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The Human Rights Bill [HL], Bill 119 of 1997-98: Some constitutional and legislative aspects

The *Human Rights Bill* has passed through its Lords stages (it was introduced as HL Bill 38 on 23 October) and is due to have its Commons second reading debate on Monday 16 February. It seeks to give effect in domestic UK law to the rights contained in the European Convention on Human Rights. This Paper discusses briefly some of the broader constitutional issues surrounding the Bill and its provisions, especially its relationship to the doctrines of Parliamentary sovereignty and separation of powers. It also considers the related issue of the effect of the Bill on legislation, including the remedial order mechanism in *clauses 10-12*.

Companion Papers deal with the form and policy of the Bill (RP 98/24), its privacy implications for the press (RP 98/25) and its possible application to religious organisations and churches (RP 98/26). Earlier relevant Research Papers are cited therein.

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Summary

The *Human Rights Bill* has wide constitutional and legal implications for the political system of the UK. It is a novel constitutional device in our existing arrangements, and is part of the Government's overall package of constitutional and Parliamentary modernisation.

This Paper, one of a series on the Bill, examines generally some of the Bill's constitutional implications, especially for the doctrines of Parliamentary sovereignty and for the separation of powers. More general briefing on these concepts is contained in Research Paper 96/82, *The constitution: principles and development*, and the incorporation aspect was also explored in Research Paper 97/68, *The European Convention on Human Rights*. These issues were thoroughly aired in the Lords debates on the Bill, and extracts of these proceedings are used in this Paper to illustrate the relevant arguments.

The method of legislative remedial action is also examined in this Paper. The policy of resort to subordinate legislation, especially of a 'Henry VIII' type (which allows for delegated legislation to amend or repeal primary legislation), led to much comment in the Lords debate, which are again cited extensively here. The policy of pre-legislative scrutiny of legislation on Convention grounds is partly administrative within government and Parliament, but this Paper does examine briefly *clause 19*, which provides for written statements of compatibility to be published by ministers in charge of Bills before their second reading debate.

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A Introduction

The constitutional aspects of a human rights statute have long been debated in the UK, because of this country's unique constitutional arrangements. These issues were considered in detail in Research Paper 96/82, *The constitution: principles and development*, 18 July 1996, to which Members are referred.[1] This section seeks simply to provide a brief overview of some of the relevant constitutional aspects in the context of the *Human Rights Bill*. Some of the arguments are similar to those relevant to the other major constitutional proposal of this session, devolution to Scotland and Wales, in terms of, for example, the entrenchment of any novel constitutional arrangements within a system based on the legislative supremacy of Parliament.[2]

While the present Government has a package of significant constitutional change, which it is seeking to enact in this and future sessions, there is no official policy for a comprehensive constitutional revolution underpinned by a full written constitution.[3] Constitutional documents of that sort in other countries commonly include a section in the nature of a 'bill of rights', making that a form of 'higher law' superior to ordinary legislation and administrative action. Countries which have a common law foundation and a 'Westminster model' Parliamentary system have often tended to adopt various ways of 'incorporating' a bill of rights. Arguments about *incorporation* of a bill of rights (the ECHR or otherwise) in the UK constitutional system have tended to dominate the debate in Britain for the last quarter century.[4]

B Two constitutional concepts

There are two key (somewhat inter-related) constitutional concepts at the heart of any human rights debate in the UK:

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1 See also Research Paper 97/68, *The European Convention on Human Rights*, 27.5.97

2 The Lord Chancellor, Lord Irvine of Lairg, noted, in a recent speech to a constitutional reform conference in Cambridge that "as in Scotland, the key question we had to address in settling the Human Rights Bill was how to give real effect to our policy whilst preserving the sovereignty of Parliament" [17.1.98, p6 of transcript on LCD speeches web-site]. See also his speech to the Clifford Chance conference on 28 November 1997, also on the LCD speeches web-site.

3 In his Cambridge speech, the Lord Chancellor set out in some detail the Government's approach to its overall programme of constitutional reform, and noted, *inter alia*, that "our proposals have been designed to preserve the Union, the sovereignty of Parliament and the separation of powers. I am confident that they will do so" [17.1.98, *op cit*, p8].

4 See further Research Papers 96/82, *op cit*, and 97/68, *The European Convention on Human Rights*, 27.5.97, esp chap V.

1 Separation of powers

This concept is discussed in chap IVB of Research Paper 96/82. In the present context it relates to the separation of the judicial and the legislative functions of the state, carried out by the courts and by Parliament respectively. As such, the concept is of fundamental constitutional importance in that it underpins the rule of law and the democratic, 'limited government' nature of our constitutional system. Put very simplistically, elected, accountable representatives of the people collectively in an open Parliament are responsible, in theory, for *making* the law to which the people are subject, and unelected, unaccountable judges should simply *interpret*, but not make, law. In practice, the very act of judicial interpretation can often be, or be perceived as, tantamount to judicial law-making, thus leading to the recurring debate of a battle between 'the judges' and 'Parliament.' The doctrine of Parliamentary sovereignty (discussed below) means, *inter alia*, that the courts have no power to declare an Act of Parliament invalid or 'unconstitutional' ('judicial review', in the USA sense of the term). Parliament should, in theory, always be able to have the last word on the content of the law of the land.

However the development of administrative law, and, in particular, judicial review (especially in England) is based on the notion of judicial supervision of the legality of administrative action. Judicial review, as an issue, is beyond the scope of this Paper, but its rapid development in the last 30 years, and the frequency with which the courts will tackle issues of high political importance and controversy has often thrust the procedure and the judiciary to the forefront of political discussion. Judges who frequently deal with English judicial review cases have become relatively regular contributors to the wider constitutional debate, due, perhaps, in part to their experience of European jurisprudence through EU and ECHR cases. The judicialisation of highly controversial political and social issues can often be seen to put the judges 'in conflict' with Ministers and the Parliament. In some situations the judges will step back and state that a particular matter should be settled not by the courts but by political means. In such circumstances they will often employ 'separation of powers' language as the explanation of, or justification for their decision, especially when it is a matter of statutory interpretation.

A classic example of this was the litigation over the steel strike of the early 1980s. The union sought to increase pressure on British Steel by extending action to private sector companies not directly party to the dispute. The companies sought injunctions, and the case turned on the language of the industrial relations legislation concerning the 'furtherance of a trade dispute'. The Court of Appeal granted the injunctions, Lord Denning being concerned about the "disastrous effect on the economy and well-being of the country". However, the House of Lords was clearly alarmed at the Court of Appeal's reasoning, based not so much on statutory interpretation as on extraneous political/social motives. Lord Diplock declared:[5]

> at a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a

[5] *Duport Steels v Sirs* [1980] 1 All ER 529 at 541

> defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount.

However, the use of the word 'Parliament' in the 'separation of powers' context, while strictly accurate in constitutional theory, perhaps masks the political reality that legislation is (in general) that of the Government, rather than some 'autonomous' body called Parliament. The courts' 'dispute' therefore is, in practical terms, often with the Government of the day,[6] rather than 'Parliament' as such.

Critics of greater judicial involvement in 'law-making' fear that moves towards written constitutional devices, such as a bill of rights, will legitimise attempts by the judiciary to claim 'the last word' on the validity and meaning of the law (as the US Supreme Court claimed for itself in the early 19th century). In particular, in matters of law not covered expressly by statute (including new areas of public policy arising from technological, scientific or social developments), there would be greater scope for judges to use the generally broad phrases of constitutional documents to create judge-made law in this area. This has arisen classically in the USA, where the law on highly controversial matters such as abortion, contraception, capital punishment and police powers has been developed as much by the courts through constitutional interpretation as by federal and state legislatures and executives. The power of judicial review, in this context, refers to the 'higher law' of the Constitution itself (and its amendments, the first ten of which are known commonly as the 'Bill of Rights'), and so judge-made law can be regarded as constitutionally superior to law made by legislatures. Privacy, in its various manifestations, is a particular aspect of this sort of 'judicial activism' in the USA, and, as has been seen from the debates over the *Human Rights Bill* thus far, is a key issue in the current UK scene, especially in relation to press freedom.[7]

The scheme of the *Human Rights Bill* is designed to reflect and preserve the notion of separation of powers, as discussed. Courts will interpret legislation in the light of Convention rights (seeking in so far as is possible a compatible interpretation: *clause 3(1)*), and where they find an incompatibility they can make a declaration to that effect (*clause 4*). However they cannot declare Acts of Parliament to be void for incompatibility nor, in any other way, affect the validity or operation of statute (*clauses 3(2) and 4(6)*) or require such legislation to be repealed or amended. It remains up to Parliament (in political practice, generally, the Government, especially in relation to a secondary legislation route) to decide *whether* and, if so, *how* to make any appropriate changes in legislation, whether by relevant general primary or secondary legislation or by way of a remedial order under *clauses 10-12*. A failure to remedy an

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6 for a more recent instance, see Research Paper 95/64 *Criminal Injuries Compensation*, concerning *R v Home Secretary ex p Fire Brigades Union*

7 On privacy issues, see the companion Research Paper 98/25.

incompatibility at all or effectively may well lead to further action, such as a *clause 4* declaration, and would also have implications in an international law context.

To sum up this very brief overview: appreciation of 'separation of powers' notions can assist in an understanding of the present constitution, and perhaps provide some criteria for those seeking some degree of constitutional change or reform. It is central to fundamental constitutional issues such as the relationship between Executive and Parliament, and, in the context of the *Human Rights Bill*, the relationship of the judicial function of the courts and the legislative function of Parliament and the executive.

2 Parliamentary sovereignty

Much of the debate thus far on the incorporation of the Convention in general and on the *Human Rights Bill* in particular has been expressed in terms of 'Parliamentary sovereignty'. As will have been seen from the discussion above, much of this may more accurately be expressed in 'separation of powers' terms, in that it is the relationship between, and the respective and appropriate roles of, the judiciary and the legislators which is generally the subject of debate.

The relevance of sovereignty, or more accurately in this present context, 'the legislative supremacy of Parliament', to the *Human Rights Bill* lies in the policy of the Bill in maintaining the position that the courts cannot themselves override or overturn Acts of Parliament.[8] *Clause 3(2)(b)-(c)* preserves the validity and enforceability of any incompatible primary legislation, and incompatible secondary legislation where primary legislation prevents removal of the incompatibility. *Clause 3(1)* sets out a rule of statutory interpretation so that legislation is to be construed in so far as possible in conformity with Convention rights. Where that is not possible, the courts may make a 'declaration of incompatibility', but this declaration does not itself affect the validity or operation of the relevant legislative provision: *clause 4*. As the *Notes on Clauses* on the Bill as introduced in the Lords, states: "Parliament's intention, therefore, cannot at the end of the day be thwarted if legislation is in fact incompatible with the rights … The intention is to underline that, although it is expected that it will not normally be possible for legislation to be construed in such a manner, there comes a point where an interpretation must yield to the intention of Parliament notwithstanding that, in the result, the legislation is incompatible with the Convention rights. In particular, and as read with clause 4, the interpretive rule does not empower courts to strike down or ignore legislation, including that enacted before the Bill."

The sovereignty of Parliament is the expression of legal sovereignty in the United Kingdom. It was described as "the very keystone of the constitution" by A V Dicey, the Victorian jurist most

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[8] The Lord Chancellor, in his recent Cambridge speech said that "the Bill's unique feature … lies in its provisions about declarations of incompatibility. The judges would, I believe have been unhappy with a power to negate or disapply Acts of Parliament. in any event, the Government was determined to uphold the ultimate sovereignty of Parliament" [17.1.98, *op cit*, p6].

associated with the doctrine.[9] His formulation is the starting point for much modern discussions of sovereignty (pp 39-40):[10]

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the law of Parliament".

Several doctrines fundamental to the UK constitution can be derived from Dicey's definition. First, that legal sovereignty, or as it is often described, the *legislative supremacy* of Parliament, is a legal rule, a description of the relationship between Parliament and the courts. The courts are bound to accept, and to give effect to, any law duly effected by 'Parliament' (ie, Commons, Lords and Monarch), and an Act of Parliament is the ultimate expression of law (not necessarily the case in states with written constitutions). No law enacted by Parliament can be questioned as to its validity by any court or other body; there is no 'judicial review' by any supreme or constitutional court.[11] Thus the legal sovereignty of Parliament is the UK constitution's 'rule of recognition' or '*grundnorm*', in the terminology of the legal philosophers H L A Hart and Hans Kelsen respectively. Some examples can illustrate this legal rule. The Courts have ruled (or confirmed?) that the legislative supremacy of Parliament is not limited by international law;[12] independence or home rule of former colonies;[13] fundamental civil liberties;[14] or any form of so-called 'higher law' such as natural law, law of God or natural justice.[15]

Second, several practical consequences for constitutional development and 'reform' result from the notion of legal sovereignty. Territorial changes such as devolution can be complex because any scheme which preserves the existing constitutional norms of sovereignty must organise the hierarchical distribution of legislative power between the sovereign Parliament and the tier(s) of devolved Parliament(s), in much the same way, if at a more elevated level, as, say the relationship between Westminster and local authorities.[16] Again, the theory of sovereignty means that no Parliament can bind its successors, and this inability of Parliament to prevent any law from being later altered or repealed by a Parliament means that, in principle, no scheme of constitutional change - Bill of Rights, devolution, even, perhaps, a written constitution itself[17] - can be *entrenched* - made secure against any or easy amendment or repeal - in the legal order. The recent schemes by proponents of Scottish devolution and of some form of a Bill of Rights

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9 *The Law of the Constitution*, 10th ed, 1965, p.70

10 Dicey's formulation could perhaps be said to be the UK constitutional equivalent of the first two of the Ten Commandments.

11 UK Courts can, of course, *interpret* legislation

12 eg *Mortensen v Peters* (1906) 8F(J) 93: limits of territorial waters; *Cheney v Conn* [1968] 1 All ER 779: Geneva Conventions

13 eg *Manuel v A-G* (1983) 1 Ch 77: Canada

14 eg *R v Jordan* (1967) Crim LR 483: *Race Relations Act 1965*

15 *British Railways Board v Pickin* [1974] 1 All ER 609 at 614, Lord Reid (alleged invalidity of a private Act on Parliamentary legislative procedure grounds)

16 This is considered more fully in Research Paper 98/2, January 1998

17 or any statutory 'constitutional' guarantees, such as those for Northern Ireland

demonstrate how difficult (perhaps impossible) it is to reconcile formal, legal entrenchment (as opposed to 'political-moral' entrenchment) with conventional sovereignty.[18]

Many, including Dicey himself, have sought to distinguish between *legal* sovereignty and *political* sovereignty. Indeed Dicey regarded the Queen-in-Parliament (i.e. the legal body comprising the two Houses and the Monarch) as the legal sovereign and the electorate as the political sovereign. This latter point is the British version of what in many other constitutions is the idea of 'the people' as the true sovereign, a political concept which is often invoked to confer upon the constitution moral authority and binding force as the supreme source of legal power. Perhaps the most famous example of this is in the constitution of the United States ("We the people...").

FF Ridley notes this contrast between the UK and much of the rest of the world in terms of sovereignty of a state residing with, or flowing from, its people. According to Ridley, "Britain never developed this idea of popular sovereignty in constitutional terms, even if we sometimes talk of the sovereignty of the electorate in political terms. Even if the latter were true it would merely allow the people to choose their government: it does not base the governmental order, the British 'constitution', on their authority and thus only gives them half their right. (Moreover, since a parliamentary majority can change that order, prolong its own life, alter the franchise or reform the electoral system, even the political rights of the electorate depend on Parliament.) What we have instead is the sovereignty of Parliament. Parliament determines - and alters - the country's system of government. If we ask where that power comes from, the answer is broadly that Parliament claimed it and the courts recognised it. The people never came into the picture. The liberal (middle-class) democracies established in Europe had, despite their generally limited franchise, to base their constitutions on the principle that ultimate authority was vested in the people. Britain seems to be the sole exception to this democratic path."[19]

TRS Allan in an essay entitled "The limits of parliamentary sovereignty" in the 1985 volume of *Public Law* has criticised this distinction, as it seeks to separate the legal validity of law-making from any political subjectivity. In other words the traditional Diceyan view, the one which the courts themselves have consistently upheld, requires them simply to have regard to the form of law rather than its substance when considering the validity of legislation. Allan claims that the courts' adherence to the doctrine has a constitutional basis, and that the sovereignty of Parliament "derives its legal authority from the underlying moral or political theory of which it forms a part. The sterility and inconclusiveness of modern debate about the nature of sovereignty stems from Dicey's attempt to divorce legal doctrine from political principle. Legal questions which challenge the nature of our constitutional order can only be answered in terms of the political morality on which that order is based. The legal doctrine of legislative supremacy articulates the courts' commitment to the current British scheme of parliamentary

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[18] On which see Section VI of Research Paper 96/82

[19] "There is no British constitution : a dangerous case of the Emperor's clothes" (1988) 41 *Parliamentary Affairs* p.345

democracy."[20] He argued that the legal/political sovereignty distinction cannot be an absolute distinction, because it could not apply in extreme cases, and gave the example of legislation to deprive the large section of the population who may be government opponents of the right to vote. Such a statute "could not consistently be applied by the courts as law. Judicial obedience to the statute in such extreme and unlikely circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty since the statute would plainly undermine the fundamental political principle which the doctrine serves to protect."

It is in the nature of political and legal argument about such fundamental concepts to test them by postulating extreme cases. Some such as Professor Simon Lee have warned against this approach as unrealistic and unhelpful: "The genius of our constitution is that it is geared to the real world. We all know that Parliament will not pass statutes condemning blue-eyed babies to death so why worry because it could do so? If we try to alter our constitution to combat improbable eventualities, we may prevent too much."[21]

C The Lords debates

The Lord Chancellor, Lord Irvine of Lairg, addressed the constitutional context when introducing the second reading debate in November 1997:[22]

> Our critics say the Bill will cede powers to Europe, will politicise the judiciary and will diminish parliamentary sovereignty. We are not ceding new powers to Europe. The United Kingdom already accepts that Strasbourg rulings bind. Next, the Bill is carefully drafted and designed to respect our traditional understanding of the separation of powers. It does so intellectually convincingly and, if I may express my high regard for the parliamentary draftsman, elegantly.
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> The design of the Bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate. If a Minister's prior assessment of compatibility (under Clause 19) is subsequently found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action. There is a fast-track route for Ministers to take remedial action by order. But the remedial action will not retrospectively make unlawful an act which was a lawful act--lawful since sanctioned by statute. This is the logic of the design of the Bill. It maximises the protection of human rights without trespassing on parliamentary sovereignty.

For the Opposition, the shadow Lord Chancellor, Lord Kingsland, attacked what he saw as the constitutional dangers inherent in the Bill (cc1234-5):

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[20] "The limits of Parliamentary sovereignty", 1985 *Public Law* 614
[21] 1985 *Public Law* at p.633
[22] HL Deb vol 582 cc1228-9, 3.11.97

If the Bill becomes law it will be a defining moment in the life of our constitution. Perhaps the only other examples this century of such defining moments were the passage of the Parliament Acts of 1911 and 1949. As your Lordships are acutely aware, they had a dramatic effect on the balance of power between your Lordships' House and another place.

If this Bill reaches the statute book it will have an equally defining influence on the balance of power between the legislature and the judiciary. Whatever the inherent merits of its contents, I hope that your Lordships, in formulating your amendments, will be aware of how deep are the implications for that relationship. They lie at the heart of the doctrine of the separation of powers in our constitution, which has been the hallmark of our liberties throughout the centuries.

He criticised the Bill's proposals for incorporation (not following exactly either of the New Zealand or Canadian models for example) on separation of powers grounds (cc1236-7):

I suggest that he has gone for a hybrid of the two: he is not striking down the previous statute but is giving judges the power to make a declaration of incompatibility. He then gives Parliament the option to legislate not by full primary statute but by order in council.

I believe that that solution is constitutionally unacceptable for two reasons which I shall try to explain as briefly as I can. In the Bill, the courts of this country are not bound by the decisions of the court in Strasbourg. It is to have a persuasive but not obligatory effect. When a court in this country makes a declaration of incompatibility, it might be making a declaration which is not an accurate photograph of the law of the convention. Indeed, that option is expressly incorporated in the Bill. To the extent that a declaration of incompatibility does not reflect the true construction of the jurisprudence of the convention, the judges will be making a declaration about the making of new law, judge-made law. Indeed, they will be doing more than that. They will be initiating a legislative procedure in Parliament.

What is the doctrine of the separation of powers in our country? It is that judges do not interfere with the parliamentary process on the one hand and Parliament does not interfere with the judicial process on the other. That principle has stood us in enormously good stead, certainly since the Glorious Revolution more than 300 years ago. To the extent that the judges are not reflecting the jurisprudence of the convention but stating their own view about what the convention says, they are in breach of that doctrine. They are initiating new legislation.

Of course, it is true that Parliament does not have to go ahead and pass that legislation. Indeed, what I fear may flow from a judicial decision of incompatibility is a long and bitter debate in Parliament about whether the judges were right and even if they were right, whether it is right to legislate……

My Lords, first, the declaration expresses the judge's view about what is the difference between the convention and the previous statute. It does not necessarily reflect the view of the court in Strasbourg. It is therefore a home-grown judicial expression of what the law ought to be. It is not an expression of what the law of the convention is. I see that the noble Lord shakes his head and he is perfectly entitled to do so. But if the judge is making a declaration about the difference between the convention and the previous statute which is not based on the jurisprudence of the court in Strasbourg, and if his court is not bound by that jurisprudence in the future, then he must, by definition, be taking his own view about what that difference is. That view is what forms the basis for the order in council. In other words, that view is what initiates the legislation. Therefore, there is a breach of the doctrine of the separation of powers. That is the point that I make.

Supporters of the Bill denied that it involved an attack on existing constitutional norms. The Liberal Democrat and leading proponent of human rights legislation, Lord Lester of Herne Hill said (c1239):

> It involves no challenge to the English dogma of absolute parliamentary sovereignty. Rather its enactment involves the much-needed exercise of parliamentary sovereignty, giving our own courts proper authority to perform their duty of interpreting and applying common law and statute law in accordance with the UK's international obligations under the convention. True to the doctrine of parliamentary sovereignty, as the noble and learned Lord the Lord Chancellor said, the courts must defer to existing and future Acts of Parliament if it is impossible to read and give effect to them in a way which is compatible with the convention. Therefore, far from weakening Parliament's role, the Government's proposals will increase the accountability of the Executive to Parliament.

Lord Scarman, a longtime judicial proponent of human rights legislation, was even more emphatic (c1256):

> The Bill is the beginning of a very important constitutional chapter in our history. The quality of the Bill is that it recognises that in a democracy, the democratically elected assembly--for us, that is Parliament--must be sovereign. At the same time, the Bill recognises that the European Convention on Human Rights exists and that that convention, ratified by Britain in 1951, guarantees the human rights stated in it. The Bill recognises that those rights are already in existence in the United Kingdom, although their direct enforcement is not yet possible here.
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> What has the Bill done? The Bill has stood up for parliamentary sovereignty. At the same time, to quote from the preamble to the Bill, it,
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> "gives further effect ... to rights and freedoms guaranteed under the European Convention on Human Rights".
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> The Bill recognises that under our law those rights are already guaranteed and takes that as an opportunity for constitutional reform. The Bill is modest. As I have said, the legislation will be an Act to give further effect to rights and freedoms that are already guaranteed under the European convention.
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> The Bill has done that in a brilliant way and I congratulate the noble and learned Lord the Lord Chancellor, his colleagues in government, the civil servants and the draftsmen on the document that they have produced. We now have the protection of our primary law and the protection of the rights that are guaranteed by the European convention. That is achieved by a partnership, if I may put it like that, between Parliament and the judges. The judges do not strike down primary legislation; they merely indicate their opinion, without fuss, that certain matters are incompatible and leave it at that. When there is incompatibility between a primary statute and the European Convention on Human Rights, there will be a fast-track parliamentary procedure.
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> The Bill may or may not need reform or looking at again in the future, but it is the beginning of a new constitutional chapter and I see absolutely nothing in the history of English law which indicates that either the judges or Parliament will play rough. This is a new form of partnership, with the judges sticking to their judicial work and Parliament being supreme in legislation. That is absolutely right. If we are to be a democracy, the people must have the last word. Having said that, constitutionally we can ensure the protection and development of our rights, guaranteed under the convention.

Lord Bingham of Cornhill, the Lord Chief Justice, said (c1246):

I believe that these are solid reasons for welcoming the Bill. But I do not think that they will turn our world upside down. I do not think so badly of our institutions as to suppose that we have been routinely violating human rights and undermining fundamental freedoms all these years. I am aware, as are your Lordships, of a number of objections in principle to incorporation. The first is that it involves, so it is said, a major transfer of power from Parliament to the judiciary. While I respect those who advance that argument, it is not one I accept. The mode of incorporation does not empower judges, as the noble and learned Lord the Lord Chancellor made clear, to overrule, set aside, disapply, or--if one wants to be even more dramatic--strike down Acts of Parliament. That is a power which throughout the recent debates the judges have made clear they do not seek. The mode of incorporation adopted is that which most fully respects the sovereignty of Parliament. Following incorporation, nothing will be decided by judges which is not already decided by judges. The difference is that British judges will in the first instance have an opportunity to provide a solution.

The second objection in principle which one frequently hears is that it will draw the judges into politics. That has not, so far as I know, happened in all the other member states of the Council of Europe which have either incorporated the convention or given effect to it. As noble Lords well know, judges already from time to time find themselves deciding cases which have political, sometimes even party-political, implications. The judges strive to decide those cases on a firm basis of legal principle; and that is what they will continue to do when the convention is incorporated if the Bill becomes law.

The former Master of the Rolls, Lord Donaldson of Lymington, had been an opponent of incorporation but would support the Bill because its scheme preserved existing constitutional doctrines (c1292):

I believe it to be a very cleverly crafted Bill. I have a great professional admiration for the way in which it has been put together. I am quite satisfied that it upholds the authority of Parliament, which is one of the things that has always troubled me. It avoids any conflict between Parliament and the courts.

I know that it will not politicise the appointment of judges and I hope that it will not lead to the public perceiving judicial decisions as being political in their nature. It is true that they will involve a measure of discretion and a measure of social and judicial engineering, but it will be done under the authority of Parliament and with the guidelines, such as they may be, which can be derived from the convention and from other decisions on the convention in other jurisdictions.

It is an occupational hazard for a judge to be accused of reaching a political decision. Those who have worked in the field of judicial review know perfectly well that, whichever way they decide a matter, they will be accused of playing politics. It may be wrapped up a little but, essentially, that is what is at stake. Indeed, in many of the judicial review cases the applicants had no hope--and knew that they had no hope--of getting a favourable decision. What they really wanted to do was to air their particular hobby horse and, when it failed, to blame the judge for that failure.

However other peers, mainly but not exclusively from the Conservative benches, remained opposed to the policy on constitutional grounds. Lord Waddington, a former Conservative Home Secretary, said (cc1253-4):

> According to the noble and learned Lord [ie the Lord Chancellor], incorporation will include a very significant transfer of power to the judges, who--I quote from a press report of a speech he made--
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> "will incorporate the convention to reflect changing social attitudes".
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> In plain language, that means that the judges will make new laws. The noble and learned Lord was reported some time ago as saying that he contemplated, as an example of the sort of law they would make, a new law of privacy. It does not take too much imagination to see that that would have one great advantage for the Government. The Government would at least be spared the embarrassment of having to introduce a privacy Bill themselves, with all the risks of conflict with the press which that would entail.
>
> Now of course the judges have always made law. Indeed when we talk about human rights, as we do today, we should remember that such human rights as our law recognises are largely judge-made; for example, the presumption of innocence, the right of peaceful assembly and the freedom of the press. As we applaud the judges for having used common law principles to uphold individual rights, we are entitled to wonder whether we cannot trust them to continue to develop the common law to meet new threats to our liberties when they arise.
>
> But make no mistake about it, when we ask the judges to get to work on some of the vague and imprecise concepts in the convention, such as the right of respect for family life, when we give the judges the opportunity to put whatever construction they like on these concepts, we will be giving an immense new impetus to the judges' law-making power, for good or ill. Furthermore, we will be doing so at a time when the judges have not exactly been backward in coming forward, having in any event been demonstrating an increasing enthusiasm to make new laws, particularly new laws to fetter the Executive.
>
> Against this background, is it not obvious that the greater the latitude allowed to judges to make new laws, the greater the risk of their appearing arbitrary, capricious and biased; and is it not obvious that the greater the latitude allowed to judges to make law, the greater the risk of conflict with Parliament?
>
> We were told that the Bill has been drafted to minimise the risk of such conflict. But increasing conflict there undoubtedly will be. The courts may not be able to strike down a Bill as conflicting with the convention, but the noble Lord, Lord Mishcon, has to acknowledge that the end result will be precisely the same. If the judges make law which conflicts with a law made by Parliament, a fast-track procedure will be invoked to ensure that Parliament bows the knee and the judges' law prevails. That is the truth of the matter. And what these laws will be, to which Parliament will have to bow the knee, is anyone's guess.
>
> It will all depend, according to the noble and learned Lord the Lord Chancellor, on the judges' views of what Parliament, the elected representatives of the people, has failed to do by way of change to the present law to reflect "changing social attitudes". When these conflicts with Parliament arise, as they inevitably will, it is equally inevitable that there will be much greater interest in the political affiliations of those appointed to the Bench and, as in the United States, appointments will become a matter of controversy, with the suspicion, justified or not, that they have been made on political grounds. We will finish up paying a handsome price for the exercise on which we have now embarked.

What makes this whole exercise particularly unsatisfactory is that while, through incorporation, we will be running all these risks, we will not avoid continuing to be made fools of by the judges in Strasbourg. If British judges are robust and reject large numbers of complaints, the litigants, or a large number of them, will go to Strasbourg anyhow, and we could actually finish up with more decisions against us at Strasbourg than we get now.

That of course will mean us finishing up with the worst of all worlds: first, erosion of the sovereignty of Parliament, with the judges rather than the elected representatives of the people making laws to reflect changing social attitudes; and, secondly, foreign judges, brought up in an entirely different tradition, making embarrassingly inappropriate decisions in Strasbourg.

Lord Mayhew of Twysden, a former law officer, made similar points (c1261):

However, I am also a firm admirer of our judiciary and the limitations that our constitutional practice has placed upon its work. Those limitations have preserved the judiciary from any perceived taint of partiality, especially in controversial fields of political policy. That is important and we want to risk it only after the greatest care and consideration.

It is important because it bears upon the need for the public to retain confidence that the judiciary is altogether impartial. That is nowhere more important than in the case of the disappointed litigant. It is important that he leaves the court believing that the judiciary is altogether impartial. He may believe that the judiciary did not understand the case--perhaps that is par for the course--but he should never believe that because of a perceived taint of partiality the judiciary could never have been expected to find in his favour.

That must continue. My grave fear is that if we require our judges to undertake the additional tasks provided for in the Bill--in shorthand, they can be said to interpret and apply the provisions of the convention--by reason of the broad brush conceptual language, referred to by the Right Reverend Prelate, confidence will diminish not because of what the judges will do to the convention but what the convention will do to the judges.

Lord McCluskey, a law officer under the 1974-79 Labour Government and a senior Scottish judge, remained an opponent of incorporation on constitutional grounds (c1266):

The present Bill does a great deal to achieve a remarkable and reasonable compromise. However, I still believe that it offends against points of fundamental principle. By incorporating into our domestic law vague, imprecise and high sounding statements of legal rights, we hand what is truly legislative power away from a democratic and accountable Parliament to an appointed, unelected and unaccountable judiciary. No doubt the latter will be composed of distinguished men--indeed, that applies to some, many or most of them--but they will be successful lawyers with very limited democratic credentials and experience.

And (c1267):

We should not run away from the fact that this is empowering judicial legislation. Of course the judges will not possess quite the same power here as they do in the United States or in other places, but the effect will be exactly the same. Elsewhere in the White Paper it is made abundantly plain that in almost every case--and I know of no exception--Parliament will at once move to bring the law into line with what judges say the convention says it is. In fact, Parliament has no option if the Strasbourg Court so decides. The certain aim of British judges

will be to interpret the convention in the way that they think the Strasbourg Court will. Otherwise, they will be overturned in Strasbourg.

Replying to the short debate on 5 February that the Bill do now pass, the Lord Chancellor summed up the policy of the Bill:[23]

> The Bill is based on a number of important principles. Legislation should be construed compatibly with the convention as far as possible. The sovereignty of Parliament should not be disturbed. Where the courts cannot reconcile legislation with convention rights, Parliament should be able to do so--and more quickly, if thought appropriate, than by enacting primary legislation. Public authorities should comply with convention rights or face the prospect of legal challenge. Remedies should be available for a breach of convention rights by a public authority. We have brought these principles together into what your Lordships have, I think, generally agreed is a carefully constructed Bill.

He described the application of Convention rights in our domestic judicial system as follows: "The convention rights are the magnetic north and the needle of judicial interpretation will swing towards them.… What the Bill does not do is make the convention rights themselves directly a part of our domestic law in the same way that, for example, the civil wrongs of negligence, trespass or libel are part of our domestic law.… I hope that we can put to one side what is really a theological dispute in relation to the meaning of incorporation and concentrate on what the Bill was designed to achieve, which is a real enhancement of the human rights of people in this country" (c840).

II Legislative remedial action

A General

The ways in which the Bill permits or requires UK law to be made or amended to reflect the requirements of the Convention are at the heart of the Bill's overall policy. These broader issues are discussed more fully in other sections of this and the companion Paper. This section considers directly the remedial order mechanism in *clauses 10-12* of the Bill, in part through the debates on these clauses in the Lords, where many of the relevant points were debated. The Lord Chancellor, Lord Irvine of Lairg, summarised the policy in a recent speech:[24]

> As in Scotland, the key question we had to address in settling the Human Rights Bill was how to give real effect to our policy whilst preserving the sovereignty of Parliament. We reconciled the two by determining that the courts should be required to interpret legislation, so far as possible, in conformity with the Convention.

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[23] HL Deb vol 585 c839, 5.2.98

[24] Opening address to a constitutional reform conference in Cambridge, 17.1.98 [transcript, pp6-7 on LCD speeches web-site].

Before the Second Reading of any Bill, the responsible Minister will be obliged to make a statement about a Bill's compatibility with the terms of the Convention. By requiring this statement, we are underlining our commitment to undertaking further pre-legislative scrutiny of all new legislative measures. Where a Minister states that he is unable to make a positive statement, that will be a very early signal to Parliament that the human rights implications of the Bill will need to receive the closest consideration.

Clause 3 of the Bill provides that legislation, whenever enacted, must as far as possible be read in a way which is compatible with the Convention rights. This will ensure that, if it is possible for the judge to interpret a stature in two ways - one compatible with the Convention and one not - the courts will always choose the interpretation which is compatible. In practice, this will prove a strong form of incorporation.

In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way compatible with Convention rights, they will be able to make a declaration of incompatibility. This is a unique legislative concept. When I read Sir William Wade's paper last night I understood that he regarded the "weak part" of the Bill as its failure to incorporate the Convention rights themselves. I became happier when he continued: "The "strong" part, and the Bill's unique feature, which has no analogy in New Zealand, or, as far as I know, elsewhere, lies in its provisions about declarations of incompatibility." It is quite different to striking down an Act of Parliament. The judges would, I believe, have been unhappy with a power to negate or disapply Acts of Parliament. In any event, the Government was determined to uphold the ultimate sovereignty of Parliament.

Sir William was troubled that in our House of Lords Debates "there was no mention ..... of the rule of law." He continued: "Yet to allow questions of personal legal right to be decided by executive discretion offends against the rule of law in its most basic sense, the rule of law as opposed to the law of discretionary power." But what the Bill will do is not incorporate the Convention rights themselves, but legislate for an interpretative principle. I do not believe the rule of law is offended. With the greatest respect I believe Sir William's point is a reflection of his conviction that the Convention rights as such should have been incorporated, but that we chose not to do because it could lead to judges striking down or disapplying Acts of Parliament. Constitutional change, like politics, is the art of the possible.

If a declaration of incompatibility is made, it will be for Parliament to decide whether there should be remedial legislation. Parliament may - not must, but in practice, we believe, usually will - legislate. If a Minister's prior assessment of compatibility is subsequently found, by a declaration of incompatibility by the courts, to have been mistaken, it is hard to see how the Minister could withhold remedial action. There is a fast-track route for Ministers to take the necessary remedial action by Order. But the remedial action will not retrospectively make a lawful act - lawful because sanctioned by Statute - unlawful. This is the logic of the design of the Bill. It maximises the protection of human rights without trespassing on Parliamentary Sovereignty.

The white paper explained that legislation would be enacted to remedy speedily any incompatibility in existing legislation:[25]

[25] Cm 3782, Oct 1997, p11

Amending legislation

2.17 Although the Bill does not allow the courts to set aside Acts of Parliament, it will nevertheless have a profound impact on the way that legislation is interpreted and applied, and it will have the effect of putting the issues squarely to the Government and Parliament for further consideration. It is important to ensure that the Government and Parliament, for their part, can respond quickly. In the normal way, primary legislation can be amended only by further primary legislation, and this can take a long time. Given the volume of Government business, an early opportunity to legislate may not arise; and the process of legislating is itself protracted. Emergency legislation can be enacted very quickly indeed, but it is introduced only in the most exceptional circumstances.

2.18 The Bill provides for a fast-track procedure for changing legislation in response either to a declaration of incompatibility by our own higher courts or to a finding of a violation of the Convention in Strasbourg. The appropriate Government Minister will be able to amend the legislation by Order so as to make it compatible with the Convention. The Order will be subject to approval by both Houses of Parliament before taking effect, except where the need to amend the legislation is particularly urgent, when the Order will take effect immediately but will expire after a short period if not approved by Parliament.

2.19 There are already precedents for using secondary legislation to amend primary legislation in some circumstances, and we think the use of such a procedure is acceptable in this context and would be welcome as a means of improving the observance of human rights. Plainly the Minister would have to exercise this power only in relation to the provisions which contravene the Convention, together with any necessary consequential amendments. In other words, Ministers would not have carte blanche to amend unrelated parts of the Act in which the breach is discovered.

The Bill, as originally introduced in the Lords, reflected this policy:

10. - (1) This section applies if-

(a) a provision of legislation has been declared under section 4 to be incompatible with one or more of the Convention rights; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights, a provision of legislation is incompatible with one or more of the obligations of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that, in order to remove the incompatibility, it is appropriate to amend the legislation using the power conferred by this subsection, he may by order make such amendments to it as he considers appropriate.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers-

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that it is appropriate to do so using the power conferred by this subsection, he may by order make such amendments to the primary legislation as he considers appropriate.

(4) The power conferred by subsection (2) may also be exercised where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with one or more of the Convention rights and the Minister proposes to proceed under section 12(1)(b).

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section "amendments" includes repeals and the application of provisions subject to modifications.

11. - (1) An order made under section 10 (a "remedial order") may-

(a) contain such incidental, supplemental, consequential and transitional provision as the person making it considers appropriate;

(b) be made so as to have effect from a date earlier than that on which it is made;

(c) make provision for the delegation of specific functions; and

(d) make different provision for different cases.

(2) The power conferred by subsection (1)(a) includes-

(a) power to amend or repeal primary legislation (including primary legislation other than that which contains the incompatible provision); and

(b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

12. - (1) No remedial order may be made unless-

(a) a draft of the order has been approved by resolution of each House of Parliament; or

(b) it is declared in the order that it appears to the Minister making it, or Her Majesty in Council, that because of the urgency of the matter it is necessary to make the order without a draft being so approved.

(2) If a remedial order is made without being approved in draft-

(a) the order must be laid before Parliament after it is made; and

(b) if at the end of the period for consideration a resolution has not been passed by each House approving the order, the order ceases to have effect (but without that affecting anything previously done under the order or the power to make a fresh remedial order).

(3) In subsection (2) "period for consideration" means the period of forty days beginning with the day on which the order was made.

(4) In calculating the period for consideration, no account is to be taken of any time during which-

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

The House of Lords Committee on Delegated Powers and Deregulation examined the Bill in its sixth report last November, and its analysis of the remedial orders procedure was as follows:[26]

Remedial orders

22. Another form of a declaration of incompatibility relates to circumstances where it is primary legislation alone which is found to be incompatible with the Convention (clauses 4(1) and (2)). Both kinds of declaration can lead to action under clause 10, as can a decision of the European Court of Human Rights. Under that clause a minister may by order make such amendments to primary and subordinate legislation as he thinks appropriate to remove the incompatibility which has been identified. Such an order is a "remedial order" and the width of the power can be seen from clause 11. The procedure is laid down in clause 12 and is affirmative unless the urgency of the matter requires that the order be made without waiting for the draft to be approved. In such a case the order lapses after 40 days unless previously approved by both Houses.

23. This is a Henry VIII power of the utmost importance, which the Committee wishes to draw to the House's attention. The House may take the view that the "fast track" procedure to remedy speedily laws which have been held by the courts to be incompatible with the Convention is necessary. The orders could, however, affect significant change in sensitive and important areas of existing law. We have noted the Lord Chancellor's statement to the House at second reading that the power could only be used under strictly limited circumstances. Without strict limitations, a secondary power of such potential width would be unacceptable. In view of the significance of the Lord Chancellor's statement we repeat his words here:

"...the power to make a remedial order may be used only to remove an incompatibility or a possible incompatibility between legislation and the convention. It may therefore be used only to protect human rights, not to infringe them. And the Bill also specifically provides that no person is to be guilty of a criminal offence solely as a result of any retrospective effect of a remedial order."

24. The bill, quite rightly in the Committee's view, requires the affirmative resolution procedure. This procedure, however, does not allow the House to amend an order.

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[26] Sixth report, HL 32 of 1997-98, 5.11.98

> Given that the power has to be open-ended in order to meet any need that could arise, and that it might be used to make extensive changes to existing legislation, the House may wish to consider whether there is a case for developing a new procedure to scrutinise such orders modelled on that for the second stage parliamentary scrutiny of deregulation orders. Such a procedure could allow for a limited period in which the proposal to make a remedial order could be considered by both Houses of Parliament, with the opportunity that would give for amendments to be proposed.

25. The House may also wish to note that primary legislation and subordinate legislation are defined in clause 21 in terms which do not correspond to commonly accepted meanings. For example, some orders in Council are treated as primary legislation while an Act of the Parliament of Northern Ireland is treated as subordinate legislation. Some of the consequences may be surprising: for example, a court could strike down a Northern Ireland Act under clause 3 (because a declaration of incompatibility is only relevant where the fault stems from the enabling legislation and this can hardly be the case where the subordinate legislation is itself an Act).

Note that ministers are not required, as a matter of domestic law[27], to legislate to remedy any incompatibility in relevant legislation, whether by primary legislation or by remedial order under *clauses 10-12* of this Bill. Indeed *clause 6(8)* expressly excludes from the categories of acts of public authorities which cannot lawfully be done in a way incompatible with the Convention, "a failure to – (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order." The *Notes on Clauses*, published for the Lords proceedings, stated that, in relation to this provision, "it is not intended, for example, that a decision of the Government not to introduce legislation to correct an incompatibility should be capable of being challenged in the courts." The relevant note on *clause 10* states that "there is no requirement for the Government to make amendments under this clause, but it is almost certain that the Government would wish to respond in some way to any declaration of incompatibility. The power is also available following adverse findings in United Kingdom cases by the European Court of Human Rights." Presumably any remedial legislation, whether by remedial order or otherwise, could itself be challenged on incompatibility grounds.

B Form of remedial legislation

The availability, under *clauses 10-12*, of secondary legislation, especially of the 'Henry VIII' form (which amends primary legislation), as the mechanism for the amendment of legislation which is incompatible with Convention rights, has been the subject of some comment. Ministers will be able, if they wish, to seek to use primary legislation to achieve this purpose, but the SI route generally has advantages (not least of speed) for ministers seeking to remedy any incompatibility.[28]

Recent years have seen the development of new legislative forms and procedures, which combine various features of the conventional primary and secondary routes. The most

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[27] As already noted, there may well be legal implications as a matter of *international law*

[28] The use of secondary rather primary legislation is common in the application of EC law, under s2, *European Communities Act 1972*. On the nature of delegated legislation in general, and 'Henry VIII' clauses in particular, see Research Paper 94/16, *Deregulation and Contracting Out Bill*, 28.1.94, chap II.

obvious examples are probably Transport and Works Orders under the *Transport and Works Act 1992* and Deregulation Orders under the *Deregulation and Contracting Out Act 1994*.[29] New legislative devices and techniques may well emerge from current constitutional developments such as devolution and the modernisation of the procedures of the House of Commons. Primary legislation ('Acts of Parliament') nevertheless remains the most prestigious and understood form, and this tends, in general, to raise a presumption that it is the appropriate form for the making or amending of laws of general public importance, such as particular issues of what may be termed 'human rights'. Ministers seeking resort to devices other than primary legislation will therefore generally feel the need to explain and justify their policy. Perhaps one of the most obvious and important instances of the secondary legislative route is in relation to EC law, under S.2 of the *European Communities Act 1972*, as was frequently noted in the Lords debates.

There are several reasons for resort to legislative forms other than primary legislation. These include the pressure on Parliamentary time caused by the nature and scale of the legislative process; technicality of the relevant subject matter; the need for flexibility in the implementation of a statutory policy or scheme, and the need to react speedily to extraordinary circumstances, such as states of emergency. On the other hand the delegation of legislative power from Parliament to other governmental agencies, especially ministers and their departments, raises obvious constitutional and practical issues. Delegated legislation is intended generally to amplify and 'flesh out' detailed policies and principles set out in statute (having thereby been considered and approved by Parliament), not to create or alter substantive policy. The approach of using 'framework' or 'skeleton' bills has generally been frowned upon, except where expressly adopted as part of a more general policy.[30] Constitutional propriety generally requires that delegated legislation should not, for example, improperly or too-easily provide for sub-delegation, retrospection or imposition of taxation, and various forms of protection and control exist in the processes of Parliamentary scrutiny, judicial control, statutory publication requirements and consultation arrangements.

The Lord Chancellor, Lord Irvine of Lairg, in his July 1997 speech to a UCL conference, promised that "any fast track procedure would have to operate in a way which did not infringe the legislative role of Parliament." The availability not only of a secondary legislation route, but one of a 'Henry VIII' form means that the remedial order policy has been controversial. The deregulation orders procedure was the subject of much criticism for this reason by Opposition parties during the passage of what became the *Deregulation and Contracting Out Act 1994*. For example, replying for the Opposition in the second reading of the Bill in February 1994, Robin Cook said:[31]

> Let us be clear what those four clauses propose. They propose that Ministers may be able to set aside Acts of Parliament by Statutory Instruments. I understand that such clauses are termed Henry VIII clauses in disrespectful commemoration of that monarch's tendency to

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[29] Michael Ryle (a former Clerk of Committees in the House of Commons, and secretary of the Hansard Society Commission on the legislative process, whose report, *Making the law*, was published in November 1992), has argued that the deregulation order procedure could be the prototype for a form of legislation suitable for 'major' SIs: see "The Deregulation and Contracting Out Act 1994: a blueprint for reform of the legislative process?" (1994) 15 *Statute Law Review* 170.

[30] The granting of subordinate legislative powers to the National Assembly for Wales under the current *Government of Wales Bill* is an example. See Research Paper 97/132, chap III for further details.

[31] HC Deb vol 237 c157, 8.2.98

absolutism. They have, of course, become increasingly common under this Government, as we would expect, given their tendency to absolutism. To be fair, the Henry VIII clauses which the Government have produced have so far been slipped into the back of Bills. They have been consequential clauses, temporary in their powers and Bill which contained them. The Bill is one big Henry VIII clause.

He continued (c158):

Nothing does a more thorough hatchet job on the proceedings of Parliament than the Bill presented by the Government. Let us be clear what would happen and what we would lose if clauses 1 to 4 were passed unamended. Ministers would be able to repeal full Acts of Parliament by statutory instrument. There would be no Committee stage in which the measure was considered line by line. Statutory instruments cannot be amended; they have to be accepted or rejected as they stand. There would be no Report stage in which new clauses could be considered. The House would have to accept the priorities of the Minister who presented the order.

There would be no Lords amendments in which the second Chamber gave us a chance to have second thoughts. We would not even have the now traditional debate on the guillotine motion, which is a standard part of the proceedings under the Government. Instead of that full, exhaustive process of legislation, we would have the miniaturised proceedings of a statutory instrument, which are usually taken last thing at night in 90 minutes dead, without even the troublesome need to move a guillotine motion.

In the debate on procedure for the scrutiny of deregulation orders, Derek Fatchett, winding up for the Opposition, repeated Labour's objection to the Bill "because it gives extensive powers to the Executive to repeal primary legislation …. That is the key constitutional point." He warned that once such powers were conceded by Parliament other governments could do likewise: "Once the Government take that direction, one precedent will lead to many others. Do not Conservative Members recognise the danger that others with different motives and objectives may wish to use the same procedures? They will not have the right to come back to the House and object. I should not want a Labour Government to use the extensive powers proposed in the first four clauses of the Deregulation and Contracting Out Bill, or anything like them, but the Government have introduced them, to which we object in principle."[32]

One crucial difference between primary and secondary legislation, in terms of Parliamentary legislative scrutiny, is the general rule that delegated legislation cannot be amended by Parliament. This question was considered at length during the various proceedings on the deregulation orders procedures, both on the parent Act and on what is now S.O. no. 141 on the Deregulation Committee[33], and was examined in Research Paper 94/16 on the *Deregulation and Contracting Out Bill*. This issue was examined by the Procedure Committee in 1978, who pointed out the practical difficulties, such as the *vines of* amendments, and concluded that "the power to amend statutory instruments would be likely to exacerbate the existing difficulties relating to delegated legislation and to undermine the advantages of the system of delegation".[34]

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[32] HC Deb vol 242 c415, 11.5.94

[33] see the 1998 edition of the Standing Orders, HC 533 of 1997-98, February 1998. See also S.O. no. 18.

[34] First report of 1977-78, HC 588-I, July 1978, para 3.20

As noted, the Lords Delegated Powers Committee suggested, in their report on the *Human Rights Bill*, that a 'deregulation order'-type procedure would provide Parliament with some form of scrutiny and control over the use of remedial orders.

The current deregulation order procedure in the Commons is as follows:[35]

Under the Deregulation and Contracting Out Act 1994, the Government may make an Order (instead of having to obtain an Act) to amend or repeal provisions in primary legislation which are considered to impose a burden on business or others and which could be repealed or amended without removing any necessary protection. Such orders follow a special procedure:

The Government, having consulted interested parties, lays the proposal before Parliament.

There is a period of 60 days (not counting adjournments etc. of more than four days) during which select committees in each House scrutinise the proposal. The Commons Deregulation Committee examines each proposal against nine criteria, taking evidence if necessary, and reports to the House on whether the proposal should proceed, not proceed or proceed only in an amended form.

After the 60 days, a draft Order may be laid, with a statement setting out any differences from the original proposal.

The two committees must consider the proposed Order again and make a further report to the House, in the case of the Commons committee within 15 sitting days.

The draft Order requires approval by each House. In the Commons the procedure depends on what happened in Committee:

i. Committee approves without division: Question put in House without debate.

ii. Committee approves with division: Debate in House for up to 1½ hours.

iii Committee rejects: Motion in House to disagree with Committee's report, debated for up to 3 hours; if agreed, question then put forthwith on draft Order.

Lists of deregulation proposals currently before the House are published each Wednesday and are available from the Vote Office.

C Lords' consideration of the remedial orders procedure

Introducing the second reading of the Bill, the Lord Chancellor said:[36]

A declaration of incompatibility will not itself change the law. The statute will continue to apply despite its incompatibility. But the declaration is very likely to prompt the Government and Parliament to respond.

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35 Extract from the Commons' *Short guide to procedure and practice* web-site.

36 HL Deb vol 582 c1231, 3.11.97

In the normal course of events, it would be necessary to await a suitable opportunity to introduce primary legislation to make an appropriate amendment. That could involve unacceptable delay when Parliamentary timetables are crowded. We have taken the view that if legislation has been declared incompatible, a prompt parliamentary remedy should be available. Clauses 10 to 12 of the Bill provide how that is to be achieved. A Minister of the Crown will be able to make what is to be known as a remedial order. the order will be available in response to a declaration of incompatibility by the higher courts. It will also be available if legislation appears to a Minister to be incompatible because of a finding by the European Court of Human Rights.

We recognise that a power to amend primary legislation by means of a statutory instrument is not a power to be conferred or exercised lightly. Those clauses therefore place a number of procedural and other restrictions on its use. First, a remedial order must be approved by both Houses of Parliament. That will normally require it to be laid in draft and subject to the affirmative resolution procedure before it takes effect. In urgent cases, it will be possible to make the order without it being approved in that way, but even then it will cease to have effect after 40 days unless it is approved by Parliament. So we have built in as much parliamentary scrutiny as possible.

For the Opposition, the shadow Lord Chancellor, Lord Kingsland, attacked not only the mechanism of the 'declaration of incompatibility', but also the fact the Bill, "then gives Parliament the option to legislate not by full primary statute but by order in council." He believed that this policy was "constitutionally unacceptable" because the judges would, in effect, "be initiating a legislative procedure in Parliament", contrary to the constitutional doctrine of the separation of powers" (cc 1236, 1237). He continued (c 1237, extracts):

What is the doctrine of the separation of powers in our country? It is that judges do not interfere with the parliamentary process on the one hand and Parliament does not interfere with the judicial process on the other. That principle has stood us in enormously good stead, certainly since the Glorious Revolution more than 300 years ago. To the extent that the judges are not reflecting the jurisprudence of the convention but stating their own view about what the convention says, they are in breach of that doctrine. They are initiating new legislation.

Of course, it is true that Parliament does not have to go ahead and pass that legislation. Indeed, what I fear may flow from a judicial decision of incompatibility is a long and bitter debate in Parliament about whether the judges were right and even if they were right, whether it is right to legislate …...

What is more, the legislative process which is initiated is not a full primary legislative process. It starts an order in council process. We all know that an order in council cannot be amended; and we know also that it is not usually debated, although of course in this case it will require an affirmative resolution of both Houses of Parliament. That is not proper parliamentary consideration of future legislation.

However the Liberal Democrat Lord Lester of Herne Hill, a long-time champion of human rights legislation, was not so concerned about the proposed legislative procedure (cc1240-1):

Some have criticised the power to take remedial action by subordinate legislation as being a sinister sapping of parliamentary powers. That criticism is misconceived. At present, when a

judgment of the European Court requires the amendment of primary legislation, that can only be done by new, amending primary legislation. That is a slow and cumbersome method of complying with our international obligations. It has sometimes resulted in a tardy and incomplete implementation. Similarly, where a British court decides that there is a fatal inconsistency in a statute, what is needed is a speedy means of remedying the defect and of providing a remedy for the individual victim.

Under the European Communities Act 1972 (enacted by a Conservative Government), the power to implement the UK's Community obligations may be implemented by subordinate legislation, without any requirement to obtain the affirmative approval of both Houses. But this Bill provides for stronger parliamentary control, as, except in cases of pressing urgency, the implementation of the UK's convention obligations by subordinate legislation can be done only by the affirmative procedure. To require the Government to introduce primary amending legislation to give effect to European or British judgments would be to hinder the speedy and effective implementation by Parliament of convention rights, obligations and remedies.

Baroness Williams of Crosby went further (c1300):

The third matter of concern, again expressed by a number of noble Lords, concerns the issue of the "fast track". If I may pay a compliment to the noble and learned Lord the Lord Chancellor among others, it is a most ingenious solution to the problem of how to deal with both parliamentary sovereignty and the need to have a recognition of individual human rights in this country. I wonder whether we could not even further improve on the already remarkable decisions suggested by the Bill: by bringing the proposed committee on human rights to which the noble and learned Lord the Lord Chancellor referred more directly into relationship with that particular process.

For example, on the analogy of our own delegated legislation committee in this House, it should surely be possible for the new committee and its sub-committees to give an indication of their own view on proposals for affirmative resolutions to amend legislation to bring it into line with the requirements of the European convention; and perhaps also to be involved, as happens in New Zealand, with pre-legislative scrutiny of new Bills to ensure that the committee is also satisfied that they meet the requirements of the European convention. My noble friend Lord Lester referred to Australia. That is also correct; the Australian Senate has such a committee. Many of us would feel reassured by the greater involvement of Parliament without delaying the changes in the legislation that those proposals would imply.

Winding up for the Opposition, Lord Henley said (c1305):

I turn to the question of the fast-track procedures. I am grateful for the acceptance by the noble and learned Lord the Lord Chancellor that this is not a power to be taken lightly. I agree with that fully. On many occasions in the past I have been on the receiving end of the strictures of my noble kinsman, Lord Russell--I do not see him in his place--when, on moving legislation through this House, I have attempted to take powers that he considered to be bearing on the Henry VIII side of things. I know that my noble kinsman takes a fairly strong view of the use of delegated legislation of that sort. But he accepts that this occasion is one that is suitable for the use of the Henry VIII clause, just as he accepts that the same could be said of the European Communities Act 1972.

I believe that is an issue that we must address carefully. We must also address the fact that, under the fast-track procedure, much has been made of the fact that the Minister himself will have discretion as to whether or not it is used. When one looks at the words in paragraph 2.10 of the White Paper it makes it clear that,

"it will almost certainly prompt the Government and Parliament to change the law".

In other words, the Minister's discretion is bound very tightly. Between now and Committee stage the Delegated Powers Scrutiny Committee will examine what is proposed and will report to the House so that the House has the benefit of the views of that committee.

There were detailed debates on the *clauses 10-12* legislative procedure. At committee stage, Lord Campbell of Alloway moved amendments which sought, in effect, to remove the so-called 'fast-track' remedial order procedure:[37]

The machinery proposed for the implementation of the fast track under Clause 10, subsections (2) to (5), Clause 11 and Clause 12 disturbs the delicate balance which separates the powers of the legislature from those of the judiciary. It is without the constitution as it has so far evolved, which has as yet not adopted this novel approach to law-making--an approach which is not necessary, satisfactory or sound. There was no reference to this fast track in the Labour Party Manifesto; there is no mandate for its introduction.

The amendment to which I speak is a procedural one which in no way challenges the principle of the Bill. Incorporation of the convention without any direct assault on the sovereignty of Parliament to provide a domestic remedy in our courts is wholly acceptable. The means proposed for implementation by the fast track is not acceptable. It is only the proposed means of procedure which the amendment calls into question …..

In the context of the fast-track procedure, the Committee will be aware of the sixth report of the Delegated Powers and Deregulation Committee, in particular paragraphs 22 to 25, concerning resort to Henry VIII powers. My noble friend Lord Henley sought an assurance from the Lord Chancellor that he would abide by the recommendations of that all-party Select Committee. The noble and learned Lord declined to give any such assurance. However, in opening a debate it is hardly appropriate to stray into the area of storm-tossed seas of contention and so I pass on.

On Second Reading the noble and learned Lord the Lord Chancellor conceded that,

"A power to amend primary legislation by [Order in Council] is not a power to be conferred or exercised lightly".--[Official Report, 3/11/97; col. 1231.]

As yet no justification has been advanced for so doing. On Second Reading reservations were expressed by many noble Lords. My noble friend Lord Kingsland explained why the means of incorporation were of critical consequence and concluded in a closely reasoned exposition why the fast track failed to afford proper parliamentary consideration for future legislation. The noble and learned Lord, Lord Wilberforce--I am delighted to see him in his place--expressed reservations as to the effect of the fast track on substantive law; as to calling upon judges to undertake functions normally suitable for Parliament and as to the interpretation of vague phrases in the convention in concrete cases. He referred to vague phrases such as "private life" and "family life", not defined in the convention. Reference has already been made to "public authority" where the incidence of fast track is left open, without any statutory exclusion, to be decided by the courts on the specific facts of each case.

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[37] HL Deb vol 583 cc1109-11, 27.11.97, extracts

It is no easy task to amend primary legislation to reflect declarations of incompatibility on the facts of concrete cases; to assimilate and thereby achieve compatibility with the convention. Law-making on the hoof, in particular in these circumstances, has inherent incalculable hazards. Is it not better to take time to get it right? Has not due parliamentary process that very propensity? As part of such process no doubt a Select Committee of your Lordships' House, chaired by a noble and learned Lord with other noble Lords and noble and learned Lords as members, could report on the form an amendment to primary legislation should take to reflect the judicial declaration of incompatibility. That would be an invariable source of guidance for both Houses in the interests of the country.

One must be realistic. It is idle to seek accommodation on this amendment. The gulf is too wide. But the Committee may wish to consider in due course whether, in the light of this debate today, any justification has been advanced for the abrogation of due parliamentary process for the amendment of primary legislation. I beg to move.

The Liberal Democrats supported the principle of the remedial order procedure as, in the words of Lord Goodhart, "an ingenious compromise between what may be described as the maximalists and the minimalists." He thought that any remedial *primary* legislation would have to wait its place in the legislative queue, and may then be subject to debate if it dealt with a controversial subject. "In those circumstances, it seems reasonable to us that there should be a speedy procedure to bring in a remedial order before Parliament and to change the law to the extent -- and no further -- that is required to correct the incompatibility. In those cases we believe that a fast-track procedure is wholly appropriate" (c1112). His colleague Earl Russell declared himself to be no friend of Henry VIII clauses in normal Bills. However he thought that the Human Rights Bill could not be described as such, comparing it to the *European Communities Act 1972*, where Geoffrey Rippon (later, as Lord Rippon of Hexham, a leading proponent of strict scrutiny of delegated powers) had piloted through an even more sweeping Henry VIII provision (cc1112-3).

For the Opposition, Lord Henley said (cc 1113-4):

My noble friend Lord Campbell has put forward the case--it is one which we on these Benches support--that on this occasion such a power is not appropriate. It is proper that Parliament should be entitled to examine the issues properly by means of primary legislation. I remind those who, like the noble Lord, Lord Goodhart, say that that could lead to considerable delay that it is possible to get legislation through both Houses of Parliament very quickly where there is a will. In the very rare cases, as the noble and learned Lord the Lord Chancellor put it, where there was a declaration of incompatibility, I am sure that there would be the will to achieve that legislation and to get it through as quickly as possible.

I appreciate that the delegated powers scrutiny committee does not go so far as saying that it would be inappropriate to have secondary legislation to achieve that. However, it went on to suggest that if there were to be secondary legislation as a means of achieving the fast-track procedure the House might wish to consider whether there is a case for developing a new procedure to scrutinise such orders, modelled on that for the second stage of parliamentary scrutiny of deregulation orders. I should like to come back to that point when we deal later with the group of amendments to which I have my name. However, before we get to that, the Committee should consider carefully whether secondary legislation should be used at all and

whether we should not, as my noble friend Lord Campbell put it, consider the case for proceeding by means of primary legislation.

As I said earlier, I believe there is a case for using primary legislation. Primary legislation can be made to operate quickly and without delay should all the parties--I am sure all the parties would be of this view--so wish it. We have all seen primary legislation proceed quickly through both Houses. There have been occasions when legislation has proceeded through both Houses in less than 24 hours but has still been considered and has still been amendable in a way that the procedure recommended by the Government at the moment is not. For those reasons, I support my noble friend.

Replying, the Lord Chancellor said (cc1116-8, extracts):

I remind the Committee that before any remedial order is brought before your Lordships for your consideration, it will have been preceded by a reasoned judgment of a higher court--perhaps the very highest court--which will have made the declaration of incompatibility. The legislation in question will have been scrupulously analysed, the point identified and the need for the declaration made as clear as the higher court can make it. Therefore, in a sense this is first-class briefing material so that your Lordships may focus your attention on the need for the order. That is an important reason for regarding this use of the Henry VIII clause as a legislative development which is sensible and designed to serve, not hinder, parliamentary sovereignty.

I now speak having been chairman of the Queen's Speech and Future Legislation Committee for the past seven months. I am acutely conscious of the pressures on the legislative programme. This is a very extended legislative programme and the next legislative programme will be similarly very extended. There will be competitive bids. Priorities will have to be determined by the committee that I chair. I am afraid that when I hear it said that it is easy to get something into the legislative programme if the will is there, I feel that that does not respond to the realities of a legislative programme which is inevitably under pressure…..

I am absolutely convinced that this House will be well informed of the need for change by the fact of the judgment of the higher courts which will set out the need for change. I venture to suggest that the purpose of a remedial order is to give Parliament the earliest possible opportunity in a considered way to remedy an incompatibility between a statute passed by Parliament (in all probability, inadvertently) and the European Convention on Human Rights, to which the United Kingdom is a party. Far from trenching on parliamentary sovereignty, I think that that gives Parliament the earliest legislative opportunity to remedy in a focused way an incompatibility which was probably the product of parliamentary inadvertence, not intention.

I turn to the amendment proposed by the noble Lord, Lord Campbell of Alloway. Amendment No. 67B would remove all but subsection (1) of Clause 10. It would therefore destroy the mechanism of remedial order which we have put in place. Paragraph (a) of the proposed amendment provides that if there is incompatible primary legislation, an amendment Bill may be introduced to remove the incompatibility. That seems to have no point at all because the Government could introduce a new Bill irrespective of any powers in this Human Rights Bill.

Paragraph (b) provides that in the case of incompatible subordinate legislation, a draft order to amend that legislation may be made subject to the affirmative resolution procedure. As the paragraph provides no specific powers to amend primary legislation, which would need to be amended in order to remove the incompatibility of inevitably incompatible subordinate legislation (because it is consequential upon an incompatible provision of the parent

legislation), it too serves little purpose. Its only effect would be to supersede other provisions in parent statutes which may allow for a procedure less onerous than the draft affirmative resolution procedure. So, we cannot accept the amendment because, in substance, it wrecks.

The amendment was defeated on a division, 64-110. Related issues of principle arose in a report stage amendment moved by Lord Lester of Herne Hill to ensure that the remedial order power is used only when deemed necessary, rather than simply appropriate, to correct an incompatibility. He cited the Lord Chancellor's words in committee on 27 November to the effect that that was the intention of the Bill, but wanted this to be inserted expressly into the Bill:[38]

I regard it as of great importance that the words of the Lord Chancellor should be reflected on the face of the Bill because of the unease on all sides of the House, shared with different levels of disquiet, about Henry VIII clauses. I note that when we come later to Amendment No. 49 we shall look at attempts to impose further safeguards on the fast-track procedure. My attitude to those amendments will be greatly affected by the reply from the Government Benches to this amendment, and whether the Government are willing to create the necessary safeguard. I know it will be said that it goes without saying and that the courts are likely to read into the Bill a test of necessity and not just appropriateness, but the words "appropriate" and "necessary" are not the same. Therefore, it is very important that before delegated powers to amend primary legislation are invoked—powers with which I entirely sympathise for the reasons given by the noble and learned Lord the Lord Chancellor during the previous debate--the test of necessity should be on the face of the Bill.

The Lord Chancellor replied, querying the linkage of the proposal to *clause 11*, which dealt with supplementary matters, rather than to *clause 10* (cc401-3):

I hope that I can reassure your Lordships, as I and my noble friend Lord Williams of Mostyn sought to do both at Second Reading and in Committee, that the Bill contains sufficient safeguards to meet concerns about the powers conferred under Clauses 10 and 11. These powers have been carefully tailored to ensure that a remedial order can perform the job that it is designed to do; namely, to remove incompatible provisions of legislation in an effective and tidy way. A remedial order would not be used, and in our view could not be used, for any other purpose…..

The Government understand the desire to ring-fence the powers in Clauses 10 and 11 so far as possible, consistent with the purposes of the remedial order; but we believe that the existing provisions provide appropriate safeguards. I will list the elements. The order-making procedure is only available where a declaration of incompatibility under Clause 4 or a Strasbourg court judgment has been given or there is an urgent need to replace subordinate legislation quashed on convention grounds. Crucially, for present purposes, the power is to be used to remove incompatibility found by the UK or the Strasbourg court, and plainly it cannot be used in any connection for any other purpose.

The power to make incidental, supplemental, consequential and transitional provision is not novel; it is a well precedented supplementary vires provision. I emphasise "supplementary". It is not a basis on which a Minister could properly tackle some unrelated issues. Supplementary provision can only be added to a Clause 10 order, and the object of the Clause 10 order must be to remove the incompatibility found by the United Kingdom or Strasbourg court. In other

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[38] HL Deb vol 585 cc399-400, 29.1.98 (amendment 48)

words, while the power extends to amending other legislative provisions, it is heavily circumscribed because of the plain purpose of Clause 10.

Our view is that it is necessary to have the extra powers in Clause 11 in addition to the main powers in Clause 10 if the job is to be done properly and remedial orders are to make proper sense. We think that the amendment would make this impossible.

The purpose of Clause 10(2) and Clause 11(1)(a) is to ensure that the removal of an incompatibility is complete so far as the statute book goes. As we see it, that is all that there is to it, and on that basis I hope the noble Lord will withdraw the amendment.

At the Bill's committee stage, Lord Mackay of Drumadoon introduced an amendment which sought to ensure that the remedial order process could not take place until the time for any relevant appeal had expired.[39] While the Government believed that such an eventuality would be unlikely, it was not unwilling for such a provision to appear on the face of the Bill, and what is now incorporated into *clause 10(1)(a)* was inserted on report.[40] Also at committee stage, an amendment was moved to ensure that the remedial order power could not, in respect of a European Court finding, be used retrospectively or in relation to a case brought against a country other than the UK. Again the Government thought such eventualities unlikely, but was willing to incorporate provisions to make that clear in the Bill, and an amendment at report stage inserted the words "made after the coming into force of this section in proceedings against the United Kingdom" into *clause 10(1)(b)*.[41]

Amendments were also moved to ensure that ministers gave reasons to Parliament for the remedial order in any particular case. Lord Goodhart moved an amendment in committee to require ministers to state, within a reasonable time after a declaration of incompatibility, whether or not they will exercise the remedial order power. However ministers believed that existing Parliamentary methods would be sufficient to ensure that ministers acted promptly and kept Parliament informed.[42] The Lord Chancellor brought forward an amendment at report stage (now *clause 12(3)*), so that a remedial order, or a draft order, laid before Parliament must be accompanied by a statement containing an explanation of the relevant incompatibility (including particulars of the relevant declaration, finding or order), and the reasons why the person making the order considers an order in those terms appropriate.[43]

However, Lord Coleraine also wished the Bill to require a statement as to why the maker of an order believed the remedial order procedure itself was an appropriate way to proceed in any particular case, and he pursued this point at third reading. This goes to the heart of the

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39 HL Deb vol 583 cc1099-1100, 27.11.97 (committee, 3rd day).

40 HL Deb vol585 cc393-5, 29.1.98 (report 2nd day, amendment 40).

41 *Op cit*, cc393-5, 29.1.98 (amendment 42). Lord Lester was concerned about the different treatment to pre- and post-Act Court findings, but Lord Williams emphasized that the remedial orders procedure was part of the Bill's policy, but acknowledged that anomalies may exist which may have to be addressed in ways other than remedial orders.

42 HL Deb vol 583 cc1104-7, 27.11.97 (committee 3rd day, amendment 67).

43 HL Deb vol 585 c410, 29.1.98. The Lord Chancellor said that the amendment was "designed … to facilitate the consideration of remedial orders by Parliament."

issue of choice of legislative device, already briefly considered. The Lord Chancellor responded by saying that the terms of *clause 10(2)* dealt with any consideration of the appropriateness of the remedial order route, rather than, say, primary legislation, and that this was buttressed by the terms of *clause 12(3)(b)*. He promised to reflect further on whether it was necessary to make this more explicit in the latter clause:[44]

> My Lords, the noble Lord, Lord Coleraine, is right in that this issue turns on the proper construction of Clause 12(3)(b) but in the light of Clause 10(2). Clause 10(2) provides that,
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> "If a Minister of the Crown considers that, in order to remove the incompatibility, it is appropriate to amend the legislation using the power conferred by this subsection, he may by order make such amendment to it as he considers appropriate".
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> So that is a double appropriateness test: the Minister must consider it appropriate to amend by way of remedial order, and then he may, by order, make amendments which he considers appropriate.
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> I should have thought that a court would construe Clause 12(3)(b), which provides that,
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> "A remedial order (or draft) laid before Parliament must be accompanied by a statement containing ... (b) a statement of the reasons why the person making it (or proposing to make it) considers an order in those terms appropriate",
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> to mean that the statement must give reasons both as to why the order itself is considered appropriate and why its terms are considered appropriate.
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> I do, however, take the point made by the noble Lord, Lord Coleraine, that we should reflect--if I may put it in my own language--as to whether it should be made more express that a double appropriateness test applies in Clause 12(3)(b), as certainly it does in Clause 10(2). I will certainly undertake to reflect upon the matter. On that basis I invite the noble Lord, Lord Coleraine, to withdraw his amendment.

Following attempts by the Opposition to amend the Bill so as to introduce some features of the deregulation order procedure into the remedial order mechanism, the Lord Chancellor brought forward a series of amendments at report stage which sought to address this point:[45]

> My Lords, I certainly agree with the noble Lady that this is an important group of amendments. In Committee your Lordships discussed in some detail the procedure for making a Clause 12 remedial order. There was undoubtedly feeling that the procedure should be amended to make it easier for Parliament to exercise its scrutinising role. Amendments were tabled on that occasion to lengthen the period for consideration of remedial orders to provide for the scrutiny by a parliamentary committee and to enable them to be amended by Parliament. Similar amendments have been tabled for Report. They are before your Lordships again. In Committee, we undertook to reflect on the concerns that had been expressed. As your Lordships will see, we have responded and we have concluded that some changes to the procedure should be made, although we have not adopted all the suggestions made in Committee. Nonetheless, we hope that the government amendments will give a measure of satisfaction.

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[44] HL Deb vol 585 c819, 5.2.98 (amendment 19)
[45] HL Deb vol 585 cc406-7, 29.1.98

The first change we propose relates to the period for consideration of draft remedial orders. Under Clause 12(1)(a), no remedial order may be made unless a draft has been approved by Parliament. No period of time is prescribed for this procedure, so it would be possible for a draft to be approved, and an order made, very soon after the draft was laid before Parliament. The effect of government Amendments Nos. 51, 57 and 58 is to provide a minimum period of 60 days' consideration before a draft of the order may be approved by Parliament. The noble Baroness, Lady Williams of Crosby, was good enough to call attention to that. This is designed to allow interested parties an adequate period of time in which to comment upon a draft remedial order. It responds to amendments tabled in Committee by the noble Lord, Lord Meston, and to one aspect of the amendments tabled by the Opposition.

I ought to point out that the government amendments depart from those tabled in Committee in not providing a 60-day period for the consideration of urgent remedial orders made under clause 12(1)(b). In these cases the order will expire after 40 days unless approved by Parliament. These orders are to be made without prior parliamentary approval, and we do not want to extend the time in which they may have effect without such approval. A 60-day period for consideration of these orders would simply delay the point at which Parliament could, if it chose, express its disapproval of the order.

The other change that we propose is in the government Amendment No. 56. It would require a remedial order, or draft, to be accompanied by an explanatory statement. This would contain particulars of the court case in which the declaration of incompatibility had been made, and would seek to explain what the incompatibility was. It is designed, therefore, to facilitate the consideration of remedial orders by Parliament.

We think this would be helpful because we still believe, as we said in Committee, that it would not be appropriate to create a statutory, and I emphasise statutory, requirement for the scrutiny of remedial orders by a parliamentary committee, as the amendments in the name of the noble Baroness and others would do. We assume that this will be the parliamentary committee on human rights, and we have said before, and I say again, that we would welcome the establishment of such a committee, but it is a matter for Parliament. We do not want to anticipate what the functions of that Committee might be. As we said in Committee, it is not normal practice for provisions of this kind to be set out in statute, and I have to say that I do not think there is a case for departing from the normal practice on this occasion. But I made perfectly plain what the position of the Government is in relation to the establishment of a parliamentary committee on human rights. Nor do we think it necessary to provide for the amendment of remedial orders once made or laid in draft, as proposed in the Opposition amendments. Statutory instruments cannot be amended. An instrument has to be revoked, remade or another amending instrument made, and remedial orders are no different. The advantage of the draft affirmative resolution procedure in Clause 12 is that Parliament can decline to approve so the order cannot be made and a further order would then have to be prepared to meet Parliament's concerns; otherwise the incompatibility desired to be removed would simply continue. The explanatory document that we propose will make it possible for Parliament to have an informed debate about the incompatibility which has been exactly identified by a court and what the Government's proposals are for removing it.

In proposing these changes I can say that I am conscious of looking ahead to the possible establishment of a parliamentary committee on human rights. Such a committee, I can readily say, would be able to look afresh at the issue of procedure in the light of the experience gained in operating these provisions. If it recommended that a closer Parliamentary scrutiny of remedial orders was needed, I am sure that the Government would be very much influenced by that. But for the present, although we cannot accept the Opposition amendments or those in the name of the noble Baroness, and others, I hope the House will accept, particularly in the light of the explanations that I have given, that we do offer the government amendments for approval by your Lordships' House in a spirit of conciliation and as

improvements which go some considerable way towards meeting the concerns expressed in committee.

III Statements of compatibility

The white paper set out the Government's policy for ensuring that future proposed legislation would be scrutinised for conformity with Convention rights:[46]

Government legislation

3.2 The Human Rights Bill introduces a new procedure to make the human rights implications of proposed Government legislation more transparent. The responsible Minister will be required to provide a statement that in his or her view the proposed Bill is compatible with the Convention. The Government intends to include this statement alongside the Explanatory and Financial Memorandum which accompanies a Bill when it is introduced into each House of Parliament.

3.3 There may be occasions where such a statement cannot be provided, for example because it is essential to legislate on a particular issue but the policy in question requires a risk to be taken in relation to the Convention, or because the arguments in relation to the Convention issues raised are not clear-cut. In such cases, the Minister will indicate that he or she cannot provide a positive statement but that the Government nevertheless wishes Parliament to proceed to consider the Bill. Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the Bill. This will ensure that the human rights implications are debated at the earliest opportunity.

This legislative procedure is part of a more general policy of ensuring that legislation complies with the Convention, as the White Paper explains (para 3.1):

But it is also highly desirable for the Government to ensure as far as possible that legislation which it places before Parliament in the normal way is compatible with the Convention rights, and for Parliament to ensure that the human rights implications of legislation are subject to proper consideration before the legislation is enacted….

And,

Consideration of draft legislation within Government

3.4 The new requirement to make a statement about the compliance of draft legislation with the Convention will have a significant and beneficial impact on the preparation of draft legislation within Government before its introduction into Parliament. It will ensure that all Ministers, their departments and officials are fully seized of the gravity of the Convention's obligations in respect of human rights. But we also intend to strengthen collective Government procedures so as to ensure that a proper assessment is made of the human rights implications when collective approval is sought for a new policy, as well as when any draft Bill is considered by Ministers. Revised guidance to Departments on these procedures will, like the existing guidance, be publicly available.

3.5 Some central co-ordination will also be extremely desirable in considering the approach to be taken to Convention points in criminal or civil proceedings, or in proceedings for judicial review, to which a Government department is a party. This is likely to require an inter- departmental group of lawyers and administrators meeting on a regular basis to ensure that a consistent approach is taken and to ensure that developments in case law are well understood by all those in Government who are involved in proceedings on Convention

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[46] Cm 3782, Oct 1997

points. We do not, however, see any need to make a particular Minister responsible for promoting human rights across Government, or to set up a separate new Unit for this purpose. The responsibility for complying with human rights requirements rests on the Government as a whole.

A Parliamentary Committee on Human Rights

3.6 Bringing Rights Home suggested that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy". How this is achieved is a matter for Parliament to decide, but in the Government's view the best course would be to establish a new Parliamentary Committee with functions relating to human rights. This would not require legislation or any change in Parliamentary procedure. There could be a Joint Committee of both Houses of Parliament or each House could have its own Committee; or there could be a Committee which met jointly for some purposes and separately for others.

3.7 The new Committee might conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take. It might also want to range more widely, and examine issues relating to the other international obligations of the United Kingdom such as proposals to accept new rights under other human rights treaties.

Clause 19 is as follows:

19. - (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill-

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

The Lord Chancellor, Lord Irvine of Lairg, explained the provision during his second reading speech:[47]

Clause 19 imposes a new requirement on government Ministers when introducing legislation. In future, they will have to make a statement either that the provisions of the legislation are compatible with the convention or that they cannot make such a statement but nevertheless wish Parliament to proceed to consider the Bill. Ministers will obviously want to make a positive statement whenever possible. That requirement should therefore have a significant impact on the scrutiny of draft legislation within government. Where such a statement cannot be made, parliamentary scrutiny of the Bill would be intense.

In committee, Baroness Williams of Crosby moved amendments to require the relevant minister to provide reasons for the statutory statements. Responding, the Lord Chancellor noted that there was no need for the Bill to contain this clause at all:[48]

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47 HL Deb vol 582 c1233, 3.11.97
48 HL Deb vol 583 cc1163-4, 27.11.97

> And so, by requiring the Minister in charge of a Bill to give a statement about its compatibility, we are underlining our commitment to undertaking further pre-legislative scrutiny of all new policy measures. The noble Baroness will appreciate that, if there had been no such provision in the Bill, that might have given a quieter life for Ministers. Also, where the Minister states that he is unable to make a positive statement about the Bill's compatibility, that will be a very early signal to Parliament that the possible human rights implications of the Bill will need and will receive very careful consideration. Therefore, a statement giving the Government's conclusions, whether positive or negative, on the status of the Bill will go a long way towards the achievement of those aims. Therefore I ask the Committee not to underestimate the significance of what is already there.
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> Of course, Parliament will wish to know the reasons why the Government have taken whatever view they have taken. Therefore, I can understand why these amendments have been put forward. But the reasoning behind a statement of compatibility or the inability to make such a statement will inevitably be discussed by Parliament during the passage of the Bill. Of course it will be; and it will be discussed thoroughly.
>
> I believe that a debate in Parliament provides the best forum in which the Government's thinking can be fully explained. In those circumstances, therefore, I require a great deal of persuasion that a written statement on the face of a Bill, setting out the Minister's reasons, would add anything of real value.
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> In principle, the idea of the equivalent of written argumentative essays on the face of Bills does not appeal to me. Debate in the Chamber on such issues will inevitably take place and that, surely, is the natural forum for ascertaining the Minister's reasons and having him develop them so that Members of this Chamber can test by question and debate the sufficiency of the reasons. Is there any real need to clutter up the face of the Bill with a statement of reasons? I beg leave to doubt it.

Ministerial statements of compatibility may become relevant from the point of view of the effect of the House of Lords case of *Pepper v Hart* [1993] AC 593, [1993] 1All ER 42. This stated that, under certain limited circumstances, the courts could examine Hansard to seek to resolve ambiguities and the like in the interpretation of statutes.[49] Since that case, ministers have, for example, often been asked in Parliament to provide interpretations and explanations of statutory provisions, on a *Pepper v Hart* basis.[50]

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[49] See *Erskine May*, 22nd ed, 1997, pp91-2

[50] See for example the written answer by the then Chancellor of the Duchy of Lancaster on the impact of *Pepper v Hart*, HC Deb vol 289 c469w, 3.2.97, and references to the case in the recent Lords debate on legislative drafting, HL Deb vol 584 cc1583-