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7 THE ALLEGED BACKLASH AGAINST HUMAN RIGHTS: EVIDENCE FROM DENMARK AND THE UK

Jacques Hartmann and Samuel White

1 Introduction: Populist Backlash Against Human Rights?

As noted in Klug's introductory Chapter, some Western democracies are now beginning to press the ejection button on the universal human rights framework. In these democracies politicians often refer to an alleged popular backlash against human rights, a narrative that is also adopted by some scholars. This chapter aims to show that although much academic literature and political discourse points to a major backlash against human rights, little data actually exists to support any such claim. Indeed, some data shows strong public support for human rights. Using the examples of Denmark and the United Kingdom (UK) – countries that have either recently had a showdown with human rights or seem on the verge of one – the chapter shows that popular support of human rights is either far stronger than many scholars or politicians suggest or that the true extent of popular support is simply unknown. Despite this, it will be argued that there is no room for complacency and that much work needs to be done in enhancing our comprehension of the public's views, knowledge and understanding of human rights.

2 The Populist Critique of Human Rights

Human rights have always been a contested concept, but recently most empirical arguments seem to have been swept away by a wave of populist critique.¹ Some even argue that the 'upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War.'² Concerningly, a report by the Tony Blair Institute for Global Change notes that in recent years there has been a momentous 'rise of populism within countries that could significantly remake the global international order.'³

The general populist critique of human rights is similar around the world: human rights are portrayed as anti-democratic because they allow courts, domestic or international, to encroach upon the place of national legislatures. At times, this critique is even expressed by judges themselves. For example, the former UK Supreme Court judge, Jonathan Sumption, said in his 2019 Reith Lectures that human rights allow courts to take inherently political questions and reclassify 'them as questions of law, thus reforming them from the realm of democratic decision making and referring them instead to national and international courts.'⁴ Not everyone agreed. His lectures drew

The authors are grateful to Professor Conor Gearty, Professor Mark Gibney, Dr Brian Christopher Jones and the editors for their valuable comments. The usual disclaimers apply.

¹ For a definition of 'populism', see JW Müller, *What Is Populism?* (Penguin 2017).

² E Posner, 'Liberal Internationalism and the Populist Backlash' (2017) Chicago Public Law and Legal Theory Working Paper No 606.

³ J Kyle and B Meyer, 'High Tide? Populism in Power, 1990-2020' (Tony Blair Institute for Global Change 2020) 9 <<https://institute.global/sites/default/files/2020-02/High%20Tide%20Populism%20in%20Power%201990-2020.pdf>> accessed 24 March 2020.

⁴ J Sumption 'Human Rights and Wrongs' (2019 Reith Lectures, Edinburgh, 4 June 2019).

criticism, including from fellow judges such as former President of the Supreme Court, Brenda Hale. She rejected the ‘suggestion that judicial processes are not also democratic processes’, arguing further that existing processes ‘are a necessary part of the checks and balances in any democratic Constitution.’⁵ Interestingly, when an undertaking was made by the UK Government to pursue constitutional reform,⁶ including altering the workings of the Supreme Court and increasing political involvement in judicial appointments, Sumption backtracked somewhat, arguing that judges are capable of managing the situation themselves.⁷ Nonetheless, Sumption is not alone in the view that judges are too involved in political issues and his critique echoes that of populists around the world.⁸

Critique of human rights is not in itself new. Many have already complained about the ‘inflation’ in human rights discourse and the need for a more disciplined articulation of the core concept of such rights and their influence on law and politics.⁹ The critique also manifests itself in criticisms of liberal institutions which are said to have powers that are too far reaching and to present unnecessary obstacles to dealing with perceived threats, such as terrorism or migration.¹⁰ In Denmark and the UK, as well as more widely in Europe, there has been a recent surge in criticism of the European Court of Human Rights (ECtHR).¹¹ As explained by Lambrecht, criticism towards the Court is ‘nuanced and complex’ but the vast majority is focused on its functioning.¹² But this critique is also not in itself new. What is new is that domestic politics seem to have changed and a ‘showdown’, that is to say a possible repeal of domestic human rights law or withdrawal from international human rights treaties, no longer seems inconceivable. This is well exemplified by political debates in Denmark and the UK.

⁵ Lady Hale, ‘Law and Politics: A Reply to Reith’ (Dame Frances Patterson Memorial Lecture 2019 Address, 8 October 2019). For an overview of the debate by judges, see Ed Bates, ‘Ed Bates: The Senior Judiciary on “Strasbourg” – More Supportive Than Some Would Have You Believe’ (*UK Constitutional Law Association*, 28 May 2015) <<https://ukconstitutionallaw.org/2015/05/28/ed-bates-the-senior-judiciary-on-strasbourg-more-supportive-than-some-would-have-you-believe/>> accessed 24 March 2020.

⁶ S Clear, ‘Boris Johnson Is Planning Radical Changes to the UK Constitution – Here Are the Ones You Need to Know About’ (*The Conversation*, 18 December 2019) <<https://theconversation.com/boris-johnson-is-planning-radical-changes-to-the-uk-constitution-here-are-the-ones-you-need-to-know-about-128956>> accessed 24 March 2020.

⁷ J Sumption, ‘Meddling by Judges Is a Problem Only They Can Fix’ *The Times* (16 February 2020). See also J Sumption, ‘Brexit and the British Constitution: Reflections on the Last Three Years and the Next Fifty’ [2020] *The Political Quarterly*.

⁸ See e.g. Human Rights Watch, ‘World Report 2018’ (*Human Rights Watch*, 2017) <<https://www.hrw.org/world-report/2018>> accessed 24 March 2020.

⁹ See e.g. M Cranston, ‘Human Rights: Real and Supposed’ in DD Raphael (ed), *Political theory and the rights of man - David Daiches Raphael* (Macmillan 1967); C Wellman, *Real Rights* (Oxford University Press 1995); B Orend, *Human Rights: Concept and Context* (Broadview Press 2002). See also Chapter 1 in this Volume.

¹⁰ See Chapter 4 in this Volume.

¹¹ See J Hartmann, ‘Misdiagnosing the Human Rights Malaise: Possible Lessons from the Danish Chairmanship of the Council of Europe’, *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019); P Popelier, S Lambrecht and K Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersia 2016). As well as discussion in this Volume, Chapters 3, 4 and 8.

¹² S Lambrecht, ‘Assessing the Existence of Criticism of the European Court of Human Rights’ in P Popelier, S Lambrecht and K Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016) 505 and 510.

3 The Debates in Denmark and the UK

Although Denmark arguably was the first country to experience a form of showdown with the ECtHR, anti-human rights rhetoric arguably has a longer and more established history in the UK. In fact, the UK has always had an ambivalent relationship with the European human rights system.¹³

Prime Minister Winston Churchill and his coalition war-cabinet are often mentioned as a driving force behind the European project, but the UK was 'highly sceptical' during the negotiation of the European Convention on Human Rights (ECHR).¹⁴ Churchill's successor in the post-war Labour government, Prime Minister Clement Attlee, was 'suspicious of the Convention and only supported it with reluctance'.¹⁵ Prime Minister Tony Blair, who led the incorporation of the Convention into UK law by way of the Human Rights Act 1998, in due course became 'an angry critic' of it, particularly after terrorism incidents in the early 2000s.¹⁶ In 2006, Prime Minister David Cameron – who famously stated that he felt 'physically ill' at the thought of giving prisoners the vote¹⁷ – said he would abolish the Human Rights Act and put a British Bill of Rights in its place. He also initiated a process that led to the Brighton Declaration, which by many was seen as way to reduce the ECtHR's power and influence.¹⁸

Abolition soon became a recurrent theme in UK politics, and the policy was re-announced in 2014.¹⁹ The reasoning was explained by Dominic Raab, then a junior justice minister, who said: 'Our aim is to protect fundamental rights, prevent the abuse of human rights law and restore some common sense to the system.'²⁰

Cameron's successor, Prime Minister Theresa May, was also a critic of human rights. She denounced 'activist left-wing human rights lawyers' for challenging British forces over the use of torture in Iraq.²¹ She further suggested that the UK should withdraw from the ECHR, rather than simply replace

¹³ C Gearty, *On Fantasy Island: Britain, Strasbourg, and Human Rights* (Oxford University Press 2016).

¹⁴ E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford 2010) 78.

¹⁵ J Norman and P Osborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act* (Liberty 2009) 6. For a more general account of the history of the ECHR, see Bates, *The Evolution of the European Convention on Human Rights* (n 14).

¹⁶ *ibid* 6–11.

¹⁷ HC Deb 3 November 2010, vol 517, col 921.

¹⁸ See e.g. E Bates, 'The Brighton Declaration and the "meddling court"' (*UK Human Rights Blog*, 22 April 2012) <<https://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/>> accessed 24 March 2020.

¹⁹ O Wright, 'David Cameron to "Scrap" Human Rights Act for New "British Bill of Rights"' *Independent* (1 October 2014) <<https://www.independent.co.uk/news/uk/politics/conservative-party-conference-cameron-announces-plans-to-scrap-human-rights-act-9767435.html>> accessed 24 March 2020.

²⁰ HC Deb 6 May 2016, vol 609, col 515.

²¹ S Osborne, 'Theresa May Speech: Tory Conference Erupts in Applause as PM Attacks "Activist Left Wing Human Rights Lawyers"' *Independent* (5 October 2016). <<https://www.independent.co.uk/news/uk/politics/theresa-may-tory-conference-speech-applause-attacks-activist-left-wing-human-rights-lawyers-a7346216.html>> accessed 24 March 2020.

the Human Rights Act.²² Whilst the UK's current policy is unclear, it remains Conservative party policy to 'update the Human Rights Act . . . to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.'²³ In line with this Volume's overarching framework, this can be seen as an attempt to eject human rights, presenting them as challenges to national security and state sovereignty.²⁴ Presumably, the abolition issue will resurface once the current preoccupation with leaving the European Union is over.²⁵ Although recent events, such as the increasingly overt government antagonism to the ECHR, may even indicate that a UK showdown is now imminent.²⁶

In comparison to the UK, Denmark has had a shorter, albeit no less acrimonious, political debate on human rights. Originally, Denmark was itself sceptical of a European human rights system that could, as they saw it, meddle in domestic affairs.²⁷ But until the late 1990s, in line with Francesca Klug's recognition of a broad acceptance phase, human rights were not a controversial topic in Danish politics.²⁸ This changed with the rise of the hard-right Danish People's Party (DPP), which became ever more influential by denouncing immigration, multiculturalism and Islam as alien to Danish society and values. The rise of the DPP fundamentally changed Danish politics. The centre-right government – in power from 2015-2019 with a confidence-and-supply deal²⁹ with the DPP – almost halted the arrival of asylum-seekers and governed on a political agreement which explicitly mentioned the need to:

. . . critically review the way in which the dynamic interpretation of the European Court of Human Rights has broadened the scope of parts of the European Convention on Human Rights.³⁰

That political ambition culminated in the government announcing plans to use the Danish chairmanship of the Council of Europe (CoE) – November 2017 to May 2018 – to reform the ECHR.³¹

²² W Worley, 'Theresa May "Will Campaign to Leave the European Convention on Human Rights in 2020 Election"' *Independent* (29 December 2016) <<https://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html>> accessed 24 March 2020.

²³ Conservative Party, 'The Conservative and Unionist Party Manifesto 2019' (2019) 48.

²⁴ Chapter 2 in this Volume, 9.

²⁵ The Conservatives' 2017 election manifesto committed to not repealing or replacing the 1998 Human Rights Act, but only 'while the process of Brexit is underway'. More telling is the fact that the draft of the Political Declaration related to Brexit originally indicated that the relationship would be underpinned by a reaffirmation of the United Kingdom's commitment to the ECHR, but the final document replaced this with the more nuanced formulation that the UK would merely agree 'to respect the framework of the European Convention on Human Rights.' See G Giannouloupoloulos, 'Human Rights with a (Brexit) Use-by Date - UK in a Changing Europe' (1 February 2019) <<https://ukandeu.ac.uk/human-rights-with-a-brexit-use-by-date/>> accessed 24 March 2020.

²⁶ K Proctor, 'Sentencing: Minister Rejects European Human Rights Convention Warning' *The Guardian* (5 February 2020) <<https://www.theguardian.com/uk-news/2020/feb/05/sentencing-minister-rejects-european-human-rights-convention-warning>> accessed 24 March 2020. This issue is discussed further in the conclusion.

²⁷ Bates, *The Evolution of the European Convention on Human Rights* (n 14) 77–78.

²⁸ Chapter 2 in this Volume, 4–6.

²⁹ A deal that is less formal than a full-blown coalition but one that allows a minority party, or coalition of parties, to form a government without an outright majority.

³⁰ J Hartmann, 'A Danish Crusade for the Reform of the European Court of Human Rights' (*EJIL Talk*, 14 November 2017) <<https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>> accessed 24 March 2020.

³¹ *ibid.*

The proposed reforms were supposed to make it easier to deport foreign criminals and secure less scrutiny of domestic decisions. The proposals were met with significant criticism from commentators and NGOs, who argued that the reforms posed a 'grave risk to the independence, integrity and authority of the European Court of Human Rights'.³² In the end, Denmark failed to garner support among the 47 members of the CoE for the proposed reforms. Instead, the members adopted a watered down version of the so-called 'Copenhagen Declaration'.³³ Repeated bills put forward by the DPP to abolish the Danish law incorporating the ECHR likewise failed.³⁴

In 2019, the centre-right government was replaced by a centre-left government, but hostility to immigration and human rights has remained and the Danish Social Democrats stance on these issues is often hard to distinguish from that of the DPP.³⁵ The new Prime Minister, Mette Frederiksen, has on several occasions stated that human rights protect the 'wrong people', highlighting her willingness to support international efforts to change international human rights treaties.³⁶ Political scientist Cas Mudde has even used Denmark as an example when warning against pandering to right-wing anxieties about immigration as attempt to try to stop right-wing populism.³⁷

4 The Broader Scholarly Debate

The political debate in Denmark and the UK is extreme, but not unique, and political hostility to human rights is mirrored in scholarly debate around the world.³⁸ Some suggest that we are probably already in the 'post-human rights era'.³⁹ Others refer to the survival of human rights,⁴⁰ their 'twilight'⁴¹ or 'endtimes'.⁴² Stephen Hopgood has suggested that the 'foundations of universal liberal

³² A Donald and P Leach, 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must Be Rewritten' (*EJIL Talk*, 21 February 2018) <<https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/>> accessed 24 March 2020. See also A Follesdal and G Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' (*EJIL Talk*, 22 February 2018) <<https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/>> accessed 24 March 2020.

³³ J Gerards and S Lambrecht, 'The Final Copenhagen Declaration: Fundamentally Improved with a Few Remaining Caveats' (*Strasbourg Observers*, 18 April 2018) <<https://strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats/>> accessed 24 March 2020.

³⁴ The most recent attempt was rejected in October 2018 by 83 to 23 (out of 179 eligible votes). See <<https://www.ft.dk/samling/20171/beslutningsforslag/b22/index.htm>> accessed 24 March 2020.

³⁵ 'Denmark's Social Democrats Beat the Migrant-Bashers at Their Game' *The Economist* (9 June 2019) <<https://www.economist.com/europe/2019/06/09/denmarks-social-democrats-beat-the-migrant-bashers-at-their-game>> accessed 24 March 2020.

³⁶ See e.g. HS Andersen and C Bloch, 'En Udtalelse Fra Mette Frederiksen Om Konventioner Får Støttepartier Til at Gå Til Angreb: »Dybt, Dybt Bekymrende«' *Berlingske* (13 November 2019) <<https://www.berlingske.dk/politik/en-udtalelse-fra-mette-frederiksen-om-konventioner-faar-stoettepartier-til>> accessed 24 March 2020.

³⁷ C Mudde, 'Why Copying the Populist Right Isn't Going to Save the Left' *The Guardian* (14 May 2019) <<https://www.theguardian.com/news/2019/may/14/why-copying-the-populist-right-isnt-going-to-save-the-left>> accessed 24 March 2020.

³⁸ See especially Chapter 2 in this Volume.

³⁹ I Wuerth, 'International Law in the Age of Trump: A Post-Human Rights Agenda' (*Lawfare*, 14 November 2016) <<https://www.lawfareblog.com/international-law-age-trump-post-human-rights-agenda>> accessed 24 March 2020.

⁴⁰ C Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

⁴¹ EA Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014).

⁴² S Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013).

norms and global governance are crumbling' and that we are 'living through the "endtimes" of a civilizing mission.'⁴³ Those less pessimistic talk about a 'crossroad',⁴⁴ 'crisis'⁴⁵ or 'emergency'. Samuel Moyn, for example, notes that 'Today is widely regarded as a moment of emergency for human rights around the world.'⁴⁶ He blames the international human rights movement itself for the lack of distributive or material equality, which he sees as the source of modern populism and calls for a fundamental re-think:

For a generation, it has been familiar to think that human rights are the essential bulwark against atrocity and misrule. It is time, however, to relearn the older and grander choice between socialism or barbarism, and time to elevate it to the global project it has rarely been but must become.⁴⁷

In a less radical fashion, Philip Alston, Special Rapporteur on extreme poverty and human rights, also points to inequality. He believes that:

. . . a renewed focus on social rights and on diminishing inequality must be part of a new human rights agenda which promises to take into account the concerns, indeed the human rights, of those who feel badly done by as a result of what we loosely call globalization-driven economic change.⁴⁸

Those that are less pessimistic are often more moderate in their suggestions. Instead of a fundamental re-think, they suggest new approaches to the interpretation of human rights law to help address the challenges of populism, such as increased judicial respect for and deference to political institutions.⁴⁹ A few call for 'radical moderation'.⁵⁰

Regardless of the starkness of their predictions, much of the political and scholarly debate is premised on the assumption that popular support for human rights is waning. This assumption is seldom challenged, despite the fact that the lack of public opinion research in the field of human rights has been long lamented. As stated by Sam McFarland:

. . . few international polls have covered a broad range of human rights topics or attitudes toward human rights in general. International polls on a number of human rights issues appear totally missing, including, as examples, the rights of the accused to a presumption of innocence and a fair trial, the prohibition of slavery, the rights of property and privacy. . .⁵¹

The lack of public opinion research has not prevented many scholars from proclaiming the demise, or even the death, of the human rights movement. Most point to the election of populist leaders, especially US President Donald Trump, and the growth of right-wing nationalism in countries such as

⁴³ *ibid.*

⁴⁴ M Goodale, *Human Rights at the Crossroads* (Oxford University Press 2015).

⁴⁵ A Bullard (ed), *Human Rights in Crisis* (Ashgate 2008).

⁴⁶ S Moyn, 'On Human Rights and Majority Politics' (2019) 52 *Vanderbilt Journal of Transnational Law* 1135, 1157.

⁴⁷ S Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018) 220.

⁴⁸ P Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1, 6.

⁴⁹ K Sikkink, "'Human Rights, Responsibilities, and Democracy,'" Sikkink Comments on Tasioulas and Moyn Papers: "Symposium on the Future of International Human Rights Law" (2019) 52 *Vanderbilt Journal of Transnational Law* 1315.

⁵⁰ H Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge University Press 2019).

⁵¹ S McFarland, 'International Differences in Support for Human Rights' (2017) 12 *Societies Without Borders* <<https://scholarlycommons.law.case.edu/swb/vol12/iss1/12>> accessed 24 March 2020.

Russia, as evidence that the human rights movement is facing unprecedented challenges.⁵² Such comments, however, conflate several issues. The election of illiberal leaders undoubtedly represents a challenge to the human rights movement, but voting for a particular political candidate – such as Trump or Putin – is at best a blunt indication of political preferences. In every election, candidates stand on a range of policies, some of which individual voters may dislike but disregard because of other priorities, or entrenched personal voting patterns. Thus, a vote for a specific candidate does not (necessarily) clearly and precisely indicate support for or opposition to a particular government policy, such as an anti-human rights policy.⁵³ Indeed, there is evidence of continued and strong support for human rights in both Russia and the United States.⁵⁴

Despite empirical evidence to the contrary, numerous scholars seem to have fallen prey to the fallacy that because populist movements with explicitly anti-human rights agendas win national elections, then the human rights movement must be lacking popular support. Alston undoubtedly captured the concerns of many when he asserted that:

. . . the reality is that the majority in society feel that they have no stake in the human rights enterprise, and that human rights groups really are just working for “asylum seekers”, “felons”, “terrorists”, and the like. This societal majority seems far less likely today than it might have been in the past to be supportive of the rights of the most disadvantaged merely out of some disappearing ethos of solidarity.⁵⁵

He further stated that there is ‘waning affection in the United Kingdom, not to mention many other states for the European Court of Human Rights.’⁵⁶ Yet, no empirical evidence is cited for either assertion and those few studies which exist, that are mentioned below, strongly contradict the assertion that there is an absence of support for the ECHR.⁵⁷ Despite this, as noted above, many scholars continue to conflate public attitude and governmental policy, or simply assert that human rights lack popular support.

The following seeks to illustrate the disconnect between the political and the scholarly debates on human rights, on the one hand, and our current knowledge on attitudes towards human rights, on the other. It further warns against adopting the populist framing and rhetoric of an alleged backlash against human rights. Finally, it asks some fundamental epistemological questions about what people know about human rights, making suggestions for how this vital debate may become better informed. In doing so, the chapter relies on data from Denmark and the UK.

⁵² See e.g. I Wuerth, ‘International Law in the Age of Trump: A Post-Human Rights Agenda’ (*Lawfare*, 14 November 2016) <<https://www.lawfareblog.com/international-law-age-trump-post-human-rights-agenda>> accessed 24 March 2020; S Moyn (n 47); P Alston (n 48) 1; S Hopgood, ‘Fascism Rising’ *Open Global Rights* (9 November 2016) <<https://www.openglobalrights.org/fascism-rising/>> accessed 24 March 2020.

⁵³ Cf. P Kline, *A Handbook of Test Construction (Psychology Revivals): Introduction to Psychometric Design* (1 edition, Routledge 2015) 1289.

⁵⁴ SB Snyder, ‘Is the Trump Administration Abandoning Human Rights?’ *Washington Post* (2 July 2017) <<https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/is-the-trump-administration-abandoning-human-rights/>> accessed 24 March 2020; TP Gerber, ‘Public Opinion on Human Rights in Putin-Era Russia: Continuities, Changes, and Sources of Variation’ (2017) 16 *Journal of Human Rights* 314.

⁵⁵ Alston (n 48) 6.

⁵⁶ *ibid* 8.

⁵⁷ Amnesty International UK, ‘The Public’s Message in New Poll: Keep Your Hands off the Human Rights Act’ (9 November 2015) <<https://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/public-message-new-poll-keep-your-hands-human-rights-act>> accessed 24 March 2020.

5 Popular Support For Human Rights: Denmark and the UK

The UK played a significant role in the drafting of the ECHR, and was the first country to ratify the Convention.⁵⁸ Denmark also engaged readily in the process, and was a crucial player, resisting a ‘close call’ to scrap the drafting all together.⁵⁹ It was among the first countries to ratify the Convention and to recognise the right of individual petition to the ECtHR.⁶⁰ Despite both being important forces in its creation, in recent times, there has been much discussion in both countries about the need either to overhaul the European human rights system or to withdraw from it altogether. These debates seem to accept uncritically the populist narrative, according to which human rights lack popular support. As explained by Jan-Werner Müller: ‘Populists claim that they, and they alone, represent the people’.⁶¹ But as will be illustrated below, the claim to exclusive representation is not an empirical one.⁶²

5.1. Data from Denmark

In Denmark, leading politicians from across the political spectrum have criticised the ECtHR and many have highlighted that there is a risk of human rights losing public support.⁶³ Among others, the then Danish Prime Minister explained the motivation for reform of the ECHR during a speech to the CoE’s Parliamentary Assembly in 2018. With a direct reference to the Danish political debate he said: ‘The question has been asked whether the Court goes too far in its interpretation and leaves too little room to the national democracies. It is no secret that we have had such discussions in Denmark too.’⁶⁴ The Prime Minister sought to ‘future proof’ the Convention, stating that if difficult questions were not addressed ‘we risk losing public support for human rights’.⁶⁵

The emphasis on public support has also been highlighted by human rights institutions and scholars. The Danish Institute of Human Rights, among others, has stated that it wants a strong human rights system where there is support for both the ECHR and the ECtHR. Noting further that ‘Regrettably, this support is declining, and that is why we must respond.’⁶⁶ By responding, the Institute meant supporting the above-mentioned proposals for reform. Danish scholars have likewise postulated that

⁵⁸ For an in-depth discussion of the political role the UK had in the development of the ECHR see G Marston, ‘The United Kingdom’s Part in the Preparation of the European Convention on Human Rights, 1950’ (1993) 42 ICLQ 796. See also E Bates (n 14) 134.

⁵⁹ SLB Jensen, ‘Evolving Internationalism: Denmark and Human Rights Politics, 1948–1968’ (2018) 36 Nordic Journal of Human Rights 252, 256.

⁶⁰ Bates (n 14) 175, n 13.

⁶¹ Müller (n 1) 3.

⁶² What follows is by no means intended as exhaustive study of relevant polls, but rather a collection based on the authors’ research. The data on Denmark has previously been published in J Hartmann, ‘Misdiagnosing the Human Rights Malaise: Possible Lessons from the Danish Chairmanship of the Council of Europe’, *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019) 153-163.

⁶³ Cf. J Hartmann, *Danmark og Den Europæiske Menneskerettighedskonvention* (Ex Tuto 2017).

⁶⁴ Speech by the then Prime Minister of Denmark, Lars Løkke Rasmussen, at the Parliamentary Assembly session Strasbourg (24 January 2018) Available at <<https://rm.coe.int/24-january-2018-speech-by-the-prime-minister-of-denmark-lars-l-kke-ras/1680786028>> accessed 24 March 2020.

⁶⁵ *ibid.*

⁶⁶ DE Svinth and J Christoffersen, ‘Institut for Menneskerettigheder: Menneskerettigheder er menneskeskabte - derfor skal vi naturligvis kunne diskutere dem’ *Politiken* (28 March 2018) <<https://politiken.dk/debat/kroniken/art5890632/Menneskerettigheder-er-menneskeskabte-derfor-skal-vi-naturligvis-kunne-diskutere-dem>> accessed 24 March 2020.

human rights lack popular support, again supporting reform of the ECHR.⁶⁷ Few have referred to any empirical evidence for their assertions.

Despite the repeated assertion that human rights lack popular support, the truth is that scholars and politicians know very little about the public's attitude towards human rights. The simple reason for this is that little data exists. Denmark is, however, an exception. During the debate leading up to its chairmanship of the CoE two polls were commissioned in quick succession. Although the results were contradictory, they were nonetheless illuminating.

The first poll, published in an online newspaper, purportedly showed that almost half of the Danish public (48 per cent) wanted to leave the ECHR. Whereas only 34 per cent wanted to remain.⁶⁸ A second poll was published only two days later, and showed a startlingly different result. It showed that a large majority (73 per cent) wanted to remain party to the ECHR, while only 12 per cent wanted to withdraw from it.⁶⁹ How can this difference be explained?

Arguably, the question in the first poll was leading the respondents towards a specific answer. In the first poll, the respondents were asked:

The government will try to re-negotiate the European Convention on Human Rights so that it becomes easier to expel criminals without Danish citizenship. Should Denmark leave the Convention if it does not become easier to expel criminals?⁷⁰

The phrasing of the question suffers from obvious flaws: it is well known that even small wording differences can substantially affect the answers people provide in polls.⁷¹ The same is arguably the case with the first 2017 poll. By referring to the expulsion of foreign criminals, the pollsters altered the context of the question, and may therefore have influenced the outcome.

⁶⁷ See e.g. A Henriksen, 'Lektor i folkeret: Der er brug for en reform af menneskerettighederne' *Politiken* (17 January 2017) <<https://politiken.dk/debat/art5792662/Der-er-brug-for-en-reform-af-menneskerettighederne>> accessed 24 March 2020, and MB Andersen, 'Derfor er det svært at ændre konventionen' *Berlingske* (11 July 2017) <<https://www.berlingske.dk/kronikker/derfor-er-det-svaert-at-aendre-konventionen>> accessed 24 March 2020.

⁶⁸ E Holstein, 'Opbakningen Til Menneskerettighedskonventionen Er På Vippen' *Altinget* (4 September 2017) <<http://www.alinget.dk/christiansborg/artikel/opbakningen-til-menneskerettigheds-konventionen-er-paa-vippen>> accessed 24 March 2020. The poll was conducted via Norstats' Internet Panel among 1,000 respondents from a representative sample of the Danish population over the age of 18. The data was subsequently weighted to be politically representative. Answers were collected from 16–22 June 2017.

⁶⁹ J Hartmann, 'Retseksperter i Debatindlæg: Menneskerettighedsdomstolen Har Faktisk Folkelig Opbakning' (*Politiken*, 6 September 2017) <<https://politiken.dk/debat/debatindlaeg/art6096209/Menneskerettighedsdomstolen-har-faktisk-folkelig-opbakning>> accessed 24 March 2020. The poll was conducted via YouGov's Internet Panel among 957 respondents from a representative sample of the Danish population over the age of 18. Answers were collected from 25-27 August 2017. See also R Kerrn-Jespersen, 'Bakker Danskerne Op Om Den Europæiske Konvention Om Menneskerettigheder? - TjekDet - Leveret Af Mandag Morgen' (15 September 2017) <<https://www.mm.dk/tjekdet/artikel/bakker-danskerne-op-om-menneskerettighedskonventionen>> accessed 24 March 2020.

⁷⁰ Holstein (n 68). Authors' own translation.

⁷¹ See e.g. PEW Research Center, Questionnaire Design, <<http://www.pewresearch.org/methodology/u-s-survey-research/questionnaire-design/>>.

In this regard, the result from a 2016 poll published in the same online newspaper is noteworthy. In the 2016 poll, the same pollsters asked which of the following two statements the respondents most agreed with:

1. Denmark must withdraw from the international conventions so that we can more easily expel criminals and determine how many asylum seekers we will receive.
2. Denmark shall remain in the international conventions which help to uphold the international legal order and provide protection for individuals.

Although there was still a strong focus on the expulsion of criminals, this time half of the respondents (50 per cent) wanted to remain within the 'international conventions', whereas only 38 per cent wanted to leave. As the two polls have significant differences, they are not immediately comparable, nor do they say anything about changes over time. Thus, it is impossible to say if there is a backlash against human rights in Denmark. Neither poll, however, seems to bolster the prevalent narrative that support for human rights lacks popular support. This conclusion is supported by a second 2017 poll.

The second poll was commissioned by one of the authors and simply asked the respondents whether they had heard of the ECHR. Despite the poll being conducted at a time when there was intense media coverage of the topic, 6 per cent of respondents had never heard of the ECHR. Of those that knew it, 41 per cent said that they did not know much about it, whereas 41 per cent said they had some knowledge and 10 per cent said they had good knowledge of the ECHR.

Those who knew about the ECHR were asked: *'Do you think that Denmark should remain a member of the European Convention on Human Rights?'*⁷² 73 per cent said that Denmark should remain, whereas only 12 per cent wanted to leave. The result is in stark contrast to the first poll, which is especially interesting as both polls were carried out almost simultaneously, applying similar methods.⁷³

The second poll contained a further question: *'To what extent do you think that Denmark has benefited from being member to the European Convention on Human Rights?'* The majority thought that Denmark had benefitted: 61 per cent said either to a *'very high'* (8 per cent), *'high'* (16 per cent) *'some'* (25 per cent) or *'lesser'* (12 per cent) degree. Only 7 per cent answered: *'Not at all'*. Almost a third (32 per cent) answered that they did not know whether Denmark had benefited or not.

The above mentioned polls are complemented by a poll from 2018. The poll was commissioned by Amnesty Denmark, and asked:

How much do you agree with the following statement: Human rights are a relic from a different time and not relevant to us today.

The majority disagreed: more than 77 per cent either *'strongly disagreed'* (43.8 per cent) or *'disagreed'* (33.3 per cent). A sizable group *'neither agreed nor disagreed'* (12.2 per cent). And only 7.1 per cent either *'agreed'* (4.1 per cent) or *'strongly agreed'* (3.7 per cent). The remaining 2.9 per cent said they did not know. The same poll also asked:

⁷² Six per cent of the respondents had never heard of the ECHR. These were excluded from the rest of the poll.

⁷³ See above n 49 and 50.

How much do you agree with the following statement: Is it important that all people have some fundamental rights that states and governments are required to respect.

The vast majority agreed: 83.8 per cent either '*strongly agreed*' (52 per cent) or '*agreed*' (31.8 per cent). 6.2 per cent '*neither agreed nor disagreed*'. Only 8.1 per cent either '*disagreed*' (1.9 per cent) or '*strongly disagreed*' (6.2 per cent).

Unlike most other countries, a considerable body of evidence therefore exists on the popular support for human rights in Denmark, and it does not seem to fit the picture painted by scholars or politicians alike. Although the Danish polls provide some information on the public's attitudes towards human rights, there is still a lot we do not know.

5.2 Data from the UK

In recent years, successive UK governments have become ever more antagonistic towards human rights. Former Prime Minister Theresa May received 'sustained applause' at her party conference when she attacked 'activist left wing human rights lawyers who harangue and harass the bravest of the brave: the men and women of our armed forces'.⁷⁴ This rhetoric was harnessed when she made clear her intention to campaign to withdraw the UK from the ECHR.⁷⁵ Whilst this policy may have temporarily softened, it remains the policy of the current Conservative government to 'update the Human Rights Act . . . to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.'⁷⁶

As in Denmark, common justifications given by politicians for reform of the existing human rights framework are the alleged lack of popular support for either the domestic or European human rights framework.⁷⁷ This view was, among others, expressed by then Attorney General, Geoffrey Cox, who said Britons did not feel 'ownership' or 'affection' towards the 'unloved' ECHR.⁷⁸

The remarks were made following reports that ministers were furious when judges blocked the deportation of a number of Jamaican-born offenders to their home country because they had received inadequate legal advice, an opinion which reportedly 'reflect a view among many members of the government'.⁷⁹ The underlying assumption of the current government seems to be that 'the balance of power has tipped too far from politicians and towards an unelected caste of lawyers whose views are out of kilter with voters.'⁸⁰

⁷⁴ Osborne (n 21).

⁷⁵ Worley (n 22).

⁷⁶ Conservative Party (n 23) 48.

⁷⁷ A Wagner, "'A Bad Name in the Public Square": Does It Matter What People Think about Human Rights?' (2016) 21 *Judicial Review* 58.

⁷⁸ C Hymas and C Hope, 'Attorney General calls for British Bill of Rights' *The Daily Telegraph* (12 February 2020) <<https://www.telegraph.co.uk/politics/2020/02/12/attorney-general-calls-british-bill-rights/>> accessed 24 March 2020.

⁷⁹ R Wright and J Croft, 'UK attorney-general backs calls to curb judges' powers' *Financial Times* (12 February 2020) <<https://www.ft.com/content/3b6ca19e-4d89-11ea-95a0-43d18ec715f5>> accessed 24 March 2020.

⁸⁰ 'Boris Johnson takes on the Judges', *The Economist* (20 February 2020).

In contrast with Denmark, however, little up-to-date data on public support for human rights exists in respect of the UK.⁸¹ The lack of data makes claims of diminishing public support harder to challenge. But it also makes them difficult to believe.

The most in-depth study of UK attitudes to human rights is now over a decade old. It was carried out by the Equality and Human Rights Commission in 2009 to 'build a strong evidence base' to inform the Commission's work.⁸² At the outset it is worth noting that this study took place in England and Wales only, but there is more recent data in respect of Scotland, which is discussed below.

The 2009 study shows that rather than exhibiting outright antipathy towards human rights, the UK public appears to be supportive. Indeed, this study showed that 64 per cent of respondents '*disagreed*' with the statement that '*Human rights are meaningless to me in everyday life*', whereas 21 per cent '*agreed*' with the statement.⁸³ Moreover, a direct counter to the widely expressed opinion that the public has a negative perception of human rights seems to come from the statement that '*Human rights are important for creating a fairer society in the UK*', with which 81 per cent of respondents '*agreed*'. By contrast, only 5 per cent '*disagreed*'.⁸⁴ In addition, when asked for their views on the statement '*It is important to have a law that protects human rights in Britain*', 85 per cent either '*strongly agreed*' (40 per cent) or '*tended to agree*' (44 per cent).⁸⁵ Taken together this suggests that the public not only value human rights as a broad concept, but that they also agree with the need to ensure that there is domestic legislation to protect human rights.

One issue does appear to be key for the UK public, and that is that a large group of people take the view that human rights are being misused. Indeed, 80 per cent of respondents believed that '*some people take unfair advantage of human rights*'. This view was held more strongly by older people and those who read tabloid newspapers.⁸⁶ This appears to fit the narrative that human rights are either abused or exploited by the 'wrong' people, which is often encouraged in the UK press.⁸⁷ The same sentiment has been expressed by ministers, such as Dominic Raab when he said: 'Our aim is to

⁸¹ Whilst the UK as a whole is subject to the Human Rights Act 1998, the devolved nations within the UK (Scotland, Wales and Northern Ireland) all have varying powers to implement their own human rights regimes. To date, by far the most progressive has been Scotland which, amongst other things has recently committed to incorporating the UN Convention on the Rights of the Child into Scots law. The Scottish Government policy on children's rights is available at <<https://www.gov.scot/policies/human-rights/childrens-rights/>> accessed 24 March 2020.

⁸² K Kaur-Ballagan and others, 'Public Perceptions of Human Rights' (Equality and Human Rights Commission 2009) iii. The study was carried out by Ipsos Mori on behalf of the Equality and Human Rights Commission. The quantitative research adopted a face-to-face Omnibus poll among a representative sample of 1,994 British adults ages 16 or over. The qualitative research made use of deliberative workshops carried out over three hours with 23 members of the public. The research was carried out between 14 and 21 August 2008. See K Kaur-Ballagan and others, 3–5, for detailed discussion of the methods used.

⁸³ *ibid* 15.

⁸⁴ *ibid* 20.

⁸⁵ *ibid* 23.

⁸⁶ *ibid* 16.

⁸⁷ See for example 'Human Rights Laws Are Protecting the Wrong People' *The Daily Telegraph* (24 April 2011) <<https://www.telegraph.co.uk/comment/telegraph-view/8470149/Human-rights-laws-are-protecting-the-wrong-people.html>> accessed 24 March 2020. This article opined that 'A legal system that protects the "rights" of people who are not citizens, and who have behaved in ways which threaten the safety of those who are, has clearly got things back to front.'

protect fundamental rights, prevent the abuse of human rights law and restore some common sense to the system.⁸⁸ A similar narrative has been highlighted by Alston who suggests that ‘the majority in society feel that they have no stake in the human rights enterprise, and that human rights groups really are just working for “asylum seekers,” “felons,” “terrorists,” and the like.’⁸⁹ But such statements do not necessarily reflect public opinion. And it is difficult to see how Alston’s view sits alongside the wide support which appears to exist for human rights in the UK.

Whilst the 2009 study is the most up-to-date in-depth poll of public attitudes towards human rights, a range of smaller scale polls have taken place. Thus in 2012 the Equality and Diversity Forum commissioned research into public attitudes towards human rights in the UK.⁹⁰ It found that 26 per cent of the public were ‘*opposed*’ to human rights, 22 per cent ‘*supportive*’, 41 per cent ‘*conflicted*’ and 11 per cent were simply ‘*uninterested*’. These results do not, however, sit well with a 2013 ComRes poll which asked various questions for the human rights advocacy organisation, Liberty. Answering the question ‘*How important or unimportant do you think it is that there is a law that protects rights and freedoms in Britain?*’, 98 per cent of respondents said ‘*important*’.⁹¹

Clearly, then, there is no overwhelming public antagonism to human rights which emerges from any of these polls. And there is certainly not enough to justify the oft-repeated political stance that human rights lack popular support in the UK. Indeed, summarising the polling which had been carried out up until 2016 Adam Wagner notes that ‘people are generally supportive of rights in principle’ and that while there appears to be some drive for reform this does not amount to a majority in favour of any such change.⁹² But the existing polling is either small scale or somewhat out-of-date.

The most recent large-scale study of human rights in the UK relates to Scotland and was carried out in 2018.⁹³ This study grouped respondents into four categories: ‘supporters’, ‘conflicted’, ‘opposed’, and ‘disengaged’. Whilst it provides less detailed data than the 2009 report, it is noteworthy that there are many similarities between the two.

Supporters are ‘those who agree with positive messages about human rights, and disagree with negative messages about human rights . . . They tend to have a greater overall knowledge of human rights and believe rights should be protected.’⁹⁴ This was the largest group, made up of 42 per cent of those sampled.⁹⁵ This suggests again that support for human rights is not in such a dire position as many scholars seem to believe or politicians claim.

⁸⁸ HC Deb 6 May 2016, vol 609, col 515.

⁸⁹ Alston (n 48) 6.

⁹⁰ They sampled 2,280 adults in England, Scotland and Wales between 25–29 May 2012. See Equally Ours (formerly Equality and Diversity Forum), ‘Telling the Story of Everyone’s Rights, Every Day’ (2013) <<https://www.disabilityrightsuk.org/sites/default/files/pdf/TelltheStory.pdf>> accessed 24 March 2020.

⁹¹ Cited in Wagner (n 77).

⁹² *ibid* 61.

⁹³ ‘Building a Human Rights Culture in Scotland’ (Scottish Human Rights Commission 2018). This research was carried out between 6 and 17 April 2017 by YouGov on behalf of the Scottish Human Rights Commission. It consisted of an online poll sampling over 1,513 adults aged 16 years or more throughout Scotland, and four focus groups, two face-to-face and two online.

⁹⁴ *ibid* 10.

⁹⁵ *ibid*.

Those in the 'conflicted' category (30 per cent of those sampled) were described as agreeing 'with both positive and negative messages about human rights' but 'have *very little knowledge* about human rights, the Human Rights Act and which agencies have responsibilities for protecting rights.'⁹⁶ The study notes that 'This group have [sic] the potential to become supporters of human rights with more information.'⁹⁷ As is outlined below, the knowledge gaps in what the public knows about human rights may hold the key to understanding the level of support for human rights in countries such as the Denmark and the UK.

By contrast with the 72 per cent of those supportive of or conflicted about human rights, only 13 per cent were actively hostile to them. This latter group (those 'opposed') was described as being those who:

. . . disagree with positive messages and agree with negative messages about human rights. They believe: that there are some people who abuse human rights laws. However, when given information, this group did agree that human rights sound good in theory. They would be more supportive if they were to hear about the benefits of human rights from individuals or groups who have experienced human rights breaches (particularly to address issues that they relate to)⁹⁸

The final group were 'disengaged'. The research highlighted that members of this group 'are generally disengaged in human rights and politics and don't hold firm views.'⁹⁹ They accounted for 14 per cent of the sample. Whilst this was taken to suggest that these individuals had a less than positive attitude towards human rights,¹⁰⁰ it does not follow automatically that these people are naturally opposed to human rights, nor that they support, for example, the repeal of the Human Rights Act or withdrawal from the ECHR.

The above-mentioned polling relates to the support of human rights in the UK and little polling relates to the UK's membership of the ECHR. The limited polling which has been carried out does not point to an overwhelming antipathy to the UK's continued membership. Indeed, a YouGov poll carried out in 2016 asked '*Do you think Britain should or should not remain a member of the European Convention on Human Rights?*', of 3,357 respondents, 42 per cent believed the UK should remain a member compared with 35 per cent who believed it should not.¹⁰¹

Taken with the support expressed for human rights generally, and for a legal framework to protect human rights in the UK, it is difficult to see support for the oft-repeated claim that the public is opposed to human rights. The lack of continued polling, however, makes it difficult to assess the claim by Alston that there is a 'waning affection' for the ECtHR, which seems to suggest that support has been falling over time.¹⁰²

In spite of the evidence of support for human rights in the UK, it remains the case that politicians target human rights laws, in response to specific incidents. After the attacks on London Bridge in December 2019, for example, Prime Minister Boris Johnson said that the UK:

⁹⁶ *ibid* 12, emphasis added.

⁹⁷ *ibid* 13.

⁹⁸ *ibid* 14.

⁹⁹ *ibid* 16.

¹⁰⁰ *ibid* 6.

¹⁰¹ Data available at <<https://yougov.co.uk/topics/travel/survey-results/daily/2016/12/09/fa4d0/1>> accessed 24 March 2020. It is noteworthy that 23 per cent of respondents did not know how to respond, suggesting no strong feeling either way.

¹⁰² Alston (n 48) 8.

. . . must reform human rights laws to shift the balance in favour of our security and intelligence services . . . our laws are constrained, for example, by the “right to private life” which limits surveillance of terrorists, and recent court cases have placed unacceptable limits on our intelligence services.¹⁰³

Such reactionary responses that attempt to eject human rights and pit them as being in contrast to national security are not limited to terror cases.¹⁰⁴ After the *Hirst* judgment,¹⁰⁵ that ruled that a blanket ban on prisoner voting was inconsistent with the ECHR, ‘Euro-sceptics seized on the . . . case and quickly made the leap from it to clamouring for the repeal of the UK’s Human Rights Act’.¹⁰⁶ The judgment was criticised for failing to respect parliamentary sovereignty and democracy.¹⁰⁷

Despite these continued attacks on human rights, the above-mentioned polls appear to indicate that the public remains more positive about human rights than many politicians and scholars believe. Nonetheless, the need for much greater research on what the public thinks of and knows about human rights is evident.

6 Possible link between Knowledge of and Attitudes Towards Human Rights

In spite of a vast body of literature on human rights, very little is known about the public’s attitude towards, and understanding of, human rights. As a result of this gap in knowledge, there is a huge disconnect between the political and scholarly debates on human rights, on the one hand, and knowledge of public attitudes towards human rights, on the other.

The use of polls raises both general and specific concerns. The most basic concern is why the general public should support human rights? Human rights were purposely developed as a counter-majoritarian safeguard to protect minorities from the ‘tyranny of the majority’.¹⁰⁸ On that basis, it seems naïve to expect widespread support, even if that is what the above-mentioned polls seem to indicate.¹⁰⁹

¹⁰³ G Owen, ‘Boris’s Rage at Killer’s Early Release: PM Pledges to Rip up Human Rights Laws after London Bridge Terrorist Was Freed to Murder Two in Knife Rampage’ *Daily Mail* (30 November 2019) <<https://www.dailymail.co.uk/news/article-7742463/PM-pledges-rip-human-rights-laws-London-Bridge-attack.html>> accessed 24 March 2020.

¹⁰⁴ The issue of terrorism and human rights is addressed in more detail in this volume by Birdsall and Bhatt in Chapters 6 and 9.

¹⁰⁵ *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

¹⁰⁶ C Gearty, ‘The Human Rights Act Should Not Be Repealed’ (*UK Constitutional Law Association Blog*, 17 September 2016) <<https://ukconstitutionallaw.org/2016/09/17/conor-gearty-the-human-rights-act-should-not-be-repealed/>> accessed 24 March 2020.

¹⁰⁷ HC Deb 10 February 2011, vol 523, col 501. For an overview of the long-lasting stand-off, see E Adams, ‘Prisoners’ Voting Rights: Case Closed?’ (*UK Constitutional Law Association Blog*, 30 January 2019) <<https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/>> accessed 24 March 2020.

¹⁰⁸ A sentiment often expressed by the ECtHR which has repeatedly stated that ‘Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.’ *Leyla Şahin v Turkey*, Grand Chamber Judgment of 10 November 2005, para 108.

¹⁰⁹ Unless, of course, it is accepted that the majority are ‘liberal and decent people’ as theorised by Rawls. J Rawls, *The Law of Peoples: With, the Idea of Public Reason Revisited* (Harvard University Press 1999).

Another concern is that public opinion as expressed in standard polls is substantively inadequate to direct public policy.¹¹⁰ The 2012 Commission on a UK Bill of Rights decided not to poll the public, as polling was ‘notoriously unreliable’.¹¹¹ This concern is heightened by the fact that the representation of human rights is often misleading, or even deceitful.¹¹² An analysis of human rights discourse by Counterpoint, the Public Interest Research Centre, and Equally Ours, shows that in the UK, media narratives typically link human rights to ‘undeserving’ groups and to anti-European views.¹¹³

In addition, many polls – including those mentioned above – seemingly start from the premise that the public know enough about human rights for them to be able to develop well-informed opinions on the topic. But there is no reason to expect this to be the case. Anecdotal evidence suggests that some members of the UK Conservative party think that the European Convention and Court of Human Rights are inventions of the EU.¹¹⁴

Anybody teaching human rights law also knows how difficult it is even for law students to understand the difference between the CoE – a loose association of 47 European states responsible for the ECHR – and the European Union – a close-knit association of 27 European states, with supranational elements, but not directly related to the ECHR.¹¹⁵

A significant feature of the 2009 Equality and Human Rights Commission study is that in response to a question on how much they knew about human rights, 58 per cent of respondents said ‘*Not very much*’ (50 per cent) or ‘*nothing at all*’ (8 per cent).¹¹⁶ Those interviewed also suggested that the public did not know a significant amount about the Human Rights Act, with only 4 per cent saying they knew ‘*a great deal*’ about the Act and 25 per cent who knew ‘*a fair amount*’ about it. This is in contrast to the 70 per cent who indicated that they knew ‘*not very much*’ (50 per cent), had ‘*heard of, but knew nothing about*’ the Act (16 per cent) or had ‘*never heard of*’ the Human Rights Act (4 per cent).¹¹⁷ Interestingly, the polling seemed to indicate that support for human rights increased following discussion and education.¹¹⁸ In common with the 2009 study, the more recent Scottish Human Rights Commission study also showed a direct correlation between support for and knowledge of human rights.¹¹⁹

¹¹⁰ G Langer, MW Traugott and RM Worcester, ‘Comments on the Keynote’ (2008) 20 *International Journal of Public Opinion Research* 23.

¹¹¹ Report of the Commission on a Bill of Rights quoted in Wagner (n 77) 59.

¹¹² A Wagner, ‘The Monsterring of Human Rights’ (*UK Human Rights Blog*, 22 September 2014) <<https://ukhumanrightsblog.com/2014/09/22/the-monsterring-of-human-rights/>> accessed 24 March 2020.

¹¹³ R Kryszewski, ‘Research-Based Messaging Changes Public Support for Human Rights’ (*Open Democracy*, 3 July 2015) <<https://www.opendemocracy.net/en/openglobalrights-openpage/researchbased-messaging-changes-public-support-for-human-rights/>> accessed 24 March 2020.

¹¹⁴ Former Secretary of State for Justice, Kenneth Clarke, notes that ‘Right-wing members of [the Conservative Party] often believe that these are creations of the European Union and are fiercely opposed to the Court’s jurisdiction over the United Kingdom.’ K Clarke, *Kind of Blue* (Pan 2016) 457.

¹¹⁵ Confusion is so widespread that the CoE has a special webpage explaining the difference: <<https://www.coe.int/en/web/about-us/do-not-get-confused>> accessed 24 March 2020.

¹¹⁶ Kaur-Ballagan and others (n 82) 17.

¹¹⁷ *ibid* 21–22.

¹¹⁸ *ibid* 33–34. Although it is important to note that ‘The numbers sampled here are too small to create a statistically valid finding (so findings should be interpreted with caution)’.

¹¹⁹ ‘Building a Human Rights Culture in Scotland’ (n 93) 10–17.

Such correlation raises fundamental epistemological questions on what people know and how knowledge influences attitudes towards human rights. In this regard, human rights scholars may draw inspiration from politics and political psychology. Since the 1950s, public opinion polls have been used to measure 'political sophistication', which refers to the role of facts and the use of such information in the forming of political judgments.¹²⁰ The study of political sophistication has been described as one of the 'best documented features of contemporary politics'¹²¹ and has dramatically changed the way in which political theory understands the day-to-day working of democracy. The research asks, among other things, to what extent and under what circumstances citizens have genuine attitudes toward government policy options? And to what extent and under what circumstances are those attitudes well informed?¹²² If a government wants to implement its citizens' desires people must be able to communicate those desires. In order for that to happen, three conditions must be met: firstly, the citizens must have real attitudes toward government policy; secondly, those attitudes must be expressed; and, thirdly, those attitudes must be wise.¹²³ Without more knowledge on the public's views, knowledge and understanding of human rights most of these three requirements cannot be fulfilled. In this regard, the extensive body of research on political sophistication stands in stark contrast to the lack of research on human rights.

7 Conclusion

This chapter has sought to illustrate the huge disconnect between the political and the scholarly debates on human rights, on the one hand, and our current knowledge of attitudes towards human rights, on the other. The lack of public opinion research in the field of human rights has been long lamented, but in the current political context it seems more important than ever. This is true of many parts of the world, but nowhere is it more urgent than in the UK.

As part of the Brexit negotiations, the UK is refusing to guarantee continued membership of the ECHR, a key request of the EU.¹²⁴ Despite Prime Minister Johnson's insistence that the UK will remain a party to the Convention, the refusal to repeat this commitment in any future agreement with the EU suggests that the UK may, in the future, seek to withdraw from the ECHR.

In addition to the refusal to renew its commitment to the ECHR, the UK government is embarking on a review of the way in which judicial review and the judiciary function. One of the members of government appointed to oversee this review, Attorney General Suella Braverman, has echoed a common populist critique, stating that the government needs to take back control from the 'unelected, unaccountable judges [who] determine wider public policy, putting them at odds with elected decision makers.'¹²⁵ Against this backdrop it is increasingly important to understand the

¹²⁰ In his classic work, Luskin identifies three dimensions of political sophistication: 1) the number of political facts a person knows, 2) the range of subject matter of those facts, and 3) the organisation of those ideas. RC Luskin, 'Measuring Political Sophistication' (1987) 31 *American Journal of Political Science* 856.

¹²¹ LM Bartels, 'Uninformed Votes: Information Effects in Presidential Elections' (1996) 40 *American Journal of Political Science* 194.

¹²² JA Krosnick, PS Visser and J Harder, 'The Psychological Underpinnings of Political Behavior' in ST Fiske, DT Gilbert and G Lindzey (eds), *Handbook of Social Psychology* (John Wiley & Sons, Inc 2010).

¹²³ *ibid* 1289.

¹²⁴ S Payne, 'Will the human rights convention sink a Brexit trade deal?' *Financial Times* (5 March 2020).

¹²⁵ S Payne, L Hughes and G Parker, 'Michael Gove to oversee UK constitutional review' *Financial Times* (14 February 2020).

public's views on human rights and whether there is empirical support for the often repeated claim that human rights lack popular support.

Although the political discourse and much academic literature points to a major backlash against human rights, little data actually exists to support any such claim. It seems undeniable that populism has made dramatic inroads into the world of politics. It is equally undeniable that populist movements are often explicitly antagonistic to human rights. As a result, the challenges now facing the human rights movement are, as noted by Alston, 'fundamentally different' to those of the past.¹²⁶ Yet, at present, the proposals for remedying this situation seem unwarranted or even ill-conceived.

As noted by Müller, populists seem to have managed to convince not only their supporters but also their opponents that they are responding to deep yearnings among ordinary people. Stating further that:

The more that defenders of liberalism and the liberal order buy the stories these leaders (and associated movements) are selling and adopt the framing and rhetoric of populism, the more they allow their opponents' ideas to shape political debates. In doing so, parties and institutions of the center-left and the center-right are helping bring about the very thing they hope to avoid: more closed societies and less global cooperation to address common problems.¹²⁷

One story that many politicians and some scholars have bought into is that there is a backlash against human rights. Despite the lack of evidence, this narrative is often uncritically accepted. The core claim of all populists is that they, and they alone, represent the 'people'.¹²⁸ Thus, only they can tell us what worries the people. However, giving the populists a monopoly on telling us what really worries the public 'betrays a deep misunderstanding of how democratic representation works'.¹²⁹ And populists benefit greatly from politicians and scholars adopting their framing and rhetoric, which has the effect of ratifying and amplifying their messages.¹³⁰

As the data related to Denmark and the UK clearly illustrates, there is no evidence to suggest that human rights lack popular support in either country. Nor is there any basis on which to suggest that support is faltering. The same may be true in other countries as well. Given the huge disconnect between the political and the scholarly debates on human rights, on the one hand, and our current knowledge on attitudes towards human rights, on the other, it seems unwarranted to accept calls for the fundamental reform either of international or domestic human rights systems, as has been suggested in both Denmark and the UK. Instead, what is needed is more research to improve our comprehension of the public's views, knowledge and understanding of human rights. Only with such knowledge will we be able to understand and possibly counter the ejection of human rights in Western democracies.

¹²⁶ Alston (n 48) 2.

¹²⁷ JW Müller, 'False Flags - The Myth of the Nationalist Resurgence' (2019) 98 *Foreign Affairs* 35, 35.

¹²⁸ Müller (n 1) 3.

¹²⁹ *ibid* 107.

¹³⁰ Müller (n 125).