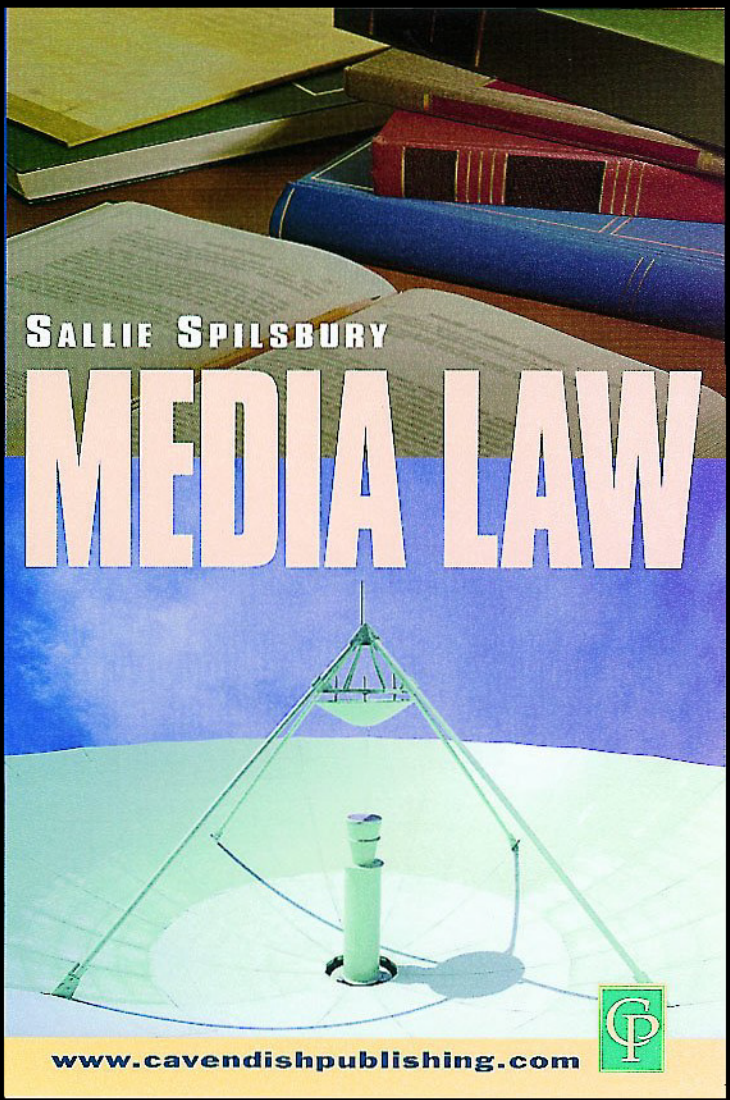
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PART 1

THE HUMAN RIGHTS ACT 1998 AND THE MEDIA

> Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress, and for the development of every man.[1]

The Human Rights Act 1998 ('the Act') has now come fully into force throughout the UK on 2 October 2000.[2] It is likely to have far-reaching implications for most, if not all, areas of civil and criminal law, including the law affecting the media.

The objective of the Act is stated to be 'to give further effect'[3] in UK law to the majority of the rights provided for in the European Convention of Human Rights ('the Convention'). The Act does not create new substantive rights under domestic law, but it makes existing Convention rights more immediate and relevant.

THE CONVENTION

The Convention is a statement of rights and freedoms drawn up in 1950 in the aftermath of the Second World War. Its full title is 'the Convention for the Protection of Human Rights and Fundamental Freedoms'. The objectives of the Convention are set out in the Convention's preamble. They include the maintenance and further realisation of human rights and fundamental freedoms, and the maintenance of effective political democracy. Section 1 of the Convention is headed 'Rights and Freedoms' and provides for a number of rights for citizens of Convention countries. Some of the rights and freedoms established by the Convention are absolute and others are subject to specific limitations. Where they apply, the limitations are designed to ensure respect for competing rights and freedoms or for other legitimate public purposes.

The Convention rights are as follows:

Art 2 – right to life;

Art 3 – prohibition of torture;

Art 4 – prohibition of slavery and forced labour;

---

1 *Handyside v UK* (1976) 1 EHRR 737, ECHR.

2 The Act is already in force in Scotland at the time of writing.

3 As stated in the long title to the Act.

Art 5 – right to liberty and security;

Art 6 – right to a fair trial;

Art 7 – no punishment without law;

*Art 8 – right to respect for private and family life;

*Art 9 – freedom of thought, conscience and religion;

*Art 10 – freedom of expression;

Art 11 – freedom of assembly and association;

Art 12 – right to marry;

*Art 13 – right to an effective remedy (for the violation of rights and freedoms provided for in the Convention);[4]

Art 14 – prohibition of discrimination on any ground (in relation to the rights and freedoms provided for in the Convention);

Art 15 – derogation in times of emergency;

Art 16 – restrictions on political activity of aliens;

Art 17 – prohibition on abuse of rights;

Art 18 – limitation on use of restrictions of rights.

The rights marked * are of particular relevance to media law and will be considered in further detail in this chapter and throughout this book.

There have been a number of protocols to the Convention since the early 1950s which have provided for additional rights and freedoms. The first protocol, which has been ratified by the UK, provides for the following additional rights:

Art 1 – right to peaceful enjoyment of possessions/property;

Art 2 – right to education;

Art 3 – right to free elections.

The sixth protocol provides, *inter alia*, for the abolition of the death penalty.

Section II of the Convention provides for the establishment of a European Court of Human Rights to function on a permanent basis.[5] The Court was established at Strasbourg in 1959 to hear petitions against *States* who are

4 The right to an effective remedy is not amongst the 'Convention rights' provided for in the Act. The view of the Government is that the operation of the Act will by implication provide for an effective remedy (in particular, s 8 of the Act) and that an express inclusion of Art 13 would be unnecessary and would involve duplication. The decisions of the European Court of Justice under Art 13 will, however, be relevant under domestic law (an assurance given by the Lord Chancellor during the report stage of the Bill; *Hansard*, 19.1.1998, col 1266).

5 HRA 1998, Art 19.

signatories to the Convention. Complaints to Strasbourg may only be brought against Contracting *States,* rather than against private individuals or organisations who are domiciled or resident in those States. Since 1966, individual claimants in the UK have had the right to complain directly to the European Court in Strasbourg about alleged breaches of the Convention. Where a country is found to have violated a Convention right, the court's judgment does not have the automatic effect of changing the national law of the Contracting State, but the State is obliged to change its law in line with the Convention.

THE POSITION UNDER ENGLISH LAW BEFORE THE ACT CAME INTO FORCE

The Convention was ratified by Britain in 1951, but has never been directly incorporated into UK law. The lack of incorporation into UK law has meant that, whilst private litigants could, in some circumstances, complain to the European Court in Strasbourg that their Convention rights had been violated, they could not make any such complaint to the British courts. There was no domestic cause of action for breach of a Convention right.

Litigants who took their cases to Strasbourg faced a lengthy and expensive journey. On average, it took five to six years to get judgment from the European Court from the time of the petition being lodged, and all national avenues for complaint and appeal must previously have been exhausted.

The Convention, whilst not part of national law, has had a role to play prior to October 2000. By way of example, where the terms of legislation were ambiguous, the Convention might be used as an aid to construction.[6] In addition, increasingly in the field of media law, the judiciary have had regard to the Convention in their decision making (although, in some instances, 'have regard to' has amounted to little more than paying lip service to). But there has been no *obligation* on the courts to apply the Convention or to follow Strasbourg jurisprudence in reaching their decisions.

6 For an example, see *AG v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696, p 760.

THE SCHEME OF THE ACT

The Act does *not* incorporate the Convention itself into UK law. It does, however, elevate the Convention and the jurisprudence of the Strasbourg Court from the sidelines to a central place in domestic law.

The focal point of the Act is the so called 'Convention rights'. These are defined in s 1 of the Act as meaning the rights set out in Arts 2–12 and 14 of the Convention, the rights provided for in the first protocol and the abolition of the death penalty contained in the sixth protocol. There is also provision for new rights to be added if further protocols to the Convention are ratified by the UK in the future.

The key effects of the Human Rights Bill were summarised by the Lord Chancellor in the following terms:

> The Bill is based on a number of important principles. Legislation should be construed compatibly with the Convention as far as possible. Where the courts cannot reconcile legislation with Convention rights, Parliament should be able to do so – and more quickly, if thought appropriate, than by enacting primary legislation. Public authorities should comply with Convention rights or face the prospect of legal challenge. Remedies should be available for breach of Convention rights by a public authority.[7]

THE MAIN PROVISIONS OF THE ACT

Interpretation

Duty to have regard to Strasbourg jurisprudence

- *Section 2* of the Act provides that a court or tribunal determining a question which has arisen in connection with a Convention right must *take into account* any relevant jurisprudence of the European Court of Human Rights, whether judgment, decision, declaration or advisory opinion and whether or not it relates to a decision involving the UK. The national court or tribunal must also take into account any opinions or decisions of the European Commission of Human Rights and decisions of the Council of Ministers (although the Commission and Council ceased to have a judicial function in 1998). Significantly, the obligation is to 'take into account', rather than 'to follow'. Strasbourg jurisprudence will not be binding on

7 *Hansard*, HL, 5.2.1998.

domestic courts in the same way as we think of precedents under English law.

Example

The *Daily Tabloid* is sued for defamation by the pop star Sharon Sparkle. The *Daily Tabloid* might claim in its defence that the defamation action interferes with the Convention right to freedom of expression. Under s 2 of the Act, the court must take into account the jurisprudence of the European Court of Human Rights on the question whether the defamation action is a legitimate restriction on the right to freedom of expression. The court does not have to follow that jurisprudence, but it is under an obligation to take it into account.

The Lord Chancellor explicitly rejected the idea of including a statutory formula in the Act providing that Convention jurisprudence should bind the national courts. He observed that 'our courts must be free to develop human rights jurisprudence by taking into account European judgments and decisions, but they must also be free to distinguish them and to move out in new directions to the whole area of human rights law'.[8]

This move away from binding precedent is also in line with the approach of the Strasbourg Court itself, which tends not to regard its own decisions as binding on itself. For example:

(a) the Convention has often been described by the Strasbourg Court as a '*living instrument*',[9] to be interpreted afresh in the light of prevailing conditions of the day, rather than by reference to earlier precedent;

(b) the doctrine of the *margin of appreciation* is a further reason for rejecting the idea of a binding system of precedent under Strasbourg case law. The margin essentially allows each Contracting State leeway in determining what is compatible with the Convention, provided always that the actions of the State conform to the objectives of the Convention. The margin of appreciation is considered further below.

Statutory interpretation

- *Section 3* of the Act provides that, *so far as it is possible to do so*, primary legislation (such as Acts of Parliament) and subordinate legislation (for example, statutory instruments and Orders in Council) must be read and given effect to in a way which is compatible with Convention rights. This will apply whether or not the legislation was enacted before the Act came into force. The obligation to construe legislation in line with the

8 *Hansard*, HL, 24.11.1997, col 835.

9 *Tyrer v UK* (1978) 2 EHRR 1.

> Convention is not limited to courts and tribunals. Everyone should construe legislation in this way.
>
> Where primary legislation cannot be given effect to in a way which is compatible with Convention rights the legislation is *not* invalid. However, under s 4, certain courts[10] have discretion to make a *declaration of incompatibility*[11] where a provision of *primary* legislation is incompatible with a Convention right. The Crown has a right to notification and an opportunity to intervene in any proceedings where the court is considering whether to make a declaration of incompatibility.[12]

A declaration of incompatibility will not affect the validity of the legislation,[13] which will continue to apply unless and until the legislation in question is amended. Nor is the declaration binding on the parties to any legal proceedings in which it is made.

During the second reading of the Bill in the House of Commons, the Home Secretary, Jack Straw, observed that 'a declaration of incompatibility will not affect the continuing validity of the legislation in question. That would be contrary to the principle of the Bill. However, it would be a clear signal to the Government and Parliament that, in the court's view, a provision of legislation does not conform to the standards of the Convention … it is likely that Government and Parliament would wish to respond to such a situation and would do so rapidly'.[14]

In relation to *subordinate* legislation, where it is not possible to construe such legislation in a way which is compatible with the Convention, the court should treat the subordinate legislation as invalid, unless the primary legislation under which the subordinate legislation was made prevents the removal of the incompatibility (when considering whether the primary legislation prevents the removal of the incompatibility, any possibility of revocation of the subordinate legislation should be disregarded).[15] Where the primary legislation *does* prevent the removal of the incompatibility, the court has no discretion to find the subordinate legislation invalid and must give effect to it.

The obligation to construe legislation in line with the Convention is likely to have far-reaching effects on the way that the courts interpret legislation.

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10 In England and Wales, the courts which may make a declaration of incompatibility are the House of Lords, the Court of Appeal, the Judicial Committee of the Privy Council and the High Court (s 4(5)).

11 HRA 1998, s 4(2) for primary legislation and s 4(3) for subordinate legislation.

12 *Ibid*, s 5.

13 *Ibid*, s 4(6).

14 *Hansard*, 16.2.1998, col 778.

15 HRA 1998, s 3(2).

Interpretations of legislation which were made before the Act came into effect may no longer apply. The courts are likely to move away from a technical way of construing legislation which focuses on the detailed meaning of particular words. Instead, it is probable that the courts will adopt a broader, more purposive construction dependent on the overall objective of the statute and the relevant Convention right.[16] Lord Cooke described the change in approach in the following terms:

> The clause will require a very different approach to interpretation from that to which UK courts are accustomed. Traditionally, the search has been for the true meaning; now it will be for a possible meaning that would prevent the making of a declaration of incompatibility[17] … in effect, the courts are being asked [to apply] a rebuttable presumption in favour of the Convention rights …

Jack Straw, the Home Secretary, assured Parliament that it was not the Government's intention that the courts should contort the meaning of words to produce implausible or incredible meanings.[18]

- Where a provision of legislation is declared incompatible, the Act makes provision for amendment of the legislation by statutory instrument where a minister of the Crown considers there are *compelling reasons* for doing so, but only to the extent necessary to remove the incompatibility.[19] This introduces a new fast track procedure. Even primary legislation which has been declared to be incompatible with the Convention may be amended by way of this fast track procedure. It will no longer be necessary for the government of the day to wait for an opportunity to introduce the appropriate amendments to primary legislation into a crowded parliamentary timetable. The procedure will also be available if legislation appears to a minister to be incompatible with the Convention because of a finding of the European Court of Human Rights. The Act provides for two different procedures for amending legislation, which has been declared incompatible by domestic higher courts or by the European Court: a standard procedure under which prior parliamentary approval is required to the amendment and an emergency procedure,[20] under which no prior approval is necessary.

  There is no *obligation* on the government to amend offending legislation. If a piece of legislation were not to be amended, a disgruntled victim of a breach of a Convention right would have to pursue its remedies to the

16 Wadham, J and Mountfield, H, *Blackstone's Guide to the Human Rights Act*, 1999, London: Blackstone, has a useful commentary in this regard.

17 *Hansard*, HL, 3.11.1997, col 1272.

18 *Hansard*, 3.6.1998, col 422.

19 Section 10.

20 Both are contained in Sched 2 to the Act.

European Court of Human Rights. The domestic courts have no power to disapply or strike down the offending provision.

- Under s 19 (which has been in force since November 1998), a minister of the Crown in charge of a Bill in Parliament must, before the second reading of the Bill, make a statement to the effect that, in his view, the provisions of the Bill are compatible with the Convention rights (a statement of compatibility) or make a statement that, although he is unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill. In either case, the statement must be in writing and published in such a manner as the minister considers appropriate.[21] The Lord Chancellor has indicated that a statement of compatibility will provide a 'strong spur' to the interpretation of legislation so as to render it compatible with the Convention.[22]

Public authorities

Section 6 of the Act provides that it is unlawful for a *public authority* to act in a way which is incompatible with a Convention right except where, as the result of provisions of primary legislation, the authority could not have acted differently[23] or where the authority was acting to give effect to provisions of primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights.[24] Section 6 (and the complementary s 7) apply to public authorities only. Private individuals or businesses are under no direct obligation to behave compatibly with Convention rights.

For the purposes of s 6, an act includes a failure to act[25] where the failure is incompatible with a Convention right. It would appear that this would cover both deliberate and unintentional omissions.[26]

The meaning of 'public authority'

The Act defines 'public authority' as 'any person whose functions are functions of a public nature'.[27] This definition is wide ranging and focuses on the nature of the acts performed by the authority, rather than the make up or

21 HRA 1998, s 19.

22 Tom Sargant Memorial Lecture, 16 December 1997: available on the LCD website.

23 HRA 1998, s 6(2)(a).

24 *Ibid*, s 6(2)(b).

25 *Ibid*, s 6(6).

26 Mike O'Brien, *Hansard*, 24.6.1998, col 1097.

27 HRA 1998, s 6(3), although note that it does not include either House of Parliament (unless the House of Lords is acting in a judicial capacity, in which case, it is a public authority for those purposes (s 6(4))).

substance of the body itself. This approach is intended to be in line with Strasbourg jurisprudence where national States have been held to be responsible for the actions of authorities which carry out functions of a public nature. The question whether a particular body is a public authority will be for the courts. It is the sort of question which the courts are accustomed to considering in the context of judicial review proceedings. In deciding whether a party is a public authority for the purposes of the Act, the Government envisages that the court should consider the jurisprudence already developed in respect of judicial review applications.[28] The reader is referred to Chapter 2, where the application for judicial review is considered in more detail.

During the passage of the Bill, the Home Secretary explained that there are three categories of person for the purposes of the Act:

- *obvious public authorities*, for example, government departments and the police, all of whose functions will be public and so who will be caught by the Act in respect of everything that they do;
- *organisations which have a mix of private and public functions*, for example, private security firms which run prisons as well as providing security services for private organisations. These bodies will be public authorities in relation to their public role (and so will be subject to the Act in relation to those functions), but they will not be public authorities in relation to acts which they carry out which are private in nature.[29, 30]
- *organisations or individuals with no public functions* against whom the Act will not be directly applicable.[31]

The Government gave the following indications during the passage of the Bill about organisations in the media industry which might be classified as public authorities (although it was stressed that the decision would ultimately be for the courts):

- the BBC would probably be regarded as a public authority, as it is 'plainly performing a public function'.[32] Channel 4 might also be a public authority;
- the Press Complaints Commission is a body exercising public functions and, therefore, a public authority, but the press as a whole or as individual publications are not;[33]

28 *Hansard*, 17.6.1998, col 410.

29 HRA 1998, s 6(5).

30 During the passage of the Bill, the Lord Chancellor also gave the example of Railtrack, which as a public utility has public functions and so would qualify as a public authority in relation to those functions. On the other hand, if Railtrack was acting in its capacity of private property developer, that would probably be construed by the courts as being a private activity outside the scope of s 6 of the Act. *Hansard*, 24.11.1997, col 796.

31 *Hansard*, 17.6.1998, col 409.

32 *Hansard*, HL, 16.2.1998, col 776.

33 *Ibid*, col 777.

- the Independent Television Commission exercises public functions and is therefore a public authority, but independent private television companies are unlikely to be.[34]

Significantly, a court or tribunal is a public authority under the Act. This is an important point. It means that courts and tribunals must decide cases before them in a way which is compatible with the Convention. A failure to do so will be an unlawful breach of s 6.

Redress for unlawful acts of public authorities

Under s 7, a person who claims that a public authority has acted or proposes to act in a way which is unlawful under s 6 may take action against the authority, provided that he is a victim of the unlawful act.[35] There is *no* corresponding right of action for breach of a Convention right against a private person or against a body with a mixture of private and public functions where the conduct complained of relates to the private functions only. It follows that the Act does not provide for rights of action for breach of Convention rights as between private entities; only as against public authorities (the so called '*vertical effect*').

The right to take action is limited to the victim of the unlawful act. Under Strasbourg jurisprudence, a victim is someone who has been, or will potentially be, directly affected by the unlawful act in question. Pressure groups are unlikely to fall within this definition.

The right of action against the public authority for its failure to act compatibly with the Convention may take one of two main forms as follows:

- the Convention right(s) may be relied on in any legal proceedings taken against or brought by a public authority, for example, as a defence to any proceedings or as a counterclaim or during the course of an appeal;[36] or
- the victim may bring specific proceedings against the public authority under the Act. This is a new type of action introduced by the Act based solely on a breach of the Convention rights. Remember that it will *not* be available for claims against non-public authorities.

The Act provides that proceedings against public authorities under s 7 must be commenced in the 'appropriate court or tribunal'.[37] A claim that a judicial decision is incompatible with the Convention may only be brought in the High Court or by the usual method of appeal. Any other claim under s 7 may

34 *Hansard*, 16.2.1998, col 776.
35 HRA 1998, s 7(1).
36 *Ibid*, s 7(2).
37 *Ibid*, s 7(1)(b) and (2).

be brought in any court. It is likely that the s 7 action may take the form of an application for *judicial review* or a new tort for breach of statutory duty.[38] In view of the fact that the action can only lie against public authorities and that the test to determine whether a body is a public authority will draw heavily on the law relating to judicial review, it is probable that an application for judicial review will be the most common method of obtaining s 7 redress.

Where it is alleged that a court or tribunal is in breach of s 6, the Act says that the claim for redress must take the form of an appeal using the conventional appeal procedure or, alternatively, an application for judicial review.[39]

Time limit for bringing an action

Any proceedings for breach of a Convention right must be brought before the end of the period of one year beginning with the date on which the act complained of took place (or such longer period as the court or tribunal considers equitable, having regard to all the circumstances).[40] *Note that where the procedures under which proceedings are brought provide for a shorter time limit, that shorter time limit will apply*. In relation to judicial review an application must be made as promptly as possible and, in any event, within three months of the action complained of.

Remedies

A court which holds that a public authority has committed an unlawful breach of a Convention right may grant 'such relief or remedy or make such order within its powers as it considers just and appropriate'.[41] The remedies include damages where the court is satisfied that an award is necessary to afford just satisfaction to the person in whose favour it is made.[42] The decision whether to award damages and the amount of an award must be made in accordance with the principles of the European Court of Human Rights,[43] under which a successful applicant has no automatic entitlement to a damages

38 Note that, in deciding whether a body has acted unlawfully, the courts cannot act as legislators.

39 HRA 1998, s 9.

40 *Ibid*, s 7(5).

41 *Ibid*, s 8.

42 *Ibid*, s 8(3).

43 *Ibid*, s 8(4).

award. On some occasions, the court has found that the finding of violation of a Convention right is itself is sufficient to provide redress.[44]

A person who relies on his Convention rights under s 7 does so without prejudice to any other right or freedom he has under any law having effect in the UK[45] or his right to bring proceedings on any other ground. The right to petition the European Court of Human Rights is thus preserved.

Impact of the Act

It is probable that the Act will have repercussions beyond claims against public authorities.

First, the obligation to have regard to Convention jurisprudence under s 2 of the Act and to construe legislation in a way which is compatible with the Convention under s 3 will apply whatever type of claim is before the court or tribunal, whether against a public authority or not. Although a claim which is not brought against a public authority cannot be based solely on breach of a Convention right, the court will have a duty to consider the Convention rights and Convention jurisprudence where the claim concerns Convention rights.

Secondly, there is an argument that, because courts and tribunals are themselves public authorities, any decision by the court which is incompatible with a Convention right will give rise to a claim against the court under s 7 – notwithstanding that the claim arose during the course of litigation between private entities. In this way, so it is argued, Convention rights will become relevant to all types of dispute (an indirect 'horizontal effect'). This approach is in line with government thinking. The Lord Chancellor has observed that 'we believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving public authorities, but also in developing the common law in deciding cases between individuals'.[46]

THE CONVENTION RIGHTS

The two Convention rights which are of particular relevance to the media are the right to freedom of expression (Art 10) and the right to respect for private

44 In *Soering v UK* (1989) 11 EHRR 439, the European Court held that the domestic remedy of judicial review was, in principle, an effective remedy for breaches of the Convention rights.

45 HRA 1998, s 11.

46 *Hansard*, 24.11.1997, col 783.

and family life (Art 8). Neither of these rights is absolute. The permitted limitations to each right are similar, but not identical.

The articles read as follows:

Article 10

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Article 8

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Strasbourg Court has indicated that Art 8 'does not merely compel the State to abstain from interference [with private and family life]: in addition to this primary negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.[47]

47 *X v Netherlands* (1985) 8 EHRR 235.

The Approach of the European Court of Human Rights to Art 8 and Art 10

When considering whether an interference with Convention rights is reconcilable with the Convention, the European Court of Human Rights adopts the following sequence of reasoning:

- Does the complaint in question actually concern a Convention right? The Court tends to take a wide approach to the scope of the Convention rights and so will readily find that the complaint concerns a Convention right.
- If so, can the interference about which complaint is made be justified as being compatible with the Convention? This involves consideration of the following matters:
  (a) the interference must be prescribed by law;
  (b) it must serve a legitimate purpose;
  (c) it must be necessary in a democratic society; and
  (d) it must not be discriminatory.

Looking at each of these criteria in turn.

Was the interference prescribed by law?

To be lawful, an interference with a Convention right must have a basis in law (common law or statute).

However, it will not be sufficient to show that the interference is based in law. The law itself has to be of sufficient quality. In order to be lawful, any interference with the Convention rights must be both *ascertainable* and *sufficiently precise*. If it is not, it will be an unlawful interference, no matter how laudable the purpose of the interference.

In *Sunday Times v UK*,[48] the Court made the following observation:

> The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequence which a given action may entail.
>
> These consequences need not be foreseeable with absolute certainty; experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.

48 *Sunday Times v UK* (1979) 2 EHRR 245, para 49.

The test whether a measure is prescribed by law tends to be applied generously by the European Court. Absolute certainty about the scope of the law is not necessarily required. A law which confers a discretion on the part of the decision maker can be prescribed by law, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give adequate protection against arbitrary interference.[49] The English law of blasphemy has been found to be sufficiently precise for the purposes of the Convention, notwithstanding the fact that a finding of blasphemy involves an element of subjectivity on the part of the court and the fact that the law had been criticised by the Law Commission as being unreasonably vague.[50]

In cases involving violations of the right to respect for private and family life, the European Court has twice found that the UK has permitted interception with telephone conversations by public authorities in circumstances where the interference was not prescribed by law.[51] In neither case was the law sufficiently clear in its terms to give citizens an adequate indication about the circumstances in and conditions on which public authorities were empowered to resort to surveillance measures.

Was the aim pursued by the interference with the right legitimate?

The legitimate purposes which may justify an interference with freedom of expression or the right to respect for home and family life are set out in Arts 10(2) and 8(2) of the Convention. The purposes are drawn widely in the Convention and tend to be interpreted widely by the Court. For example, the phrase 'authority of the judiciary' in Art 10(2) has been interpreted to cover the machinery of justice as well as the members of the judiciary and, in particular, the notion that the courts are the proper forum for hearing disputes.[52]

But an interference with a Convention right will not necessarily be compatible with the Convention simply by virtue of the fact that it falls within the limitations contained in the relevant Article. The Court has to be satisfied that the interference was necessary having regard to the circumstances of each particular case.

49 *Wingrove v UK* (1996) 24 EHRR 1.

50 Law Commission, *Offences Against Religion and Public Worship,* Working Paper No 79, 1981.

51 *Malone v UK* (1984) 7 EHRR 14 and *Halford v UK* (1997) 24 EHRR 523.

52 *Sunday Times v UK* (1979) 2 EHRR 245.

Was the interference necessary in a democratic society?

The requirement that the restriction should be necessary involves three considerations as follows:

- the interference must correspond to a pressing social need; and
- it must be proportionate to the legitimate aim pursued; and
- the State must give relevant and sufficient justifications for the interference.

The margin of appreciation

In assessing whether an interference with a Convention right is necessary, the European Court permits Contracting States to exercise a margin of appreciation. The margin is essentially a device adopted by the Strasbourg Court to facilitate its functioning as an international court. As a court for all signatories to the Convention, the Strasbourg Court must give rulings which are acceptable to a variety of States which may have radical different cultures and outlooks (within the general parameters of a democratic society). What offends against the morals of the majority of citizens in one State may be perfectly acceptable to citizens of another and the margin recognises that, in many respects, the individual State is in a better position to make judgments as to what is necessary and proportionate than the international court.

The margin enables the State to use its discretion in deciding whether there is a pressing social need for a particular limitation of a Convention right and, if there is, in deciding the nature of the measure which should be invoked to meet the need. The width of the margin will vary according to the nature of the interference in question. Where no common standard exists throughout Contracting States, the margin will be relatively wide. This will particularly be the case where the interference is for the protection of morals or religion, where Contracting States are likely to have different opinions as to the standard which should prevail.[53] This point was expressly recognised by the Strasbourg Court in relation to laws which seek to uphold moral values:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.[54]

However, the margin of appreciation must be exercised subject to the supervisory jurisdiction of the Strasbourg Court. The task of the Court is not

53 *Wingrove v UK* (1996) 24 EHRR 1.

54 *Handyside v UK* (1976) 1 EHRR 737, paras 48–49.

to take the place of the national authority by substituting its own judgment, but rather to review the decision of the national State in the light of the case as a whole, to ensure that the interference is proportionate to the legitimate aim pursued and in line with the objectives of the Convention. Where a wide margin is appropriate, the international court should only intervene if the national decision cannot reasonably be justified.[55] On the other hand, where the issue involves a commonly recognised standard, such as the importance of enabling freedom of political discussion in a democratic society, the margin (or each State's room for the exercise of discretion in putting in place limitations on political discussion) will be much more restricted.

When the Human Rights Bill was going through Parliament, the Home Secretary observed that 'we are giving a profound margin of appreciation to the British courts to interpret the Convention in accordance with British jurisprudence as well as European jurisprudence'.[56]

In other words, the margin of appreciation provides a rationale for rejecting the idea of a binding system of precedent in respect of the decisions of the Strasbourg Court, particularly those decisions to which the UK is not a party. Whether this will lead to our national courts watering down the impact of the Convention rights by finding a way to distinguish Strasbourg judgments remains to be seen.

Non-discrimination

Under Art 14, any interference with a Convention right must not discriminate in a way which has no objective or reasonable justification.

It is probable that the English criminal law of blasphemy, which is considered in further detail in Chapter 12, offends against Art 14 of the Convention. The law of blasphemy operates in a discriminatory fashion in that it offers redress only against material which offends against the established Anglican Church. In recent times, a cause of action has been denied to Muslims who sought to prosecute Salman Rushdie for blasphemy in respect of his novel *The Satanic Verses*. The prosecution was struck out on the ground that the blasphemy laws do not offer protection to Muslims.[57]

55 *Wingrove v UK* (1996) 24 EHRR 1.

56 *Hansard*, 3.6.1998, col 424.

57 *R v Chief Metropolitan Stipendiary Magistrate ex p Choudhury* [1991] 1 All ER 306.

The right to freedom of expression (Art 10)

The Strasbourg Court has interpreted freedom of expression as extending to a wide variety of material, such as:

- works of art;[58]
- the freedom of commercial expression, for example, the freedom to advertise;[59]
- information or ideas which offend, shock or disturb as well as to those which are favourably received or regarded as inoffensive or as a matter of indifference;[60]
- importantly, the right includes not only the right to impart information and ideas, but equally the right to receive them.

The Court has consistently reiterated that freedom of expression constitutes one of the essential foundations of a democratic society. Nevertheless, it recognises that it is not an absolute right. As we have seen, the right to freedom of expression is subject to the exceptions set out in Art 10(2) of the Convention. The Strasbourg Court has stressed that the exceptions in Art 10(2) must be narrowly interpreted in every case.[61] It is not simply a question of balancing the right to freedom of expression against the exception in any particular case. In the *Sunday Times* case, the Court observed that:

> The Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.[62]

The interpretation of any limitation focuses on whether the limitation is necessary and proportionate, and on the justification for exercising it.

The Court has imposed varying degrees of necessity and proportionality, which it has applied to limitations on the expression of different types of material.

Material in the public interest

When considering whether an interference with freedom of expression is necessary, regard must be had to whether the material in question involves questions of public interest.[63] Whilst it is not the case that the right to freedom of expression only protects material which is in the public interest, material of

58 *Muller v Switzerland* (1991) 13 EHRR 212.

59 *Ibid*.

60 *Observer v UK* (1991) 14 EHRR 153.

61 *Ibid*.

62 *Sunday Times v UK* (1979) 2 EHRR 245.

63 *Bladet Tromso-Stensaas v Norway* (1999) 28 EHRR 534.

that quality is afforded special protection. The Court has often observed that the most careful scrutiny on the part of the Court is called for when the interference in question is capable of discouraging the participation of the media in debate over matters of legitimate public concern.[64]

The Court has explicitly recognised that it is incumbent on the press to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas, but the public also has a right to receive them. Were it otherwise, the Court has observed, the press would be unable to play its vital role of 'public watchdog'.[65]

Public authorities, the Government and politicians

The Strasbourg Court has imposed particularly strict limits on the interference with the publication of facts and opinions which refer to the activities of *public authorities*.[66] This is on the basis that it is essential to put the public in a position where it can keep a critical control on the exercise of public power. The limits of permissible criticism of the *Government* are wide: '... in a democratic system, the actions or omissions of government must be subject to the close scrutiny of legislative and judicial authorities and public opinion'.[67] Similarly, the limits of acceptable criticism are wider as regards a *politician* than as regards a private individual. A politician is deemed to have knowingly laid himself open to close scrutiny of his every word and deed by journalists and by the public at large, and he must display a greater degree of tolerance: '... the requirements of the protection of reputation has to be weighed in relation to the interests of open discussion of political issues.'[68] English law has also acknowledged this distinction between private and public, at least in relation to breach of confidence and defamation cases.[69]

The Court has found that the exercise of freedom of expression is particularly important for elected representatives of the people[70] and for political parties and their active members.[71]

64 *Jersild v Denmark* (1995) 19 EHRR 407.

65 *Observer v UK* (1991) 14 EHRR 153.

66 *Thorgeirson v Iceland* (1992) 14 EHRR 843.

67 *Incal v Turkey* (2000) 29 EHRR 449.

68 *Lingens v Austria* (1986) 8 EHRR.

69 Breach of confidence: *AG v Jonathan Cape* [1976] QB 752; defamation: *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, HL.

70 *Castells v Spain* (1992) 14 EHRR 445.

71 *Incal v Turkey* (2000) 29 EHRR 449.

Other types of information

As regard other categories of information/ideas, States are granted a wider margin of appreciation when deciding whether restrictions on freedom of expression are necessary and proportionate to meet a pressing social need. There is relatively wide scope for a State to interfere with right to freedom of expression where the limitation is not capable of discouraging the participation of the media in matters of legitimate public concern; nor does it stifle criticism of public authorities, etc. This is considered further in the chapters relating to breach of confidence, privacy, defamation and copyright laws.

Journalists' sources

Another area in which freedom of expression plays an important role is the enforced disclosure by journalists of the identity of their sources. The European Court has held that, if journalists are forced to disclose their sources, the role of the media as public watchdog could be seriously undermined, because of the effect such disclosure would have upon the free flow of information. An order for the disclosure of sources cannot, according to the Court, be compatible with Art 10, unless there is an overriding public interest in identifying the source.[72] We shall see in Chapter 11 that it is at least arguable that English law concerning the disclosure of sources has been applied in a way which cannot be reconciled with the Convention.

Duties and responsibilities

In every case involving freedom of expression, the media must not overstep the boundaries set out in Art 10(2). Their duty is to impart information and ideas on all matters of the public interest in a manner which is compatible with their obligations under the Convention.

Article 10(2) points out that freedom of expression carries duties and responsibilities. The safeguards afforded by Art 10 to journalists in reporting matters of public interest is accordingly subject to the proviso that the media must act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[73] The judgment as to whether these standards have been met depends on the facts of the particular case. In the *Bladet-Tromso* case, a newspaper reported on alleged violations of seal hunting regulations. The article was, in large part, based on, and quoted from, an

72 *Goodwin v UK* (1996) 22 EHRR 123.

73 *Bladet Tromso-Stensaas v Norway* (1999) 28 EHRR 534.

official report. The newspaper had not carried out independent research in order to verify the findings of the official report and was sued for defamation. The question arose as to whether Norwegian libel law was compatible with the right to freedom of expression. The European Court noted that no independent research had been carried out by the newspaper to verify the official report. It observed that, where assertions of fact are made, the ordinary obligation on the media is to verify statements which were defamatory of individuals, unless there were any special grounds for dispensing with this requirement. However, the media were normally entitled, when contributing to a public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, their vital watchdog role would be undermined. This line of reasoning which emphasises the importance of ensuring that information is accurate and reliable was also displayed by the House of Lords in *Reynolds v Times Newspapers Ltd*[74] (considered in further detail in Chapter 3).

In construing whether the media had acted in good faith, the Court in the *Bladet-Tromso* case cited with approval an earlier judgment on a similar question, where it was stated that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation[75] – although the permissible limits of this type of reporting will depend on the facts of each case.

Freedom of expression, privacy and the Human Rights Act 1998

The media initially feared that the implementation of the Act would give fresh impetus to the development of a legally enforceable right to privacy in English national law, which would have the effect of limiting the media's freedom of expression. As a result of strenuous lobbying by the media, a new clause was added to the Human Rights Bill relating specifically to the right to freedom of expression. That clause is now s 12 of the Act. It is in the following terms:

> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied:
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.

74 *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, HL.

75 *Prager and Oberschlick v Austria* (1996) 21 EHRR 1.

(3) No such relief is to be granted so as to restrain publication before trial, unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to:

(a) the extent to which:

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section:

'court' includes a tribunal; and

'relief' includes any remedy or order (other than in criminal proceedings).

Points to note about s 12

Section 12 will apply in any case where a court or tribunal is considering granting relief which might affect the right to freedom of expression, not just to cases involving freedom of expression and questions involving privacy. The section is not limited to cases to which a public authority is a party.[76] It applies to any person whose right to freedom of expression might be affected, including the media.

The Home Secretary explained[77] that under sub-s 2, interim injunctions applied for without notice (*ex parte* injunctions) will be granted only in 'exceptional circumstances', where all practicable steps have been taken to notify the respondent or where there are compelling reasons why the respondent should not be notified. In relation to what might amount to 'compelling reasons', the Home Secretary thought that it might arise in a case raising issues of national security where the mere knowledge that an injunction was being sought might cause the respondent to publish the material immediately. He said that the Government did not anticipate that the limb would be used often.[78]

Sub-section 3 deals with interim injunctions generally where they might affect the right to freedom of expression, whether applied for with or without notice. An interim injunction is a prior restraint measure. Before an interim

76 The Home Secretary, *Hansard* 2.7.1998, col 536.

77 *Ibid*.

78 *Ibid*.

injunction is granted, *the court must be satisfied that the applicant is likely to establish at trial that publication should not be allowed*. The onus of establishing a likelihood of success on the merits is on the applicant for the injunction.[79] The Home Secretary explained that the courts must consider the merits of the application. Interim injunctions should not be granted simply to preserve the status quo between the parties (the reader is referred to Chapter 2, where the significance of the status quo test and interim injunctions is explained).

In relation to all forms of relief which might affect freedom of expression (whether interim or not and whether an injunction or other type of relief), sub-s 4 provides that the court must have particular regard to certain matters.

First, it must have regard to the importance of the Convention right to freedom of expression. As we have seen, the European Court regards freedom of expression as an essential foundation of democracy and considers that permitted limitations of the right must be narrowly interpreted.

In addition, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material, the court should have regard to certain extra factors. 'Journalistic, literary or artistic material' is not defined in the Act. Will the mere fact that the media publishes the material mean that it will be deemed to be published for journalistic purposes or will the media have to establish also that the material is newsworthy or is to be used for reporting current events? This point has to be clarified. It is likely that, over time, a body of case law will emerge to define the meaning with greater precision. The European Court of Human Rights has emphasised the media's role as public watchdogs. Media activities which fall within this watchdog role will almost certainly fall within the definition of journalism.

The phrase 'journalistic, literary or artistic purposes' also appears in the Data Protection Act 1998.[80] Case law under that Act might help to clarify the definition.

The extra factors which the court must have regard to when the proceedings relate to journalistic, literary or artistic material are:

(a) the extent to which the material is or is about to become available to the public. This factor is aimed at avoiding the type of situation which arose in the *Spycatcher* litigation, where the publication of a book was restrained in the UK as being in breach of confidence at the same time as it was freely available elsewhere in the world. The Home Secretary has explained that, under s 12, where the material at issue will shortly be available anyway in another country or on the internet, it must affect the decision whether it is appropriate to restrain publication in this country.[81]

79 Home Secretary, *Hansard*, 2.7.1998, col 356.

80 Considered in Chapter 9.

81 Home Secretary, *Hansard*, 2.7.1998, col 538.

The Home Secretary observed that 'there is no direct qualification to the word "public" in the new clause. Ultimately, it would be a matter for the courts to decide, based on common sense and proportionality. The fact that the information was available across the globe in very narrow circumstances would be weighed in the balance … [the courts] would also take into account the extent to which the information was available in another country or on the internet, but in each case, the courts would have to apply balance and proportionality';[82]

(b) in relation to journalistic, literary or artistic material, the court must also have regard to the extent to which it is, or would be, in the public interest for the material to be published. The scheme of the Act suggests that public interest is a factor to take into account in the *context* of the relative importance of the right to freedom of expression in a particular case, rather than as *a prerequisite to the right to freedom of expression being invoked at all*. The Parliamentary Under Secretary of State at the Home Office indicated that the basic question is whether the public should have particular information. Examples of information which the public should have were put forward as information which might have an effect on proper political discourse or a matter of public policy or that might affect individual behaviour. These areas, according to the Under Secretary of State, were matters in which there is a proper public interest in revealing information. He gave the example of information about BSE which, he said, might have affected a person's decision about whether or not to eat beef if it had been made available. He observed that a judge would have to ask 'is a matter only of interest to the public, or is it a matter of public interest? *There should be some good reason why the public should know*';[83]

Domestic case law interpreting the phrase 'the public interest' is discussed in Chapter 5.

(c) the court must, in relation to journalistic, literary and artistic material, also have regard to any relevant privacy code (such as the Press Complaints Commission Code of Practice, the Independent Television Commission Code, the Advertising Standards Authority Code of Practice and the BBC Producers' Guidelines). The fact that the media has complied with the relevant Code of Practice, or conversely if it is in breach of the Code, is one of the factors which the court should take into account in deciding whether or not to grant relief. Note that it will not be determinative. It is open for the courts to grant relief in circumstances where the privacy provisions of the Codes have been complied with, for example, where the court is of the view that the Codes do not create sufficiently stringent requirements. The Home Secretary indicated that 'the higher the conduct

82 *Hansard*, 2.7.1998, col 540.

83 *Ibid*, col 562.

> required [by the Code], the better for the public and – this is why the provision created a virtuous circle – the better the defence available under the new clause to a newspaper [or other media entity], should it be subject to an application for relief'.[84] It is therefore possible that a sufficiently stringent privacy code could be elevated into the *de facto* legal standard for the protection of privacy in the context of the media. It would be enforced not through the courts, but through the regulatory authorities such as the PCC or the ITC. This view was echoed by the Lord Chancellor when he said 'it is strong and effective self-regulation if it – and I emphasis the "if" – provides adequate remedies which will keep these cases away from the courts'.[85] The privacy provisions of the various codes are considered further in the chapter on privacy.

Section 12 as a whole is intended to regulate the relationship between freedom of expression and other competing rights, including rights of privacy. The Government rejected an amendment to the Bill which would automatically favour Art 10 (freedom of expression) over Art 8 (respect for private and family life). As the Home Secretary explained:

> The difficulty with that is that it goes further than the terms of the Convention and Strasbourg case law. Nothing in the Convention suggests that any one right is normally to be given precedence over any other right … so far as we are able, in a manner consistent with the Convention and its jurisprudence, we are saying to the courts that whenever there is a clash between Art 8 and Art 10 rights, they must pay particular attention to the Art 10 rights.[86]

Sub-section 4 does not simply relate to journalistic, literary or artistic material, but also conduct connected with such material. It is intended to apply where inquiries or research is ongoing, although the actual material in question is yet to be produced.[87]

The section does not apply to freedom of expression issues which arise in criminal proceedings. However, the Home Secretary stressed that criminal courts, like other courts, are required to act in a way that is not incompatible with the Convention right.[88]

The development of a right to privacy in the wake of the Human Rights Act 1998

English law does not presently recognise a right to privacy as such. Will it be obliged to do so in order to give effect to Art 8 of the European Convention?

84 *Hansard*, 2.7.1998, col 539.
85 *Hansard*, 3.11.1997, col 1229.
86 *Hansard*, 2.7.1999, col 542–43.
87 *Hansard*, 2.7.1998, col 540.
88 *Ibid*.

The Lord Chancellor has made it clear that the Act does not represent the introduction of a privacy statute.[89]

This question may be academic. The courts had already begun to enforce rights to privacy indirectly, notably through the law relating to breach of confidence, and this trend looks set to continue. In addition, as we have seen, the scheme of s 12 of the Act places emphasis on the provisions of the media industry codes when a court is called upon to adjudicate on issues of privacy. Over time, the codes may be transformed into a *de facto* legal right to privacy, at least in so far as the media are concerned.[90]

The Lord Chancellor has made it clear that the courts will not be permitted to act as legislators in the creation of a right of privacy where there is no existing statutory or common law right to do so:

> In my opinion, the court is not obliged to remedy the failure by legislating via the common law either where a Convention right is infringed by incompatible legislation or where – because of the absence of legislation – say, privacy legislation – a Convention right is left unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of Convention rights unless the common law itself enables then to develop new rights or remedies.[91] I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidentiality and the like, to fashion a common law right to privacy.

A disgruntled person unable to obtain redress under domestic law for an alleged infringement of privacy could pursue a claim to the European Court of Human Rights. However, there would be no guarantee of success. In *Winer v UK*,[92] the European Commission of Human Rights did not consider that the absence of an actionable right to privacy to show a lack of respect for the applicant's private life.[93]

An overview of the likely impact of the Human Rights Act on media law

The English courts have increasingly had an eye to the Convention when considering matters involving freedom of expression, despite there being no obligation to do so. The House of Lords have felt able to pronounce on at least two occasions[94] that English common law in the field of freedom of expression issues is consistent with the requirements of the Convention.

89 *Hansard*, 3.11.1997, col 1229.

90 This is discussed further in Chapter 8.

91 *Hansard*, 24.11.1997, col 783.

92 *Winer v UK* (1986) 48 DR 154.

93 The possibility of a claim in breach of confidence rather than privacy may also lead to an application to the Strasbourg Court being dismissed: *Spencer v UK*. This is considered further in Chapter 5.

94 Lord Keith [1993] AC 534, p 658; Lord Templeman and Lord Goff [1987] 1 WLR 1248.

So, what changes is the Act likely to bring? Specific areas of the law are considered in the relevant chapters in Part 1 of this book. But, on an overview basis, it is suggested that the Act is likely to herald a change of approach in decision making in at least the following ways:

(a) prior to the Act, freedom of expression was not recognised by the English courts as an enforceable right. It was one of the many residual freedoms which permeated English law. As Lord Donaldson explained, 'the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by common law or by statute'.[95] In other words, 'you have the right to say that which you are not otherwise restrained from saying'. This approach leaves the nature and extent of our 'freedoms' at the whim of the legislature and the judiciary. There is no obligation to preserve rights. Erosions of the extent of the rights can take place gradually and virtually unnoticed.

    Under the Act, English law must give further effect to the *right* of freedom of expression. The existence of the right is presupposed and will be the starting point for any consideration of the question whether a particular restraint on the right is justifiable. This is likely to have a profound effect on the focus of arguments before a court. A submission seeking to give effect to a recognised right will have a stronger focus than an application which is seeking to demonstrate a negative such as an absence of any restriction on a residual freedom. This change in focus ought to put the media in an overall stronger position;

(b) the change in focus is not merely cosmetic. Traditionally, the English courts have viewed freedom of expression not as a stand alone right or freedom, but as a consideration to be weighed in the balance in any particular case against competing factors (for example, the need in that case to protect of the rights of others or the administration of justice).

    This demotion of freedom of expression from an absolute value to an issue whose importance will vary depending on the other factors present in a particular case has given rise to numerous examples where freedom of expression has been overridden. As Lord Hoffman has observed:

    > There are in the law reports many impressive and emphatic statements about the importance of freedom of speech and the press. But they are often followed by a paragraph which begins with the word 'nevertheless';[96]

95 *AG v Guardian Newspapers* (No 2) [1990] AC 109.

96 *R v Central Television* [1994] 3 All ER 641, p 650.

(c) this failure to protect freedom of expression is not just because freedom of expression is reduced to just one of the competing factors in the decision making process. It also stems from the fact that the courts have tended to see freedom of expression narrowly, in terms of the particular publication at issue. But freedom of expression also involves a wider and subtler aspect. There is a wider public interest in freedom of expression, which may be damaged if a limitation of freedom of expression is allowed in a particular case.[97] Organisations such as the media might be deterred from reporting on comparable matters if they face the prospect of large damages awards and court costs (the so called chilling effect). Sources may be deterred from coming forward if they face the prospect of identification and legal action. So notwithstanding that a particular outcome may be justified in a particular case, the courts should bear in mind the wider effect which the judgment might have on freedom of speech generally. We shall examine the failure of the courts to pay adequate regard to the wider public interest in the context of disclosure of sources, where the failure has been most easily apparent, in Chapter 11, but it is a failure which has permeated throughout media law.

In *R v Central Television,*[98] Lord Hoffman went on to say, with words which illustrate the new approach which the Act ought to herald:

> The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them … But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute … It cannot be too strongly emphasised that outside the established exceptions, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.

Or, in the words of the European Court:

> The Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted;[99]

(d) the fourth main change in approach is likely to be a move away from decisions based on technical points of detail towards broader, more

97 It is interesting to note that the Data Protection Act 1998 (considered in Chapter 9) refers to the need to have regard to the *public interest* in freedom of expression. This implies a recognition on the part of the legislature that public interest extends beyond the particular material concerned.

98 *R v Central Television* [1994] 3 All ER 641, p 650.

99 *Sunday Times v UK* (1979) 2 EHRR 245.

purposive decisions. The spirit of the Convention must be kept in mind by the judiciary. There are a number of cases considered in Part 1 of this book which reflect a technical analysis of the law on the part of the courts.[100] It remains to be seen whether the change in approach which the Act promises will lead to a greater emphasis on the broad effect which a particular decision would have on the ability of citizens to exercise their Convention rights, rather than an introverted examination of technical legal principle.

100 Eg, *Hyde Park Residences v Yelland* [2000] RPC 249; and *Telnikoff v Matusevitch* [1991] 4 All ER 817.