couple of years.

Q36 **Baroness Drake:** You have expressed very clearly your view on the impact of this Bill and you briefly referenced the Sewel convention. In the event that the Scottish and Welsh Parliaments and the Northern Ireland Assembly do not consent to the UK Internal Market Bill, does the operation of the Sewel legislative consent convention need to be reconsidered? What is your view on the implications?

**Mick Antoniw MS:** The view I take is that Sewel has been in intensive care for quite some time and this Bill effectively switches off life support for it. We had a letter from the right honourable Stephen Barclay MP, Secretary of State for Exiting the European Union, on 14 January 2020, when the UK Government chose to override the refusal of legislative consent from Wales and Scotland in the EU (Withdrawal Agreement) Bill. He said very clearly that, “The Sewel Convention holds that the UK Government should not normally press ahead with legislation without legislative consent motions from devolved Administrations”—so far so good—“but the circumstances of our departure from the European Union are specific, singular and exceptional”. If that is the criteria, if this legislation goes ahead without legislative consent—as seems likely—overriding this raises the whole question of what the status of Sewel is any longer.

We have seen all sorts of other legislation on agriculture, fisheries and so on where, in order to avoid conflicts on Sewel, memoranda of understanding have tended to become, in my view very unsatisfactorily, a mechanism for resolving those disputes. In my view, this brings Sewel

to an end. The only way of salvaging Sewel, which is a statutory convention—that is, it exists, but with very little status—is that until it becomes justiciable, it is brought to an end.

That issue of justiciability was raised during the Article 50 case and was part of that judgment. We recognise that. Wales never sought to argue that it was justiciable, but I think we have reached the stage now where the question is how you can have a convention where all the power and all the determination is in the hands of just one of the parties. It was a convention of its time, but we need to move on from it. We need to make it justiciable—that is, there a clear mechanism for resolving disputes—and if agreement cannot be reached there has to be some form of justiciability; otherwise, where is the delineation of power?

**Baroness Drake:** Given your view that the life-support system has been turned off, how do you believe constructive discussions around that can take place between the Parliaments, the Assembly and central government? What are the considerations to rebuild a level of confidence or a working mechanism or convention?

**Mick Antoniw MS:** I find it very difficult. I think that the almost terminal breach of the Sewel convention leads to political consequences. I believe that it leads to political consequences in Scotland. This legislation is a dream for those who wish to see the break-up of the United Kingdom. It has significant political consequences within Wales and, of course, for the UK itself. It is a destabilising factor. My view—and it is a view shared by increasing numbers of persons—is that this Bill destabilises the UK constitution. It destabilises our mutual engagement and it will contribute increasingly to a potential break-up of the United Kingdom.

Q37 **Lord Howarth of Newport:** As a former Newport MP, and prompted by your observations on the Newport bypass issue, from your point of view in the Senedd what do you consider to be the role and the potential contribution of MPs at Westminster representing Welsh constituencies? What sort of dialogue is there on these constitutional issues at present between the Senedd and the Welsh MPs? Is there some potential for Welsh MPs to mediate in this difficult situation with the fraying of relationships and impairment of dialogue?

**Mick Antoniw MS:** There is a lot of engagement with Members of Parliament. Members of Parliament are polarised, because this particular legislation is a very polarised in terms of the party system. There has been a lot of engagement and amendments have been attempted. Yesterday, further amendments were proposed, and so on.

The problem is whether there is a genuine basis with the UK Government for a recognition of the importance of the mutuality of the common agreements and the process that was under way, and whether there is a recognition of the impact this has on the constitution and the devolved system that we have.

At the moment, I do not see that. That is a grave difficulty, because in order to mediate you have to have a common basis for mediation. The only way that would be tested would be whether the UK Government recognised the significance of the powers that they were seeking to achieve in respect of financing and intruding into areas of devolved responsibility. In addition—this is a matter that we may come on to—there is the issue of lawfulness, the powers in respect of overriding international agreements and so on. That is a very significant issue in itself, because that has implications for the Senedd as well.

We continue to operate and we continue to engage. I have many discussions with MPs, but it is a very polarised environment when you have a UK Government with a large majority who have chosen to drive through legislation. That in itself creates constitutional reactions if those powers are not exercised properly. You may have the power to force something through, but then you have to be prepared to accept the political consequences of that.

**Q38 Lord Faulks:** I want to ask you about international law, but before I do can I pick up on something you said in answer to questions from Baroness Drake about the Sewel convention and your view that we should move towards justiciability? Can you expand a bit on that? Who do you envisage would decide, what would they decide, and what would be the consequences of any decision?

**Mick Antoniw MS:** You start from the point of view that the UK Government will not normally legislate in areas that are devolved responsibilities. The first problem is what “normally” means: how do you define it, and how can you possibly say at what stage a Government will choose to override? Secondly, if you have disputes in legislation over whether there is competence or not, how do you determine that? We have had situations where the Welsh Government have said, “This is a matter of competence for us and therefore we have to give legislative consent”. The UK Government say, “No, it isn’t, we don’t agree with you”. We ask why and they say, “Basically because we say so”. How do you resolve that scenario? You have to have a mechanism for ensuring that there is transparency over that particular process. That is one particular step.

What happens when you get to genuine disagreements between them as to the competence issue and whether the UK Government should decide that this is not a normal matter? I remind you again of what I said earlier about what we were assured—the issue of specific, singular and exceptionality, which seems to be a further clarification of the Sewel convention by a government Minister.

If agreement cannot be reached, how do you resolve that? The only way of resolving it every time that situation is reached is by the UK Government effectively overriding or coming to an agreement. If agreement cannot be reached, you need a mechanism for doing that.

If you have a dispute resolution process, it means that disputes are less likely and that agreement is more likely to be reached. Ultimately, in situations where it is not, it becomes a matter for perhaps the Supreme Court acting as a constitutional court. That is a function which the Supreme Court has increasingly adopted from time to time.

**Lord Faulks:** What would the Supreme Court have to decide?

**Mick Antoniw MS:** You could have a mechanism for the dispute resolution that only the most important and serious matters would go to the Supreme Court. You could have a mechanism that was a sort of agreement for dispute resolution between the parties et cetera, and you would buy into the outcome of that process. It would need to have some independence of interests of the respective parties, so it would need to be that sort of mechanism. In areas that were more fundamental and more serious disputes—those matters of importance—the ultimate resolution of those would be the Supreme Court.

**The Chair:** Are you talking Newport bypass or Welsh lamb?

**Mick Antoniw MS:** A trade agreement on Welsh lamb, for example, would be a matter of agreement being reached. If not, there would be a mechanism for resolving the dispute which the parties would then buy into. I do not see that or the issue of the M4 being something that might have to be resolved constitutionally, but I might see major interventions involving finance or disputes over the application of the funding formula and so on as issues that might ultimately have to be resolved constitutionally.

**Lord Faulks:** I do not want to take up too much time on this, but it is of quite significant constitutional importance. What criteria do you think the Supreme Court would use when adjudicating on these issues?

**Mick Antoniw MS:** That would depend on what the intergovernmental agreements were and what they said. It would be an interpretation of the existing devolution statutes. Where important issues arose in relation to common frameworks, common agreements and so on, they might be clear issues of competence, for example: who has competence in certain grey areas. If that could not be resolved, and could not be resolved through a lower-level mechanism, ultimately the only people who would determine competence would be the Supreme Court.

Q39 **Lord Faulks:** Can I move on now to international law? The Government have stated pretty unequivocally that certain parts of this Bill are a violation of international law. That comes as something of a surprise to many of us. As the Chair of the Legislation, Justice and Constitution Committee, where do you think that leaves Parliament? How do you think, for example, that can be reconciled with obligations to comply with the rule of law?

**Mick Antoniw MS:** I do not think it can be reconciled. In the constitutional structure that we have, some of which consists of statute, others by conventions, others involving prerogatives and so on, the rule

of law is something that we have all fundamentally bought into. Of course, it is often quite difficult to interpret. I cannot remember whether it was Roosevelt who said the best way of describing the rule of law is to refer to countries that do not have the rule of law. That may not be a very helpful way of defining it, but it is one thing for Governments to legislate in a way that might be open to challenge as to whether they are in breach of, for example, international obligations; it is completely another thing to specifically legislate for unlawfulness, for illegality. That is the shock that has been sent in attempting to introduce this legislation.

I tried to look for examples of any other modern European state that has passed similar legislation that would not only restrict the responsibilities of the judiciary but impact on devolved Governments and give extended powers almost of immunity in respect of a breach of legal obligations. I could not find any, unless you go back to the 1930s and the 1933 Enabling Act in Germany, which did something similar.

I do not want to be melodramatic about these things, but this is a major constitutional breach. It is wholly unacceptable. I listened to the arguments in Parliament, and I am quite astonished at the extent to which some lawyers have been able to come up with almost a justification for doing it.

I saw Mark Elliott's evidence and I very much agree with that analysis and that interpretation. My committee has specifically asked the Counsel General for Wales to look at whether the Senedd, the Welsh Parliament, can give legislative consent to a piece of legislation that effectively enables breaches of international legal obligations.

I have two concerns here. The first is whether ethically we can do it. Secondly, in the setting up of the Welsh Parliament, formerly the Welsh Assembly, we were required in our legislation and our activities to comply with European and international law. Can we therefore, in a Bill every part of which the UK Government say requires legislative consent, give consent to that? I know that that matter is being considered and will no doubt exercise legal minds as well when this comes forward. At the moment, my view is that I do not think we can. I do not think that I could vote for a piece of legislation that authorised that breach, undermining not only international law but the fundamental principles of the rule of law that we buy into.

**Q40 Lord Hennessy of Nympsfield:** You have touched several times this morning on the theme of respect and the respect between the various parts of the United Kingdom—the harmony co-operative model of devolution, really.

**Mick Antoniw MS:** Yes.

**Lord Hennessy of Nympsfield:** Obviously your last reply was very strong and heartfelt. Have you really lost respect for the central government of the United Kingdom? If so, will it make the restoration of that harmony model far harder to achieve when we are through all this?

**Mick Antoniw MS:** It seems to me that respect and mutual trust and mutual common purpose are fundamentals. Sewel was obviously a key part of that and as a convention was very much dependent on respect and trust. I used to describe Sewel within the constitution of the UK with devolution being almost like the oil of the engine that enabled the parts to work together. When that trust and respect begins to disappear, there is probably an increasing emphasis on the need for justiciability and for dispute resolution.

Maybe it is an inevitable consequence of the process of devolution, as more and more powers have been devolved, as we have had increased decentralisation, as we have had increasing divergence in legislation, both from the English side and the Welsh side and mutually. It is a maturing of devolution that you need to move to a requirement for greater delineation of responsibilities.

There are those who would say what we need now is a written constitution. There are arguments on that. I certainly believe that we need a constitutional convention to bring the nations of the UK together to decide the purpose of the UK and how it should operate. There is an interim mechanism that would take us a long way forward, and that is a more effective Joint Ministerial Council, properly resourced, with a dispute resolution mechanism to it. That would provide a transitional framework.

However, you are right. Ultimately, as we stand at the moment, much of what we do is dependent on the trust, and I believe that the internal market Bill is a piece of legislation that says, "We don't trust the devolved nations of the UK, so we are going to secure these powers".

Q41 **Lord Wallace of Tankerness:** I want to go back to what you said earlier about the financial assistance from the UK Government. You gave the example of the Newport bypass, and you seemed to indicate that your concerns are not whether the UK Government might take it from the block grant but that they could also ride roughshod over planning, environment and public inquiry provisions. Is that your interpretation of the relevant clauses relating to financial assistance: that it is not only a question of financial assistance but that in fact it gives the UK Government powers to set aside relevant planning and environmental laws?

**Mick Antoniw MS:** Yes, because effectively that is what would happen. It is not so much a question of setting aside, because it does not take those powers away from the Senedd or from the Welsh Government. What it does is give the power to UK Government Ministers and the UK Government to override those locally taken decisions and to take them, if they wish, without any consultation or engagement whatever with the Welsh Government.

It is difficult to see how some of these could operate in practice. Again, as you say, why are these powers being taken? I cannot conceive that they are an essential component to an internal market Bill. If this is purely about the establishment of a legislative framework for ensuring

that there is an internal market, what is the logic to these additional powers being taken by the UK Government and UK Government Ministers—and, incidentally, from what I can see, with very little scrutiny by the UK Parliament as well?

**Lord Wallace of Tankerness:** Let me understand this, and it is purely hypothetical. If the UK Government said, “We’ll provide X billion or X hundred million pounds for the Newport bypass”, it would not have to go through any further procedures that would normally attend such a major infrastructure investment?

**Mick Antoniw MS:** No. From my reading, it gives the UK Government powers to override any local decisions that are taken by the Assembly, as with the examples that I gave you in many other areas. I will give an example of the democratic side to this. We have elections to the Welsh Parliament in May, and we will have manifestos from political parties and people will be elected on the basis of promises that will be made as to what we will do on the environment, and all these particular areas. I cannot guarantee that I will be able to deliver on any of the promises that I make—there are clearly commitments that I can make under the existing devolution arrangements—if this Bill goes through. They will all be determined by what the UK Government choose to do in those particular areas.

**The Chair:** We are back to the word “notwithstanding”, which seems to have occurred in several areas of legislation. Notwithstanding what you think about the planning or environmental impact of the Newport bypass, which has come to be the example we are all using, they could still go ahead?

**Mick Antoniw MS:** Yes, and they could do it, if they chose, by saying, “This is a priority for us. We have decided that we’re going to do this, we have the power to do this and we’re going to fund it”. They could even say that they will take that funding out of the component in the Welsh block grant that is already designated for those areas. It effectively enables the UK Government to decide the priorities in devolved areas under the current arrangements.

**The Chair:** You have made that very clear indeed, Mr Antoniw, and we are very grateful for the detail that you have gone into and the overall perspective that you have been able to give us in the view from Wales. Thank you very much indeed.

**Mick Antoniw MS:** Thank you for the opportunity to give evidence.