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Moving away from common sense: the impact of the juridification of human rights

‘If in such cases where human rights and human rights legislation are cited, and the conclusion reached runs counter to common sense, then the conclusion is wrong.’

Lord Falconer¹

Introduction²

There has been a documented series of relentless attacks against the Human Rights Act (HRA) led by a part of the centre-right leaning press, with headlines such as ‘How Europe’s human rights court has made a mockery of British justice’ (Daily Mail 1 August 2015), ‘It’s time to stop crazy human rights rulings from European judges’ (The Sun, 26 July 2014), ‘Human Rights madness to end’ (Daily express, 3 October 2014) or “‘Rights” that make a mockery of our courts’ (Daily Telegraph, 27 April 2013).

These newspapers are among the leading opponents of the HRA³. Through the qualifiers used (mockery, crazy, mad etc.), they insist that (mostly European) judges have lost ‘common sense’ when applying the European Convention on Human Rights (ECHR). The usual response from human rights lawyers and other defenders of the HRA/ECHR is to challenge the quality of the criticisms made. They highlight the errors, exaggerations and misinformation that many of these articles bear.⁴ They tend to insist that the attacks are actually a form of ‘monstering’⁵, a demonization of the HRA/ECHR rather than a proper discussion of controversial issues.

This paper follows a different approach. It does not challenge the existence of ‘monstering’ (some of which have been condemned by the courts) but rather seeks to complement the analysis of the misrepresentations conveyed by part of the media. This chapter insists on taking seriously the criticism that there has been a loss of ‘common sense’ in the application of the law due to the application of the HRA. It looks for the reasons behind these claims: is it a problem with the way the Convention’s rights are phrased? With the Strasbourg judges’ interpretation? With how the British government implements the ECHR? Or something else altogether?

¹ Speech University of Manchester, 2007. Cited in J Rozenberg, ‘£25,000 spent on human rights spin’ *Daily Telegraph* (London, 10 February 2007).

² This paper has benefitted from insightful comments from Dr David Rossati and from Frederick Cowell, the editor.

³ L Gies, *Mediating Human Rights* (Taylor and Francis, 2014)18; Joint Committee on Human Rights, *The Human Rights Act: the DCA and Home Office Reviews* (2005-06, HL 278, HC 1716) 23-24.

⁴ See D Mead, “‘You Couldn’t Make It Up’’: Some Narratives of the Media’s Coverage of Human Rights’, in *The UK and European Human Rights: A Strained Relationship?*, K S Ziegler, E Wicks, L Hodson (eds) (Hart, 2015) 453-472; A Wagner, ‘The monstering of human rights’, 19 September 2014, Talk to University of Liverpool Conference on Human Rights in the UK Media: Representation and Reality.

<<https://adam1cor.files.wordpress.com/2014/09/the-monstering-of-human-rights-adam-wagner-2014.pdf>> accessed 25 September 16.

⁵ Wagner (n 4).

Because journalists do not always need to express the reasons behind their arguments and can write in a polemic fashion, it is often difficult to assess what is really meant by the claimed loss of 'common sense'. Fortunately, occasionally, they provide a selection of cases, such as when Jack Doyle of the Daily Mail chose 10 cases illustrating why the judges are 'so wrong' when they apply the ECHR.⁶ In the descriptions of the cases that are given, the problem is always to highlight something of the situation of the applicant which makes the outcomes absurd. In a nutshell, this is what the applicants stand for in these 10 cases:

- 1) Hate preacher
- 2) Sexual abuser
- 3) Prisoners wanting to use methadone
- 4) IRA terrorists
- 5) Spy who was compensated for breach of free expression
- 6) Murderer and career criminal
- 7) Murderer
- 8) Police chief who was doing unethical things who had her phone tapped
- 9) The criminal not expelled for reasons of fear to his physical integrity if deported
- 10) Male to female transgender who could not get a pension as a female

From the cases selected in that article, and in others⁷, two implicit dimensions of the 'loss of common sense' argument appear. The first common element for eight of these cases is that the beneficiary of the human rights law is somebody guilty of having committed serious criminal offenses such as murder, rape, sex offences, robbery etc., in other words a human rights abuser, or a 'culprit' claiming to be a victim.⁸ The assumption appears to be that human rights should be dependent on past behaviour. Under that view, unlinking rights from duties would thus be a 'mockery' of justice. The second common element is that each time the Strasbourg court finds a violation of the Convention in regard to the cases mentioned, critical newspapers and commentators dismiss it as being not serious enough in comparison to what the individual in question has done. Therefore human rights must deal with serious issues or otherwise fail into 'madness'. Finally some cases are inspired from liberal values rejected by the press critical of the ECHR.

These dimensions can be explained by the transformation of the common language of human rights into human rights law. The press and the human rights lawyers do not quite speak the same language when they address human rights questions. Both sides purport to discuss human rights issues as being tackled by courts but one does it from the perspective of the general public, the other from the legal one. This makes a crucial difference, in

⁶ James Slack 'Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals', *Daily Mail* (London, 11 January 2012).

⁷ See also the list provided in 'Case by case: How Europe's human rights court has made a mockery of British justice' *Daily Mail* (London, 10 February 2011).

⁸ F Klug, 'A Bill of Rights: do we need one or do we already have one?' (2007) *Public Law* 701.

particular as human rights law is usually not presented as being much different from the media version.⁹

When attacking the ECHR, the media make a series of assumptions, some express, some implied. Of those, many fail to match the premises on which the legal regime created by the HRA and the ECHR actually functions. It can appear that the criticisms made by the press against the court(s) are valid because they relate to a common view of what human rights should be and that human rights law only incidentally follows such a view. In many aspects they are actually far apart. Quite often the language used by the European Court of Human Rights is substantially different from the 'common view' expressed by the media (hereafter referred to as the 'common human rights language').¹⁰ As human rights transformed into a legal language, it has been taken over by lawyers and legal institutions which alter both its form and substance.¹¹ The legalisation of the human rights produce a modification of the content of the human rights away from a common sense of justice and at the same time give to expert judges powers which traditionally rested in domestic politics. Human rights law has moved from a shared will to use human rights as a way to fight potential totalitarian practices such as the atrocities committed during and in the wake of the Second World War¹² to a technical and managerial¹³ legal language for which the fight against totalitarianism is no longer central.¹⁴ The technical and managerial led transformations of human rights law explain four situations where the press may find nonsensical decisions.

The first point is that the legal human rights language breaks the direct connection between the past behaviour of the applicant and their claim contrary to other branches of the law. For many critics of the ECHR, criminals should not have been found to be victims of human rights violations as they should primarily be seen as culprits. Unlike the structure and form of criminal law where third party like victims can participate in the procedure, human rights law has severed the link between the victim of a human rights abuse and the culprit. It only asks itself whether the government has unduly restricted the rights of the applicant. The second point is that the media often presumes that for a human rights question to be dealt by courts it should be sufficiently serious. This is a politically sensible argument which is shared by many member states and the Council of Europe itself. However, the seriousness of the issue is only one factor among others for deciding the admissibility and the substance

⁹ The Equality and Human Rights Commission for instance defines human rights in the following way on their website: 'human rights are not just abstract concepts – they are defined and protected by law. In Britain our human rights are protected by the Human Rights Act 1998'. <www.equalityhumanrights.com/en/human-rights/what-are-human-rights> accessed 26 September 2016.

¹⁰ A Mooney 'Human rights: Law, language and the bare human being' 32(3) (2012) *Language & Communication* 169.

¹¹ See S Meckled-García, B Çal (eds), *The Legalization of Human Rights: Multidisciplinary Approaches*, (Routledge, 2006); N Kang-Riou 'Confronting the legalization of human rights: a counterpoint' in N Kang-Riou, J Milner, S Nayak (eds) *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge, 2012) 9.

¹² See A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, 2001) Chapter 4.

¹³ This is how Martti Koskenniemi describes this process of expert-rule: 'the fate of the rule of law as power in international institutions is increasingly wielded by expert regimes and networks looking for "optimal" outcomes that tend to be situation-specific'. M Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 47.

¹⁴ E Bates, *The evolution of the European Convention on Human Rights* (OUP, 2010).

of the claim under the ECHR. The third point is related to the second. Not only can a human rights court find a violation of human rights even when the restriction of the right can seem to be trivial, but they can also find some when a court is unsure if there has been a violation of a human right at all. Counter-intuitively, legally speaking a violation of the ECHR does not mean that an individual's human rights have been breached. Finally, some cases which are as seen as 'absurd' arise from differing political values expressed in defining what human rights are. I conclude by mapping out some possibilities to bridge the gap between the two sets of discourses on human rights.

1. Human rights law obfuscates the link between the past behaviour of an individual and their right to human rights

The first 'common sense' statement, which has been widely put forward as an argument behind the UK Bill of rights, is that rights should be connected to the past behaviour of an individual making a rights claim.¹⁵ Rights should not be disjointed from the responsibilities, doing anything else would go against common sense. In this area the conflict between human rights law and their opponents seem to be at their clearest. Most of the media pieces attacking the HRA and the ECHR base themselves on cases where criminals have been able to win cases for a breach of their human rights. This has been derided as making 'a mockery of justice'¹⁶. Cases where convicted criminals are able to escape deportation on the basis that it would breach their right to private and family life are particularly targeted in this context.

At first glance, the difference in perspective seems to be insurmountable. Newspapers opposed to the HRA clearly state that individuals who have committed serious crimes should not be able to claim that they have suffered a human rights violation because of what they did to their own victims. For Tony Parsons, in a 2014 Sun on Sunday column:

'The Human Rights Act is an affront to human decency. It contradicts everything the British believe about fairness and justice. It gives succour, comfort and aid to the perpetrators of evil and insults the good, the innocent and all the victims of crime. Foreigners who come to this country who murder, rob or rape should FORSAKE their right to a "family life"'.¹⁷

This is a denial that convicts still have human rights or at least is an argument that they only have a limited number of rights. At a cursory level, it is contrary to the nature of human rights law which asserts the unqualified and universal nature of human rights: all humans have rights regardless of their qualities.¹⁸ Of course upon closer examination, the operation of qualified rights contained in the ECHR, such as the right to private and family life, allows for restrictions. Human rights lawyers know very well that paragraph 2 of the right to private and family life, right to freedom of religion or the right to freedom of expression as set out in

¹⁵ See for a recent general discussion of the link between human rights and duties: S Parmentier, H Werdmolder, M Merrigan (eds) *Between Rights and Responsibilities: A Fundamental Debate* (Intersentia, 2016).

¹⁶ *Daily Mail* (London, 3 October 2014).

¹⁷ T Parsons, 'Why the Human Rights Act is just so wrong', *The Sun on Sunday* (London, 14 December 2014).

¹⁸ Universal Declaration on Human Rights, Article 1.

ECHR, allow the government to restrict these rights if there is a legal basis, a legitimate aim and a necessity for such a restriction in a democratic society. Therefore a government can justify restrictions on the rights of a convict for public interest reasons, such as guaranteeing public safety. The evidence of the danger to the public is the past criminal behaviour. This is where a link between the rights and the responsibility of an individual appears, even though it is only an indirect and relative one. The British government has won many cases in Strasbourg or in front of British courts on such basis.¹⁹

Critics of the media are quick to point out that cases where governments win and courts allow the deportation of criminals, or some other measure, are generally unreported by the media.²⁰ Thus the reader of the press hostile to the HRA could be forgiven if they concurred with the statement regarding the operation of art 8 ECHR, that '[i]t doesn't matter if you come to this country and rape, murder and steal'²¹. If this were true, it would go against the 'common sense' approach to what immigration should be about. Most people would agree that a serious breach of criminal law is as bad a behaviour can get in a democratic society. In a world with borders, the immigration compact is based on the premise that upon an individual's entry into the territory of another state they are required to respect its laws, especially its criminal legislation. It is therefore reasonable to refuse to let a person stay in a state if they have committed such a breach of the terms through which they were allowed to come in in the first instance. This is also what the European Court of Human Rights has consistently stated, noting that 'the Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences.'²² In that same case, the Grand chamber of the Court has explicitly refused to assimilate long term migrants with nationals. It could thus seem that the critics have just failed to do their homework.

The chasm comes from the way the Strasbourg Court has interpreted the operation of Article 8 in such circumstances. It balances the rights of the individual with the public interest by taking into account a series of factors, the severity of the offence committed being only one of them. The other elements are the length of applicant's stay in the country from which they are to be expelled, the time since the offence was committed, the applicant's conduct during that time and the applicant's family situation and solidity of applicant's social, cultural, and family ties with the host and destination countries²³. Therefore the two sides being balanced are the crime on the one hand and the extent of the integration of the applicant on the other. The legal version no longer fits with the simpler test espoused by the media.

In substance and in legal terms, what critics of the ECHR are pointing at is a divergent view on how the proportionality test should operate by insisting on the pre-eminence of the past

¹⁹ See for an analysis of the appeal against deportation decisions in the UK and in Strasbourg in 2011 and 2012: Klug 'A Bill of Rights' (n 8).

²⁰ Mead (n 4).

²¹ *ibid.*

²² *Uner v Netherlands*, ECHR 2006-XII, GC, para. 54.

²³ *ibid.* para. 57 and 58.

behaviour, as per the criminal law regime. The ECHR demands that restrictions of rights to be 'necessary in a democratic society'. What that test entails is subject to interpretation. A plausible view could be that some crimes are so severe that in the case of foreign criminals they should always lead to an expulsion. This would be a legitimate restriction in legal terms and one which could not be so easily dismissed by human rights advocates. In fact such a reading is entirely possible under the Convention²⁴ making it arguable that the interpretation of the ECHR made by the Strasbourg court lacks common sense as it fails to integrate the operation of the ECHR within its wider societal context.²⁵ Many believe that some crimes are in and of themselves sufficiently serious to allow for the balance to side with the protection of public order.

The majority of the Strasbourg judges disagree. They have only recognised that crimes like rape or drug trafficking are generally a sufficient justification while at the same time allowing for exceptional individual circumstances to prevail over deportation.²⁶ The interpretation of the ECHR stems from a liberal perspective of law and justice. In particular it has rejected retributive justice to encompass a stronger view on restorative justice.²⁷ When a convict claims a breach of right, the crime committed is assessed under its current impact not the past one towards the victims. Furthermore, as the case is based on a breach of human rights law, the convict is no longer seen in that perspective and the victim disappears from the procedure. What seems reasonable or common sense thus changes, as the liberal view insists on the importance of the individual character of the violation rather than on the general context. Thus it is structurally difficult for these two sets of views to be reconciled regarding the impact of the breach of past duties on the enjoyment of human rights.

2. A breach of human rights law is not necessarily a serious human rights issue

In the common discourse, when someone speaks of a human right violation it relates to something important, deeply affecting the individual concerned. This is how charities, NGOs dedicated to human rights such as Amnesty International or Human Rights Watch report human rights abuses taking place internationally.²⁸ This is also what human rights institutions focus upon when they circulate a press release, the media choosing to report on matters seen as being important by the public. Therefore if a finding of a human rights violation is publicised then it has to be deemed serious.²⁹ This is one of the major criticisms of the HRA which can be seen in the cases cited as lacking 'common sense' and is summarised by Dominic Raab, a Tory MP and former solicitor as follows:

²⁴ In a case where an individual was deported after convicted for drug trafficking, the Court stated that: 'In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge', *Baghli v France*, ECHR 1999-VIII.

²⁵ For an academic view supporting this argument: see M Bossuyt, *International Human Rights Protection: Balanced, Critical, Realistic* (Intersentia, 2016).

²⁶ *Beldjoudi v France* (1992) Series A no 234-A.

²⁷ For a study on restorative justice see H V Miller (ed) *Restorative Justice: From Theory to Practice* (Emerald Pub, 2008).

²⁸ On Amnesty International, see S Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Cornell University Press, 2006).

²⁹ Of course different INGOs will see problems differently, see S Stroup, *Borders among Activists: International NGOs in the United States, Britain, and France* (Cornell University Press, 2012) Chapter 4.

‘The British tradition of liberty has been conflated as swathes of other comparatively minor grievances, claims and interests have been shoe-horned into the ever-elastic language of inalienable, unimpeachable and judicially enforceable rights. In place of our most basic – fundamental – freedoms, steadily eroded and undermined since 1997, we have witnessed the expansion of a range of novel, often trivial, rights.’³⁰

The finding of a breach of the ECHR does not mean that it necessarily constitutes an important case in relation to the applicant. The Court has always considered the severity of the breach for the applicant as only one element to be taken into account in order to decide the admissibility of the application. Prior to Protocol 14, the only test applicable in that respect was that an application should not be ‘manifestly ill-founded’.³¹ This covers many components including the lack of importance of the restriction of the right complained of.³² This has not prevented the Court from finding violations of the Convention where at first sight the behaviour of the state does not seem to have been wrong. Technically it is sufficient for the court to find an illegal restriction of the right. Often the operation of the law fails to distinguish between serious breach of a provision and a minor breach.

A case usually cited by the British press in this context is *Mc Cann and others v UK*.³³ The case concerned IRA members in Gibraltar who were killed by the Special Air Service who genuinely thought they were in a middle of a car bombing attack, whereas they were only conducting the preparations for future bombing. The Court did not refute that the killing was absolutely necessary to prevent a crime and therefore was compatible with Article 2 of the ECHR, the right to life. Still it found a breach of Article 2 because of the behaviour of the government in the circumstances leading to the attempted arrest. In particular, they pointed towards the decision not to try to arrest the IRA members when they landed at the airport in Gibraltar where it would have been less risky. The tabloid press later claimed that the case “outraged the public”.³⁴

The Daily Mail was also dismayed³⁵ by the decision in *Blackstock v the UK*.³⁶ The Strasbourg Court found a breach of the right to liberty guaranteed by Article 5 of the ECHR because there was no review of an individual’s continued detention after the minimum tariff of imprisonment had expired. Failure to conduct such a review, the Court held, constituted a breach of Article 5, even if there was no evidence that an earlier review would have led to an earlier release.

In both cases, the press did not seem to see a restriction of the right which would warrant the finding of a breach. Interestingly this criticism has borne fruit within the system itself

³⁰ D Raab, *The Assault on Liberty: what went wrong with rights* (Fourth Estate, 2009) xviii.

³¹ L Zwaak, ‘The procedure before the European Court of Human Rights’, in P Van Dijk *et al* (eds) *Theory and Practice of the ECHR* (Intersentia, 4th edn, 2006) 198-199.

³² A Buyse, ‘Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35(3)(b)’, in Y Haec, B McGonigle Leyh, C Burbano Herrera (eds) *The Realisation of Human Rights: When Theory Meets Practice* (Intersentia, 2014) 107.

³³ (1995) Series A no 234. This case is listed among the 10 cases cited (n 6).

³⁴ Daily Mail ‘Case by case’ (n 7).

³⁵ Slack (n 6).

³⁶ App. no 9152/00 (ECtHR, 21 June 2005).

through the introduction of the *de minimis* criterion of admissibility with Protocol 14, which allows the Court to dismiss a case if ‘the applicant has not suffered a significant disadvantage’ (Article 35 para. 3(b)).³⁷ Still, even in these circumstances the Court is not bound to dismiss a case if it believes that it is demanded for the ‘respect for human rights’³⁸. It can thus continue to examine cases that the press would find unreasonable to consider in human rights terms. For instance the Court has agreed to deal with a case even though the original dispute concerned 17 euros, because it was important for the national courts to know the correct interpretation of the ECHR.³⁹ No doubt that if it had concerned the UK, it would have been rejected by the press as nonsensical.

3. A breach of human rights law is not necessarily of breach of human rights

The media tend to conflate violations of human rights law with violations of human rights. However, lawyers know that the transformation of anything external to law into law, such as human rights, necessarily result in structural changes regarding the meaning and application of the imported concept.⁴⁰ This is also true regarding the application of the ECHR. Two cases vilified in the press illustrate this problem well: *Averill* and *Hirst*.⁴¹

In *Averill v UK*⁴², the UK was found in breach of the right to a fair trial (Article 6 ECHR) because the applicant did not have access to a lawyer during the first 24 hours of his interrogation, contrary to an (extensive) interpretation of the Convention affirmed by the Court⁴³. However, he stayed silent during the whole time. He was then found guilty of murder. It is doubtful that the failure to follow procedural rules had a negative impact on the applicant in that case, even if the trial judge did make an inference from his silence in the first 24 hours.⁴⁴ As he stayed silent even after being represented, it is very unlikely that even if he had been assisted earlier by a lawyer that the outcome would have changed. The fact that he was not awarded any pecuniary damages by the Court is significant as it points towards Strasbourg judges believing that the applicant did not suffer any adverse impact. Of course, what the Strasbourg Court is after in such cases, is to make sure that the procedural guarantees are in place regardless of the circumstances so they can benefit society at large. This is an example of an individual case being used more as a tool to ensure general compliance from the defending state rather than to provide individuals reparations for individual breaches of their human rights. From a ‘common sense’ view it can seem wrong to find a breach of human rights in the person of Mr Averill; from the perspective of the Court, it was necessary as the procedural guarantee that the right to a lawyer must be in place in all circumstances of the case to uphold the rule of law.⁴⁵

³⁷ Buyse (n 32).

³⁸ Article 35(2) ECHR.

³⁹ *Nicoleta Gheorghe v Romania* App no 23470/05 (ECtHR, 3 April 2012).

⁴⁰ For a general sociological account, see N Luhmann, *Law as a social system* (tr K A Ziegert, OUP, 2004) esp. chapter 2.

⁴¹ Both cases are listed in the 10 cases mentioned above (n 5).

⁴² ECHR 2000-II 212.

⁴³ *Murray (John) v UK*, ECHR 1996-I.

⁴⁴ *Averill v UK*, para 48.

⁴⁵ Explanation provided about the rule in *Salduz v Turkey* App no 36391/02 (ECtHR, 20 November 2008) para 55.

One case which has generated strong opposition, not only from the press⁴⁶, but also from both the Conservative and Labour parties is *Hirst*⁴⁷. The finding of a violation rested on the existence of an absolute ban for all prisoners to vote regardless of their personal circumstances. The Strasbourg court recognised the compatibility with the Convention of legislations enforcing a ban on prisoners' voting for certain categories of prisoner. Mr Hirst would have clearly fallen within such categories, as he had been convicted to a life sentence for murder. Removing his individual right to vote would have been completely acceptable under the ECHR, as confirmed later by the Court in another case.⁴⁸ Therefore, Mr Hirst had not been subject to a violation of his human right to vote in the substantive sense. In that case the Court targeted a general issue in the UK, both the lack of specific parliamentary discussion of the prohibition to vote for all detainees and its absolute character regardless of the individual circumstances. Again here, from a 'common sense' perspective, it could seem absurd to find a breach of Mr Hirst's right to vote, as even if legislation had been passed to allow for some prisoners to vote, it would never have included individuals sentenced for long term sentences.⁴⁹

There are many caveats to be added to the statement that a violation of a human rights treaty was found by an international human rights court. It may sound substantively similar to stating that there was a finding of a breach of a universally accepted human rights but it is rather different. Some reasons are quite simple and linked to the development of a highly specialised and technical language. The European Court of Human Rights is tasked with the interpretation of the Convention and not the interpretation of human rights in a more general or wider sense. The Court is bound by the vocabulary used in the text of the Convention and more importantly it tends to follow its own case-law.⁵⁰ Regarding the former, the court has been quite happy to ignore or rewrite some of parts of it using interpretative tools.⁵¹ So the latter is more decisive. As a consequence a finding of a violation by the Court is relative and specific to the ECHR itself it is not necessarily a statement that a universally accepted human rights norm has been breached. This is the case the breach of Article 3 Protocol 1 in *Hirst* which can only be understood in the context of the development of the case law, not only of that provision, but also more generally in the Convention. For instance, the Court has developed the procedural dimension of the Convention rights by insisting that the restrictions placed on rights are discussed and justified by parliaments or domestic judges.⁵²

⁴⁶ T Shipman, '6,000 Perverts and Thugs to Get the Vote: Tory Rebels' Fury at Plans to Let Inmates Cast a Ballot' Daily Mail (London, 6 January 2011).

⁴⁷ *Hirst v UK*, ECHR 2005-IX, GC.

⁴⁸ *Scoppola (No. 3) v Italy*, app no 126/05, GC (ECtHR, 22 May 2012).

⁴⁹ The bill made in order to comply with *Hirst* at best offered the vote for prisoners with less than a 4 years sentence. See Draft Voting Eligibility (Prisoners) Bill 2012 Cm 8499.

⁵⁰ See A Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9(2) *Human Rights Law Review* 179-201.

⁵¹ G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007); A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 5.

⁵² E Brems, 'Procedural protection: an examination of procedural safeguards read into substantive Convention rights' in E Brems, G Janneke (eds) *Shaping Rights in the ECHR* (Cambridge University Press, 2014) 156.

Secondly, the Court has several objectives when making an interpretation of ECHR. They are broadly defined within the preamble of the ECHR: rule of law, democracy and human rights. The protection of human rights is only one of the elements to be taken into account by the Court. It believes that human rights are truly protected only in a society which respects the rule of law and democracy.⁵³ The aim of the ECHR as interpreted by the Court is not only about the protection of the individual rights of the applicant but more generally to ensure the protection of human rights within the state party to the Convention. In *Hirst*, the Court asserted that a fundamental aspect of democracy had not been respected as the link between the loss of the right and the individual had not been explained by the UK Parliament. Regarding the rule of law, one key dimension of the ECHR is the development of procedural obligations. There the Court is targeting the operation of the state as a whole, rather than looking at any individual situation. Any refusal of the application of the law, even if benign in a particular case, is wrong when the wider situation is taken into account. The state should always abide by accepted rules, including the ones stemming from an evolutionary interpretation of the ECHR, which was the issue in *Averill*.

The development of the interpretation of the ECHR in both its rule of law dimension and its procedural components ineluctably lead towards a wider disconnect with the common sense understanding of what human right violations are. In these two examples, the extent of the infringement of the rights is not the basis of the breach of the Convention. In *Averill* and *Hirst*, the breach comes first from a deviation from the constructed obligations of the state towards all, regardless of the individual situation. This is contrary to the perspective on the cases taken by the media and politicians who discuss the limitation of the rights in relation to the behaviour of the state complained of. In that respect, the Court's decisions can seem as lacking common sense as even though they are fully aligned with the objectives it has set itself, their decisions appear to be going beyond the individual situations brought to their attention. The Court through its case law has thoroughly extended the range of the rights protected far from the 'bare' human rights of the individual whereas part of the media have stayed with this original vision.⁵⁴

4. A finding of a breach of human rights law can be politically influenced

Several cases have been selected by the Daily Mail⁵⁵ as bad examples because the Strasbourg court judgments reflected a (liberal) view of society seemingly at odds with the (conservative) values of the newspaper. Two cases illustrate this: *Tyrer*, a case a corporal punishment and *B and L* a case relating to the right to marriage.

In *Tyrer v UK*⁵⁶, the UK was found in breach of Article 3 of the ECHR as corporal punishment was inflicted to a child in a school on the Isle of Man. This judgment was criticised for undermining Britain's 'reasonable chastisement' law which allowed parents to smack their children, but has also led to limits on corporal punishment by parents.⁵⁷ Even though the

⁵³ See for instance, *Malone v UK* (1984) Series A no 82, para 79.

⁵⁴ Mooney (n 9).

⁵⁵ Daily Mail 'Case by case' (n 6).

⁵⁶ (1982) 4 EHRR 232.

⁵⁷ *ibid.*

international legislative trend points towards a limitation of physical punishment⁵⁸ this is still resisted by part of the population, by Tory politicians but also Labour.⁵⁹ Critics of the judgment warned that a 'nanny state' was being developed from Strasbourg.⁶⁰ This generated a divide between what seemed to be reasonable in the UK and among the Strasbourg judges.

In *B and L v UK*⁶¹ the Court found a breach of Article 12, the right to marriage, because of the prohibition of marriage in UK law between a father-in-law and daughter-in-law. The Daily Mail argued against this claiming that '[c]enturies-old rules banning marriage between children and their parents-in-law were swept aside... [T]he ban had been cemented in law for more than 400 years in the Book of Common Prayer'.⁶² This was presented as a case of traditional values being challenged by the Court, even though the Labour government of the time had been looking at changing the law. In both cases, the disagreement as to what counts as common sense is imbued with values. Liberals approve whilst conservatives oppose, both sides believing they represent what common sense should be. This division is traditionally at the centre of the political divide between left and right across Europe. What this highlights is not so much an issue of common sense but of politics and relates to what many lawyers have noted concerning the political dimension of decisions taken by the Court.⁶³

Even within the discourse of human rights law, there are various politics at play in terms of interpretation and application what that law should mean. There is no accepted single view within the human rights law community of what is the correct interpretation of human rights law in many situations. One needs to look no further than at the dissenting opinions of Strasbourg judges to see that even they can be divided.⁶⁴ There are also oppositions to the European view of human rights stemming from the national legal profession.⁶⁵ The discourse of human rights law tends to present itself as technical, an application of what is the correct application of the rules for the situation in question. This is only partly true. Judgments are also the result of the application of political preferences by judges. By political, what is meant is that the courts decisions are taken through a mechanism very similar than the one taken by politicians when a proportionality test is conducted. The outcome of such a test depends on personal views as to what the good life is, of how society should function.⁶⁶ This

⁵⁸ See P R Gandhi and J A James 'Parental rights to reasonable chastisement and the European court of human rights' (1999) 3(3) *The International Journal of Human Rights* 97.

⁵⁹ *ibid.* 98.

⁶⁰ C M Lyon 'Spare the Rod - care for the child: A consideration of proposed changes to the Law on reasonable chastisement of children in the different jurisdictions of the UK' (2001) 7(3) *Child Care in Practice* 193.

⁶¹ (2006) 42 *EHR* 195.

⁶² Daily Mail 'Case by case' (n 6).

⁶³ G Beck, 'Human rights adjudication under the ECHR between value pluralism and essential contestability' (2008) *European Human Rights Law Review*, 214-244; N Valticos, 'Interprétation juridique et idéologies in Protection des droits de l'homme : la perspective européenne', in P Mahoney *et al* (eds) *Mélanges à la mémoire de Rolv Ryssdal* (Carl Heymanns Verlag, 2000) 1471-1482.

⁶⁴ R CA White, I Boussiakou 'Separate opinions in the European court of human rights' (2009) *Human Rights Law Review* 37-60.

⁶⁵ See for instance, A L Kjær, L Palsbro 'National identity and law in the context of European integration: the case of Denmark' (2008) 19 (5) *Discourse and Society* 599-627.

⁶⁶ D Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard University Press, 1997) 58.

process is bound to lead to differences as to what is the common sense answer to a particular question. Generally speaking in a democracy, it is elected MPs who are tasked with solving diverging views on how to achieve a good society. According to the media hostile to the ECHR, the ones to make this kind of judgements should be British⁶⁷. This disagreement is then more about who decides what common sense is than how it is decided.⁶⁸

Conclusion: limiting the expert rule

This chapter has looked at some of the structural reasons why the legal discourse of the European Court of Human Rights often moves away from a common sense understanding as to what human rights violations are. Media hostile to the ECHR are quick to point out apparently absurd decisions which insufficiently take into account the overall context of the case or fail to provide convincing reasons as to why there was a breach of human rights. The language of human rights law has transformed the finding of a violation of the ECHR in an exercise which is quite different from the one tabloids conduct, which tend to rest on a minimalist version of human rights. Of course, there are many biases within the media as well. They are for instance much more prompt to recognise human rights violations abroad than those in the UK⁶⁹, or need to feel a sufficient emotional proximity to the victim to side with them. But that does not explain away the gap in perception between the two. The differences between the premises behind the operation of the human rights test under the 'common sense' or by lawyers are so important that it is unavoidable that the role of the Strasbourg led interpretation of the ECHR in the UK constitution continues to be challenged.

Nevertheless there are ways to close the gap between the two perspectives without needing to leave the ECHR. This can be done by both member states and Strasbourg. On the states side, they need to claim their full role in the operation of the ECHR by developing their domestic interpretations of rights within the language of the Convention. As it was discussed in part 1, decisions dealing with the potential breach of art 8 protecting the right to private and family life are mainly about setting the boundary for the application of a proportionality test. With the Immigration Act 2014⁷⁰, the UK government has understood that well, providing domestic judges with clear guidance as to how the test should operate. This is one avenue for states to use at the maximum the margin of appreciation granted by the European Court of Human Rights to balance the interests of different parties.⁷¹ This could limit the creation of judge policy making in domestically sensitive areas.⁷²

⁶⁷ Of course some of the decisions attacked have been made by British judges without following direct guidelines from Strasbourg. But the argument still stands.

⁶⁸ Koskeniemi (n 13).

⁶⁹ L Gies, *Mediating Human Rights* (Taylor and Francis, 2014).

⁷⁰ Immigration Act 2014, s 19.

⁷¹ D Spielman 'Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) *Cambridge Yearbook of European Legal Studies* 381.

⁷² This idea of a wider margin has been actively pursued by the British government at the time of the Presidency of the Council of Europe in 2012. See High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012. <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf > accessed 26 September 2016.

Another way to bridge the gap is for the Strasbourg Court to be more careful when selecting the cases they use to evolve case-law. It would have been easy for the Court to dismiss the application made by Mr Hirst as manifestly ill-founded, leaving only applicants who have been detained for short period of times as the battle ground for discussing the right to vote of prisoners. The Court should be more politically savvy; it should know that the implementation and respect of its decisions is not something that can be taken for granted. It should be better at taking a pragmatic view of how legitimacy impacts its efficacy in particular in a time where many states have continuously failed to implement decisions.⁷³ Finally the Court also needs to define the limits of its judicial creativity, if it wants to continue to keep its role as the provider of a concrete level of human rights protection in Europe and continue to expand without endangering the system itself.⁷⁴ The debate which arose between the Sir Gerald Fitzmaurice and the other judges of the European Court of Human rights in the 1970s about the interpretative role of the Court has not been definitively settled.⁷⁵ What was acceptable in the 1980s or 1990s, an era of further European integration and of the intellectual supremacy of the liberal model (at least in the West), seems to have changed in the new millennium. The June 2016 UK vote to leave the EU is a clear example of a growing popular rejection of the liberal discourse of European integration through legal institutions. Because of the issues highlighted here, and the more general problems with the human rights discourse⁷⁶, the debate about what human rights are much wider than the legal realm, it must go beyond lawyers. At the same time one must deal with the tension of limiting the potential excesses of expert rule whilst continuing to allow for an external control on national governments behaviours restricting human rights.

⁷³ Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights*, Report Doc. 13864, 09 September 2015.

⁷⁴ One example of scholarship geared towards setting boundaries, even though vague ones: B Hale, 'Common law and Convention law: the limits to interpretation' (2011) *European Human Rights Law Review* 234.

⁷⁵ See Bates (n 14) 319.

⁷⁶ M Koskenniemi 'The Effect of Rights on Political Culture', in P Alston (ed) *The European Union and Human Rights* (1999, Oxford University Press) 99-116 .