HOME SECRETARY

QUEEN ANNE'S GATE LONDON SW1H 9AT

29th November 1985

Dear John,

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BILL

Lord Broxbourne introduced this Bill on 21 November and it is provisionally set down for Second Reading on 10 December.

Purpose and Effect

2. The Bill seeks to incorporate the provisions of the European Convention on Human Rights into UK statute law. Any acts done by or for the purposes of the Crown or a Minister of the Crown, or by various public authorities, which infringe any of the fundamental rights and freedoms of the Convention, would be contrary to UK law.

Background

3. The UK is party to the European Convention on Human Rights and Fundamental Freedoms. It must therefore, under Article 53, abide by the decision of the European Court in any case to which it is a party. It has also accepted the optional article 46 (until at least 1991) which recognises the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention. If the Court finds UK law, procedures or practice in breach of the Convention, the UK is under treaty obligation to provide an effective remedy to the person whose rights or freedoms have been violated. Once the UK has been found in breach, the Government takes immediate steps to seek changes in the law or administrative practice to remedy the grievance. Yet Parliament remains the supreme legislative body and cannot necessarily be compelled to legislate in the sense required, as the fate of the Education (Corporal Punishment) Bill shows.

4. The incorporation of the ECHR has been suggested at intervals in the past. Lord Wade presented similar Bills on four occasions since 1976; in 1981 his Bill was passed in the Lords but talked out in the Commons. More recently, in two Early Day Motions, MPs have requested the Government to incorporate the European Convention; and early this year the Constitutional Reform Centre, headed by Lord Scarman, was set up to press for incorporation. This Bill is understood to have originated with Lord Scarman.

5. The more important arguments for and against incorporation are set out in the attached conclusions of a Select Committee of the Lords on a Bill of Rights, whose report was published in 1978, and who concluded by 6 to 5 that the UK should not have a Bill of Rights. These arguments are still to the point; but in the intervening period the UK has been found in breach of the Convention in a number of cases and there has been pressure on the one side for the UK to distance itself from Strasbourg (eg by not renewing the right of individual petition) and on the other side, by further calls for incorporation. It has been suggested by those in favour of incorporation that it would reduce

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The Rt Hon John Biffen, MP

the number of cases where the UK is found in violation by the European Court and (something that we do not accept) that Article 13 (that everyone whose rights under the Convention are violated shall have an effective remedy by a national authority) requires incorporation.

Policy

6. In the debate on Lord Wade's Bill in 1981, the Solicitor-General stated that the Government was not committed on the Bill, but stressed the need for all-party talks. The matter was discussed by H Committee on 1 June 1981 but the Prime Minister finally agreed in early 1982 not to pursue talks. No publicity was given to this decision. More recently, the Prime Minister asked officials to consider various ways of mitigating the influence of Strasbourg on the United Kingdom, but a meeting chaired by the Prime Minister on 17 July decided, inter alia, not to seek to incorporate the European Convention. Our public line since then has been that we have no present plans to incorporate the Convention; but the Prime Minister said in reply to a Parliamentary Question on 14 November that she did not think it right to incorporate the Convention into our law.

Financial, manpower and EC implications

7. The consequences of incorporation are difficult to predict but there are significant resource implications. There could be a heavy burden on the domestic courts because, although the avenue to Strasbourg would not be closed, the domestic path - given publicity by the legislation - might attract many litigants. If these are unsuccessful, there could be an increase in cases at Strasbourg. Because of the greater risk of litigation, consideration would need to be given to vulnerable areas of administration (prison overcrowding) and policy (immigration). Parliamentary business would be at risk of disruption if a judicial decision found existing provisions of the law incompatible with the incorporated provisions.

8. EC Implications. The Commission is currently debating a proposal for the Community itself to become a party to the European Convention. We are resisting this but were we to incorporate, we would need to reconsider our stance. (Of the other EC countries, Ireland and Denmark have not incorporated the European Convention.)

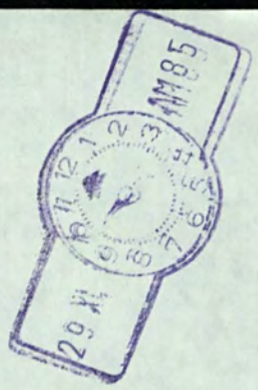
Conclusion

9. I invite colleagues to agree that we should set out the Government's objections to the Bill at Second Reading in the House of Lords but that, in line with convention, Ministers should abstain in the event of a division. If the Bill makes progress arrangements should be made to block it in the House of Commons.

10. I am sending copies of this letter to members of Legislation Committee, the Prime Minister, First Parliamentary Counsel, Sir Robert Armstrong and the secretaries to Legislation Committee.

Yours,

Douglas.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HOME SECRETARY

WITH
THE COMPLIMENTS OF THE
PRIVATE SECRETARY

HOME OFFICE
50 QUEEN ANNE'S GATE
LONDON SW1H 9AT

could this please be attached to the letter dated 29/Nov. from Mr Hurd to Mr Britten (Human rights Fundamental Freedoms Bill)
Thankyou 29/11

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MSC 186/5/7.
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of those advocating a Bill of Rights, including a number of witnesses before the Committee, pitch thier case too high. Similar considerations equally suggest that the case against a Bill of Rights has also been exaggerated. It is from this standpoint that the Committee now set out what they see as the most important arguments on either side.

The Arguments For and Against

32. The Committee summarise in this paragraph the most important arguments (as they see it) put to them in favour of a Bill of Rights.

(a) The individual citizen might be better off, and could not be worse off, if the European Convention were made part of United Kingdom law, since in the event of conflict between the Convention and other provisions of United Kingdom law whichever was more favourable to the plaintiff would prevail.

(b) Embodying the Convention in our domestic law would provide the individual citizen with a positive and public declaration of the rights guaranteed him, thus complementing the United Kingdom's traditionally "negative" definition of his common law rights.[1] This would have special value at the present time for the many individuals and groups who tend to feel impotent in the face of the size and complexity of the public authorities which seem to dominate their lives.

(c) Although when the United Kingdom acceded to the Convention, and thus allowed the right of individual petition to the Court at Strasbourg, it was believed that our law had nothing to fear from any appeal to the Articles of the Convention, a number of doubts have emerged since that time. Experience has shown that there are a number of areas where the British subject must at present take the long road to Strasbourg as a court of first instance (as Golder[2] did, since the domestic law provides no remedy in the courts of the United Kingdom.

(d) The Commission and Court at Strasbourg were not established as a "court of first instance", but rather as a "court of appeal" to which the citizen can have recourse only when domestic procedures have been exhausted. Although there is no obligation on a Member State to incorporate the Convention, the Strasbourg Court has said that the intention of the drafters of the Convention that the rights set out should be directly secured to anyone within the jurisdiction of the contracting States finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law. The United Kingdom is at present the only signatory which neither has a charter of fundamental human rights nor has incorporated

[1] There is, for example, no law positively conferring freedom of speech. The citizen's freedom in this respect lies in his right to say anything that does not fall foul of any laws imposing restrictions in that regard, such as those concerning defamation, contempt of court, blasphemy, sedition, official secrets, etc.

[2] Mr. Golder, while serving a sentence in a United Kingdom prison, was refused permission to write to his solicitor to seek advice about possible defamation proceedings against a prison officer. He complained to the Human Rights Commission, who upheld his complaint and, in the absence of a friendly settlement, brought the matter to the Human Rights Court. The Court upheld the complaint, holding that Mr. Golder's rights had been infringed under both Articles 6 and 8 of the Convention.

the Convention into domestic law. So long as the Convention remains only an international treaty and forms no part of United Kingdom law, it suffers from the disadvantage of being both remote and expensive. Moreover the United Kingdom is exposed to unflattering world publicity. Our compliance with the Convention can already be tested judicially at Strasbourg. There is no reason to suppose that our own courts are not equally capable of determining these issues. Any uncertainty there may be about the impact of the Convention on our domestic law already exists and can be argued out at Strasbourg. Why not in the Strand?

(e) An Act incorporating the Convention would not be an alternative to the continued exercise by Parliament of its traditional sovereignty, but would complement other Acts by which Parliament may wish to make law affecting human rights, including any amendment of the law that Parliament thinks desirable in the light of a United Kingdom court decision. Meanwhile, however, the Convention, if embodyied in our domestic law, would, in Lord Scarman's words, "freshen up the principles of the common law" and when read with the common law would "provide the judges with a revised body of legal principle upon which they could go on slowly developing the law, case by case, as they have been doing for centuries", without waiting until the opportunity for legilsation occurred. Q. 793 Q. 792

(f) Our membership of the European Economic Community reinforces the value of the European Convention on Human Rights and makes it the more desirable that United Kingdom citizens should become increasingly aware of the European dimension. It is therefore all the more important that our legal system and jurisprudence should be developed as part of the European Community and not in splendid isolation.

(g) The Act would constitute a framework of human rights guaranteed throughout the United Kingdom and this would have special value if Scottish and Welsh Assemblies are established with powers devolved from Westminster, to ensure the exercise of such powers (e.g. those respecting local government and education) by the Assemblies with due regard to the United Kingdom's international commitments under the Convention. Significance is attached to the unanimous recommendation of the Northern Ireland Standing Advisory Commission on Human Rights favouring the incorporation of the Convention into legilsation applying to the whole of the United Kingdom. This the Northern Ireland Commission believed to be in the long-term interests of that province.

(h) The incorporating Act, though not limiting Parliamentary sovereignty, would nevertheless be a continuing reminder to legislators of the international commitment undertaken when the United Kingdom government ratified the Convention. Indeed, the Convention seems likely to have far more practical effect on legislators, administrators, the executive, the judiciary and indi-

vidual citizens as well as legilsators if it ceases to be only an international treaty obligation and becomes an integral part of the United Kingdom law, guaranteeing the citizen specific minimum rights enforceable in the first instance in the United Kingdom courts.

33. The Committee now summarise in this paragraph the arguments against a Bill of Rights which seem to them to be the most important.

(i) Incorporation of the Convention would be to graft on to the existing law an Act of Parliament in a form totally at variance with any existing legislation and indeed incompatible with such legislation. Hitherto, it has been an accepted feature of our constitution that Parliament legislates in a specific form and that it is the role of the courts to interpret such legislation. Incorporation of the Convention would, for the first time, open up wide areas in which legislative policy on such matters as race relations, freedom of speech, freedom of the press, privacy, education and forms of punishment would be effectively handed over to the judiciary. All these are matters which our constitution has hitherto reposed in the hands of the legislature.

(ii) Nor is it right to say that the role the courts would have under a Bill of Rights would be no more than the kind of role they have always had under the common law. Under the common law the courts have developed legal principles slowly and empirically, from case to case. Under a Bill of Rights they would start with principles of the widest generality and would have a free hand to decide how those principles operated in the cases that came before them.

(iii) Parliament has on numerous occasions shown its readiness to intervene in new areas where fresh social problems have arisen, and it is better for Parliament to enact detailed legislation as it has done, for instance, on such matters as race relations and sex discrimination, rather than to look to the unelected judges to develop both the policy on such matters and the way in which it should be dealt with.

(iv) So far as possible, the law should be clear and certain, whereas if the European Convention, framed as it is in broad and general terms capable of a variety of interpretations, were to become part of our domestic law, it would introduce a substantial and wide-ranging element of uncertainty into our law. (The same would be true of a Bill not based on the European Convention because it is in the nature of any Bill of Rights to be framed in the same sort of way as the Convention.) Individuals and companies would no longer be able to obtain confident advice as to what their rights, powers, obligations and liabilities were. That in itself would be a price too high to pay for flexibility—and answers the point that the individual citizen could not on any footing be worse off with a Bill of Rights. The uncertainty thus brought into our law would itself afford opportunity for exploiting endless challenges in the courts or before any tribunal to the validity of the existing laws. No one would know where he stood until each question had been tested afresh, and the least that can be said is that there is the prospects of a very great extension of litigation in the courts.

To take only one example, the introduction of Article 10 of the European Convention into our domestic law would introduce serious

doubts into such important areas of the law as those relating to defamation and contempt of court, and official secrets.

(v) It is fallacious to suggest, as some witnesses suggested, that to make the Convention part of our domestic law would simply to be give to our judges the same sort of role, in relation to the Convention, as is played by the judges in Strasbourg. There is a great difference between the Commission or the Court at Strasbourg from time to time measuring our domestic law against the yardstick of the Convention, and the United Kingdom courts applying the Convention as an instrument of our domestic law. As a set of principles of domestic law, the Convention would have a life of its own quite independent of its international existence. The Convention could then be invoked daily in our Courts and they would constantly have to give decisions on it without any guidance from the jurisprudence at Strasbourg (where the number of cases adjudicated is very limited). Moreover, our Courts would be free to give the Convention a wider effect than was required by such Strasbourg jurisprudence as was available. In doing so they would be acting quite consistently with our international obligations.

(vi) The present situation in the United Kingdom is in accord with the original philosophy of the European Convention. The Convention was intended to lay down minimum standards of human rights which it was assumed would be in accord with the spirit of all the legal systems of the signatories to the Convention. It was always contemplated, as in fact has proved to be the case, that from time to time there would be conflicts between the domestic laws of the signatory states and the Convention, and for this reason the Convention set up machinery by way of the European Commission and the European Court to deal with such cases. Such conflicts have inevitably arisen in all signatory states, whether or not the Convention is part of their domestic law. It is in accordance with the spirit of the Convention that, when it emerges that there is such a conflict in the case of the United Kingdom, this should be put right.

Where necessary this can be done by legislation, but often the deficiency will call for no more than a change of administrative regulation or instructions. But it is no more unflattering to this country than it is to any other signatory of the Convention if the kind of dispute contemplated by the drafters of the Convention from time to time goes to Strasbourg for argument: and it is not the case, as some of the witnesses assumed, that relatively more cases have gone to the Commission from the United Kingdom than from other countries.

(vii) Even on the most unfavourable view of the extent to which United Kingdom law at present falls short of the standards of the Convention[1], there are no more than a few marginal situations where the incorporation of a Bill of Rights might bestow a remedy where present law does not do so. They have mainly related to privacy and the conduct of the prison services. As to privacy, this has already been the

[1] In a written answer in the House of Lords on 23rd March the Minister of State, Home Office, stated that

"The Government have at present no reason to suppose that there is a conflict between any of the provisions of the Convention and the law of the United Kingdom or the general rules governing administrative practice in this country."

subject of a thorough investigation by the Younger Committee, which made various suggestions for reform but came down against a general law of privacy. As to the conduct of the prison services, there has been one case so far, the *Golder* case, where a complaint has succeeded, and where the matter was dealt with by a change in the relevant regulations. The Committee are aware that there are several other cases now before the Commission but cannot properly comment on these.

(viii) There is no reason for supposing that the Government, and Parliament, are likely to proceed in ignorance of the country's international commitments; and indeed the Committee were given examples of proposals which had been modfied by the Government in their preliminary stage to take account of our commitments under the European Convention. It is not realistic to fear that there is any risk of this country—whether at Westminster or in the devolved assemblies —legislating in "splendid isolation" and without regard to the treaty provisions by which we are bound. The effect of incorporating the Convention into United Kingdom law in the event of devolution to Scotland would be to introduce similar uncertainties into the operation of any legislation emanating from the Scottish Assembly as those injected into the law of the United Kingdom generally.

(ix) It is felt that adequate weight is not given in the Report of the Northern Ireland Standing Advisory Commission to the arguments against incorporation from the point of view of its effect on the legal system as a whole; and that the argument that what is good for Northern Ireland must be good for the United Kingdom as a whole is unproven.

34. The foregoing paragraph briefly summarise the main arguments for and against a Bill of Rights which were reviewed by the Committee. Much has been written in the various publications but the Committee hope that they have picked out those arguments which will seem to the House to be the most important. Which of the arguments have the greater force, as has already been indicated, is a question on which the Committee are irreconciliably divided. They can, however, offer certain conclusions on the second question—what form a Bill of Rights should take—and the Report now turns back to these.

The form a Bill of Rights should take

35. The primary conclusion here was indicated at the beginning of this Report, namely, that, if there is to be a Bill of Rights at all, it should take the form of a Bill giving effect in our domestic law to the European Convention. To that extent the Committee are in broad agreement with the form of Lord Wade's Bill. As already explained, however, the Committee think that it would require amendment, and they have considered some of the questions that arise in this regard.

36. There is first the question whether the whole of the European Convention, and its Protocols, should be included, as in Lord Wade's Bill. Only the first 18 Articles of the Convention, and parts of the Protocols, actually set out the rights to be protected. The rest of the

the Department which prepares the proposals, and the Committee were told that any Department which was in doubt about the effect of proposed legislation could obtain advice from the Foreign and Commonwealth Office or from the Law Officers. The Committee were told that care was taken to ensure that no Government proposals were laid before Parliament which might conflict with the international obligations of the United Kingdom. P. 101

47. The Committee were sceptical of the usefulness of a Parliamentary Committee. It did not seem likely that such a Committee would succeed in detecting a breach of the Convention in proposed legislation which had escaped notice at the various stages of preparation through which it would already have passed. In that matter, the Committee agreed with the views expressed in evidence by Lord Hailsham. Q. 24

Summary

48. The first section of this Report (paragraphs 1–12) is introductory. It explains that the Committee regarded their terms of reference as requiring them to consider the case for a Bill of Rights in the light of the existing constitutional arrangements. It records that, on the two questions posed in the Committee's terms of refrence (a) they were agreed that, if there was to be a Bill of Rights, it should be based on the European Convention on Human Rights; but (b) they were not agreed on whether a Bill of Rights was desirable.

49. The second section (paragraphs 13–31) goes on to discuss the scope of a Bill of Rights. In particular it considers the question of entrenchment, and the possible impact of any Bill of Rights, within the present constitution, on our law. It also examines the extent to which the European Convention already plays a part in our domestic law; and it records the Committee's view that the advantages and disadvantages of having a Bill of Rights tend to be exaggerated by advocates on both sides.

50. The third section (paragraphs 32–34) sets out what seemed to the Committee the most important arguments for and against having a Bill of Rights.

51. The fourth section (paragraphs 35–45) makes comments and proposals on the form a Bill of Rights should take, if there was to be such a Bill.

52. The fifth section (paragraphs 46 and 47) deals with the possibility of introducing formal scrutinising machinery.

Conclusions

53. The Committee are agreed in concluding that, if there is to be a Bill of Rights, it should be a Bill based on the European Convention; and that, in the event of such a Bill proceeding, there should be some changes in the Bill as introduced by Lord Wade last Session (and attached as an Appendix to this Report). Whether there should be a Bill at all is an issue on which the Committee are divided. Six members of the Committee (Lord Blake, Lady Gaitskell, Lord Jellicoe, Lord

O'Hagan, Lord Recliffe-Maud and Lord Wade) were in favour of a Bill; five members (Lord Allen of Abbeydale, Lord Boston of Faversham, Lord Foot, Lord Gordon-Walker and Lord Lloyd of Hampstead) took the opposite view. Although the Committee were thus unable to give an undivided answer to the first question put to them in their terms of reference, they nevertheless hope that the arguments and considerations to which the Report draws attention will be of help to members of the House in formulating their own views.