Would the repeal of human rights laws help or hinder journalism?

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Introduction

The Conservative 2015 manifesto pledged to repeal the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR) into UK law and binds the Member States to follow its principles, in favour of a British Bill of Rights.[1] Despite the fact that the United Kingdom was one of the major players in drafting it,[2] and among the first countries to sign and ratify it,[3] the Convention and, thus, the Human Rights Act 1998 (HRA), has come to be perceived as an imposition on the UK of a 'foreign court that is insensitive to national mores'.[4] Aided by the sensationalistic and factually incorrect stories published by the media[5] politicians, and especially the members of the Conservative Party, started fostering into a rhetoric aimed at destroying the reputation of the 1998 Act. Shortly after its implementation in 2000, a first Commission was established in 2011 with the task of investigating 'the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties'.[6] Although only two of the eight members of the Commission on a Bill of Rights were opposed to the possibility of repealing the Human Rights Act in favour of a British Bill of Rights,[7] the Report was archived and forgotten until it was discussed again in the Conservative 2015 manifesto. Furthermore, following Brexit and the appointment of Theresa May as Prime Minister, the likelihood of this controversial constitutional change being carried out has become more real than ever.

Similarly, other non-UK British jurisdictions have also adopted laws to enhance the rights and freedoms guaranteed under the European Convention on Human Rights that may risk being repealed in this political climate. For instance, the Channel Islands and the Isle of Man[8] have enacted the Human Rights (Jersey) Law 2000, the Human Rights (Bailiwick of Guernsey) Law 2000 and the Human Rights Act 2001 (Isle of Man) to provide further effect to Convention rights in home courts.

This paper will hence also consider the Human Rights (Jersey) Law 2000, which, much like the Human Rights Act 1998, holds that courts must take into account any 'judgment, decisions, declaration or advisory opinion of the European Court of Human Rights' [9] when deciding on a case dealing with the rights protected under the Convention. It is worth clarifying here that the Convention was extended to Jersey in 1954 and that The Bailiwicks of Jersey and Guernsey, albeit part of the British Isles,

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[1] Conservatives.com, 'The Conservative Party Manifesto 2015' (Conservatives.com, 2015) <https://www.conservatives.com/manifesto> accessed 3 March 2017

[2] White Paper, para 1.2

[3] *ibid*.

[4] Mark Elliot, 'A Damp Squib in the Long Grass: The report of the Commission on a Bill of Rights' [2013] 8(1) Legal Studies Research Paper Series, 5

[5] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, 29-31. See, e.g., Dennis Nilsen who was sentenced to life in prison in 1983 for multiple murders. In an application for judicial review in 2001, he claimed that denying him access to a book containing hardcore gay porn constituted "inhuman or degrading treatment", thus breaching Article 3 of the Convention. Although it was widely reported by the media that the HRA allowed him to win the case, his application was refused at the permission stage.

[6] Report of the Commission on a Bill of Rights, 5

[7] Helena Kennedy and Phillipe Sands, "In Defence of Rights", in Report of the Commission on a Bill of Rights, 221-230

[8] Henceforth, 'the Crown Dependencies'.

[9] Human Rights (Jersey) Law 2000, s 3 (1)

have their own courts and legislations. They are not a UK constituency, do not elect representatives in Westminster and do not participate in UK and European elections 'notwithstanding formal UK sovereignty over these territories and UK control over international and defence matters'.[10]

This study aims at analysing the implications that the repeal of the Human Rights Act and the Human Rights (Jersey) Law 2000 could have on journalism and British media by examining cases from the European Court of Human Rights (ECtHR) which have had an impact on media rights, and by critically assessing their effect on domestic law. In part 1, I will explain the functioning of the European Court of Human Rights, the Human Rights Act 1998 and the Human Rights (Jersey) Law 2000, while also providing, in section 1.1, critiques brought forward by politicians, the media and the public and assessing whether these are justified. Sections 2 and 2.1 will deal with the achievements that journalism has reached through ECtHR landmark cases in areas like freedom of expression, protection of sources and protection of journalists respectively. In section 3, I will analyse the limitations posed by the Human Rights Act 1998 and the the Human Rights (Jersey) Law 2000 on British media in terms of privacy law. Section 4 will draw a conclusion and 5 will discuss limitations.

1. The Route Towards 'Bringing Our Rights Home'

Drawn upon the ethical principles of the 1948 Universal Declaration of Human Rights[11] and born as an international agreement that the horrors carried out during the two wars were never again to be repeated, the European Convention on Human Rights came into force in September 1953. 'Seeking to protect individuals from arbitrary abusive acts or omissions and misuses of power by officials and governments', the Convention attempts to set a code of fundamental human rights 'whereby remedies can be available for victims of human rights violations'.[12] More importantly, it allows each citizen[13] of the signatory states to submit a petition to the European Commission of Human Rights when they feel their human rights have been breached by a state. If the claim is considered admissible, the Commission will interrogate the Committee of Ministers of the Council of Europe on whether it believes that there has been a violation.[14] When the matter cannot be easily resolved, the case will then be referred to the European Court of Human Rights for consideration.[15] If the Court rules that there has indeed been a human rights violation, it will be able to award an 'effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.[16]

A person may enjoy the protection of the ECHR only against a state and not against another individual. However, under Article 1, 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms',[17] which implies that each Member State has a positive obligation towards its citizens and it can be sued if it has failed to provide an individual with all the means necessary to enjoy their fundamental human rights. In other words, if 'the breach by an individual is attributable to a state's failure to legislate in order to secure observance of the rights within the Convention, then an action may be commenced against that state for this failure'.[18]

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[10] Stefan Graziadei, 'Democracy v Human Rights?' [2016] 12 European Constitutional Law Review 62
[11] Francesca Klug, 'A Bill of Rights: do we need one or do we already have one?' [2007] 2 LSE Law, Society and Economy Working Papers, 6
[12] Edwin Shorts and Claire de Than, Human Rights Law in the UK (1st edn, Sweet & Maxwell 2001), 11
[13] Initially cases involving the UK could be brought under the Convention only by Contracting States and not by individuals. In 1966 the UK recognised the right of individual petition, which became mandatory in 1998.
[14] White Paper, para 1.9
[15] *ibid.*
[16] ECHR, art 13
[17] ECHR, art 1
[18] Edwin Shorts and Claire de Than, Human Rights Law in the UK (1st edn, Sweet & Maxwell 2001), 22

What soon started to become clear was that with the accession of a greater number of Contracting States to the Convention, the enormous workload that the Strasbourg Court came to handle made the process excessively long and too costly.[19] It was, with an estimate of approximately five years and £30,000 to bring a case to Strasbourg[20] in mind, that, in 1997, the New Labour Government argued that although in the United Kingdom 'it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law',[21] the last two decades of the 20th century proved that it was not sufficient to rely on the common law and that the incorporation of Convention rights into domestic law was necessary.[22]

The 'drive for constitutional reform' that had long been advocating for a written Bill of Rights by 'lone intellectuals and political norm entrepreneurs' [23] finally found its fulfilment in the Human Rights Act 1998, which not only incorporates Convention rights into domestic law, but also offers remedies for human rights violations in home courts. An individual may now bring an action to home courts without having to apply to the ECtHR first, though may still submit an application to the Strasbourg court once all domestic actions have been attempted.

Analogously, the Human Rights (Jersey) Law 2000, 'follows closely the philosophy and, to a considerable extent, the form of the Human Rights Act 1998'.[24] Introduced to give 'further effect'[25] to Convention rights in Jersey, the provision ensures consistency in the rights and freedoms enjoyed by British citizens across the British Isles,[26] meaning that the rights protected by the Human Rights Act 1998 should be broadly similar to those available under the Human Rights (Jersey) Law 2000. The Law is set out to 'enable persons to rely on their Convention rights before the courts in the Island in the same circumstances as they can rely upon them before the Strasbourg institutions'.[27] Hence, an individual is now able to seek remedies when they feel that their Convention rights have been breached directly in Jersey without having to petition the ECtHR first, but may still do so after all domestic actions have been exhausted.

1.1 Critiques of the Human Rights Act 1998

The need for a written Bill of Rights that reflected British values instead of merely transplanting international law[28] started re-emerging in 2010 under the Conservative-Liberal Democrats (Lib Dems) Coalition. If the Lib Dems' manifesto pledged to protect the HRA, the Conservative Party conveyed the idea of replacing the 1998 Act with a British Bill of Rights[29] and established a Commission to investigate the modalities with which such constitutional reform was to be carried out. After almost two years from its creation, the Commission published a Report in which only two of the eight members – albeit recognising that the Act is 'far from being a perfect institution'[30] – held that it was not time to 'start moving towards a UK Bill of Rights until the parameters of such proposals are clearly set out'.[31] The majority, however, were in favour of replacing the

[19] White Paper, para 1.14
[20] *ibid*.
[21] White Paper, para 1.4
[22] *ibid*.
[23] Cristina E. Parau, 'Constitutional Ferment in Britain: Towards a Republican Constitution?' [2014], 1
[24] Richard Whitehead, 'Human Rights: Coming Home to Jersey?' [2000] 4 (1) The Jersey Law Review, 12
[25] Human Rights (Jersey) Law 2000, 1
[26] Richard Whitehead, 'Human Rights: Coming Home to Jersey?' [2000] 4 (1) The Jersey Law Review, 12
[27] *ibid*, 19
[28] Natalie Kyneswood, 'Can the proposed British Bill of Rights and Responsibilities command greater respect than the UK Human Rights Act 1998?' [2015] 3 (1) IALS law review, 22
[29] Mark Elliot, 'A Damp Squib in the Long Grass: The report of the Commission on a Bill of Rights' [2013] 8(1) Legal Studies Research Paper Series, 4
[30] Helena Kennedy and Phillipe Sands, "In Defence of Rights", in Report of the Commission on a Bill of Rights, 221
[31] *ibid*, 222

1998 Act, on the condition that the rights contained in new British Bill of Rights 'should be broadly similar to those in the Human Rights Act'[32], leaving open the question as to whether what is an 'essentially cosmetic shift'[33] can justify the repeal of the 1998 Act.

One of the aspects that can be deduced from the Report is, nonetheless, that the major issue with maintaining the HRA is related to the perceived compromised reputation of the 1998 Act.

Much of the criticism moved to the HRA is, according to Helena Kennedy and Phillipe Sands, a result of the 'misinformation'[34] around the Act. One of the claims that are often made is that the Human Rights Act bind British courts to follow the decisions made in Strasbourg and that they undermine parliamentary sovereignty. Arguably the primary source of protection of human rights in the UK, [35] these provisions are not constitutionally binding but 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.[36] Further, domestic courts cannot set aside primary legislations but may do so with secondary legislations.[37] Ultimately, if 'the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility',[38] after which the Parliament, albeit not obliged to act on it,[39] is left with the decision of whether to change the legislation to remove such incompatibility. The concern that incorporating Convention rights into British legislation undermines Parliamentary sovereignty is, thus, resolved by sections 3 and 4[40] of the Human Rights Act 1998 and 4 and 5 of the Human Rights (Jersey) Law 2000.

There is wide concern across the British political spectrum that the Convention is a foreign system forced on the UK that does not take into consideration the diverse cultural and legal traditions of each Member State. However, the ECHR recognises that domestic authorities may, in some cases, enjoy a better understanding and ability to judge than the Strasbourg Court and thus adopts a margin of appreciation, 'the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights'.[41] By implementing a margin of appreciation, the Convention endeavours to create a 'delicate balance between setting a common standard for human rights protection, while at the same time recognising that Contracting Parties are likely to be drawn from diverse cultural, economic and social conditions'.[42] The importance of the margin of appreciation will be further discussed in the following sections.

Notwithstanding, the 1998 Act is allegedly[43] perceived by the public as a statute that should be repealed in favour of a more British Bill of Rights. The concern with

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[32] Report of the Commission on a Bill of Rights, para 12.24
[33] Mark Elliot, 'A Damp Squib in the Long Grass: The report of the Commission on a Bill of Rights' [2013] 8(1) Legal Studies Research Paper Series, 4
[34] Helena Kennedy and Phillipe Sands, "In Defence of Rights", in Report of the Commission on a Bill of Rights, 226
[35] Elin Weston, 'The Human Rights Act 1998 and the Effectiveness of Parliamentary Scrutiny' [2015] 26(2) King's Law Journal, 266
[36] Human Rights Act 1998, s 3 (1), Human Rights (Jersey) Law 2000, s 4 (1).
[37] Conor Gearty, 'On fantasy island: British politics, English judges and the European Convention on Human Rights' [2015] 1(1-8) European Human Rights Law Review, 1
[38] Human Rights Act 1998, s 4 (2), Human Rights (Jersey) Law 2000, s 5 (1).
[39] Francesca Klug, 'Judicial deference under the Human Rights Act 1998' [2003] 2(2) European Human Rights Law Review, 125-133
[40] Nicholas Bamforth, Parliamentary sovereignty and the Human Rights Act 1998. in (1st edn), Public Law (Sweet & Maxwell 1998), 572
[41] Steven Greer, The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights (1st edn, Council of Europe Publishing 2000), 5
[42] Kathleen A. Kavanaugh, 'Policing the margins: rights protection and the European Court of Human Rights' [2006] 4(1) European Human Rights Law Review, 423
[43] The Report of the Commission on a Bill of Rights notes that the numbers seem to show an 'overwhelming support to retain the system established by the Human Rights Act'. According to the Report 88% of those who were interviewed opted to maintain the HRA, 225

ownership seems to be the force behind the drive for such constitutional reform as the public feels 'alienated from a system that they regard as 'European' rather than British'.[44] It appears that the fact that the UK played a crucial role in drafting the Convention or that it was the first of twelve countries to ratify it,[45] does not satisfy the parameters of ownership required to be considered a British statute.

Unlike other aspects – which have been extensively explored by scholars – one of the potential problems that may arise from the repeal of the Human Rights Act and the Human Rights (Jersey) Law surrounds press freedom and media rights. Although it is not easy to assess the implications that Brexit will have on journalists' rights, it is safe to assume that there will be 'a period of uncertainty' and 'potentially significant changes'[46] in media law. After consistent speculation on the repeal of the Human Rights Act, Brexit could finally open the window to such reform, but if the 1998 Act[47] was scrapped from domestic jurisprudence, would journalism in British jurisdictions enjoy further liberty or would it endure stricter limitations?

2. Freedom of Expression

There is very little controversy around the argument that one of the most vital rights in a democratic society is freedom of expression.[48] It is paramount not only because it allows an individual to freely hold and express an opinion but also because it is pivotal in the assertion of freedom of the press, traditionally the public watchdog of liberal democracies. 'Any suppression of this role can undermine society and allow the state to control the information its citizens are fed'.[49] Responsible journalism therefore has the challenging duty of informing citizens and holding authorities accountable, thus often enjoying a greater degree of freedom to express and impart information and opinions. Although it has been claimed that the Convention, and thus the Human Rights Act 1998, and hence the Human Rights (Jersey) Law 2000, has not brought about a substantial change in the protection of such a right when compared to the protection that was already available at domestic jurisprudence,[50] this study aims to show that landmark cases heard by the European Court of Human Rights have consistently improved journalists' rights in terms of freedom of expression. In fact, freedom of expression, and other rights that used to be 'of only uncertain common law status' are now 'explicitly recognized by the Human Rights Act 1998'.[51] The ECHR case law that has dealt with freedom of expression has often represented incredible victories for journalism in the United Kingdom. Further, since it is unlawful for a public authority to act in a way that is not compatible with ECHR rights,[52] judges, who are public authorities, must, so far as it is possible, conform common law with Convention rights, meaning that the degree of freedom of expression protected by the ECHR should be broadly similar to that recognised by British home courts.

Article 10 ECHR, as 'incorporated' by the Human Rights Act 1998 and the Human Rights (Jersey) Law states that everyone has the right to freedom of expression. Such Article is fundamental to journalism especially because it also safeguards the right to 'hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[53] The pillar of press freedom, Article 10

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[44] Report of the Commission on a Bill of Rights, 29
[45] *ibid*, 10
[46] Rupert Earle and others, 'Brexit - the impact on media law' [2016] 27(7) Entertainment Law Review, 229
[47] And the Human Rights (Jersey) Law 2000
[48] Raymond Wacks, Privacy and Media Freedom (1st edn, Oxford University Press 2013), 37.
[49] Timothy Pinto, 'How sacred is the rule against the disclosure of journalists' sources? ' [2003] 14(7) Entertainment Law Review, 171
[50] Amos Merris, 'Can we speak freely now? Freedom of expression under the Human Rights Act' [2002] 6(1) European Human Rights Law Review, 755
[51] Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998 ' [2009] 84(3) Indiana Law Journal, 243
[52] Human Rights Act 1998, s 6 (1), Human Rights (Jersey) Law 2000, s 7 (1)
[53] Human Rights Act 1998, art 10 (1), Human Rights (Jersey) Law 2000, art 10 (1)

offers nevertheless several limitations. Such restrictions are those 'prescribed by the law' and '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 the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.[54]

It is also worth noting that other justifications of interference may arise when there are domestic legislations that are incompatible with such freedoms,[55] or when there may be a need to strike a balance between freedom of expression and other rights, as happens in cases surrounding privacy claims. Although this does indeed preclude certain press liberties, section 12,[56] introduced during the parliamentary debates on the incorporation of the Convention in an attempt to address press fears that Article 8 would undermine press freedom, arguably makes it more complicated than it used to be to obtain interim injunctions against news outlets.[57] Among other specifications, section 12 holds that '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'.[58] Although it is generally argued that section 12 has added 'very little to existing United Kingdom or ECHR jurisprudence',[59] it has substituted the American Cyanamid test with one that accepts restrictions prior to publication only if the claimant is able to prove that they are more likely than not to succeed in a potential future trial.

Furthermore, restriction of an article or an opinion prior to publication is very rarely considered by the Strasbourg Court as a measure proportionate to the legitimate aim pursued. Questioning whether banning an article prior to its publication can ever be a proportionate interference is arguably one of the most important features that the ECHR has brought to the table on issues around freedom of expression. In Dammann,[60] the ECtHR unanimously reiterated that convicting a journalist for a piece that has yet to be published is a clear violation of Article 10 as it deters journalists from contributing to debates in the public interest and does not qualify as a proportionate measure in a democratic society. In this case, Viktor Dammann was sentenced by the Swiss authorities for instigating an assistant at the Public Prosecutor's office to disclose confidential data, notwithstanding that the journalist eventually decided not to publish the information received. Such actions are very likely to instil a "chilling effect" in journalists who feel threatened and become unable to perform their duty of public watchdog.

Section 12 also specifies that courts must have 'particular regard'[61] for freedom of expression in areas like journalism and the arts and must consider whether the publication would be in the public interest. This is a substantial specification as it considers 'that views on issues of public interest should be informed and confronted within the public arena - with particular emphasis on the actions of elected governments'.[62] In Lopes Gomes da Silva,[63] the ECtHR held that journalists should be allowed a greater degree of freedom of expression when it comes to criticising political

[54] *ibid*, art 10 (2)
[55] See: Official Secrets Act 1989.
[56] Such section can also be found in the Human Rights (Jersey) Law 2000.
[57] Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998 ' [2009] 84(3) Indiana Law Journal, 244
[58] Human Rights Act 1998, s 12 (3), Human Rights (Jersey) Law, s 12 (3)
[59] Amos Merris, 'Can we speak freely now? Freedom of expression under the Human Rights Act' [2002] 6(1) European Human Rights Law Review, 755
[60] Dammann v. Switzerland, no. 77551/01 (25 April 2006)
[61] Human Rights Act 1998, s 12(4), Human Rights (Jersey) Law 2000, s 12 (4)
[62] Bulak Begum and Alain Zysset, '"Personal autonomy" and "democratic society" at the European Court of Human Rights: friends or foes?' [2013] 2(1) UCL Journal of Law and Jurisprudence, 244.
[63] Lopes Gomes de Silva v. Portugal, no. 37698/97 (28 September 2000)

figures. In fact, although the journalist had written that politician Mr Silva Resende was a 'grotesque', 'buffoonish [*boçal*] candidate' and 'an incredible mixture of crude reactionaryism [*reaccionarismo alarve*], fascist bigotry and coarse anti-Semitism',[64] the Court ruled that the boundaries normally awarded for the protection of the reputation of others should be looser when it concerns political figures. It follows that, generally speaking:

> 'A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues.' 65

The European Court of Human Rights has often reiterated the importance of freedom of political speech in a liberal society and will thus 'scrutinise restrictions on such speech very carefully'. [66] Such degree of liberty accorded to the press had been previously recognised by the Strasbourg Court in another landmark case, Oberschlick v Austria. The ECtHR, in the 1997 case, ruled that the article in which the journalist called far-right Austrian leader Mr Haider an "idiot" and not a "Nazi" was not to be considered as an unjustified personal attack but as part of an argument made to contribute to the public debate and, thus, in the public interest. Journalists should, in the Court's view, be allowed to make not only remarks that are 'favourably received or regarded as inoffensive' but also to those that 'offend, shock or disturb'[67] and even more so when they are referred to politicians[68] and the authorities.

Criticism of the authorities was the central issue for Thorgeir Thorgeirson, [69] a journalist who had written two articles on police brutality in which he had called the officers 'beasts in uniform' and 'brutes and sadists' who 'act out their perversions'[70] and was fined for defamation by the Icelandic government in response. Although the government maintained that the conviction was necessary in a democratic society and justified in the legitimate aim pursued – namely the protection of the reputation of others – the ECtHR ruled that, although containing strong language, the publication contributed to the general debate. It maintained that the 'conviction and sentence were capable of discouraging open discussion of matters of public concern',[71] creating a chilling effect in journalists that would be otherwise willing to denounce the authorities.[72]

Journalists who are dismissed after critiquing their employers can now cite Fuentes Bobo v Spain, in which the ECtHR held that the discharge of an employee of the public broadcasting organisation TVE was a breach of his freedom of expression. The

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[64] *ibid*, para 10
[65] Lingens v. Austria, no. 9815/82, para 42, Lopes Gomes de Silva v. Portugal, no. 37698/97, para 30
[66] Howard Erica, 'Gratuitously offensive speech and the political debate' [2016] 6 European Human Rights Law Review, 637
[67] Oberschlick v. Austria (no. 2), no. 47/1996/666/852 (1 July 1997), para 29
[68] Similar decisions: Feldek v. Slovakia, no. 29032/95 (12 July 2001), Renaud v. France, no. 13290/07 (25 February 2010) and Arslan v. Turkey [GC], no. 23462/94 (8 July 1999)
Limits of acceptable political criticism can be found in the judgment in Zana v. Turkey (25 November 1997) *Reports of Judgments and Decisions* 1997-VII, where the Court held that the restrictions applied to the publication of an interview in the newspaper Cumhuriyet in which the interviewee supported the PKK movement was necessary in a democratic society as it incited to violence and condoned terrorism, and did not thus amount to a breach of Article 10.
[69] Thorgeir Thorgeirson v. Iceland, no. 13778/88 (25 June 1992)
[70] *ibid*, para 9
[71] *ibid*, para 68
[72] A similar approach can be found in Özgür Gündem v. Turkey, no. 23144/93 (16 March 2000), where the Court held unanimously that the authorities of a democratic State must tolerate criticism, even if it can be considered provocative or insulting as long as it does not advocate or incite violence.

journalist had written a piece and had appeared in two radio shows in which he criticised his managers, accusing them of 'arrogance and despotism'.[73] The Court considered that the inflammatory remarks made by the applicant were part of a public debate around the management of the public TV channel and thus in the public interest. Furthermore, albeit recognising that his dismissal was a necessary measure to protect the reputation of others, it was not satisfied with the Spanish authorities' view that it was a 'pressing social need' nor that there was a 'proportionate relationship'[74] between the sanction set out for the applicant and the legitimate aim pursued. The Court established with this case that the right to freedom of expression continues to stand even in relationships between employers and employees and that the State has a positive obligation to ensure that Article 10 of the Convention is protected without the interference of private parties. Once again, the decision considers the chilling effect that such interference may have on journalists who wish to criticise their employer or someone with a position of power, which would undermine their role of public watchdog in a democratic society. The Strasbourg Court appreciates that certain interferences with freedom of expression must then be considered 'not only in the light of the individual applicant, but also the broader effect this interference has on freedom of expression generally'.[75]

In Jersild,[76] the Court was 'faced for the first time with the need to determine how far the desire to eliminate race discrimination could make inroads into the scope of the freedom of expression guaranteed in the Convention'.[77] The journalist, drawing from other newspaper articles, produced a video in which he interviewed the members of the "Greenjackets" making racist and hateful remarks. Mr Jersild was subsequently fined for aiding and abetting the dissemination of racist statements. When the case was presented to the ECtHR, the Court held that punishing a journalist for televising the comments made by others would seriously jeopardise the contribution of the press to matters in the public debate and seriously impede their role of public watchdog. Furthermore, it held that news reporting 'based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog"'[78] and that 'it is not for this Court, nor for the national courts … to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists'.[79] [80]

It is also worth noting in this chapter that the European Court of Human Rights stresses that Article 10 also ensures that there is media plurality in a democratic society. In Di Stefano,[81] the Grand Chamber of the European Court of Human Rights explained that there can be no freedom of expression – and thus no democracy – without media plurality,[82] as when a 'powerful economic or political group in society' is allowed to obtain a 'position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom',[83] the

[73]Fuentes Bobo v. Spain, no. 39293/98 (29 February 2000), para 25. (This is a translation from the Spanish original report)
[74]*ibid*, para 43
[75]Rónán Ó fathaigh, 'Article 10 and the chilling effect principle' [2013] 3 European Human Rights Law Review, 312
[76]Jersild v Denmark, no. 15890/89 (23 September 1994)
[77]John Andrews and Anna Sherlock, 'Freedom of expression: how far should it go?' [1995] 20(3) European Law Review, 335
[78]Jersild v Denmark, no. 15890/89 (23 September 1994), para 35
[79]*ibid*, para 31
[80]The same approach can be found, inter alia, in Bergens Tidende and Others v. Norway, no. 26132/95 (2 May 2000), where the Court reiterated that interviews are pivotal in the assertion of the role of public watchdog of the press. Further, the articles, which recounted the experiences of women who had undergone plastic surgery, contributed to a public debate on health by raising issues and were thus in the public interest.
[81]Centro Europa 7 S.L.R. v Italy, no. 38433/09 (7 June 2012)
[82]A similar approach can be found in Demuth v. Switzerland, no. 38743/97 (5 November 2002), where the Strasbourg Court stressed that the refusal to grant a broadcasting licence is an interference with the exercise of the right to freedom of expression.
[83]Centro Europa 7 S.L.R. v Italy, no. 38433/09 (7 June 2012), para 133

fundamental role of freedom of expression in a democratic society is undermined. In this case, the Italian authorities, by postponing making frequencies available to Centro Europa 7 in favour of the former Italian Prime Minister Silvio Berlusconi's private broadcaster Mediaset, had failed to enshrine their positive obligation to 'put in place an appropriate legislative and administrative framework to guarantee effective pluralism'.[84]

These cases are not legally binding on UK and non-UK British judges as to their interpretation of the ECHR rights, but should be highly persuasive. Claims of breach of freedom of expression must so far as possible be processed accordingly to the landmark cases provided in this chapter. Indeed, Section 2 of the 1998 Act and section 3 of the Human Rights (Jersey) Law 2000 require British courts to take into account relevant Strasbourg case law. Although it is arguable that other Articles of the Convention may in fact limit the freedoms enjoyed by the media, it is safe to say that the freedom of expression granted to journalists under the Strasbourg jurisprudence is greater than that accorded by domestic laws. Nonetheless, freedom of expression is not an absolute right and, even under the Convention, it has encountered several limitations.

The Court has often stressed that hate speech is not protected under Article 10 of the Convention.[85] Such speech is considered intolerable in a democratic society by the Strasbourg Court whether it is against foreigners,[86] homosexuals,[87] or whether it involves religious insult.[88] Article 17 of the ECHR prescribes the abuse of rights. Convention rights cannot thus be interpreted as a right to inferring 'for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.[89] Article 17 was hence put in place to avoid extremist groups justifying their actions by appealing to the ECHR.[90] The Court has applied it to speech aimed at revisiting or denying the Holocaust[91] as well as speech of racial,[92] religious[93] and ethnic hatred.[94] The ECtHR has also dismissed claims when they constituted incitement to hostility[95] and condoning of terrorism.[96]

Additionally, 'within the discourse of international human rights law, there exists a tension between those who argue for a universal set of human rights and those who believe that human rights, as with other norms, are relative'.[97] The Strasbourg Court has and continues to accept that establishing whether the rights of others should be allowed a greater protection than the rights of those who intend to impart information, can, under certain circumstances, be better addressed by the home country. This is especially the instance with most cases that deal with morals. Infamous cases have

[84] *ibid*, para 134.
[85] Observatory European audiovisual, *Iris Themes: Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, vol. III (Council of Europe Publishing 2013), 26.
[86] Féret v. Belgium, no. 15615/07 (16 July 2009)
[87] Vejdeland v. Sweden, no. 1813/07 (9 February 2012)
[88] İ.A. v. Turkey, no. 42571/98, (13 September 2005)
[89] Antoine Buyse, 'Dangerous expressions: the ECHR, violence and free speech' [2014] 63(2) International & Comparative Law Quarterly, 492
[90] *ibid.*
[91] Garaudy v. France, no. 65831/01, Honsik v. Austria, no. 25062/94 and Marais v. France, no. 31159/96 (those cases were declared inadmissible)
[92] Glimmerveen and Haqenbeek v. the Netherlands, no. 8348/78 (declared inadmissible)
[93] Norwood v. the United Kingdom, no. 23131/03 (declared inadmissible)
[94] Pavel Ivanov v. Russia, no. 35222/04 (declared inadmissible)
[95] Sürek (no.1) v. Turkey, no. 26682/95 (8 July 1999) (no violation of Art 10)
[96] Leroy v. France, no. 36109/03 (2 October 2008) (no violation)
[97] Kathleen A. Kavanaugh, 'Policing the margins: rights protection and the European Court of Human Rights' [2006] 65(1) European Human Rights Law Review, 174

dealt with blasphemous[98] – once also illegal in the UK[99] – and obscene[100] material considered to be offensive to the Christian population at the time. Exploring whether such cases would still be judged in the same way today warrants further study, since the ECtHR has often been described as a living instrument that takes into consideration 'present-day standards as an important factor in interpreting the Convention'.[101]

2.1 Protection of Sources

One of the basic conditions for press freedom and freedom of expression, the confidentiality of journalistic sources has long been an issue that the law has tried to regulate and protect. It is fundamental for the functioning of a democratic society that journalists can rely on sources to provide accurate and reliable information, otherwise 'the press would either be kept in the dark or have to rely on official press releases, which are of course normally subjected to a heavy dose of spin'.[102] The protection of sources allows the media to hold to account the use and abuse of power of both public and private institutions, and denying such journalistic privilege could potentially produce a chilling effect in sources that would otherwise be willing to come forward. Although anonymity of sources in the UK was already partially protected by section 10 of the Contempt of Court Act 1981,[103] the scope of this study is to show that Article 10 of the ECHR has strengthened the law and brought considerable victories to investigative journalism – largely based on anonymous informants – and thus constitutes the second argument put forward in favour of the preservation of the HRA into UK law. Further, considering that no statutory provision to protect anonymous sources existed in Jersey before the implementation of the Human Rights (Jersey) Law 2000, the maintenance of such Law appears to be key for journalism in Jersey.

It is argued that the discussion on the protection of journalistic sources could be easily divided in 'before the European Court of Human Rights decision in Goodwin, Goodwin itself, and after the HRA'.[104] Section 10 of the Contempt of Court Act 1981 provides that:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established... that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."[105]

It is, however, important to note that the section does not grant 'absolute immunity'[106] to journalists and arguably fails to provide them with a real legal right to protect their informants' identity.[107] If Article 10 of the ECHR places the emphasis on journalistic sources as a primary matter of public interest, s. 10 of the Contempt of Court Act fails to establish anonymity of sources as a prevailing interest over other interests. 'Prior to the HRA, once necessity was established as a question of fact, the court's disability was

[98]Wingrove v. the United Kingdom no. 17419/90 (25 November 1996), Otto-Preminger-Institut v. Austria, no. 13470/87 (20 September 1994)
[99]The common law offences of blasphemy and blasphemous libel in England and Wales were abolished in March 2008.
[100]Handyside v. the United Kingdom, no. 5493/72 (7 December 1976)
[101]George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy' [2012] Available at http://dx.doi.org/10.2139/ssrn.2021836, 5
[102]Timothy Pinto, 'How sacred is the rule against the disclosure of journalists' sources? ' [2003] 14(7) Entertainment Law Review, 170
[103]Introduced because of the ECHR and after Sunday Times v. the United Kingdom, no. 6538/74
[104]Janice Brabynn, 'Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions' [2006] 69(6) The Modern Law Review
[105]Contempt of Court Act 1981, s 10
[106]Susan Nash, 'Freedom of expression, disclosure of journalists' sources and the European Court of Human Rights ' [1997] 5(1) International Journal of Evidence & Proof, 412
[107]Ruth Costigan, 'Protection of journalists' sources' [2007] AUT Public Law, 466

lifted and the journalist's immunity evaporated, leaving press freedom in the realms of discretion'.[108] It is contended that a journalist, to enjoy the protection of section 10, must prove that he or she have acted responsibly and in the public interest and that their sources did not have an ulterior motive when delivering the information to the press.[109]

By contrast, Article 10 of the ECHR drastically tilts the balance towards the public interest argument of necessity of anonymous sources as one of the pillars that ensures the press with their important role of public watchdog. Unlike other freedoms safeguarded by Article 10, protection of sources is rarely accorded a margin of appreciation[110] as an order to disclosure confidential sources by a state can seldom be justified as proportionate to the legitimate aim pursued and as necessary in a democratic society.[111] It follows that the Strasbourg Court accepts disclosure orders only when 'particularly compelling reasons'[112] that outweigh the protection of sources under Article 10 are presented. Arguably also the 'principal provision'[113] of the ECHR which provides whistle-blowers with protection, Article 10 has been invoked in several cases that dealt with orders to disclose sources. It is argued in this chapter that the Article made law the right to the protection of journalistic sources, epitomised by the landmark case of Goodwin v. the United Kingdom.[114]

Mr Goodwin, a trainee journalist working for "The Engineer", received a phone call from a source who provided him with a corporate plan designed to solve the financial problems faced by Tetra Ltd. Although the information was 'unsolicited and was not given in exchange for any payment',[115] the High Court granted the company an interim injunction on the publication and asked the journalist to disclose the identity of his informant who had, according to Tetra, breached confidentiality and had to be thus identified and terminated. When Mr Goodwin refused to reveal his source, he was fined for contempt. The applicant hence sought remedies at the ECtHR, which held that the order to disclose his sources could not be compatible with Article 10 of the Convention unless 'it is justified by an overriding requirement in the public interest'.[116] The Strasbourg Court stated:

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States… Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."[117]

Following the Goodwin case, the Strasbourg Court has repeatedly stressed that maintaining the confidentiality of journalistic sources is one of the basic conditions for press freedom. Among numerous cases building upon the decisions of the Court in

[108] *ibid*, 469
[109] *ibid*.
[110] The Rt. Hon. Lady Justice Arden, 'Proportionality: the way ahead?' [2013] Jul Public Law
[111] Stephen J.A. Tierney, 'Press freedom public interest: the developing jurisprudence of the European Court of Human Rights' [1998] 4 European Human Rights Law Review Review, 428
[112] Paul David Mora and Ashley Savage, 'The protection of journalistic sources, Norwich Pharmacal orders and Article 10 ECHR: Financial Times Ltd and others v The United Kingdom' [2010] 21(4) Entertainment Law Review, 139
[113] Jeremy Lewis and John Bowers, 'Whistleblowing: freedom of expression in the workplace' [1996] 6 European Human Rights Law Review Review, 638
[114] no. 17488/90 (27 March 1996)
[115] *ibid*, para 11
[116] *ibid*, para 39
[117] *ibid*.

Goodwin,[118] the Sanoma[119] pronouncements have added further protection to such journalistic privilege. In this case, the Strasbourg Court held unanimously that the order to hand over to the police – who were investigating another crime – pictures of an illegal car race taken by the Dutch journalist, was indeed in breach of Article 10 as the state had failed to allow the applicant to establish an independent assessment into whether the police investigation overrode the public interest argument in the protection of sources. 'In contrast to these earlier decisions which have largely afforded substantive protection by attributing significant weight to the confidentiality of the source at the proportionality stage' this case 'provides procedural protection against any arbitrary interferences which may disproportionately reveal a source'.[120]

Additionally, the Strasbourg Court has often reiterated that the search of home and workplace and the seizure of journalistic material is very rarely justified as a proportionate measure in the legitimate aim pursued since national authorities can often rely on other procedures in their investigations that do not affect the media's role of public watchdog. Among other cases,[121] in Ressiot[122] the Court found that the French authorities were unsuccessful in striking a balance between the different interests involved, thus failing to recognise the importance of freedom of expression and press freedom in a democratic society, protected by Article 10 of the Convention.

The cases explored seem to show that protection of sources is almost always accorded to journalists by the Strasbourg Court and is thus a right that has been incorporated into UK law through the Human Rights Act 1998 and into Jersey law through the Human Rights (Jersey) Law 2000. However, Article 10, albeit recognizing the need for confidentiality of sources, does not universally allow journalists to maintain this privilege. Nordisk Films & TV[123] and Stichting Ostade Blade,[124] show that prevention of crime and terrorism are overriding necessities and that under such circumstances the order to reveal sources does not thus amount to a disproportionate measure in a democratic society.

It is also worth noting, in this section, that the ECHR also shields journalists from abuses under other Articles of the Convention. In fact, the ECHR not only protects journalists' thoughts with Article 10, but also their lives under Article 2. Furthermore, 'while the right to life and freedom of expression have been the key rights in the leading judgments and authoritative considerations on attacks on journalists, other human rights may also be implicated'.[125] As Parmar notes, other Articles that allow press freedoms are dealt with in Article 3,[126] 5,[127] 6,[128] 9,[129] 11[130] and 1 of Protocol 1[131] of the ECHR. The positive obligation that Member States have towards their citizens to

[118]See: Voskuil v. the Netherlands, no. 64752/01, Financial Times Ltd and Others v. The United Kingdom, no. 821/03
[119]Sanoma Uitgevers B.V. v. the Netherlands, no. 38224/03 (14 September 2010)
[120]Ashley Savage and Paul David Mora, 'Independent judicial oversight to guarantee proportionate revelations of journalistic sources under art10 ECHR' [2011] 22(2) Entertainment Law Review, 68
[121]Inter alia: Roemen and Schmitt v. Luxembourg, no 51772/99, Tillack v. Belgium, no. 20477/05
[122]Ressiot v. France, no. 15054/07 (28 June 2012)
[123]Nordisk Film & TV A/S v. Denmark, no. 40485/02 (8 December 2005). This case concerned a journalist who had obtained research material on a paedophile association. The application made by the journalist to avoid surrendering his material to the authorities was declared inadmissible by the ECtHR as it was found to be manifestly ill-founded.
[124]Stichting Ostade Blade v. the Netherlands, no. 8406/06 (27 May 2014). This case involved the searches of the magazine's premises after it had asserted to have received a letter from an organisation claiming responsibility for a series of bombing attacks. The Court found that the protection that is normally awarded to informants could not be recognised to the author of the letter, thus declaring the claim inadmissible.
[125]Sejal Parmar, 'The Protection and Safety of Journalists: A Review of International and Regional Human Rights Law' [2014] Towards an effective framework of protection for the work of journalists and an end to impunity, 7
[126]Prohibition on torture and cruel, inhuman or degrading treatment or punishment
[127]Right to liberty and security
[128]Right to a fair trial
[129]Freedom of thought, conscience and religion
[130]Freedom of assembly and association
[131]Right to property

ensure that journalists can enjoy such human rights is the third argument presented in this study for maintaining the HRA and the Jersey Law in domestic jurisprudence.

3. Privacy

The third part of this study will reflect on whether the incorporation of Article 8 of the Convention into British law has brought about limitations for journalists in the fulfilment of their role of public watchdog. It is contended, in fact, that the establishment of the right to remedy for invasion of privacy by the media has long been considered as 'one of the most dramatic and controversial likely effects of the introduction into English law of Art.8 of the European Convention on Human Rights'[132] through the HRA[133] as, without the necessity of a relationship of confidence, it offers pecuniary or symbolic remedies to an individual whose 'private and family life', 'home' and 'correspondence'[134] have been intruded. It is an overreach, however, to claim that the freedom of expression of the media is always restricted by this Article. It is, in fact, important to note that the Council of Europe considers every person's right to privacy and the right to freedom of expression of equal value,[135] albeit recognising that, when the publication is in the public interest, the exercise of the right to freedom of expression should be given a greater weight. Although public interest is a 'chameleon' expression that 'changes its colours and shape from one context to the next',[136] it should be intended here as matters of public concern capable of contributing to the general debate.

There is a growing consensus that the Human Rights Act has introduced the law of privacy in the domestic law of both the UK[137] - once reliant mainly on breach of confidence – and Jersey, which traditionally dealt with privacy issues on a case by case basis rather than through a statutory right.

Breach of confidence was, in the UK, at the basis of the infamous cases of Prince Albert v. Strange,[138] Pollard v. Photographic Co[139] and Argyll v. Argyll,[140] where some kind of relationship of confidence could be established. Although breach of confidence has sometimes been over-stretched to protect the right to privacy, thus dissolving the need for a relationship of confidence,[141] it generally only applies when, as Tugendhat J. recently reiterated in Terry v. Persons Unknown[142]:

> "... (i) [The] information has the necessary quality of confidence, (ii) it has been imparted in circumstances importing an obligation of confidence to the claimant and (iii) unauthorised use or disclosure is threatened. A duty of confidence arises when information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential."[143]

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[132]Gavin Phillipson, 'Judicial reasoning in breach of confidence cases under the Human Rights Act: not taking privacy seriously?' [2003] Special Issue (Privacy 2003) European Human Rights Law Review, 54
[133]And the Human Rights (Jersey) Law 2000 in Jersey
[134]Human Rights Act 1998, Art. 8(1)
[135]Council of Europe Resolution 116 5 (1998), para 11
[136]ATH Smith, 'Assessing the public interest in cases affecting the media - the prosecution guidelines' [2013] 6 Criminal Law Review, 456
[137]Jonathan Coad, 'Privacy - Art 8 Who needs it?' [2001] 12(8) Entertainment Law Review, 227
[138](1849) 64 ER 293
[139](1888) 40 Ch D 345
[140](1967) Ch 302
[141]Arye Schreiber, 'Confidence crisis, privacy phobia: why invasion of privacy should be independently recognised in English law' [2006] 2(0) Intellectual Property Quarterly, 171-176
[142](2010) EMLR 16
[143]*ibid*, para 49. See: Megarry J. in Coco v. AN Clark [1968] F.S.R. 415: "...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".

While the need for a relationship of confidence was indeed welcomed by journalists as it allowed them a greater degree of intrusion into public figures' lives, Article 8 of the ECHR 'deals with multiple separate but loosely related concepts'[144] surrounding privacy rights and, as noted by Lord Nicholls in the Campbell[145] decision, ignores the first two prerequisites required by common law breach of confidence and poses its attention on a person's reasonable expectation of privacy instead.[146] This has had consistent implications on journalism in the UK, notably the necessity of establishing a public interest argument as a justification for the intrusion, which can often result in Article 8 being given precedence over Article 10[147] as exemplified by the first von Hannover case.

In von Hannover,[148] the ECtHR had to decide whether Princess Caroline of Monaco – who was denied an injunction by the Federal Constitutional Court of Germany on a series of photos of her carrying out her daily routine on the grounds that, because she was a contemporary public figure, she had to tolerate the publication of pictures of herself in a public space even though she was not shown carrying out official duties – had suffered a violation of Article 8. The Court stressed that there needs to be a distinction between 'reporting facts – even controversial ones – capable of contributing to a debate in a democratic society',[149] and reporting details of someone's private life that would merely satisfy 'the curiosity of a particular readership'.[150] These, in the Court's opinion, cannot be regarded as a contribution to 'any debate of general interest to society despite the applicant being known to the public'[151] and thus amount to a breach of privacy rights. The ruling thus enhances privacy protection and provides 'new strict guidelines'[152] for the media.

The von Hannover case is particularly interesting not only because it stresses the importance of an individual's privacy and image rights[153] when no public interest argument can be established, but also because it reflects both on the idea that a matter of private nature can occur in a public space and on the definition of public figures, establishing that they are 'all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain'.[154]

With the incorporation of Convention rights through the Human Rights Act 1998 in English law and through the Human Rights (Jersey) Law 2000 in Jersey jurisprudence, domestic courts must now take into account the case law of the Strasbourg Court and Article 8, which extends 'well beyond traditional private law conceptions of privacy'.[155] The right to privacy thus encompasses an individual's right to have a private life without attracting publicity and is 'a broad term not susceptible to exhaustive definition', which includes not only 'elements such as gender identification, name, sexual orientation and sexual life' but also 'a right to identity and personal development, and the right to establish and develop relationships with other

[144]Suzanne Lambert and Andrea Lindsay-Strugo, 'Focus on Article 8 ECHR: Recent Developments' [2008] 13(1) Judicial Review, 40
[145]Campbell v MGN Ltd (HL) [2004] UKHL 22; 2 A.C. 457; 2 W.L.R. 1232
[146]ibid, para 21
[147]Tom Lewis, 'The Human Rights Act 1998, section 12 - press freedom over privacy?' [1999] 10(2) Entertainment Law Review, 57
[148]Von Hannover v. Germany, no. 59320/00 (24 June 2004)
[149]*ibid*, para 63
[150]*ibid*, para 65
[151]*ibid*.
[152]Hugh Tomlinson, 'The struggle between privacy and freedom' [2004] 42 European Lawyer, 71
[153]Judith Janna Märten, '"Caroline-cases" and their legal impact on images rights in German law' [2014] 25(8) Entertainment Law Review 303
[154]Council of Europe Resolution 116 5 (1998), para 7
[155]N. A. Moreham, 'The right to respect for private life in the European Convention on Human Rights: a re-examination' [2008] 1(0) European Human Rights Law Review, 79

human beings and the outside world and it may include activities of a professional or business nature'.[156]

For tabloid journalism this indeed presents limitations, as not only are "kiss and tell" and gossip stories[157] very rarely considered as publications in the public interest, but also because it restricts their use of photographs of public figures, even if they were taken in a public place. This was the case in the post-HRA Campbell ruling,[158] where the House of Lords stated that, under Article 8, the supermodel was entitled to a compensation for the publication of pictures showing her leaving a Narcotics Anonymous meeting, even though they were taken in a public place. Further, it rejected the idea that because she was a role model she had to accept a greater intrusion into her life.[159] Lord Phillips MR said:

> "…the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual that has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay."[160]

Nevertheless, recent cases like Axel Springer and von Hannover (no. 2) 'have been hailed as good news for the media'[161] as in both cases freedom of expression prevailed on privacy rights. In Springer,[162] the applicant complained to the Court about the injunctions granted by the German authorities on further publication of details surrounding the arrest for cocaine possession of X, a well-known actor, at the Munich Beer Festival. The ECtHR recognised that the articles presented a 'degree of general interest'[163] since the public has a right to be informed about criminal proceedings. Further, it held that X indeed qualified as a public figure and that, since he played the part of a police detective on TV, there was a public interest argument in establishing 'whether in his private life he actually behaved like his character'.[164] More importantly, the Court considered his previous conduct with the media, determining that because he had previously 'actively sought the limelight… his "legitimate expectation" that his private life would be effectively protected was henceforth reduced'.[165]

Similarly, the second von Hannover[166] case concerned the publication of three pictures of Princess Caroline and her husband, Prince Ernst August, on a skiing holiday. Since the first two showed the applicants simply enjoying their activities, the German court had granted an injunction on them but the same approach was denied to the third photo, used as the background for an article on the Princess's father who was severely ill in hospital at the time of their trip. Upon complaining to the ECtHR, the Court agreed with the German courts that while the first two pictures merely amounted to entertainment, the third one discussed a matter of public interest as it informed the public of the 'conduct of the members of his family'[167] during Prince Rainier III's illness, as he was at the time the reigning sovereign of Monaco. Both this and the Axel Springer

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[156]Peck v. the United Kingdom, no. 44647/98 (28 January 2003), para 57.
[157]See for example Jagger v. MGN where Mick Jagger's second-eldest daughter successfully applied for an interim injunction on CCTV footage in which she was seen engaging in sexual activity behind the front door of a club in Soho. The Court nevertheless often advantages the media in exercising the balance between freedom of expression and privacy even in cases where the sole scope seems to be entertainment. See: Lillo-Stenberg v. Norway, no. 13258/09
[158]Campbell v MGN Ltd [2004] UKHL 22; 2 AC 457; 2 WLR 1232; EMLR 247
[159]Raymond Wacks, Privacy and Media Freedom (1st edn, Oxford University Press 2013), 154
[160]Lord Phillips MR in Campbell, para 40
[161]Elspeth Reid, 'Rebalancing privacy and freedom of expression' [2012] 16(2) Edinburgh Law Review, 253
[162]Axel Springer AG v. Germany, no. 39954/08 (7 February 2012)
[163]*ibid*, para 96
[164]*ibid*, para 97
[165]*ibid*, para 101
[166]Von Hannover v. Germany (No. 2), nos. 40660/08 and 60641/08 (7 February 2012)
[167]*ibid*, para 117

decisions are strikingly different from those adopted in the first von Hannover case. Indeed, contrary to merely knowing the whereabouts of Princess Caroline in the first von Hannover case, some degree of public interest and contribution to the public debate could be established in the other two cases, due to the nature of the activities reported. The Court thus gave precedence to freedom of expression over privacy rights.

As explored in this section, the substitution of common law breach of confidence with Article 8 of the HRA can be seen as a limitation to journalism in the UK. However, the case law analysed demonstrates that there are criteria that the Strasbourg Court, and hence domestic courts, consider when striking a balance between freedom of expression and privacy under the Human Rights Act 1998, namely whether the publication contributes to a public debate, the notoriety of the person concerned, the prior conduct of that person, the method with which the information was obtained and the content and veracity of such publication.[168] This approach ensures the freedom of the media when what is reported can contribute to a debate of public interest, but does not shield journalists when they intrude a public figure's life for frivolous matters. Although the public may want to know the gossip surrounding public figures, they do not need to be informed of such details. In this case, the media are not performing their role of public watchdog and should not, it is contended, enjoy the protection granted by Article 10 of the Convention.

4. Conclusion

This study argues that Convention rights, incorporated into domestic law through the Human Rights Act 1998, 'outperform the common law in terms of their normative reach and their protective rigour'.[169] Specifically, it shows that the 1998 Act has often strengthened press freedom in the United Kingdom through Article 10, the primary source of protection of free speech in domestic law. Through cases dealing with both freedom of expression and protection of sources, the European Court of Human Rights' rulings and the HRA have improved British law and continue to ensure the UK press with the freedom of expression needed to exercise their role of public watchdog in a democratic society.

Similarly, it is argued that the Human Rights (Jersey) Law 2000 has provided journalists with a real statutory right to freedom of expression and protection of sources. Such protection evidently has an enormous impact on journalism in Jersey, providing journalists for the first time with the rights necessary to hold those in power accountable. Although cases of human rights violations involving Jersey are scarce,[170] it is safe to assume that the Human Rights (Jersey) Law 2000 has contributed to press freedom in Jersey.

Further, the positive obligation that the state has to warrant that journalists can enjoy, inter alia their right to avoid torture and cruel, inhuman or degrading treatment or punishment, to liberty and security, to a fair trial, to property and to freedom of thought, conscience and religion, is what shields journalists and enables the public to receive information from the world. Although the right to privacy, granted by Article 8 of the ECHR, often restricts what details of a public figure's life journalists can report on, this is only the case in circumstances where no public interest argument can be established and is thus tabloid and sensational journalism, far from the responsible journalism desirable in a democratic society. In conclusion, it is in the interest of both

[168]These criteria are laid out in Axel Springer AG v. Germany, no. 39954/08, paras 89-95
[169]Paul Bowen QC, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' [2016] 4 European Human Rights Law Review, 376
[170]Since the Convention was extended to Jersey, there have been 14 claims of human rights violations in Jersey, none of which concerned media rights. All of those applications were declared inadmissible by the ECtHR. Such declaration of inadmissibility can be found, inter alia, in X v. the United Kingdom (1976), Snooks v. the United Kingdom (2002) and, more recently, Bhojwani v. the United Kingdom (2014).

the media and the public that the Human Rights Act 1998 in the UK and the Human Rights (Jersey) Law 2000 not be repealed, and that that, if substituted with a British Bill of Rights, should maintain the same approach to media law in order to ensure a free public watchdog to hold those in power into account.

5. Limitations

Future developments on the much-discussed repeal should be monitored and the sample of cases discussed should be extended. This study has tried to predict possible outcomes drawing from a limited amount of past cases, but cannot foresee, with certainty, the impact that such repeal will have on media law.