***Instrumentalism in Human Rights and the Media: Locking Out Democratic Scepticism?***

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*Introduction*

Public debates about human rights – as filtered through the lens of the media – have a seemingly binary character. The ‘Bad Press’ distorts and rejects rights claims, whereas the ‘Good Press’ embraces the architecture and value commitments which underpin modern human rights law. Yet, in framing debates about rights in this way, the inherently political nature of both positions (and any others which might be imagined between these caricatured extremes) is readily overlooked. This paper reflects on the implications of characterising argument about the contemporary salience of human rights in this way. It suggests that human rights claims are instrumentalised, by press both ‘Bad’ and ‘Good’, but for different ends.

This should not be surprising, however, for it is in the very nature of the legal human rights discourse that rights claims become instrumentalised in a paradigm which is oriented to the (in)justice of outcomes. This outcome orientation of modern human rights law, and the use and representation of rights claims in (and by) the modern media, may distract our attention from thinking about the means by which political decisions are (and ought to be) taken. One particular consequence is that little space is left for public debate to be influenced by democratic scepticism about human rights law. It may be unreasonable – perhaps even impossible – to expect that democratic critiques of modern human rights law could be translated for use in the media. Nevertheless, the reflection of the instrumental nature of human rights law in debates about media reporting has the potential to lock in this outcome oriented paradigm, and lock out sceptical perspectives on the systemic difficulties with legal structures established for the protection of human rights.

This paper first explores the architecture of the debate about media representations of legal human rights, and the way in which discussion is framed in binary terms. The paper then moves on to consider the implications of the instrumentalism which prompts a focus on the ends, rather than the means, of human rights law in public debate. Finally, the paper concludes by reflecting on the consequences of framing media debate about human rights law in these terms, and considers whether this is simply further evidence that, in furiously debating the use and abuse of rights claims by the modern press, we are having the wrong argument, about the wrong problem.

*The Architecture of Debate about Media Representations of Legal Human Rights*

The legal protection of human rights in the UK was transformed by the enactment of the Human Rights Act 1998 (HRA). This legislation provided overarching protection for the core rights set out in the European Convention of Human Rights (ECHR), to which the UK had been a signatory as a matter of international law since 1950.[[1]](#footnote-1) For some, it was the ‘cornerstone’ of the UK’s new constitution.[[2]](#footnote-2) While such claims as to the constitutional centrality of the HRA 1998 are misplaced, not least given live questions about the likelihood that this legislation will endure,[[3]](#footnote-3) the impact of the domestication of human rights has been significant. It has changed the form and nature of much constitutional argument, and prompted an (ongoing) recalibration of the relationships between the courts, the government, and Parliament. And this has been the UK’s part of a broader ‘rights revolution’, with human rights discourse becoming the dominant language of social justice across the modern world, and in western liberal democracies in particular.[[4]](#footnote-4)

The modern prominence of human rights – both in the UK constitution, and as the primary language of international political argument – has inevitably been reflected in the attention given to the subject in the media. As many other chapters of this collection demonstrate, many of the issues tackled in the language of human rights are intensely controversial, ranging from torture and detention without trial, to immigration and asylum, to LGBT discrimination, and abortion.[[5]](#footnote-5) As complex, contentious moral-political issues they are, for a number of reasons, also liable to be simplified, or even flatly misrepresented, in media reporting. The focus of this chapter, however, is on a different topic – rather than considering the extent to which human rights issues are accurately or inaccurately represented in media reporting, why this might occur, the existence of good or bad faith, or the implications, this chapter aims to consider the structure of debates about human rights, as manifested in the media.

Why adopt a focus on the structure of debate about human rights? Discussion concerning the fair and accurate representation of human rights issues, arguments, cases and claims in the media is undoubtedly important. Yet there are also structural issues which deserve sustained attention, and are often underappreciated. Human rights do not simply provide a basis for asking discrete questions of law and morality, they also offer a specific way of organising and channelling challenges to the use of public power. The systemic dimensions of human rights law as a means of public accountability are also crucial, because challenges to official decisions or policies on human rights grounds do not occur in isolation, but within a broader scheme. This broader scheme has both institutional and conceptual components: in relation to the institutional, rights claims are developed in specified courts, by specialised advocates, and resolved by the judiciary; in relation to the conceptual, the relevant actors must question whether a right has been engaged, where there has been interference with that right, and whether any identifiable interference can be justified as legitimate or proportionate.[[6]](#footnote-6) This standard legal scheme provides a degree of uniformity to the evaluation of human rights claims, and the operation of this general system can be as significant as the substantive issues concerning the content of any specific right in shaping how a particular question or case is resolved.

As human rights structures become an ever more prominent means through which the exercise of public power can be challenged, the public representation of these claims becomes of parallel importance. A crucial part of accountability in a democratic state is that this occurs openly, and is therefore something which citizens can have access to, and potentially become engaged in. The media must therefore play a significant role in publicising the means by which official actors are challenged and held responsible for policy choices, to avoid the processes of governmental accountability becoming merely an exercise in intra-elite intrigue. Yet that the media have an important constitutional function is well established; the press gallery was long ago described as the ‘Fourth Estate’ by Carlyle, which was ‘more important far’ than the other three estates in Parliament, the House of Commons, House of Lords and the Crown.[[7]](#footnote-7) The modern media of the information age may be much more complex, yet the essential idea that it has a key role in the effective operation of the accountability processes of a system of government remains clear. The media may now be crucial in setting the political agenda, investigating specific instances of governmental failure, generating or amplifying public pressure on office holders, cultivating sentiment around key policy decisions, and many other things besides. There can be little doubt that the activities of the media must be accommodated within any account of the operation of a system of government, for they will play a significant role in shaping how power is used within (and sometimes outside of) the formal rules of the political order.[[8]](#footnote-8)

Media representations of accountability claims made with the legal human rights framework are therefore of clear significance and, as such, deserving of critical scrutiny. Perhaps the key feature of public debates about rights – as filtered through the lens of the media – is that they have an ostensibly binary character. This is particularly the case when we focus on the press, which unlike television and radio broadcasters, are not subject to requirements of reporting with ‘due accuracy’ and presenting issues with ‘due impartiality’ as imposed by legislation,[[9]](#footnote-9) and enforced by Ofcom, the UK’s communications regulator.[[10]](#footnote-10) The binary nature of the debate is framed around the existence of, and differences between, a ‘Bad Press’ and a ‘Good Press’. The ‘Bad Press’ distorts the meaning of fundamental human rights provisions, and their applicability in the UK in particular, in support of a hostile right wing political agenda lacking in compassion for anyone who is foreign, different, or perhaps especially in the current climate, European.[[11]](#footnote-11) The paradigmatic example of a newspaper exhibiting this hostility to human rights claims is generally seen as the *Daily Mail*.[[12]](#footnote-12) This representation of rights is largely underpinned by a distinction between the deserving and undeserving; there are groups or individuals who do not deserve the legal protection of their human rights, a claim which appears to challenge the ostensible universality of these fundamental claims. In contrast, we have the ‘Good Press’ – with the *Guardian* perhaps standing as the exemplar of this tradition.[[13]](#footnote-13) The ‘Good Press’ accepts the universality of rights, and the substantive values of liberty and equality which are seen to underpin rights to live, associate, express opinions, be free from torture and unjustified punishments, and others. And in so doing the ‘Good Press’ demonstrates compassion for the very groups or individuals demonised by the ‘Bad Press’, and extols the virtues of having a system by which rights claims can be promoted.

This account of the framing of debate about human rights law around a diametrically opposed ‘Bad’ and ‘Good’ press is obviously, to some extent, a caricature of what is in reality a more varied landscape. Yet, while a simplification in some respects, in other respects it feels as if much public debate about media representations of human rights is structured in exactly this way: those on the side of virtue understand and respect human rights, whereas those focused on the pursuit of grubby self-interest regard universal rights as an exclusive luxury at best, and a dangerous indulgence at worst. It also works in combination with a second binary distinction. The ‘Good’ and ‘Bad’ press approaches to human rights are themselves underpinned by a binary conception of legality – or perhaps of the idea of the rule of law. This binary conception of the rule of law posits the legality of a particular state of affairs as a matter of absolute judgment – either something is definitively lawful or it is not. While this is no doubt an accurate representation of the outcome of nearly any specific legal case, it masks the real complexity of the contested moral, political, and policy dimensions of an assessment of human rights compatibility that is inherent in such adjudication. The ensuing lack of nuance as to the operation of legal systems for the enforcement of human rights reinforces the basic division between a ‘Good’ and ‘Bad’ press – the result of a rights claim becomes a clear cut matter of legal fact, and something to be praised or lamented, depending only on the vantage point occupied.

These binary approaches seem to structure a great deal of thought and debate about legal human rights. But what is lost in this is the political aspect of human rights law, which is suppressed by the binary conception of legality which constitutes the terrain on which both the ‘Good Press’ and ‘Bad Press’ engage alike. For to embrace the language and significance of human rights to establish and sustain claims for social goods or entitlements, fair treatment or respect, is to make a political choice, and to engage in political discourse via the medium of rights, rather than ascend to a higher level of enlightenment, and operate above the fray. While human rights law may present itself as based on unquestionable premises around which there is little or no room for debate, there is no objective argument from reason which can establish the natural or fundamental character of either the particular human rights identified in a legal scheme of protection, or justify as uncontentious the ways in which these basic rights are fleshed out and applied in specific contexts.[[14]](#footnote-14) Of course, there is immense rhetorical power in the idea of rights inherent to all people – whether in a particular context, or in systemic terms – as human rights becomes a catch-all, stock phrase for the pursuit of justice, fairness, liberty, equality, autonomy, well-being and much else besides. But such rights must be contingent and political, rather than ‘trumps’ which bypass the existence of differing perspectives on how we should organise our societies.[[15]](#footnote-15)

Against this backdrop, it becomes evident that the position adopted by the ‘Good Press’ on human rights is no less politicalthan that adopted by the ‘Bad Press’. It may be, in substance, a politics which many instinctively prefer, especially within the legal professions and academia, given the primacy, perhaps even reverence, afforded to human rights law – but it is still a politics. It is to use rights – to instrumentalise human rights instruments, language, provisions[[16]](#footnote-16) – just as the ‘Bad Press’ does. The difference here is one of ends, not means. Yet this media instrumentalism concerning human rights is also a reflection of the nature of human rights law itself. The claim of human rights law to circumvent politics through its grounding in universal values – based on a simplistic, binary conception of the rule of law – is an impossibility, and may raise a range of difficulties, which will be explored in the next section.

*Ends, Means and Human Rights as Instruments*

Once the instrumentalism of human rights law is recognised, we can see more clearly the difficulties with the structure of debates about media representations of rights. The instrumental nature of human rights law means both the ‘Good Press’ and ‘Bad Press’ are caught in a paradigm which is crucially oriented to outcomes. Human rights language is used to establish or bolster claims for desirable social goods , with legal processes for rights protection the mechanism by which these claims might be vindicated: the fundamental human right to X must be understood to require the provision of entitlement Y (or the removal of constraint Z), and the courts must use the powers at their disposal to ensure that this is recognised by law.[[17]](#footnote-17) This is an enterprise which is focused on the outcomes of social decision-making. The ends are inevitably prioritised over the means of reaching a decision about the distribution of social goods or individual entitlements, because it is the ends that are being legally measured as to their compatibility (or incompatibility) against the benchmark which the premises of human rights law provide.

Now this is not to argue that ends do not matter. And, as such, we are of course fully entitled to take a side in criticising and challenging the particular instrumentalisation of rights by the ‘Bad Press’, where that has the effect of fostering hostility and social division, or stigmatising vulnerable people or groups. Instead, it is to recognise that to do so is to engage in an enterprise that is political as well as legal, and that we are not here above the fray, challenging prejudice with objective legal facts derived from the unquestionable premises of human rights law. And once the inevitably political character of human rights argument is acknowledged – even within the confines of legal structures for the protection of such rights – it also becomes clear that a focus on only the outcomes which flow from such systems will be inadequate. While it is certainly the case that the ends of human rights processes matter, they do not matter exclusively – we cannot, in other words, become entirely drawn into a debate which is solely about ends, and forget entirely about means. For the process by which social ends are determined, and how those ends are distributed, matters too. This is especially the case in a state committed to democratic ideals, which are premised on the political equality of citizens. Political equality must be delivered through the means as well as the ends of collective decision-making, and so the manner in which decisions are made must matter at least as much as the substantive quality of the decisions reached.

When we recognise the importance of considering the means of decision-making, as well as the ends of the process, the contemporary institutions, structures, and discourse of human rights law (but also the politics and morality inevitably underpinning the human rights project) can be found lacking in a number of ways. Human rights law positions itself to frame, constrain, and limit substantive political possibilities.[[18]](#footnote-18) But given the human rights project must be a political enterprise, in reality the effect is to alter, perhaps even warp, the politics which must inherently be the basis for any society.[[19]](#footnote-19) Human rights discourse privileges individualism above all, with its ultimate representative the rights-bearer defending their entitlements against the state.[[20]](#footnote-20) It fractures issues, considering them in isolation from other related matters, and in only the partial context that the individual-state dynamic makes possible. Even when claims are brought in groups, arguments develop by drawing fine distinctions between atomised individuals, serving ultimately to sub-categorise any collective. The legalism which accompanies the conversion of human rights discourse into human rights law narrows further the terms of argument.[[21]](#footnote-21) It establishes the supremacy of an elite level practice, conducted in a language which is doubly problematic, in that it is vague while ostensibly accessible, but this accessibility is actually illusory. This leads to engagement through terms of art which can be disorienting when it subverts the meaning of otherwise understandable concepts.[[22]](#footnote-22) The primacy given to individual rights by the legal institutionalisation of mechanisms for human rights protection has the potential to subjugate other important principles of justice, like collectivism and shared responsibility, while capturing others, like equality and non-discrimination, and imposing definitions of them in formal rather than substantive terms. And, finally, there may also be a range of concerns as to the forum which human rights law promotes as the crucible in which claims must be raised and vindicated: the fact that such claims must be developed in the courtroom, subject to the strictures of legal argument, and decided by members of the judiciary, who are generally isolated and removed from political accountability by design, while unrepresentative of the population at large.[[23]](#footnote-23) Ultimately, the decision to task the judiciary with the legal protection of human rights can be seen to empower non-democratic actors with some of the most sensitive and important decisions that stand to be taken in a society.[[24]](#footnote-24) Even where the power to make such decisions definitively is not passed to the judges – as in the UK, under the Human Rights Act 1998 – there are still many reasons for concern about the impact of human rights law on the democratic practices of a state founded, formally at least, on the political equality of citizens.

These deficiencies with the processes and structures of human rights decision-making – and no doubt others that might be identified – are not reflected, and indeed are barely even recognised, in media representations of human rights law. Even where structural issues have been critical in the context of a particular human rights case, they are explored only in a cursory fashion – and, crucially, on the terms established by the courts themselves. To take an example, the case of *R (Nicklinson) v Ministry of Justice*[[25]](#footnote-25) concerned (among other claims) a challenge to the criminalisation of assisting another in committing suicide,[[26]](#footnote-26) on the grounds that it violated the Article 8 ECHR right to private and family life of the disabled claimants who were physically incapable of ending their own lives without medical assistance. The judgment is an immensely complex one, given the Supreme Court essentially split three ways, with Lords Neuberger, Mance and Wilson holding that it would not be inappropriate for the courts to make a declaration that the law in this area was incompatible with human rights, but only at some future point. Lady Hale and Lord Kerr argued that the court could make such a declaration and should not wait; whereas Lords Sumption, Clarke, Reed, and Hughes determined that this was a sensitive matter of political judgment for Parliament, not for the judges. As such, there was a 5-4 majority in favour of the courts being entitled to issue a declaration of human rights incompatibility at some point, but a 7-2 majority against doing it at that time (for some because it would never be appropriate, for others only if Parliament failed to reconsider the matter).

This key constitutional question – who should decide, Parliament or the courts? – is in many ways a proxy through which the more elaborate kinds of human rights scepticism outlined above can be addressed. The media reporting of the Supreme Court decision acknowledged that the question of the division of responsibility between Parliament and the courts had been in issue, yet treated it as a matter which had essentially been resolved in this case, and by the court, rather than something which is ongoing, and about which non-judicial actors may take a different view. In the *Guardian*, for example, it was reported that the Supreme Court had ‘ruled that judges do have the "constitutional authority" to intervene in the debate’, but the focus was on the substantive finding, and there was no explanation of why it might be contentious for the legalisation of assisted dying to be a matter for judicial, rather than parliamentary, determination.[[27]](#footnote-27) The same can be said of the reporting of the decision in the *Daily Mail* – there is little that can be gleaned as to why we might be sceptical about judicial claims to possess the authority to resolve this issue on human rights grounds, although it does provide further context about the dynamic between Parliament and the courts in reporting Lord Neuberger’s view ‘that if MPs and peers did not give serious consideration to legalising assisted suicide, there was a “real prospect” a future legal challenge would succeed.’[[28]](#footnote-28) In the exemplars of the ‘Good Press’ and the ‘Bad Press’, as discussed above, we therefore find little in the reporting of a contentious human rights case that would provide insight into reasons for scepticism about the legal structures or processes of human rights law. Instead, despite the fact that some of these issues were under direct consideration by the Supreme Court, the human rights paradigm goes unchallenged in these media representations.

Of course, this is not to say that issues associated with the operation of the system of legal protection of human rights do not get aired in the press. On the contrary, both the *Guardian* and the *Daily Mail* have specific agendas concerning human rights law, which are made explicit in editorials related to the unending debates about repeal of the Human Rights Act 1998.[[29]](#footnote-29) But whether defensive of, or hostile to, the human rights project, these issues are outlined in discrete pieces on the topic of potential legal reform – the reporting of the more regular use of legal human rights claims is therefore insulated from such considerations. Perhaps this is unsurprising because, as considered above, media representations of human rights reflect the outcome orientation of human rights law. However, the danger is that they then shape public debate in a way which locks in the binary framing of a ‘Good’ and ‘Bad’ press, responding to the ‘Good’ or ‘Bad’ ends of human rights decisions, with the means of human rights laws – the structures, processes, institutions, and discourse – relegated to a subsidiary matter.

This is especially regrettable when there is much about which to be sceptical in practice, as well as in principle. While some may believe we are in a new liberal era of judicial decision-making, longer term studies – both historical and contemporary – provide little to justify such complacency.[[30]](#footnote-30) We see the false promise of human rights law – its rhetoric is of the delivery of universal social goods to all, yet the reality is that legal decision-making, even that concerning human rights, is at most based on gradualism, moderation, and leads inevitably to compromised outcomes. The results of the ‘bedroom tax’ litigation are instructive – there may have been headline success for the most vulnerable claimants, but the majority of the litigants, also in extremely disadvantageous circumstances, did not prevail, demonstrating that the application of human rights law can have a limited capacity to make a real impact on iniquitous government policies.[[31]](#footnote-31) Similarly, the so-called ‘workfare’ litigation indicates that human rights law may only have an impact for select categories of claimants, leaving the vast majority of those affected by the (initially unlawful) withdrawal of jobseeker’s allowance without any remedy.[[32]](#footnote-32) There are also recent cases in which the justice of human rights outcomes may be very much disputed. For example, the Supreme Court decision that the use of police ‘stop and search’ powers did not discriminate against members of black and minority ethnic groups, but indeed were for their ‘benefit’.[[33]](#footnote-33) Or the decision of that court that it would be unlawful for the National Assembly for Wales to introduce a policy allowing for the NHS to boost its funding by charging the insurance companies of employers whose employees had required treatment for cancers and other medical conditions attributable to exposure to asbestos, because this would amount to a retrospective interference with their right to the peaceful enjoyment of property.[[34]](#footnote-34)

Human rights law may also impact negatively upon the way in which future policy choices can be made and delivered. To take a high profile example, while successive UK governments have refused to implement the judgment of the European Court of Human Rights in *Hirst (No. 2)*,[[35]](#footnote-35) which held that a ‘blanket ban’ on prisoner voting rights was incompatible with the right to free elections under Article 3 of Protocol 1 of the ECHR, all consideration has been of very modest changes to the availability of the franchise for prisoners.[[36]](#footnote-36) The effect of this decision has been to box in the future policy spectrum, and make it essentially inconceivable for more radical solutions – such as the universal democratic enfranchisement of all serving prisoners, subject to no restrictions at all – to be promoted in the current political environment. Moreover, even when social policy choices are made which can be defended from human rights challenges constructed by powerful commercial interests, the delay to the implementation of legislative changes, which have been democratically determined and entirely lawful from the outset, is itself damaging to the public interest. This has been very visible in the succession of challenges engaging human rights claims by tobacco companies, alleging unjustified interference with their right to peaceful enjoyment of property, in response to increased regulation of their commercial activities through bans on advertising and restrictions on packaging.[[37]](#footnote-37) Yet, so superficially attractive are the claims of universal human rights protected by law, that we even see the emergence of a narrative where human rights law draws credit almost magnetically, in comparison with a politics which is caricatured as obviously flawed. For example, attempts to portray the justice eventually obtained by campaigners for the 96 Liverpool supporters killed in the 1989 Hillsborough football disaster as a triumph of human rights law are especially difficult to accept.[[38]](#footnote-38) The persistent and pervasive failures of the justice system over decades compounded the injustice perpetrated in the aftermath of Hillsborough, and was only undone by sustained political action by the families of the 96 supporters, with the crucial breakthrough in obtaining new coroner’s inquests into the circumstances of the disaster delivered by the non-legal independent panel which reviewed and documented the official failings in a critical report.[[39]](#footnote-39) And this is to say nothing of the difficulties presented by models based on even greater empowerment of the judiciary for the protection of fundamental rights, most influentially in the system pioneered in the United States of America,[[40]](#footnote-40) but also across a range of democratic states.[[41]](#footnote-41)

In such circumstances, a binary, simplified, outcome-oriented approach to human rights law can be seen to provide a fundamentally inadequate basis for public debate in this area. It is a matter for great regret that media representations reflect back this framing of human rights law, yet it is also understandable, given its deep rooting in the structures of legal rights protection. Yet perhaps an even greater cause for concern is that if human rights law continues to be represented in this way in the media, there is the potential for it to shape public discourse in a way which not only locks in this binary, ends-focused framing, but may simultaneously serve to lock out democratic scepticism about the processes of the legal systems of human rights protection. How far it may be possible to prevent the exclusion of such scepticism about the functioning of the structures and institutions of human rights law – if it is possible at all – will be considered in the next section.

*Locking Out Democratic Scepticism About Human Rights*

The previous section identified a range of reasons for scepticism about the operation of human rights law in a democratic society. Human rights law empowers non-democratic (legal) actors,[[42]](#footnote-42) can legalise the operation of politics, entrench individualism at the expense of collectivism, capture and narrow the terms of moral argument, while failing to fulfil its hollow promises about the ability of such legal mechanisms to establish a just state of affairs in a community. Yet these grounds for scepticism are not reflected in debate about media representations of human rights law, which is framed around binary ideas of a ‘Good’ and ‘Bad’ press, and a conception of the rule of law which promotes absolute ideas of legality. This paper has suggested that this may not be surprising, for the instrumentalism associated with such representations of human rights law originates at the very heart of the legal structures for the protection of human rights. The outcome orientation of human rights law – with a focus on the legality of the ends of policy, rather than the means by which policy decisions are reached – is reflected both in the representation of human rights in the media, and in the debate about the quality or veracity of those representations.

But there is a further concern which has the potential to flow from this position. There is a danger that the inevitable reflection of the instrumental nature of legal human rights in media representations becomes more than simply a reflection. If public discourse is influenced so as to shift away conclusively from the idea that fundamental rights are instruments, to a conception of legality which is absolute, singular, and laden with morality, there is a risk that the real character of human rights law becomes concealed, and an outcome focused understanding potentially becomes locked in. If debates about human rights continue to be framed in binary terms, oriented to the ends of legal processes rather than the nature of those processes themselves, this may leave even less space for legitimate critique of human rights instrumentalism than exists at present. And if media representations serve to reinforce and entrench this vision of human rights law further and further, as the dominance of this outcome focused paradigm becomes locked in, the potential for critique of the means, structures, and systems of this form of legal protection could become locked out. Ultimately, and paradoxically, the instrumentalisation of law through human rights therefore has the potential to disguise the fact that the law itself is an instrument, the tool of political, social and economic actors, rather some inherent repository of benevolent values.

How, then, might we respond to this position? Can the press (‘Good’, ‘Bad’ or indifferent) respond in ways which meet this objection? Can instrumentalism be avoided, whether by the media or other actors engaged in public debate about the use and utility of systems for the legal protection of human rights? Is it inevitable that democratic scepticism will be locked out in the way considered above? There are no easy answers to these questions, and the difficulty for the media is clear: whatever we may think of the desirability of a legal culture framed around the concept of human rights, it exists, is increasingly significant, and cannot be ignored by the press. Nor is it necessarily the responsibility of the media to challenge the outcome oriented paradigm which human rights law establishes. How could it anyway be done, even assuming the very best of faith? Given the necessary substantive specificity and temporal focus of most media reporting – as so obviously signalled in the very idea of ‘current affairs’ – it seems unimaginable that deeper systemic scepticism could be readily and, perhaps crucially, consistently acknowledged as one part of a standard written or video journalistic piece. Yet if this is the case, the representation of human rights law as being concerned with an ongoing series of individual matters may unavoidably reinforce the outcome focused paradigm, and preclude public engagement with structural issues.

If it is therefore difficult to anticipate how this kind of scepticism about human rights law can be manifested regularly in the media, perhaps it is as much as we can do to try to be aware of the instrumentalism of human rights and promote the need to be critical of the power structures such legal mechanisms create. It is also important that this should be done in a constructive fashion, which is not the way these concerns about judicial power are often voiced in the media. When scepticism is based on knee-jerk reactions rather than more considered reflection – such as hysterical claims, albeit not in a human rights context, about the judiciary as ‘enemies of the people’[[43]](#footnote-43) – this will only serve to polarise yet further an already binary debate, and diminish the potential for real democratic discussion about the best way to deliver democracy.

Moreover, when we engage in debate about human rights and their representation in the media, we may do well to qualify, to some extent, our criticism or praise for the use of rights claims by press outlets both ‘Good’ and ‘Bad’. On either side (and the many steps in between), we see rights instrumentalism in support of political ends, and it is these political ends which also deserve to be challenged and scrutinised, over and above the deification or exploitation of the rights template in which they are presented. Just as the adequacy of the structures and mechanisms of human rights law cannot be presumed, and requires independent and sustained scrutiny, the outcomes of individual human rights cases should be recognised and assessed in terms of their distinct political character, rather than simply praised or condemned on the basis that they are the product of a system which is desirable or undesirable, depending on the caricature adopted. Such engagement with specific substantive problems from a human rights perspective does not mean that we move away from a position based on systemic scepticism; instead, it is to approach particular human rights problems in a way which is informed by that broader scepticism about the operation of such legal structures and institutions.

In contrast, some may respond that we should simply accept the human rights paradigm as unavoidable, and embrace its instrumentalism for pragmatic reasons. Perhaps the ease with which this debate about human rights law has become binary and focused on outcomes suggests that all that matters is that we achieve social justice, rather than how we do so. Indeed, there are good philosophical arguments that may be developed in support of this position which accommodate some of the scepticism about the transcendental claims of human rights law. Rorty, for example, rejects the argument that the nature or authority of human rights is grounded in an inherent, natural rationality common to all humans: ‘no useful work seems to be done by insisting on a purportedly ahistorical human nature, there probably is no such nature, or at least nothing in that nature that is relevant to our moral choices’.[[44]](#footnote-44) Yet ‘human rights culture’ may still have value when considered from the perspective of ‘efficiency’, if it assists us in determining ‘how best to bring about the utopia sketched by the Enlightenment’.[[45]](#footnote-45) That human rights are ‘social constructions’ rather than inalienable is irrelevant; instead what counts is whether they have ‘utility’.[[46]](#footnote-46)

Yet even if we accept that rights are far from philosophically unassailable trumps, there may be a number of objections to wielding such pragmatism in support of human rights law. First, the outcome oriented nature of the human rights paradigm means that, in adopting it, we risk assuming that achieving progress (however that is defined) is always framed in these terms, and we simply need more rights, better rights, better judicial decision-making, better media representations. The possibility of democratic scepticism opens up debate about the credible potential of the structures and systems of human rights law, and raises issues which are problematic even when viewed pragmatically, in so far as they close our minds to constructing alternative institutional arrangements with even greater social value. If pragmatists like Rorty suggest that we ‘look to the future rather than to eternity’, and ‘prefer new ideas about how to change things over stable criteria for determining the desirability of change’,[[47]](#footnote-47) there might be concern that the prevalence, even dominance, of human rights law as the mode and engine of progress could drive complacency about the ‘end of history’.[[48]](#footnote-48) And if the human rights project is simply an instrumental activity grounded in pragmatism, there would be no moral loss if it could be displaced by something better.

Second, Rorty acknowledges the existence of systemic issues with a human rights culture when recognising it may be ‘revolting to think that our only hope for a decent society consists in softening the self-satisfied hearts of a leisure class’.[[49]](#footnote-49) Yet he does not think moral progress is likely to ‘burst up from below’ rather than flow from ‘condescension from the top’.[[50]](#footnote-50) Yet whether this is the case or not, there are surely different considerations engaged if we act to institutionalise condescension from the top through legal mechanisms focused around judicial empowerment, as this may have other costs. In particular, there might be legitimate concerns that the non-democratic character of human rights mechanisms and institutions may actually interfere with the creation of the kind of human rights culture, based on inclusion and the minimisation of difference,[[51]](#footnote-51) to which Rorty aspires.

It may ultimately be the case that the debate about media representations of human rights law is one which obscures far deeper questions about the means and utility of the legal systems and structures which have been established for the protection of ostensibly fundamental rights. Nor can we avoid these deeper questions by pragmatic appeals to embrace human rights instrumentalism. In that sense, we may currently be having the wrong debate about the wrong problems: one which occurs within the framework established by human rights law and the public representations of that phenomenon, rather than one which is open to contesting the foundations of the human rights project, especially on democratic grounds.

None of this is necessarily an argument against human rights law per se, nor is this a credible prospect in any event, despite some claims that human rights law faces its twilight.[[52]](#footnote-52) Instead, the aim has been to identify inconsistencies in existing binary debates, and suggest that more nuance is required to understand fully the dynamics of media portrayals of legal human rights. We should be cautious in particular about adopting the absolutist conception of legality which underpins the archetypal characterisation of this debate, as between a ‘Good’ and ‘Bad’ press. For it throws a veil of unassailability over legal judgments, whether we view those results as desirable or obnoxious. And as the UK judiciary accrues greater power and influence in the constitution, legitimate scepticism of such claims to power is as important here as elsewhere. It may be an indictment of our present accountability processes to suggest that there are no alternatives to the judicial scrutiny of political action on human rights grounds, but the risk in choosing this path is that it excludes many others, now or in the future. Once democracy is positioned as something which is subject to human rights law, rather than something which should be understood necessarily to generate commitments to collective and individual rights, this conceptual switch will be difficult to reverse. This is especially the case if elites are persuaded to commit to the formal legal protection of human rights on the basis that it provides them with moral cover, contracts out a range of difficult decisions they would prefer to avoid to a potential judicial scapegoat, while broadly sustaining their social authority.[[53]](#footnote-53)

How exactly we might alter the institutional arrangements associated with human rights protection has remained an open question in the UK for some time, and while no resolution appears imminent, any Bill of Rights is likely to replicate many of the core features of the Human Rights Act it would replace, as well as having been justified in exceptionalist and jingoistic terms.[[54]](#footnote-54) The serious flaws of that debate do not vindicate the present arrangements,[[55]](#footnote-55) and much more expansive thinking about democratic alternatives to human rights law is required. Yet this may be exactly the problem: the binary public debate about rights makes nuanced sceptical positions difficult, perhaps near impossible, to articulate, and accountability processes which would replace, rather than supplement, existing legalistic mechanisms become difficult, perhaps near impossible, to construct. The nature of rights discourse may, ironically, be the very thing that generates such impoverished debate about human rights and their place in the constitution. And while this is something we may try to acknowledge and understand, it is not something we can easily fix or break out of. So even if we are having the wrong argument about the wrong problem, the current public debate about human rights law is already framed in such a way as to make extremely challenging the shift from where we are now – arguing about rights-outcomes and their representation in simplistic binary terms – to where we might instead want to be going.

*Conclusion*

Considering the debate about human rights law and its representation in the media has the potential to give us important insights into deeper issues with (and within) our legal and political systems. This chapter has argued that, on all sides, the press should be understood to be using rights instrumentally because rights are, truly, an instrumental tool. In that sense, the debate about human rights and (or in) the media is simply one in which a more fundamental problem is manifested – the democratic political difficulties posed to a society which embraces the language and architecture of human rights as the basis for its core political morality. This problem is one which deserves real and sustained attention, yet the very nature of human rights law – which is ultimately focused on the ends, rather than the means, of political decision-making – frames the discourse about rights in ways which threaten to lock out discussion of the systemic, structural, institutional problems with the operation of legal human rights protection. While the displacement of democratic scepticism about the functioning of human rights law is far from inevitable, the prospect of an institutional realignment which moves us away from the current legal rights paradigm seems distant. It may be, then, that the value of democratic rights scepticism needs to be found in prompting fresh thinking about how to enhance accountability practices and processes which sit outside the architecture of human rights law, while also attempting to cultivate awareness of the false claims that such utopian legal frameworks ultimately propagate. In pursuing these goals, we will need to overcome the limitations of democratic scepticism if we are to challenge the limitations of human rights law.

1. On the Human Rights Act 1998 generally, see e.g. KD Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 *Modern Law Review* 79; C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004); A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press, 2009); AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing, 2009). [↑](#footnote-ref-1)
2. V Bogdanor, ‘Our New Constitution’ (2004) 120 *Law Quarterly Review* 242, 259. See also V Bogdanor, *The New British Constitution* (Oxford, Hart Publishing, 2009). [↑](#footnote-ref-2)
3. See the (ongoing) debates – within the Conservative Party in particular – about whether the Human Rights Act should be replaced with a British Bill of Rights; see e.g. the report of the Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012). For an overview, see House of Commons Library, ‘A British Bill of Rights?’, *Briefing Paper 7193* (18 May 2016) [↑](#footnote-ref-3)
4. See e.g. S Moyn, *The Last Utopia* (Harvard, Harvard University Press, 2010). [↑](#footnote-ref-4)
5. Cross refs to other chapters? [↑](#footnote-ref-5)
6. ## For an example in the European Court of Human Rights, see *Al-Jedda v United Kingdom* (Application No. 27021/08) (2011) 53 E.H.R.R. 23; for influential discussion of the approach of the courts in the UK, see *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167.

   [↑](#footnote-ref-6)
7. T Carlyle, *On Heroes, Hero-Worship and the Heroic in History* (1840), Lecture V. [↑](#footnote-ref-7)
8. See e.g. the recognition by Woodhouse of the significant influence of the contemporary media over the application of the constitutional conventions concerning the responsibility of government ministers: ‘Most cases of resignation in the last 50 years owe something to the media’; ‘a sustained campaign by the media against a minister may be sufficient to bring him or her down’; D Woodhouse, ‘UK Ministerial Responsibility in 2002’ (2004) *Public Administration* 1-19, 16. [↑](#footnote-ref-8)
9. Communications Act 2003, ss. 319-320. [↑](#footnote-ref-9)
10. See *The Ofcom Broadcasting Code* (April 2017), at: <https://www.ofcom.org.uk/\_\_data/assets/pdf\_file/0005/100103/broadcast-code-april-2017.pdf>. [↑](#footnote-ref-10)
11. Add refrence to Drywood/Gray and Reynolds chapters here [↑](#footnote-ref-11)
12. See e.g. ‘Travellers use “human rights” to stop police “spying on them 24/7” then immediately dump and set fire to 70 TONS of rubbish on private land’, *Daily Mail* (5 April 2017), at: <http://www.dailymail.co.uk/news/article-4382730/Travellers-use-human-rights-stop-police-watching-them.html>. [↑](#footnote-ref-12)
13. See e.g. ‘New human rights to protect against “mind hacking” and brain data theft proposed’, *The Guardian* (26 April 2017), at: <https://www.theguardian.com/science/2017/apr/26/new-human-rights-to-protect-against-mind-hacking-and-brain-data-theft-proposed>. [↑](#footnote-ref-13)
14. See e.g. Bentham’s famous account of rights as ‘nonsense on stilts’; J Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* in P Schofield, C Pease-Watkin, and C Blamires (eds), *The Collected Works of Jeremy Bentham* (Oxford, Oxford University Press, 2002). For influential discussion of these ideas in a more recent context, see JAG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1. [↑](#footnote-ref-14)
15. For the contrary view, arguing in favour of ‘rights as trumps’, see R Dworkin, *Taking Rights Seriously* (London, Duckworth, 2nd ed. 1978). [↑](#footnote-ref-15)
16. On ‘rights-instrumentalism’, see J Waldron, *Law and Disagreement* (Oxford, Clarendon Press, 1999) 252-254. [↑](#footnote-ref-16)
17. The formal powers available to the courts to give effect to the determined requirements of human rights law will vary depending on the system of protection in place; under the Human Rights Act 1998, the courts should interpret legislation in a way that is rights compatible ‘so far as it is possible to do so’ (s.3), or might otherwise at their discretion make a declaration of incompatibility which does not affect the legal validity of primary legislation (s.4). The actions of public authorities which violate human rights, and were not mandated by primary legislation, should be struck down as unlawful (s.6). The Human Rights Act has been described as one example of the ‘new commonwealth models’ of rights protection, which withhold full powers to invalidate legislation from courts, yet are still effective in embedding a legal human rights culture; see S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge, Cambridge University Press, 2013). [↑](#footnote-ref-17)
18. See e.g. M Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford, Hart Publishing, 2000); M Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003) ch 7. [↑](#footnote-ref-18)
19. See e.g. Gordon Silverstein, *Law’s Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge, Cambridge University Press, 2009). [↑](#footnote-ref-19)
20. See e.g. K Marx, ‘On the Jewish Question’ (1844), republished in D McLellan, *Karl Marx: Selected Writings* (Oxford, Oxford University Press, 2nd ed 2000). [↑](#footnote-ref-20)
21. See e.g. JN Shklar, *Legalism* (Cambridge, Mass., Harvard University Press, 1964); MA Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, Free Press, 1991). [↑](#footnote-ref-21)
22. See e.g. the discussion of the distortion of the ‘right to liberty and security’, focusing on Art 5 of the ECHR, in KD Ewing and JC Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] *Public Law* 668. A similar critique might apply to the intensely fluid ‘right to private and family life’ recognised by Art 8 of the ECHR. [↑](#footnote-ref-22)
23. This is certainly the case in the UK, where (as of May 2017) there had only been one woman ever appointed to the UK’s highest court (whether in the form of the House of Lords or the Supreme Court), no female judge ever appointed as the Lord Chief Justice or one of the Heads of Division, and lamentable representation of judges who are female or from black or minority ethnic groups across the senior judiciary. See the Judicial Diversity Statistics (July 2016) at <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2016/>. [↑](#footnote-ref-23)
24. See e.g. Waldron, n.15; J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346. [↑](#footnote-ref-24)
25. [2014] UKSC 38; [2015] AC 657 [↑](#footnote-ref-25)
26. Suicide Act 1961, s.2. [↑](#footnote-ref-26)
27. ‘Assisted suicide campaigners fail to get supreme court to overturn ban’, *The Guardian* (25 June 2014), at https://www.theguardian.com/society/2014/jun/25/assisted-suicide-ban-doctors-supreme-court. [↑](#footnote-ref-27)
28. ‘European judges agree with British courts and throw out right-to-die case brought by paralysed ex-builder and widow of man who had locked-in syndrome’, *Daily Mail* (16 July 2015), at: <http://www.dailymail.co.uk/news/article-3163593/Paralysed-ex-builder-widow-man-locked-syndrome-lose-right-die-case-European-Court-Human-Rights.html#ixzz4gaZDHUdD>. This report is of the decision of the European Court of Human Rights, which also rejected the claims of *Nicklinson*, but it provides a summary of the Supreme Court’s judgment from a year earlier. The *Daily Mail* website only carries Press Association reporting of the Supreme Court decision in June 2014. [↑](#footnote-ref-28)
29. See e.g. ‘The Guardian view on scrapping the Human Rights Act’ *The Guardian* (3 October 2014), at: <https://www.theguardian.com/commentisfree/2014/oct/03/guardian-view-scrapping-human-rights-act-dangerous-jumble>; ‘A nation imperilled by the Human Rights Act’ *The Daily Mail* (1 August 2015), at: <http://www.dailymail.co.uk/debate/article-3181945/DAILY-MAIL-COMMENT-nation-imperilled-Human-Rights-Act.html>. [↑](#footnote-ref-29)
30. See especially KD Ewing and CA Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford, Clarendon Press, 1990); JAG Griffith, *The Politics of the Judiciary*, 5th edn (London, Fontana Press, 1997); KD Ewing and CA Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford, Oxford University Press, 2000); KD Ewing, *The Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford, Oxford University Press, 2010). [↑](#footnote-ref-30)
31. *R (Carmichael and others) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 W.L.R. 4550. [↑](#footnote-ref-31)
32. *R (Reilly) v Secretary of State for Work and Pensions (No. 2)* [2016] EWCA Civ 413. In this challenge to the retrospective legislation which the government introduced in Parliament to legalise what had been the unlawful withdrawal of jobseekers allowance from people who had refused to undertake unpaid work, only those who had lodged appeals prior to the retrospective legislation would be eligible for any relief available on human rights grounds. This was estimated in the proceedings in the Court of Appeal as some 2,500 out of 250,000 people – approximately 1% of the unlawfully sanctioned benefit claimants. [↑](#footnote-ref-32)
33. *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79; [2016] 1 W.L.R. 210, [41]: ‘Any random “suspicionless” power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individual cases. There are, however, great benefits to the public in such a power…. The purpose of this is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that many of these gangs are largely composed of young people from black and minority ethnic groups. While there is a concern that members of these groups should not be disproportionately targeted, it is members of these groups who will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers’. [↑](#footnote-ref-33)
34. Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3; [2015] AC 1016. [↑](#footnote-ref-34)
35. *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849; considering this decision in the UK, see *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271. [↑](#footnote-ref-35)
36. See the report of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill established to consider the possibilities (HL Paper 103, HC 924, 18 December 2013). Even the very modest recommendations of the Committee have gone unimplemented. [↑](#footnote-ref-36)
37. ## See e.g. *Imperial Tobacco* *Ltd v* *Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153; *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182, and the decision of the Supreme Court to refuse permission to appeal on 12April 2017, at: <https://www.supremecourt.uk/news/permission-to-appeal-decision-12-april-2017.html>. For discussion of this point, see C McCorkindale, ‘The New Powers of the Judiciary in Scotland – Part I’, *Judicial Power Project Blog* (29 April 2016), at: <https://judicialpowerproject.org.uk/the-new-powers-of-the-judiciary-in-scotland/>.

    [↑](#footnote-ref-37)
38. See e.g. David Allen Green, ‘Theresa May, Hillsborough, human rights law and the politics of superficiality’, *The Financial Times* (27 April 2016), at: <http://blogs.ft.com/david-allen-green/2016/04/27/theresa-may-hillsborough-human-rights-law-and-the-politics-of-superficiality/>. [↑](#footnote-ref-38)
39. See *Hillsborough: The Report of the Hillsborough Independent Panel* (HC 581, 12 September 2012), at: <http://hillsborough.independent.gov.uk/repository/report/HIP_report.pdf>. The judgment of the Divisional Court which quashed the original inquest was based on revelations made in the *Report of the Independent Panel* as to serious flaws concerning the imposition of a premature evidential cut-off point, claims about the use of alcohol by fans, evidence of the alteration of police statements, and existing safety concerns relating to the stadium; see *Attorney General v HM Coroner for South Yorkshire (West)* [2012] EWHC 3783 (Admin). The legal authority to quash the original inquest was provided by the Coroners Act 1988, s 13. The only mention of human rights law in the judgment is in the conclusion at [28], indicating that the new coroner would need to decide whether Art 2 ECHR was engaged when determining the format of the new inquests, and if so, to ensure that the format of the new inquests would be compatible with those requirements. Yet, in any event, it would already be clear that the new inquests would inevitably need to be structured in such a way as to consider the material revealed by the Independent Panel, so as to avoid the serious flaws which caused the original inquest to be quashed. [↑](#footnote-ref-39)
40. See e.g. GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (London, University of Chicago Press, 1991); M Tushnet, *Taking the Constitution Away from the Courts* (Princeton, Princeton University Press, 1999); J Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (New York, Oxford University Press, 2016); A Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in American* (New York, Picador, 2016). [↑](#footnote-ref-40)
41. See e.g. J Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto, University of Toronto Press, 1997); R Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Cambridge MA, Harvard University Press, 2004). [↑](#footnote-ref-41)
42. For discussion of the idea of judges as non-democratic actors, see M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford, Hart Publishing, 2015) 141-142. [↑](#footnote-ref-42)
43. This headline was in reaction to the decision of the Divisional Court in the *Miller* case, concerning the need for an Act of Parliament to authorise the government triggering Article 50 TEU, and commencing negotiation over withdrawal from the European Union. See ‘Enemies of the people: Fury over “out of touch” judges who have “declared war on democracy” by defying 17.4m Brexit voters and who could trigger constitutional crisis’, *Daily Mail* (3 November 2016), at: <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>. [↑](#footnote-ref-43)
44. R Rorty, ‘Human Rights, Rationality and Sentimentality’ in *Truth and Progress: Philosophical Papers Vol. 3* (Cambridge, Cambridge University Press, 1998) 172. [↑](#footnote-ref-44)
45. *Ibid* 172. [↑](#footnote-ref-45)
46. R Rorty, *Philosophy and Social Hope* (London, Penguin, 1999) 85-86. [↑](#footnote-ref-46)
47. Rorty, n.43, 174-75 [↑](#footnote-ref-47)
48. See F Fukuyama, *The End of History and the Last Man* (Harmondsworth, Penguin, 1992). [↑](#footnote-ref-48)
49. Rorty, n.43, 182. [↑](#footnote-ref-49)
50. *Ibid* 182 [↑](#footnote-ref-50)
51. Rorty, n.45, 84-85 [↑](#footnote-ref-51)
52. See e.g. E Posner, *The Twilight of Human Rights Law* (New York, Oxford University Press, 2014). [↑](#footnote-ref-52)
53. See Hirschl, n.40. [↑](#footnote-ref-53)
54. See e.g. the language of the *Conservative Party Manifesto* (2015) 60: ‘We have stopped prisoners from having the vote, and have deported suspected terrorists such as Abu Qatada, despite all the problems created by Labour’s human rights laws. The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.’ [↑](#footnote-ref-54)
55. On other flaws in the Human Rights Act repeal debate, see A Tucker, ‘The Anti-Democratic Turn in the Defense of the Human Rights Act’ *UK Constitutional Law Association Blog* (6 July 2015), at: <https://ukconstitutionallaw.org/2015/07/06/hra-watch-reform-repeal-replace-adam-tucker-the-anti-democratic-turn-in-the-defence-of-the-human-rights-act/>. [↑](#footnote-ref-55)