The UK and the European Convention on Human Rights

The Home Secretary is wrong to argue that Britain should leave the European Convention on Human Rights.

The Convention was drafted in the light of the atrocities committed in the 1930s and 1940s. Its aim was to ensure, as far as an international treaty was capable of doing it, that those things never happened again. Two of the Convention's leading sponsors were the British Conservative politician and lawyer, Sir David Maxwell-Fyfe (who had been a prosecutor at the Nuremburg trials) and the French politician, lawyer and prominent member of the Resistance: Pierre – Henri Teitgen.

It is a short document. Most people who have actually read it agree with most of what it says.

There are 47 States who are parties to the Convention. These include Russia, Azerbaijan and Ukraine. Any citizen of a State party can bring a case against his or her government in the European Court of Human Rights in Strasbourg. This has benefits for the citizens of these States and raises internal standards of justice (and therefore stability). It also has significant potential benefits for all of us (in addition to stability). A State that gets used to having to act within the law inside its country may eventually be more likely to begin to feel obliged to act within the law outside its country.

Britain is almost universally regarded as one of 'the beacons on the hill' when it comes to justice and the rule of law. It is hard to over-estimate the respect for British legal traditions and institutions around the world. What Britain does in this area has real impact. No other State party could damage the European Convention or respect for human rights and the rule of law around the world more profoundly by leaving the Convention than Britain would.

So, why, one might ask, is such a move being seriously proposed? There seem to me to be three reasons.

The first appears to be a combination of the feeling in the government that human rights compliance makes their job more difficult, the unrelenting attacks on 'human rights' by some newspapers with a wide readership and the attempt by some politicians to deal with the threat from more extreme parties on their political right. This combination provides the worst reason of all to leave the European Convention. Britain, thank God, is not a nation with much tolerance for extreme views, and a long tradition of respect for individual liberty. However, as in any society, constant vigilance is needed to maintain these hard won principles. The whole point of a human rights instrument is that it is there to protect the individual citizen from government, from certain waves of popular opinion and from more extreme political views whether they be from the right or the left. The fact that some in government or the press or some politicians denigrate the Convention and want to leave it is what one would expect to happen if it were to be achieving its aims. These voices are precisely the ones that should not be able to persuade us that it is a good idea to leave.

The second appears to be dissatisfaction with some of the judgments in Strasbourg.

Caution is needed here. In 2015 the Strasbourg court issued 2, 441 judgments. Most of those were never reported in the press. It is not reasonable to judge the entire Convention system on the basis of a few judgments with which one might disagree. In addition, it is in the nature of a judicial system that every case involves a winner and a loser. It is not reasonable or compatible with adherence to the rule of law to want to leave a judicial system because one has lost some cases.

There appear to be two categories of cases which the 'leavers' particularly rely on. Cases involving serious criminals such as terrorists and cases involving the right of prisoners to vote. Neither of these categories of case should persuade us to support them.

It is right to say that some of the cases involving terrorists have taken far too long. However, that is a reason to call for reform of the system, not, by itself, a reason to leave it. The reasons why the serious criminals cases should not persuade us to leave are as follows. It is hard to over-estimate the importance to all of us that the legal system be fair. To be guaranteed to be fair it must be fair to absolutely everybody without any exception. As soon as an exception is made the system ceases to be fair and we are all in danger. We would have ceded our right to a fair trial to the subjective views of a human being (a judge) or human beings. Once a human being is given the discretion as to who to grant a fair hearing to there is no safety for anyone. Imagine what would happen if a judge did not, for example, particularly like Catholics or women or particular ethnic groups (and he or she may be having a bad day). In addition, the requirements of fairness are worked out on a case by case basis. The reader of this article may be statistically unlikely to end up in the dock in an English criminal court. It is therefore very unlikely that a significant case dealing with the rules of fairness would be dealing with such a person. It is far more likely that such a case would be dealing with a notorious criminal whose actions (or alleged actions) shock the conscience. Yet your fair trial (should you ever be in the position of needing one) will to some extent depend on the judgment given and the principles applied in the notorious case. This argument applies to other rights also. Rights must be applied to everyone and it is often the difficult and controversial cases that develop the law. The serious criminals cases protect us all.

The prisoner voting cases should not persuade us to leave either. They are not primarily about prisoners; they are about democracy. They are saying that democracy is a very very important thing and the right to vote is truly fundamental. They then conclude that because of the importance of the right a State cannot impose a blanket ban on all prisoners voting. The State must distinguish between those who have committed relatively minor offences and those who have committed more serious offences. Reasonable people can and will disagree with the results in these cases (some of the judges in the ECtHR, themselves disagreed) but they should not disagree with the Court's view about the fundamental importance of democracy and the right to vote. They certainly should not use these of all cases to argue that we should leave the Convention System.

The third reason for the 'leave' movement appears to be the fact that the decisions under the Convention are being taken by an international court and not by exclusively British judges. This reason should be rejected too. A number of attributes of the European Court of Human Rights as an international court are sometimes forgotten. By reason of its status as an international court, a person can only have his or her case heard in Strasbourg if they have 'exhausted domestic remedies', that is to say used the English legal system and all its possible courts first. The European Court applies this rule very strictly and many cases are rejected on the basis that the applicant did not use the remedies available in the domestic courts. The focus of the Convention system remains on the domestic courts and statistically very few cases end up with a reasoned judgment on the merits in Strasbourg. The character of the court as an international court has another consequence. It means that the Court gives States a 'margin of appreciation' that is to say it often applies a lighter touch than a domestic court would, recognising that there is often more than one way to solve a problem. In those cases it leaves it to States themselves to decide which solution to adopt.

There are two reasons why it seems to me that the 'international court' reason for leaving is not persuasive. The first is that our being subject to the jurisdiction of the European Court is the 'price' of the other 46 States parties to the Convention being subject to it. As I say above, that is a price that

is well worth paying. Secondly, if we are to leave, the ultimate arbiter of human rights questions will be the domestic legal system. I do not say that would be a bad thing in itself but it would be likely to have consequences which may be unwelcome for some of those who are currently arguing to leave the European Convention. It seems to me that British courts, unconstrained by the ECtHR and not obliged to apply any 'margin of appreciation' may well be emboldened and the leavers may find more rather than less judicial interference with parliamentary legislation.

It is right to say that there are problems with the current approach to human rights. One is the temptation for some judges to interpret particular rights by applying their own social views. Views that are expressed to be independent or universally held but which in reality are not. Another is the attempt by powerful pressure groups to expand the number of rights recognised as being fundamental to include the interest of their group. Some of these proposed rights are not recognised as being universal and fundamental by humanity as a whole, others are, on proper analysis, issues which involve a balance of fundamental and universal rights. In order to maintain respect for the system and the universal character of Convention rights these (and other) trends should be resisted. However, the fact that something is flawed is a reason to strengthen and reform it, not necessarily a reason to leave and therefore weaken it.