HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Parliament and human rights, HC 550

Wednesday 6 July 2022

Watch the meeting

Members present: Joanna Cherry MP (in the Chair); Baroness Chisholm of Owlpen; Lord Dubs; Florence Eshalomi MP; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; David Simmonds MP; Lord Singh of Wimbledon.

Questions 12 – 20

Witnesses

II: Baroness Kennedy of The Shaws QC, Barrister at Doughty Street Chambers; Lord Pannick QC, Barrister at Blackstone.

Examination of witnesses

Baroness Kennedy of The Shaws QC and Lord Pannick QC.

Q12 **Chair:** We are about to start our second panel of this afternoon and we are very fortunate in being joined by two of the United Kingdom's most highly regarded silks, certainly two of the most outstanding silks of their generation, and also Members of the House of Lords. We are very grateful to you for giving us your time and we are looking forward to hearing your views, particularly as legislators.

This question very much flows on from some of the evidence we have already heard this afternoon. How effective do you think Parliament is at holding the Government to account for their international and domestic human rights obligations and what do you think Parliament and this committee could do differently?

Baroness Kennedy of The Shaws: I cannot speak for David, but in the House of Lords we are doing that all the time. I see that as being one of my roles because of my background in law over many decades. I think that the House of Lords plays a pretty good role in holding government to account for legislation that might contravene or in some way dilute human rights, and also about making amendments to Bills where we think we could strengthen human rights. I believe the House of Lords does that rather well.

I am not so sure that the Commons is able to do that and I think that there is a different quality of debate; it is often discussed where the most effective scrutiny takes place. I think that the role of the House of Lords has been exemplary, particularly in recent times.

It is about taking a long view. One of the things that I have always felt about the House of Lords in making an argument for a second Chamber, and for our particular second Chamber, which is highly esteemed—I have a friend at Harvard University in the law department and who works with the politics department there. They have reviewed parliaments around the world, and they maintain that the House of Lords has one of the most effective procedures for scrutinising Bills and that the quality of the scrutiny and the quality of debate based on evidence is highest of all. I want people to know that, because there is often a marginalisation of the House of Lords because it is not democratically elected.

It may be that people feel more able to take a long view because they are not looking over their shoulder for the next election and they are not all the time preparing for what a new election might bring. The absence of that pressure means that the House of Lords takes a long view. It is able to scrutinise constitutional matters; it is alert to ways in which human rights and civil liberties might be eroded, the ways in which our parliamentary sovereignty may be eroded. One of the things that has concerned the House of Lords most recently has been a shift of power away from the judiciary and it playing its role as an independent judiciary, which is vital, and an expansion of executive power. Some of the legislation that has been going through has been doing precisely that

in ways that we perhaps have been trying to alert the world to, but looks as if it is arcane and rather specialist. Something important is happening and I consider this new British Bill of Rights to be yet another power grab that is taking power away from Parliament and the judiciary and away from the checks and balances that are vital in a democracy. I think something concerning is happening.

Chair: Lord Pannick, could you focus on the second part of the question? What could Parliament and this committee do differently to improve the Government's adherence to international and domestic rights obligations?

Lord Pannick: It is a great pleasure to give evidence. If Parliament does legislate in breach of international human rights standards, and it often does, it does not do so in a state of ignorance. It has the valuable reports of this committee, we have the reports of public interest groups—JUSTICE, Liberty, the Bingham Centre, specialist groups in particular areas—and in the House of Lords, as Baroness Kennedy says, she and I and many of our colleagues spend a great deal of our time drawing attention to human rights issues. The problem is not a lack of information or a lack of process, in my view; it is that the Government have a strong majority. They have, I am afraid under this Government, limited interest in or concern about our international and domestic human rights, and they are going to get their way, and that is democracy. The speakers in the previous session, Mr Evans and Mr Hunt, made a number of valuable suggestions and I will not add to them, but I repeat that it is not a matter of process or information.

Q13 **Baroness Massey of Darwen:** Perhaps we add to what David Pannick began with by talking about information and where it comes from. What information can we use when we are scrutinising legislation in respect for human rights during its passage through the Lords?

Baroness Kennedy of The Shaws: Like Lord Pannick, I receive briefings, usually from organisations that are concerned with particular human rights issues, and there are the organisations that Lord Pannick has mentioned. I am the president of JUSTICE, the organisation that does lots of wonderful briefings for parliamentarians on issues to do with law and rights. I receive them from Liberty and the Bingham Centre, and of course I am the head of the International Bar Association's Human Rights Institute, which also concerns itself with human rights. I usually have a plethora of information about ways in which a particular piece of legislation could be enhanced or improved upon, or ways in which it is reducing rights or the ways in which it may have negative consequences. Sometimes they are unintended consequences but, as lawyers in the field, we know how that can work out and we are more alert to it even than those who are non-practitioners who advise government, because we are in the courtrooms, and we know how that works.

Usually, I am relying upon very good briefings that come from specialist organisations that know about this stuff. There are not only generic organisations but some that, for example, work specifically with the elderly, so they will know about rights for the elderly, or you get people

who are specialists in children's rights, and you receive these briefings. They are enormously powerful, as any parliamentarian will tell you, in helping to work out for yourself what your position will be and the things that you will take up and the amendments you might table.

Baroness Massey of Darwen: Do you ever lack information?

Baroness Kennedy of The Shaws: Yes, but when I do I usually go on an inquiry of my own. I then contact lawyers who I know. One of the benefits of being in the profession and being as long in the tooth as I am is that I know most of the people who work in the field and I can go to commercial lawyers as well as lawyers who are working on human rights issues. You go to immigration lawyers or employment lawyers, and you go to the ones in the academic world as well. Sometimes they will do a piece of research for you, simply out of their interest and then they want to see how it plays out in Parliament. I pursue my own avenues of inquiry.

Lord Pannick: It is very rare, in my experience, not to have adequate briefings on issues. It is unusual for that to be so. Sometimes I think perhaps the absence of information is not so much on the legal implications but on the practical aspects of the way a Bill is going to work, but in the House of Lords, as you know, there are normally people who know about most subjects. There are also people who think they know and do not, but there are normally people who do know, and we rely on them. As well as the sources that I mentioned, we have very valuable briefings from the House of Commons Library, House of Lords Library and it is more often that we have too much information rather than too little.

Q14 **Lord Dubs:** How important to you are the statements that Ministers currently make that the Bill is in their view compatible with convention rights? What do you think will be the impact of the repeal of Section 19 of the Human Rights Act that requires such statements to be made on the legislative process?

Lord Pannick: I thought Mr Evans and Mr Hunt made some very valuable points, but I am not as concerned about the repeal of Section 19 as they are. I would simply point out that if you look at the Bill of Rights Bill, on the first page, Secretary Dominic Raab has made the following statement under Section 19: "In my view the provisions of the Bill of Rights Bill are compatible with Convention rights". Well, they are not. No serious person could possibly think that the contents of this Bill in its entirety—you could argue about this and that—comply with convention rights. I fear that the reality in government is that Section 19 is not taken as seriously as it might be. I think that the repeal will not prevent good civil servants and good Ministers from doing exactly what Murray Hunt described should be done and is done. I do not think this is such an important matter as they do.

Baroness Kennedy of The Shaws: I disagree with David, let me just tell you now. I think that sometimes the formality of something has

meaning, and I share his scepticism. Of course I share his view on the Secretary of State for Justice signing off this British Bill of Rights, because it does not conform. We have known previous Ministers at different times to do this as a matter of rote and you strongly wonder what is going on behind the scenes and what legal advisers might feel about that signing off when we suspect that they must have reservations about that being done.

The reason why I feel strongly that it should remain is because I think that while there may be times when we have falling from grace and Ministers not doing this in the proper way, we want to try to raise standards. One of the things that is being discussed in Parliament now is the falling away of standards and the importance of doing things the right way. I feel that currently in government we have a falling away from the practice and the proprieties that used to inform the way that Ministers behaved. I want that Section 19 personal statement of compatibility by a Minister to remain there as a requirement. As you heard from the previous witnesses, it drives the process behind the scenes and it has work done behind the scenes, usually of high quality, from my experience, but from the lawyers who work in government and so forth.

It is usually the Minister who is being dismissive. I think a lot of that—as is going on now, to my regret, even when those Ministers might in fact have had a legal background themselves—is why we have had so many resignations of people with a background in law because they know that law is not being treated seriously by this current Government. I am afraid I am not going to be circumscribed in what I say. I think that we are seeing a serious falling away of standards in how a proper Minister should behave. This requirement of a personal statement by a Minister of compatibility should be there, should be there going forward and I hope that we will return to proper government before too long.

Q15 **Lord Singh of Wimbledon:** Good afternoon. I will formally introduce myself as Lord Singh of Wimbledon, a Cross-Bench Member of the House of Lords. I was fascinated by the frank answers to the previous questions.

Do you make use of the Government's memoranda setting out their analysis of rights that are engaged and produced on Bills? Do you consider this information should be changed or improved?

Lord Pannick: Yes, I look at them but they are the Government's point of view. They are not objective. They could usefully use a greater depth of analysis and a franker analysis of the problems that are posed. They are not a primary source of information but they are of some value.

Baroness Kennedy of The Shaws: I concur with what David has just said. Often a spin has been put around some of the explanations as to why something is being done. I regret that. I would like them to be of better quality. I always have a look at them to see what their rationale is and I sometimes feel that it is not for our benefit but for the benefit of sections of the Government's party, to appease those who do not like human rights at all or who are not firm believers in the importance of

law. I do not set a lot of store by them but I would like to see them being improved upon.

Q16 **Baroness Ludford:** I am Sarah Ludford, a Liberal Democrat Member of the House of Lords. Do you think that the Human Rights Act has been problematic for parliamentary sovereignty? Why do you think the Government feel they need to add a clause in the Bill of Rights Bill affirming that ECHR judgments do not affect the right of Parliament to legislate? You can comment on that proposed clause as well.

Lord Pannick: Before the 1998 Act came into force, and ever since, Parliament has had the power to legislate as it sees fit. The Human Rights Act does not reduce that power. I simply cannot understand why it is necessary in this Bill to include provisions that assert parliamentary sovereignty and assert that the judgments of the European court are not binding on our courts. They are not anyway.

Clause 1 of the Bill is a very peculiar clause. I would be astonished to be told that this was drafted by the parliamentary draftsmen. It includes in Clause 1(2)(c), "that courts must give the greatest possible weight to the principle that in a parliamentary democracy, decisions about the balance between different policy aims … are properly made by Parliament". Who seriously would doubt that? This reads not like a piece of legislation but like a speech to a Conservative Party conference. It is a disgrace and it should not be in a Bill. There is no serious doubt about the basic principles and it is a great shame that the Bill suggests to the contrary.

Baroness Kennedy of The Shaws: It is almost impossible to be restrained in how one describes this. There is a pretence that somehow Parliament is being denuded of its powers because of the Human Rights Act, and it is just not true.

One of the magical things about the way in which it was conceived was that it does not, unlike constitutions or bills of rights elsewhere, put power into the hands of judges to be able to crush anything. As David has just said, what it says is that the current Human Rights Act requires courts to interpret legislation compatibly with the European Convention on Human Rights so far as is possible. It is what is called an interpretative obligation. That has been got rid of. You do not need that. If you are wanting to comply with human rights you are not being required to conform to what the judgments of the European court are, but it is about trying to have some level of consensus to raise the bar everywhere. We are wanting to have the protection of human rights.

Also, the Human Rights Act requires the UK courts to take account of the jurisprudence of the European Court of Human Rights but they are not required to. There is no requirement. It is almost dishonest because it is as though the public are being told that there is a requirement, and there is not. The spin on this piece of legislation is dishonest because it is suggesting something to the public, and even to parliamentarians who are not lawyers and who are not involved in this stuff, to think that this foreign court is busy telling us what to do.

Inherent in it is: "Why should foreign judges be doing this? Bring things back to Britain". But it is not just an attack on foreign judges, it is an attack on our judges because it is limiting our judges' discretion. Let us be very clear, this is not about judges sitting in Strasbourg; this is about inhibiting the powers of our judges, so there is a dishonesty in it.

It is putting us in the company of people such as Orbán, Hungary's premier. We will become an outrider on human rights when we do this. We should not because the European Convention on Human Rights was produced by British lawyers—Conservative lawyers, much admired by Lord Henley and many others who are Conservatives of a particular ilk who know why this stuff matters and who know that this is important. But this is about people who do not respect the ways in which our judges—the finest judges in the world—are very cautious about what they do and they are not somehow radical outriders. They are very conscientious and cautious about their interpretation of human rights. This will have a chilling effect on our judiciary and it will limit the rights of British citizens. British citizens should be told that.

Chair: I will ask a cheeky little supplementary. You said, Helena, that it will have a chilling effect on our judiciary. Do you think that the rhetoric around human rights to date has had a chilling effect on our judiciary?

Baroness Kennedy of The Shaws: I do. You cannot have the media attacking our judiciary in the way that they have done in recent times; for example, calling some of our most senior judges enemies of the people. You cannot have this business of attacking the Supreme Court when it was protecting parliamentary sovereignty on the Miller cases 1 and 2, a case that, Madam Chair, you were involved in. Those were about our constitution and protecting the constitution. They were nothing to do with Brexit and yet it has somehow been swallowed, because of the way in which it has been communicated to the public, as though this was our courts working in some partisan way around Brexit, but it was not. It was about protecting parliamentary sovereignty.

Unfortunately, red in tooth and claw, there has been an attack upon the very stuff that we are talking about here today. The attack is on parliamentary sovereignty but it is also an attack on our judiciary. It has meant that our judiciary, possibly without even being conscious of it, have retreated from some of the areas where perhaps they should have been more protective of human rights, in my view.

Chair: What prompts that question is that I was reading recently some analysis of Supreme Court judgments over the last couple of years by Lord Sumption on the right hand and on the left hand, Professor Conor Gearty. They agreed that there has been a certain retrenching in the Supreme Court's approach to constitutional and human rights issues. Do either of you agree with that analysis?

Lord Pannick: I think that there has been a distinction in the substance of judgments in the court of Baroness Hale and the court of Lord Reed, but I do not go along with the suggestion that this is a reaction to

criticism of judges. I think it is more a reflection of the different personalities, the different approach of different judges. I would be very sorry if this committee were to express a view that our judges are not sufficiently independent or sufficiently full of integrity to make up their own minds on the difficult issues that they have to address. I am perfectly confident that they are, although I agree with Helena that many of the attacks on the judiciary are outrageous, but that is a different question.

Chair: I think that you have made a very important distinction there, Lord Pannick. Helena, would you like to comment?

Baroness Kennedy of The Shaws: I am not suggesting that our judges are not—Lord Reed was part of the court that decided on the issues of Gina Miller 1 and Gina Miller 2, but other people were involved in that litigation. But those decisions were about where should decision-making take place, and it was about our constitutional arrangements and our parliamentary sovereignty, and the fact that it was against the backdrop of Brexit was not the point at all.

Personalities are different among judges, just as they are among parliamentarians, but I believe that our judges are some of the best judges in the world and I do not recoil from that view, but if you are remorselessly being criticised and you know that you are being pursued by the media, without even knowing you are doing it you might be much more cautious. Of course, there are personality issues in all this, but I do not think that the Supreme Court now would have made any different decisions from the ones that were made by the court that was led by Baroness Hale dealing with Miller 1 and 2. But I think that it has had the effect on certain sections of the Conservative Party, where they have read it as if somehow our courts have to be reined in. That is a very detrimental thing and it is not what one would expect of the Conservative Party that we all used to know and respect.

Chair: I am interested in your comments there about the Supreme Court, which I think are very important.

Q17 **Lord Henley:** Lady Kennedy, you referred to judges or lawyers whom I might or might not admire. I hope you were not assuming I went back as far as the original drafting of the European Convention on Human Rights!

Baroness Kennedy of The Shaws: Most Conservatives of your generation whom I know looked back on the post-war period, when great Conservative lawyers came together under the leadership of Winston Churchill and said we should be creating a European convention on human rights. It was drafted, as you know, by a great Attorney-General, with assistance from other Conservative lawyers. The drafting of the European convention came out of our lawyering. In fact, the advances in law across Europe have often been as a result of the contributions made by British lawyers.

Lord Henley: I fully agree but it is not for me to give evidence on this

occasion. I just wanted to make the point that I was not quite that old.

You heard me put questions to Murray Hunt and Paul Evans about the so-called democratic shield as proposed in the Government's consultation. What do you think that Parliament should do in relation to judgments from the European Court of Human Rights, and obviously of the UK courts, which find people's human rights have been violated? What should its role be?

Baroness Kennedy of The Shaws: I do not like the language because the idea that we have to create a democratic shield suggests that there is not a democratic shield already, and I believe that there is. I was impressed by the suggestions that were being made about the possibility that to have a better-informed debate, the Joint Committee on Human Rights, which is a very important committee in the scheme of parliamentary oversight, and I think a paper produced when there is a judgment that says, "This piece of legislation is falling short on our commitments on human rights"—if a court makes that decision or the European court does—could provide a piece of work to inform the debate that then takes place inside Parliament so that we do not have misinformation being presented as reality in our parliamentary debates.

I think Lord Pannick was involved too, but in that period of the 1990s when we were looking at the incorporation of the European Convention on Human Rights into UK law, we looked at all the different possibilities and we struggled and wanted to make sure that there was parliamentary oversight. That is why I think we came up with such a wonderful resolution of that. We lead the world on this because we have married up the independence of the judiciary with, ultimately, the sovereignty that Parliament has. I love that we managed to do that. It was about hard work, looking at what other people did and then saying, "We can do it our own way and differently".

We can always be thinking of ways of strengthening that but I do not think that we are bereft of it just now. It has been spun to present to the world and to our citizenry a suggestion that somehow Parliament has no say in any of this, which is not true.

Lord Pannick: Murray Hunt gave a very full answer to this question and I agree with what he said. Could I emphasise two points? He said it is very important for adverse judgments of the European court to be debated in Parliament soon after they are handed down. It is a very important matter if the Strasbourg court says that we are in breach, which sometimes happens. Prisoners' rights is a good example where Prime Minister David Cameron said the judgment made him feel physically sick, but it is rare for judgments to be immediately debated.

Murray's other suggestion, which I thought was particularly attractive, was that this committee might wish to invite the British judge on the Strasbourg court periodically to speak to this committee so that there is a channel of communication. It is of course absolutely vital that everybody understands that that judge will not be asked about the merits of any

particular judgment. The precedent is that the Constitution Committee hears every year from the President and the Deputy President of the Supreme Court. There was an unfortunate incident recently where one member of the committee thought it appropriate to ask pointed and detailed questions about the merits of the Prorogation decision, but that can be avoided.

I should declare formally my interest in that I acted for Gina Miller in the two cases.

Baroness Kennedy of The Shaws: That part of your legal history goes before you, David, and you argued it brilliantly.

I thought Murray Hunt's suggestions were good about the ways in which we could strengthen the knowledge of Parliament about human rights, improving the kind of scrutiny. Can I deal with the business of the great controversy there was over the decision about prisoners having the right to vote? Europe was not saying all prisoners have to have the right to vote. The Prime Minister of the time's response was that it made him physically sick, the idea that rapists and murderers would be allowed to vote, but the European court was not saying that at all.

It was under Cameron but the arguments took place during the Labour Administration's period in office. I feel that it was always misrepresented to the general public. It would have been perfectly satisfactory if we had said, "People who are serving a sentence of less than two years should retain the right to be on the electoral register and to be able to vote and mechanisms can be created for that to be possible". We were not talking about serial killers having the right to vote but it was about a way of sustaining connection with the community, a connection with your civic rights, a way to ensure that people will be functioning members of society when they come out. If we believe that prison has any role in rehabilitation, there was something of value in all that.

I felt that it was never well conveyed to the public and that we were not helped by our politicians, in either the Labour or Conservative ranks, because it was not presented properly. I do not know who was advising people at the time but it was just a populous, knee-jerk thing. I remember Jack Straw's position was not very helpful either. Lord Henley knows that I was very critical of some of the things that were done on rights by Labour in government too. That is our purpose, as people who are trying to protect human rights: it does not matter who is in government, we have to be vocal when we see things being done that will contravene the human rights of our citizens and other people who are living in our nation.

Lord Henley: I have a copy, signed by you, of your book, *Just Law*.

Q18 **David Simmonds:** My question is about Clause 7, which requires the UK courts to consider that when Parliament has passed legislation it struck the appropriate balance between the policy aims of whatever the legislation is and the convention rights. In your view, would Clause 7

change the weight the courts already accord to Parliament in interpreting that legislation? Does it create more of an onus on Parliament to have a detailed proportionality assessment when it is debating clauses that come before it?

Lord Pannick: No. When we come to debate this provision in the House of Lords, assuming it survives the House of Commons, I would like to ask the Minister which judgments have provoked this clause, which judgments demonstrate that the courts are not primarily concerned with what Parliament has enacted. That is what courts spend their time doing. I am afraid that Clause 7 proceeds on a basis of complete ignorance of the way in which the judicial process operates. I could give you many examples but I will confine myself to one recent judgment.

I suggest you look at the case of the Queen on the application of SC v the Secretary of State for Work and Pensions, which is reported in 2021, 3 Weekly Law Reports 428. It is a Supreme Court judgment. It is Lord Reed giving a judgment for a seven-judge court and he was rejecting the claim that under the Human Rights Act the two-child limit for child tax credit was unlawful. This is what he said in paragraph 208: "The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning ... Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies." That is the legal position.

Clause 7 is no more and no less than a political slogan and it has no place, in my view, in this legislation.

Baroness Kennedy of The Shaws: Who could say it better than that? This British Bill of Rights is all about spin and unfortunately it is one of the ways in which we are undermining law. It is presenting things as truthful that are not correct. It is such a source of dismay to me that this is happening. I think it is to pacify certain sections of the hard right end of the Conservative Party because those people have not been told the truth about how our judiciary works, how decisions are made, how account is taken of our parliamentary processes and how policy decisions are made. The judges want to keep their distance from that. I feel that this is about spin rather than reality.

Chair: We are making good progress here. We have enough time to ask you some more general questions about the Bill of Rights, some of which I think you have touched on already. I will hand over to Baroness Chisholm for the first of those.

Q19 **Baroness Chisholm of Owlpen:** I am Carlyn Chisholm, I sit on the Conservative Benches in the House of Lords. We have heard during the last half an hour that neither of you are that enthusiastic about the Bill, but are there any changes that you think are important and welcome within the Bill?

Baroness Kennedy of The Shaws: Again, some mealy-mouthed things are said. I always remember that when the coalition Government were in existence there was a problem over the Human Rights Act because the Conservative manifesto said, "We are going to scrap the Human Rights Act" and of course the Liberal Democrats who went into government with the Conservatives said, "We believe in the Human Rights Act" and therefore they felt the opposite. Suddenly in the coalition Government there was a problem around this and so they created a commission to look at whether there should be a British Bill of Rights. I was appointed to sit on that.

It became very clear to me that the one thing that kept being brought up was that the right to a jury trial should be included in any British Bill of Rights. I am a big believer in a jury trial but I accept that, unlike in the United States, there are limitations that you put on a jury trial. For example, we do not have it in civil litigation any longer; it is very rarely ever used in libel; limitations in anything other than criminal cases and then in criminal cases usually of some substance.

Of course, the way that this is drafted, the protection of the right to a jury trial is not whether there should be a right to a jury trial, because of course we know it has to be circumscribed, so they say "in as much as is possible" or "as often as possible". I cannot remember what the words are, but it is gesture politics. This is a gesture. All this is about political gesturing because we know that, by and large, historically, traditionally, we are committed to a jury trial in things that will have implications for the liberty of the individual. It is hard to legislate for and so they have had problems snuffling that into this British Bill.

I am also very concerned, and I think other people should be, because I go up and down to Scotland—I have always practised at the English Bar but I do a certain amount of advisory work sometimes on things in Scotland—and they say, "How will this impact on the Scotland Act? How will they feed this into the Scotland Act?" The same is said in Northern Ireland. I wonder if it has been at all thought through or if it is not just a piece of gesture politics to buy off a section of the Conservative Party that somehow has been led to believe that human rights are a terribly bad thing. Unless we made them into something British, they are something foreign and we have to somehow deal with it.

I am very sceptical about this whole Bill, and I am sorry to say this to you because you are a parliamentarian who I greatly admire and I suspect that you want to be loyal to your party, but honestly this is not worth the candle.

Lord Pannick: There is lots in this Bill that I object to and perhaps we will come to that in a moment, but your question was whether there was anything positively that I do not object to or I welcome. Can I give three examples? I do not object to Clause 15, which imposes a requirement for permission to bring proceedings. That is already the case for judicial review so it seems unexceptionable to impose a similar requirement for human rights cases. I do not object to a Bill making plain that domestic

courts are not bound by the judgments and decisions of the Strasbourg court. I think that is already the position but I do not object to a neutral statement in the Bill that clarifies that for everybody's guidance.

Others will disagree with me on this—I doubt that Baroness Kennedy and particularly Murray Hunt would agree with me—but I can see the case for removing Section 3 of the Human Rights Act, which requires the court to do everything it possibly can to secure consistency between legislation and our human rights obligations. The court strains sometimes against Parliament's evident intention to reach a convention-compliant interpretation, so I do not object to the removal of that. The reason I do not object is because it is in any event a general principle of statutory interpretation that courts will try, if they can, to interpret legislation consistently with our international obligations, but courts also need to look at what Parliament intended. That is absolutely vital. If Parliament wants to change the law, it can.

That is trying to look favourably on what has been done, but there is a lot more that I do object to.

Baroness Chisholm of Owlpen: I think Oliver and I will look forward to the debates when they come.

Lord Pannick: We will be debating this no doubt extensively.

Q20 **Chair:** I will now ask the very obvious question of whether there are provisions in the Bill of Rights that you think are of concern and should not be included in the Bill of Rights for the UK. I note that earlier, Lord Pannick, when we were talking about Section 19 of the Human Rights Act, you suggested that no serious person would agree that there are not aspects of this Bill that breach our international law obligations. I will start with you and then move on to Helena.

Lord Pannick: The answer to your question is: how long do you have? Let me summarise the position. Clause 1 contains political slogans that have no place in legislation. Clause 3 adopts a theory of interpretation that is associated with the late Justice Scalia of the US Supreme Court and Justice Thomas. That is an originalist position. You interpret the European convention in the way that the framers interpreted it, and no constitutional court in the world adopts that approach. They all adopt a living instrument approach and that has been the approach of our own Judicial Committee of the Privy Council since the case of Edwards, 1930 Appeal Cases 124 at page 136. where it found that the word "persons" in the British North America Act included women, and so they were eligible to become Senators, although it was perfectly obvious that the framers of that legislation did not regard women as persons for that purpose.

Clause 5 seeks to ignore positive obligations, which will inevitably put this country in breach of our obligations under the European convention. Clause 6 on public protection will have the same result. Clause 7 is unnecessary and inappropriate for reasons I have already given. Clause 8 on deportation imposes criteria that will inevitably mean that our courts

and this country are in breach of convention rights. I do not understand what Clause 9 on jury trial is seeking to achieve or what it is seeking to prevent. Clause 20 on the binding force of assurances from another country in a deportation case is plainly contrary to the European court's judgment in Othman v the United Kingdom, the Abu Qatada case. There is much that is of real concern in this Bill. I highlight the most obvious points.

One final point: it seems to me absolutely plain that much of this Bill will put this country in breach of our obligations under the convention and yet the Lord Chancellor has repeatedly stated that the Government will continue to be a member of the Council of Europe and they will continue to be a signatory of the convention, complying with its obligations. Something has to give. If this Bill were being sold in the shops the Lord Chancellor, in my view, would be at risk of prosecution for false or deceptive advertising.

Chair: Lord Pannick, can you give us any recent examples of when the courts have perhaps strained Section 3 too far, an interpretative obligation?

Lord Pannick: Let me think about that.

Chair: Before I hand over to Baroness Kennedy for the same question, can I also ask you what you make of Clause 24 on interim measures?

Lord Pannick: Thank you for raising that one. It is very clear under the jurisprudence of the European court. There have been a number of cases in which the court has said that although the power to issue interim measures is not in the convention, it is in the rules of the court, it is inherent in the convention and the right to petition that the court has a power to grant interim measures, and member states, contracting states, are obliged under the convention to comply with them. Therefore, it is almost impossible to understand how Clause 24 could be consistent with our obligations under the convention.

Chair: We will come back to you at the end on my question about examples of Section 3 being taken too far, or possibly it is a bit unfair to put you on the spot. Perhaps you can follow up in writing, if you would prefer to take a bit more time to think about it.

Lady Kennedy, are there provisions in the Bill that you think are of concern and should not be included in a Bill of Rights for the United Kingdom?

Baroness Kennedy of The Shaws: Let me not rehearse exactly the same list. I completely agree with what David is saying, and I think you will find that most of the lawyers who do this kind of work will cover all that same territory. We are concerned about the fact that we will find ourselves in breach of our obligations.

I do not understand how it can be claimed that we will still be compliant with the European Convention on Human Rights and remaining in the

Council of Europe if we do what this Bill is seeking to do. I do not see how that tallies. On this business that our Supreme Court has to have the final say, the truth is—and we have to be realistic about this—that the European court is ultimately the external extra pair of eyes at the end of a process to say whether there is conforming or not. Once you start basically blowing a raspberry at any of that decision-making, you will be an outlier and you will not be conforming. I cannot see how you square that circle that is being presented to Parliament. I do not think it is honest.

I do not agree with my dear friend David Pannick when it comes to the business about having a sifting procedure to weed out unworthy claims. I feel that you are throwing yet more hurdles in the way of ordinary people in the United Kingdom having access to the courts when decision-making by public bodies has undermined their human rights. There has to be the ability to challenge. Already it is problematic because of the absence of legal aid for most people and all that. There are real difficulties in this and the erosion of judicial review, in my view, is not a healthy one. To say "If we can do it in judicial review why not do it here?" is yet a further way of limiting access of ordinary people to the courts to have a review of some of the decision-making that has been made.

Chair: On that point, do not a lot of people enforce their human rights by way of a judicial review, so there is already an inbuilt sift in the judicial review?

Baroness Kennedy of The Shaws: There will be another additional sift.

Chair: You are adding an additional one here. Am I correct in my understanding of that?

Baroness Kennedy of The Shaws: You are absolutely right; that is how it is done. What is also not understood by people who do not work in this area of law—most commercial lawyers do not, for example—is that by bringing test cases you develop law and that some of the most important developments in our legal system and in the rights of people have come through these processes.

I wrote a piece for the *Financial Times* last Saturday about this new British Bill of Rights. I said it is a power grab. It is a moving of power from the courts and towards the Executive, and that is what is happening in here. I write in that about this business of moving away from the living instrument doctrine, which has been important in the way in which our laws are developed. Gay people would not have had rights. Lots of women's rights, lots of things on behalf of victims have been made possible by using the Human Rights Act to have—

Chair: Trans rights as well. Trans rights have been enforced as a result of the living instrument doctrine.

Baroness Kennedy of The Shaws: I remember, as a child brought up in Scotland, where we used to have our hands strapped with a leather

strap, that it was a Scottish mother who brought a case to stop corporal punishment in schools. It went through the European courts. Important decisions have been made that have really changed things and brought a shift and reflected a shift in what we thought was proper child-rearing and proper discipline in schools.

There are lots of different things. There is the business of religious freedom where a British Airways air hostess was wearing a crucifix, and it was the European court that decided of course a person should be able to identify with things—that a Sikh can wear his turban, that a young Muslim woman can wear a hijab—and that these are signifiers of something that is very deep and meaningful to people and part of their identity. Those things are important.

I do not like the Scalia school of lawyering—which is originalist, "Go back to the original text"—because the world would never have moved on if we did that. We would still be sitting trying to examine the Magna Carta to find out what it really meant. Let us be real about the nature of law and how it has to live and breathe and go with the grain of change in our society.

As for the business of the "person" case that allowed women into the Senate, for a very long time here in Britain, under the common law, judges decided that persons did not include women and so women were excluded from universities, the vote, standing for Parliament, the professions and so on. When they brought cases and said, "I am a person who is suitably qualified" the judges said, "A person does not include a person of the female sex".

We have to reckon with the fact that change happens in society. Law has to keep abreast with it and we cannot be stuck in originalist thinking.

Chair: On that note, we will bring what have been two very interesting and illuminating sessions to a close. I thank all our witnesses this afternoon very much for their contributions. I will now formally close this meeting.