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EC PC

Prime Minister CAB.
We have set up a meeting on this for early June.
CDP 22/5.

PRIME MINISTER

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Human Rights

1. With his minute of 13 May the Home Secretary circulated a paper prepared by his officials on the impact of the European Convention on Human Rights. This has opened my eyes to a number of misconceptions which I had shared. He suggested that we use this as a basis for dicussion. I am happy to do so but I think that it may assist the discussion if I make a few points in advance.

2. The first part of the paper seeks to identify the problems which the existing Strasbourg system is thought to create for us. This seems to me to take us to the heart of the matter, namely, whether the present system does indeed do serious harm to the United Kingdom and therefore needs to be replaced or substantially modified; or whether, despite the embarrassment from time to time caused by some decisions in Strasbourg, that system is in fact as good as any other that is in practice available to us - good, that is, in the sense of effectively protecting the rights that need protection without unduly impeding good government.

3. The Home Secretary rightly points out that, while there can be no certain way of measuring the impact of the Convention on the United Kingdom (either now or under any modified version of the system), the position of the United Kingdom, when examined statistically, seems better than some critics make it out to be. As a general point I would add that, while we suffer some embarrassment both by our being a "defendant" in Strasbourg and especially by our losing cases there, it is in the nature of the human rights process (whether in Strasbourg or in domestic courts) that Governments are the defendants, and it is also in the nature of that process that they sometimes lose cases. Indeed, there are some cases which Governments ought to lose - or if that is thought to be too heretical, which a Government of a different political persuasion from our own ought to lose!

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This no doubt means that there are some cases that a sensible Government ought not to fight to the bitter end, and that is a point which the Home Office paper very properly makes.

4. Looking at the assumptions identified in the paper as lying behind the concern at the impact of the Convention on the United Kingdom, it seems to me that many of them are of doubtful reliability. I have already mentioned the question of statistics, i.e. the popular belief that we are always in the dock and always losing. For example, though there have been cases in which the Strasbourg organs have clearly failed to appreciate the effectiveness of our constitutional arrangements as a safeguard for individual rights, it is only in the most exceptional case that it can be said that the difference between the Common Law and the United Kingdom legal system on the one hand and the law and legal systems of other States of the Council of Europe on the other hand has had a significant effect on the outcome in Strasbourg. Nor do I believe that we should be justified in building too much on the belief that we suffer unduly, or perhaps at all, from decisions that are manifestly wrong or perverse or are the result of an excessively "evolutionary" interpretation of the Convention. Certainly, there have been some decisions against us, as well as a few in our favour, which were arguably (not manifestly) wrong. I can also think of at least one decision (Campbell and Cosans - corporal punishment in schools) where it seemed to me that the Court quite unreasonably stretched the language of the Convention. But we should remember that, on the substance of that case, we were out of step with virtually the whole of Western Europe, and opinion in the United Kingdom itself was sharply divided. It is worth pointing out that in the Closed Shop case the Court's judgment was also based on what could be regarded as a stretching of the language of the Convention in a way which, as the travaux preparatoires clearly showed, was not what the draftsmen of the Convention had intended: but we did not make it a matter of reproach to the Court in that case. As for "evolutionary" interpretations, there is more than a grain of truth in that charge but I suspect that it is a charge that could be found applicable to any tribunal entrusted with the task of interpreting an instrument drafted in the broad terms appropriate to a Bill of Rights. If we are considering incorporating

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the Convention in our domestic law so that it falls to our domestic courts to interpret it, then (although I accept that our courts would provide the advantage that they would be more ready than the Strasbourg organs to regard "Ministerial responsibility" as an adequate substitute for strictly legal safeguards) I think that we should be unwise to be confident that their approach to its interpretation would be substantially different from that of the Strasbourg organs or that they would not be just as capable of adopting an "evolutionary" interpretation when they thought it necessary to protect the citizen against the authorities of the State. The way that judicial review has been developed by the judges in the last few years (for example, in the context of prisoners' rights) should give us no ground for complacency on that score.

5. This takes me to the last point that I would make in advance of our discussions. Incorporation in one form or another would have certain advantages: notably, the provision of a "universal" domestic remedy that would have to be exhausted before an individual application could be taken to Strasbourg and the probability that the Strasbourg organs would usually be reluctant to second-guess our courts on issues on which those courts had already given a judgement.

6. But I see formidable disadvantages to incorporation. First, of course, there is the enormous constitutional problem of somehow providing for an incorporated Convention to have an effect which would override subsequent legislation incompatible with it and to have some degree of entrenchment (which is not the same thing). Then there is the practical disadvantage that a judgment of our courts declaring that an administrative action or a piece of legislation is ultra vires has the effect of immediately invalidating it pro tanto, often with retrospective effect. A finding that such action or legislation was in conflict with the Convention as incorporated in our law would prima facie have to have the same effect; and I must say that I am not at all convinced by any of the suggestions in the Home Office paper for devices for evading this result. That result should be contrasted with the position under the Strasbourg system where conveniently we are left a very wide discretion

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and flexibility, both as to timing and as to method, for remedying a finding that the Convention has been violated. Then there is the third, and equally important, point that thrusting our courts into a role which requires them to determine the validity of legislation or administrative action would necessarily bring them into the political arena and, so to speak, "politicise" our judiciary to an extent which I personally would regard as highly undesirable.

This happens with Judicial Review

7. I have already made the point about the likely attitude of our own judges to the interpretation of a domestic Bill of Rights (whether taking the form of the incorporation of the Convention or any other form). I would only add that, if we envisage incorporation as being in addition to, rather than in replacement for, the acceptance of the binding authority of the Convention and its own enforcement machinery, incorporation seems to me to be likely, on balance, to increase rather than reduce the problems for Government which are inherent in any enforceable system of human rights. If, on the other hand, we contemplate incorporation being accompanied by a withdrawal from the Strasbourg system, we have to grapple with all the political disadvantages of such a step which the Home Office paper rightly draws attention to. I do not see how we could hope to justify withdrawal from the Strasbourg system without including at least as far-reaching provisions in our own law and establishing enforcement machinery at least as effective at the instance of individual citizens.

8. I am copying this minute to the Lord President, the Lord Chancellor, the Foreign and Commonwealth Secretary, the Home Secretary, the Secretary of State for Scotland, the Lord Privy Seal, the Secretary of State for Northern Ireland, the Lord Advocate, the Chief Whip and the Secretary to the Cabinet.

M.H.

21 May, 1985

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