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RESEARCH ARTICLE

Politicising human rights in Europe: Challenges to legal constitutionalism from the Left and the Right

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In this article I compare the political rhetoric of Podemos and the Tories. Ideologically opposed, both parties use populist rhetoric and both thematise human rights as central to their populism. The article compares the parties' uses of human rights along three dimensions: Who are human rights for? What are human rights? And how should they be achieved in practice? How Podemos and the Tories construct human rights challenges the ongoing project of European legal constitutionalism, the juridicalisation of rights which means that disputes over the interpretation of rights are referred to constitutional courts, where – ideally – they become the object of impartial and definitive decisions by judges who reason only through legal principles.

Podemos from the Left is challenging European legal constitutionalism in the name of social justice, the Tories from the Right in the name of security: both parties construct European elites (and in Podemos's case, national elites too) as a danger to democracy. Demonstrating what it means to take seriously the theoretical consequences of social constructivism - human rights are necessarily political – the article proposes a framework for the analysis of explicitly politicised human rights.

Keywords: constitutionalism; law; courts; democracy; populism; neoliberalism; social rights; migrants

Human rights are political

It is common to claim or to argue for human rights in public as if they were morally transcendent values and/or positive law.¹ But if human rights are socially constructed, historically specific rather than founded in natural law, if they are not given either ontologically or epistemologically, then human rights are political. Human rights are used strategically for particular ends, they are implicated in issues of power, access to resources, and in practical and ideal, more or less achievable, visions of how society should be governed. Human rights are not (just) moral ideals; nor are they (just) entitlements that are encoded in law. In claiming or trying to realise human rights in practice, however, there is something very powerful in the idea that human rights are *beyond* politics which is surely part of their appeal.

In Europe, it is above all positive law that has been seen as providing a secure foundation for the realisation of human rights in practice. Europe has developed the most

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robust regional system of international human rights law in the world.² The European system is understood to be underpinned by moral principles – against totalitarianism and for the peaceful integration of peoples through commitments to values of dignity, freedom and the rule of law after the horrors of World War II.³

In fact, the European legal system of human rights is better understood as two overlapping but discrete systems that have become increasingly unified in European Union (EU) law. The best known is built around the European Convention of Human Rights of the Council of Europe (ECHR); adjudicated by the European Court of Human Rights (ECtHR), it now allows individual petitions as well as inter-state complaints once domestic remedies have been exhausted. The Council of Europe has also developed the European Charter of Social Rights, which seems to be virtually unheard of outside the Council's own offices. In the EU in 2009 member states agreed to be governed by the Charter of Fundamental Rights, an appendix to the Lisbon Treaty, which retrospectively validated rulings that had already been made by the European Court of Justice (ECJ) to bring the national law of member states in line with EU law. The Charter of Fundamental Rights and the ECJ are now as much a part of the European legal system of human rights as the ECHR and the ECtHR in the member states of the EU. Although much less well-known, the Charter of Fundamental Rights is the latest stage in the ongoing juridicalisation of rights in Europe.

For more than 50 years – albeit in fits and starts – legal constitutionalism, the view that rights are *de*-politicised by referring disputes over their interpretation to constitutional courts, and that other branches of the state must defer to judges' decisions, has been the dominant model through which human rights are to be achieved in Europe. As a result, there is now effectively a kind of European constitution. It is an unusual constitution in that it has not been formally declared (it proved impossible to ratify the 'European Constitution' following 'No' votes in referenda in France and Denmark in the mid-2000s, but much of it was subsequently incorporated into the Lisbon Treaty); it is supranational but it is sometimes in an uneasy relationship with the national constitutions of the member states; and it is pluralist in the hierarchies of judgment established in different courts in the system.⁴

In contrast to the overwhelming focus of scholarship on human rights in Europe on positive law, the focus of this article is on explicitly political constructions of human rights. We will compare Left and Right constructions of human rights in the populist rhetoric of Podemos in Spain and of the Conservative Party – popularly known as the Tories – in the United Kingdom (UK). These cases were chosen because the politicisation of human rights is central to the rhetoric of both Podemos and the Tories. The article shows how legal constitutionalism is being challenged in these two cases in detail. In very different ways, both Podemos and the Tories demonstrate the limits of legal constitutionalism as a progressive project to realise human rights in the EU.

From opposite ends of the ideological spectrum, both Podemos and the Tories construct human rights as central to their populist rhetoric. Podemos and the Tories are populist according to the 'minimalist definition' of Cas Mudde in that each divides society into two homogeneous and antagonistic groups, 'the pure people' and 'the corrupt elite', and each thematises democracy as an expression of the will of the people against or beyond elites.⁵ Podemos, which is directly influenced by the work of Ernesto Laclau and Chantal Mouffe on populism and hegemony, is unusual in Europe in positioning itself on the Left.⁶ The Tories are unusual in that they make use of populist rhetoric but they do not come from outside the conventional political system. In this respect Tory populism is what Slavoj Žižek calls 'post-political populism', which he glosses as 'a mediatic administrative government legitimizing itself in populist terms'.⁷

For both Podemos and the Tories, ‘human rights’ figure in constructions of a ‘crisis of democracy’ in which self-serving elites ignore the demands of the people. For both parties the reform and reconstruction of human rights is necessary to restore ‘national sovereignty’ that is currently under threat in Europe. Coming from the Left and the Right, of course, each constructs ‘the crisis’ in quite different ways. For Podemos, it is neo-liberalisation and corruption in national and European governance that is undermining democracy, and expanding human rights is a solution to the crisis. Podemos expands and extends definitions of human rights to carry the social democratic project of Spanish anti-austerity movements into national and EU institutions of governance. For the Tories, the European system of human rights as such produces a crisis of democracy, and the solution is limiting European human rights law to ‘repatriate’ rights; to allow only law made by the British parliament to regulate national affairs.

The rhetoric of Podemos and of the Tories is ‘political’ with a small ‘p’, intended to challenge and remake the basis on which European human rights have been established so far. Politics with a small ‘p’ concerns the construction of social reality, the shaping of fundamental but everyday assumptions that make a society more or less politically, socially and economically liberal or social democratic. In order to challenge what they see as a growing chasm between European elites and national publics, both Podemos and the Tories aim to reconstruct what human rights *mean* – the subjects they enable to make claims (who?), what is framed as a human rights ‘wrong’ (what?), and what kinds of institutional reform are needed for human rights to be realised (how?).⁸ Pablo Iglesias, an honorary professor in political sciences at the Universidad Complutense in Madrid as well as the leader of Podemos, does not hesitate to theorise the party’s strategy along Gramscian lines: ‘[T]he critique of culture and of dominant ideologies [i]s the most fundamental political task’.⁹ Politics with a small ‘p’ concerns the institutions of civil society, and especially today, the media. Of course, the Tories do not use the language of Gramsci, but they also understand very well the importance of the media. In fact, Tory proposals to reform European human rights law are at least in part a response to media campaigning in the UK, which, in the overwhelmingly right-wing press, has been sustained at high-volume since the Human Rights Act was passed by a Labour government in 1998.¹⁰

At the same time, Podemos and the Tories are also engaged in ‘Politics’ with a capital ‘P’: their aim is to access and work levers of power through the state. In the first place, both Podemos and the Tories construct human rights in populist terms to further the ambitions to rule of each political party. For Podemos the language of human rights enables the party to challenge the middle ground of Spanish politics – the two-party rule established at the end of the Franco dictatorship – to claim to represent the majority of ordinary people, including those who do not identify with socialism, by substituting ‘human rights’ for the traditional language of the socialist Left.¹¹ For the Tories politicising human rights has been a way of dealing with splits in the party. In 2015 the Tory government, which has long been split between ‘modernising’ pro-Europeans (most of the government at the time was in this camp) and Euro-sceptics (some of whom wanted to leave the EU), drew up proposals to restrict the scope of European human rights law while the bill that would shape the Brexit referendum was going through parliament.¹² In Spain and the UK, who human rights are and should be for, what they are and should be, how they are to be realised – these are all now matters of party strategy and electoral competition.

Second, Podemos and the Tories are involved in ‘Politics’ in that both are concerned with the reform of national and European governance. Their radical, and radically divergent, interpretations of what human rights *should* mean in Europe today are linked to their visions and plans for national and European institutions. If the long arc of history

has so far tended towards the juridicalisation of human rights in Europe, Podemos and the Tories propose new directions, Left and Right, in the development of European human rights.

Who are human rights for?

One of the aspects of international human rights law for which Europe is most celebrated is its cosmopolitanism.¹³ European human rights law treats individuals as equally entitled regardless of their nationality. It therefore breaks down distinctions between citizens and non-citizens, citizens by birth and more recently settled groups in a country, migrants across the borders of European countries and also – though more selectively – those from further afield. This is true of the ECtHR, which accepts petitions from any individual over whom member states of the Council of Europe have jurisdiction, whether or not they are citizens of the state against which they are bringing their case, or, indeed, of any member state in the Council. It is also true of the ECJ. Christian Joppke argues that the ECJ has been explicitly concerned to equalise the rights of EU citizens with those of nationals in countries in which they are resident since the Treaty of Amsterdam in 1997; and it has also ruled to achieve the ‘near equality’ of the rights of ‘third country nationals’ (migrants from countries outside the EU) with nationals in terms of social rights to education, health care, housing and social security.¹⁴

The rhetoric of Podemos is similarly cosmopolitan in that it constructs rights in ways that blur the distinction between citizens and migrants – without eradicating it. Unlike typical national-populism on the Right, the populism of Podemos does not posit foreigners or non-citizens as ‘the enemy within’.¹⁵

Podemos is typically national-populist in that it uses the language of patriotism, representing the party as standing up for the people of the Spanish nation. As Iñigo Errejón, one of Podemos’ chief strategists puts it in Laclauian terms, ‘[It is a serious mistake] to relinquish to [Right-wing populists] the battle for hegemony in the sphere of national identification’.¹⁶ As a political party seeking election, Podemos must appeal to citizens above all – it is only citizens who can vote in national elections. The leaders of Podemos often focus on citizenship as a rallying cry. In the founding statement of the party, for example, ‘Mover ficha’ (‘Make a move’), Podemos represents itself as ‘[a] candidate for the recuperation of popular sovereignty: it’s citizens who should decide, not the selfish minority that have brought us here [to austerity cuts]’ (author’s translation).¹⁷

At the same time, however, very often the rhetoric of Podemos does not distinguish between citizens and non-nationals at all, using ‘human rights’ in ways that could be understood as encompassing both categories. And when Podemos does focus explicitly on the rights of migrants, it is to argue that they should be virtually (short of voting in national elections) equal to those of citizens. In Podemos’ ‘Collaborative Programme’ published in 2014, the sections of the programme that deal specifically with migrants, headed ‘the right to rights’, concern rights that are currently considered to be ‘limited’ by the ECtHR, including the right of undocumented migrants seeking asylum not to be detained for administrative purposes. They also include better working and living conditions for migrants, to prevent individuals and businesses taking advantage of their marginal situation; the right to live and work for five years whilst applying for refugee status; and voting rights for all migrants where they live.¹⁸ In effect, Podemos demands virtually the same social rights for resident non-citizens as for citizens whilst at the same time appealing to patriotic sentiments in order to advance those rights.

In contrast, Tory Party rhetoric is classically national-populist. In Conservative Party rhetoric on human rights, ‘the people’ is the British people, and the elites that act against the people’s interests and without accountability are European judges and bureaucrats. In addition, Tory Party rhetoric also constructs a very strong sense of ‘us’ and ‘them’ as deserving and undeserving of rights *within* the territory of the national state. In relation to human rights, the ‘enemy within’, like the enemy without, are foreigners: foreign criminals, migrants and terrorists are taking advantage of European law to infiltrate, profit from and endanger the British public. Tory Party leaders claim to support human rights. According to former Prime Minister David Cameron, in a speech objecting to a ruling of the ECHR in 2012, ‘Human rights is a cause that runs deep in the British heart and long in British history.’¹⁹ On the other hand, in a speech to the Royal United Services Institute in 2014 on the need to alter the effects of European human rights law in the UK, the former Home Secretary Theresa May congratulated her party on the fact that: ‘We have worked hard to make it easier to get rid of foreign nationals, including terrorists and terror suspects, who should not be in this country.’ She then went on to list measures her government had already taken to this end, including restricting the right to a family life, making it easier to expel people to countries where they are considered to be at risk of torture, extending secret courts and surveillance. In fact, May’s targets included not just ‘foreigners’ who are non-citizens but also some citizens. Reforming human rights law should also make it easier to deprive naturalised Britons of their citizenship – to get rid of those ‘who should not be in this country’.²⁰ These reforms are already a very substantial reduction in the protection afforded by European human rights law, for (some) British citizens and non-citizens alike.

What are human rights?

The construction of *what* human rights are and should be, their substance or content, is ongoing in European courts today. The ECHR is limited to civil and political rights (and as we have noted, the European Charter of Social Rights is of virtually no significance in the Council of Europe system). The 2009 Charter of Fundamental Rights formally incorporated the ECHR into EU law, and it also consolidated existing EU law and ECJ rulings. The charter therefore includes social as well as civil and political rights – not an absolute break with the past, but nevertheless a new beginning for the EU.

Social rights are especially prominent in the rhetoric of Podemos. It is Podemos’ emphasis on social justice and substantive equality that puts them firmly on the Left. Podemos draws on a Hispanic tradition of human rights in which social rights are as important as civil and political rights, represented in many constitutions in Latin America as well as in Spain.²¹ The social rights in question are the very extensive rights listed in the long Spanish constitution: to health care, education, housing, even the right to work. Podemos finds evidence of the violations of rights for which ‘la casta’ – corrupt and parasitic elites in Spain and Europe – is responsible in the deteriorating conditions of health, education, sanitation, pensions, housing and food suffered by the Spanish people as a result of cuts in public spending. According to the ‘Collaborative Programme’, social rights should be considered equivalent to civil and political rights, and they should be guaranteed at the national and European level.²²

In contrast, ‘social rights’ do not exist as such in the rhetoric of the Tories. ‘Social rights’ is a kind of category error: what is covered in European law as ‘social rights’ is constructed in the UK not as rights but rather as ‘benefits’ (as in ‘welfare benefits’), as ‘policy’ (education or employment policy), or (in the case of health care) as ‘the National Health

Service'. Access to public goods is certainly not constructed in terms of justiciable rights to be adjudicated in courts. In fact, the UK government negotiated an 'opt-out' from the social rights guaranteed in the Charter of Fundamental Rights before agreeing to sign it in 2009 precisely to avoid social rights being constructed as justiciable.²³

How are human rights to be achieved?

The question of 'how' human rights are to be realised is raised very acutely in explicitly political constructions of human rights. The question can usefully be broken down into two elements. The first concerns 'efficacy'. 'How?' can be analysed in part as a strategic question: 'how can human rights best be *successfully* achieved in practice?' Second, 'how' also concerns legitimacy: 'how can human rights be realised *in the right way*?'²⁴ In particular, 'how are human rights to be realised?' raises difficult questions about the best mixture and balance of law and parliamentary democracy, of judge-made law and legislation and public policy made by elected representatives. In the rhetoric of Podemos and the Tories, answers to the question 'how are human rights to be realised?' challenge legal constitutionalism as the only legitimate and efficacious way to secure human rights.

Podemos' populist rhetoric actually collapses 'legitimacy' and 'efficacy'. Social rights are not just a set of demands; the deterioration of rights is above all a *sign* that the people are being ignored, their interests and values are not respected by the leaders who are supposed to serve them in a democracy. As Pablo Iglesias puts it on his webpage, 'I want Human Rights to become the political compass of our country and of Europe.'²⁵ It is only if social rights were respected in practice – if they were 'efficacious' – that we could conclude that the people have really been represented in the institutions in which public policy and legislation are made. In this sense Podemos constructs democratic legitimacy as *intrinsically* linked to efficacy. It is only if social rights are really effective, if there is greater equality and basic rights for all, that a society could possibly be considered democratically legitimate, the outcome of the real will of the people.

Podemos' proposals concerning how rights, especially social rights, should be realised go far beyond legal constitutionalism. Podemos proposes a wide-ranging remaking of national and European institutions in order to create the conditions within which social democracy will be possible. In the short term Podemos suggests that Spain must derogate from the Lisbon Treaty to return sovereignty to the Spanish government; above all, to allow the government to intervene strategically in the national economy – in sectors like banking, public services and energy companies – for the protection of basic social rights. In the longer term, the Lisbon Treaty should be completely revised in the European Parliament to prevent or reverse inappropriate marketisation in strategic sectors of national economies.²⁶ Consultant economists commissioned by the party, Vicenç Navarro and Juan Torres López, also suggest a number of short- and long-term reforms at the national and European level, intended above all to promote investment and growth in Spain's economy following Keynesian principles. The reforms they suggest in the short term include scrapping the 'balanced budget' rule from the Spanish constitution (effectively rejecting the 'fiscal compact' imposed on Spain by the EU), raising the minimum wage (so boosting consumption and production), and enshrining a 35-hour working week (to boost employment). In the long term they suggest far-reaching reforms to EU governance, including making the European Central Bank accountable to the European Parliament, which should also be in charge of appointing its members; creating mechanisms so that surpluses and deficits are calculated on a Europe-wide rather than a member state basis; and ensuring the effective supervision of the financial system at the European level.²⁷ In

other words, what Podemos proposes in order to guarantee social rights is a thorough reshaping of the institutions of European political and economic governance. They are proposing that the Economic Monetary Union should become a political union in which fiscal, budgetary and economic policy will be subjected to the oversight of nationally elected representatives. In fact, Navarro and Lopez go so far as to suggest that beginning a serious project to reform these institutions in order to guarantee social and workers' rights should be a condition of Spain remaining a member state of the EU.²⁸

At the national level, Podemos' focus on 'efficacy' as intrinsically linked to 'legitimacy' also goes beyond legal constitutionalism, though one of the party's proposals does significantly extend the powers of the Spanish Constitutional Court. Podemos proposes that social rights to health care, education, and the basics of well-being (energy for light and heat, for example) are made fundamental rights in the Spanish constitution, equivalent to civil and political rights.²⁹ The aim is to make all legislation passed by the Spanish and the European parliaments concerning health care, education, housing, energy policy and so on subject to judicial review by the Constitutional Court. In the Spanish system politicians, judges in lower courts and individuals are all permitted to bring cases to the Constitutional Court.³⁰ If social rights were to be made fundamental, cases could be brought by any of these actors on the grounds that government legislation is inadequate for, or has violated rights to, health care, education and basic subsistence.³¹ Podemos' demand is intended to protect people in Spain from the public spending cuts and the aggressive repossession of mortgaged homes by banks to which many have been subjected since the financial crisis. They see the value of the Spanish Constitutional Court as providing a barrier against dis-possession, against the imposition of cuts to public spending whether they come from the European or the national parliament, and to predatory behaviour on the part of banks and corporations that deprive people of the necessities of civilised life. However, even their proposals to give more power to judges goes beyond legal constitutionalism as the 'de-politicising' of rights. Podemos is also demanding that the electorate should have more say in the election of judges who sit in the Spanish Constitutional Court.³² Although Podemos proposes that electing judges will 'de-politicise' the constitutional court, it seems designed rather to have the opposite effect, making judges *more* sensitive to public opinion. Podemos' strategy is to *politicise* the rulings of the Constitutional Court, at least with respect to social rights.

Podemos' demand for an expansion of the role of judges *is* somewhat surprising. After all, judges tend to come from, and to move in, the same circles as those in charge of other branches of government, as well as the heads of banks and commercial organisations. They are surely part of the elites that are so problematic for Podemos. It makes sense, however, if we consider how Podemos connects efficacy and legitimacy: it matters less who makes decisions and where than that there should be an egalitarian, inclusive outcome which guarantees the rights for citizens and non-citizens alike. If judges are bound by the Spanish constitution to respect social rights, they will have to make rulings that do so minimally at the very least. It makes strategic sense to try to build social rights as binding into the constitution (difficult though that is) since Podemos is unlikely to have a majority in parliament in the foreseeable future.³³ In addition, Podemos aims to increase pressure on Spanish elites through the organisation of 'circuitos podemos'. 'Circuitos podemos' are small, local, face-to-face meetings of neighbours or workers in the same sector. They are spaces in which those who are most affected by austerity can be consulted, solidarity can be built and, perhaps most importantly, in which issues that are of pressing importance and that are not being dealt with adequately by Spanish elites can be raised, developed and put on the agenda of parliament and of judges.³⁴

In contrast, for the Conservative Party, the question ‘how should human rights be achieved’ apparently *only* raises issues of ‘legitimacy’. The official aim of the Conservative Party as a whole (unrelated to positions on whether or not the UK should be part of the EU) is to limit the scope of both European and UK human rights law and to return rule to the British people. The Human Rights Act, which incorporated the ECHR into UK domestic law in 1998, must be repealed in order to restore ‘parliamentary sovereignty’.³⁵ European human rights law, they suggest, should only be considered *advisory* in the UK, and British judges should avoid deferring to it in making their judgements. There must be ‘limitations on individual rights in some circumstances’, they recommend that courts should be allowed to consider only ‘the most serious cases’ of violations of human rights, and that they should only interpret legislation according to the ‘clear intention’ of the British parliament.³⁶ In ‘Protecting Human Rights in the UK’, the Tories pledge to: ‘put Britain first’; to prevent the ECtHR (‘Strasbourg’) from succeeding in its attempts to ‘overrule decisions of our democratically elected Parliament’; to ‘restore common sense’; and ‘to protect human rights only in line with the will of the British Parliament and the rulings of the British courts’.³⁷

In fact, it is far from clear that it is necessary to repeal the Human Rights Act to restore parliamentary sovereignty in UK law. Richard Bellamy argues that the Human Rights Act that incorporated the ECHR into UK law is consistent with parliamentary sovereignty because it allows only ‘weak judicial review’. Neither the ECtHR nor the UK Supreme Court is allowed to ‘strike down’ legislation made by parliament; they are only allowed to ask parliament to revisit legislation they have found incompatible with the ECHR (and, in the UK, the Human Rights Act): existing legislation continues to hold until parliament has debated and passed new law. In fact, in principle, the British parliament may decide *not* to remedy the incompatibility of legislation at all; it may legally decide to pass legislation that does not comply with UK or European human rights law. In practice it seems that this has happened once; when parliament passed the Communications Act in 2003, it was advised that it might have been in breach of Article 10 of the ECHR concerning freedom of expression, but it nevertheless proceeded on the grounds that it was permitted to do so by Section 19 of the Human Rights Act. Although, as a political theorist opposed to legal constitutionalism, Bellamy is concerned that the UK parliament *may* submit to pressure from European and national judges, the fact that it is not legally bound to defer to their rulings in UK law means that it has not formally given up its legal sovereignty, and so it need not give up sovereignty in practice either.³⁸

The issue of Tory constructions of human rights in EU law is much more complex – and has, of course, become far more so since the ‘Brexit’ vote on 23 June 2016. The Tory Party has long been divided between ‘modernisers’, who are in favour of remaining in the EU for economic reasons, and those we might call ‘romantics’, who are against it on the grounds of national sovereignty. In this context it is significant that in Tory rhetoric on the need to limit human rights to restore UK parliamentary sovereignty there has been virtually no mention of the ECJ – their proposals have concerned only the ECtHR. To be sure, the ECJ is not a human rights court as such, but its rulings do concern social rights in European member states. In fact, it is widely agreed that what Alex Stone Sweet calls ‘the most powerful and influential supranational court in world history’ has made law, over-riding what states have formally agreed to in Treaties of the EU. Rather than *following* what states have formally agreed to in Treaties of the EU in terms of sharing sovereignty, the ECJ has *led* the making of EU law to such an extent that treaties – from Maastricht, to Amsterdam, to Lisbon – have followed and formalised law made by the ECJ, significantly reducing the legislative scope of parliaments in each case.³⁹

We have noted that because the ECJ has taken itself to have a mandate to harmonise the law of member states of the EU with regard to the freedom of movement across borders, many of its rulings concern ending discrimination in the enjoyment of social and workers' rights between citizens and non-citizens. The Conservative Party led by David Cameron was officially committed to cutting the national deficit and to reducing immigration, and for both reasons it sought to *re-introduce* discrimination against migrants that is not permitted by EU law (for example, as part of his reform of the UK's relationship with the EU prior to the referendum, Cameron negotiated the restriction of access to welfare benefits for European citizens from outside the UK, which goes against the principle of the free movement of people that has been so central to the European economic project). It is surprising, therefore, that the ECJ is not mentioned in any of the Tories' proposals to limit European human rights law.

Why do the Tories thematise the power of the ECtHR, which does *not* impact on parliamentary sovereignty, but not that of the ECJ, which *does*? Felix Scharpf argues that the rulings of the ECJ tend to be rather obscure, technical and focussed on small but substantive changes to national law. Scharpf argues that it is difficult for politicians (even those who are absolutely opposed to the EU) to know how to address the ECJ's rulings. Cases are referred to the ECJ by national courts and become law through those courts; because they do not go through parliaments, and they often seem to involve detailed and highly technical but apparently quite trivial changes, it is difficult for any politicians, even those who are opposed to the EU, to engage the public in mobilising against their wider consequences.⁴⁰ It is presumably because they are difficult to dramatise that the ECJ's jurisprudence has received so little attention in the generally Euro-sceptic UK media, especially compared to the rulings of the ECtHR, which are routinely vilified in the right-wing press.⁴¹

The rhetoric, and perhaps even more importantly the *silences*, the gaps in that rhetoric, through which the Tories construct human rights, contributes to what Habermas calls the 'technocratic integration' of the EU. Habermas argues that without *political* integration, including a strengthening of the European Parliament and clear protection for the constitutional arrangements of the member states (along the lines argued for by Podemos), the dominant structural tendencies in the EU that are oriented towards marketisation will continue, increasingly undermining national solidarity without generating solidarity on a wider, European scale.⁴² The jurisprudence of the ECJ has contributed to marketisation. The general principle of the ECJ's jurisprudence is that barriers to mobility must be broken down across EU borders. In practice, then, freeing financial, trade and labour markets is just as likely to result in the *removal* of workers' rights and social protection as it is to ending discrimination between different member states. Felix Scharpf lists rulings in the twenty-first century that have gone against safeguarding workers' and social rights, subordinating the right to strike to the freedom of establishment of business, the right to collective bargaining and legislative wage determination to the freedom of service provision, and the legislative determination of corporate governance to the freedom of capital movements.⁴³ People in the UK, where marketisation has advanced beyond most other countries in the EU, may have found workers' and social rights protected in the short term because of the UK's membership of the EU. But in the absence of counter-balancing *re-regulation* through European political institutions, Habermas argues that social protectionism will be weakened throughout Europe over the longer term, fostered in part by the efforts of the ECJ to enhance the freedom of movement of goods, money and persons across borders. According to Habermas, all that is necessary for technical integration and marketisation to continue is that politicians in Europe ignore or downplay the need for European-wide political integration.⁴⁴ Effectively, by thematising the human rights jurisprudence of

the ECHR as a danger to national sovereignty, whilst allowing the far more wide-reaching structural consequences of the jurisprudence of ECJ to continue to be ignored in the run up to the referendum in 2016 on whether the UK should remain a member of the EU, this is just what pro-European Tories were doing: they have been passively, even invisibly, trying to shape European institutions as liberalising, de-regulating, marketising.

Challenging legal constitutionalism

In this article we have seen how Podemos and the Tories are politicising human rights in Europe. Both parties thematise human rights as central to their projects for returning power to the people. In this respect, both challenge the foundations of European human rights as guaranteed through legal constitutionalism. They construct what judges do in national and (selectively) European courts as politics – ‘politics by means of law’. The European project for realising human rights has answered the ‘*how?*’ question by giving judges oversight to decide *who* human rights are for, and, ultimately, *what* they are – how they should be interpreted and defined. For Podemos, rights are far more than interpretations of law decided by judges: they are a moral compass, a measure of the strength of democracy, and a way of defining and demanding standards – including of material well-being – that everyone in a society should enjoy. In contrast, for the Tories, the juridicalisation of rights undermines democracy: decisions over human rights should not be left to judges (though as we have noted, for the Conservative Party there is a problem where judges interfere with matters of national security, and no problem where they are involved in opening up markets).

The emphasis Podemos puts on human rights is not shared by other left-wing populist parties in Europe: human rights are not notably thematised by Syriza in Greece, for example, with which Podemos shares a platform in the European Parliament; nor are ‘rights’ one of the themes of the populist Five Star Movement in Italy. Podemos’ constructions of human rights have, as we have noted, been influenced by social movements and populist parties in Latin America, as well as by post-Marxist political theory. ‘Human rights’ is a language within which Podemos has been able to campaign for social justice and equality free from the historical and ideological baggage of the socialist Left in Spain. The rhetoric of human rights is in part at least a tactic; a short-term strategy, intended to help Podemos win seats in the Spanish and European parliaments. However, given Podemos’ unexpected electoral success, which seems to suggest that their rhetorical tactics have been successful, human rights may also feature in the longer-term strategy of the party to build counter-hegemony, a new common-sense through which to resist neo-liberalisation and to transform institutions of governance in Spain and Europe.⁴⁵ As a political party that has taken indignation from the streets and turned it into policy proposals in the meeting rooms of the EU and of Spanish government, Podemos is an inspiring model of how to link European and national elites with the concerns of ordinary people.

The rhetoric of the Tories on human rights has been similarly strategic. It seems there has been a willingness amongst leaders of the (ironically) pro-European side of the party to sacrifice the ECHR as a matter of internal party politics. Though the sacrifice may not be entirely cynical: the Tory campaign against European human rights fits very well with the traditionally racialised authoritarian emphasis of the party on matters of policing, crime and national security.⁴⁶ At the same time, the pro-European wing of the party has clearly had no intention of allowing national-populism to disrupt business. For this wing of the party the gamble of the Brexit referendum, the hope that it would heal divisions in the party, has clearly and spectacularly failed. Nevertheless, under whatever conditions

the UK leaves the EU, and given that UK politicians will no longer have a voice inside EU institutions, the long-term strategy of the ‘modernisers’ in the Tory Party will remain, as ever, a Europe that, in Margaret Thatcher’s words, ‘wakes up to this modern world of competition and flexibility’.⁴⁷ And although the political vision of the ‘modernisers’ is currently under pressure after the referendum, the Tories’ strategic construction of human rights – combining national-populism that enables the strengthening of security especially with regard to minorities, and neo-liberalism that enables what remains of the welfare state to be quietly dismantled behind the scenes – is surely just as an inspiring model for other political parties in Europe as is Podemos’ vision of social democracy.

The rise of populism in Europe, more typically on the Right than on the Left except in the Mediterranean states of Spain, Greece and Italy, suggests that the challenges Podemos and the Tories represent to European assumptions about the juridicalisation of human rights may well have a life beyond these particular party political projects. As such, the analysis I have presented in this article not only exemplifies explicitly political uses of human rights in Europe today, it also illustrates the value of taking the theoretical implications of social constructivism seriously. If human rights are always political – never just moral values or entitlements encoded in law – ultimately they can only be won and maintained through political action. Podemos’ radically democratic, cosmopolitan vision of human rights will only be won through political action, in mediated publics, party politics and parliaments. In contrast, given that that ‘technocratic integration’ in the EU is already underway, it is enough not to interfere with existing EU governance for it to continue – though clearly the gamble of Brexit has complicated this strategy for pro-European Tories in the UK. If the technocratic integration of the EU does continue, it is clear that human rights in Europe will never come close to the ideals of radical democracy and cosmopolitanism, the possibilities of human rights represented by Podemos.

In terms of the now very uncertain future of human rights in the UK (and I am writing this in the feverish days after the Brexit referendum), it is perhaps worth noting that leaving the EU does not mean leaving the Council of Europe because, though overlapping, they are quite separate systems of human rights law. The UK is still a signatory to the ECHR, the ECtHR will still hear cases brought by individuals against the UK (including by non-nationals), and the UK parliament will still be required to respond to the court’s rulings. The UK is also a signatory to the little-known European Charter of Social Rights (ECSR) of the Council of Europe. The ECSR covers all the social rights included in the Charter of Fundamental Rights of the EU, but the mechanisms for creating compliance amongst member states do not involve judge-made law. Compliance with the ECSR is monitored through the submission of ‘activity reports’ by states, which are then assessed by a panel of experts – the European Committee of Social Rights. Some states (though not the UK) have also agreed that nongovernmental organisations may submit reports of non-compliance. It is then up to governments to take the necessary measures in law and in practice in order to meet their commitments to the ECSR – and effectively to other governments, citizens and residents in member states of the Council of Europe (which includes those in Russia and Turkey). The Council’s mechanisms for realising social rights rely on politics and persuasion rather than on judicial rulings. There is no doubt that the ECSR is practically unknown despite the fact that it was ‘relaunched’ in the ‘Turin process’ that began in 2014 and that is still ongoing. But although it is under-used now, for those of us in the UK still committed to participation in a Europe-wide project to realise social rights, although it is undoubtedly cumbersome and bureaucratic, the ECSR may be our best, indeed our only, hope.

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Notes

1. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2003).
2. Philip Alston and Ryan Goodman, eds, *International Human Rights*, 4th ed. (Oxford: Oxford University Press, 2013).
3. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2014).
4. Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', *Global Constitutionalism* 1, no. 1 (2012): 53–90; Miguel Maduro, 'Europe and the Constitution: What if this is as Good as it Gets?', in *Rethinking European Constitutionalism*, ed. J.H.H. Weiler and M. Wind (Cambridge: Cambridge University Press, 2000).
5. Cas Mudde, *Populist Radical Right Parties in Europe* (Cambridge: Cambridge University Press, 2007).
6. Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (London: Verso, 1985); Ernesto Laclau, *On Populist Reason* (London: Verso, 2005); Ínigo Errejón, 'Ernesto Laclau, teórico de la hegemonía', 2014, https://www.academia.edu/6751485/Ernesto_Laclau_te%C3%B3rico_de_la_hegemon%C3%ADa (accessed 8 August 2015); Ínigo Errejón and Chantal Mouffe, *Podemos: In the Name of the People* (London: Lawrence and Wishart, 2016). The leaders of Podemos go to some trouble to deny that they are on the Left because they do not think the Right/Left distinction is meaningful to voters in Spain. In fact, they believe that it makes many voters nervous who would otherwise support their programme for social justice. However, concerned as they are with social justice and equality, the leaders of Podemos certainly do not deny their affiliation with the values around which the Left traditionally mobilises. And outside Spain they are routinely identified as a 'left-wing' party.
7. Slavoj Žižek, 'Against the Populist Temptation', *Critical Inquiry* 32, no. 3 (2006): 551–74; see also Andrew Arato, 'Political Theology and Populism', in *The Promise and Perils of Populism: Global Perspectives*, ed. Carlos de la Torre (Kentucky: University of Kentucky, 2015).
8. In 'Reframing Justice', Nancy Fraser outlines the importance of these questions as meta-level framings that have become necessary as Westphalian limits of justice are called into question in a globalizing world: Nancy Fraser, 'Reframing Justice in a Globalizing World', *New Left Review* 36 (2005): 69–88. On the importance of these questions to human rights: Kate Nash, *The Cultural Politics of Human Rights: Comparing the US and UK* (Cambridge: Cambridge University Press, 2010): 15–16.
9. Pablo Iglesias, *Politics in a Time of Crisis: Podemos and the Future of a Democratic Europe* (London: Verso, 2015); Pablo Iglesias, 'Understanding Podemos', *New Left Review* 93 (2015): 7–22.
10. Francesca Klug, *Values for a Godless Age, the Story of the UK's New Bill of Rights* (Harmondsworth, Middlesex: Penguin, 2000); Nash, *Cultural Politics of Human Rights*.

11. Iglesias, *Politics in a Time of Crisis*, 203.
12. Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', 2015, https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf (accessed 25 August 2015).
13. Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2008).
14. Christian Joppke, *Citizenship and Immigration* (Cambridge: Polity, 2010).
15. In populist rhetoric there is very often an 'enemy within'. Those who are worthy of respect – 'the heartland' – are distinguished from the unworthy. While worthy citizens are honest and unassuming, the unworthy take advantage of the very decency of 'ordinary people' to further their own interests. As Taggart puts it, the virtues of 'the people' are the mirror opposite of the vices of the demonised Others, which are always scheming elites, and very often calculating villains within civil society too: Paul Taggart, *Populism* (Buckingham: Open University Press, 2000), 93.
16. Errejón and Mouffe, *Podemos*.
17. Podemos, 'Mover ficha: convertir la indignación en cambio político', 2014, <http://tratarde.org/wp-content/uploads/2014/01/Manifiesto-Mover-Ficha-enero-de-2014.pdf> (accessed 29 April 2016).
18. Podemos, 'Documento Final Del Programa Colaborativo', 2014, <http://www.congde.org/contenidos/descargar/attachedfiles/1175/original?1400068557> (accessed 25 August 2015).
19. Alston and Goodman, *International Human Rights*.
20. Theresa May, 'On Counter-terrorism', speech delivered to the Royal United Services Institute, London, 2014, <https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism> (accessed 25 August 2015).
21. Paulo G. Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', *Human Rights Quarterly* 25 (2003): 281–313.
22. Podemos, 'Mover ficha'.
23. There has been a good deal of discussion about whether Protocol 30, the 'opt out' from the charter, would actually be effective in practice. See The House of Commons European Scrutiny Committee Report, 2011, <http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf> (accessed 28 April 2016). Since the 'Brexit' referendum, however, once the negotiations for the UK to leave the EU are complete, ECJ rulings will no longer apply at all in the UK, making the question redundant.
24. This distinction is inspired by Nancy Fraser's analysis of the possibilities of 'scaling up' the national public sphere: Nancy Fraser, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World', in *Transnationalizing the Public Sphere*, ed. Kate Nash (Cambridge: Polity, 2014).
25. Pablo Iglesias, 'Podemos – Pablo Iglesias', 2014, https://www.youtube.com/playlist?list=PLhKnrz7gbJ0Eurun8HblPX4i_Q2WX5ss6 (accessed 4 January 2016).
26. Podemos, 'Documento Final', 28; Podemos, 'Directiva Derechos Humanos y Control Ciudadano de Podemos', 2014, <http://www.lasexta.com/a3document/2014/05/30/DOCUMENTS/00001/00001.pdf> (accessed 4 January 2016).
27. Vincenç Navarro and Juan Torrez López, 'Un Proyecto Económico Para La Gente', 2014, <https://web-podemos.s3.amazonaws.com/wordpress/wp-content/uploads/2014/11/DocumentoEconomicoNavarroTorres.pdf> (accessed 29 April 2016).
28. *Ibid.*, 18.
29. Vera Gutiérrez Calvo y José Manuel Romero, 'Propuesta para la reforma constitucional, partido a partido', *El País*, 6 December 2014.
30. Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy', *West European Politics* 25, no. 1 (2002): 77–100.
31. Amending a rights provision of the Spanish constitution is very difficult: it requires a 'super-majority' in both houses, the Cortes and the Senate, of two-thirds of the vote, followed by the dissolution of parliament and ratification of the proposed reform by referendum. No such changes have been made to rights in the Spanish constitution since it was established in 1978: see Stone Sweet, 'Constitutional Courts and Parliamentary Democracy', 91.
32. Calvo y Romero, 'Propuesta para la reforma constitucional'.
33. Thanks to Richard Bellamy for this point.

34. Luis Gomez y Carmen Pérez, 'Los círculos del descontento', *El Pais*, 2 June 2014; Podemos, 'Principios Organizativos', 2014, <http://podemos.info/wp-content/uploads/2015/06/Documento-organizativo.pdf> (accessed 25 August 2015).
35. Conservative Party, 'Protecting Human Rights in the UK'.
36. *Ibid.*, 6; Angela Patrick, 'Incoherent, Incomplete and Disrespectful: The Conservative Plans for Human Rights', 2014, <http://ukhumanrightsblog.com/2014/10/03/incoherent-incomplete-and-disrespectful-the-conservative-plans-for-human-rights-angela-patrick/> (accessed 18 August 2015).
37. Conservative Party, 'Protecting Human Rights in the UK'.
38. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Richard Bellamy, 'Political Constitutionalism and the Human Rights Act', *International Journal of Constitutional Law* 9, no. 1 (2011): 86–111.
39. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); Fritz Scharpf, 'The Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy', Max-Plan-Institut Für Gesellschaftsforschung Working Paper 09/12 (2009).
40. Scharpf, 'The Double Asymmetry of European Integration', 9.
41. The structural consequences of the ECJ are not specifically thematised in the rhetoric of Podemos either – even though democratic reform of EU institutions is central to their project for securing rights.
42. Jürgen Habermas, *The Lure of Technocracy* (Cambridge: Polity, 2015).
43. Scharpf, 'The Double Asymmetry of European Integration', 20–1.
44. Habermas, *The Lure of Technocracy*.
45. Podemos has enjoyed remarkable electoral success, winning five seats in the European Parliament in 2014, just months after it was formed, and 69 seats in the elections in December 2015, forcing the two major parties in Spain to consider government by coalition for the first time in Spanish history. In the elections of June 2016, Podemos joined with other small parties on the Left and won 71 seats – not enough to trouble the Partido Popular which will now form a government without a majority, but still impressive considering that the party is so new and so radical.
46. Stuart Hall, *The Hard Road to Renewal: Thatcherism and the Crisis of the Left* (London: Verso, 1988).
47. Quoted in Habermas, *The Lure of Technocracy*, 88.