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PS/Secretary of State
16 June 1994

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17 JUN 1994
659/c

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- CC PS/SofS (B&L) - B
- PS/Michael Ancram (B&L) - B
- PS/Sir J Wheeler (B&L) - B
- PS/PUS (B&L) - B
- PS/Mr Fell - B
- Mr Legge - B
- Mr Thomas - B
- Mr Lyon - B
- Mr Steele - B
- Mr Watkins - B
- Mr Williams - B
- Mr Brooker - B
- Mr Daniell - B
- Mr Dodds - B
- Mr Bramley, SIL - B
- Mr Adams - M
- Mr Bentley, HOLAB

Mr Bell - B

ASSTJ
SEC
20 JUN 1994
C.C.R.U.
235/k

1. Mr [unclear] 20/6
2. Mr [unclear] 20/6

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BILL OF RIGHTS: DINNER WITH LCJ

As foreshadowed in his letter to the LCJ of 23 March, the Secretary of State gave dinner to the LCJ on Monday 13 June for the purposes of an informal discussion of the possibilities of a Bill of Rights. The LCJ was accompanied by Brian Kerr and Mr Lavery; PUS and Mr Fell were also present. The Secretary of State was most grateful for the briefing provided with your submission of 9 June.

2. The Secretary of State explained that a Bill of Rights had wide support, although much of it might not be well-informed. All the parties supported a Bill of Rights in principle and saw it either as an element of an overall settlement or as justified in its own right. In the context of an overall settlement, most saw advantage in some solemn affirmation and entrenchment of basic principles beyond amendment by a local legislature. Many picked on incorporation of the ECHR because it was readily available, but on its own it did not necessarily meet all Northern Ireland's needs. Some, such as Mr Trimble, had developed their thinking a little further to include communal rights, although without any clear definition as to what these might include. More generally, there was a feeling that, since the UK allowed the right of individual petition under the ECHR to Strasbourg, it was

ridiculous that we should insist on such slow access to it. Both Lord Chief Justice Taylor and the Master of the Rolls now supported incorporation of the ECHR in the domestic law of the UK on the basis that this would allow quicker access and would re-patriate to UK judges much of the interpretation of the Convention. It was therefore an appropriate time to take a general and informal sounding of the views of the judiciary in Northern Ireland.

4. It soon became clear that the LCJ had strong doubts about a Bill of Rights and, in particular, incorporation of the ECHR. These doubts included:-

- the fear that if incorporation of the ECHR took place while a terrorist campaign continued, it could have far-reaching effects. Incorporation could lead either to the overturning of some important elements of the law against terrorism, or require derogations from the start, which would be counter-productive. Although the UK had successfully defended a number of cases before the European Court, the outcome might be different in the event of incorporation because the local judiciary would have to pay direct account to the ECHR and it would be pleaded in many more cases - doubtless a number would be brought deliberately to embarrass the security forces. Particular problems might include Article 2 (use of force), Article 6 (right to examine witnesses) and property rights. (We pointed out that there was a body of opinion which thought the opposite: incorporation of the ECHR would place its interpretation in the first instance in the hands of the local judiciary who were likely to be more reluctant to overturn the established law, while the European Court would also be reluctant to overturn a national court interpretation);

- the concern that incorporation of the ECHR would require the judiciary to decide a large number of issues on the basis of the public interest. Although the judiciary

could in some cases already be asked to determine where the public interest lay, this was always within a clear statutory framework and a body of case law. Judicial review required the judiciary to examine procedural issues and whether a public body had acted unreasonably, but did not generally require them to make their own determination of where the public interest lay. But a number of the ECHR articles had exceptions couched in terms of the public interest or public morals or public health. As a result the judiciary would repeatedly be asked to make its own judgement of where the public interest lay, which would bring it into very controversial areas and attract adverse comment on the judiciary. They might for example, be asked to determine whether restrictions on marches were justified in terms of the public interest. (The Secretary of State noted that everyone had to sustain adverse comment and the judges could not necessarily be an exception. Under the PII procedure they could already be required to determine where the interest of national security lay. He wondered whether the LCJ was saying that these issues were in principle not justiciable, or whether it was that the judges did not want to decide such issues. The LCJ said he thought it was a bit of both).

5. The LCJ seemed slightly happier with the idea of a home-grown Bill of Rights and commended in particular the provisions in the Government of Ireland Act 1920, while noting that no cases under it had actually been brought. Other points covered by the LCJ included:-

- he would be very unhappy at the idea of applying entrenched provisions to Northern Ireland alone. Any provisions, whether incorporation of the ECHR or an alternative, would be much preferable if applied to the UK as a whole;

he was not concerned, when the Secretary of State asked him, that a Bill of Rights would lead politicisation of judicial appointments;

- he was very opposed to any active role for SACHR in the event of a Bill of Rights;

- noting Mr Spring's idea of a "covenant" he voiced suspicion at the idea of such a statement embracing the whole of Ireland, which could easily lead to claims that Dublin judges should be involved in any jurisdiction established under it.

6. It was clear that the LCJ came to deliver a firm thumbs down. Brian Kerr did not contribute much, apart from confirming the LCJ's doubts about the implications of incorporation of the ECHR for some of our existing provisions. [REDACTED]

SIGNED

JONATHAN STEPHENS
Private Secretary

Bill of Rights

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FROM: P N BELL, AUS(L)
9 JUNE 1994

ASST./
SEC
13/6
10 JUN 1994
C.C.R.U.

cc: PS/Michael Ancram (L&B) -B
PS/Sir John Wheeler (L&B) -B
PS/PUS (L&B) -B
PS/Mr Fell -B
Mr Legge -B
Mr Thomas -B
Mr Lyon -B
Mr Steele -B
Mr Watkins -B
Mr Williams -B
Mr Bentley, HOLAB
Mr Brooker -B
Mr Daniell O/R -B
Mr Dodds -B
Dr Power -B
Mr Bramley -B
Mr Adams -B
Mr Archer, RID -B
HMA, Dublin -B

10-6
Mr Campbell
Mr [unclear]
Mr [unclear] 13/6
[Signature]

383/6
-9 JUN 1994
STATE SEC

PS/Secretary of State (L&B) -B

BILL OF RIGHTS: DINNER WITH SIR BRIAN HUTTON

The Secretary of State, accompanied by PUS, will be dining with the Lord Chief Justice and Mr Justice Kerr on Monday 13 June to explore the views of the NI judiciary on the possibility of a Bill of Rights for Northern Ireland incorporating the ECHR.

2. The decision will ultimately be a political one: my own personal view is the practical benefit of such a Bill would be limited, though my no means negligible, while its symbolic resonances especially in the context of an overall settlement, but also as a possible interim measure, would be generally benign. However the Secretary of State would obviously want to think twice (or even three times) before seeking to persuade colleagues to accept a Bill of Rights confined to Northern Ireland if it was likely to create significant problems for the NI Judiciary. Equally, he will want their views on the technical means of introducing a Bill of Rights if that is what is eventually decided.

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3. Against this background, the Secretary of State's letter of 23 March to Sir Brian Hutton sketched out some of the more important topics likely to emerge at their dinner. They include:

- the effects of incorporation of the ECHR - practical, procedural, political; symbolic; radical or modest in its impact; making what difference to the outcome of inevitably difficult cases?
- constitutional implications - including exaggerated or real dangers of politicisation of the Judiciary.
- ring-fencing - how can it best be done, and the problems of 'read across' to GB minimised?
- scope of the ECHR/other forms of protection - if the discussion allows, it would be useful to sound out the Lord Chief Justice on the issues which are of particular concern to the political parties as shown by their stance in Strand I and at the SACHR Seminar last year (summarised at Annex A). A key issue is the application of a Bill not just to devolved legislation but to reserved and excepted matters in NI (eg security).
- Incorporation - technical options and their political impact.

4. There is continuing support for the idea of incorporating the ECHR as the most realistic option for a Bill of Rights in the Province, while the UUP, in their "Blue Print for Stability" are even talking, thanks to Mr Trimble, of supplementing protection for individual rights based on the ECHR with some protection for communal rights based on the CSCE texts. It may also be a subject that can help the Talks Process keep afloat over the next few months.

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5. The Irish also have gone on record as welcoming the idea of some form of entrenched protection of human rights, (we had a warm and constructive discussion with them only today in the Anglo-Irish Liaison Group) and there may come a point when the Secretary of State will wish to put the issues to his Cabinet colleagues.

6. Although the Secretary of State is incomparably better informed on this subject than his officials, he may find helpful the attached aide-memoire for which I am indebted to Mr Adams at Annex B.

(Signed PNB)

P N BELL

OAB 6469

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BILL OF RIGHTS

Background

Over the last two years the Secretary of State has sought to explore with the constitutional parties their wish to provide additional forms of protection for human rights. The draft answer keeps the door open for further discussions on how this might be taken forward.

In Strand I of the talks in 1992 there was some agreement among the parties that the "further protection and enhancement of human rights would be an important element in any new political institutions in Northern Ireland". All the major constitutional parties have from time to time continued to express support for "further protection". The DUP document "Breaking the Log-jam" refers to the agreement reached in the Strand I Sub-Committee; the UUP document "Blueprint for Stability", published in February, goes further by specifically endorsing the idea of a Bill of Rights.

Over the past six months Michael Ancram has met delegations from both the Workers Party and the National Peace Council to discuss, among other things, a Bill of Rights. Representations have also been received through correspondence from the SDLP and the Committee for the Administration of Justice.

The Secretary of State in his speech at Birmingham on 23 February said that among the possible features of a political accommodation:

"there might well be some form of entrenchment of human rights to provide additional, built in safeguards against discrimination and disadvantage. That is widely supported already".

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CHR warmly welcomed the Secretary of State's Birmingham speech and, along with Initiative 92, they continue to recommend a Bill of Rights. During the debate in the House of Lords on the Opsahl Report on 3 March both the Opposition front bench speakers, Lord Williams of Mostyn and Lord Holme of Cheltenham, expressed their support. The Liberal Democrat document "A New Deal for Northern Ireland", published on 19 May, seeks a Bill of Rights.

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BILL OF RIGHTS: DISCUSSION WITH SIR BRIAN HUTTON

Background

Positive atmosphere at present for strengthening the protection of human rights (ideally, but not necessarily, as part of a global settlement). Broad and persistent support (SACHR, Initiative 92, and all the Talks participants) for some kind of Bill of Rights. Strong attraction as a measure of potential benefit to members of all communities.

Essential to think through the implications - constitutional, legal and practical - before taking this forward. Want to draw out the feelings of the judiciary about the idea in general and what kind of impact it would have on their work.

Necessary to focus on incorporation of ECHR, but discussion may go wider. ECHR (and its Protocols) not the last word. There are some issues which it only partially addresses eg:

- constitutional matters including the question of self-determination;
- communal rights, such as language rights, access to education (just possible that CSCE may have a role);
- discrimination, where the existing law is far more effective than the ECHR guarantee;
- emergency laws, where the derogation allowable under the ECHR should mean in practice that there would be little real change; and
- social rights, such as divorce, abortion.

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Nevertheless, those favouring a Bill in principle argue that:

- it is a nonsense at best, a denial of justice at worst that, given the existing right of individual petition to Strasbourg, applicants cannot seek similar relief more cheaply and quickly in our domestic courts;
- there is a more deep seated constitutional (and practical) need to set human rights standards in general and justiciable terms, and to provide additional criteria for judicial review;
- there are symbolic advantages, particularly in Northern Ireland, in demonstrating the Government's commitment for the protection of the rights and freedom of all sections of the community;
- the Bill would provide remedies, accepted by the wider community as legitimate, to some minority groups.

Questions for discussion

Effects of incorporation

The Lord Chief Justice of England and Master of the Rolls have both spoken in support of the idea of incorporation (and of a Bill of Rights); their arguments are partly to do with dealing more speedily with ECHR cases. What are the views of the judiciary in Northern Ireland?

What views are held among colleagues in the judiciary about;

the impact of the Convention on cases before the courts under present arrangements; and

the incorporation of the ECHR into domestic law?

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Legislation is already Convention-proofed. It is usually (but not always - cf Dudgeon on Homosexuality in NI) execution of policy that gives rise to ECHR challenges. How might incorporation alter the nature of judgements on politically sensitive cases?

What advantages would litigants face (eg speed in securing a resolution, accessibility, interpretation by a court familiar with N.I.)?

What additional challenges (or burdens) could the judiciary face in carrying out their task?

Constitutional implications

How radical a departure would it be to add a comprehensive rights measure to NI law? What lessons can be learned from the experience of ECHR and European Community Law cases?

Incorporation could be seen as conferring on the judiciary greater power in political matters. Are there lessons to be learned from the growth of judicial review?

What danger would there be of (further) politicisation of the judiciary? Could it affect judicial appointments? (cf Lord Hailsham - "the judiciary is political already")

What would be the effect on NI law of judgements of the European Court of Human Rights.

Ring Fencing

How best could we ring-fence the incorporation of the ECHR into the law of Northern Ireland?

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Could an incorporation measure be limited to the activities of: (a) a devolved administration; (b) those areas plus the application of emergency legislation in Northern Ireland?

How would senior members of the judiciary in Britain view the prospect of 'ring-fenced incorporation' in Northern Ireland? How can we best deal with the problems of 'read across' (assuming GB did not follow suit).

Scope of ECHR

How far would the incorporation of the ECHR into domestic law significantly add to the rights already protected by law?

How would derogations and unratified Protocols be handled?

What other rights require protection, in addition to those already protected in the ECHR?

Would it be desirable for any comprehensive statement of rights to cover constitutional issues?

Should communal rights also be formally protected? If so what should they cover and how should they be defined? Has the CSCE a role here? (cf "the Blue Print for Stability")

Other forms of Human Rights protection

Incorporation (or the creation of a separate Bill of Rights) in Northern Ireland is not the only way of providing further protection for human rights. Other possibilities include:

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- development of existing provisions, such as extending the Northern Ireland Constitution Act 1973 to introduce further general constraints on executive power and subsequent legislation;
- specific legislation targetted at specific problems, such as the fair employment legislation;
- executive action, such as policy guidelines on fair treatment issues (PAFT)

To what extent can such arrangements provide desirable further protection of human rights? How might these kind of arrangements complement or substitute a comprehensive declaration of rights?

Methods of incorporation and entrenchment

How could a Bill of Rights best be entrenched and given a priority over other statutes and common law and inhibit a local legislature from enacting measures that would breach it?

Do they have views as to how incorporation or the existing arrangements for Convention cases might be buttressed (eg by dealing with weaknesses in procedure in respect of remedies for breaches of the Convention, over rights to initiate proceedings, or procedural innovations such as amicus curiae briefs?)

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