Some Brief Reflections on the ECHR

It is worth starting with a reminder that the European Convention on Human Rights (ECHR) dates from 1950 and is a creature of the Council of Europe which the UK co-founded in 1949. The European Court of Human Rights (ECtHR) sits in Strasbourg. The ECHR is quite separate from Brussels and the European Union (EU) whose court, the European Court of Justice, sits in Luxembourg. The Council of Europe has 47 members (including Russia, Turkey and Ukraine). The EU has 28 members (the most recent members to join being Bulgaria, Romania and Croatia).

The ECHR broke new ground in international law with its Court having jurisdiction to hear disputes between States and complaints by individuals against States and with States undertaking to comply with the judgments of the Court. In the first decades of the ECHR, States were able to opt in to the right of individual petition and to the acceptance of the jurisdiction of the Court. For example, the UK accepted the right of individual petition only in 1966. In these years, the Court moved relatively cautiously as States gained confidence in the novel international human rights institutions that they had created.

The ECHR system has been successful and has become remarkably powerful. The jurisdiction of the ECtHR and the right of individual petition are now compulsory (except for overseas territories) and the ECtHR issues legally binding judgments which heavily influence the law in 47 States across Europe. This is an unprecedented degree of power in an international tribunal and should have as its corollary a strong sense of maturity and responsibility on the part of the judges. But the incentive for judges to be cautious in imposing their values and extravagant interpretations of the ECHR on States is somewhat lacking whereas the incentive to be seen as activist, liberal and expansionist and so be applauded by the generally liberal "human rights community" as champions of human rights is rather stronger.

To take just one example, in the Lautsi v Italy case, the atheist applicant complained of the presence of crucifixes on the walls of Italian schools. A 7-judge chamber of the ECtHR held unanimously in 2009 that there had been a violation of Article 9 ECHR which protects freedom of thought, conscience and religion. Had this judgment stood, an intolerant version of secularism could have been imposed as a compulsory model of society across Europe. In the event, there was an unprecedented storm of protest with some 20 States supporting Italy's appeal to the 17 judge Grand Chamber of the ECtHR which overturned the lower court's judgment by a vote of 15-2 in 2011.

One might say that very broadly speaking the ECtHR today serves two purposes. In dealing with some cases from the East of Europe, it rules on classic violations of human rights (e.g. extra-judicial killings and torture) and provides an essential remedy for individuals who cannot get justice in their own courts. However, in dealing with cases in Western Europe it is often in reality dealing with questions of social policy or gender ideology where a country's Parliament or national courts may have already considered the question, balanced the interests involved, and come to a view. It is not altogether obvious why a selection of international judges in the ECtHR will be likely to come to a better decision than the national authorities.

This problem is exacerbated by the contrast between judges of say the UK Supreme

Court, with vast experience of litigation as practitioners and as High Court and Court of Appeal judges working their way up on merit, and the judges of the ECtHR who are nominated by their Governments, elected by the Parliamentary Assembly of the Council of Europe and are therefore something of a mixed bag. As well as professional human rights enthusiasts who believe passionately that the ECHR should provide a remedy for everything that they perceive to be an injustice, the Court needs judges who appreciate the real problems and dilemmas that governments have to face.

So the question can legitimately be asked, what real substantive value does the ECtHR add to the consideration of legal issues in the UK? Could not our Supreme Court do the job equally well or better? If so, we are left with the argument that the UK has a strong international reputation for upholding human rights and the rule of law. Yes, the UK amending the Human Rights Act to accord less deference to the ECtHR would be setting a bad example to Russia etc. but by that argument the UK will always be hostage to our reputation regardless of the quality of Strasbourg judgments.

Threatening to withdraw from the Convention may be an overreaction, but it may also be that the rumour of withdrawal has had a mildly salutary effect on checking the Court's tendency to ever more liberal expansionist interpretations of the Convention. Following a meeting of Council of Europe States in Brighton in 2012, a new Protocol 15 to the ECHR has been adopted. Once this Protocol enters into force, it will insert references to “subsidiarity” and the “margin of appreciation” to be accorded to States into the preamble of the ECHR and make some other modest reforms. These are attempts to correct the course of the ECtHR, alongside signs that the Court may feel the need through its judgments to enter into some kind of more respectful dialogue with national courts and Parliaments.

In conclusion, while there is a danger of rather ill-informed antagonism to the ECtHR usually expressed by politicians and the media following a Court judgment that goes against the UK, there is equally a danger of uncritical and naïve enthusiasm for the Court simply because of the rhetorical appeal of "human rights" and an instinct to support international tribunals. Instead, we need to adopt an informed and critical approach to the Court, acknowledging its useful functions but also keeping a wary eye on its tendency to act like any other powerful and to some extent unaccountable institution.