

The Guardian's Publications of Snowden Files: Assessing the Standards of Freedom of Speech in the Context of State Secrets and Mass Surveillance †

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Abstract

The unprecedented pressure that has been exerted on the Guardian by UK authorities for disclosing state secrets about mass surveillance programmes of security and intelligence services and the instrumental involvement of large high-tech corporations has legal and practical consequences. On one hand, it endangers freedom of speech that characterises and sustains democracy at domestic level and, on the other, it reinforces cross-jurisdictional tactics of media organisations and uncontrolled disclosures on the internet, where the danger of manipulation of national state secrets is considerable. The legal problem involved lies in a judicial deviation from the entrenched standards of constitutional review, forcing an exclusive focus on the alleged damage that is caused by media publications. To secure a healthy political and public debate domestically and avoid unwarranted disclosures and manipulation of national state secrets in foreign media and digital markets, the importance of the public interest issue that is disclosed by domestic media must be evaluated, and safeguarded accordingly by a higher level of protection of freedom of speech in constitutional review.

Keywords: media, official secrets, political speech, public interest, privacy, security services, R v Shayler

‘Reality becomes too complex for oral communication’¹
from the opening of Alphaville, J-L. Godard

1. Introduction

In 2013, the Guardian newspaper played the leading role in informing the public about the mass secret surveillance programmes of security and intelligence services (hereinafter security services) of the US and UK (e.g. the NSA's PRISM, UPSTREAM and CGHQ's TEMPORA programmes) that were disclosed by Edward Snowden, a former US security services

† All cited webpages in the current article were last accessed on 9 May 2016. The article is dedicated to the memory of Caspar Bowden.

¹ The opening line of the film Alphaville is an extract from Jorge Luis Borges's essay 'Forms of a Legend'.

contractor.²The newspaper's publications have shown that electronic monitoring applies to entire populations, including those of other states, and personal data have frequently been communicated to US security services without appropriate safeguards. In the surveillance activities of collecting, storing and sharing people's personal data, the involvement and collaboration of high-tech companies, such as Google, Skype, Apple, Microsoft, Amazon, Facebook, Twitter, etc., has been instrumental. What has previously been imagined in the totalitarian dystopian visions of Orwell's 1984 and Godard's Alphaville, as inspired by surveillance practices and secret filing of people's personal data during the dark period of European history of WWI/II and Cold War,³ compares to real-life situations in our age.⁴ The newspaper articles have exposed also the EU for providing the legislative basis for imposing, as an obligation, the collaboration of high-tech corporations in the mass surveillance programmes, under the provisions of the Data Retention Directive 2006/24/EC. The revelations by the Guardian and other newspapers have sprung up a public debate around various interrelated issues: the desirable scope of secret surveillance in the interests of national security and crime prevention, its legality (incl. safeguards against abuses), the oversight of security services, the policy and decision-making processes both in the UK and EU, the protection of constitutional rights (esp. the right to privacy),⁵etc. As a result, in the post-2013 period, legal

² See, e.g., Glenn Greenwald and Laura Poitras, NSA Whistleblower Edward Snowden: 'I Don't Want to Live in a Society that Does These Sort of Things'— video *The Guardian* (London, 9 June 2013) <<http://gu.com/p/3ged4/stw>>; Ewen MacAskill, 'GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications' *The Guardian* (London, 21 June 2013) <<http://gu.com/p/3gn55/stw>>; Ewen MacAskill et al, 'Mastering the Internet: How GCHQ Set Out to Spy on the World Wide Web' with subheading: 'Project Tempora – the evolution of a secret programme to capture vast amounts of web and phone data' *The Guardian* (London, 21 June 2013) <<http://gu.com/p/3gn4j/stw>>; James Ball, 'Edward Snowden NSA files: Secret Surveillance and our Revelations so Far' *The Guardian* (London, 21 August 2013) <http://gu.com/p/3t7kt/stw>; Nick Hopkins, 'UK Gathering Secret Intelligence via Covert NSA Operation' *The Guardian* (London, 7 June 2013) <<http://www.theguardian.com/technology/2013/jun/07/uk-gathering-secret-intelligence-nsa-prism>>; Luke Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man* (Vintage, 2014); Eben Moglen, 'Privacy Under Attack: the NSA Files Revealed New Threats to Democracy' *The Guardian* (London, 27 May 2014) <[shttp://gu.com/p/3pfn5/stw](http://gu.com/p/3pfn5/stw)>.

³ Some of the architects of the European Data Protection Directive 95/46/EC (i.e. one of the most sophisticated and detailed piece of privacy legislation that exists) were self-exiled academics from that period.

⁴ Ian Crouch, 'So Are We Living in 1984?' *The New Yorker* (NY, 11 June 2013) <<http://www.newyorker.com/books/page-turner/so-are-we-living-in-1984>>. For the involvement of high-tech corporations, see, e.g. Glenn Greenwald and Ewen MacAskill, 'NSA Prism Program Taps in to User Data of Apple, Google and Others' *The Guardian* (London, 7 June 2013) <<http://gu.com/p/3gd58/stw>>; James Ball et al, 'BT and Vodafone among Telecoms Companies Passing Details to GCHQ' *The Guardian* (London, 2 August 2013) <<http://gu.com/p/3hn3y/stw>>; James Ball et al, 'Revealed: How US and UK Spy Agencies Defeat Internet Privacy and Security' *The Guardian* (London, 6 September 2013) <<http://gu.com/p/3thvv/stw>>; James Glanz et al, 'Spy Agencies Tap Data Streaming From Phone Apps' *New York Times* (NY, 27 January 2014) <<http://nyti.ms/1jXrwHq>>.

⁵ Caspar Bowden, 'The US Surveillance Programmes and their Impact on EU citizens' Fundamental Rights' [2013] European Parliament's DG for Internal Policies (Citizens' Rights and Constitutional Affairs) <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/474405/IPOL-LIBE_NT%282013%29474405_EN.pdf>. See also Nick Hopkins and Matthew Taylor, 'Edward Snowden Revelations Prompt UN investigation into Surveillance' *The Guardian* (London, 2 December 2013) <<http://gu.com/p/3kpzx/tw>>; Tom Stoppard, 'State Surveillance of Personal Data: What is the Society We Wish to Protect?' *The Guardian* (London, 10 December 2014) <<http://www.theguardian.com/world/2013/dec/10/state-surveillance-data-tom-stoppard>>; Guardian's Editorial: 'Civil liberties: Surveillance and the State' with subheading: 'We need to talk about the Relationship between the State, Technology Giants and Telecoms Companies – and the outsourcing of highly sensitive intelligence to corporations' *The Guardian* (London, 16 June 2013) <<http://www.theguardian.com/commentisfree/2013/jun/16/civil-liberties-surveillance-state-editorial>>.

actions have also been taken to challenge the mass surveillance programmes and the existing surveillance laws.⁶ The most known case is *Digital Rights Ireland and Seitling and Others v Ireland* which led to the invalidation of the Data Retention Directive by the Court of Justice of the European Union (CJEU). This case is particularly important because it was tried under the provisions of the EU Charter of Fundamental Rights and, hence the issue of legality of secret surveillance laws was examined in constitutional review.⁷

The ensuing, major media coverage of Snowden's revelations put the Guardian under considerable pressure. Such pressure has been exercised in the form of prosecution threats (which have not been realised, yet),⁸ police investigation,⁹ the GCHQ-supervised destruction of the Guardian hard drives containing the Snowden files,¹⁰ the summoning of its editor-in-chief, Alan Rusbridger before the House of Commons' Home Affairs Committee,¹¹ and the pre-screening of the newspaper's publications¹² – before the Guardian's publications, a great

⁶ C-362/14, *Maximillian Schrems v Data Protection Commissioner*, 6 October 2015: '[the applicant] Mr Schrems referred in this regard to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency ('the NSA').', para. 28. In that case the CJEU invalidated the EU Commission's US Safe Harbour Decision (that allowed data transfers between the European Union and the United States). Similarly, in *Liberty (The National Council of Civil Liberties) & Others v The Secretary of State for Foreign and Commonwealth Affairs & Others* [2014] UKIPTrib 13_77-H, 05/12/2014, it was noted that '[t]he alleged conduct itself is not admitted by the Respondents [state authorities, incl. CGHQ]. It falls to be considered as a result of allegations made by Mr Edward Snowden ... the [Investigatory Powers] Tribunal's detailed scrutiny is at this stage carried out upon the basis of assuming the relevant allegations to be derived from Mr Snowden's leaks to be true.', para. 4(i) (emphasis added). See also *Big Brother Watch, Open Rights Group, English PEN, Dr Constanze Kurz v United Kingdom*, App. No. 58170/13 (pending before the European Court of Human Rights) and the US case of *ACLU v Clapper* 785 F.3d 787, opinion of 7 May 2015 in which the Court of Appeals for the 2nd circuit ruled that the NSA's call-records programme violated section 215 of the US Patriot Act.

⁷ C-293/12 and C-594/12, *Digital Rights Ireland and Seitling and Others v Ireland*, 8 April 2014. For constitutional review of surveillance laws, see also *R (Davis and Others) v Secretary of State for the Home Department & Others* [2015] EWHC 2092 (Admin).

⁸ Christopher Hope, 'Attorney General to Decide Whether to Prosecute Guardian over Snowden Leaks, say Ministers' *Telegraph* (London, 10 November 2013) <<http://www.telegraph.co.uk/news/politics/10439222/Attorney-General-to-decide-whether-to-prosecute-Guardian-over-Snowden-leaks-say-Cabinet-ministers.html>>.

⁹ Darren Boyle, 'MP told by Police that Met Investigating Guardian over Snowden Files' *Press Gazette* (London, 12 November 2013) *Press Gazette* <<http://www.pressgazette.co.uk/metropolitan-police-confirm-investigation-guardian-over-snowden-leak-files-letter-tory-mp>>; Ronan McGreevy, "'Guardian' Reporting of Snowden Leaks Threatened with Closure, Conference Told' *Irish Times* (Dublin, 27 March 2014) <<http://www.irishtimes.com/news/world/uk/guardian-reporting-of-snowden-leaks-threatened-with-closure-conference-told-1.1738203>>; Ryan Gallagher, 'U.K. Police Confirm Ongoing Criminal Probe of Snowden Leak Journalists' *The Intercept* (London, 24 July 2015) <<http://interc.pt/1LHhGbL>>.

¹⁰ Julia Borger, 'NSA Files: Why the Guardian in London Destroyed Hard Drives of Leaked Files' *The Guardian* (London, 20 August 2013): 'The decision was taken after a threat of legal action by the government that could have stopped reporting on the extent of American and British government surveillance revealed by the documents.' <<http://gu.com/p/3t6yg/stw>>; Nicholas Watt, 'NSA files: UK and US at Odds over Destruction of Guardian Hard Drives' *The Guardian* (London, 21 August 2013) <<http://gu.com/p/3t6zk/stw>>; Luke Harding, 'Footage Released of Guardian Editors Destroying Snowden Hard Drives' *The Guardian* (London, 31 January 2014) <<http://gu.com/p/3mbzj/stw>>.

¹¹ Home Affairs Committee - Minutes of Evidence HC 231-iv, Oral evidence (Alan Rusbridger's), Tuesday 3 December 2013 <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/c231-iv/c23101.htm>>; See also Walter Oppenheimer, "'The Guardian' Falls under the Shadow of McCarthyism' *El Pais* (Madrid, 8 December 2013) http://elpais.com/elpais/2013/12/08/inenglish/1386528219_873150.html.

¹² Home Affairs Committee, *ibid.*, Alan Rusbridger's answer to Question 296: 'It is important to know that in the last six months there have been more than 100 contacts with the official side of things. ... In this country it has

number of contacts had been made with various state officials and the DA-notice committee members who operate as an unofficial censorship system.¹³ The reaction to such pressure has resulted in a cat-and-mouse game, with the most notable act being the Guardian's editor's decision to share a large part of the Snowden files with the editor of the New York Times. Consequently, a foreign media organisation has had access to confidential information of British security services, including names of security agents – although there was no public disclosure of such names by the newspapers concerned.¹⁴

The pressure that the Guardian has faced and its reaction to share confidential materials with The New York Times is explained by the fact that the US Courts guarantee a higher degree of protection of freedom of speech than their UK counterparts. The main problem that is examined in the current article lies with the application of the standards of constitutional review in the context of state secrets, especially secret surveillance, which was the subject of the Guardian's publications. The Official Secrets Act (OSA) 1989 restricts the media's right to freedom of speech, but a decision that is based solely on its provisions does not suffice per se to prosecute or convict the media for disclosing information which is made a criminal offence under the provisions of that Act. Where there is an interference with human rights, the provisions and standards of the Human Rights Act (HRA) 1998 must also be taken into account, as they impose constitutional limits to any restrictions on human rights (including freedom of speech) through the rules and standards of constitutional review.

Additionally, in the era of the internet and Wikileaks, the jurisdictional limits of state's laws have meant that prohibitions of freedom of speech, which national law can impose, may not prevent disclosures, as leaked information can still find its way on the internet. In such a reality, punishing or putting undue pressure on mainstream media, which usually take due care and carefully redact the disclosed materials¹⁵ and voluntarily and informally engage in pre-publication screening with state officials (such as with the DA-Notice Committee),¹⁶ will not stop state-held confidential information from ending up on the internet or in foreign media. A situation which cannot effectively be controlled by state law poses considerable dangers, such as manipulation of the disclosed information. In this respect, domestic media are not usually the problem but the main safeguard for an informed and healthy debate of issues of public interest. For such a dialogue to be possible, the standards of protection of free speech and of the media should be guaranteed by the constitutional review in clear and unequivocal terms. The current article is an inquiry as to the requisite standards of protection of free speech and of the constitutional review through which such standards can emerge.

included Downing Street, the Cabinet Office, the National Security Advisor, GCHQ themselves and the DA-Notice Committee. We have consulted on more than 100 times with the agencies in order to be aware of their concerns before we publish material.'

¹³ See Geoffrey Robertson and Andrew Nicol, *Media Law* (Penguin, 2007), p. 657.

¹⁴ Home Affairs Committee, note 11, Question 304 by MP Mark Reckless: 'Can I ask why you didn't redact those names [of security people working for both the NSA and GCHQ] before showing them to The New York Times?' followed by Alan Rusbridger's answer: 'There were 58,000 documents, Mr Reckless.'

¹⁵ *Ibid.*, Alan Rusbridger's answer to Question 254: 'I think we have published 26 documents so far out of the 58,000-plus that we have seen. We have made very selective judgments about what to print.'

¹⁶ See, e.g., Robertson and Nicol, note 13, p. 657.

2. General Points of Law about the Scope of Constitutional Protection of Freedom of Speech, Especially Where Political/Public Interest Issues are Concerned

Freedom of speech is a known constitutional right which has long been recognised in common law¹⁷ and is consolidated in the form of Article 10 of the European Convention of Human Rights (ECHR), as incorporated into the UK's legal system by the HRA 1998. Being a constitutional right, which attracts an additional protection by section 12 of the HRA 1998, freedom of speech gives automatic protection to individuals against any act (also in the form of omission) of interference by public authorities, whose human rights obligations are set out in section 6 of the HRA 1998.

At first, it should be noted that the right of freedom of speech is not an absolute right. The need to restrict its scope can be illustrated by the opening sentence of Kafka's known novel, *The Trial*: '[s]omeone must have been spreading lies about Josef K. for without having done anything wrong he was arrested one morning'.¹⁸ If statements contain lies, it is perceivable that the exercise of freedom of speech may cause harm to another individual or to sections of the public. Additional interests need also to be protected against certain forms of speech and include competing human rights, such as the right to privacy. For this purpose, the second paragraph of Article 10, ECHR contains an exhaustive list of legitimate aims of interference with freedom of speech. In national law, limitations to freedom of speech are imposed on media disclosures in relation to six categories of state secrets (incl. secret surveillance) of the Official Secrets Act (OSA) 1989, while for offences relating to spying, sabotage and espionage the provisions of OSA 1911 apply also (i.e. for information that might be useful to an enemy).

However, it should be specified that the legitimate aims of interference with freedom of speech, which are provided for under Article 10(2), do not have an independent, self-standing application but require justification under the established legal standards of constitutional review that applies to human rights. Unlike freedom of speech which does not need justification, as it is a constitutional right featuring in HRA 1998 and ECHR, any attempt to interfere with a human right and limit its scope requires always a justification under the standards and rules of constitutional review. In this respect, there is no automatic limitation of freedom of speech where an otherwise legitimate aim of interference (e.g. cases involving national security issues) is involved, because the value of speech in the context concerned must also, and always, be evaluated and weighted in the constitutional review (e.g. the proportionality stage of that review – see section 5.3 below).¹⁹ In general, the possibility to

¹⁷ See, e.g., *Attorney General v Guardian Newspapers Ltd* [1987] UKHL 13; *Attorney General v Guardian Newspapers Ltd* (No 2) [1988] UKHL 6; *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011; *R v Secretary of State for the Home Department, Ex p Simms* [1999] UKHL 33.

¹⁸ Franz Kafka, *The Trial* (Douglas Scott and Chris Waller tr, Picador, 1981), opening sentence.

¹⁹ David Feldman, 'Proportionality and the Human Rights Act 1998' in Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999); Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] Public Law 671; Eva Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008); Tom Hickman, *Public law and the Human Rights Act* (Hart, 2010); Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP, 2012); Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights?', (2013) 11(2) International Journal of Constitutional Law 466; Thomas Raine, 'Judicial Review under the Human Rights Act: A Culture of Justification' [2013] North East Law Review 81.

justify a restriction to freedom of speech is set in reverse relation to the value of speech in the context concerned. The greater the value of free speech under the circumstances the less possible it is to justify a restriction to that freedom.

It is, therefore, of critical importance to identify the type of speech in the publication concerned and the general value to which constitutional review standards have attributed to it. It is observed that most of or all of the substantive issues covered by the provisions of OSA 1989, including state surveillance by security services and other state bodies, concern information about the exercise of the powers of the state, the relationship between the state and the individual, as well as the state's relationships with other states. Such information is undoubtedly political in nature – indeed, typical types of political information. By way of analogy, a media publication in which such political information is disclosed and discussed is political speech.²⁰ The Guardian's publications that were based on Edward Snowden's files about the secret surveillance programmes of US and UK security services have revealed a massive interception of individuals' online communications (incl. their metadata). Although the fact of secret surveillance is not disputed as a general measure of national security, the unprecedented scale and degree of intrusion of individuals' private lives, the involvement of foreign intelligence services and foreign private corporations and, ultimately, the question about the desirable trade-off between national security and individuals' privacy, concern highly political matters over which political lines in party politics are formed that influence also people's approval of their political representatives.

In the courts' jurisprudence, political speech is not confined to actions of the government or elected politicians. In *Radio Advertising Clearance Centre (ex parte London Christian Radio Ltd & Anor)*, Lord Dyson MR has adopted the definition of Eric Barendt who has pointed out that

[t]he public is entitled to discuss a wide range of topics, irrespective of whether they are taken up by government and political parties.²¹ 'Political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.²²

The shift in focus to more general issues over which the public is entitled to form an opinion presupposes both reception of relevant information by the public and a forum, such as the media (various forms of them) through which a given issue can be communicated and discussed. It is public opinion that feeds political opinion, influencing governmental or parliamentary opinion,

²⁰ Cf. *Hadjianastassiou v Greece* App no 12945/87 (ECHR, 16 December 1992). In that case, the issue was not political, as the disclosure of state-held confidential information was made for commercial purposes and monetary benefit.

²¹ *Radio Advertising Clearance Centre (ex parte London Christian Radio Ltd & Anor)* [2013] EWCA Civ 1495, at para. 22 citing Eric Barendt, *Freedom of Speech* (Oxford OUP, 2005), p. 161.

²² This broad definition of political speech conforms also with section 319 (2)(g), of the Communications Act 2003 and the relevant jurisprudence that deals with advertisements of political nature in television and radio services. See also the cases of *R v BBC (ex parte Alliance)* [2003] 2 WLR 1403; *R v Secretary of State for Culture, Media and Sport, ex parte Animal Defenders International* [2008] UKHL 15; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECHR [GC], 22 April 2013).

and the subsequent approval or rejection of that opinion and of political representatives by the public.

A closely related type of freedom of speech, or a wider set within which political speech is considered, is that concerning issues of public interest. The relevant legal question is that specified by section 12(4)(a)(ii), HRA 1998, whether ‘it is, or would be, in the *public interest* for the material to be published’ (emphasis added). This type of speech requires special protection beyond the individual needs of personal speech of the speaker. In general, freedom of speech, as an individual human right, confers a personal benefit to the individual who exercises it so as to develop his/her personality and interact with others in various social relationships.²³ Additionally, where individual speech provides information that the public or a section of the public has a direct interest to receive it, because it concerns issues that affect them either directly or indirectly, an additional value in the exercise of freedom of speech is recognised. Such a value is similar or identical to that recognised for political speech. Indeed, Lord Dyson’s endorsement of Barendt’s definition of political speech applies also to speech of issues of public interest. Therefore, speech which does not simply benefits the individual speaker but also the public, or a section of it, has an added value. This added value is reflected in legal examination by a high degree of protection of the right to freedom of speech that ECHR case-law has long recognised. The European Court of Human Rights (ECtHR) has constantly reiterated in its jurisprudence that ‘there is little scope under Article 10(2)...for restrictions on political speech or on the debate of questions of public interest’.²⁴ Thus, although the general position of constitutional law is that freedom of speech is not an absolute right and legitimate aims of interference may restrict the scope of that freedom if they are justified under the circumstances, relevant ECtHR jurisprudence shows that restrictions on freedom speech dealing with issues of public interest (including political) are rare.

3. The Constitutional Recognition of the Essential Role of the Media in a Democratic Society

Where political or public interest issues are publicly discussed, a dual aspect of the right to freedom of speech can be discerned: an individual right to express an opinion and a collective right of a section or sections of the public who seek access to the given information and opinion. Being a corollary to freedom of speech, the right to receive information is also provided for by Article 10, ECHR which states that freedom of speech includes freedom to hold opinions and

²³ *R v Secretary of State for the Home Department (Ex Parte Simms)*, note 17. *Lingens v Austria* App no 9815/82 (ECHR, 8 July 1986), para. 41: ‘freedom of expression, ..., constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.’; *Steel and Morris v the United Kingdom* App no 68416/01 (ECHR, 15 February 2005), para. 101.

²⁴ See, e.g., *TV Vest As & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECHR, 11 December 2008), para. 59; *Dink v Turkey* App nos 2668/07, ..., 7124/09 (ECHR, 14 September 2010), para. 133; *Brosa v Germany* App no 5709/09 (ECHR, 17 April 2014), para. 42; *Morice v France* App no 29369/10 (ECHR, 23 April 2015), para. 125. See also *Axel Springer AG v Germany* App no 39954/08 (ECHR [GC], 7 February 2012): ‘The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court ...has recognised the existence of such an interest not only where the publication concerned political issues or crimes’ (cited cases omitted), para. 90.

to *receive* and impart information and ideas without interference by public authority.²⁵ In modern societies with their large populations, the media provide the platform enabling the communication of a given speech to the public, and serve also as the means through which the public receives the relevant information and opinion.²⁶ Therefore, what needs to be protected, first and foremost, is that platform, that is the media, a term which encompasses public communication networks, such as social media (e.g. Google's blogsphere, YouTube, Vimeo, Quora, Reddit, Facebook, Twitter, Wordpress).

The essential role that the media play in public debates of issues of public interest was self-asserted and gradually won by authors, journalists, editors, publishers and booksellers who had been prosecuted for such seminal publications, as the books and pamphlets of Thomas Paine (*Common Sense*, *The Rights of Man*, *The Age of Reason*) in the late 18th century, and L' Aurore's headline article in 1898 featuring Emile Zola's open letter 'J'accuse' that he addressed to the President of the French republic directly.²⁷ In US, the influence of Paine's writings and his contacts with American revolutionaries is reflected in the First Amendment to the US Constitution of 1791 which recognises freedom of speech and the protection of the media in same constitutional provision: 'Congress shall make no law ... prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press'. Although freedom of speech applies to all, the US constitutional text particularly stresses the role and value of the media and recognises the practical reality that the communication platform which the media provide is of preliminary and fundamental importance. As Justice Stewart explained in his concurring opinion in *Houchins v. KQED*

[t]hat the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.²⁸

The same approach has been followed in European human right case-law, as seen in *Observer and Guardian* (1991) and in numerous subsequent cases and judgments, where the role of the media is particularly recognised as essential and indispensable for the exercise of freedom of speech and for enabling the reception of that speech by the public, both reflecting the dual aspect of that freedom (i.e. communication and reception of information/opinion). The text of ECHR may not mention the media in its text, as the First Amendment of US Constitution does, but the media's special role has constantly been emphasised and reiterated in the Article 10

²⁵ Article 10, ECHR (emphasis added). See, e.g., *Lingens v Austria*, note 23; *Thorgeir Thorgeirson v Iceland*, App no 13778/88 (ECHR, 25 June 1992), paras 59-70; *Stärkung und Schaffung v Austria* App no. 39534/07 (ECHR, 28 November 2013), paras 41; *Roşiianu v Romania* App no 27329/06 (ECHR, 24 June 2014).

²⁶ The etymological meaning of the word 'media' (plural of medium) is an intervening agency, means, or instrument; Greek: meso (*Méσo*: the middle, the means of; medium); Latin: medium (the middle, midst, centre, interval).

²⁷ It is considered the most famous newspaper article in the history of journalism with the most famous title ('I accuse') and opening ('Mr. President, would you allow me...') (translation). The original French paper is electronically available at <<http://gallica.bnf.fr/ark:/12148/bpt6k701453s.langFR>>. See also Louis Ingelhart, *Press and Speech Freedoms in the World, from Antiquity until 1998: a Chronology* (Greenwood Press, 1998).

²⁸ *Houchins v KQED*, 438 U.S. 1, 17 (1978).

jurisprudence of its court. In particular, the right of the public to receive information through media communications has long been recognised, including the particular context of state secrets. The general position of the ECtHR was clarified in *Observer and Guardian v the United Kingdom* as follows:

Whilst it must not overstep the bounds set, inter alia, in the ‘interests of national security’ or for ‘maintaining the authority of the judiciary’, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.²⁹

This passage highlights that freedom of speech and, the corollary right to receive the information concerned, are reinforced where the subject matter relates to issues of ‘public interest’. The link that connects the individual or the journalist to the public, and correspondingly, the link between freedom of speech and the right to receive that speech is effectuated in practice by the media, which offer the communication platform. In recognition of this practical reality and the historical role of the press in enabling the public debate and scrutinising the powers and acts of the state and, also, of non-state actors (e.g. private companies and corporations),³⁰ the protection of the media has been equated with the protection of free speech, democracy, transparency and accountability, communications of ideas, public opinion and public scrutiny.³¹ The common reference point about the role of the media is the constant recognition in ECHR jurisprudence that they are the ‘public watchdog’. In this respect, the individual freedom of speech and the corollary right of other individuals to receive information and opinion are safeguarded and enabled, in practice, by the constitutional protection of the media.

The special protection of the media, which is accorded by the ECHR, reflects the human right standard for the forty-seven states of the Council of Europe. In the UK, this standard is directly relevant through section 2 of the HRA 1998 which has enabled British judges to use and further develop the legal principles of ECHR case-law. An important clarification of the special legal protection of the media in domestic case-law, as a first bold step, was made in 2001, the year

²⁹ *Observer and Guardian v the United Kingdom* App no 13585/88, (ECHR, 26 November 1991), para. 59 (b). See also *Castells v Spain* (1992) 14 E.H.R.R. 445, para. 43; *Jersild v Denmark* (1994) 19 EHRR 1, para 35; *Vides Aizsardzības Klubs v Lettonie* App no 57829/00, (ECHR, 27 May 2004), para 42; *Társaság A Szabadságjogokért v Hungary* App No 37374/05, (ECHR, 14 April 2009), paras 27, 36 and 38; *Riolo v Italy* App no 42211/07, (ECHR, 17 July 2008), paras 55 and 62; *Flux (No 7) v Moldova* App no 25367/05, (ECHR, 24 November 2009), para 40; *Axel Springer AG v Germany*, note 24, paras 79 and 91; *Von Hannover v Germany* (No. 2) App nos 40660/08 and 60641/08, (ECHR, 07 February 2012), paras 102 and 110; *Times Newspapers Ltd v the United Kingdom* (Nos. 1 and 2) App nos 3002/03, 23676/03 (ECHR, 10 March 2009), para. 40.

³⁰ *Sunday Times v the United Kingdom* App no 6538/74, (ECHR, 06 November 1980); *Delfi AS v Estonia* App no. 64569/09, (ECHR [GC], 16 June 2015).

³¹ Lord Justice Leveson Report, *An Inquiry into the Culture, Practice and Ethics of the Press* (London: Stationery Office, 2012), Vol 1, Part B, Chapter 2(4): ‘A free press, free of the censorship and restrictions imposed by the powerful, ... serves the public interest by its investigative and communicative role. Both roles are necessary.’, p. 64, citing the witness statement of Neil Manson. See also John Milton, ‘Aeropagitica: A Speech for the Liberty of Unlicensed Printing (1644)’ in *Prose Writings* (Everyman’s, 1958).

before the HRA 1998 took effect. In *Reynolds v Times Newspapers Ltd*, the Supreme Court (then House of Lords) in the opinion of Lord Steyn acknowledged first that the media had not had a specially privileged position, but he indicated that the case at hand offered the opportunity to recognise the ‘vital public watchdog role of the press’, quoting the reasoning developed in ECHR case-law.³² In *Reynolds*, the special legal protection of the media has been recognised in clear terms in the opinion of Lord Nicholls who has pointed out that

freedom to disseminate and receive information on political matters is essential to the system of parliamentary democracy cherished in this country. ... there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept.³³

The indispensable role of the media is particularly appreciated in political matters, including issues of public interest, as *Reynolds* and subsequent cases have confirmed.³⁴ This clarification and recognition of the role of the media in such context reflects, in legal constitutional practice, an added protection of freedom of speech when the media are involved. Thus, on one hand, freedom of speech is an individual right that is given to ‘everyone’³⁵ and, therefore, the exercise of that right does not require any special status as to the identity of the right-holder, be it a journalist or a person whose activities are unrelated to the media. On the other hand, the special (added) protection of the media is recognised when a restriction to freedom of speech of the media is attempted. In such circumstances, what is at stake is not merely the exercise of an individual freedom, but rather the whole function and role of the media. The various forms of pressure against the Guardian, including prosecution threats for disclosing secret surveillance programmes of security services, do not concern simply the individual decisions of its then editor-in-chief, Alan Rusbridger, but the negative impact that such prosecution will have on the function of the media in the UK and the right of the public to have access to information on matters of public interest. In this respect, unwarranted attacks on the media have far-reaching consequences that go far beyond isolated publications of one newspaper, the Guardian.

As already noted in the previous section, the protection of speech is judicially recognised as being semi-absolute when its content is political or concerns issues of public interest. This already very high standard of constitutional protection of such type of free speech is doubled where freedom of speech is exercised by the media, reflecting respectively the two critical parameters involved: a) type of speech (i.e. political speech and public interest issues) and b) the identity of the right-holder (i.e. the media). Where these two parameters are present, it is extremely difficult to restrict freedom of speech.

³² *Reynolds v Times Newspapers Ltd* (2001) 1 AC 127 citing *Goodwin v the United Kingdom* (1996) 22 E.H.R.R. 123, 143, para. 39 and *Castells v Spain* (1992) 14 E.H.R.R. 445, 476, para 43.

³³ *Ibid*, at para 200.

³⁴ *Flood v Times Newspapers Ltd* [2012] UKSC 11.

³⁵ Article 10, ECHR, opening word.

Thus, in constitutional review, although state authorities may have a margin of appreciation as to their action against media publications, in judicial practice, the constitutional standard of protection of freedom speech is set very high where political matters and issues of public interests are communicated to the public, and additional protection is guaranteed where such communications are enabled by the media. This double narrowing of the state's margin of appreciation reflects the European constitutional standard which has been reiterated and summarised by the ECtHR, as follows:

the breadth of the margin of appreciation ... is defined by the *type of the expression* at issue and, in this respect, it is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest ... [t]he margin is *also* narrowed by the strong interest of a democratic society in the *press exercising its vital role as a public watchdog*'.³⁶

In these terms, the double protection of freedom of speech recognises, in legal constitutional practice, a very high level of protection of political speech and of the communicating platform, the media, reflecting correspondingly a very narrow possibility for limitations to freedom of speech by state authorities in such context.

The public exposure of global surveillance programmes, first by the Guardian and later by other newspapers, such as the New York Times and Washington Post, has shown that the exercise of freedom of speech by the media has been the only guarantee and means available that have informed and protected the public against repeated violations of their constitutional rights (right to privacy) by national and, more seriously, by foreign intelligence agencies (i.e. US's NSA). Whether or not, foreign intrusion is made with the national government's consent, foreign agencies remain outside the remit of the national constitutional and democratic control of the public.

More problematic is the situation with the legislative measures of surveillance that are negotiated and enacted by the EU, such as the Data Retention Directive of 2006 which imposed an obligation on member states to require high-tech private corporations to collect and store the online traffic data of entire populations. The constitutional control which the CJEU exercised in the case of *Digital Rights Ireland* led to the invalidation of the Directive six years later after it had been enacted, and one year after the Guardian's revelations had been published. The Court found a violation of privacy and data protection rights under the EU Charter of Fundamental Rights in relation to the 'entire European population'.³⁷ This kind of institutional control, and without considering the passage of six years, including the CJEU's own delays, cannot be the only one because political and constitutional matters, such as national security and human rights, are not the monopoly domain of the foreign judges of the CJEU; in *Digital Rights Ireland*, the CJEU could well have reached an opposite conclusion. Democratic control, public debate and constant assessment and constant changes of laws and practices involve, first and foremost, the people who are directly affected by national security issues and human rights

³⁶ See, e.g., *Animal Defenders International v the United Kingdom*, note 22, para 102 (case-law references omitted) (emphasis added).

³⁷ *Digital Rights Ireland and Seitling and Others v Ireland*, note 7, para. 56.

violations. It should be remembered that the participation of the people in the policy and decision-making of the EU is severely restricted due to the inability of the only elected EU body, the European Parliament, to introduce or amend laws by its own initiative. In such an institutional reality, the media provide a key public forum (albeit diverse, fragmented, multiple and informal) where the participation of the public is secured to debate and scrutinise the ever-increasing number of laws which are negotiated and imposed by the EU, and especially in the very sensitive context of national security and constitutional rights.³⁸

In sum, it can be contended that the starting point is no longer whether restrictions of freedom of political speech and of the media can be justified, but rather whether freedom of political speech and that of the media can ever be restricted where publications concern issues of public interest, such as mass, secret surveillance programmes. This reversed perspective is the result of decades-long development of constitutional standards of ECHR and national case-law, as well as recognition of the practical realities of the EU's democratic deficit, which provide additional justification for maintaining and increasing the constitutional protection of the media and free speech.

4. Jurisdictional Limits to the Media's Liability: Inherent and Practical Limits of Restrictions on Freedom of Speech

The preliminary condition of the media's liability regards the parameters of location or nationality.³⁹ A media organisation is bound by the restrictions of freedom of speech under the OSA 1989 if, and only if, its publication takes place within the territorial jurisdiction of the state or the media company or the author is subject to state laws (e.g. a British citizen writes an article in a newspaper which is based in Iceland). Conversely, a foreign newspaper cannot be dragged to litigation in the UK for not complying with the restrictions on free speech of OSA 1989, where that newspaper does not have a base in the UK or its publication is not made in the UK. In such circumstances, journalists, say from Iceland, can perfectly ignore the laws of foreign states.⁴⁰ The same applies to the Guardian and other UK-based media organisations in relation to restrictions and bans on freedom of speech that the national laws of other states impose.

In the digital age, interested individuals who are based in the UK are able to access information that has been published in foreign media. In addition, domestic media can report information which has first appeared outside the UK. Once information is published in foreign media, its dissemination can easily be redistributed through the journalists' common practice of

³⁸ Alan Rusbridger, 'The Splintering of the Fourth Estate' *The Guardian* (19 November 2010) <<http://www.theguardian.com/commentisfree/2010/nov/19/open-collaborative-future-journalism>>: 'It's always been a given that the business we journalists are in is not quite like other businesses. What it does matter too much. That's why it has sometimes rather grandly been called the fourth estate – a part of society as important as government, the courts or the church. Some would say more so.'

³⁹ See, e.g., section 15, OSA 1989.

⁴⁰ Home Affairs Committee, note 11, Question 245, Chair: 'Clearly other editors took the decision [to publish] as well. We know it has been in *The New York Times*, *The Washington Post*, *El País*, *Le Monde* and other newspapers, but they are not before us today. [obviously]'. The choice of the state in the example which is made with reference to Iceland is not accidental, as Iceland guarantees a high level of protection of free speech in Europe. See also the work of Icelandic Modern Media Initiative <<https://en.immi.is/>>.

reportage. In the current digital and borderless landscape of the media, news about the UK, such as secret, mass surveillance programmes of CGHQ, which may be generated in foreign media can subsequently be covered as reportage by British media or simply be accessed by UK residents when visiting foreign media's websites.

Because mainstream media organisations have been around longer than the individual legislators and administrators of the day,⁴¹ they have built their international sectoral network through previous collaborations and mutual assistance. Indeed, what may appear as a sudden or isolated disclosure of confidential state-held information in foreign media, may be a pre-agreed course of action between media organisations from various jurisdictions.⁴² Due to instant publication and accessibility of information on the internet, time zone differences, and the media's 24/7 working model, as facilitated by the use of data journalism software tools and mobile collaboration in communication process, the news reach the targeted audiences around the world within the same day or hour, although from a legal technical point of view a prior dissemination or original publication of a given information in foreign media can still be observed.⁴³

The jurisdictional tactics of the media are also reinforced by the advent of web-based only media organisations, primarily Wikileaks, which is not subject to any national jurisdiction and whose internet traffic data and activities are carried out anonymously using cutting edge cryptographic technologies including various versions of Tor network. Although it is possible to identify some key members, such as its founder, Julian Assange, the organisation has numerous anonymous members around the world who adhere to new business models of digital commons, such as Wiki, which develop through collaborative work and, therefore, practically speaking, the organisation has key characteristics of a social movement and/or of an

⁴¹ The Guardian became a national newspaper in 1964. The first article about Snowden's revelations appeared in June 2013 and was authorised by Mr Alan Rusbridger who served as the newspaper's chief-editor from 1995 to 2015.

⁴² A very notable example of such practice is the disclosure of information regarding confidential files of US military operations in Afghanistan and Iraq. Key publications of this information were made possible through the co-operation of mainstream media organisations (The Guardian, New York Times, Der Spiegel, etc.) with Wikileaks. For background information regarding the jurisdictional tactics of media organisations, see, e.g., the description given by of the former editor of the New York Times, Bill Keller, 'Dealing with Assange and the WikiLeaks secrets' *New York Times* (NY, 26 January 2011), <<http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html>>; Stephen Engelberg and Richard Tofel, 'Why We Published the Decryption Story' *ProPublica* (NY, 5 September 2013) <<https://www.propublica.org/article/why-we-published-the-decryption-story>>; Cf. Lloyd Grove, 'Is The Guardian Holding Back The New York Times' Snowden Stories?' *Daily Beast* (NY, 14 October 2014) <<http://thebea.st/1yZk3BI>>; Glenn Greenwald, 'A Redaction Re-Visited: NSA Targeted "The Two Leading" Encryption Chips' *The Intercept* (NY, 4 January 2016) <<http://interc.pt/1RcQeHq>>.

⁴³ A recent, exemplary and confident cross-jurisdictional collaboration of various media organisations and journalists is the disclosure of the so-called Panama papers that concerned an unprecedented leak of 11.5m files exposing secretive offshore tax regimes. Micah White, 'The Panama Papers: Leaktivism's Coming of Age' *The Guardian* (London, 4 April 2016): 'the Panama Papers are being dissected via an unprecedented collaboration between hundreds of highly credible international journalists who have been working secretly for a year. This is the global professionalization of leaktivism.' <<http://gu.com/p/4t5e3/stw>>. See also the online database on the matter which has been organised by the International Consortium of Investigative Journalists <<https://offshoreleaks.icij.org/>>.

international business model (i.e. open access/source).⁴⁴ In such digital environment, the published work and internet archive of Wikileaks that stores the disclosed information facilitates considerably the work of traditional media which can now *re-publish*, in the form of reportage, information that has already been disclosed to and published by Wikileaks.⁴⁵

The territorial jurisdictional limits of national law, and hence, the limits of protection of state secrets (e.g. on mass surveillance programmes) have been known since the *Spycatcher book* cases of *Attorney General v Guardian Newspapers Ltd* (Nos 1 and 2) (1987-88) and *Observer and Guardian v the United Kingdom* (1991). The cases concerned the Australian publication of a former British intelligent agent's memoir whose copies entered the UK through travellers and whose extracts were subsequently ended up in national newspapers.⁴⁶ In his separate opinion Lord Bridge acknowledged that it would look ridiculous if the British courts upheld a limitation to freedom of speech to keep secret confidential information about the work of intelligence services that had already been disclosed elsewhere.⁴⁷ The ECtHR agreed with his reasoning and clarified that the Attorney General's injunctions against the newspapers could not be sustained or pursued where confidential state-held information had already been disclosed in public. Indeed, in both law and practice, information that has already been revealed to the public loses automatically its confidential nature and, as a result, there can never be a legal obligation to keep something secret, which is already known to the public, even outside the territory of the given state. Accordingly, the ECtHR held that the prosecution of the newspapers by the Attorney General violated Article 10, ECHR. A limitation to freedom of speech could not be justified when confidential information, especially on a matter of public interest, had already been disclosed to the public, even in the media market of a foreign state.⁴⁸

If such conclusion and standard of protection of freedom of speech were reached in the pre-Internet era when the *Spycatcher book* case arose, it has full application and practical justification in the current, global digital environment of the media, where information that is

⁴⁴ E.g. Wikipedia, Wikimedia. See also Don Tapsott and Anthony Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Portfolio, 2006): 'Rather than consume the TV news, you can now create it, along with thousands of independent citizen journalists who are turning the profession upside down.', p. 13; Glyn Moody, *Rebel code: Inside Linux and the Open Source Revolution* (Perseus Publishing, 2001); Ken Auletta, 'Freedom of Information' *The New Yorker* (NY, 7 October 2013): 'In his memoir, Rusbridger describes how the Guardian's coverage of Assange and WikiLeaks helped him realize the extent to which his industry had changed: now anyone could become a publisher. ... The path forward lies in what he calls "open journalism," meaning a newspaper that not only is free for anyone to read but invites readers to participate in the journalistic venture.' <<http://www.newyorker.com/magazine/2013/10/07/freedom-of-information>>

⁴⁵ Keller, note 42.

⁴⁶ *Attorney General v Guardian Newspapers Ltd* (Nos 1, 2), note 17; *Observer and Guardian v. the United Kingdom*, note 29. The author of the *Spycatcher book* criticised and mocked various practices and acts of the security services.

⁴⁷ *Attorney General v Guardian Newspapers Ltd* (No 1), *ibid*, per Lord Bridge: 'The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book *Spycatcher* enter this country and circulate here, will seem more and more ridiculous.'

⁴⁸ *Observer and Guardian v. the United Kingdom*, note 17, para. 69: 'continuation of the restrictions ... prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.'

published online is accessed instantly and massively by people residing in other jurisdictions.⁴⁹ Therefore, the restrictions on freedom of speech which are imposed by the OSA 1989 in relation to secret surveillance and other state secrets are considerably mitigated – in reality – by the possibility of disclosure of such information in foreign media, and by web-based only organisations (e.g. Wikileaks), that is practices of which mainstream and non-mainstream media have so far taken good advantage.⁵⁰

5. Constitutional Review for any Interference with Human Rights: Standards and Deviations

All the big statements which are constantly reiterated in case-law regarding the very high or semi-absolute standard of protection of political speech and the special status of the media as ‘a public watchdog’, may only have a real and practical significance if they are reflected in the standards of constitutional review in human rights cases.

The meaning of constitutionality beyond the known theoretical justifications of human rights is that both their protection and limitation require a specific, well-entrenched judicial examination. Whether or not an Act of Parliament specifies the scope of protection or limitation of human rights that may directly or indirectly be affected by its provisions, the standards of constitutional review are always implied. The OSA 1989 restricts the media’s right to publish information from certain types of state secrets when the disclosure is ‘damaging’.⁵¹ What the 1989 Act does not say is the degree of seriousness of damage that is actionable and whether, how and, how much, the content of speech (newspapers’ articles) is considered and evaluated before the media’s liability can ever accrue. These additional (constitutional) requirements are not stated in the OSA 1989 but are implied by the HRA 1998 and the relevant case-law.⁵²

To evaluate the legal obligations of the media in circumstances such as those relating to the Guardian’s publications of Snowden files and, in particular, the disclosure of information about CGHQ’s mass surveillance programme, TEMPORA, the prohibition of freedom of speech under the OSA 1989 should be considered in conjunction with the standards of constitutional review so as to estimate the scope and limits of such prohibition in that context. At first, it should be noted that although the standards of constitutional review have been entrenched in a great number of cases, in the particular context of state secrets, including secret surveillance,

⁴⁹ Auletta, note 44, ‘The Guardian’s coverage of Murdoch, WikiLeaks, and Snowden’s files has brought acclaim and an international audience. Its online readership has tripled since 2009, and two-thirds of its readers are now located outside the U.K.’

⁵⁰ Notes 42-44. See also, Alan Rusbridger, ‘The Snowden Leaks and the Public’ *The New York Review of Books* (NY, 21 November 2013): ‘The material is so secret and revelatory that any single news organization will come under immense pressure, up to and including criminal, legal, and government threats, not to publish it, or even to hand it back. Newspapers have in the past caved in to pressure, or sat on confidential documents for months or even years. So I will ensure that more than one news organization gets to see it.’ <<http://www.nybooks.com/articles/2013/11/21/snowden-leaks-and-public/>>.

⁵¹ Section 5, OSA 1989.

⁵² See, e.g., *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 (Lord Steyn); *Huang v Home Secretary for the Home Department* [2007] UKHL 11. See also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009).

there has been an unjustifiable deviation from the established standards of constitutional review.

The deviation from the standards of constitutional review and the corresponding lowering of the standards of freedom of speech, and the current restrictive operational framework of the media in the UK, are the result of the Supreme Court (then House of Lords)'s judgment in *R v Shayler* (2002).⁵³ Being a Supreme Court's judgment, it remains the most authoritative legal case on freedom of speech in the context of state secrets.

The facts concerned an article in Mail on Sunday which was written in 1997 by Mr David Shayler, a former security service employee, as well as other articles of journalists relying on information they received from him. The information that was disclosed had been classified as 'Classified' or 'Top Secret' and related inter alia to secret surveillance practices of security services. Mr Shayler was bound by a strict duty of confidentiality under the terms of his employment contract which included the signing of the OSA 1989 declaration in the pre- and post-employment period. In asserting his right to freedom of speech, he submitted that the public had the right to receive information and assess whether the security and intelligence services' powers were being abused and whether the services were being run properly, pointing also to a danger to the public in respect of life, limb and property.

The facts and circumstances of the *Shayler's* case have a strong similarity with Snowden's revelations in the Guardian, in that both former security agents, Shayler and Snowden, did not merely reveal confidential state-held information on secret surveillance to the press but they acted also as main authors or co-authors of newspapers' articles. In this respect, they were involved as both the source (aka whistleblowers) and main authors/co-authors of information published in the media (i.e. Snowden as interviewee, Shayler as main author).⁵⁴ As the right to freedom of speech under the HRA 1998 and ECHR is guaranteed to 'everyone', the constitutional review follows the same legal principles and structure. As a result, the way by which the constitutional review has been undertaken in the *Shayler* case impacts on the exercise of freedom of speech by the media. Points of distinction can also be identified and their respective weight in constitutional review should be noted and evaluated under the key stages of the review, which are analysed below.

5.1 Preliminary Review: Identifying Legitimate Aims of Interference

Restrictions to freedom of speech can only be attempted and justified in pursuit of legitimate aims of interference that are exhaustively listed in paragraph 2 of Article 10 of the ECHR, as included in Schedule 1 of the HRA 1998. Secret surveillance programmes are initiated and implemented in the interests of national security or for the prevention of disorder or crime. Both aims are listed in paragraph 2 of Article 10 as legitimate limitations to freedom of speech.

⁵³ *R v Shayler* [2002] UKHL 11.

⁵⁴ See Snowden's interview with Glenn Greenwald, Ewen MacAskill and Laura Poitras, 'Edward Snowden: the Whistleblower behind the NSA Surveillance Revelations' *The Guardian* (London, 10 June 2013) including a link to the interview's video <<http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>>. For the legal concept of authorship and co-authorship, see sections 9 and 10 of the Copyright, Designs and Patents Act 1988, as amended.

The need to preserve secrecy in surveillance operations is part of the realisation of these aims. Accordingly, the ban that the OSA 1989 imposes on freedom of speech where secret surveillance is concerned pursues legitimate aims of interference under Article 10(2), ECHR.⁵⁵

With this preliminary examination, the first step of constitutional review identifies the competing interests involved, which can be illustrated as: *freedom of speech v national security* or *freedom of speech v crime prevention*. The balancing of these interests is undertaken at the final stage of constitutional review (see the proportionality stage below). The problems with the Supreme Court's approach in *Shayler* are identified in the following steps of constitutional review.

5.2 Legality Review: *The Interference is Regulated by Law*

The second main step of constitutional review looks at the scope and basis in national law (including developments in jurisprudence) of the given restriction on freedom of speech. Article 10 (2), ECHR requires that any limitation to that freedom be 'prescribed by law'. Section 5 of the OSA 1989, which is entitled '[i]nformation resulting from unauthorised disclosures or entrusted in confidence', imposes a ban on freedom of speech of every individual, including the media, which is a limitation to that freedom expressly regulated by this statutory provision. Therefore, the general requirement of legality review is established.

In addition, however, the legality review also requires standards against arbitrariness and abuse (e.g. safeguards against absolute restrictions on human rights).⁵⁶ In *Shayler*, the issue related to the obligation imposed on security agents to seek formal authorisation from an internal censorship system prior to disclosure of confidential information. This requirement applies to security agents only under sections 1 and 4 of OSA 1989 – but not to the media, although the newspapers' regular contacts with the DA-notice committee for pre-screening of publications, informal or otherwise, may have a similar censorship and deterring effect.⁵⁷ Although it is beyond the scope of the current article to examine the legality of the internal censorship system that is imposed on security agents, as it has no direct application to the media, it may briefly be noted that the judges in *Shayler* failed to find that, at the time, the censorship system, including the attached judicial review, fell far short of the requisite human rights standards, since the HRA 1998 did not exist when *Shayler*'s disclosures were made in the media in 1997.⁵⁸ Not only was the internal censorship system not in conformity with human rights standards but the judges discussed that system at the next stage of constitutional review, that of proportionality. However, proportionality is a key stage of constitutional review which offers the opportunity to balance the various stakes involved. If, at that crucial stage, the judges talk

⁵⁵ *R v Shayler*, note 53, para. 26 citing *Klass and Others v Germany* App no 5029/71 (ECHR, 6 September 1978), para 48; *Leander v Sweden* App no 9248/81 (ECHR, 26 March 1987), para 59; *Hadjianastassiou v. Greece*, note 20, paras 45-47.

⁵⁶ *Rotaru v Romania* App no 28341/95, (ECHR, 4 May 2000).

⁵⁷ Robertson and Nicol, note 13, p. 657.

⁵⁸ *R (Daly) v. Secretary of State for the Home Department* [2001], note 52, (Lord Steyn): 'There is a material difference between the [traditional] *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake [in post-HRA 1998 period].', para. 26, see also para 27; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138. C.f. *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

about irrelevant issues, such as a procedural requirement to use an internal censorship system, which should have been examined at the legality stage, the focus of proportionality stage of constitutional review can easily be distorted.

5.3 Proportionality Review: the Interference Must be Necessary to the Legitimate Aim(s) Pursued

The last main stage of constitutional review is that of proportionality which examines whether an interference (i.e. to prosecute and punish a media organisation or journalists) with the right to freedom of speech is necessary under the circumstances. This question revolves often around a valued judgement as to the fair balance that needs to be struck between the competing interests involved, that is national security and crime prevention, on one hand, and freedom of speech and right of the public to be informed of issues of public interest, on the other.⁵⁹ In *Shayler*, the Supreme Court quotes Jeffrey Jowell for the key starting point that ‘proportionality...is a test of constitutionality’.⁶⁰ This point means that the entire system of both law and practice is examined and assessed for compliance with human rights at the proportionality stage, within the scope of constitutional review.⁶¹ The judges quote also David Feldman who has pointed out that ‘[t]here will be some cases in which the national security considerations are so sensitive and important that the courts will still decline to intervene, but the doctrine of proportionality should be able to operate (giving appropriate but not unquestioning weight to national security)’.⁶² Feldman’s comment emphasises that competing interests must *always* be balanced, even where issues of national security are concerned.

The proportionality examination mainly requires that the state show, first, ‘a pressing social need’ for any restriction of freedom of speech and, then, balance this need against the public interest involved in the speech concerned.⁶³

For this purpose, the key requirement at the proportionality stage is a prior assessment of each of the competing interests involved. The interests of the government have already been identified at the first stage of the constitutional review, i.e. to protect national security and prevent crime and public disorder. Subsequently, at the proportionality stage, what needs to be assessed is the degree of damage that the given media publication has caused or may cause to national security or crime prevention operations. Concurrently, the same requirement for evaluation applies to the interests of the media in maintaining their freedom of speech, in general, as well as to the value and importance of the publication concerned, in particular. Once each of the competing interests has been examined and assessed, the courts should be able to

⁵⁹ See, generally, Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2006).

⁶⁰ Jowell, note 19.

⁶¹ The scope of review is that afforded to High Courts by sections 4 and 6(1)(3) of the HRA 1998.

⁶² Feldman, note 19.

⁶³ Ex parte *Daly*, note 52, per Lord Steyn. Loukis Loucaides, *Essays on the Developing Law of Human Rights* (Martinus Nijhoff, 1995): ‘[t]he case-law uses the test of proportionality in conjunction with the requirement of “pressing social need”. The organs of the Convention must *first* be satisfied that there was a pressing social need for the measure under examination and then examine whether the particular measure was proportionate to that need.’, at 197 (emphasis added). See also note 19 and the opinion of Lord Bingham in *R v Shayler*, note 53, citing the observations of Sydney Kentridge, para 59.

determine which interest should prevail under the circumstances. This evaluation looks at the particular facts involved and the general level of protection of freedom of speech in the context concerned (i.e. political speech and the role of the media), as analysed in sections 2 and 3, above.

5.3.1. Damage to National Security and/or Prevention of Crime: the Actionable Threshold

In assessing the justification of the interests pursued by the state, it must be shown that a publication disclosing state secrets (e.g. secret surveillance) causes or can cause damage to national security or crime prevention operations. It should be noted that the element of damage exists also in OSA 1989 as a condition defining the liability of the media in the range of categories of state-held confidential information which are regulated by the 1989 Act. Under section 5, liability accrues if disclosures of confidential information, covered by the OSA 1989, is ‘damaging’. In various provisions of the 1989 Act, the term ‘damaging’ is explained as follows: ‘it causes damage to the work of, or of any part of, the security and intelligence services’,⁶⁴ ‘it endangers the interests of the United Kingdom abroad’,⁶⁵ or ‘it impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders’.⁶⁶ Defined in such broad terms, the element of damage does not appear difficult to establish, because in the millions of people whose communications are monitored by state agents some criminal activities may be detected and, therefore, an unauthorised disclosure is likely to ‘impede the prevention or detection of [some] offences’.⁶⁷ Thus, revelations in the media of security services’ secret surveillance are likely to cause some damage, thereby engaging the liability of the media organisation concerned under the OSA 1989. However, the media’s freedom of speech can only be restricted by the standards of constitutional review, as opposed to the provisions of the OSA 1989, taken alone.⁶⁸ Under the constitutional standards, at the proportionality stage of review, neither is any damage actionable nor is the element of damage enough per se to restrict freedom of speech, since the nature, content and importance of the information in the publication concerned must also be evaluated.

For damage to the state’s legitimate interests to be considered in constitutional review, the state must show ‘a pressing social need’ when restricting the right to freedom of speech.⁶⁹ If the damage that the publication causes does not reflect the pressing social need threshold, the proportionality stage is not reached and, therefore, no restriction to freedom of speech is possible. Admittedly, where the disclosure concerns confidential information about secret surveillance of security services, damage usually reaches the actionable threshold because secrecy in the operation of security services is often seen as necessary.

⁶⁴ Section 1(4)(a), OSA 1989.

⁶⁵ Section 3(2)(a), OSA 1989.

⁶⁶ Section 4(2)(a) (iii), OSA 1989.

⁶⁷ *Ibid.*

⁶⁸ Note 61.

⁶⁹ Note 63.

At the hearing of the House of Commons' Home Affairs Committee, in which the Guardian's revelations of UK and US mass, secret surveillance programmes were examined, some members of the panel argued that the newspaper's publications caused some damage.

In *R v Shayler*, the Supreme Court found damage to security services resulting from the disclosure of information inter alia of malpractices in secret surveillance. It amounted to a 'pressing social need' reflecting the general need for secrecy and loyalty in the operation of security services. Surprisingly, however, this finding alone sufficed to limit freedom of speech under the circumstances. Despite the fact that the Supreme Court included in its judgement the clarifications of learned scholars about the scope and purpose of proportionality examination, as quoted in section 5.3 above,⁷⁰ it did not examine the value of freedom of speech in that case, thereby collapsing the examination of proportionality review – despite the misleading labels of 'proportionality' and 'necessary' that were used as headings of relevant sections in the judgment.⁷¹

The standards of constitutional review where damage is caused by a newspaper article can best be seen in the known case of the ECHR jurisprudence, *Sunday Times v the United Kingdom*.⁷² In that case, a newspaper published information and commentary about an active legal case which concerned the side-effects of a drug which had been produced and marketed by a German pharmaceutical company – a case which later became known as the 'thalimomide disaster'.⁷³ It regarded the very serious side-effects of teratogenesis attributed to certain ingredients of the drug in question which severely affected dozens of thousands of individuals and their families. In such a context, a ban on freedom of speech applies in the form of contempt of court prohibiting commentaries in the media when a legal case is active. The strictness of this ban is justifiable in general terms and amounts to a legitimate aim of interference with freedom of speech, which is expressly listed also in paragraph 2 of Article 10, ECHR ('for maintaining the authority and impartiality of the judiciary').

This apparently absolute ban on freedom of speech in the form of contempt of court was tested under the proportionality stage of constitutional review of the ECtHR, under which the value of speech must also be examined and evaluated in the circumstances concerned. The ECtHR found that the newspaper publications related to a matter of undisputed public interest. It explained that the public had the right to know about these issues so that individuals and their families, who suffered harm, should be able to know how they could protect themselves and assert their rights. In addition, it highlighted the importance of the newspaper's articles in initiating a public and political debate about how the liability of innovative industries (such as pharmaceutical companies) should be regulated and the legitimate rights of the consumers be guaranteed. Such issues raised, directly or indirectly, concerns about inadequacies in the

⁷⁰ Notes 60-2.

⁷¹ Indeed, the issue of legality review was mainly examined in these sections of the judgment, as noted in subsection 5.2, above.

⁷² *Sunday Times v the United Kingdom*, note 30.

⁷³ Harold Evans, 'Thalidomide's Big Lie Overshadows Corporate Apology' *Reuters* (NY, 12 September 2012) <<http://www.reuters.com/article/idUS387880049020120912>>; see also Sunday Times' supplement of 6 May 2012, its cover is available at <<http://www.instituteartist.com/filter/sunday-times/cover-Pride-joy-and-pain-by-Zed-Nelson-in-The-Sunday-Times-Magazine>>.

regulatory framework of the pharmaceutical industry. Having found that the content of newspaper's publications informed the general public about issues of public interest, the ECtHR held that the application of the rules of contempt of court in such circumstances violated the editors' right to freedom of speech, as guaranteed by Article 10 of the ECHR.

In that case, there was no doubt that the newspaper's publication caused some damage, since the ban on freedom of speech for contempt of court safeguards the integrity and impartiality of the judiciary when cases are tried or pending. In addition, the right to a fair trial of the German pharmaceutical company, which caused one of the most known disasters in the history of medicines, may admittedly have been undermined. However, the constitutional review employs the proportionality principle which recognises and evaluates all competing interests involved – and not only the damage caused by the given publication in the media. The ECtHR reasoned that even where harm was likely to result from newspaper publications, nevertheless the facts and comments presented in the publication concerned did 'not cease to be a matter of public interest'.⁷⁴ Unlike *Shayler*, the case of *Sunday Times* has shown that there is no automatic restriction of freedom of speech where damage has been caused by media publications. By analogy, damage to national security that may have been caused by the Guardian's disclosures of secret surveillance programmes is of course actionable but does not suffice per se to limit the newspaper's right to freedom of speech.

5.3.2. *Balancing the Competing Interests Involved: the Value of the Given Speech Needs Prior Determination Also*

The proportionality stage of constitutional review does not end with evidence of damage alone but merely starts from there, as without evidence of damage, actual or potential, the proportionality stage cannot be reached and, therefore, no interference with freedom of speech can be considered or accepted. The disclosures of Snowden files (apparently only 1% of them has been used in the Guardian's articles) may have caused *some* damage to the operations of security services. To limit the media's freedom of speech, the constitutional review requires a balance between freedom of speech and damage to national security or crime prevention operations caused by the speech concerned.⁷⁵

An analysis of the current state of law can be made with reference to the Supreme Court's judgment in *Shayler*, which deals with revelations in the media of state secrets, including secret surveillance practices. Although the right to freedom of speech is exercised in that case by a whistleblower, a former security agent, the requirements of constitutional review are the same and apply to everyone exercising his/her right to freedom of speech, and hence to the media. The only difference that exists between a security agent and a newspaper is an additional

⁷⁴ *Sunday Times v the United Kingdom*, note 72, para. 66. See also *Morice v France*, note 24, 'a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest', para. 125; *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* App no 1529/08, (ECHR, 29 March 2011), para. 47.

⁷⁵ *McCartan, Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, per Lord Bingham: 'The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than necessary to promote the legitimate object of the restriction.', at 290.

damage that is caused by the former. If the acts of a security agent (e.g. David Shayler's articles; Edward Snowden's interview and communication of secret files) cause damage to national security or crime prevention operations, the same damage is caused by the newspaper which effectuated the publication of the security agent's articles and information (with D_1 being damage to national security or crime prevention operations). When a security agent is involved, additional damage is caused due to the need to maintain loyalty in the security services and sustain their secret character and function (with D_2 being general damage to the loyalty system of security services). Therefore, the degree of damage increases in the case of a secret agent ($D_1 + D_2$), compared to that caused by the media (D_1). However, this difference in the assessment of damage does not change the fact that the exercise of freedom of speech and the actual content of the information that is communicated to the public must still be assessed and evaluated in order to strike a fair balance between the competing interests at the proportionality stage of constitutional review.

Such evaluation of the actual content of the publications in the media was not made by the Supreme Court in *Shayler*. Despite the labels used in sections of the judges' opinions and the references to the technical words of 'proportionality' and 'necessity', nowhere in the judgment was there any examination and assessment of the value of speech under the circumstances. The exclusive focus and area of enquiry of the judges was on the examination of damage that the publications caused to security agencies. However, this kind of approach looks solely at the ban on freedom of speech by the OSA 1989, without taking into account the provisions of the HRA 1989 and its relevant jurisprudence which have introduced and secured constitutional review standards wherever an interference with a human right is attempted. The only possible way to limit the scope of constitutional review is to invoke section 4 of HRA 1998 (i.e. to make a declaration of incompatibility with regard to the provisions of OSA 1989), but it was not used in that case.

The exclusive focus on the damage that is caused by the disclosure of state secrets in the media can be seen in Lord Hatton's opinion when he illustrated his reasoning by saying

An example of such a matter would be where a political figure in the United Kingdom had been under surveillance for a period a considerable number of years ago. It was submitted that the disclosure of such information could not constitute any impairment of national security or hinder in any way the efficient working of the Security Service. [§] I am unable to accept this submission.⁷⁶

In the judge's example, the publication or disclosure of a state secret concerns the prolonged secret surveillance of a British politician. Where the disclosure of this secret information is made by a former security agent it causes damage to intelligence services due to the general interest in maintaining loyalty in their operations and function (i.e. D_2 -type damage). That 'a political figure in the United Kingdom [who] had been under surveillance for a period a considerable number of years ago' may constitute an illegal act (i.e. a blatant violation of

⁷⁶ *R v Shayler*, note 53, para. 99.

his/her right to privacy) due to secret surveillance and the prolonged period of time involved, is something that does not seem to be of a concern to Lord Hatton.

If the value and importance of the exact content of the publication is not examined and assessed, then how it is possible to perform a fair balance between the actual speech (publication) and the damage it has caused since one of the competing interests (i.e. freedom of speech) is not considered and evaluated. The fact that freedom of speech is exercised by a security agent or the media makes no difference to the evaluation of the importance of the information which has been communicated to the public. Accordingly, what needs to be clarified in the future is that irrespectively of the identity of the person who exercises his/her right to freedom of speech, the value and seriousness of the revelation must be examined and assessed in its own right. Without this, no balance of competing interests is possible under the proportionality stage of constitutional review and, therefore, no constitutional review can be said to take place if the stage of proportionality collapses.

Moving beyond *Shayler's* judgment, the pertinent question is not if the value of media publications must be assessed, which is a basic requirement of the proportionality examination, but how such an evaluation is made and how a fair balance is struck between the competing interests involved. It has been explained in section 2 above that freedom of speech is a constitutional right exercised by 'everyone' and has a personal benefit for the individual concerned, as it is recognised as a prerequisite for the development of one's personality.⁷⁷ In addition, freedom of speech encompasses also the right to receive information.⁷⁸ This societal value of freedom of speech reaches its highest point where the information that the speech communicates deals with an issue of public interest, including political issues, such as the desirable scope and/or legality of secret surveillance programmes.⁷⁹ The high standard of protection of such type of speech is not influenced by the identity of the person exercising his/her right to freedom of speech. The evaluation of speech depends only on the importance and nature of the subject matter that is revealed and its usefulness for and impact on a section or sections of the public. Thus, the value and importance of the speech concerned does not change because of the identity of the person who reveals the relevant information to the public. Additional constitutional protection is accorded when the media are involved due to the constant judicial recognition of their essential role as a 'public watchdog'.⁸⁰

By analogy, the revelations of Edward Snowden about state secrets in mass surveillance programmes that the Guardian published should be judged and evaluated as to their importance and value as issues of public interest or political matters. In particular, the information that was communicated by the Guardian involved various important issues, such as:

⁷⁷ Note 23.

⁷⁸ Note 25.

⁷⁹ See section 2, above. In the *Sunday Times* case, access to information would allow a section of the public to be alerted to dangers to their physical safety and to ways of asserting their rights where harm has been suffered.

⁸⁰ See section 3, above.

a) The scope and scale of secret surveillance. It has been revealed that almost the entire population is monitored online.⁸¹ This raises questions about the desirable trade-off between national security and crime prevention, on one hand, and the people's human rights (their right to privacy), on the other. Such issues require a public debate that includes the choices of elected politicians and also the people's choices of their politicians.

b) The close cooperation that exists between foreign-based, major high-tech corporations and security and enforcement services for the monitoring, collection and transfer of data of people's communications.⁸²

c) The monitoring of communications by foreign security agencies and the transfer of national surveillance data to these agencies.⁸³

d) Issues of legality: whether and to what extent the surveillance practices that have been revealed comply with surveillance laws and constitutional human rights. In this respect, individual legal challenges of secret surveillance can only be enabled by access to relevant information which only the exercise of the right to freedom of speech has guaranteed.⁸⁴

Once the constitutional review, at the proportionality stage, has evaluated the nature, content and importance of the exercise of freedom of speech, as well as the degree of severity of damage that that speech has caused, the judges must strike a fair balance between the competing interests involved. This job relates to the question of how much weight should be given to each of the competing interests under the circumstances.⁸⁵ Additionally, this assessment may go beyond individual facts and interests so that the balancing exercise can set also general standards of protection or limitation of freedom of speech and of the media.

General standards of protection of freedom of speech and of the media have already been recognised and entrenched in the jurisprudence where the speech is political or, more broadly, deals with issues of public interest. As has already been noted, the general position and starting point in ECHR case-law is that 'there is little scope under Article 10(2)...for restrictions on political speech or on the debate of questions of public interest'.⁸⁶ In these terms, the balancing of competing interests is not a neutral exercise since its principal aim, as established in case-law, is to guarantee and maintain a high, almost semi-absolute level of protection of political speech.⁸⁷ In practice, limitations to political speech can only be examined if there is a very high degree of severity of damage under the circumstances concerned. As clarified in the *Sunday*

⁸¹ See also the findings of CJEU in *Digital Rights Ireland and Seitling and Others v Ireland*, note 7, para. 56.

⁸² Note 4.

⁸³ Hopkins, note 2.

⁸⁴ Note 6, esp. the passage with the added emphasis.

⁸⁵ See, e.g., *R (Daly) v Secretary of State for the Home Department*, note 52 per Lord Steyn: 'the proportionality test...may require attention to be directed to the relative weight accorded to interests and considerations.', para. 27.

⁸⁶ Note 24.

⁸⁷ A similar approach applies in the US: 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.', *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Times case, newspaper articles may cause damage to legitimate interests of the state or to other parties whose interests the state must also protect,⁸⁸ however, the facts and information that is communicated to the public may ‘not cease to be a matter of public interest’.⁸⁹ Accordingly, the threshold of damage that can outweigh freedom of political speech (e.g. publications about secret surveillance of security services) increases substantially due to the very high level of protection of that type of speech. However, although the ECHR standard is known and well-entrenched, there is, yet, no unequivocal clarification in domestic case-law of the level of protection of freedom of speech in the context of state secrets (incl. secret surveillance) that is covered by the OSA 1989.

6. The US Standard of Freedom of Speech

The US has a higher standard of protection of free speech and of the media than the UK. The US standard is particularly relevant not as a typical academic exercise for a comparative analysis but for practical reasons relating to the global digital environment and market in which the media now operate – as facilitated also by the global reach of English language. This has meant that national state secrets involving issues of public interest can be and are transferred to and published by US media. Similarly, for problems that arise from US state activities, such as the global surveillance programmes of US security and intelligence agencies, the domestic public in the UK and other countries that are directly affected by US mass surveillance, may have to rely on information published in US media. This is a paradoxical situation and is not without dangers, since national secrets are transferred and disclosed to journalists and media organisations of other countries.⁹⁰ Thus, in the UK, although the Guardian was forced by governmental pressure to destroy the hard discs with the Snowden files, its chief-editor had already passed them to the New York Times, clearly because the protection of the media in the US is stronger.⁹¹

The different treatment of the media in US and UK is explained by the higher standard of protection of freedom of speech in US. The very high standard of protection of free speech in the US was set by the US Supreme Court (SCOTUS) in the *Pentagon Papers* case in which the New York Times and Washington Post were prosecuted for publishing confidential state-held information.⁹² The high standard of freedom of speech, as defined in that case, is similar to that used by the ECtHR but it was established earlier and against a more serious background of national security issues. In the *Pentagon papers* cases, both newspapers published large extracts from a confidential report on Vietnam War, classified as ‘top-secret’, which were disclosed to them by a military analyst, Mr Daniel Ellsberg, through the then high-tech means

⁸⁸ Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, 2011); Esther Salamanca Aguado, ‘Respect for Privacy and Personal Data Protection in the Context of Mass Surveillance of Communication’ (2014)(4) *Journal of the Spanish Institute for Strategic Studies* 1-24.

⁸⁹ Note 74.

⁹⁰ Notes 14 and 40.

⁹¹ See section 4, above; Rusbridger, note 50.

⁹² *New York Times Co. Ltd v. the U.S.* and *U.S. v. Washington Post*, 403 U.S./713 (1971) (the *Pentagon Papers* case). Although, in *Shayler*, the Supreme Court cited the *Pentagon Papers* case, it did not examine it.

of photocopying.⁹³ With that case, SCOTUS seized the opportunity and defined a high standard of protection of freedom of speech, thereby acquitting the newspapers and their editors from prosecution.

The element of damage was also considered by the US judges but its threshold was set very high so that only very serious damage to the state could potentially limit freedom of speech in such circumstances. The high standard of protection of free speech and of the media in the US can best be appreciated by the fact that the publication of information from top secret reports of Vietnam War took place during wartime.⁹⁴ The US judges were fully aware that ‘the case will go down in history’⁹⁵ and their judgment contains a good number of statements about the justification of the high level of protection of the press by the US Constitution. Due attention was also paid to the interests of national security, although the term was seen as broad and of vague generality.⁹⁶ It is also stressed in separate opinions of the judgment that limitations to the freedom of speech are possible in the context of confidential state-held information when a very high degree of damage can be shown. Indeed, the revelations of the highly secretive confidential report by the New York Times and Washington Post may have caused damage to the state but it did not reach a high degree of seriousness which could pose a limitation to freedom of the press and to the right of the public to have access to relevant information. In his concurring opinion, Mr Justice White found that

after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases.⁹⁷

The constitutional standard that SCOTUS set in the *Pentagon Papers* case has been clarified in subsequent case-law, thereby entrenching a high level of protection of the media that may only be outweighed by evidence of a very serious damage to national security.⁹⁸ A similar influential confirmation and clarification was given by Justice Brennan in *Nebraska Association v. Stuart* when he determined and examined the legal question as to whether the disclosure of state secrets ‘will surely result in direct, immediate and irreparable damage to our

⁹³ The Pentagon Papers were originally titled ‘Report of the Office of the Secretary of Defense Vietnam Task Force’ and have recently been released in their entirety in commemoration of 40th anniversary of the leak to the press - they are available at <<https://www.archives.gov/research/pentagon-papers/>>.

⁹⁴ Cf. Article 15 of the ECHR allows the states to derogate from its obligations ‘in time of war or other public emergency threatening the life of the nation’, albeit ‘to the extent strictly required by the exigencies of the situation’. See also the partly dissenting opinion (concerning prior restraint of free speech) of Judge De Meyer, joined by Judges Pettiti, Russo, Foighel and Bigi in *Observer and Guardian v the United Kingdom*, note 29. Section 1(2) of the Official Secrets Act 1911 prohibits publications that might be directly or indirectly useful to an enemy.

⁹⁵ *Ibid*, per Mr Justice Douglas.

⁹⁶ *Ibid*.

⁹⁷ The *Pentagon Papers* case, note 92.

⁹⁸ See, e.g., *Landmark Communications Inc. v. Virginia*, 425 U.S./829 (1978); *Nebraska Association v. Stuart*, 427 U.S./ 593 (1976) and *U.S. v. The Progressive*, 486 F. supp. 990 (1979) (the Hydrogen Bomb case).

nation or its people'.⁹⁹ The high standard of protection of free speech and of the media that the US constitutional review has set explains why the media in the US have not been subjected to pressure by state authorities, such as that exerted on the Guardian, when they published confidential information from the Snowden files.

The destruction of the Guardian's discs with the Snowden files, containing highly secretive confidential information and data of UK security agencies and their prior transfer to US media, are real consequences of the different constitutional standards of freedom of speech in the UK and US. In the end, the destruction of the Guardian's discs did not achieve anything for UK security services and national state secrets are now in the hands of foreign newspapers, while the British public wait to be informed if, and when, the US media publish something from the disclosed files that may be of some interest to their domestic market.

7. Conclusion

The leading role that the Guardian has played, at global level, in exposing the mass secret surveillance programmes of security and intelligence services, as disclosed by Edward Snowden, has been countered by an unprecedented pressure that stage authorities put on the media organisation. It has been revealed that US and UK security services have targeted communication data of entire populations. The mass surveillance programmes and practices have been supported by broad national legislative provisions, including the EU's Data Retention Directive, which forced the collaboration of major high-tech companies, such as Google, Microsoft, Apple, Facebook, Twitter, in the massive collection of people's personal data in public communication networks and on the internet. The pressure that has been exercised on the Guardian can be observed in the period before and after the publication of Snowden file (NB: only 1% of the files has been published) and has included: the destruction of the Guardian's hard discs with the Snowden's files, the summoning of its then editor-in-chief, Alan Rusbridger, by the House of Commons' Home Affairs Committee, the threats of prosecution, and the pre-screening of publications by the DA-Notice committee, as an informal, yet constant practice. As a result of newspaper revelations, there has been a variety of reaction by the public including legal actions challenging surveillance practices which led to the invalidation of the EU Data Retention Directive and to continuous discussion for legal reforms of surveillance laws and for effective oversight of security services – which is a known and persistent issue.

The pressure that has been exercised on the Guardian has two direct negative consequences: First, it has a chilling effect on freedom of speech, a freedom that sustains democracy which, in turn, sustains human rights. It also undermines the media's essential role as a public forum for information and debate of issues of public interest that enables the public to scrutinise state powers, including those of security services. Second, confidential state-held information is a commodity for which there is a market on the internet, especially, in the post-Wikileaks era, and in the media market of other jurisdictions with higher standards of protection of freedom of speech (e.g. US, Iceland, etc.). Putting pressure, at national level, on serious mainstream

⁹⁹ *Nebraska Association v. Stuart*, *ibid.*, at 730.

media,¹⁰⁰ such as the Guardian – one of the most respectable newspapers in the world – discourages responsible journalism and leaves the initiative and treatment of disclosed state-held information to foreign media and internet leaks. In such circumstances, the danger of manipulation of state secrets is considerable.

The role of mainstream media can be safeguarded and guaranteed by improving the legal standards of freedom of speech and of the media. Such standards emerge in individual legal challenges invoking human rights requirements and standards of constitutional review under the HRA 1998. Although the OSA 1989 restricts freedom of speech in the context of confidential state-held information, such as secret surveillance, the standards of constitutional review for the protection of human rights are also implied. However, although the standards and safeguards of constitutional review are known and have been and are applied consistently in accordance with the principles of the ECHR case-law, in the particular context of state secrets, as covered by the OSA 1989, including secret surveillance, there has been a deviation from the constant constitutional practice in the Supreme Court's judgment in *R v Shayler*, which remains the most authoritative case in the context concerned. In order to better protect freedom of speech and the media, a different approach should be taken to (re)assert the rules and standards of constitutional review as such in the context of state secrets, since it is that review which can guarantee a higher standard of protection of the media.

The analysis in previous sections has shown that in human rights case-law, the constitutional review starts from a double protection of freedom of speech that reflects a very high standard of protection of political speech and of the media, with each of these standards being considered alone and in combination. Speech that is political, covering also issues of public interest, is revered in case-law and the media's involvement is seen as providing the essential public platform that enables the participation of interested individuals in public debates, hence, the judicial recognition of the media as a 'public watchdog'. In technical, legal terms, a semi-absolute protection of freedom of speech transpires in such a context when a fair balance of competing interests is examined at the proportionality stage of constitutional review.

However, the deviation from the entrenched standards of constitutional review that occurred in *Shayler* has had a negative impact on freedom of speech in the context of confidential state-held information (e.g. secret surveillance) that is covered by the OSA 1989. With reference to that case, certain issues remain problematic: In particular, the damage that media publications cause to national security or to crime prevention operations does not suffice per se to limit freedom of speech. This is because the norms of constitutional review require that the opposing interest, that is freedom of speech and of the media, is an indispensable part of the proportionality assessment which categorically requires an evaluation and a fair balance of

¹⁰⁰ Auletta, note 44. See also the description of the Guardian's mainstream status by Wikileaks' founder, Julian Assange, in his article, 'How 'The Guardian' Milked Edward Snowden's Story' *Newsweek* (NY, 20 April 15): 'In recent years, we have seen The Guardian consult itself into cinematic history—in the Jason Bourne films and others—as a hip, ultra-modern, intensely British newspaper with a progressive edge, a charmingly befuddled giant of investigative journalism with a cast-iron spine.' <http://europe.newsweek.com/assange-how-guardian-milked-edward-snowdens-story-323480?utm_source=social&utm_medium=twitter&utm_campaign=/assange-how-guardian-milked-edward-snowdens-story-323480>.

competing interests involved. In practice, this means that even if the Guardian's publication may have caused some damage to the national security services, this finding alone cannot limit the right to freedom of speech. For constitutional review to be possible, or put it another way, for a constitutional review to be such, the value and importance of speech in the circumstances concerned must always be evaluated.

Moving beyond the Supreme Court's restrictive approach, the constitutional review, as has long been entrenched in ECHR and national jurisprudence (but regrettably not in *Shayler*), undertakes the evaluation of speech by looking at the nature, content and seriousness of the matter that is communicated to the public, including considerations of the right of the public to receive the relevant information. Where the publication concerns an issue of public interest, including political issues (e.g. the oversight of security services, the trade-off between crime prevention and right to privacy, abuses of secret surveillance, incl. non-compliance with surveillance laws, the collection or transfer of personal data to foreign agencies, etc.), a semi-absolute standard of freedom of speech is affirmed and constantly reiterated in ECHR case-law. In this respect, damage to national security or crime prevention operations, which would otherwise suffice to engage the liability of the media under the OSA 1989, taken alone, may not justify a limitation to speech that deals with matters of public interest, when the standards of constitutional review apply in addition to the provisions of the OSA 1989. As the ECHR case-law has clarified in the *Sunday Times* case, the damage that newspaper articles may cause does not change the fact that the information and comments presented in the publication concerned do 'not cease to be a matter of public interest'.¹⁰¹

Setting a very high standard of protection of freedom of speech where issues of public interest are concerned means that media publications may not be restricted or punished with evidence of some damage alone. Since a very high standard of protection of such type of speech has been recognised, which is considerably reinforced when the media are involved, it follows that the question of damage becomes pertinent only where a very serious harm to national interests can be shown. A very high standard of free speech has also been secured in the US, since the SCOTUS judgment in *Pentagon Papers* case which was set – remarkably – during wartime. The US standard does not simply confirm the known position to constitutional lawyers that freedom of speech and of the media are strongly protected in the US due to the high standard set in US constitutional review but, more practically, shows its market relevance in global communications. In the digital age (esp. post-Wikileaks), confidential state-held information, such as that concerning the mass surveillance programmes of security services (e.g. NSA's PRISM; GCQH's TEMPORA), can easily be leaked on the internet, usually in bulk, or end up in foreign (e.g. US, Icelandic) media which are subject to higher standards of protection of free speech – both markets being beyond state's jurisdiction. In such circumstances, the damage to national security may increase considerably due to the perceivable risk of manipulation of confidential information. Since the role of domestic media is indispensable for the functioning of a democratic state and for the public's participation in the matters that concern them, it is imperative that the work of serious media organisations, such as the Guardian, be protected.

¹⁰¹ Note 74.

For this purpose, a higher standard of protection of free speech must be set and guaranteed in constitutional review in the context of disclosure of official secrets when important issues of public interest are involved.