



University of Dundee

Misdiagnosing the Human Rights Malaise

Hartmann, Jacques

Published in:

The Global Community Yearbook of International Law and Jurisprudence 2018

DOI:

[10.1093/oso/9780190072506.003.0006](https://doi.org/10.1093/oso/9780190072506.003.0006)

Publication date:

2019

Document Version

Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):

Hartmann, J. (2019). Misdiagnosing the Human Rights Malaise: Possible Lessons from the Danish Chairmanship of the Council of Europe. In G. Z. Capaldo (Ed.), *The Global Community Yearbook of International Law and Jurisprudence 2018* (pp. 153-163). (The Global Community Yearbook of International Law and Jurisprudence; Vol. 2018). Oxford University Press. <https://doi.org/10.1093/oso/9780190072506.003.0006>

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from Discovery Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain.
- You may freely distribute the URL identifying the publication in the public portal.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

THE GLOBAL COMMUNITY

Yearbook of International Law
and Jurisprudence

2018

Edited by

Giuliana Ziccardi Capaldo

OXFORD
UNIVERSITY PRESS

Misdiagnosing the Human Rights Malaise

Possible Lessons from the Danish Chairmanship
of the Council of Europe

BY JACQUES HARTMANN*

Abstract

Contemporary populism is antagonistic towards human rights. As a result, the challenges now facing the human rights movement are fundamentally different from those of the past. Yet, proposed remedies to this malaise often seem ill-conceived. Populists tend to claim that the institutions charged with the protection of fundamental rights not only limit the capacity of the people to exercise their rightful power but are also the source of a growing discontent with the system itself. This narrative is often uncritically accepted and leads to suggestions that human rights must be fundamentally reformed. Although intuitively appealing, such suggestions commonly lack support from empirical evidence. In addition, much of the debate seemingly starts from the premise that the public is fully informed. Using Denmark as a case study, this Note shows that existing assumptions may be questioned. It further suggests that it may be dangerous to propose a cure before the malaise has been properly diagnosed.

I. THE ALLEGED POPULAR BACKLASH AGAINST HUMAN RIGHTS

In recent years challenges posed by the financial downturn, the so-called ‘refugee crisis’ and the war on terror have prompted scholars, political commentators, and policy makers to talk about the ‘endtimes of human rights.’¹ Human rights are commonly regarded as a

* Reader, School of Law, University of Dundee, UK. Email: jhartmann@dundee.ac.uk.

¹ STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013).

fundamental element of liberal democracy, but have always been a contested concept.² Yet, contemporary challenges to human rights increasingly come from within the democratic process itself. Across Europe ‘populist’³ movements explicitly criticise human rights and human rights institutions, most notably the European Court of Human Rights, for presenting unnecessary obstacles to dealing with perceived threats, such as migration or terrorism.⁴

In France, the Netherlands, Norway, Russia and the United Kingdom there has been a recent surge in criticism of the European Court of Human Rights.⁵ Human rights have always been the subject of controversy, but today criticism is no longer limited to the political fringes. In the United Kingdom, for example, Prime Minister Theresa May has denounced ‘activist left-wing human rights lawyers’ for challenging British forces over the use of torture in Iraq.⁶ She has further suggested that the United Kingdom should withdraw from the European Convention on Human Rights.⁷

A similar debate has taken place in Denmark, where the government announced plans to use its 2017–2018 Chairmanship of the Council of Europe to reform the European Convention on Human Rights. Politicians from all sides of the political spectrum strongly criticised the European Court of Human Rights, with the Danish Prime Minister denouncing its judgments, which, according to him, no longer ‘resonate with the general public.’⁸

This alleged ‘backlash’ against human rights has already led to proposed reforms that would undermine the liberal order established since the Second World War. Some scholars have suggested that the foundations of universal liberal norms and global governance are crumbling and that we are living through the ‘endtimes’ of human rights.⁹ Others see a need for a fundamental re-think, suggesting that there is a desperate need to find new tools, other than human rights, with which to combat the many challenges posed by populism.¹⁰

² Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUMAN RIGHTS QUARTERLY 281 (2007).

³ For a definition of populism, see JAN-WERNER MÜLLER, WHAT IS POPULISM? (2017).

⁴ See, e.g., Human Rights Watch, *World Report 2018* (HUMAN RIGHTS WATCH, 2017), <<https://www.hrw.org/world-report/2018>> (accessed 10 November 2018).

⁵ CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS: SHIFTING THE CONVENTION SYSTEM: COUNTER-DYNAMICS AT THE NATIONAL AND EU LEVEL (Koen De Feyter, Patricia Popelier & Wouter Vandenhole eds., 2016), at 512.

⁶ Samuel 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 10 November 2018).

⁷ Will 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 10 November 2018).

⁸ Jacques 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 10 November 2018).

⁹ HOPGOOD, *supra* note 1. See also Ingrid 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 10 November 2018).

¹⁰ SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

A few are less pessimistic, calling merely for the development of new ways to combat the challenges posed by populism.¹¹

Regardless of the direness of their predictions, these, and similar, works are all premised on the assumption that popular support for human rights is faltering. Yet, scholars, politicians and policy makers presently have a very limited understanding of what the public actually thinks or knows about human rights. As noted by Professor McFarland, former President of the International Society of Political Psychology:

... 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 ...¹²

Despite the lack of empirical evidence, some scholars have proclaimed the demise, or even the death, of the human rights movement. Many point to the election of populist leaders—especially US President Donald Trump—as evidence that the human rights movement is facing unprecedented challenges.¹³ The election of illiberal leaders undoubtedly represents a challenge to the human rights movement, but it does not follow that human rights lack popular support. There is, for example, evidence of continued and strong support for human rights in both Russia and the United States.¹⁴

Despite empirical evidence to the contrary, numerous scholars seem to have fallen prey to the fallacy that because populist movements with nationalistic, xenophobic, misogynistic, and explicitly anti-human rights agendas win national elections, then the human rights movement must be lacking popular support. There is, however, very little evidence to support this conclusion and voting for a particular political candidate does not clearly and precisely indicate support for or opposition to particular government policies, such as an anti-human rights agenda.¹⁵ Even so, many seem to take the lack of support for granted. Professor Philip Alston, a leading human rights lawyer and current Special Rapporteur on extreme poverty and human rights, 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

¹¹ Philip Alston, *The Populist Challenge to Human Rights*, 9 JOURNAL OF HUMAN RIGHTS PRACTICE 1 (2017); SAMUEL MOYN, *LAST UTOPIA* (2012).

¹² Sam McFarland, *International Differences in Support for Human Rights*, 12 SOCIETIES WITHOUT BORDERS (2017), <<https://scholarlycommons.law.case.edu/swb/vol12/iss1/12>> (accessed 10 November 2018).

¹³ See, e.g., Wuerth, *supra* note 9; MOYN, *supra* note 10; Alston, *supra* note 11; Stephen Hopgood, *Fascism Rising*, OPENGLOBALRIGHTS (9 November 2016), <<https://www.openglobalrights.org/fascism-rising/>> (accessed 10 November 2018).

¹⁴ Sarah B. 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 10 November 2018).

¹⁵ Erik Holstein, *Opbakningen Til Menneskerettighedskonventionen Er På Vippen*, ALTINGET (4 September 2017), <<https://www.altinget.dk/christiansborg/artikel/opbakningen-til-menneskerettigheds-konventionen-er-paa-vippen>> (accessed 10 November 2018).

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.¹⁶

He further stated that there is a ‘waning affection in the United Kingdom, not to mention many other states’ for the European Court of Human Rights.¹⁷ No empirical evidence is cited for either assertion and the few studies that exist strongly contradict the latter.¹⁸ Even so, numerous scholars continue to conflate public attitude and governmental policy, or simply assert that human rights lack popular support.¹⁹

The purpose of this Note is not to contradict the assertion made by Professor Alston, that the challenges now facing the human rights movement are ‘fundamentally different from much of what has gone before.’²⁰ Instead, it seeks to highlight 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 further seeks to raise some fundamental epistemological questions regarding what people know about human rights, making suggestions for how the debate may become better informed. In this regard, Denmark and its Chairmanship of the Council of Europe is used as a case study to exemplify how the debate on human rights is often uninformed and may become detached from reality, with perilous political consequences.

II. THE DANISH CHAIRMANSHIP OF THE COUNCIL OF EUROPE

In November 2017 Denmark took over the six-month-long rotating Chairmanship of the Council of Europe. Denmark is a founding member of the Council and has traditionally been a strong supporter of human rights.²¹ Yet the Danish government announced that the main priority of its Chairmanship would be the reform of the European human rights system. To understand the Danish priorities, it is necessary to provide some insights into contemporary politics in Denmark.

Immigration has long been a dominant theme in Danish politics. In the late 1990s, the Danish People’s Party (DPP) began to denounce immigration, multiculturalism and Islam

¹⁶ Alston, *supra* note 11, at 6.

¹⁷ *Id.*, at 8.

¹⁸ Amnesty International UK, *The Public’s Message in New Poll: Keep Your Hands off the Human Rights Act*, AMNESTY INTERNATIONAL UK (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 10 November 2018).

¹⁹ See, e.g., HOPGOOD, *supra* note 1; ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014); Mary Lawlor, *Backlash: The War Against Human Rights*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (5 May 2016) <<http://fundamentalrightsforum.eu/en/frf/blog/backlash-war-against-human-rights>> (accessed 10 November 2018); Alston, *supra* note 11; Andrew Gilmour, *The Backlash against Human Rights* (24 November 2017), <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22514&LangID=E>> (accessed 10 November 2018); Leslie Vinjamuri, *Human Rights Backlash*, in *HUMAN RIGHTS FUTURES* (Stephen Hopgood, Jack Snyder & Leslie Vinjamuri eds., 2017); William A Galston, *The Populist Challenge to Liberal Democracy*, *JOURNAL OF DEMOCRACY* (2018), <<https://www.journalofdemocracy.org/article/populist-challenge-liberal-democracy>> (accessed 10 November 2018); MOYN, *supra* note 10.

²⁰ Alston, *supra* note 11, at 2.

²¹ On the negotiations relating to the European Convention on Human Rights, see ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2010).

as alien to Danish society and values. Since 2001, the DPP has supported various minority coalition governments and gained extensive influence over Denmark's immigration policy, which is now one of the most restrictive in Europe. The current government and its immediate predecessor have aggressively pursued a highly restrictive migration agenda, adopting more than one hundred legal amendments tightening immigration laws since 2015.²²

After a parliamentary election in mid-2015 a new minority centre-right coalition was established. It was and is headed by Prime Minister Lars Løkke Rasmussen, who had previously led a minority government. The new coalition consists of three parties supported by the DPP. They govern on the basis of a coalition agreement that explicitly notes 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.'²³ A reform of the European human rights system was therefore at the heart of the government's political programme.

The focus on immigration has influenced the debate on human rights. Criticism of the European Convention on Human Rights is not new in Denmark, where much debate has focused on the influence of the Convention on the deportation of the foreign criminals. In May 2016, the Danish Supreme Court delivered a judgment which reignited the debate by preventing the deportation of a notorious convicted criminal, and Croatian national, Gimi Levakovic.²⁴ Despite Levakovic's extensive criminal record, the Danish Supreme Court found that his deportation would constitute a disproportionate interference with his right to respect for private and family life. It justified its decision by emphasising that Levakovic had no real ties to Croatia, which he had not visited since he came Denmark at the age of three. It further noted that Levakovic had four children in Denmark, two of whom were minors under his sole custody.

The decision of the Supreme Court caused a maelstrom. Public—or rather media—outrage was fuelled by the fact that Levakovic was a household name, after he appeared on a Danish TV documentary, controversially entitled: 'The Gypsy Boss and His Notorious Family.'²⁵ Politicians across the political spectrum called for reform of the European human rights system, which had a very direct impact on Danish politics.

Impetus for reform was further increased in May 2017 when the Danish Supreme Court found that four Romanian nationals could not be deported to their home country, as prison conditions there fell below human rights standards.²⁶ The decisions not to allow the deportation created yet another maelstrom, and focused the priorities of the Danish Chairmanship of the Council of Europe.

The initial aim of the Danish Chairmanship was somewhat ambiguous. The Danish government published a list of priorities, which included the rather abstruse priority: 'The European human rights system in a future Europe.'²⁷ This priority was clarified by the Danish prime minister during a speech to the Council of Europe's Parliamentary Assembly

²² For a list of changes, see <<http://uim.dk/gennemforte-stramninger-pa-udlaendingeomradet>>.

²³ Marienborgaftalen 2016. Available at <<https://www.regeringen.dk/publikationer-og-aftaletekster/regeringsgrundlag-marienborgaftalen-2016>>. Author's own translation.

²⁴ Decision of 12 May 2016. Case No. 258/2015. Available at <<http://www.hoejesteret.dk>>.

²⁵ Sigøjnerbossen: og hans berygtede familie (2015). Author's own translation.

²⁶ The decision was made in two distinct cases, both decided on 31 May 2017: Case Nos. 267/2016 and 261/2016. Both decisions are available at <<http://www.hoejesteret.dk>>.

²⁷ Priorities of the Danish Chairmanship of the Committee of Ministers of the Council of Europe (15 November 2017–18 May 2018). CM/Inf (2017) 22 (13 November 2017), available at <<http://um.dk/~media/UM/English-site/Documents/Politics-and-diplomacy/2017cminf22.pdf?la=en>> (accessed 10 November 2018).

in January 2018. With a direct reference to the political debate in Denmark, the prime minister stated that it is ‘simply not fair, that countries like Denmark end up housing foreign criminals, because of the poor prison conditions in their home countries.’ He continued:

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. We have seen cases where it has been considered a violation of the right to family of hardcore foreign criminals if they were deported to their home countries. Decisions I cannot understand. And it does not resonate with the general public understanding of human rights.²⁸

The potential lack of popular support was an important element of the Danish argument for reform of the European human rights system. 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.’²⁹

III. THE DISCONNECT BETWEEN THE DEBATE ON AND KNOWLEDGE OF HUMAN RIGHTS

The Danish prime minister is not alone in assuming that human rights lack popular support. As illustrated above, scholars, political commentators and policy makers all over the world seem to assume that human rights either lack popular support or are in danger of losing such support. In this regard, Denmark provides a convenient case study. The socio-economic situation in Denmark is not comparable to many other countries where there is an alleged lack of support for human rights. Even so, the debate in Denmark echoes that in many other countries. It is therefore noteworthy that the Danish debate often illustrates a complete disconnect between the political and scholarly debate on human rights, on the one hand, and the current knowledge on the public’s attitudes towards human rights, on the other. Despite vital differences, the Danish debate may therefore hold important lessons for scholars, political commentators and policy makers across the world.

It is not only the Danish government that has suggested that human rights lack popular support in Denmark. Leading politicians from across the political spectrum have criticised the European Court of Human Rights and many have highlighted a risk of human rights losing public support.³⁰ The emphasis on public support has also been highlighted by human rights institutions and Danish 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 European Convention and the European Court of Human Rights. Noting further that: ‘Regrettably, this support is declining, and that is why we must respond.’³¹

²⁸ Speech by the 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 10 November 2018).

²⁹ *Id.*

³⁰ Cf. JACQUES HARTMANN, DANMARK OG DEN EUROPÆISKE MENNESKERETTIGHEDSKONVENTION (2017).

³¹ Dorthe Elise Svinth & Jonas 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 10 November 2018).

By responding, the Institute meant supporting the Danish priorities for reform. Danish scholars have likewise postulated that human rights lack popular support, again supporting reform of the European Convention on Human Rights.³² The same is true for political commentators.³³ Few scholars or political commentators have referred to any empirical evidence for their assertions.

The debate in Denmark, and indeed the wider world, raises fundamental epistemological questions regarding the public's attitude towards and understanding of human rights. Firstly, how do we know that human rights either lack popular support or are in danger of losing such support? Secondly, even if there are polls suggesting that human rights do lack popular support, or if the public communicates discontent in another way, how do we know those attitudes are well informed? And what truly explains any discontent?

The following will investigate what we know and, just as importantly, what we do not know about public attitudes towards human rights in Denmark.

A. The Danish Debate on Human Rights: What We Know

Despite the repeated assertion that human rights lack popular support, the truth is that scholars, political commentators and policy makers know very little about the public's attitude towards human rights. The simple reason is that little data exists. Denmark is, however, an exception. During the debate leading up to its Chairmanship of the Council of Europe two polls were commissioned in short 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 percent) wanted to leave the European Convention on Human Rights. Whereas only 34 percent wanted to remain.³⁴ A second poll was published only two days later showed a startlingly different result. It showed that a large majority (73 percent) wanted to remain party to, and that only 12 percent wanted to leave, the European Convention on Human Rights.³⁵ What explains the difference?

³² See, e.g., Anders 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 10 November 2018), and Mads Bryde 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 10 November 2018).

³³ Erik Holstein, *Opbakningen Til Menneskerettighedskonventionen Er På Vippen*, ALTINGET (4 September 2017), <<https://www.altinget.dk/christiansborg/artikel/opbakningen-til-menneskerettigheds-konventionen-er-paa-vippen>> (accessed 30 October 2018).

³⁴ *Id.* 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 16–22 June 2017.

³⁵ Jacques Hartmann, *Retsekspert i debatindlæg: Menneskerettighedsdomstolen har faktisk folkelig opbakning*, POLITIKEN (6 September 2017), <<https://politiken.dk/debat/debatindlaeg/art6096209/Menneskerettighedsdomstolen-har-faktisk-folkelig-opbakning>> (accessed 10 November 2018). The poll was conducted via YouGovs' Internet Panel among 957 respondents from a representative sample of the Danish population over the age of 18. Answers were collected 25–27 August 2017. See also Rasmus Kerrn-Jespersen, *Bakker danskerne op om den europæiske konvention om menneskerettigheder?*, FAKTATJEK (15 September 2017), <<https://www.mm.dk/tjekdet/artikel/bakker-danskerne-op-om-menneskerettighedskonventionen>> (accessed 10 November 2018).

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?³⁶

The phrasing of the question suffers from obvious flaws: it is well known that even a small difference in the wording of a question can substantially affect the answers people provide in polls. The PEW Research Center provides an illustrative example of how a simple difference can have a significant impact. When, in a 2003 poll, the Center asked people whether they would ‘*favor or oppose taking military action in Iraq to end Saddam Hussein’s rule,*’ 68 percent of the respondents said they favoured military action, while 25 percent said they opposed such action. However, when asked whether they would ‘*favor or oppose taking military action in Iraq to end Saddam Hussein’s rule even if it meant that U.S. forces might suffer thousands of casualties,*’ responses were dramatically different. The introduction of a reference to US casualties meant that only 43 percent favoured military action, while 48 percent said they opposed it. The introduction of a reference to US casualties altered the context of the question and dramatically influenced whether the respondents favoured or opposed military action.³⁷ 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.

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.

This time half of the Danish public (50 percent) wanted to remain within the ‘international conventions’, whereas only 38 percent 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 popular narrative that support for human rights is lacking. This conclusion is supported by a second 2017 poll.

The second poll was commissioned by the author. It attempted to be neutral and asked: ‘*Do you think that Denmark should remain a member of the European Convention on Human Rights?*’ In regard to this question, 73 percent of respondents said that Denmark should remain, whereas only 12 percent wanted to leave the European Convention on Human Rights. 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.³⁸

³⁶ Holstein, *supra* note 33. Author’s own translation.

³⁷ PEW Research Center, *Questionnaire Design*, <<http://www.pewresearch.org/methodology/u-s-survey-research/questionnaire-design/>> (accessed 23 October 2018).

³⁸ See *supra* notes 34 and 35.

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

Unlike most other countries, a considerable body of evidence exists on the popular support for human rights in Denmark, and it does not seem to fit the picture painted by scholars, political commentators and policy makers alike. This was, to some extent, acknowledged by the Danish Minister of Justice. The minister has several times referred to the first poll from 2017, but was in December of that year asked to comment on the second poll. Speaking in Parliament, he said that he did not believe it was ‘possible to draw clear conclusions from the different opinion polls in relation to the overall popular support for the European human rights system.’³⁹ Thus, contrary to previous statement, the minister no longer seemed to perceive an immediate threat to the support for human rights in Denmark.

B. The Danish Debate on Human Rights: What We Do Not Know

Although the Danish polls provide some information on the public’s attitudes towards human rights, there is still a lot we do not know. Firstly, the use of polls raises both general and specific concerns. Generally, the most basic concern is that public opinion as expressed in standard polls is substantively inadequate to direct public policy.⁴⁰ This concern is heightened by the fact that the representation of human rights is often misleading, or even deceitful.⁴¹ Specifically, many polls—including those mentioned previously—seemingly start from the premise that the public know enough about human right for them to be able to form well informed opinions on the topic.

Research done in political psychology strongly suggests that such knowledge cannot be taken for granted. Much of the research done in political psychology informs an understanding of the democratic processes. This 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?⁴² The results are not encouraging. The ignorance, especially amongst the American electorate, is well documented. As noted by Somin, ‘The sheer depth of most individual voters’ ignorance may be shocking to readers not familiar with the research.’⁴³ Friedman states that ‘the public is far more ignorant than academic or journalist observers of the public realize.’⁴⁴ Ferejohn concurs,

³⁹ Reply to question 178 of 8 December 2017. Available at <<https://www.ft.dk/samling/20171/almdel/reu/spm/178/svar/1451181/1831769/index.htm>> (accessed 10 November 2018).

⁴⁰ Gary Langer, Michael W. Traugott & Robert M. Worcester, *Comments on the Keynote*, 20 INTERNATIONAL JOURNAL OF PUBLIC OPINION RESEARCH 23 (2008).

⁴¹ Adam Wagner, *The Monstering of Human Rights*, UK HUMAN RIGHTS BLOG (22 September 2014), <<https://ukhumanrightsblog.com/2014/09/22/the-monstering-of-human-rights/>> (accessed 10 November 2018).

⁴² Krosnick, Visser & Harder, *supra* note 15, at 1290.

⁴³ ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 17 (2nd ed. 2016).

⁴⁴ Jeffrey Friedman, *Democratic Competence in Normative and Positive Theory: Neglected Implications of “the Nature of Belief Systems in Mass Publics”*, 18 CRITICAL REVIEW 1, v (2006).

stating: ‘Nothing strikes the student of public opinion and democracy more forcefully than the paucity of information that most people possess about politics.’⁴⁵

There is no reason to believe that the public should be any more informed about human rights, either. In fact, the above-mentioned poll commissioned by the author showed that 19 percent of the Danish public had either never heard of the European Convention of Human Rights (6 percent) or if they had heard of it, they did not know that Denmark was party to the Convention (13 percent). This is despite the fact that the poll was done at a time when there was intense media coverage of the Danish membership of the Convention.⁴⁶

IV. HOW WE MIGHT LEARN MORE

In spite of a vast body of literature on human rights, scholars, political commentators and policy makers presently know very little 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 the scholarly debates on human rights, on the one hand, and knowledge of public attitudes towards human rights, on the other. This state of affairs raises fundamental epistemological questions on what people know about human rights, calling for greater and better understanding of public attitudes in order to inform both policy and scholarly debate on 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’. 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.⁴⁷ The study of political sophistication has been described as one of the ‘best documented features of contemporary politics’⁴⁸ and has dramatically changed the way in which political theory understands the day-to-day working of democracy.

Political sophistication insights have been crucial to challenging longstanding political theory postulates, *viz.* that democracy is workable only when the public has a high degree of political information. This lineage can be traced back to influential thinkers, such as John Stuart Mill, John Locke, and Alexis de Tocqueville. Starting in the 1950s and 1960s, however, polls of political sophistication provided new data, clearly showing that the public fell far short of the ‘supercitizen model’ advanced in the works of classical political theorists.⁴⁹

⁴⁵ John A. Ferejohn, *Information and Electoral Process*, in *INFORMATION AND DEMOCRATIC PROCESSES* 3 (John A. Ferejohn & James H. Kuklinski eds., 1990) 3, available at <<https://trove.nla.gov.au/version/19968792>> (accessed 10 November 2018).

⁴⁶ The intensity of the debate was captured in a collection of material for a hearing by the Danish Parliamentary Committee on the Council of Europe. The collection contained thirty-two articles on the European Convention on Human Rights published between 10 February and 2 October 2017. Some of the articles were published after the above-mentioned poll, but the collection, which does not purport to be exhaustive, nonetheless provides an indication of the intensity of the debate. Available at <<https://www.ft.dk/samling/20171/almdel/ERD/bilag/1/1808235.pdf>> (accessed 10 November 2018).

⁴⁷ Robert C. Luskin, *Measuring Political Sophistication*, 31 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 856 (1987).

⁴⁸ Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 194 (1996).

⁴⁹ RUSSEL J. DALTON, *CITIZEN POLITICS: PUBLIC OPINION AND POLITICAL PARTIES IN ADVANCED INDUSTRIAL DEMOCRACIES* (2013).

Political psychology has since provided a new understanding of political cognition and has markedly changed views on how citizens process information and make political decisions. This research has stripped away the idealised standards of classic democratic theory and the rationalisations of elitist democratic theory.

This extensive body of research on political sophistication stands in stark contrast to the lack of research on human rights sophistication. Little scholarship on human rights sophistication exists. Most human rights theory moreover tends to focus on the universality of human rights, the ability of individuals to claim such rights, and their moral justification.⁵⁰ These theoretical insights have had a significant impact, but are ill-equipped to help understand the root causes of the alleged backlash against human rights or to suggest ways to address it. As a result, there is an urgent need to gather data on human rights sophistication and on how citizens process information concerning human rights.

V. CONCLUSION: POTENTIAL FOR MISDIAGNOSING THE HUMAN RIGHTS MALAISE

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.⁵¹ Yet, the remedy to this malaise often seems ill-conceived. Populists exploit the tensions inherent in liberal democracies.⁵² They tend to claim that the rule of law and the institutions charged with the protection of fundamental rights not only limit the capacity of the people to exercise their rightful power but also give rise to a growing discontent with the system itself.⁵³ 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’.⁵⁴ 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’.⁵⁵ It is furthermore dangerous to propose a cure to the human rights malaise before the disorder has been properly diagnosed. As this case study of Denmark clearly illustrates, there is no evidence to suggest that human rights lack popular support in Denmark. 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 difficult to accept calls for the fundamental reform either of regional or global human rights systems. Instead, what is needed is a better understanding of the public’s knowledge and understanding of human rights and their role in liberal democracy. Only with a better understanding is it possible to address the populist critique and suggest solutions to any discontent.

⁵⁰ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2013).

⁵¹ Alston, *supra* note 11, at 2.

⁵² MÜLLER, *supra* note 3, at 6.

⁵³ CAS MUDDE & CRISTOBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* (2017), at 95.

⁵⁴ Müller, *supra* note 3, at 3.

⁵⁵ *Id.*, at 107.

