

FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.



PRIME MINISTER

HOUSE OF LORDS,
SW1A 0PW

Prime Minister
An ingenious idea from
the Lord Chancellor.
There is to be a Ministerial
discussion next week.

Human Rights

CDP 4/6

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1. I hope you will not mind a modest contribution by myself to the current discussion on the European Convention on Human Rights, the Strasbourg Court, and the impact on ourselves. The Home Secretary's minute of 13th May, with officials' paper attached and the Attorney General's of 21st May refer.

2. I am a good deal less happy about the Strasbourg Court than either of the official paper or my colleagues' minutes would imply. The Court seems to me to suffer from two main defects. The first is that, despite the immense time consumed by its proceedings it basically has too little to do, and like most people with too little to do it seems to me to be constantly trying to enlarge its influence and occupying itself with trivialities. It was really designed after Hitler's war to safeguard basic human freedoms. Instead of that it insists on seeking to outlaw corporal punishment in schools and laws against homosexuality in Northern Ireland. It is not that I necessarily disagree with either decision. There are perfectly reputable arguments to be advanced. It is that I think that a free nation can be trusted to decide these questions for itself.

3. My second criticism of the Strasbourg Court is that its judicial personnel is not as good as those of the component countries. When the Judicial Committee of the Privy Council was in its heyday it could command the finest judicial brains in the

Commonwealth and particularly the United Kingdom. But, without casting any aspersions I ask myself the rhetorical question whether I would recommend for our representation there anyone I would seriously consider recommending to the Prime Minister for the Court of Appeal or above. It is otherwise with the Luxembourg Court where we have sent some of our best judicial timber.

4. There is a third disadvantage peculiar to ourselves. I readily concede that there is a growing understanding among lawyers on the continent of the sophistication of our own judicial system and the interplay of forces within our Cabinet system of Government. But nothing will convince me that our own judges do not understand these things better, even though successive Governments occasionally suffer the humiliation of defeat at the hands of our own judges in the novel procedures by way of judicial review. If a complainant had to exhaust his remedies here, including consideration of the Convention, before recourse to Strasbourg he would at least have to bring with him the judgments of some of our best judicial brains. I readily agree that this did not help us in the Sunday Times case, but, as has already been pointed out, the House of Lords had to decide the matter without benefit of the Phillimore Report.

5. I do not argue for total incorporation. To do so would be to interfere with the Sovereignty of Parliament. But I do suggest that there is an acceptable half way house. We could pass an Act of Parliament establishing for the Courts a rule of interpretation

that any Act passed by Parliament before the commencement date should be read, so far as possible in the light of the Convention obligations, and that any Act of Parliament passed after the commencement date should be read subject to the Convention unless an intention to derogate was clearly expressed in the body of the Act. If this were done complainants would have to go to our own courts first. If they succeeded we should at least not have been subjected to the ignominy of international censure. Many who failed would not take the matter further. If they did then invoke the Strasbourg jurisdiction, at least the Strasbourg Commission and the Strasbourg judges would have the English (or Scottish or Northern Irish) judgment in front of them.

I am copying this to the Lord President, the Lord Privy Seal, the Foreign Secretary, the Secretary of State for Scotland, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate, the Chief Whip and to the Secretary to the Cabinet.

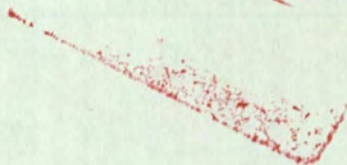
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3 June 1985

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