**‘Some Good News on Human Rights’**

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On 21 April 2021, Italy the last country and after years of delay finally ratified Protocol No. 15 to the European Convention on Human Rights. From entry into force on 1 August, the European Court of Human Rights may hopefully begin to shift its strategy.

I continue to favour a UK bill of rights as part of a written constitution, but now *un peau d’histoire* to situate Protocol no. 15 and justify my modest optimism.

The treaty of London 1949 led to the establishment of the Council of Europe, as a sort of region of the United Nations. There were ten founders, led by the UK. There are now 47 members, including Russia and Turkey.

In 1950, the council of Europe drew up the human rights convention. Sir David Maxwell Fyfe (later the first Earl of Kilmuir), who had prosecuted at Nuremburg, played a leading role. The convention entered into force in 1953. And the court in Strasbourg opened in 1959, the UK joining in 1966.

The preamble to the convention included as a recital: ‘Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms…’.

The Council of Europe avoided major entanglement with the EU, being broader and shallower. It is unaffected by Brexit.

Many domestic lawyers treat Strasbourg uncritically as another source of law (incorrectly imposing domestic rules of precedent). I am less concerned about the convention, and even human rights. The problem is the judiciary at Strasbourg (one for each member): many states select academics and state officials rather than independent lawyers.

The UK suffered setbacks at Strasbourg, partly due to the Northern Ireland troubles, and, in 1998, the first Blair government enacted the Human Rights Act: the convention remains out there (as does the Strasbourg court), but human rights have been litigated in domestic courts since 2 October 2000.

That is to reckon without (first) David Cameron, detoxifying the conservative party, who, in 2006, as the new leader of the opposition, called for the repeal of the Human Rights Act 1998.

It is also to reckon without (second) the new supreme court, which, in three cases, in 2009-13, declined to follow Strasbourg. The UK stood up to the council of Europe. Our criminal justice system prevailed.

(In a 2019 supreme court case on the presumption of innocence, Lord Wilson described Strasbourg as having ‘step by step, allowed its analysis to be swept into hopeless and probably irretrievable confusion. An analogy is to a boat which, once severed from its moorings, floats out to sea and is tossed helplessly this way and that.’)

It is also to reckon without (third) reformers within the council of Europe, and the high-level conferences at Interlaken in 2010 and Izmir in 2011. David Cameron – with Ken Clarke as his lord chancellor – made his move at the Brighton conference in April 2012.

The result was Protocol no. 15, agreed on 24 June 2013, which most members ratified relatively promptly, save for Bosnia and Herzegovina (2020) and Italy … which is where we came in.

Protocol no. 15 adds a new recital to the preamble: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.’

Strasbourg was never established to micro-manage the justice systems of 47 states, and it has frankly overstimulated demand with repeat applications from principally Russia and Turkey.

Subsidiarity is an important concept in civil law, which provides for government as close to the people as possible. The Council of Europe is about promoting human rights, democracy and the rule of law, and arguably the Strasbourg court has unbalanced its constitution.

The margin of appreciation is a related concept, whereby judges in Strasbourg supposedly recognize that national judges, implementing constitutional human rights, might well have a better appreciation of how the executive branch of government understands its people and national traditions.

The Strasbourg court, I have long argued, is not antithetical jurisprudentially to a UK bill of rights, it being the usual suspects – most recently the followers of John Bercow – who have sought to defend the Human Rights Act 1998 as somehow sacred, inviolable and immune from amendment and even repeal.

A recital is not a provision of a treaty, so UK lawyers will have to hit the ground running on 1 August with challenges to Strasbourg jurisprudence. How about: this case has been considered up to four times by our judges, and we respect their legal acumen?

I still think we will have to develop our own bill of rights, against the votaries of Strasbourg in various sectors, but that we may do it now more easily as part of the Strasbourg project. That would keep the UK in the Council of Europe, where there are other diplomatic objectives to pursue in the national interest.