The Contradictions of the UK Human Rights Act

Thomas Phillips*

Abstract

The UK's Human Rights Act 1998 is a target of legislative action aimed at undermining its ability to protect universal human rights. This article sets out to characterise those ongoing assaults as an example of *populist constitutionalism*. Understanding them as such is, I will argue, a necessary first step in formulating defensive strategies that might effectively protect the future of legal human rights protection in the UK. In order to come up with such a strategy, it is necessary to take a critical look at how the Human Rights Act has been bound-up with social, political, and economic processes that have led to the seemingly inexorable rise of populism across the globe. With those imbrications in mind, I propose some modest but ambitious legal reforms that might empower bottom-up human rights movements to dig-up authoritarian populism at its roots.

Keywords

Populism - human rights - neoliberalism - constitutionalism - economic and social rights - trade union rights.

1. Introduction

The Human Rights Act 1998 (HRA) has been the subject of opprobrium in the UK ever since its introduction by Tony Blair's New Labour government. The current Conservative government has long been in favour of replacing it with a new Bill of Rights. The reform proposals took some time to materialise but began to get off the ground post-Brexit with the introduction of the Bill of Rights Bill[1]. Simultaneously the government appears to have adopted a new strategy of selectively disapplying parts of the Act whenever it sees fit, as reflected in the recent Illegal Migration Act. The aim of this article is twofold. First, to evaluate these recent developments as a type of *populist constitutionalism*[2]. Second, to reflect on the Act's possible

* Senior Lecturer, Liverpool John Moores University.

[1] Full text available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf (accessed 24 August 2023).

[2] According to Blokker, populist constitutionalism is characterised by its "claim to directly represent the people and to overcome the significant constraints to popular rule…in liberal or legal constitutionalism" while pursuing a course of action that "violates key dimensions of democratic constitutionalism, such as those of pluralism, inclusiveness, and actual civic participation…". P Blokker, 'Populism as a constitutional project' (2019)17 *International Journal of Constitutional Law* 535, 536.

future and what can be done to defend it. In order to meet the second aim, it will be necessary both to take a critical view of the Act's imbrications with the populist whirlwind that threatens to destroy it *and* to salvage the valuable core of the HRA and offer a constructive set of reform proposals.

Drawing on the existing critical literature, it will be argued that the HRA is unable to grasp at the root causes of populism because it (and the European Convention on Human Rights that it incorporates) drives a wedge between the political and the economic. After elaborating upon the causes and consequences of that wedge, I argue that defending the HRA and its important achievements requires fundamental social, economic, and political change, but that the limited scope of human rights law means that securing that change is a task that necessarily falls to bottom-up human rights movements. With that aim in mind, I sketch some modest but ambitious reforms to the legal framework that could help to bridge the gap between the political and the economic and empower such movements to aim at a radically different order that better meets the existential challenges of our time.

2. The Human Rights Act 1998: Constitutional Balancing and Legitimacy

Before evaluating the main criticisms of the HRA, it is necessary to say a few words about its architecture and its place in the UK's uncodified constitution. On the latter, it may be said that that the 'central organising principle' of the UK constitution is the legally unlimited legislative sovereignty of Parliament.[3] It is also claimed that insofar as human rights are concerned, the UK's constitutional tradition is one of 'freedom under the law rather than the granting of positive rights'[4] or, to put it another way, *liberties* rather than enumerated rights. This claim must, however, be nuanced in the context of the common law's development of a certain limited set of rights[5] that the courts were (and are) willing to protect from executive action, even in the face of hostile primary legislation, through creative mechanisms of statutory interpretation such as the principle of legality.[6] Moreover, it is a long-standing constitutional principle that legislation ought to be construed in a manner that gives effect to the UK's obligations under international law—including its human rights obligations—insofar as it is 'reasonably capable'

[3] M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Bloomsbury 2017) 23.
[4] A Lyon, *Constitutional History of the United Kingdom* (Cavendish Publishing 2003) 446.
[5] *See* for example *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115 on the right of prisoners to be interviewed by journalists.
[6] The principle of legality is 'a principle of statutory interpretation which is typically taken to mean that if Parliament wishes to infringe basic common-law norms it must do so through express language or by necessary implication'. J Varuhas, 'The Principle of Legality' (2020) 79(3) *Cambridge Law Journal* 578.

of being so construed.[7] The two constitutional traditions of parliamentary sovereignty and freedom under the law go hand-in-hand, for if Parliament's legislative authority is legally unlimited then it may as easily limit the scope of human freedom as grant new positive rights,[8] and there is no room for a legally entrenched bill of rights. The HRA was therefore designed to walk a tightrope between effectively domesticating the UK's human rights obligations under the European Convention on Human Rights (ECHR) and preserving the constitution's 'central organising principle' of parliamentary sovereignty.[9]

The resulting HRA made it unlawful for a public authority to act in a way which is incompatible with a Convention right[10], provided victims of such unlawful behaviour a power to bring legal proceedings against the authority[11], and required domestic courts and tribunals to 'take into account' the European Court of Human Rights' (ECtHR) jurisprudence.[12] Deference to parliamentary sovereignty is clearly visible in the carefully circumscribed enforcement powers of the courts, which are limited to interpreting incompatible primary legislation in-line with Convention rights 'insofar as it is possible to do so'[13] and, in the final resort, declaring legislation incompatible with Convention rights.[14] Declarations of incompatibility do not affect the validity, operation or enforcement of that legislation,[15] rather the onus shifts to the political sphere, Parliament and the executive,[16] to take remedial action if they so choose.

At first glance, the HRA preserves both aspects of Dicey's orthodox statement of parliamentary sovereignty by inaugurating a weak form of judicial review. The lack of a strong judicial strike-down power means that parliament retains the right to 'make or unmake any law,'[17] even a law that contradicts substantive human rights. It also appears to acknowledge the principle that 'no person or body is recognised by the law of England as having a right to override or set aside

[7] *Garland v British Rail Engineering Ltd* [1983] 2 A.C. 751 [771].
[8] On statutory rights *see*, for example, The Freedom of Information Act 2000.
[9] The aim of the New Labour government that introduced it was to weave Convention rights into UK jurisprudence by allowing people to enforce those rights against the state in British courts, facilitating British input into the interpretation of Convention rights without providing a mechanism for judicial override of primary legislation or any kind of entrenchment. Labour Party, 'Rights Brought Home: The Human Rights Bill' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf (accessed 7 July 2023).
[10] Human Rights Act 1998, s 6.
[11] *Ibid*, s 7.
[12] *Ibid*, s 2.
[13] *Ibid,* s 3.
[14] *Ibid,* s 4.
[15] *Ibid*, s 4(6).
[16] *Ibid*, s 10.
[17] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1915) 3.

the legislation of Parliament'[18] since the judicial interpretative power in section 3 HRA is circumscribed by the phrase 'insofar as it is possible to do so' and, in any event, Parliament could opt to have the last word on rights protection by legislatively overriding a court ruling with which it does not agree, and by choosing to ignore a section 4 declaration of incompatibility. But behind these formal features of the HRA its concrete operation reveals a strong challenge to the orthodox view of parliamentary sovereignty. For example, although the House of Lords in *Ghaidan v Godin-Mendoza*[19] made it clear that section 3 does not permit the courts to 'adopt a meaning inconsistent with a fundamental feature of the legislation' or to contradict the legislation's 'underlying thrust'[20] it also acknowledged that the interpretative obligation 'is of an unusual and far-reaching character' that may require the court to 'depart from the intention of the Parliament which enacted the legislation'.[21] It went on to effectively re-write parts of the Rent Act 1977 to render it compatible with Convention rights. Though not explicitly characterised as such, Tucker points out that in *Ghaidan* the court effectively 'overrode Parliament', thereby violating Dicey's negative dimension of parliamentary sovereignty, namely, that no body can override primary legislation.[22] Moreover, as Aileen Kavanagh underscores, though Parliament formally retains 'the last word' on rights protection it is not, in practice, keen to exercise that right.[23]

Presumably alive to the legitimacy problems this could create, the courts have reciprocated by building-in a considerable degree of deference to the legislature. To take a recent example, in *R (SC and others) v Secretary of State for Work and Pensions and others*[24] a unanimous Supreme Court set out its approach to assessing whether a restriction of qualified Convention rights by the state is proportionate – an approach based on giving 'appropriate respect to the assessment of democratically accountable institutions'[25] and '[respecting] the boundaries between legality and the political process'.[26] As the court put it,

---

[18] *Ibid*, 3-4.
[19] [2004] 2 A.C. 557.
[20] *Ibid* [33] per Lord Nicholls.
[21] *Ibid* [30].
[22] Adam Tucker, 'Parliamentary Sovereignty and the Ingenuity of the Human Rights Act' (2012) 3(1) *Jurisprudence* 307.
[23] Aileen Kavanagh, 'What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1008. *Also see* Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).
[24] [2022] A.C. 223.
[25] *Ibid*. 159.
[26] *Ibid*. 162.

> The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues.[27]

Responsibility for human rights protection in the UK is therefore shared between Parliament and the courts. Both institutions play a role in ensuring that the UK meets its binding obligations under the ECHR. As the next section will show, it might also be the case that in the era of authoritarian populism Parliament will be willing to exercise its power to have the 'final word', rendering it less theoretical than once seemed the case.

The remaining question is a difficult but unavoidable one, namely, whether it is legitimate for unelected and unaccountable courts to have this kind of role in determining how the UK's abstract human rights obligations are concretised. To answer that question, it is necessary to first draw a crucial distinction between two analytically distinct concepts: *justice* and *legitimacy*. The former is outcome-oriented and concentrates on the supposed correctness of human rights decisions. The latter is process-oriented and focuses on how human rights decisions are brought about, and what makes those decisions legitimate in a democratic society.[28] Much opposition to the HRA rests on the claim that its supporters put their own (liberal) conception of justice ahead of concerns about the allocation of human rights decisionmaking power to the non-democratic judiciary. In other words, for supporters of the HRA it is said to be more important to reach a 'correct' decision (as they see it) than it is for the decision to be reached through a democratically legitimate process that everyone can accept. Claims of this kind, with important differences, have been made by eminent former Supreme Court judges[29] and legal philosophers,[30] as well as the UK government (see below). The problem with this line of argument is that the UK constitution has evolved in a majoritarian and centralised direction: its first-past-the-post electoral system tends to return single-party governments and the executive tends to hold great (though not complete) sway over the sovereign legislature. In that context, the HRA can be seen as a constitutional nodal point at which marginalised and ignored groups can have their voices heard and have their concerns

---

[27] *Ibid*, [161].
[28] T Hickey, 'Legitimacy – *not Justice* – and the Case for Judicial Review' (2022) 42(3) *Oxford Journal of Legal Studies* 893, 895.
[29] J Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019).
[30] J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *The Yale Law Journal* 1346.

forced onto the agenda. It therefore alleviates the pathologies of the UK's majoritarian democracy and, as Kavanagh points out, can help to secure *effective* rather than just *formal* participation for plural groups.[31] By adding this imperfect but important steam outlet, the HRA may in fact contribute to, rather than distract from, the legitimacy of the UK's constitutional arrangements.[32] Even moreso given the space afforded to democratic deliberation through the UK's flexible constitutional amendment procedures.[33] This is not to say, however, that the mechanisms of the HRA are entirely unproblematic. Legitimacy is not a binary desideratum, existing instead on a sliding scale. Though the HRA might enhance the overall legitimacy of the UK's centralised and majoritarian constitution, it might also be the case that there are other, more democratic, ways of protecting human rights that are much *more* legitimate. On that score, a strong normative argument is made by democratic political constitutionalists that we need 'much more expansive thinking about democratic alternatives to human rights law'.[34]

In the following sections, I hope to paint a picture of government criticisms and reform proposals that instrumentalise these legitimacy concerns and put them in service of a populist constitutionalist project aimed not at finding more democratic ways of protecting rights, but at undermining their universality and concentrating executive power.

3. Government Reform Projects

There is nothing new in UK constitutional discourse about proposals to reform the HRA or to replace it with a Bill of Rights. In fact, criticism of the HRA and proposals for its reform have been *de rigueur* for UK governments and mainstream political parties ever since the Act's introduction.[35] Much of this has been driven by intense media hostility to the Act, which tends to focus on some core populist themes such as hostility to foreign elite judges, immigrants, and prisoners.[36] Gordon Brown's New Labour government, for example, appeared keen to yield to some of this media sensationalism by floating the idea of a *British* Bill of Rights and Duties

[31] A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron', (2003) 22 *Law and Philosophy* 451.
[32] Hickey (n 28).
[33] *See* C Ignacio Guiffré, 'Deliberative constitutionalism "without shortcuts": On the deliberative potential of Christina Lafont's judicial review theory' (2023) 12 *Global Constitutionalism* 215.
[34] M Gordon, 'Instrumentalism in human rights and the media: Locking out democratic scepticism?' in M Farrell, E Drywood and E Hughes, *Human Rights in the Media: Fear and Fetish* (Taylor & Francis 2019).
[35] For a flavour of the main political parties' evolving positions *see* Liberal Democrats, *For the People, By the People* (2007); Labour, *The Governance of Britain* (2007); Labour, *Rights and Responsibilities: developing our constitutional framework* (2009); Conservatives, *Human Rights Act Reform: A Modern Bill of Rights* (2021).
[36] *See* D Mead, 'They offer you a feature on stockings and suspenders next to a call for stiffer penalties for sex offenders: Do we learn more about the media than about human rights from tabloid coverage of human rights stories?' in Farrell, Drywood and Hughes (n 34).

that would add 'specifically British rights'[37] to the existing roster and emphasise the importance of human responsibilities[38] - a clear attempt to address the implication that the HRA is all about defending 'the Other' against the wishes of the authentic majority.[39] Though this ran the risk of turning into 'a surrogate for anti-outsider sentiments'[40] the key difference between then and now is that the early ideas were about building on the HRA's edifice without altering its enforcement mechanisms[41] whereas more recent attempts are concerned with narrowing the scope of existing rights, severely weakening the HRA's enforcement mechanisms, and empowering the executive to act on anti-outsider sentiments.

The current Conservative government came to power on the back of a manifesto pledge to 'update the Human Rights Act'.[42] In December 2020, it established the *Independent Human Rights Act Review* (IHRAR) under the chairmanship of Sir Peter Gross to examine the operation of the HRA and its impact on the separation of powers. One year later, the IHRAR produced a 570-page report that identified some flaws in the HRA (for example the 'troubling' expansion of its extra-territorial scope)[43] and proposed some modest reforms (for example an amendment to section 2 making it clear that domestic legal sources ought to be applied before taking into account ECtHR case law,[44] and an amendment to section 3 asserting that the duty to interpret statutes compatibly with Convention rights only applies when normal rules of statutory interpretation are insufficient[45]) but ultimately supported the existing framework of the HRA, which was thought to strike a delicate constitutional balance in separation of powers terms while contributing to a productive judicial dialogue between UK courts and the European Court of Human Rights (ECtHR). Shortly thereafter, the government produced a consultation paper on HRA reform that drove a coach and horses through the IHRAR's report.[46] Though promising

---

[37] Labour, 'The Governance of Britain' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf (accessed 7 July 2023).
[38] Labour, 'Rights and Responsibilities: developing our constitutional framework' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228938/7577.pdf (accessed 7 July 2023), 14.
[39] The then Justice Secretary explicitly suggested that this was indeed an explanation for the government's reformist intentions. Joint Committee on Human Rights, 'A Bill of Rights for the UK?' (2008) 94.
[40] *Ibid.* 84.
[41] Labour (n 38) 4.29.
[42] The Conservative and Unionist Party, 'Manifesto 2019' https://www.conservatives.com/our-plan/conservative-party-manifesto-2019 (accessed 7 July 2023).
[43] The Independent Human Rights Act Review https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf (accessed 7 July 2023), 335.
[44] *Ibid.* 23.
[45] *Ibid.* 177.
[46] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (CP 704, 2021).

to remain committed to the ECHR, which is baked into the UK's devolution arrangements (including, crucially, the Good Friday Agreement) and its post-Brexit relationship with the European Union, the consultation paper set-out keep the same suite of ECHR-derived rights but to explore options for changing the mechanisms through which they are applied and interpreted.

Despite the fact that the UK's devolved nations strongly opposed the government's proposals,[47] the eventual product of the consultation was the *Bill of Rights Bill*, which was laid before Parliament in June 2022. It now appears to lie on the scrapheap after the Justice Secretary informed Parliament in June 2023 that the government no longer intends to proceed with it. In its essentials, the Bill would have repealed the HRA but kept the same set of ECHR-derived rights and continued to make it unlawful for a public authority to contravene them. It would have attempted, however, to make UK courts adopt restrictive interpretations of those rights[48] and be more deferential to Parliament's judgment about the concrete application of rights.[49] It would also have introduced a new permission stage for human rights claims.[50] Its centrepiece was arguably the abolition of the interpretative obligation under section 3 combined with the retention of the declaration of incompatibility.[51] Section 3 is the primary remedial option for UK courts under the HRA due to its ability to provide an immediate remedy for victims of human rights violations. Section 4 declarations are of much more limited utility given the significant amount of time it takes for Parliament to eventually act upon them.[52] Importantly, the Bill also contained a number of provisions aimed specifically at limiting the rights of prisoners[53] and asylum-seekers.[54] In fact, as the Joint Committee on Human Rights perceptively pointed out, the entire Bill seemed to be designed as 'a vehicle for addressing a small number of specific issues'.[55] The Bill was problematic to its core - even prominent

---

[47] Scottish Government, 'Response by the Scottish Government' https://www.gov.scot/publications/human-rights-act-reform-consultation-scottish-government-response/ (accessed 7 July 2023); Welsh Government, 'The Welsh Government's Response to the Consultation launched by the UK Government on 14 December 2021' https://www.gov.wales/written-statement-welsh-government-response-uk-government-consultation#:~:text=In%20December%202021%2C%20the%20UK,consultation%20closed%20on%208%20March. (accessed 7 July 2023).
[48] Bill of Rights Bill (n 1), clauses 3, 5.
[49] *Ibid.* clause 7.
[50] *Ibid.* clause 15.
[51] *Ibid.* clause 10.
[52] The Joint Committee on Human Rights notes cases where it has taken four to five years for Parliament to remedy legislative incompatibilities. Joint Committee on Human Rights, *Legislative Scrutiny: Bill of Rights Bill* (2023 HC 611, HL 132), 95.
[53] Bill of Rights Bill (n 1), clause 6.
[54] *Ibid.* clauses 8, 20.
[55] Joint Committee on Human Rights (n 52), 9.

opponents of human rights law criticised its attempt to create a gap between the UK and Strasbourg protection of ECHR rights in such a way that domestic law would persistently diverge from the UK's international obligations.[56] Given the fact that declarations of incompatibility are unlikely to be considered an 'effective remedy before a national authority' under Article 13 of the ECHR[57], and the fact that the Bill attempted to drive human rights standards lower than those established by the ECtHR, the end result would have been to send more claimants to the Strasbourg court which would have issued more findings against the UK, less input into the court's jurisprudence by UK courts, and a wave of re-litigation.[58] Moreover, the ECHR is so deeply embedded in the UK's constitutional architecture as well as its international relations that even in the absence of formal legal entrenchment it is difficult for any government to resile from those obligations. By remaining a party to the ECHR while trying to loosen its constraints at home, the government was trying to fit a square peg into a round hole.

Despite the withdrawal of the *Bill of Rights Bill*, elements of its design live-on in more specific legislation aimed at the 'small number of specific issues' noted by the Joint Committee on Human Rights. On 7th March 2023 the *Illegal Migration Bill* was given its first reading in the House of Commons. On 20th July 2023 it obtained royal assent. The Act imposes upon the Home Secretary a duty to make arrangements for the removal of certain categories of 'illegal' migrants from the UK[59] regardless of whether they make, *inter alia*, a human rights claim.[60] This is an attempt to legislate for the government's current project of deporting certain asylum seekers to Rwanda which, at the time of writing, has been suspended after an interim injunction by the ECtHR[62] and has been ruled unlawful on human rights grounds in a detailed judgment by the UK Court of Appeal[63], specifically on the basis that asylum-seekers relocated to Rwanda are 'at real risk of refoulment' in violation of Article 3 of the ECHR's prohibition of torture and inhuman or degrading treatment.[64] The whole scheme of the Bill has been described by the

[56] Joint Committee on Human Rights, *Oral evidence: Legislative Scrutiny: Bill of Rights Bill* (2023 HC 611).
[57] The Joint Committee on Human Rights makes this claim based on the fact that remedial action in response to section 4 declarations tends to be "a long and drawn-out process" during which time the offending legislation has interim authority. Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill* (2023 HC 1241 HL 208) 34.
[58] *Ibid.*
[59] Illegal Migration Act 2023, s 2.
[60] *Ibid.* s 5(1)(b).
[62] *N.S.K. v The United Kingdom* (application no. 28774/22).
[63] The judgment is being appealed before the Supreme Court.
[64] R *(AAA) v Secretary of State for the Home Department* [2023] EWCA Civ 745 [293].

Council of Europe Commissioner for Human Rights as being in 'clear and direct tension with well-established and fundamental human rights standards, including under the ECHR'.[65]

In a perceptive report for the think-tank *Policy Exchange,* which seems to have influenced the thinking behind the *Illegal Migration Bill,* Richard Ekins and Stephen Laws noted that both domestic and international litigation under the HRA and ECHR could slow or halt the deportation scheme, and that legislative steps had to be taken in order to 'anticipate the likely grounds of litigation and to disarm them'.[66] One important step was to explicitly disapply operative parts of the HRA; another was to introduce a qualified statutory duty on the government to press ahead with the removals, which would force the government and civil servants to make the deportations without worrying about the obstacles of human rights law. Both of these steps found their way into the Act with some dilution. Section 1(5) disapplies the interpretative obligation under section 3 of the HRA (thereby removing the possibility of victims obtaining a prompt and meaningful remedy) and replaces it with an obligation to interpret the Act so as to achieve its stated purposes.[67] Section 2 obligates the Secretary of State to make arrangements for the person's removal subject to the liberty (but not the requirement) to disapply that duty if the ECtHR indicates an interim measure against it.[68] In legally mandating action to make the deportations, the Act sidesteps the requirement on public authorities to act compatibly with ECHR rights by preventing such authorities from acting differently.[69] It is worth noting that this strategy of selectively disapplying section 3 of the HRA has also found its way into the *Victims and Prisoners Bill* 2023.[70] In The Illegal Migration Act and the Victims and Prisoners Bill we therefore see the recrudescence, in concentrated form, of the *Bill of Rights Bill*'s mechanisms, but this time with the focus trained squarely on two classic 'others' of populism – asylum-seekers and criminals. It is, as the Joint Committee on Human Rights put it in a strikingly critical piece of legislative scrutiny, an unprecedented 'pick and choose approach' to human rights.[71]

[65] Letter from Dunja Mijatovic to Rt Hon Sir Lindsay Hoyle and Rt Hon the Lord McFall of Alcluith (24 March 2023).
[66] Policy Exchange, 'How to legislate about small boats' https://policyexchange.org.uk/wp-content/uploads/2023/02/How-to-legislate-about-small-boats.pdf (accessed 7 July 2023).
[67] Illegal Migration Act 2023, s 1(3).
[68] Illegal Migration Act, s 55.
[69] Human Rights Act 1998, s 6(2).
[70] Victims and Prisoners Bill, clauses 42-44.
[71] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill* (2023 HC 1241 HL 208), 82.

In summary, after the withdrawal of the *Bill of Rights Bill* the UK government's current approach to the HRA is best characterised as 'death by a thousand cuts'.[72] But what makes this an act of *populist constitutionalism?*

4. Populism and Populist Constitutionalism

As noted by Cas Mudde, populism is an 'essentially contested concept' that may be understood as an ideology, a discursive strategy, a type of popular mobilization, or some combination of the above.[73] For present purposes, populism is understood in-line with the commonly accepted definition provided by Jan-Werner Müller, namely as a 'moralistic imagination of politics' that opposes an authentic people to elites and inauthentic minorities.[74] For Müller, populists have two essential characteristics: they are anti-elitists and anti-pluralists who claim to exclusively represent, in moral terms, the authentic people.[75] Though often used in popular discourse as a simple term of abuse against anybody who challenges the *status quo*, populism is in fact a 'thin-centred ideology' that latches-onto disparate thicker ideologies that provide meaning to the opposed groups of *authentic people* and *elites*.[76] Due to its chameleonic qualities it can be either a threat to democracy or it can amplify the demands of genuinely marginalised groups and catalyse constitutional reforms aimed at their inclusion.[77] Broadly speaking, we can make a useful distinction between right-wing varieties of populism and left-wing varieties of populism. For Chantal Mouffe, the right-wing variety 'claims that it will bring back popular sovereignty and restore democracy' but only for those deemed 'true nationals'.[78] Its conception of the *authentic people* 'excludes numerous categories, usually immigrants, seen as a threat to the identity and the prosperity of the nation'.[79] As Mudde points out, European right-wing populism tends to be based not on material economic exclusion, but on *identity* and *culture*.[80] By contrast, the left-wing variety of populism is essentially material in its demands: 'A left populist strategy aims at federating the democratic demands into a collective will to construct

[72] S Wallace, 'Death by a Thousand Cuts: The Human Rights Act' *The Constitution Society* (2023) https://consoc.org.uk/death-by-a-thousand-cuts/ (accessed 7 July 2023).
[73] Cas Mudde, 'Populism: An Ideational Approach' in Cristóbal Rovira Kaltwasser et al. (eds), *The Oxford Handbook of Populism* (Oxford 2017).
[74] J Werner-Müller, 'Populism and Constitutionalism' in C Rovira Kaltwasser et al. (eds), *The Oxford Handbook of Populism* (Oxford 2017) 592-3.
[75] *Ibid.* 593.
[76] C Mudde and C Rovira Kaltwasser, 'Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America' (2013) 48(2) *Government and Opposition* 147, 150.
[77] *Ibid.* 168.
[78] C Mouffe, *For a Left Populism* (Verso 2018), 23-24.
[79] *Ibid.*
[80] C Mudde and C Rovira Kaltwasser (n 76) 167.

a 'we', a 'people' confronting a common adversary: the oligarchy'.[81] Left populism therefore pivots on an *exclusionary* material dimension and an *inclusionary* cultural dimension. For the right-wing variety of populism with which this article is concerned there is a double opposition to elites and marginal groups (constructed on the basis of identity) which are perceived to be joined at the hip.[82]

Right-wing populists in government have a tendency to claim unbridled authority over the state, though they are not necessarily opposed to constitutionalism *per se* provided the rules and institutions help to keep them in power, entrench policies that conform to their image of the authentic people, and prevent obstructions to their constructed will of the people.[83] Blokker provides us with four distinctive traits of *populist constitutionalism*, namely its emphasis on the authentic people and popular sovereignty, its dedication to majoritarianism, its legal instrumentalism, and its legal resentment.[84] One must be careful to distinguish this from variants of *democratic constitutionalism* which are likewise critical of the law's capacity to constrain the authority of elected political actors.[85] The key difference is that democratic constitutionalism typically aims to expand opportunities for meaningful and plural democratic engagement in constitutional politics, whereas for populist constitutionalists 'the actual engagement of (different groups of) citizens in society is substituted for by the idea of a united people, represented by the populist leader…government for the people, but not necessarily by the people'.[86]

Although the UK might not have traversed this right-wing populist road to the same extent as, say, Turkey, Israel,[87] Poland or Hungary, one can nevertheless see the outlines of right-wing populist constitutionalist traits in (among other examples) new legislation restricting the availability of judicial review[88], the right to protest[89], and the right to vote[90]; the desire for

[81] C Mouffe (n 78) 24.
[82] J Werner-Müller (n 74).
[83] *Ibid.* 598.
[84] P Blokker, 'Populism as a Constitutional Project' (2019) 17(2) *International Journal of Constitutional Law* 535, 540-541.
[85] For a robust critique of strong-form judicial review on democratic grounds *see* J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *The Yale Law Journal* 1346. *Also see* R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard 2007). For a more recent critique of modern legal constitutionalism in general *see* M Loughlin, *Against Constitutionalism* (Harvard 2022).
[86] P Blokker (n 84) 540.
[87] *See* T Hostovsky Brandes, 'Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination and Social Solidarity' (2020) 29(1) *Minnesota Journal of International Law* 65.
[88] Judicial Review and Courts Act 2022.
[89] Public Order Act 2023; Police, Crime, Sentencing and Courts Act 2022.
[90] Elections Act 2022.

extensive executive law-making powers[91]; and a willingness to ride roughshod over the constitutional safeguards for devolved institutions.[92] Perhaps most strikingly, the dominant right-wing approach to the Brexit project (which has clear links with HRA scepticism, tied-up as it is with another alien European institution) displayed clear populist features. Taken as a whole these developments suggest a perhaps nascent and pendulous, but still concerning, shift towards an authoritarian right-wing populist constitutionalism that aims at broadening and deepening executive power shorn of irritating constitutional checks-and-balances which are, quite typically of populist constitutionalists, considered a mere 'frustration of the people's will'.[93] Government criticisms of the HRA and the strategy of 'death by a thousand cuts' are one of the most prominent sites of this nascent populist constitutionalism, as I shall now argue.

5. The Human Rights Act: Stuck in a Populist Rut

The HRA is surrounded on all sides by right-wing populist forces. When it successfully protects the universal human rights of marginalised groups, it provides grist to the mill of those forces. When it fails to protect those rights, it allows an exclusionary and harmful politics to carry on legally unhindered. It therefore looks like it is caught in a doom-loop – when it wins it loses, and when it loses it loses. The recent government response to the defeat of its Rwanda deportation policy on human rights grounds in the Court of Appeal neatly illustrates the first point. Rather than acknowledging the strength of the court's forensically detailed reasoning and the importance of the prohibition of torture and inhuman or degrading treatment, or even expressing simple disappointment in the judgment, the Secretary of State for the Home Department used the HRA's victory as a foil for some strikingly performative populist rhetoric. The 'British people', she said, want us to deport asylum seekers to Rwanda but 'the system is rigged against them' and 'that's why we're changing the laws through our Illegal Migration Bill'.[94] Here we see in condensed form the key traits of right-wing populism: an *authentic* British people defined in majoritarian terms against the *inauthentic* asylum-seekers and the

[91] Retained EU Law (Revocation and Reform) Act 2023.
[92] *See* A McHarg & J Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512.
[93] C Crouch, 'Post-Democracy and Populism' (2019) 90 *The Political Quarterly* 124, 125.
[94] R Tingle, 'The system is rigged against the British people: Home Secretary Suella Braverman says "we need to change our laws to stop the boats" as she slams Court of Appeal ruling that Rwanda deportation plan is unlawful' https://www.dailymail.co.uk/news/article-12247297/Home-Secretary-Suella-Braverman-says-rigged-Rwanda-ruling.html (accessed 31 August 2023).

inauthentic segment (significant in size) of the citizenry that opposes the deportation scheme[95], a claim that judicial elites allied with asylum-seekers are standing against the will of the authentic people, and a follow-up populist constitutionalist project aimed at instrumentalising the law in a way that will serve the supposed will of the authentic majority by unencumbering the executive to act on their behalf. For the UK's right-wing populists, the HRA will go on serving this function of providing them with a useful shorthand and foil for their ideology. One might even speculate that the predictable outcome of the Illegal Migration Act and the Prisoners and Victims Bill in bringing more cases to the European Court of Human Rights and more defeats in that institution is not viewed as a disadvantage but as an opportunity to replace the old populist foe, the European Union, with a new one, thus keeping the culture war alive and the fault-lines of right wing populism glowing.

The concrete proposals to weaken the protections offered by the HRA (detailed above) clearly fit into the mould of populist constitutionalism developed by Blokker. First, they emphasise the authentic people, posited in a majoritarian way that excludes some of the usual right-wing populist victims, namely, asylum-seekers and criminals. This is made plain by the targets of the Illegal Migration Act and the Victims and Prisoners Bill, but it was also manifest in the government's earlier criticisms of the HRA that formed the basis of its Bill of Rights proposals. The government's consultation paper that laid the ground for the Bill of Rights Bill was critical of the ECtHR's *living instrument* doctrine and its tendency to expand the meaning of rights beyond the original intent of its framers.[96] The criticism does not seem to be aimed at judicial law making *per se* since other parts of the report speak quite fondly of strengthening domestic judge-made common law.[97] Rather, the problem is *foreign* judge made law that is somehow alien to *our* traditions. The cases highlighted by the report are quite revealing: *Hirst v The United Kingdom (No. 2)*[98] in which the right to free elections was said to be violated by a blanket disenfranchisement of prisoners, and *Othman v United Kingdom*[99] which concerned the deportation of a Jordanian national.

---

[95] YouGov, 'The government has proposed a deal where some people who have entered Britain and applied for asylum will be flown to Rwanda, in Africa, for their asylum applications to be processed. Do you support or oppose this proposal?' https://yougov.co.uk/topics/travel/survey-results/daily/2022/04/14/8bb29/1 (accessed 7 July 2023).
[96] Ministry of Justice (n 46), 47.
[97] *Ibid* . 186.
[98] [2004] 38 EHRR 40.
[99] (2012) 55 EHRR 1.

Second, the government's criticisms of the HRA instrumentalise key constitutional norms and principles and turn them towards a project aimed at concentrating executive power and eroding checks-and-balances. For example, tapping into the important constitutional principles of parliamentary sovereignty and democracy, the government argued in its White Paper on human rights reform that under the HRA the courts have 'displace[d] the role of Parliament in determining difficult questions of public policy'.[100] As noted above, there are legitimate *democratic constitutionalist* ways and means of addressing the desirability or otherwise of judicial involvement in human rights questions, but the important point here is that the criticism and the core constitutional principles upon which it relies are instrumentalised in service of concentrating executive power rather than deepening a pluralistic understanding of democracy.

It is therefore a central argument of this article that the future of the HRA, and meaningful human rights in general, in the UK (as elsewhere) depends on the collapse or at least the marginalisation of right-wing populism. The following sections therefore attempt to excavate the root causes of populism, the HRA's complex imbrications with it, and how the human rights framework might be re-shaped to make it a more useful tool for tearing-up the problem at its roots.

6. Getting at the roots of populism

The contributing factors to the rise of populism are, as might be expected, too various and multifaceted to permit a thorough examination here. Nevertheless, the main contours of its emergence have been identified with sufficient empirical support for us to be able to sketch a brief narrative that emphasises the key causes. Several overlapping theses have been developed to explain the rise of populism. Broadly speaking, we might categorise them as the *cultural backlash thesis*, the *economic thesis*, and the *disintermediation thesis*. All three have explanatory power and, when properly combined and ordered, provide a convincing account of the rise of populism as a phenomenon distinct from earlier forms of authoritarianism.

The cultural backlash thesis locates the primary cause of rising populism in Europe and the United States in the shift of younger generations away from material issues of wealth distribution to modern, post-materialist concerns like LGBTQ+ rights, feminism, universal human rights, multiculturalism, multilateralism, environmentalism, and anti-racism. This

[100] Ministry of Justice (n 46), 117.

generates a backlash against liberal and cosmopolitan values among predominantly older white men, who come to feel that *their* values and privileges, forged in an earlier age, are under threat. In an empirically informed research paper for the Harvard Kennedy School of Government, Inglehart and Norris argue that such cultural values 'provide the most consistent and parsimonious explanation for voting support for populist parties'.[101] Such factors are clearly evident in the UK context. The right-wing elements of the Brexit campaign, for example, were clearly motivated by a desire to staunch immigration and "take back control" (in the language of the official Leave campaign) from a cosmopolitan, liberal Brussels bureaucracy. It is also evident in some of the hostility to the HRA which, as the foregoing analysis showed, pivots around hostility to the idea of universal rights defined by foreign judges in a foreign court that apply to refugees, prisoners and other people deemed to be outside the proper scope of the authentic people. In the UK context, a lot of this cultural backlash boils-down to post-imperial nostalgia and hubris – the mistaken belief that UK exceptionalism can thrive in the modern globalised world, and that we have no need for European human rights institutions that tell *us* what to do.[102] Cultural explanations like this are given pride of place in some prominent defences of the HRA. For example, in his informative book *On Fantasy Island* Gearty writes about retro-cultural forces 'preying on the politics of the present' and turning Britain into 'a fantasy island constantly being called to account by geographic and socio-economic reality'.[103] This is undoubtedly correct, but it is not enough, on its own, to explain the rise of populism and its threat to the HRA. Unless we complement it with the other two explanations, we are at risk of generating either partial or hopeless strategies for its defence.

In another empirically rich piece of literature, Martin Wolf argues that populism is the symptom of a disequilibrium between the market economy and political democracy.[104] On Wolf's account, political democracy grew out of, and was made possible by, the growth of industrial capitalism. Whereas prior modes of production, such as feudalism, were based on the unification of the political and economic spheres, modern capitalism, by contrast, demands the formal separation of politics from economics. As Ellen Meiksins Wood put it in an earlier text, 'The capitalist organisation of production can be viewed as the outcome of a long process in

---

[101] RF Inglehart & P Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash' https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash (accessed 7 July 2023).
[102] C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford 2016) 176-177.
[103] *Ibid.* 177.
[104] M Wolf, *The Crisis of Democratic Capitalism* (Penguin 2003).

which certain *political* powers were gradually transformed into *economic* powers and transferred to a separate sphere'.[105] For Wolf, capitalism and liberal democracy depend on each other for their survival but must retain their separate individuality, for if wealth came from political connections then free-market capitalism would flounder and if political office came from wealth then liberal democracy would perish. The trouble, for Wolf, is that it is a necessary but exceedingly difficult marriage. Reflecting on the contemporary state of the matrimonial bond, Wolf notes 'As wealth and economic power become increasingly concentrated, liberal democracy inevitably comes under threat…In sum, capitalism may lead to democracy…but may then destroy it'.[106] All of which brings us to Wolf's analysis of the root causes of populism, which he locates in *status anxiety.* Crucially, this status anxiety is rooted in material *economic* conditions that have led to stagnant or declining real household incomes and, since the 1980s, booming inequality. And it is inequality, rather than absolute poverty as such, that for Wolf offers great explanatory power. The 'hollowing out of the middle classes' has been 'the politically crucial economic development'.[107] It has led to the status anxiety that has, in turn, led to rising populism. The story should by now be familiar territory. The post-war economic order was characterised by John Ruggie as one of 'embedded liberalism'[108] in which the old and destructive *laissez-faire* model was replaced with one that embedded open markets in institutions and legal codes that enabled domestic economic interventionism, thus giving effect to 'the need to legitimize international markets by reconciling them to social values and shared institutional practices'.[109] Welfare states, capital controls, strong trade unions and other features of this system helped to birth the so-called Golden Age of Capitalism in which the gains of rising productivity were broadly shared. The deliberate choice under global economic pressures to dispense with this system in favour of embedded *neoliberalism*, in which the levers of economic policy have been (legally and institutionally) removed from popular control[110] has led us to the current economic situation. It is not that cultural explanations of populism are redundant, rather they fail to explain why populist parties began to assume power specifically during the period of post-financial crisis austerity, and why immigration became much more politically salient at around the same time. The answer is that 'Even if such [cultural] attitudes

---

[105] E Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (Verso 2016) 36.
[106] Wolf (n 104).
[107] *Ibid.*
[108] J Ruggie, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order' (1982) 36(2) *International Organization* 379.
[109] R Abdelal and J Ruggie, 'The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism' in David Moss & John Cisternino (eds), *New Perspectives on Regulation* (Cambridge 2009), 153.
[110] *See* Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard 2018).

existed, more or less latently, in the past, it is economic change that has turned them into a political force'.[111]

Though Wolf's analysis helpfully orients us in the direction of economic matters (specifically rising inequality under neoliberalism and its attendant status anxiety), there are other important factors that he acknowledges but that are more fully drawn-out by other scholars. The final crucial development to which neoliberalism has given rise is what Anton Jäger and Arthur Borriello call *disintermediation*.[112] In short, it has given us a howling wilderness where once there was a thriving set of collectivist institutions—trade unions, political clubs, and so on—mediating between individual citizens and the state. The phenomenon has been empirically documented by Peter Mair, whose work carefully tracks changes since the late 1980s in terms of declining political party membership, trade union membership, and electoral turnout as a result of the shift to embedded neoliberalism.[113] Policy, he notes, is now widely dictated by unrepresentative (or barely representative) institutions and hyper-mobile capital, leaving the sphere of politics—formerly a site of meaningful economic contestation under embedded liberalism—denuded of substance and converted into a site of theatre, spectacle and spin. This is 'the politics of depoliticization'[114] where political opposition is a matter or *form* rather than *substance*. The population, wise to this development, withdraws from its representatives and, in turn, the political class withdraws from the citizenry into its professional milieu. The political class *qua* class then becomes the object of contestation. Populism barges onto the stage demanding the repoliticisation of the polis. For Jäger and Borriello, populism has crept into this void as the new 'ideology of disintermediation'[115] that offers citizens a new and reshaped relationship with the state. Its appeal to an authentic people against an inauthentic other obtains purchase precisely because the old group-based markers of identity, such as class, have eroded and people are receptive to new categories.[116] In short, populism is the surface manifestation of the key underlying factor, namely the lack of collectivist mediation between citizen and state, which in-turn has its roots in the shift from embedded liberalism to embedded neoliberalism.[117]

---

[111] Wolf (n 104).
[112] A Jäger & A Borriello, 'Making Sense of Populism' (2020) 3(4) *Catalyst*.
[113] P Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013).
[114] *Ibid.* 51.
[115] A Jäger & A Borriello (n 112).
[116] *Ibid.*
[117] *Ibid.*

This brief narrative gives us a few important insights. The first is that the populism that threatens the HRA is a product of the shift from embedded liberalism to embedded neoliberalism. These material and institutional shifts have given rise to disintermediation and set fire to some latent cultural tensions. Since it was born into this environment, we ought to think about the HRA's imbrications with these developments and what needs to change in order for it, and the rights it protects, to survive and thrive. Second, we should avoid complacency. The next general election might return a Labour government committed to upholding the HRA. But so long as the underlying structural dynamics described above remain in place, there is a serious risk of right-wing populist threats returning with increased strength further down the line.[118]

7. The HRA and populism

In this section, I will argue that the HRA has been bound-up with some of the developments that have given rise to the very populism that threatens it. These imbrications can be conveniently classified as ones of *history*, *form,* and *substance*.

Although the HRA was born into an environment of neoliberal disintermediation, the ECHR that it incorporates into domestic law was not. International human rights in the post-war period bore the marks of embedded liberalism. The Universal Declaration of Human Rights (UDHR), for example, combines classical civil and political rights with meaningful economic and social rights, such as the right to social security[119] and an adequate standard of living.[120] As Marco Duranti's magisterial historical excavation of the ECHR convincingly argues, the Council of Europe's take on human rights is best understood not as an adaptation of this welfarist human rights project for regional European purposes, but as a 'counterproject' led for the most part by conservative and proto-neoliberal non-state actors.[121] In his detailed telling, post-war faith in democracy was built on two pillars: individual freedom and social equality, but the ECHR exalted the former while ignoring the latter.[122] The reason, in brief, was not a purely technical one (the oft-repeated claim that economic and social rights are not justiciable) but a *political*

---

[118] Indeed, there is currently a populist insurgency inside the governing Conservative Party, much like the Trump insurgency inside the Republican Party. *See* G Hinsliff, 'Tory populists have a real enemy in their sights – they're gunning for the Tory realists' *The Guardian*, 16 May 2023.
[119] Universal Declaration of Human Rights, art. 22.
[120] *Ibid.* art. 25.
[121] M Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford 2017), 322.
[122] *Ibid.* 218.

one resulting from the 'momentary anxieties of British Conservatives and French Catholics in the European unity movements over what they believed to be the gradual erosion of democracy and human rights within their own countries at the hands of the left'.[123] The enemy against which the ECHR was pitched was not only Soviet authoritarianism and fascism, but the home-grown leftist governments that helped create the Golden Age of capitalism mentioned above. The ECHR was useful as a rear-guard action insofar as it enabled these conservatives and early neoliberals to embed viewpoints (some of which had little traction in domestic politics) into a supranational judicial institution that, for a key British participant, ought to have been able to override the parliamentary sovereignty so valued by the reformist Labour government.[124] We might therefore conclude that the rights protected by the HRA were originally intended to (among other things) restrain states and prevent radical interferences in the economic sphere in pursuit of greater equality – arguably the very thing we need to keep populism at bay. We might also dispense with any lingering illusions about Convention rights being apolitical and above the fray.

A number of things might be said about the *form* of the HRA in the context of rising populism. First, human rights have long been criticised by conservatives, utilitarians, and revolutionaries alike for their inherent individualism.[125] Claims under the HRA may only be brought by identifiable victims of an unlawful act by identifiable public authorities.[126] This obviously has practical appeal in legal terms, but it also has an effect on people's subjectivity. As Knox argues, the transition from embedded liberalism to embedded neoliberalism was not just a destructive project aimed at dismantling intermediary institutions; it was also a *productive* project aimed at creating 'individual subjects conditioned to implement and perpetuate it'.[127] The now-emaciated intermediary institutions were never purely economic or political bodies, rather they shaped the way in which their members saw themselves and saw the world around them. In the case of trade unions, for example, they created a sense of collective identity mobilised around class, where social problems were identified as being rooted in class conflict. As Ruggie acknowledges, it was (in part) the concrete manifestation of this subjectivity in trade union action that helped create and maintain the conditions for embedded liberalism and a modicum

[123] *Ibid.* 219.
[124] *Ibid.* 237.
[125] J Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge 2019).
[126] Human Rights Act 1998, s 7(1).
[127] R Knox, 'Law, neoliberalism and the constitution of political subjectivity: the case of organised labour' in H Brabazon (ed.), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2016), 93.

of economic equality.[128] Into the void created by its destruction stepped the 'last utopia'[129] of human rights, which 'imposes its own set of limits on how we think of social struggle'.[130] The individualist subjectivity produced by human rights is much more conducive to the reproduction of neoliberalism. In place of bottom-up collective action against the root causes of human rights violations comes top-down individual action through courts and lawyers against public authorities. As Susan Marks explains, this risks buying straight into the 'politics of depoliticisation' so characteristic of our disintermediated present by '[fostering] an emphasis on technical problems and state actions' and '[discouraging] engagement with the systemic character of abuses and with the contributions and further possibilities of action by ordinary citizens'.[131] Contrary to the essentially political-economic causes of rising populism and human rights violations described above, the HRA encourages us to think in terms of the deviancy of individual public authorities rather than 'the structural forces of late capitalism that continue to shape the present juncture'.[132]

Linked to the above, the substantive rights protected by the HRA are largely a product of the political machinations of the ECHR's authors, albeit with additional protocols and significant accretions from the living instrument doctrine. They are overwhelmingly civil and political in nature and leave very little room for the articulation of group-based concerns.[133] In their almost complete omission of economic and social rights they seek to drive a wedge between politics and economics. The result is a hierarchy of rights in which civil and political liberty takes priority over equality.[134] It can even be secured *at the expense of* equality, for as Ewing points out 'State initiatives to promote social equality must now overcome an additional hurdle' of justifying their interferences with privileged civil and political rights. In short, the HRA can 'provide a shield for bearers of private power who are the targets of social regulation'.[135] Moreover, the hierarchical superiority of civil and political rights sends out an ideological

---

[128] Ruggie (n 108).
[129] S Moyn, *The Last Utopia: Human Rights in History* (Harvard 2010).
[130] R Knox, 'A Marxist approach to *R.M.T. v the United Kingdom*' in D Gonzalez-Salzberg & L Hodson (eds.), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2019), 16.
[131] S Marks, 'Human Rights and Root Causes' (2011) 74(1) *The Modern Law Review* 57, 72. *Also see* W Brown, 'The Most We Can Hope For…Human Rights and the Politics of Fatalism' (2004) 103 *The South Atlantic Quarterly* 451.
[132] T Krever, 'Ending impunity? Eliding political economy in international criminal law' in U Mattei & J D. Haskell (eds), *Research Handbook on Political Economy and Law* (Elgar 2015), 314.
[133] There are some limited exceptions. See, for example, G Pentassuglia, 'Inside and Outside the European Convention: The Case of Minorities Compared' (2006) 6 *Baltic Yearbook of International Law* 263.
[134] K Ewing, 'The Unbalanced Constitution' in T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford 2001).
[135] *Ibid.* 111.

message: to be a progressive with an interest in human rights is to focus one's energies on civil and political issues. We might therefore say that the HRA holds forth the false promise that 'it is possible – without fundamental change – to reach a situation in which human rights are respected'.[136] The opposite, however, is true. As Paul O'Connell puts it 'all human rights advocates are faced with a choice (not an easy choice, but a necessary one): between acquiescence in a process which is inherently inimical to the protection of human rights or utilising the human rights paradigm to challenge and overcome the dominant model of globalisation'.[137] Something like this position is gaining currency in reputable and visible international human rights circles. Philip Alston, for example, encourages human rights advocates to 'rethink many of their assumptions'[138] and excoriates mainstream human rights advocacy for its almost complete failure to address issues of economic inequality.[139] Quite apart from failing to substantially address these problems, the HRA and the ECHR can actively *stand in the way* of efforts to do so. Even some of the most stalwart defenders of the HRA acknowledge that it would, for example, have fulfilled the aims of its conservative designers by frustrating some of the key social democratic policies of an elected Jeremy Corbyn led Labour government.[140]

Therein lies the core contradiction of the HRA. It tells us, as Knox points out, that we can have important civil and political rights *without* having to do the difficult work of securing fundamental changes in how society is currently organised. But if the foregoing analysis of the roots of right-wing populism is correct, then we know this to be false. As Moyn puts it, 'Populism is only one example of the dynamic of ignoring the disease only to denounce the symptoms'.[141] What then are we to do? Pragmatically assuming that a wholesale replacement of the UK human rights system with a better one is currently off the table, in the next section I propose some modest but ambitious reforms aimed primarily at re-empowering bottom-up movements to push for the necessary fundamental changes.

8. Reform proposals

[136] Knox, (n 130), 17.
[137] P O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483, 485.
[138] P Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1, 2.
[139] *Ibid.* 6.
[140] Gearty (n 102), 123-124.
[141] S Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard 2018), 218.

If the above analysis is correct then it leads us to some quite far-reaching conclusions, for if the populist threat to human rights sprouts from the fertile soil of economic inequality, then fundamental social, political, and economic changes are required. The difficult question is how to achieve them, and, for present purposes, what role UK human rights law could and should play in that process.

The first and most pressing task is not a reform proposal at all, but a critical defence of the core civil and political rights currently protected by the HRA. Despite its weaknesses, it is worth defending for its limited but important emancipatory achievements, which can among other things protect a space for social movements to organise; *and* for its potential (outside of dominant legal and institutional frameworks) to buttress the struggles of bottom-up social movements with legitimating human rights language. On the latter point, Colm O'Cinneide points-out that human rights commit modern states to respecting a certain notion of human equality, which—despite the limited and formal version of equality typically found in human rights instruments—opens-up opportunities for social movements to underscore 'gaps between the professed normative values of contemporary democratic societies and the reality of the embedded inequalities that shape our collective existence'.[142] Relatedly, within social movements this legitimating language of human rights often binds onto and strengthens other emancipatory languages.[143] For example, as argued in the previous section it is possible to claim that basic civil and political rights require for their full and long-term realisation a wholly different economic model that tackles substantive inequality.[144] For all its flaws, backtracking on the progressive achievements of the HRA at this moment in history would only serve to open the floodgates of executive power at the expense of subaltern groups and individuals. But our defence of the HRA ought to be critical and should contain within it the seeds of a reformed human rights framework.

Perhaps one of the most common reform proposals is to protect the HRA from populist threats by entrenching it in something like a written constitution. The Liberal Democrats have long been the strongest proponents of such legal entrenchment, arguing that civil and political rights

[142] C O'Cinneide, 'Equality, rights and the 'stickiness' of the current political moment' in K Arabadjieva et. al., *Transformative ideas – ensuring a just share of progress for all* (etui 2023), 76.
[143] *See* P O'Connell, 'Human rights: contesting the displacement thesis' (2018) 69(1) *Northern Ireland Legal Quarterly* 19.
[144] This might be considered an extension of the oft-repeated claim that human rights are interdependent. *See* JW Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 *Human Rights Quarterly* 984.

derived from the ECHR ought to be included in a written constitution with very high bars to amendment.[145] They have also proposed adding a US-style judicial power to strike-down incompatible legislation.[146] This would make it difficult for an incumbent government with a significant parliamentary majority to repeal or undermine the rights guaranteed under the ECHR. There are, however, a number of objections to this idea. First, it would play straight into the hands of those populists who object to democratic representatives being stymied by unelected and unaccountable elites. As Martin Loughlin explains, populism is in part 'the inevitable political response to the reflexive turn taken by contemporary constitutionalism'.[147] Dialling-up legal constitutionalism in this way, if it were even possible, might therefore achieve short-term tactical gains by neutering current attacks on the HRA, but at the expense of long-term strategic losses by fanning the flames of populist grievances. The populist experiences of some other states with written bills of rights ought to provide a salutary lesson. Second, by weighting the balance between the judiciary and parliament in concretising rights even more heavily in favour of the judiciary, the proposals would come with serious legitimacy problems. The great achievement of the HRA lies precisely in its careful division of responsibility in this field between the two powers, as described above. It therefore helps to achieve some of the requirements of *justice* without sacrificing the requirements of *legitimacy*. But by handing judges a power to declare primary legislation invalid on human rights grounds, and by making it exceedingly difficult for citizens and their representatives to amend those rights over time, the proposals arguably emphasise a particular liberal conception of justice far ahead of democratic legitimacy.[148]

Others have proposed models of entrenchment that might avoid both of these objections. For example, the Brown Commission's report—some of which might become official Labour Party policy—recommends a form of political rather than legal entrenchment. On this model, a reformed and democratically legitimate second chamber of Parliament representing the UK's constituent nations and regions would have the power to reject legislation that 'related to' constitutional statutes.[149] Should the HRA be classified as one of those constitutional statutes

[145] Liberal Democrats (n 35).
[146] *Ibid.* 14.
[147] M Loughlin (n 85), 199.
[148] This is not to entirely discount the potential value of a written constitution with embedded human rights guarantees. Everything depends on the details. Some proposals are in fact much more sensitive to democratic requirements. *See* J King, 'The Democratic Case for a Written Constitution' in J Jowell and C O'Cinneide (eds.), *The Changing Constitution* (9th ed, Oxford 2019).
[149] Labour, 'A New Britain: Renewing Our Democracy and Rebuilding Our Economy' https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf (accessed 7 July 2023).

then attempts to repeal it, amend it, or pass laws that in some way 'relate to' it would be subject to potential rejection from within Parliament before having to be judicially reviewed. This might represent an improvement of the current legislative process, in which the second chamber's role is largely confined to legislative scrutiny and delay due to its lack of democratic *bona fides*. If adopted, this form of political entrenchment could give rise to a more democratic method of protecting ECHR rights through entrenchment, bearing in mind that much will depend on the details (for example, whether the upper chamber ends up being dominated by the same party that dominates the lower chamber).[150] Though such ideas might be beneficial and are worth exploring, we should not make too much of the manner in which Convention rights are embedded in the UK constitution and the form that such embeddedness takes. We cannot wish away populist pressures or hope to contain them indefinitely through constitutional safeguards. To think otherwise would be, as Daly argues, to put a 'misplaced faith in the capacity of constitutional law to safeguard against political contingency and crisis and to stabilise the political world'.[151] Much more important is the range of rights protected by the UK constitution and the mechanisms of enforcement attached to them. In this regard, it is worth considering the possible inclusion of economic and social rights (ESR), particularly rights that are already well-developed in public international law such as the right to adequate food, housing, and healthcare. In addition to those rights, there is a need to think about how human rights might play a role in refilling the void created by neoliberalism. The inclusion of enhanced trade union rights is particularly notable in that latter respect.

On ESR, the Brown Commission has already recommended a suite of new human rights—including rights to health, education, housing, and social assistance—over which there is broad societal consensus.[152] The inclusion of such rights in a reformed HRA could help to address the problems identified above in a number of ways. Two in particular are worth highlighting. First, it would undercut the hierarchy of rights that currently privileges civil and political rights over ESR. In doing so, it would help to repair the rift between the two categories of human rights and make it plain that they are, in fact, interdependent. Civil and political rights, even in

---

[150] *See* A McHarg, '*The Future of the Territorial Constitution under Labour?* The Report of the Commission on the UK's Future', https://ukconstitutionallaw.org/2022/12/08/aileen-mcharg-the-future-of-the-territorial-constitution-under-labour-the-report-of-the-commission-on-the-uks-future/#:~:text=This%20safeguarding%20procedure%20would%20itself%20be%20one%20of%20the%20protected%20provisions%2C%20thus%20ensuring%20a%20type%20of%20manner%20and%20form%20entrenchment%20for%20constitutionally%20important%20statutes. (accessed 7 July 2023).
[151] E Daly, 'Constitutionalism and Crisis Narratives in Post-Brexit Politics' (2020) 68(4) *Political Studies* 895, 896.
[152] Labour, (n 149), 72.

an attenuated form, cannot long survive in the absence of economic and social rights. Second, a legally binding constitutional statement of ESR could help to generate change from the top-down and, crucially, from the bottom-up. On the former, Padraig McAuliffe convincingly argues that the benefits of ESR lie not only (perhaps not even primarily) in their capacity to generate litigation against the state for its failure to meet ESR obligations in individual cases, but also in their ability to generate *programmatic* responses aimed at fulfilling ESR from a range of institutions outside the judiciary.[153] These can take the form of, *inter alia*, National Human Rights Action Plans which are 'action-oriented, top-down policy planning tools for states to translate legal commitments into robust legislative and non-legislative operationalisation activities'.[154] Approaching the benefits of ESR from the other, bottom-up end of the pole Katharine Young argues that social movements can be galvanised by ESR to challenge prevailing neoliberal orthodoxies, in particular the wisdom of markets and the putative separation between politics and the economy.[155] In the place of these neoliberal shibboleths, social movements pursuing their ESR entitlements may 'insist on the political nature of the economy, and their participation in it'.[156] So although rights to basic *minima* do not directly address the inequality that generates status anxiety and populism, nor do they necessarily challenge the capitalist mode of production *per se* (and might, in fact, prop it up insofar as they repair its dwindling legitimacy[157]) they can at least provide a legitimating language and justification for social movements to claim that the neoliberal ideal of the 'small state' has to be replaced with a bigger state, repurposed to meet its ESR obligations.[158] They seem, in other words, to require a fundamentally different economic model from the one that has led us to the populist impasse.

Objections to the inclusion of such rights usually centre on their supposed lack of justiciability on legitimacy grounds and on epistemic grounds. Judges are said to possess neither the democratic credentials nor the expertise to involve themselves in questions of distributional justice.[159] The trouble for the advocate of ESR is that although litigation to address individual

---

[153] P McAuliffe, 'Programmatic Approaches to Realising Socio-Economic Rights: Debates, Definitions and Trends' (2021) 22 *Melbourne Journal of International Law* 1.
[154] *Ibid.* 24.
[155] KG Young, *Constituting Economic and Social Rights* (Oxford 2012), 223.
[156] *Ibid.* 239.
[157] M Salomon, 'Emancipating human rights: Capitalism and the common good' (2023) *Leiden Journal of International Law* 1.
[158] *See* P O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483, 500.
[159] KG Young (n 155), 133. Previous UK governments have used these concerns as reasons for opposing ESR, *see* Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008), 155.

violations is not the only, or even the primary, attraction of ESR (as we have just seen) there does seem to be a need for *some* level of judicial involvement to increase the chances of ESR making a positive difference from the top-down. The experience of Ireland, for example, where certain ESR are included in the constitution as 'directive principles of social policy' reveals that non-justiciable statements of intent can struggle to bite on political and legislative processes.[160] There are, however, problems with these critiques of judicial enforcement of ESR. Sandra Fredman points out that the judiciary is in fact *already empowered* by the HRA to intervene in questions of high social and economic policy but, as with the US Supreme Court's assault on New Deal legislation, it can only do so in defence of litigants deploying privileged and hierarchically superior civil and political rights.[161] So unless we propose removing all human rights adjudication from the courts, it is not a question of *whether* courts should intervene in social and economic policy, but a question of *how*. If human rights are to play a more positive role in helping us to tackle the authoritarian strands of populism that threaten the HRA, then they need to undo the one-sided prerogative of the judiciary to intervene in economic and social matters. On that score, Fredman convincingly argues that a 'deliberative model of judicial review' could have the effect of enhancing, rather than usurping, democratic accountability. On this model judges would not replace legislators as economic policymakers, rather they would play a varied and multifaceted role by, for example, enforcing a minimum core of obligations, requiring the state to produce a strategy for progressively realising ESR with measurable targets and specified timetables, and using existing tools such as proportionality review to 'demand that decision-makers give a deliberative account of the use of 'available' resources to meet their human rights obligations'.[162] The famous South African *Grootboom* case[163]—in which the Constitutional Court ruled that the duty to progressively realise the right to housing entailed judicial supervision of the reasonableness of the state's legislative and other measures to that end, combined with an obligation to "devise and implement a coherent, co-ordinated programme designed to meet its…obligations"[164]—may be taken as an example of this kind of judicial supervision. Primary responsibility for determining economic and social policy would remain with elected representatives, and courts would not be empowered to give them detailed prescriptions of what to do. They would,

[160] D Kenny & L Musgrove McCann, 'Directive Principles, Political Constitutionalism, and Constitutional Culture: the Case of Ireland's failed Directive Principles of Social Policy' (2022) 18 *European Constitutional Law Review* 207.
[161] S Fredman, 'New horizons: incorporating socio-economic rights in a British Bill of Rights' (2010) *Public Law* 297.
[162] *Ibid*, 317.
[163] Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others* 2001(1) SA 46 (CC).
[164] *Ibid.* 95.

instead, play a deliberative function in requiring decisionmakers to provide 'convincing reasons' set against the 'background values' of democratically formulated ESR.[165]

Incorporating ESR into the UK's human rights architecture alongside existing civil and political rights would help to heal the division between political, social and economic rights and could provide bottom-up movements with a new legitimating language and set of legal tools with which to push for a different economic order. But we know that such movements are hobbled by the linked problem of *disintermediation*. Could human rights, an inherently individualistic discourse, be reformed in a way that facilitates the strengthening of intermediary institutions? Could they play a role in refilling the void? Given the importance of trade union action in particular to the concrete realisation of ESR, and their historical role in giving birth to the era of embedded liberalism, it is worth reflecting on their position under the HRA and how it might be strengthened. Given the breadth and depth of legal penetration into the workings of trade unions and the scale of its interaction with the ECHR[166] one cannot hope to provide a comprehensive account here. Instead, I hope to provide a flavour of the kind of reforms that ought to be made by focusing on the most potent of trade union rights, namely, the right to strike. Of particular interest, given the present focus on the capacity of trade unions to chip away at the root causes of authoritarian populism, is the way in which the HRA shapes the ideology and practice of trade unions in such a way as to constrain their ability to disturb fundamental features of the *status quo*, and how that might be changed.

The UK approach to strike action is not rights based. As noted by Maurice Kay LJ in *Metrobus Ltd v Unite the Union*[167] 'In this country, the right to strike has never been much more than a slogan or a legal metaphor'.[168] Instead, trade unions were traditionally given space to organise industrial action via the so-called Golden Formula, which provided immunity from certain kinds of common law liability for acts done 'in contemplation or furtherance of a trade dispute'[169] and the scope of 'furtherance of a trade dispute' was interpreted quite broadly so as to include secondary action by one set of workers in support of another.[170] For the greater part of the 20th century, this method of industrial regulation was generally conceptualised as a

165 *Ibid.* 306-307.
166 For a detailed overview *see* H Collins, K Ewing and A McColgan, *Labour Law* (2nd edn, Cambridge 2019) 475-808.
167 [2009] EWCA Civ 829.
168 *Ibid.* 118.
169 Trade Disputes Act 1906, s 1.
170 *Conway v Wade* [1909] AC 506, 512.

system of 'collective laissez-faire' in which common law constraints on union action were removed and the legal framework left it to organised labour and employers to figure out the terms of their engagement between themselves.[171] It was during this period (until the 1980s) that trade union power and influence was at its peak[172] and they were able, as strong intermediary institutions, to catalyse the development of embedded liberalism. As this gave way to the rising swell of neoliberalism, a raft of legislative constraints was placed on trade unions. For purposes of analysis, we can distinguish between *procedural* constraints and *substantive* constraints. The former takes the form of deep and obstructive legislative penetration into the inner workings of trade unions including, among many other examples, a 50% turnout requirement in industrial action ballots[173] and a requirement to provide employers with at least 14 days' notice before commencing industrial action.[174] The latter, *substantive* restrictions severely narrow the meaning of 'furtherance of a trade dispute' to disputes between workers and their immediate employer, thereby removing legal immunity from secondary or 'sympathy' action.[175] Taken as a whole, the UK now has what former Prime Minister Tony Blair proudly described as 'the most restrictive laws on trade unions in the Western world'.[176] At present, the UK government is attempting to make those laws even *more* restrictive through the Strikes (Minimum Service Levels) Bill which will empower employers to mandate 'minimum service levels' in a broad range of sectors and require unions to take reasonable steps to ensure that named individuals cross picket lines to attend work on pain of the entire strike losing its legal protection.[177]

Though domestic UK law does not recognise a right to strike, the ECHR as incorporated into domestic law by the HRA *does* contain such a right. Article 11 of the ECHR protects the right to freedom of association, including the right to form and join trade unions for the protection of one's interests, subject to the usual caveat (in Article 11(2)) that states are free to restrict it

---

[171] R Dukes, 'The Liberal Socialist Tradition in UK Labour Law' in A Bogg, J Rowbottom and A Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart 2020). For a critique of the 'collective laissez-faire' interpretation *see* K Ewing and J Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46(1) *Industrial Law Journal* 23.
[172] C Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton 2005), 1.
[173] Trade Union Act 2016, s 2
[174] Trade Union and Labour Relations (Consolidation) Act 1992, s 234A.
[175] Employment Act 1990, s 4.
[176] *See* G Gall, 'Blair's Trade Union Reform at 20' *Tribune Magazine*, https://tribunemag.co.uk/2020/06/blairs-trade-union-reform-at-20 (accessed 7 July 2023).
[177] Joint Committee on Human Rights, *Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022-2023* (2023 HC 1088 HL 157).

if such restriction is prescribed by law and necessary in a democratic society for the pursuit of a legitimate aim. The ECtHR's jurisprudence on trade union rights—which it considers 'one form or a special aspect of freedom of association'[178]—is, however, at best inconsistent and at worst unprincipled.[179] The ECtHR acknowledges that 'strike action is clearly protected by Article 11',[180] as is secondary strike action[181] (solidarity action taken by one group of workers, whose employer is not a party to the trade dispute, in support of another group of workers)[182], and has been prepared to intervene when states severely restrict the former.[184] But is has also granted a capacious margin of appreciation under Article 11(2) in cases against the UK.[185] So much so, in fact, that a confident Court of Appeal has been able to give key aspects of the UK's draconian procedural constraints a clean bill of health by ruling that they are proportionate restrictions on Article 11 rights.[186] The important case of *RMT v UK*, for example, upheld the UK's absolute ban on secondary strike action by drawing a distinction between 'core' trade union activities[187] which give rise to a narrower margin of appreciation and 'accessory' activities (those that do not go to "the very substance" of freedom of association)[188] which give rise to a wider margin of appreciation.[189] The right to take secondary action fell into the latter category, and the UK's comprehensive ban on it was justified under Article 11(2) as a proportionate interference for the legitimate aim of shielding the domestic economy from disruption. As a consequence of this latitude, the HRA largely fails to bite on the UK's restrictive trade union laws and the ECtHR 'appears to have effectively closed its doors to British workers and their unions seeking to rely on the Convention'.[190]

---

[178] *National Union of Belgian Police v Belgium* (1979-1980) 1 EHRR 578 [38].

[179] K Ewing and J Hendy, 'Article 11(3) of the European Convention on Human Rights' (2017) *European Human Rights Law Review* 356. *Also see* C Barrow, 'RMT v United Kingdom [2014]: the European Court of Human Rights intimidated into timidity or merely consistent in its inconsistency?' (2015) *European Human Rights Law Review* 277.

[180] *National Union of Rail, Maritime and Transport Workers v The United Kingdom* (2015) 60 EHRR 10 [84].

[181] *Ibid.* 77.

[182] Lord Wedderburn, *The Worker and the Law* (3rd edn, Penguin 1986) 597.

[184] For example, in *Hrvatski Liječnički Sindikat v Croatia* (Application no. 36701/09) the court found a violation of Article 11 where strike action was banned outright for a period of more than three years.

[185] K Ewing and J Hendy (n 171).

[186] *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829.

[187] Previous cases listed the right to form and join a trade union, the prohibition of closed-shop agreements, and the right of a trade union to seek to persuade an employer to hear its concerns as 'essential elements' of the right 'without which that freedom would become devoid of substance'. *Demir and Baykara v Turkey* (Application no. 34503/97) 144-145.

[188] *National Union of Rail, Maritime and Transport Workers v The United Kingdom* (2015) 60 EHRR 10 [88]

[189] *Ibid.* 87.

[190] K Ewing and J Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45(3) *Industrial Law Journal* 391, 415.

The problem, however, runs even deeper than the surface-level issue of the HRA's failure to protect the rights of trade unions and their members. In a penetrating theoretical analysis of the *RMT v UK* judgment, Rob Knox draws our attention to the ideological dimension of the case and the way in which human rights as presently formulated help to channel trade unions' activities along a fundamentally neoliberal route that dampens their ability to function as effective intermediary institutions between citizen and state.[191] The critique centres on one of the problems with the HRA noted above, namely, the fact that it places a wedge between political and economic rights. On this occasion, the court in *RMT* emphasised the primarily *economic* role of trade unions—their role in maximising the interests of fractured groups of workers against their individual employers—and syphoned it off from the important *political* function that they played in the past by organising individual workers into a more-or-less coherent class and mounting a political challenge that helped birth the 20th century welfare state. Secondary action happens to be one important method through which trade unions can forge this collective class consciousness and then impress upon the political sphere the necessity to change economic structures to accommodate that class's collective interests. Absent this kind of action, trade unions become nothing more than vessels for the promotion of individual interests that might threaten this-or-that employer but have little bearing on the overarching *status quo* (which is precisely what we need them to do if they are to play a role in extracting authoritarian populism at its roots). By relegating such action to a mere 'accessory' function, and by approaching the problem as one of balancing the abstract rights of union members against the abstract rights of wider society (without acknowledging that wider society has in the past benefited mightily from trade union action), the court succeeded both in depoliticising trade union action and rendering it compatible with the neoliberal status quo. It therefore played a useful role in constructing neoliberal subjects, even within the former bastions of workers' rights.

That human rights should function in this way is not a given. The UK could, in fact, build on the existing right to strike by creating a new domestic right that ameliorates many of these problems. Perhaps the most throughgoing attempt to explain how that might be done comes from the Institute of Employment Rights, which proposes in its *Manifesto for Labour Law* a new right that removes many (though not all) of the procedural burdens and significantly

[191] R Knox, (n 130).

expands the substantive scope of legal industrial action.[192] In outline, the *Manifesto* calls for the right to (among other things) encompass action beyond terms and conditions of employment so as to include 'political protest in defence of [workers'] interests';[193] a right to take secondary action or 'sympathy action' in support of other workers in dispute;[194] a notice period to employers of no less than three days rather than the current 14 days;[195] and the removal of detailed and bureaucratic legislative intrusions into trade union procedures and their replacement with a simple requirement that their members should design their internal procedures in a democratic manner.[196] Taken as a whole, these reforms could reinvigorate the trade union movement and buttress its ability to do what it did in the 20th century, namely put pressure on the state to adopt a different economic model. It might be objected that this kind of human rights reform would lead to disruptive trade union activity, but one should acknowledge the fact that making the changes necessary to prevent the spread of authoritarian populism will necessarily imply some disruption. It is precisely the false claim that human rights can be enjoyed absent fundamental social, political, and economic changes that we are trying to challenge.

9. Conclusion

In summary, I have argued that ongoing UK government assaults on the HRA are a form of right-wing populist constitutionalism, that the HRA (for all its important successes) has been imbricated with the root causes of populism in myriad ways, and that it ought to be reformed in a manner that makes it more able to extract right-wing populism at its roots, in particular by embedding ESR and strong trade union rights.

None of the above ideas are presented in the form of a panacea or a magic pill for curing what ails us. Nor should they be taken as a wish to recover the past in the form of the present. Objective global conditions have moved-on since the Golden Age of capitalism[197] and, as Branko Milanovic reminds us, it took two world wars, the Bolshevik revolution, the international growth of militant social-democratic and communist parties, and powerful trade

---

[192] The Institute of Employment Rights, 'A Manifesto for Labour Law: towards a comprehensive revision of workers' rights' https://www.ier.org.uk/product/manifesto-labour-law-towards-comprehensive-revision-workers-rights/ (accessed 7 July 2023) 51.
[193] *Ibid.* 7.7.
[194] *Ibid.* 7.9.
[195] *Ibid.* 7.14.
[196] *Ibid.* 7.15-7.16.
[197] *See* B Milanovic, 'Will social democracy return? A review of Offer and Söderburg' http://glineq.blogspot.com/2016/10/will-social-democracy-return-review-of.html (accessed 7 July 2023).

union action to force the holders of power to 'give up some in order to preserve more'.[198] The reform proposals are instead a modest attempt to turn a human rights framework that was designed to undercut social-democratic politics in a new direction more attuned with the existential problems that have washed violently ashore with the swell of neoliberalism. They are a sample of the kind of thinking, and the kind of practice, that I think human rights advocates ought to invest in. My central concern has been to set-out some of the ways in which human rights—the modern language of human emancipation—might play a bigger part in strengthening and empowering bottom-up movements that could once again do the difficult task of forcing those in power to 'give up some in order to preserve more', in whatever form that might take.

[198] B Milanovic, 'Nostalgia for a past that never was; Part 1 review of Paul Collier's 'The future of capitalism'' http://glineq.blogspot.com/2019/08/nostalgia-for-past-that-never-was-part.html (accessed 7 July 2023). For a detailed account of the global conditions that transformed embedded liberalism into a dominant political order, *see* G Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (Oxford 2022).

Bibliography

Abdelal R and Ruggie J, 'The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism' in David Moss & John Cisternino (eds), *New Perspectives on Regulation* (Cambridge 2009)

Alston P, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1

Blokker P, 'Populism as a Constitutional Project' (2019) 17(2) *International Journal of Constitutional Law* 535

Bogg A, Rowbottom J and Young A (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart 2020)

Brabazon H (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2016)

Brandes T, 'Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination and Social Solidarity' (2020) 29(1) *Minnesota Journal of International Law* 65

Brown W, 'The Most We Can Hope For…Human Rights and the Politics of Fatalism' (2004) 103 *The South Atlantic Quarterly* 451

Campbell T, Ewing K and Tomkins A (eds), *Sceptical Essays on Human Rights* (Oxford 2001)

Collins H, Ewing K and McColgan A, *Labour Law* (2nd edn, Cambridge 2019)

Crouch C, 'Post-Democracy and Populism' (2019) 90 *The Political Quarterly* 124

Daly E, 'Constitutionalism and Crisis Narratives in Post-Brexit Politics' (2020) 68(4) *Political Studies* 895

Dicey A, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1915)

Duranti M, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford 2017)

Ewing K and Hendy J, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46(1) *Industrial Law Journal* 23

-- -- 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45(3) *Industrial Law Journal* 391

-- -- Article 11(3) of the European Convention on Human Rights' (2017) *European Human Rights Law Review* 356

Farrell M, Drywood E and Hughes E, *Human Rights in the Media: Fear and Fetish* (Taylor & Francis 2019)

Fredman S, ‘New horizons: incorporating socio-economic rights in a British Bill of Rights’ (2010) *Public Law* 297

Gall G, ‘Blair’s Trade Union Reform at 20’ *Tribune Magazine* (2020), <https://tribunemag.co.uk/2020/06/blairs-trade-union-reform-at-20> accessed 7 July 2023.

Gearty C, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford 2016)

Gerstle G, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (Oxford 2022)

Gonzalez-Salzberg D & Hodson L (eds), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2019)

Gordon M, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Bloomsbury 2017)

Hickey T, ‘Legitimacy – *not Justice* – and the Case for Judicial Review’ (2022) 42(3) *Oxford Journal of Legal Studies* 893

Hirschl R, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard 2007)

Howell C, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton 2005)

Hunt M, Hooper H and Yowell P (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015)

Ignacio Guiffré C, ‘Deliberative constitutionalism “without shortcuts”: On the deliberative potential of Christina Lafont’s judicial review theory’ (2023) 12 *Global Constitutionalism* 215

Inglehart R & Norris P, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (2016) <https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash> accessed 7 July 2023

Jäger A & Borriello A, ‘Making Sense of Populism’ (2020) 3(4) *Catalyst*

Jowell J and O’Cinneide C (eds), *The Changing Constitution* (9th ed, Oxford 2019)

Kaltwasser C et al. (eds), *The Oxford Handbook of Populism* (Oxford 2017)

Kavanagh A, ‘What’s so weak about “weak-form review”? The case of the UK Human Rights Act 1998’ (2015) 13(4) *International Journal of Constitutional Law* 1008

-- -- ‘Participation and Judicial Review: A Reply to Jeremy Waldron’, (2003) 22 *Law and Philosophy* 451

Kenny D and McCann L, ‘Directive Principles, Political Constitutionalism, and Constitutional Culture: the Case of Ireland’s failed Directive Principles of Social Policy’ (2022) 18 *European Constitutional Law Review* 207

Loughlin M, *Against Constitutionalism* (Harvard 2022)

Lyon A, *Constitutional History of the United Kingdom* (Cavendish Publishing 2003)

Mair P, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013)

Marks S, 'Human Rights and Root Causes' (2011) 74(1) *The Modern Law Review* 57

Mattei U and Haskell J (eds), *Research Handbook on Political Economy and Law* (Elgar 2015)

McAuliffe P, 'Programmatic Approaches to Realising Socio-Economic Rights: Debates, Definitions and Trends' (2021) 22 *Melbourne Journal of International Law* 1

McHarg A & Mitchell J, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512

McHarg A, '*The Future of the Territorial Constitution under Labour?* The Report of the Commission on the UK's Future', available at: <https://ukconstitutionallaw.org/2022/12/08/aileen-mcharg-the-future-of-the-territorial-constitution-under-labour-the-report-of-the-commission-on-the-uks-future/#:~:text=This%20safeguarding%20procedure%20would%20itself%20be%20one%20of%20the%20protected%20provisions%2C%20thus%20ensuring%20a%20type%20of%20manner%20and%20form%20entrenchment%20for%20constitutionally%20important%20statutes.> accessed 7 July 2023

Milanovic B, *Nostalgia for a past that never was; Part 1 review of Paul Collier's 'The future of capitalism'*, <http://glineq.blogspot.com/2019/08/nostalgia-for-past-that-never-was-part.html> Accessed 7 July 2023

Milanovic B, *Will social democracy return? A review of Offer and Söderburg*, <http://glineq.blogspot.com/2016/10/will-social-democracy-return-review-of.html> Accessed 7 July 2023

Mouffe C, *For a Left Populism* (Verso 2018)

Moyn S, *The Last Utopia: Human Rights in History* (Harvard 2010)

-- -- *Not Enough: Human Rights in an Unequal World* (Harvard 2018)

Mudde C and Kaltwasser C, 'Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America' (2013) 48(2) *Government and Opposition* 147

Nickel J.W., 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 *Human Rights Quarterly* 984.

O'Connell P, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483

-- -- 'Human rights: contesting the displacement thesis' (2018) 69(1) *Northern Ireland Legal Quarterly* 19

Pentassuglia G, 'Inside and Outside the European Convention: The Case of Minorities Compared' (2006) 6 *Baltic Yearbook of International Law* 26

Ruggie J, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order' (1982) 36(2) *International Organization* 379

Salomon M, 'Emancipating human rights: Capitalism and the common good' (2023) *Leiden Journal of International Law* 1

Sumption J, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019)

Tucker A, 'Parliamentary Sovereignty and the Ingenuity of the Human Rights Act' (2012) 3(1) *Jurisprudence* 307

Varuhas J, 'The Principle of Legality' (2020) 79(3) *Cambridge Law Journal* 578

Waldron J, 'The Core of the Case Against Judicial Review' (2006) 115(6) *The Yale Law Journal* 1346

-- -- *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge 2019)

Wallace S, 'Death by a Thousand Cuts: The Human Rights Act' *The Constitution Society* (2023) <https://consoc.org.uk/death-by-a-thousand-cuts/> accessed 7 July 2023

Wedderburn, *The Worker and the Law* (3rd edn, Penguin 1986)

Wolf M, *The Crisis of Democratic Capitalism* (Penguin 2003)

Wood E, *Democracy Against Capitalism: Renewing Historical Materialism* (Verso 2016)

Young K, *Constituting Economic and Social Rights* (Oxford 2012)