THE TOM SARGANT MEMORIAL LECTURE

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Introduction.

The Human Rights Act received Royal Assent in 1998 and came into force in 2000. It is a very simple statute. It allows individuals in the UK to enforce their rights in their local courts. It also requires public authorities to respect the rights of those that they deal with.

Pretty basic stuff, you might think. And you would be right. Each of the rights protected by the Human Rights Act is taken from the European Convention on Human Rights and, in keeping with my theme for this evening, I want to say a few words about that international agreement.

Despite its name the European Convention on Human Rights is not some suspect foreign import. It was drawn from the Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948. With the end of the Second World War and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict to happen again. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. Hence the *Universal* Declaration of Human Rights, which, when adopted, was proclaimed as a "common standard of achievement for all peoples and all nations".

Regional treaties, such as the European Convention on Human Rights and, subsequently, the American Convention on Human Rights and the African Charter on Human and People's Rights, were intended to give regional effect to this common standard of achievement. British politicians participated in the drafting of the ECHR in Whitehall

because they thought, and this is the irony in light of the current debate, that they were drafting an instrument to reflect the values which we in this country took for granted and which had, they thought, been vindicated by our military triumph. They wanted what they thought were our values to be more widely respected.

The rights in the ECHR are accordingly very simple. They include the right to life, liberty and security of person. The right to a fair trial. Protection from torture and ill-treatment. Freedom of thought, conscience, religion, speech and assembly. The right to marry. The right to free elections. The right to fair access to the country's education system. And, to top things off, the right not to be discriminated against.

A simple set of minimum standards of decency for humankind to cling onto going forward.

As the late Lord Bingham asked in a keynote speech in 2009: “Which of these rights ... would we wish to discard? Are they trivial, superfluous, unnecessary? Are any of them un-British?”. He gave his own answer: “There may be those who would like to live in a country where those rights are not protected, but I am not of their number”. I would give the same answer.

The UK accepted the international obligation to protect the basic rights in the ECHR in 1953 (61 years ago) when the Convention came into force. But it took us another 47 years to turn those international obligations into real rights that we could enforce at home via the HRA. A constitutional moment if ever there was one.

Against that background, it is perhaps surprising that instead of being celebrated as a constitutional triumph, the fate of the HRA is up on 7 May 2015, the date of the next general election.

After a prolonged phoney way which has gone on for some years, the rival political positions are now clear.

On behalf of the Labour Party, Sadiq Khan, the shadow Lord Chancellor, has made clear Labour's "unswerving support for the Human Rights Act and our membership of the European Convention on Human Rights" adding that it reflects our basic values. Having passed the HRA, it would be surprising, and disappointing, if Labour had taken any other stance.

180 degrees in the other direction, Chris Grayling, the Lord Chancellor, when introducing radical Conservative plans for reform this autumn, said "We cannot go on with a situation where crucial decisions about how this country is run and how we protect our citizens are taken by the ECHR and not by our parliament and our own courts. We also have to be much clearer about when human rights laws should be used, and that rights have to be balanced with responsibilities."

The Conservative plans for reform include not only the repeal of the HRA and its replacement with a British Bill of Rights, but also proposals to stop the European Court of Human Rights "binding over" (as the Conservatives put it) the Supreme Court, to clarify how rights will apply in cases of deportation and other removal of persons from the UK and to limit human rights protection to "the most serious cases". Although the Conservatives say that they will "engage" with the Council of Europe as they carry out their reforms, they are clear that "in the event that we are unable to reach agreement, the UK would be left with no alternative but to withdraw from the ECHR".

The stakes could not be higher.

A point recognised by Simon Hughes for the Liberal Democrats who said at his party conference, "When I see the international agreements and the domestic laws which protect the human rights of the most

vulnerable being threatened by the Tories … That is a fight I cannot sit out".

Another constitutional moment appears on the horizon.

A good time, then, to consider arguments for repeal of the HRA.

This evening I want to hold three of those arguments up to the light.

First, that our courts are now shackled because they are somehow bound to follow the decisions of the European Court of Human Rights.

Second, that, but for the HRA, the executive could act with unfettered discretion when removing foreigners from the UK.

And third, that the HRA is no more than a villains' charter abused in 'trivial' cases by undeserving individuals.

Relations with Strasbourg.

The Conservatives have made the relationship between our courts and the European Court of Human Rights in Strasbourg the cornerstone of their attack on the HRA. There are two strands of the argument and it is sensible to consider them separately.

First there is the question of whether the HRA undermines the role of our courts in deciding on human rights issues in this country. Second there is the wider issue of whether the HRA, or even perhaps the ECHR itself, undermines the sovereignty of Parliament.

As to the first issue, section 2(1)(a) of the HRA is clear: a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any ... judgment, decision,

declaration or advisory opinion of the European Court of Human Rights.

Obviously the phrase “take into account” is open to interpretation, but it is equally obvious that it does *not* require our courts to apply or follow the judgments etc of the European Court of Human Rights. As the former Labour Lord Chancellor, Lord Irvine, has argued, the language is clear and unambiguous. Judges are not bound to follow the Strasbourg court: they must decide the case for themselves.

Parliamentary and the legislative history bear this out. When introducing the Human Rights Bill in Parliament, Lord Irvine made clear that it would “allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe". A sentiment echoed by the late Lord Bingham when he said, “it seems to me highly desirable that we in the United Kingdom should help mould the law by which we are governed in this area ... British judges have a significant contribution to make to the

development of the law of human right". As he rightly pointed out, it is a contribution which, before the HRA, British judges were not permitted to make.

That having been said, it is fair to accept that the case law on the meaning of the words "take into account" in s.2 HRA has ebbed and flowed. In the relatively early case of *Ullah* in 2004, the late Lord Bingham said that no national court should "without strong reason dilute or weaken the effect of the Strasbourg case law". In his view the "clear and consistent jurisprudence of the Strasbourg court" should followed in the absence of some special circumstances. His rationale was that the ECHR is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. But, dig a little deeper, and it can plausibly be argued that all Lord Bingham was really concerned with was ensuring that the HRA, like the ECHR, is a 'living instrument'. As he put it in the same judgement, "The duty of the national courts is to keep pace

with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

This, of course, is not without relevance. One of the complaints made by the Conservatives of the European Court of Human Rights is that it treats the ECHR as a 'living instrument' which evolves over time.

I would also accept that, in the early days, when domestic human rights case law was sparse, it was perhaps understandable that our courts should look to Strasbourg for their lead on interpreting rights introduced in statutory form for the first time in our legal history. And, after all, some of us were anxious about the extent to which our judges, steeped in the common law, would embrace human rights. A close connection between the judgments of the European Court of Human Rights and the judgments of our courts helped allay that anxiety.

But, within a few years, the position began to change. Our judges adapted rapidly to the changed legal environment and the mix of cases that came up swiftly led to a rich mix of developed domestic jurisprudence. By 2009, in the case of *Horncastle*, Lord Phillips was emboldened to rule that "although the domestic court was required to take account of the jurisprudence of the European Court on Human Rights ... where, on rare occasions, the domestic court was concerned that the European court's decision insufficiently appreciated or accommodated particular aspects of the domestic process, it might decline to follow the decision". The Supreme Court had entered into a 'dialogue' with the European Court and its Grand Chamber subsequently reconsidered its approach.

Lord Neuberger followed suit in another case indicating that in his view, "this court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the

court to engage in constructive dialogue with the European court which is of value to the development of the Convention".

Against that background, to describe the European Court as "binding over" our Supreme Court is not only to misunderstand the purpose and intent of s.2 HRA but also to ignore the dialogue between our courts and Strasbourg that our judges have been so careful to craft. I cannot help feeling that s.2 HRA has been set up or 'framed' - a target for criticism which, in truth, ought to be directed elsewhere.

I turn therefore to the second strand of the attack on the HRA, namely that the wider issue of whether the HRA, or even perhaps the ECHR itself, undermines the sovereignty of Parliament.

In truth, this has got nothing to do with the HRA at all.

The argument about sovereignty is actually an argument about the relationship between international law and domestic law. It is not the HRA that obliges the UK to respond to the judgments of the European Court of Human Rights. It is Article 46(1) of the ECHR itself. As an international treaty, Article 46 states that: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”. The UK signed up to that international obligation when it signed the ECHR in 1950.

And ... it cannot wriggle out of it without withdrawing from the ECHR altogether.

The Conservative proposals indicate that they intend to stop the European Court being able to “order a change in UK law” by making an advisory body only. This both overstates the current status of judgments from the European Court and suggests an alternative inconsistent with the core principles of the ECHR.

Article 46 is clear and the fundamental inconsistency between its terms and the proposal to turn the European Court into an advisory body cannot be remedied by negotiation. The Council of Europe is simply not in a position to allow a Member State to opt out of, and enter a reservation to, Article 46. Article 46 is a central part of the ECHR – it codifies the European Court's role and operation of the ECHR - and reservations which are inconsistent with the object and purpose of a treaty are not permitted as a matter of international law.

Repealing the HRA is wholly irrelevant to this issue. It would have no effect whatsoever on the UK's obligations under Article 46. The only way is out ...

Whether that is desirable is, of course, a matter of political judgment. But as Joshua Rozenberg recently observed (3 October 2014), "Deriving people of their rights does seem to be something of an overreaction to one or two adverse rulings from the human rights court". According to figures published by the Joint Committee on

Human Rights, of the 2,082 applications made against the UK in Strasbourg in 2012, 2,047 (that's 98%) were declared inadmissible or struck out , 14 resulted in no adverse finding, leaving just 10 cases where a Convention right was found to have been breached (0.5%). That, incidently, is a reducing figure. It was 1% in 2011 and 1.3% in 2010.

I turn then to the second issue under the spotlight tonight.

Unfettered executive action?

Lurking behind the proposals for reform put forward by the Conservatives is the idea that repealing the HRA and/or withdrawing from the European Convention on Human Rights (ECHR) would free up the government to remove foreigners from the UK at will, notwithstanding any threat they face of death, torture or ill treatment, or serious impact upon children left behind.

The question on the table is whether that argument can withstand scrutiny.

As a leading light in the UN, the UK has long recognised the importance of the international obligations spawned by the UDHR which bind like-minded states together for the collective good of all. That is why the government headed by none other than Mrs Thatcher ratified the UN Convention against Torture (UNCAT) as long ago as December 1988.

UNCAT prohibits the removal of foreigners at risk of ill-treatment in pretty well the same terms as the European Convention on Human Rights. It is frequently cited in our courts and 155 state parties have now accepted its terms. In other words it is a universal set of standards, pretty well universally accepted.

UNCAT not only defines torture and commits parties to taking effective measures to prevent any act of torture in any territory under their jurisdiction, it also prohibits the removal of individuals – including by way of deportation or extradition where there are substantial grounds for believing they will be tortured (Article 3). In other words, the UK is subject to precisely the same international law obligations under UNCAT as are engaged by the provisions of Article 3 ECHR.

Whichever way you look at it, that appears to drive a coach and four through the proposals advanced by Chris Grayling. Particularly since the proposals state in terms that "Our new Bill will clarify what the test [for removal of individuals at risk of ill-treatment] should be, in line with our commitment to prevent torture and in keeping with the approach taken in other developed nations". The approach taken by other developed nations is simple and set out in UNCAT.

The same sense of international legal order that led Mrs Thatcher to ratify UNCAT later led John Major in 1991 to ratify the UN Convention on the Rights of the Child. That international agreement puts the rights of children at the centre of decision making even in controversial cases involving the removal of foreigners from the UK. If anything, it goes further than the European Convention on Human Rights in this regard. It too is frequently cited in our courts and has near unanimous international support. Another set of universal standards pretty well universally accepted.

Under the UNCRC, the UK has a responsibility to protect the rights of all children within its jurisdiction irrespective of their nationality, ethnic origin or immigration status. Unless Parliament were to enact legislation that deportation decisions could be made *without regard to any relevant international obligations*, any Home Secretary would continue to be constrained by the UNCRC in any case where a removal decision impacted on the rights of children. The current law is

reflected in the recent decision of the UK Supreme Court in ***ZH v (Tanzania) (FC) v Secretary of State for the Home Department*** [2011] UKSC 4 which puts the 'best interests of the child' at the centre of decision making in immigration cases involving deportation or removal.

And quite apart from these specific international agreements concerning torture and children, there is there is the overarching international agreement which would continue to have legal relevance in the event that the Conservatives were to succeed in repealing the HRA and abandoning the ECHR system – the International Convention on Civil and Political Rights (ICCPR).

Ratified by the UK in May 1976 but never subsequently questioned by any government, it is another human rights treaty that commands universal worldwide respect and provides human rights guarantees that reflect those to be found within the ECHR. Plainly the enforcement mechanism is very different

because the UN Human Rights Committee that oversees compliance with the ICCPR lacks the force and effect of the ECtHR (via the HRA). But unless it be suggested that Ministers should be able to act untrammeled by the ICCPR principles, then it too – alongside UNCAT and UNCRC - operates so as to constrain the actions of the Executive insofar as it seeks to make decisions that impact on the human rights of individuals within the jurisdiction.

So, here's the rub, unless the Conservative Party is prepared to renounce these core UN commitments entered into by leading members of their own party, it is hard to see what renouncing the ECHR will achieve in practical terms. Being anti-Europe is one thing (and easy politics in the current environment); being anti-UN is quite another, (and significantly affects the UK's standing on the world stage).

The only other alternative is the prospect of the UK being in constant breach of fundamental UN human rights obligations. That is both unedifying and fundamentally at odds with the frequent FCO declaration that “Human rights, democracy and the rule of law are at the heart of the government’s foreign policy”. There must be a high level of concern at the FCO when government ministers ritually denounce the ECHR while instructing the rest of the world, including other European states, to respect 'the rule of law' and collective international human rights obligations.

Let me turn, then, to the third issue for consideration this evening.

A victims’ charter not a villains’ charter.

The Conservative proposals for reform of the HRA complain that there is no proper balance between rights and responsibilities. When unpacked, the nub of the problem, as they see it, is that that the HRA is no more than a villains’ charter abused in ‘trivial’ cases by undeserving individuals.

Here, I'm afraid, there is a gap in the evidence. Although some defendants have been able to rely on the HRA to their advantage in criminal cases, by and large the impact of this has been no more than a tweaking of our current rules and approach. There has been no fundamental shift in defendants' rights and most of the HRA challenges brought by defendants in our courts have failed. Those that have been successful have usually involved issues that many would regard as fundamental to our justice system such as overturning indefinite detention of foreign terror suspects without charge or trial and the ending of the automatic removal of toddlers from their mothers in prison. The absence of more far reaching changes is largely due to the fact that major legislative schemes such as the Police and Criminal Evidence Act, passed by the Thatcher government in 1984, set out clear rights for suspects that have been successfully embedded in our law for many years.

By way of stark contrast – and this is a baby and bath water point - the HRA has heralded a new approach to victims' rights. Before the HRA, individuals in the UK did not have the right to an effective investigation into serious allegations of criminal wrong doing. Even where the police clearly and obviously failed to protect victims or to investigate properly, the common law offered nothing. The 'positive obligation' to protect life and limb found in the HRA changed all that. Often after many years of struggling to be heard, victims now have a right to have serious allegations taken seriously and to be protected and supported by the police whether they have died in the hands of the state or have been abused by other individuals.. Child victims of trafficking, women subjected to sexual violence prisoners who have died in custody, and those with vulnerabilities that inhibit reporting of abuse have all benefitted from this fundamental change in emphasis. And the families of British soldiers have been able to secure inquests into their deaths outside the battlefield in cases where inadequate care or protection may be involved.

The HRA has also changed the approach in the prosecutor's office. Victims can now challenge decisions of the Crown Prosecution Service not to bring charges in their case relying on the HRA. And that has led not only to better decision-making but more generally to much better policy-making in the CPS. The impact in court has also been dramatic. Victims, once voiceless in the process, can now argue that court practices and procedures should be adapted to take into account their rights and interests. Protective measures for victims are one example, but there are others, including the right to have some degree of control over the disclosure of sensitive medical notes and/or to be provided with adequate information by the police and prosecutors.

As we look at little more closely at these developments, let us start our journey with a boy named Ahmet Osman who went to Homerton House School in North London. When he was 14 years old, one of his teachers formed a disturbing attachment to him. He gave him money, took photographs of him and followed him home. The school

authorities were aware and the police attended the school. But nothing was done, save that the school started a process to transfer the teacher to another school. While that was going on, someone, it seems highly likely the teacher, removed Ahmet Osman's school files and started daubing graffiti of a sexual nature about him in the neighbourhood.

One month later, the teacher changed his surname to match Ahmet Osman's. He was suspended from the school. Over the next few months he carried out a number of attacks on Ahmet Osman's home: a brick was thrown through the window, the tyres of the family car were slashed and the windscreen broken; and dog excrement was left on the doorstep.

The police were informed on every occasion but, apart from questioning the teacher, nothing was done. Two months later, the teacher stole a gun, went to Ahmet Osman's house and shot his father dead.

He was later convicted of manslaughter on the grounds of diminished responsibility and sentenced to be detained in a secure mental hospital.

When the Osman family tried to bring proceedings against the police in our courts for failing to protect them, as victims, from the teacher, their claim was struck out on public policy grounds. The common law offered them nothing. But the Osman family did not give up. They took their case to the European Court of Human Rights in Strasbourg.

Before that court, the UK government argued that it had done all that was required. The teacher had been arrested, charged, convicted and sentenced. Justice had been served.

The European Court disagreed and held that ‘after the event’ remedies are not enough to protect the right to life enshrined in Article 2 of the

European Convention on Human Rights. Reasonable preventative measures were also called for.

Its reasoning was as follows. The fundamental nature of the right to life demands special protection including a *positive duty* on the state to protect the right to life. This duty includes a duty to put in place what the European Court described as “effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions”. This positive obligation may also, in certain well-defined circumstances, include a duty to take preventative operational measures to protect individuals whose lives are at risk from the criminal acts of others.

The judgement of the European Court in the Osman case marked a significant development in the protection of victims’ rights. That is because it brought into very sharp focus the difference between common law *freedoms* and the rather harder edged *rights* found in

international human rights instruments. Victims could henceforth argue not only that the authorities had themselves violated their rights in some way, but also that the authorities had failed to protect them from the wrongful acts of others.

The Osman judgment was delivered in 1999, one year before the Human Rights Act came into force. For victims this is important. By incorporating the European Convention on Human Rights into UK domestic law, the Human Rights Act has ensured that future generations of victims will not have to do as the Osman family had to and take their case all the way to Strasbourg. Instead they can enforce their rights in their local court.

The case of *OOO and others v the Metropolitan Police* [2011] EWHC 1246 is a good example.

It concerned four children. All girls, they had been trafficked from Nigeria to the UK when they were aged between 11 and 15. Once here they were forced to work as domestic slaves. The hours: long (about 6am to near midnight). The pay: nil. The employment regime: violent.

After several years, their plight came to the attention of the police, who thought that their allegations of ill-treatment were credible. But because the victims were unwilling to participate fully in the investigation without some reassurance about their safety, the police did next to nothing. The Judge hearing the case, who thought that the victims' need for reassurance about their safety was understandable in the circumstances, concluded that a criminal investigation of the victims' abusers were simply (and I quote) "not high on the [police's] list of priorities" (para.173).

That police failure was found to be a breach of the positive obligation under the Human Rights Act to carry out an effective investigation

into credible allegations of serious ill-treatment (a version of the Osman obligation). The victims won.

But, and it's a big but, in a passage of his judgment that those who advocate the repeal or replacement of the Human Rights Act should consider long and hard, the Judge said:

> "An actionable duty to investigate alleged breaches of Articles 2, 3 and 4 [the right to life, the prohibition on torture and ill-treatment, and protection from slavery and forced labour] arises only by virtue of the Convention. For all practical purposes no actionable duty to investigate crime, even crime amounting to breaches of those Articles, exists in the common law of England and Wales." (para.158)

This is stark. But for the Human Rights Act, these vulnerable victims of trafficking and forced labour would have lost their case. Is that the position Chris Grayling and the Conservatives want us to return to?

What about cases where the victim is too vulnerable even to come forward and report what has happened to them to the police? These are difficult cases. But the position under the European Convention is again clear and robust. In 2010 the European Court of Human Rights ruled that the duty to investigate serious wrongdoing does not depend on a victim coming forward; once the matter has come to the attention of the authorities they must act on their own motion (*Rantsev v Cyprus and Russia* (2010) 51 EHRR 1).

Within one year, that principle was accepted by our courts and entrenched in our law via the Human Rights Act. In the case of *OOO v Metropolitan Police* (concerning the victims of trafficking and forced labour), the Judge said:

> "I cannot accept that the duty to investigate alleged breaches of Articles 3 and 4 [the protection from ill-treatment and the prohibition on slavery and forced labour] is triggered only when the police receive a complaint from an alleged victim. The duty

> to investigate will be triggered once the police receive a credible allegation ... however that information comes to their attention."

He was explicit about the impact of the Convention on his thinking: "That is the effect of [the] *Rantsev* [case]; it is also, in my judgment, completely understandable and accords with common sense". Again, rights brought home.

Thus the Human Rights Act has entrenched in our law a victim's right to have credible allegations of serious ill-treatment investigated properly. And to have them investigated even when victims are too vulnerable to come forward themselves. It sounds so obvious. It applies to millions of victims every year. But it was only given legal effect by the Human Rights Act.

It goes further. Once the positive obligations that the European Convention on Human Rights places on the police to carry out proper investigations was properly understood, it was inevitable that, sooner

or later, the role of the prosecutor in protecting victims' rights would come under close scrutiny.

Let me pick up the thread by telling you about a case that was decided very early in my tenure as Director of Public Prosecutions in England and Wales (a post I held from 2008 until October last year).

The case was brought by a young man identified in the proceedings only as FB. He had a long history of mental illness. At about 9pm one evening he went to a coffee house in Hornsey Road in North London. Several people there were smoking cannabis and one man who had befriended FB asked him for money. When FB refused to give him money and attempted to leave the coffee house, the other man attacked him and, in the course of a short struggle, bit a piece of FB's ear off. FB described feeling a bite, putting his hand to his ear and seeing it covered in blood. Meanwhile his assailant spat out the part of FB's ear that he had bitten off and threatened FB with violence if he went to the police.

FB went to hospital, but fearing reprisals did not initially tell the authorities the truth; but later, when he felt safer, he did so. He gave his account of events and identified his assailant who was arrested and charged with wounding with intent to cause grievous bodily harm and witness intimidation.

In the lead up to the trial, the defence asked for a doctor's assessment of FB's mental state. In the resulting report, a consultant psychiatrist concluded that 'FB was suffering from a mental disorder of a kind and to a degree which may have affected his perception and recollection of events so as to undermine the reliability of his account of [the events in question].'

Faced with this assessment, prosecuting counsel decided that he could not put FB before a jury as a reliable witness. The result was that no evidence was offered against the assailant and he was acquitted on both counts.

When FB challenged the prosecutor's decision in the High Court he won. Let me read you the critical passage:

> 'In this case FB suffered a serious assault. The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB could be put before a jury as a credible witness, was to add insult to injury. It was a humiliation for him and understandably caused him to feel that he was being treated as a second class citizen. Looking at the proceedings as a whole, far from them serving the State's positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim's sense of vulnerability and of being beyond the protection of the law. It was not reasonably defensible and I conclude that there was a violation of his rights under Article 3 [ECHR].'

This brings human rights law into the heart of prosecution decision-making. And rightly so.

Just as it had been established in the Osman case that human rights law requires the state to put in place effective criminal law sanctions, backed up by equally effective law enforcement machinery, the FB case established that the duty to protect victims from death or serious injury extends to the prosecution such that any decision not to prosecute which is not reasonably defensible is unlawful. Another development brought about by the Human Rights Act. Another leap forward for victims.

Positive rights under human rights law promise and deliver a good deal more negative freedoms under the common law. The Osman family lost their case before our courts here because, before the Human Rights Act was passed, the common law did not recognise that, as victims, they had rights that they could enforce; the Human Rights Act, coming from the perspective of positive obligations, takes the opposite view.

It is often thought that civil liberties and human rights are two sides of the same coin. But this can be misleading. Civil liberties protect the individual from the state by restricting the circumstances in which the state can interfere in the affairs of its citizens. Human rights, in contrast, not only protect the individual from the state but also oblige the state, in carefully defined circumstances, to take positive steps to protect its citizens (or in fact anyone within its jurisdiction, such as trafficked children)..

This distinction is important. Positive obligations are the source of victims' rights. The HRA entrenches positive obligations in our law and hence it entrenches victims' rights. In the pre-HRA days, a civil liberties approach and the common law struggled to achieve this. Those who advocate the repeal or replacement of the HRA risk turning the clock back on this important development in victims' rights or, at the very least, impeding its progress.

Conclusion.

So I return to where I started. The HRA is a constitutional instrument. But it is also a political football.

The stakes are high and the next few months will be determinative.

In my view, repeal of the HRA would be a highly retrograde step. It would remove valuable protection to the most vulnerable in our society and cut off important developments in our law, such as the proper recognition of victims' rights.

The arguments in favour of reform are both weak and extreme.

Weak because they do not withstand close scrutiny. Our courts are not shackled and bound to follow the judgments of the European Court of Human Rights. Nor do they. Repeal of the HRA and even abandoning our obligations under the ECHR will not relieve the UK of its obligation not to remove foreigners who are at risk of torture. And far

from being a villains' charter, the HRA has provided a platform upon which victims' rights have been build.

The arguments in favour of reform are extreme because, logically, they lead to our exit from the ECHR and everything that that carries with it.

Having researched the point, Tim Owen QC and Alex Bailin QC have asserted that, as far as they are aware, only two other countries have abandoned their commitments under international human rights treaties: Venezuela (ACHR) and North Korea (ICCPR). Do we really want to joint that small club?

The case for the HRA is a strong one. It is a moral case based not only on learning from the history of some of the worst violations of human rights before and during the Second World War, but also on the here

and now. It should not be viewed suspiciously as a burden, but promoted as an instrument of social cohesion and public purpose.