11 Meeting Thurs 13 June @ 1200 Rec'd 7/6/85

Please help until nearer the time of the meeting when the arrangements can be finalised with COP 7/6

PRIME MINISTER

HUMAN RIGHTS

Although the present investigation began as an assessment of ways of reducing the impact of the European Convention of Human Rights on our law, policy and practice in the United Kingdom, both the Home Office paper and the comments on it of the Attorney General (his minute of 21 May) have rightly focussed on the fundamental questions of the extent to which our law, policy and practice are compatible with the Convention, and whether the differences are such as to make adherence (or complete adherence) to the Convention unacceptable to the United Kingdom.

As regards the question whether the basic provisions of the Convention are compatible with the United Kingdom's policies, I see no reason to doubt that the Convention, which reflects the standards of civilized western nations, is substantially compatible with our domestic law and is an effective reinforcement of basic values - such as the right to property and freedom of choice within the law - which should be observed by any democratic and constitutional government. Given the remarkable range of acceptance of the Convention, by governments of right and left, it would be unrealistic to think we could pick and choose among the provisions of the Convention. Moreover I do not believe that it seriously inhibits any legitimate policy objective of the present government : its effect is rather to require fairness and humanity in the administration of policy. If anything, it tends to be supportive of our policies - in areas such as the trade union closed shop, parental choice in education and compensation for nationalisation - and any difficulties which it creates in fields like immigration and prison discipline can usually be met by minor adjustments in law or practice.

To the objection that the development of the jurisprudence of the Convention is too evolutionary and uncertain, it must be said that there are similar cases already in our domestic law - for instance the law of compensation for war damage, obscenity and (in Scotland) shameless indecency - and more particularly in European Community law which has been part of our domestic law since 1973. Under the rule of law governments have to adjust to judicial decisions which may not suit their political or administrative convenience, and which it may not be politically practicable to reverse by legislation.

To the objection that the Convention usurps the political function in favour of the judicial, it must be said that to some extent this is a price worth paying for a measure of entrenchment of fundamental rights, while still maintaining the sovereignty of Parliament as a long-stop. Moreover as stated above the Convention is more about fairness and humanity than about political policies, and the views of the ECHR judges are not wholly divorced from political realities but will inevitably reflect to some extent the view of the Governments who appoint them. There is however little reason to fear that judges either here or in Strasbourg will use the Convention in order to usurp clearly political functions.

In these circumstances I have some sympathy with the arguments for incorporation of the Convention in our domestic law. Incorporation would align us with the large majority of the other signatories of the Convention, and I do not believe that the fact that the law in the UK is based more on judicial precedent than is continental law would make it substantially more difficult to cope with incorporation. The UK courts have already built up considerable experience of dealing with normative and evolutionary concepts in such fields as judicial review and Community law. Incorporation would probably reduce the number of successful cases against us at Strasbourg. Every case would have to go through the UK court system, complainers would be more likely to have obtained satisfaction from the domestic courts and in cases which did go to Strasbourg there would be an opinion by a U.K. court containing an analysis of the issues in the context of U.K. law and policy.

On the other hand, incorporation would mean that the vague and imprecise concepts in the Convention would have a much wider and more direct impact upon our domestic courts. This could give rise to considerable uncertainty about the state of the law, and although superior courts might be trusted to adopt a cautious approach, I am concerned at the scope for capricious decisions by inferior courts and tribunals, particularly those containing lay members. I am also concerned by the danger of unsound decisions on matters of criminal and police procedure particularly having regard to the absence of a right of appeal by the prosecution on interlocutory questions.

I do not believe that there is any workable half-way position between complete incorporation and the status quo. In particular, as regards the Lord Chancellor's proposal (his minute of 3 June) I do not believe that anything less than complete recognition, in the manner accomplished for Community law by section 2(1) and (4) of the European Communities Act 1972, would constitute compliance with the Convention (The status quo constitutes compliance on the basis of our contention that the existing law does comply with the Convention).

The choice between incorporation and the status quo is a difficult political decision. For the reasons stated above I would prefer to maintain the status quo. I believe that most of the Scottish Judges would agree with this. Incorporation would produce at times situations where policy or practice had to be changed suddenly as the result of unfavourable judicial decisions. The present arrangements give more time for the government to respond by adjusting the law so that the decision does minimum damage to domestic expectations - as with the "tawse" case (Campbell and Cosans).

I do not believe that the present arrangements result in an unacceptable number of adverse decisions at Strasbourg. More deliberate attention to "Strasbourg - proofing" future legislation, together with greater readiness to settle cases or amend our rules where no substantial issue is at stake, could help to diminish the number of such adverse decisions.

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

I. Jack
Private Secretary.

(Approved by the Lord Advocate and signed in his absence).

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