THE UNIVERSITY OF HULL

Deposit of thesis in the University Library

Name:

Department / Programme:

Degree:

I **Dimitrios Kagiaros** hereby give consent that appropriate copies of my thesis **Whistleblowing and democratic governance: Public Interest limitation in Security and Intelligence** if accepted for the degree of **PhD** (e.g. PhD, MPhil) in the University of Hull and thereafter deposited in the University Library and the University's digital repository will be made available for University and public access as follows:

1. the paper copy shall be available for consultation, interlibrary loan and photocopying;
2. the electronic copy shall be made available for access by any person or institution via the world wide web. Please provide a copy of the final, examined version, on CD-Rom.

I do not require my thesis to be withheld from general access ☐

Signature:

If in special circumstances, the author wishes to withhold this consent for ***a period of not more than five years*** from the date of the degree being awarded, and if for similar reasons he or she does not wish details of the thesis to be presented via the University Library's catalogues or repository or forwarded to any indexing or abstracting organisation, he or she should complete and sign sections (1) and (2) below, as appropriate.

(1) I wish access to my thesis to be withheld until 2020 for the following reason **Publication purposes**

Signature: **Dimitrios Kagiaros** Date: **13/01/2015**

(2) I further wish that full details of the title and subject of my thesis are not to be presented via the University Library's catalogue or repository or forwarded to any indexing or abstracting organisation until _____ for the following reason _____

Signature: _____ Date: _____

PROPER PROCESSING OF THE THESIS FOR ITS LONG-TERM MANAGEMENT CANNOT TAKE PLACE UNTIL THIS FORM HAS BEEN COMPLETED AND RETURNED. IF NO FORM IS RETURNED TO THE GRADUATE SCHOOL WITHIN 2 MONTHS OF SUBMITTING THE THESIS, IT WILL BE ASSUMED THAT THE AUTHOR CONSENTS TO THE THESIS BEING MADE AVAILABLE

THE UNIVERSITY OF HULL

Whistleblowing and democratic governance: Public Interest limitations in Security and Intelligence

being a Thesis submitted for the Degree of Philosophy Doctorate
in the University of Hull

by

Dimitrios Kagiaros LLB(Athens), LLM (Brunel)

January 2015

Acknowledgments

I would like to express my sincere and immense gratitude to the principle supervisor of this project, Professor Patrick Birkinshaw, whose unfaltering support, patience, advice and guidance were invaluable to the completion of the thesis. Similarly, I am indebted to my secondary supervisors, Dr. Marton Varju and Dr. Martina Kunnecke, for their immeasurable assistance throughout these past three years. Special thanks are also due to the team at the University of Hull Graduate School and Law School administration departments for administrative support and continuous assistance. Finally, I am grateful to the various heads of Postgraduate Research Studies, who for the past three years have worked diligently to ensure that the experience of being a research student at Hull was exciting, intellectually stimulating and ultimately unforgettable.

Contents

Introduction

Scope and originality of the thesis

As Prados asserts "intelligence work is about secrets".[1] Whether this involves gaining access to enemies' secrets or conversely keeping one's own secrets from adversaries, the intelligence world heavily relies and thrives on the concealment of information. This 'sine qua non' nature of secrecy in the services has been interpreted in the UK as a limitless and lifelong duty of confidentiality of the intelligence official, who is barred from disclosing any information relating to his or her work for these institutions.[2] Such disclosures are interpreted as being a grave national security threat regardless of their content[3] and are penalised under criminal law. Withholding information from the public relating to the methods and process of intelligence collection, the intelligence material itself and the identities of those involved in intelligence related employment is a necessary component of the work the Services are expected to perform.[4] However, legislation as it stands today would also deal with whistleblowing in the services as a form of criminal activity.

---

[1] Theoharis et al. (ed.), *The Central Intelligence Agency: security under scrutiny* (Greenwood Press, 2006) 121.
[2] Official Secrets Act 1989 s.1.
[3] *R. v Shayler* [2002] UKHL 11 [84] and [85] per Lord Hope.
[4] The duties of the Services are outlined in the Security Service Act 1989 and Intelligence Services Act 1994.

Whistleblowers, individuals who notify authorities or the public at large about instances of abuses of power, misconduct and wrongdoing[5] have begun to enjoy protection from retaliation through employment related sanctions and criminal prosecutions, in recognition of the fact that in certain cases, the public interest in accessing certain information can override a legally binding duty of confidentiality.[6] Whistleblower protection has been implemented in the UK through the Public Interest Disclosure Act (1998), to protect individuals who speak up about misconduct they have uncovered from retaliatory action. Individuals however, who are employed by the services or are considered notified individuals under s1 of the Official Secrets Act 1989 (OSA 1989) do not enjoy protection under such whistleblower protection instruments.[7]

The project will argue that whistleblower protection should be extended to include members of the security and intelligence community. It will do this by questioning the compatibility of the OSA 1989, which is the statute barring intelligence officials from proceeding to disclosures of information,

---

[5] Whistleblowing is 'the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers'. International Labour Organisation, 'ILO Thesaurus', http://www.ilo.org/thesaurus/defaulten.asp accessed 12 December 2014. Transparency International defines whistleblowing as 'the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action'. Transparency International, 'International Principles for Whistleblower Legislation', Report published 5 November 2013, available at http://www.transparency.org/whatwedo/pub/international_principles_for_whistleblower_legislation accessed 12 December 2014. See also OECD, 'G20 Anti-corruption action plan: Protection for Whistleblowers, Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation (2011)' http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf accessed 12 December 2014 and Lewis D., *A global approach to public interest disclosure: What can we learn from existing whistleblowing legislation and research?* (Edward Elgar, 2010).

[6] *Guja v Moldova* (App. No. 14277/04, 12 February 2008).

[7] The PIDA 1998 does not protect diclosures where "the person making the disclosure commits an offence by making it". Employment Rights Act 1996 s43B (3).

with freedom of expression as it is protected in the Council of Europe under Article 10 of the European Convention on Human Rights (ECHR).

Free speech under UK law in the post Human Rights Act 1998 (HRA 1998) era, is largely informed by Article 10 of the ECHR and the case law of the European Court of Human Rights (ECtHR) which domestic courts are expected to take into account when deciding on cases that involve human rights.[8]

Article 10 of the convention provides that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to *receive and impart information* and ideas without interference by public authority and regardless of frontiers.[9]

Freedom of expression in not an absolute right and as the convention provides:

> The exercise of these freedoms, since it carries with it *duties and responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of

[8] Foster S., 'Are we becoming afraid of free speech?' (2013) 18 *Coventry Law Journal* 92, 93.
[9] Council of Europe, European Convention on Human Rights and its Five Protocols (1950) Article 10 emphasis added.

> national security, [...] [and] for preventing the disclosure of information received in confidence...[10]

The employees of the Security and Intelligence Community that the thesis will be focusing on, are those who work for the Secret Service (or MI5), which is responsible for protecting internal national security,[11] the Secret Intelligence Service (SIS or as it is commonly referred to MI6), an agency that collects secret intelligence and mounts covert operations overseas in support of British interests[12] and the Government Communication Headquarters (GCHQ) based in Cheltenham which deals with interception of communications and analysis of signals.[13]

The project's aim to examine the compatibility of an absolute ban on disclosures for members of the services with freedom of expression as it is protected under Article 10 of the ECHR, is far from an original proposition. When the OSA 1911 was amended in 1989, there was extended discussion in legal scholarship questioning whether a lack of a public interest defence in the act for individuals speaking out against wrongdoing would be an undue restriction on their free speech rights.[14]

This question of compatibility was seemingly resolved in the case of *Shayler*, where the Law Lords found the Act to be compatible with free

[10] Ibid at 10(2) emphasis added.
[11] Security Service, 'What we Do' https://www.mi5.gov.uk/home/about-us/what-we-do/protecting-national-security.html accessed 12 December 2014.
[12] Secret Intelligence Service, 'What we Do' <https://www.sis.gov.uk/about-us/what-we-do.html> accessed 12 December 2014.
[13] GCHQ, 'What we Do' http://www.gchq.gov.uk/Pages/GCH-Who.aspx accessed 12 December 2014.
[14] See for instance, Birkinshaw P., *Reforming the Secret State* (Open University Press, 1990) and Palmer S., 'Tightening Secrecy Law: the Official Secrets Act 1989' [1990] *Public Law* 243.

speech. The Law Lords argued that security and intelligence officials have special duties and responsibilities under free speech which justify higher demands for secrecy.[15] They also cited Strasbourg case law which has long held that information relation to security and intelligence can be legitimately withheld from the public.[16] However, the Law Lords had to justify why disclosures of information relating to wrongdoing, that were in the public interest and not damaging to national security or other state interests, should also be suppressed. In response to this problem, Lord Bingham argued that if an individual employed in the services has concerns relating to his or her work, they could turn to internal mechanisms and raise awareness on potential wrongdoing.[17] If a concerned individual was refused authorisation to disclose information, they could seek judicial review of the decision not to disclose. The Law Lords went on to stress that the trust between members of the services in their dealings between them dictated the blanket ban on external disclosures which in their interpretation was not an illegitimate free speech restriction.[18]

This seemed to settle the issue and although there have been voices questioning aspects of the *Shayler* decision,[19] there has been little mention in the literature of how the evolution of whistleblower protection in the

---

[15] *Shayler* at [95].
[16] *Esbester v. United Kingdom* (App. No. 18601/91, Commission decision of 2 April 1993), *Murray v United Kingdom* (App. No. 14310/88, 28 October 1994), *Vereniging Weekblad Bluf v. The Netherlands* (App. No. 16616/90, 9 February 1995), *Telegraaf Media Nederland and others v. Netherlands* (App. No. 39315/06, 22 November 2012).
[17] *Shayler* at [26] and [27] per Lord Bingham.
[18] *Shayler* at [41].
[19] See Feldman D., *Civil liberties and Human Rights in England and Wales* (2nd ed Oxford University Press 2002) 891, Wadham J., 'Official Secrets Act: at last a right to disclose for spooks?' (2002) 152 *New Law Journal* 556, Bailin A., 'The last cold war statute' (2008) 8 *Criminal Law Review* 625, Fenwick Helen, *Civil Liberties and Human Rights* (Routledge – Cavendish, 2007) 597, Elliott M. and Thomas R., *Public Law* (Oxford University Press, 2014) 778.

Council of Europe, could call for a reassessment of the OSA 1989 and cast the arguments employed in *Shayler* under a new light. Therein lies the original contribution that the project aims to achieve. In light of recent high profile whistleblowing cases and developments on an international and regional level in whistleblower protection, the 13 years since the *Shayler* decision have provided a new perspective on whistleblowers' free speech rights. This central argument however, of extending whistleblower protection to Intelligence officials also raises many original problems that the project has to tackle. If the thesis simply aimed to chart the evolution of whistleblower protection through free speech and apply it to members of the Services, it would provide little insight into the complex issues of secrecy, national security and free speech that are at the heart of the issue at hand.

The project would therefore have to provide further analysis and answers firstly as to why current accountability mechanisms of the Services are insufficient. In the past few years, the democratic oversight of the Services has improved significantly with the introduction of bodies and committees that have been established with the mandate of ensuring the Services remain within their remit. This could mean that whistleblowers as an added accountability mechanism would be redundant, as instances of wrongdoing that needed to be reported to the public, would effectively be dealt with through existing oversight arrangements. The project therefore has to examine what the contribution of whistleblowing would be in this framework by examining why whistleblowers should remain an important part of the equation in keeping the services accountable.

interpretation of the prohibited act of disclosing information can have any effect on the perceptions of whistleblowers in the courts and under the law.

The thesis will call for a reassessment of the OSA 1989 and argue that restrictions to disclosures without a damage test or a public interest defence being included in the law, which would result in severe penalties for members of the services revealing wrongdoing, constitute a free speech violation.

Before proceeding to a detailed examination of this proposition however, it is necessary to state three important qualifications stemming from the use of ECHR freedom of expression standards as the main argument against the OSA 1989 in its current form.

The first qualification relates to the relationship between the Convention and the UK. The Human Rights Act 1998 gave effect to ECHR rights in UK law and requires courts to "read and give effect to legislation in a way that is compatible with the Convention rights".[22] The HRA 1998 provides that "when a legislative provision cannot be interpreted compatibly with a Convention right, certain courts may issue a declaration of incompatibility".[23] This, however, falls short of allowing courts to strike down laws that contradict the Convention. While the British constitution does not impose absolute limits on the authority of lawmakers,[24] by allowing courts to invalidate'unconstitutional' laws for instance, judges

[22] Human Rights Act 1998, s.3
[23] Ibid at s4.
[24] Elliott and Thomas at 16.

have implied that laws that offend the most fundamental of constitutional values would be met with resistance from the judiciary.[25] The existence of the Human Rights Act 1998, allows for Courts to find laws incompatible with the Convention and this in turn can prompt Parliament to repeal Acts. Thus the courts in the British constitutional order, can use the HRA 1998 "to warn parliament, but not to override it".[26] Furthermore, the thesis extensively relies on arguments emanating from the case law of the European Court of Human Rights. While these are not binding for UK judges, they "will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber".[27]

The second qualification relates to the use of ECHR standards and arguments in the thesis, at a time when the relationship between the ECHR, the ECtHR and the UK are particularly strained. Following the *Hirst*[28] judgment and Lord Hoffmann's public disapproval of the Court,[29] the very legitimacy of ECHR standards is currently under question, with calls for the UK to withdraw from the Convention system in its entirety. The thesis, however, aims to present the standards that have developed and call for a reassessment of the role of the national security whistleblower in the UK

---

[25] Ibid at 13.
[26] Anderson D., 'Shielding the compass: how to fight terrorism without defeating the law' (2013) 3 *European Human Rights Law Review* 233, 245.
[27] *R. v Secretary of State for the Home Department Ex Parte Anderson* [2002] UKHL 46 [18] per Lord Bingham.
[28] *Hirst v UK (No2)* (App. No. 74025/01, 6 October 2005).
[29] Lord Hoffmann, 'The Universality of Human Rights' (19 March 2009) Judicial Studies Board Annual Lecture available at http://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf . accessed 7 December 2014. Lord Justice Laws also argued that "the Strasbourg case law is not part of the law of England" in Lord Justice Laws, 'The Common Law and Europe' Hamlyn Lectures 27 November 2013 at [37]. For a similar critique of the Court see Lord Sumption, 'The Limits of Law' available at https://www.supremecourt.uk/docs/speech-131120.pdf accessed 7 December 2014.

security and intelligence context. It is therefore out of the scope of the thesis to engage in a discussion of whether ECHR standards still make convincing arguments for policy change in the UK, at a time of crisis and distrust directed towards the entire Convention system. Until there is a legal challenge to the current arrangement, if the HRA is repealed for instance, the thesis will work under the presumption that ECHR standards continue to create obligations under international law for all contracting parties to the Convention.

The final qualification relates to the use of Article 10 as an argument to extend whistleblower protection under the OSA 1989. One could argue that freedom of expression has an important role to play in relation to whistleblowing; however, this is limited to the protection of the press disseminating the information, and not the original source, the leaker of the information.[30] While the protection of journalistic sources is a vital component of press freedom, whether a whistleblower should be punished or not is, as some would argue, *not* a free speech issue but relates more to the protection of public interest disclosures. The thesis' submission, however, is that freedom of expression is central to the argument at hand. The ever-increasing ECtHR case law on freedom of expression and whistleblowing,[31] which now includes a case of an intelligence official enjoying Article 10 protection for disclosing illegal surveillance,[32] demonstrates that retaliation against good faith whistleblowers for public interest disclosures constitutes a freedom of expression violation. Thus, the

[30] *Goodwin v UK* (App. No. 17488/90, 27 March 1996).
[31] This will be examined in detail throughout the thesis.
[32] *Bucur and Toma v Romania* (App. No 40238/02, 8 April 2013).

whistleblower does not need to remain an 'anonymous journalistic source' to enjoy Convention protection, but has, independently of the press, a valid free speech claim against reprisals.

Structure

The main argument will be presented in two parts. The first part will focus on the regulation of secrecy in the security and intelligence community and examine the 'mainstream' accountability mechanisms that have been established to ensure that secrecy is not abused and the services remain within their remit. This part will require doctrinal analysis of the legal framework in the area of secrecy and national security. The research will be library based and include analysis of legislation, court decisions on access to information and national security as well as official reports of the Intelligence and Security Committee and the Joint Intelligence Committee.

The second part will discuss leaking and whistleblowing as a means of achieving accountability in an organisation. It will examine the evolution of whistleblower protection through freedom of expression on an international (United Nations) and regional level (Council of Europe) and analyse whether this could be applied to members of the security and intelligence community in light of the special duties and responsibilities such individuals have under free speech. It will seek to identify how the public interest functions as a prerequisite for disclosures to be protected, and argue that the lack of a uniformly accepted definition of the public interest as well as judicial reluctance to question state assertions on the public interest,

especially in relation to disclosures that affect national security, can be a serious obstacle to the effective protection of whistleblowers from the services. The final chapter of the thesis will examine whether whistlebowing in the Services can be viewed as a form of civil disobedience and analyse what the possible legal consequences of this statement may be. The main focus of the research in this part will be the case law of the ECtHR, resolutions and recommendations from the Council of Europe, Conventions and reports on the UN level relating to whistleblower protection.

Part 1: The Regulation of Secrecy and Accountability in the Intelligence and Security Community in the UK

Chapter One aims to provide the background in relation to the role of state secrecy in a modern liberal democracy. It will examine how limits are set to excessive state secrecy in the Council of Europe (COE) level, that has in recent years been at the forefront of the attempt to build a coherent framework on how the disclosure of government held information should take place. The chapter will examine the case law of the ECtHR as well as Recommendations and Resolutions of the COE pertaining to state secrets and the right of access to information. The chapter will then proceed to discuss the all-encompassing nature of state secrecy that was the cornerstone of public life in the UK. It will critically examine the history of secrecy both in the UK services but also, more broadly, in the British state, and assess how the concept has evolved from an indiscriminate ban of access to state held information, to today's system of clear classification rules and the Freedom of Information Act 2000. This will set the stage for a

discussion on the OSA 1989. Understanding the nature of state secrecy at the time the OSA amended will provide valuable insight into the justifications for amending the Act to its current form.

The second chapter aims to chart the evolution of official secrecy legislation with the main focus being on the Official Secrets Act 1911 and the amendments made in 1989. It will examine how the need for secrecy in the Services has been translated into legislation that makes it a criminal offence for current and former members of the Services and 'notified persons' under the act to proceed to external disclosures of information. This will include analysis as to the reasons that a damage test or a public interest defence were not included in the OSA 1989 for this class of individuals. This results in a situation where the prosecution, when attempting to secure a conviction for a services' whistleblower, will not have to prove that there was some damage or harm caused by the disclosures to state interests or national security, and in turn this ensures that the whistleblower cannot argue that the public interest in disclosing the information outweighs the public interest in keeping it secret.

When arguing for whistleblowing in the services however, it is important to discuss why mainstream accountability mechanisms, that are usually in the form of committees or other oversight bodies, do not suffice and have their limitations in addressing instances of misconduct. The third chapter will therefore delve into how democratic oversight of the services is achieved and highlight the conundrum that inevitably arises when trying to systemise procedures for openness and accountability in institutions that by definition

are meant to function covertly. In attempting to build effective mechanisms that can regulate and guarantee the accountability of intelligence agencies, it is therefore important to resolve a number of important issues, namely to whom agencies will be accountable and for which of their activities.[33]

The chapter will begin by looking at the Security Services Act 1989 which was the first statute in the long history of the agencies to make an attempt to regulate their activities within a coherent framework. The chapter will then focus on the Intelligence Services Act of 1994 which established the most important body in relation to the accountability of the services, the Intelligence and Security Committee (ISC). It is comprised of nine parliamentarians from both houses and reports annually to the Prime minister who in turn submits the report to Parliament after necessary redactions for security purposes. The chapter will analyse their powers and by examining their annual reports, showcase strengths and noticeable weaknesses of this mechanism, many of which were recently addressed when the Justice and Security Act 2013 was passed. The chapter will argue that although the Justice and Security Act was a significant step in the right direction, it does not succeed in limiting governmental control over the ISC. The effectiveness of the Intelligence Services Commissioner and the Interception of Communications Commissioner, whose powers were broadened under the Act, is also questionable and will be addressed in this chapter.

[33] Leigh I, 'More closely watching the spies: Three decades of experiences' in Born, Johnson and Leigh (ed.), *Who's watching the Spies : Establishing Intelligence Service Accountability* (Potomac Books 2005) 7.

The discussion of existing oversight arrangements in the Services, will serve as a link to discuss whether a whistleblower can be justified to proceed to external disclosures of allegations of wrongdoing as a means of last resort. Thus the subsequent chapter will tackle the issue of whether the existence of internal mechanisms in the Services for individuals who uncover wrongdoing to raise concern mentioned in the *Shayler* judgment, suffice to justify an absolute ban on external disclosures.

Chapter four will therefore aim to deconstruct the main argument that is commonly employed to defend the blanket prohibition on external disclosures the OSA 1989 provides for. The Law Lords argued in *Shayler* that the existence of a great number of internal mechanisms in the services that could be approached by employees with concerns about misconduct and could ensure that such issues could be addressed, meant that the unmitigated ban on external disclosures was not an undue restriction on their free speech rights. This view has been reiterated by the European Court of Human rights which held that it is a principle of whistleblower protection through free speech that whistleblowers are expected to have exhausted all internal remedies if they existed and were effective, before making any information public.[34]

The chapter will delve into the recent case law of the ECtHR that has provided valuable insight on how internal mechanisms are expected to function in order to justify retaliation against the whistleblower for public disclosures. This analysis will be juxtaposed with the Law Lords' approach

[34] *Guja* at [77].

in *Shayler*. The Law Lords refused to examine the efficacy of existing arrangements for raising concern, and seemed to argue that there was an irrebuttable presumption that internal mechanisms would in all cases be the appropriate avenue for the whistleblower to notify his or her superiors of suspicious conduct in the Services.

The chapter will examine these internal mechanisms in depth and argue that there is very little concrete information on how they function, the number of complaints they receive and how these are dealt with. It will argue that existing mechanisms are not independent of the line management chain, members of the services are inadequately informed about them and it is doubtful that they will not automatically follow the official government line, especially when they are asked to address wrongdoing that originates in the top echelons of the institution. Finally, the chapter will argue that the nature of certain disclosures can only reach its full potential to keep the services accountable and address instances of wrongdoing if the disclosure is made under media and public pressure.

Part 2 : Leaking and Whistleblowing in the UK Services

After setting the groundwork by examining the requirement for secrecy in the services, the way secrecy is regulated through the OSA 1989 and the mainstream accountability mechanisms in the form of oversight bodies and internal mechanisms that employees can use to raise concern, the project will look to address what the contribution of whistleblowing can be to the current framework.

Chapter five will provide the theoretical background to the concept of whistleblowing. It will begin by examining why there is a need to protect whistleblowers by presenting and analysing the forms of retaliation that whistleblowers face. This will call for an important question to be answered. Why are whistleblowers worthy of special protection? Is whistleblowing an acceptable behaviour, an acceptable means to achieve accountability for wrongdoing in an institution? In order to respond to this conundrum the paper will present and critically assess scholarship on whistleblowing. The practice of 'blowing the whistle' is viewed in the literature as a tension between the duty of loyalty an employee has to their organisation or institution, and the ethical duty to tell the truth and inform the public of instances of wrongdoing. Depending on which duty one places more weight, whistleblowing can be viewed as a form of treasonous conduct or an act of extreme bravery. Thus the whistleblower is required to weigh these conflicting duties, and proceed to a disclosure when he or she is convinced that the importance of the information that is disclosed overrides the duty of loyalty. The chapter will question this approach and argue that gross misconduct within an institution can to a great degree invalidate the duty of loyalty, especially if the institution in question is a public authority that is meant to serve the public interest. Thus, if no other mechanisms exist to remedy the situation, the whistleblower can be justified to proceed to public disclosures.

Chapter six will chart the evolution of whistleblower protection under free speech. It will look into the views found in legal scholarship on the issue

and also analyse primary sources, United Nations and Council of Europe resolutions and recommendations as well as case law of the ECtHR. Free speech has been the main tool employed under human rights law to protect individuals in the public and private sector that disclose information on corruption, abuses of power, illegal or criminal activities and danger to the environment or the health and safety of individuals. Freedom of expression has protected such individuals from reprisals including "non-promotion, demotion, being transferred, harassed or subjected to any other disadvantage".[35] On the UN level, the chapter will look into whistleblower protection as this has been expressed through reports of the Rapporteur on freedom of opinion and expression, the UN Convention against Corruption (2003) and Human Rights Council resolutions that have also focused on whistleblowers employed by the services in cases where grave human rights violations are concerned. The chapter will then turn to the Council of Europe and analyse Parliamentary Assembly resolutions which prompt state parties to review their legislation regarding whistleblowers and suggest a framework for whistleblower protection instruments. Finally, the chapter will also delve into the ECtHR case law to identify the progression which led to the recognition that retaliation against whistleblowers who release information in the public interest constitutes an Article 10 violation.

The following chapter will identify the problems that arise when attempting to apply this framework to the UK context. Although the HRA 1998 has emboldened courts to require more rigorous justification for measures that affect human rights in the name of national security, it is questionable

[35] Mayne S., 'Whistleblowing: protection at last' (1999) 10 *International Company and Commercial Law Review* 325, 329.

whether in issues that relate to the intelligence community, they would be able to effectively disregard government assertions that in a specific leaking case, the public interest in security outweighed the public interest in publicising the information. In light of recent developments, where justice can be secret to protect national security,[36] could a public interest defence in the OSA 1989 for disclosures by members of the Services be a viable and realistic solution to the issue at hand?

The thesis will attempt in the following chapter to examine the viability of an amendment to the OSA 1989. Which are the possible avenues for the Act to be amended for it to be compatible with the ECHR standards, but also to ensure that security is protected? In essence, how can the proportionality of a measure against a services whistleblower be assessed? How can the law and the courts balance the public interest in disclosure with the public interest in security?

This is what the thesis aims to explore in chapter eight, how the OSA 1989 can incorporate this balancing exercise in order to protect whistleblowers and thus secure the its compatibility with freedom speech standards on the one hand, while ensuring that national security will not be compromised on the other. The thesis identifies three possible avenues for this public interest exercise to be included in the law.

The first approach, the one currently favoured by the OSA 1989, considers public disclosures, to the media for instance, as incompatible with the role

[36] Justice and Security Act 2013.

of the intelligence official. It thus altogether disposes of the balancing exercise between the interest in disclosure of the specific information and national security. Consequently, this approach does not require proof of damage to security interests in order to justify retaliation against the whistleblower. In order to ensure the compatibility of such a law with emerging COE freedom of expression standards, the thesis has argued that a robust system that would permit internal disclosures to official mechanisms of raising concern would be required. If these mechanisms were genuinely independent of the line management chain and could ensure that individuals approaching them would be protected and that their concerns would be effectively addressed, free speech restrictions to public whistleblowers could be justified. The thesis has argued however, that such internal mechanisms have their inherent limitations and the COE standards allow for public disclosures even when such mechanisms exist in specific circumstances that will be examined in detail. Thus, an absolute ban on external reporting would be difficult to reconcile with ECHR freedom of expression standards.

The second approach would be for the law to include a rebuttable presumption that public disclosures from intelligence officials are damaging to national security. If the whistleblower however, was able to prove that as a means of last resort, the interest in publicly disclosing the information outweighed security concerns, protection would be provided. While this approach would require an *ad hoc* assessment of whether any freedom of expression restrictions the whistleblower experienced were justified based on the damage caused by the disclosure, the lack of a definition as to what

would constitute wrongdoing could result in 'opening the floodgates' and allowing overzealous intelligence sector employees to make assessments on particularly sensitive national security issues, thus 'usurping' the role of their superiors. If the intelligence official's duty of confidentiality was 'conditional' in this sense, the intelligence services would not be able to function effectively, and whistleblowers would face the risk that their own interpretation of the public interest, a notoriously nebulous concept, would not be confirmed by the courts. It is also questionable whether the courts themselves would be able to make such a balancing exercise in an open hearing, thus perhaps requiring an additional level of secrecy in the process which would create further complications.

The final approach includes specific definitions or categories of wrongdoing that would allow the whistleblower to proceed to public disclosures as a means of last resort, either in the form of specific exemptions to secrecy or as categories of protected disclosures in a whistleblower protection instrument. This approach, allows whistleblowers a greater degree of certainty that their disclosures will be protected and ensures that they will not proceed to arbitrary public interest assessments. However, this has the drawback that whistleblower protection becomes conditional on the 'generosity' of lawmakers in their interpretation of the public interest in the law. Therefore, if lawmakers follow a particularly narrow approach, there is danger that whistleblowers' free speech rights will not be upheld. Furthermore, the lack of consensus on the international level as to which specific disclosures would be deemed important enough to outweigh national security concerns and allow for public disclosures as a means of

last resort, would make the implementation of such a system questionable as to its feasibility in the security sector. However, the chapter will conclude that this approach offers the most reasonable solution to the issue at hand, and along with strengthened regional standards on whistleblower protection and vigilance on behalf of the judiciary, would provide concrete protection to whistleblowers while ensuring that security concerns are adequately addressed.

A pressing question that remains in this discussion however, is what the status of the security and intelligence whistleblower is under the current OSA 1989 framework. Since a freedom of expression right in revealing wrongdoing was rejected in the UK by the House of Lords, a public interest defence is disallowed and a defence of duress or necessity is highly questionable as to its efficacy in ensuring the whistleblower will be acquitted, does this mean that the services whistleblower is to be perceived as a common criminal?

Chapter nine will argue that due to the fact that disclosing information on wrongdoing is a conscientiously motivated act, where the whistleblower aims to express that he or she is compelled to speak out on activities that are harmful or illegal even if speaking out contravenes the law, whistleblowing in this context can be seen as a form of civil disobedience. The whistleblower in such cases accepts that he or she is likely to be punished but decides to speak out due to a commitment to moral and democratic values that would not allow him or her to remain silent.

Ideas relating to civil disobedience and human rights were an important part of legal discourse during the 1960's and 1970's during the US civil rights movement, but have seemed to regain prominence and are used as a means to describe new forms of protest and actions of breaking the law. The term was used as a means to explain and justify the many 'Occupy Movements' in the US and elsewhere and was also part of the discussion for the actions of Chelsea Manning and Edward Snowden.[37] After presenting the literature on civil disobedience, the chapter will apply it to unauthorised disclosures in the public interest. By looking at more recent interpretations of disobedience, the chapter will argue that the disobedient individual can be seen as enacting a legitimate human right and using the act of disobedience as a means to ask for a re-evaluation of the law based on a 'plausible interpretation' of a human rights standard that differs from the official interpretation. The third part will highlight the practical implications that claims of disobedience can have in the context of the UK judiciary. It will examine the response the Law Lords had to claims of disobedience in the context of *Jones*[38] and the contribution of the *Purdy* judgment[39].

Conclusion

Unauthorised disclosures remain a particularly controversial phenomenon that is however, unlikely to stop. The approach the OSA 1989 currently opts for, which is the non differentiation between leaks by service members that are in fact damaging, and disclosures that expose wrongdoing in the public

[37] See Scheuerman W., 'Whistleblowing as civil disobedience: The case of Edward Snowden' (2014) 40 *Philosophy & Social Criticism* 609-628.
[38] *R v Jones* [2006] UKHL 16.
[39] *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

interest, comes at the price of severely punishing individuals who at great personal cost seek to uphold the democratic values of transparency and accountability. If such individuals are discouraged from speaking out, or only provided with avenues of questionable efficacy to raise their concerns, there is a tangible risk, that information vital to the citizenry will be suppressed.

The project argues that the best way to address this, is to call for whistleblower protection for such individuals through Article 10. In 2001, when the House of Lords tackled the compatibility of official secrecy legislation with the UK's free speech obligations, there were few indications that would allow the Law Lords to interpret Article 10 in a way that could ensure robust protection for Shayler.

The intention of the thesis is to provide the arguments in favour of such protection not only on a theoretical level – by focusing on why such protection serves the ideals of a liberal democracy- but mostly by claiming that overly restrictive secrecy provisions that result in criminal prosecutions for disclosures, constitute a free speech violation. Although it is not the intention of the thesis to provide guidelines for a model secrecy legislation regime, the thesis will touch on issues of how a public interest defence could feasibly be incorporated in the OSA to ensure that the act is in compliance with free speech while at the same time indicating to potential whistleblowers which disclosures to a wider audience, and under which circumstances would be justified. The thesis will stress that strengthening mainstream accountability mechanisms and internal reporting systems is

paramount in ensuring that the services remain within their remit, however, whistleblowers should still have a role to play, when such mechanisms are intentionally bypassed or fail to produce results.

Chapter 1

Secrecy in the COE and the UK

Secrecy is not a dirty word. Secrecy is not there as a cover up. Secrecy plays a crucial part in keeping Britain safe and secure.[1]

Ian Sawers, Chief of MI6

Introduction

As Hennessy observes, secrecy is "built into the calcium of a British policymaker's bones".[2] The long tradition of secrecy in relation to government held information in Britain has been discussed extensively in the literature,[3] and is particularly prominent in relation to the policies and operations of the intelligence and security community (the services). In spite of a significant shift in the culture of secrecy in recent years, with the Freedom of Information Act 2000 providing for a presumptive right of access to information held by public authorities[4] and the pledge undertaken

[1] Sawyers J., 'Sir John Sawers's speech – full text' (guardian.co.uk, 28 October 2010) http://www.theguardian.com/uk/2010/oct/28/sir-john-sawers-speech-full-text accessed 7 December 2014.

[2] Hennessy P., *Whitehall* (Secker & Warburg, 1989) 346.

[3] See Thomas R., *Espionage and Secrecy: the Official Secrets Act 1911 – 1989 of the United Kingdom* (Routledge, 1991), Thurlow R., *The Secret State: British Internal Security in the Twentieth Century* (Wiley, 1995), Hennessy P., *The secret state preparing for the worst: 1945 – 2010* (Penguin, 2010), Hooper D., *Official Secrets: The Use and Abuse of the Act* (Martin Secker & Warburg Ltd., 1987). For a perspective on state secrecy in the US see Moynihan D., *Secrecy: the American Experience* (Yale University Press, 1998) and Snepp F., *Irreparable harm: a firsthand account of how one Agent took on the CIA in an epic battle over secrecy and free speech* (Random House, 1999).

[4] Freedom of Information Act 2000.

by David Cameron to make the UK government the most transparent ever,[5] it is safe to say that in intelligence matters, Britain remains far from a concept of "democracy as public knowledge, as a 'house of glass', exposed to the scrutiny and control of public opinion".[6]

An absolute requirement for openness, however, or a universal and unqualified access to security and intelligence related information, would create serious problems at an age where internal and external threats to security remain prominent. Furthermore, a degree of secrecy in day to day public administration, in relation to the formulation of policy or diplomatic relations for instance, is a necessity for the effective functioning of public bodies. Even whistleblower Daniel Ellsberg, the leaker behind the Pentagon Papers that revealed that the American public had been grossly misinformed in relation to the reasons that justified US intervention in Vietnam and who was perhaps the most prominent US national security whistleblower before Manning and Snowden,[7] clearly argues in favour of the idea that to suggest that "no secrets are compatible with, justified, or even required under a democracy"[8] is wholly "unrealistic"[9].

---

[5] Cameron D., 'We are creating a new era of transparency' (Telegraph.co.uk, 6 July 2011) available at http://www.telegraph.co.uk/news/politics/david-cameron/8621560/David-Cameron-We-are-creating-a-new-era-of-transparency.html accessed 7 December 2014. See also Open data White Paper: Unleashing the Potential Cm8353 (2012) and Syal R., 'David Cameron criticised for attacks on Freedom of Information Act' (guardian.co.uk, 16 July 2012) http://www.guardian.co.uk/politics/2012/jul/16/david-cameron-freedom-of-information accessed 7 December 2014.

[6] Bodei R., 'From Secrecy to transparency: Reason of state and democracy' (2011) 37 *Philosophy and Social Criticism* 889, 889.

[7] See Prados J. and Porter M. (eds), *Inside the Pentagon Papers* (University Press of Kansas, 2005).

[8] Ellsberg D., 'Secrecy and National Security Whistleblowing: Reflections on Secret-Keeping and Identity' (2010) 77 *Social Research: An International Quarterly* 773, 794.

[9] Ibid.

It is to expected therefore, that the Services remain a part of public life where information remains largely inaccessible and the executive retains a extensive powers[10] to decide which security sensitive information it will choose to publicly release. While a degree of parliamentary oversight and public accountability has been achieved by placing the services under statutory control and allowing for a committee to produce and submit to Parliament an annual report on their activities,[11] the Services retain a great degree of control in deciding which information about their inner workings will be made public.

The focus of the thesis is to examine whether the duty of secrecy of the intelligence official as it is provided for under the Official Secrets Act of 1989, should continue to allow for criminal sanctions of individuals who as a means of last resort choose to inform the public about misconduct, abuses of power and gross human rights violations perpetrated by the Services. However, before proceeding to examine in detail, how the Official Secrets Act 1989 functions and its questionable compatibility with the European Convention on Human Rights, it would be necessary to examine firstly, the standards set for state secrecy in the regional level – the Council of Europe – before proceeding to examine the background under which official secrecy developed in the British context, and the hesitance (if not outright hostility) of successive governments to the notion of openness.[12]

---

[10] These will be examined in detail in the Chapter on the accountability of the Security services,

[11] As above, the accountability of the Services and the 'mainstream' mechanisms that allow public access to certain security related information will be critically discussed in a subsequent chapter.

[12] For a discussion on openness see Birkinshaw P, 'Freedom of Information and Openness: Fundamental Human Rights?' (2006) 58 *Administrative Law Review* 177-218, Worthy B., 'The Future of Freedom of Information in the United Kingdom' (2008) 79 *The Political*

The chapter will begin by discussing how, in the past decade, the Council of Europe has been particularly active in releasing Resolutions and Recommendations pertaining to the abuse of state secrecy, national security and human rights, and accountability for actions of state agents in COE member states. The European Court of Human Rights has extensively relied on such instruments when dealing with cases of breaches to secrecy and confidentiality.[13] Using this as a starting point, the chapter will then examine how state secrecy has traditionally been perceived in the UK, and it will conclude by examining how the understanding of secrecy has evolved, by presenting the updated classification system which has come into force from April 2014 and regulates the process and reasons that will allow authorities to classify information. Although this system does not change the status of individuals covered under s1 of the OSA 1989, it provides insight into the type of information that is required to remain 'under wraps' for reasons of public interest.

Council Of Europe: Setting the Standards on State Secrecy

On the COE level, there have been a number of instruments originating from the Parliamentary Assembly that provide contracting parties to the Convention with resolutions and recommendations on how to reconcile state secrecy with the need for accessible government held information, national security considerations and unauthorised disclosures.

Quarterly 100-108 and Hood C., 'From FOI World to Wikileaks World: A New Chapter in the Transparency Story?' (2011) 24 *Governance* 635-638.

[13] Indicatively see *Stoll v Switzerland* (App. No. 69698/01, 10 December 2007) discussed below.

For the COE, information that is in the public domain, automatically cannot be considered as secret,[14] and therefore the disclosure of such information cannot be considered criminal, even if in order to disclose it "the person concerned collects, sums up, analyses or comments on such information".[15] Excluded from the veil of state secrecy according to the assembly, is also information that exposes corruption as well as "human rights violations, environmental destruction or other abuses of public authority".[16]

The COE rapporteur on issues of expression, identified three approaches on how secrecy is regulated in COE contracting parties. As he notes:

> the first consists in a short and general definition of the notion of official or state secret (or equivalent), presumably to be filled in on a case-by-case basis. The second involves lengthy and more detailed lists of specific types of classified information. The third approach combines the other two by defining general areas in which information may be classified as secret, and then relying upon subsequent administrative or ministerial decrees to fill in more specifically which types of information are in fact to be considered as secret.[17]

---

[14] COE Parliamentary Assembly, "Fair trial issues in criminal cases concerning espionage or divulging state secrets" 25 September 2006 Report by Christos Pourgourides http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=9149&Language=EN#P391_61374 [67] accessed 7 December 2014.
[15] Ibid at [10.1].
[16] Ibid.
[17] Ibid at [57].

However, the Rapporteur observes that there exists a requirement for states to be fully open as to *what* constitutes a state secret. Relying on secrecy lists that are themselves not accessible to the public, and where in essence state secrecy itself becomes a secret, is therefore a practice contrary to COE standards. This would furthermore contravene the ECHR, as any restrictions on freedom of expression due to secrecy requirements need to be to be prescribed by law, and laws interfering with rights need to be foreseeable and accessible to the public.[18] Such an approach would furthermore raise questions as to the compatibility of criminal sanctions for secrecy breaches with Article 7 of the Convention protecting the right of no punishment without law. Therefore, although states have the capacity to keep certain information secret and criminalise its unauthorised disclosure, they must clearly demarcate the areas where such a duty of confidentiality must be upheld. This means that "lists of information classified as state secrets must be publicly accessible".[19]

In the COE, national security considerations can allow for information to be suppressed. National security interests however, that justify such information restraints must be "well defined" in order to be considered "valid grounds for withholding information held by public authorities".[20] The Parliamentary Assembly also argues "information forms a crucial

[18] Harris et al., *Harris, O'Boyle & Warbrick Law Of The European Convention on Human Rights* (3rd edn., Oxford University Press, 2014) 649-651.
[19] Ibid at [66].
[20] COE Parliamentary Assembly, "National Security and Access to Information" June 2013 Report by Arcadio Diaz Tejera http://www.assembly.coe.int/Communication/pressajdoc25_2013.pdf [3] accessed 7 December 2014.

component of national security, by enabling democratic participation, sound policy formulation and public scrutiny of state action".[21]

Freedom of information laws are therefore required to be "sufficiently clear and narrowly framed"[22] in relation to the legal criteria they establish for classification. For instance, "the law should specify which individuals are authorised to classify information and that they should be traceable or identifiable from the classified document to facilitate accountability".[23]

In light of allegations of complicity of the services in human rights violations, the Parliamentary assembly responded by releasing a series of recommendations and resolutions in relation to national security, state secrecy and effective human rights protection. Recommendation 1801 (2007)[24] asked contracting parties to "ensure that information and evidence concerning the civil, criminal or political liability of the state's representatives for grave human rights violations committed are excluded from protection as state secrets"[25] and to "introduce appropriate procedures ensuring that the culprits are accountable for their actions while preserving lawful state secrecy and national security, when secrets unworthy of protection are inextricably linked with lawful state secrets".[26] Resolution 1675 (2009) urged states to ensure "that state secrecy and immunities do not prevent effective, independent and impartial investigations into serious

---

[21] Ibid
[22] Ibid at [65].
[23] Ibid
[24] Council of Europe, Recommendation 1801 (2007) on "Secret detentions and illegal transfers of detainees involving Council of Europe member states", text adopted 27 June 2007.
[25] Ibid at 3.1..
[26] Ibid at 3.2..

human rights violations".[27] This stance was later confirmed with Resolution 1838 (2011) 'On the Abuse of State Secrecy and National Security', where the Assembly stressed that national security and state secrecy cannot be employed "to shield agents of the executive from prosecution"[28] for committing grave human rights violations, while with Resolution 1954 (2013) 'On National Security and Access to Information', the Parliamentary Assembly stressed the role of judiciary and parliamentary scrutiny for addressing issues of state complicity in human rights violations.[29] Finally, Resolution 1729 (2010) 'On the Protection of Whistleblowers' urged states to codify whistleblower protection legislation that would in particular provide "protection against criminal prosecution for defamation or breach of official and business secrecy, and protection of witnesses".[30]

The European Convention on Human Rights does not directly confer a right of access to government held information, although the ECtHR has dealt with a number of cases dealing with information requests and seems to be evolving towards an interpretation of Article 10 that creates a positive obligation for states to disclose information.[31] In relation to state secrets, in the Grand Chamber judgment of *Stoll v Switzerland*,[32] the Court recognised

---

[27] Council of Europe, Resolution 1675 (2009) on 'The state of human rights in Europe: the need to eradicate impunity', text adopted 24 June 2009.
[28] Council of Europe, Resolution 1838 (2011) 'On the Abuse of State Secrecy and National Security', text adopted 6 October 2011 at [3].
[29] Council of Europe, Resolution 1954 (2013) 'On National Security and Access to Information', text adopted 2 October 2013 at [6].
[30] Council of Europe, Resolution 1729 (2010) 'On the Protection of Whistleblowers', text adopted 29 April 2010 at [6.1.3.2.].
[31] The focus has been on whether refusals to disclose breach a right to privacy or freedom of expression. See among others *Gaskin v UK* (App. No. 10454/83, 7 July 1989) at [51], *McGinley and Egan v UK* (App. No. 21825/93 23414/94 , 9 June 1998), *Guerra and others v Italy* (App. No. 14967/89 , 19 February 1998), *Sdruzeni Jihoceske Matky v Czech Republic* (App. No 19101/03, 10 July 2006), *Tarsasag v Hungary* (37374/05, 14 April 2009). The issue on whether Article 10 confers a right of access to information was central in *Kennedy v Charity Commission* [2014] UKSC 20.
[32] (App. No. 69698/01, 10 December 2007).

that "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information"[33] and observed that contracting parties to the convention had adopted "a wide variety of approaches"[34] in relation to the severity of the information disclosed or the circumstances under which it occurred, that could trigger a criminal sanction. Furthermore, the Court has accepted that security and intelligence services require a much higher degree of secrecy to function effectively than other public authorities.[35]

This need for secrecy is reflected in further restrictions to the free speech of intelligence officials who, as the Court has held, have a higher duty to maintain secrecy compared to other civil servants.[36]

However, while recognising the need for secrecy, the Court also stressed the importance of checks and balances in ensuring that the services do not overstep their boundaries and in their effort to ensure security, violate rights.[37] The relation between secrecy and individual rights is best illustrated in *Leander v Sweden,*[38] a case relating to a Marxist who was terminated from his post in a museum due to the fact that the museum was positioned

---

[33] Ibid at [155].
[34] Ibid at [44].
[35] *Vereniging Bluf Weekblad v The Netherlands* (1995) 20 EHRR 189 at [35] and [36]. The recognition that such institutions function in secrecy was further recognised in *The Sunday Times v UK (No. 2)* (App. No 13166/87, 26 November 1991), *Telegraaf Media Nederland and others v Netherlands* (App. No. 39315/06, 22 November 2012), *Segerstedt-Wiberg and Others v Sweden* (App. No. 62332/00, 6 June 2006).
[36] See indicatively *Hadjiannastassiou v Greece* (App. No. 12945/87, 16 December 1992) and the more recent case of *Pasko v Russia* (App. No. 69517/01, 22 October 2009) at [86].
[37] *Vereniging* at [32].
[38] (App. No 9248/81, 26 March 1987). See also the seminal cases of *Kennedy v UK* (App. No. 26839/05, 18 August 2010) and *Klass and others v Germany* (App. No. 5029/71, 6 September 1978).

next to a naval base and he was deemed a security risk. In this instance the Court stressed that "the law has to be sufficiently clear in its terms to give [citizens] an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life".[39] Furthermore, the Court required that:

> where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[40]

These standards, especially the ones that the Parliamentary Assembly is attempting to establish, are still in nascent form and provide a great degree of flexibility to contracting parties to the Convention to regulate state secrecy, especially in relation to he criminal sanctions that can be imposed on those who breach it. They provide an important indication however, of how secrecy laws need to be framed and the limits posed by Convention obligations to claims of secrecy and national security. In light of these it would be worthwhile at this point to examine the tradition of secrecy in the

[39] *Leander v Sweden* at [51].
[40] Ibid.

UK and recent developments relating to the classification of government held information.

UK

In the UK a democratic system of government was originally understood as a political system where the public's participation should be limited to "casting secret ballots".[41] This line of thinking asserted that matters of government were to be kept "discreet and reticent"[42] in order to ensure government efficiency. This required minimum exposure of governmental inner workings as privacy was considered a necessary component of decision-making and any publicity could potentially hinder this process.[43] As Macdonald and Jones claim, the view the British government had been following supported the idea that "state secrets should not, without due authority, be disseminated outside a closed circle until they have become sufficiently stale".[44]

This was particularly true for the security and intelligence community. From their conception, secrecy was the integral component of the policies and operations of the Services. As an early Joint Intelligence Committee report highlights, "the time for reticence about special Intelligence never expires and although from time to time reports of alleged activities in connection with Special Intelligence may be broadcast or published, it is of the utmost

[41]Birkinshaw P, 'Freedom of Information and Openness: Fundamental Human Rights?' (2006) 58 *Administrative Law Review* 177, 191.
[42] Ibid.
[43] Ibid.
[44] Macdonald J. and Jones C., *The Law of Freedom of Information* (OUP 2003) 381.

importance that complete and absolute silence on such matters should be maintained".[45]

Secrecy was in fact considered to be the "whole foundation"[46] of the Services, and it was argued that even a disclosure that may even appear to be "dull to the general reader, [can] afford valuable links to an officer of a Foreign Secret Service endeavouring to piece together our system of working",[47] and was thus discouraged. In order for this secrecy to be upheld, the services oftentimes went to extreme lengths to ensure that information would not be made public. As Aldrich describes in an interesting illustration of this, especially in the case of intercepted communications, after summaries were made of the intercepted material and circulated to Cabinet Ministers, defence chiefs and senior policy makers, they were subsequently "whisked away in 'burn bags' and consigned to vast incinerators to protect their secrecy".[48] In such an environment it is clear that upholding one's duty of secrecy is seen as an integral part of the organisational culture.

The explanation as to why the Services require secrecy to function effectively is straightforward. As former Director General of the MI5 notes,

---

[45] Moran C., *Classified: Secrecy and the State in Modern Britain* (Cambridge University Press, 2013) at pg 258 quoting JIC: general directive to chief historians for safeguarding special intelligence sources in compiling official histories 20 July 1945, TNA CAB 103/288. The central importance of secrecy in the functioning of the Services was highlighted more recently in the paper on national security strategy where it was argued that : 'Our security and intelligence agencies play a vital role in protecting our country from threats to our way of life. It is inherent in their work that most of it has to be done in secret to protect those who risk their lives for our security, and to maintain the confidence and cooperation of partners overseas'. UK Prime Minister Report to Parliament, 'A Strong Britain In an Age of Uncertainty: The National Security Strategy', October 2010 Cm7953 pg 24.

[46] Jeffery K., *MI6: The History of the Intelligence Service 1909-1949* (Bloomsbury Paperbacks, 2011) 241.

[47] Ibid.

[48] See Aldrich R., *GCHQ: The Uncensored Story of Britain's Most Secret Intelligence Agency* (Harper Press, 2011).

the Security Service is "an organisation much of whose work must remain secret. This is to protect those who share information with us and ensure that they and others will have the confidence to do so in the future, and to prevent those who seek to harm this country and its people from gaining information which might help them carry out their plans".[49] Furthermore, secrecy is necessary to protect the identities of the Services members themselves. Thus any information regarding the identities of agents for instance would be seen as hugely sensitive and be "fiercely protected by the Service, and speculation or claims about the identities of particular agents will invariably be met with an [Neither Confirm Nor Deny] response".[50]

As Andrew notes, the complete secrecy the services functioned under for their first 70 years of existence was premised on two 'dubious' constitutional principles. Firstly, intelligence was thought to be "wholly undiscussable in public – even in parliament".[51] Secondly, the prevailing view, was that when it comes to issues relating to the services, "parliament must entirely abdicate its powers in this field to the executive".[52] To understand the central, all encompassing, *sine qua non* role of secrecy in the Services, Foreign Secretary Austen Chamberlain's 1924 speech in the Commons is indicative of the culture surrounding the Services in their inception. As he stressed:

---

[49] Jonathan Evans, Foreword to Andrew C., *The Defence of the Realm: The Authorized History of MI5* (Penguin, 2010) pg 16-17.
[50] MI5 website, 'policy on Disclosure' available at https://www.mi5.gov.uk/home/mi5-history/mi5---the-authorised-centenary-history/centenary-history---policy-on-disclosure.html accessed 7 December 2014.
[51] Andrew, *The defence of the realm* at 846.
[52] Ibid

> It is of the essence of a Secret Service that it must be secret, and if you once begin disclosure it is perfectly obvious to me... that there is no longer any Secret Service and you must do without it.[53]

Such viewpoints led according to Andrew, to the "inflation of the common-sense doctrine that all intelligence operations require secrecy into the bizarre requirement that intelligence must never be mentioned at all".[54]

What secrecy means in essence in this context, is that when the government officials engage "in secret actions on behalf of the state, they generally cannot be held accountable to the people for whom they purportedly act".[55] This raises the question aptly expressed by Cole et al, "What does it mean to have a government under law if it can act in ways that are effectively immune from legal regulation?"[56] Therefore, while secrecy on the one hand is a necessary prerequisite for the effective functioning of government and to ensure that citizens are protected from external and internal threats, it also "directly undermines the representative validity of the government to the extent that it impedes citizens' ability to know what their government is doing and thereby to assess whether it is consistent with their own goals and

---

[53] Cited by Andrew C., *Defence of the realm* at 846 and *Parl. Deb. (Commons)*, 15 Dec. 1924, col. 674.
[54] Andrew, *The defence of the realm* at 846.
[55] Ibid.
[56] Cole, Fabbrini and Vedaschi (ed.), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013) Introduction by the editors.

ideals"[57]. In this respect, secrecy can become the "linchpin of abuse of power... its enabling force",[58] and transparency the only antidote.[59]

This interpretation of secrecy in the Services was the approach that was followed up until the agencies were placed under statutory control. Parliament could occasionally question the prime minister on security related issues, and he or she in turn should supply answers that, according to Prime Minister Wilson should be "regarded as uniformly uninformative".[60] To this day, it is the practice of governments regardless of their political persuasion to give a "neither confirm nor deny" response to questions about matters that are sensitive on national security grounds.[61] As the MI5 website explains "the policy mainly applies to claims or speculation relating to the activities of the security and intelligence agencies. Secrecy is essential if the agencies are to be able to perform their statutory functions effectively".[62]

This was in line with the 'Westminster System' of government which heavily relied on the concept of ministerial responsibility, instead of scrutiny through freedom of information to achieve transparency. As the 1978 White Paper on Official Secrets stated "In the British context... the policies and decisions of the executive are under constant and vigilant scrutiny by Parliament, and Ministers are directly answerable to

---

[57] Ibid.
[58] Greenwald G., *No Place to Hide: Edward Snowden, the NSA and the Surveillance State* (Hamish Hamilton, 2014) 19.
[59] Ibid.
[60] Wilson H., *Governance of Britain* (Harper & Row, 1976) Chapter 9.
[61] MI5 website, 'policy on Disclosure' available at https://www.mi5.gov.uk/home/mi5-history/mi5---the-authorised-centenary-history/centenary-history---policy-on-disclosure.html accessed 7 December 2014.
[62] Ibid.

Parliament".[63] But formal ministerial responsibility is of little consequence when the Parliament is not kept informed of details concerning the security services, and ministerial prerogative allowing ministers to refuse to answer certain questions.[64] In his book 'The Frontiers of Secrecy' Leigh pointed out there was nothing in place to force ministers to reveal information to Members of Parliament, the Press or the public.[65] As Tant has argued, British governmental practices at the time were underpinned by "elitist concepts of representation and the notion of responsible (rather than responsive) government"[66] and this was reflected in the use of agencies. Such a concept of government seeks to establish a system that will ensure its "self-perpetuation and self-defence against challenges" and therefore, is unfavourable to a more participatory direction that would strengthen access to information rights for citizens.

These high requirements for secrecy resulted in a significant delay in placing the Services under statutory control and establishing the mechanisms to ensure that they remained accountable to the public. It was not until 1985 and the period until 1996,[67] that steps were made to open up the Services to scrutiny and mechanisms responsible for accountability and their powers of oversight have not remained static since.

---

[63] Cited in Leigh D., *The frontiers of secrecy: closed government in Britain* (Junction Books, 1980) 19.
[64] Birkinshaw P., *Freedom of Information The Law, the Practice and the Ideal* (4th edn, Cambridge University Press 2010) 41 and 42.
[65] Leigh at 20.
[66] Tant A. P., '*British government the triumph of elitism : a study of the British political tradition and its major challenges* (Aldershot: Dartmouth, 1993) 247.
[67] Starmer K., 'Setting the record straight: human rights in an era of international terrorism' [2007] (2) *European Human Rights Law Review* 123, 129.

The indispensable role of secrecy in the Services is still often emphasised by those involved in intelligence work. As the Butler report found, in the Intelligence world "much ingenuity and effort is spent on making secret information difficult to acquire and hard to analyse"[68] to avoid potential disclosures and leaks that could be detrimental to the safety of the nation. The former head of MI5 Eliza Manningham-Buller concurs that secrecy is an inevitable and absolutely necessary component of intelligence collection. She stresses that "to obtain [intelligence] we have to use covert methods. We have to listen, look and follow secretly".[69] She derides calls for absolute transparency by claiming that "those who argue for a world without secrets would be less safe if their wishes were met".[70] The covert nature of the services thus requires much higher requirements for secrecy than other public authorities and therefore, unauthorised disclosures of information are viewed as extremely dangerous and irreconcilable with "the ethos of clandestine [intelligence] collection and operations".[71] Similarly, the head of the Intelligence and Security Committee, the main body responsible for keeping the Services accountable in the UK argued that the Services must remain secretive "as regards a very high proportion of their capabilities and activities"[72] and unavoidably, even their oversight must be accomplished

---

[68] Butler Report, Review of Intelligence on weapons of mass destruction, HC 898 (2003-4) at [49].
[69] Manningham – Buller E., *Securing Freedom: The Former Head of MI5 on Freedom, Intelligence, the Rule of Law, Torture and Security* (Profile Books, 2012) 39.
[70] Ibid at 55.
[71] Goldman J., *Ethics of spying: a reader for the Intelligence Professional* (Scarecrow Press, 2006) 6.
[72] Sir Malcolm Rifkind MP, lecture at Wadham College, Oxford, "Intelligence Agencies in the Internet Age: Public Servants or Public Threat?" available at http://www.wadham.ox.ac.uk/news/2014/may/intelligence-agencies-in-the-internet-age accessed 7 December 2014.
8 May 2014, last accessed 19/5/2014.

under conditions of secrecy as it "can only be exercised by people permitted to have access to the secret information that the Agencies gather".[73]

But how is information classified as secret and therefore inaccessible to the public? What triggers barring access to specific information? In October 2013, the Cabinet office released the guidelines for a system of classifying information that would replace the previous one while meeting the requirements of existing legislation and international obligations.

Classified information in the UK

The updated government security classifications system, which came into force in April 2014, allows for three types of classification, official, secret and top secret[74] and is intended to introduce a a new system "fit for the digital age".[75] This meant that the lower tiers of classified information under the previous regime, namely 'not protectively marked', 'protect', 'restricted' and 'confidential' are all incorporated into the single 'official' tier.[76] Official information, includes information relating to "routine business and services, some of which could have damaging consequences if lost, stolen or published in the media",[77] "routine international relations and diplomatic

---

[73] Ibid. See also Open Evidence Session of Security Chiefs to the ISC.

[74] Cabinet Office, Government Security Classifications 2014, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251480/Government-Security-Classifications-April-2014.pdf pg 3 accessed 7 December 2014.

[75] Minister for the Cabinet Office Francis Maude, 'Whitehall starts using simpler security classifications' available at https://www.gov.uk/government/news/whitehall-starts-using-simpler-security-classifications accessed 7 December 2014.

[76] Ministry of Defence, Industry Security Notice Number 2014/01 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300970/20140217-Industry_Security_Notice-ISN-2014-01-updated-April-2014-U.pdf pg1 accessed 7 December 2014.

[77] Government Security Classifications pg 4.

activities"[78] and "Personal information that is required to be protected under the Data Protection Act 1998".[79] The vast majority of government information, approximately 90%, will be marked as official.[80] Secret information refers to "very sensitive information that justifies heightened protective measures to defend against determined and highly capable threat actors".[81] Finally the classification of 'top secret', is reserved for information the release of which "could cause widespread loss of life or else threaten the security or economic wellbeing of the country or friendly nations".[82]

In relation to information received by foreign governments or international organisations, the new classifications system requires it to be recognised with "equivalent protections and markings"[83] and it must be handled with at least the same degree of protection as if it were UK information.[84]

The decision on the classification that will be given to a piece of information is to a great degree based on what the *consequences* would be if it were stolen or made public. It is the harm caused by disclosure therefore, that justifies the classification. Release of information classified as secret for instance would "Directly threaten an individual's life, liberty or safety ... Cause serious damage to the operational effectiveness or security of UK or allied forces ... Cause serious damage to the operational effectiveness of

---

[78] Ibid at 7.
[79] Ibid.
[80] https://www.gov.uk/government/news/whitehall-starts-using-simpler-security-classifications accessed 7 December 2014.
[81] Ibid.
[82] Ibid.
[83] Government Security Classifications at 6.
[84] Ibid. This was the central issue in the Binyam Mohummed case which will be discussed later in the thesis.

highly valuable security or intelligence operations"[85] while the potential repercussions from disclosure that are required to classify information as top secret include "widespread loss of life... Rais[ing] international tension ... Caus[ing] exceptionally grave damage to the effectiveness or security of the UK or allied forces, leading to an inability to deliver any of the UK Defence Military Tasks... Caus[ing] exceptionally grave damage to the continuing effectiveness of extremely valuable security or intelligence operations...".[86]

The new policy is not part of "a statutory scheme but operates within the framework of domestic law, including the requirements of the Official Secrets Acts (1911 and 1989), the Freedom of Information Act (2000) and the Data Protection Act (1998)".[87] The need for secrecy and classification is therefore inextricably linked to a potential damage that will be caused by unauthorised disclosure. It is this potential damage that justifies barring public access to the information. Especially in the upper tiers of classification, there needs to be a particularly high threat from potential disclosure for the information to lawfully be classified.

Conclusion

The secretive British state was premised on the idea that "private debate among civil servants and ministers produces more rational policies. Wise men cogitating quietly on the nation's problems, will produce the right

[85] Ibid at 8-9.
[86] Ibid at 9-10.
[87] Ibid at 4.

answers, if they are shielded from the hubbub of the political marketplace".[88]

However, the perception of all-powerful Services, operating under nearly non-existent controls seems to have long been eclipsed. In its current form, the Security Service is a "relatively small, politically independent national institution secretly defending Britain against covert hostile adversaries"[89] while retaining an element of operational secrecy.[90] The shift in the British perception of secrecy affected the Services to a great degree as well. As Vincent observes, "the tradition of being secret about secrecy was to be replaced by one of being open about openness"[91] and this was reflected in the Services through the recognition that there was need for a degree of public accountability in their activities.

However the services remain to a great extent out of public reach. They are excluded from information requests under the Freedom of Information Act 2000 and reports published by their main oversight body can be heavily redacted before being submitted to Parliament. The most contentious aspect however, that shows little progress from the cold war conception of secrecy, is the Official Secrets Act 1989, that applies to all members of the Services and other notified persons, and will be examined in the following chapter.

---

[88] Kellner and Lord Crowther-Hunt, *The Civil Servants, An Inquiry into Britain's Ruling Class* (Macdonald, 1980) 275.
[89] Andrew, *In defence of the realm* at 883.
[90] Ibid.
[91] Vincent D., *The culture of Secrecy: Britain 1832- 1998* (OUP, 1999) at 323.

Chapter 2

The Official Secrets Act and Whistleblowing: From 1911 to the amendment of 1989

Introduction

After providing the background of state secrecy in the UK in the previous chapter, it would be appropriate to continue the analysis by examining how the notoriously secretive British state regulates the concealment and disclosure of official information, particularly in relation to individuals working for the intelligence and security community.

The idea that publicly releasing information is incompatible with the role of an intelligence employee permeates the intelligence world. Intelligence officials have the obligation to keep information they come across in their line of work secret and in contrast with other government employees, public discussion even of misconduct and improprieties is not possible without there simultaneously being a gross violation of the classification rules and the professional ethics of the intelligence officer.[1] As Daniel Ellsberg, the whistleblower behind the disclosure of the Pentagon Papers explains, "the promise to keep secrets of state, once demanded and given, becomes

[1] Hulnick A.S. and Mattausch D.W., 'Ethics and Morality in United States Secret Intelligence' (1989) 12 *Harvard Journal of Law and Public* Policy 509, 522.

virtually part of one's core identity"[2] and compares the secrecy oaths intelligence officials take to the mafia code of omerta.[3]

This heightened duty of secrecy has been translated into penalties under criminal law for individuals employed in the services who proceed to unauthorised disclosures of official information. Therefore, the security and intelligence official who disagrees or questions the legality of policies or who remains dissatisfied after initiating allegations of wrongdoing to the mechanisms within the Services, must remain silent. Resignation from one's post to disclose information would have no effect, as the duty of confidentiality is life-long, and the threat of criminal sanction remains even after the employment relationship has ended.[4]

In relation to the framework under which official secrecy laws function, Griffith provides a very important analysis, arguing that there are three avenues to decide on how to criminalise disclosures.[5] The first way is what Griffith calls the 'whodunnit' principle, where the law focuses on the identity or a special attribute of the discloser, and provides for penalties for all disclosures from such individuals. Therefore, in this case, the law bypasses the content of the leak itself altogether, and the justification for the penalty lies in the breach of confidence the leaker committed by disclosing the information. Leaks in this instance are seen as incompatible with the role

[2] Ellsberg, 'Secrecy and National Security Whistleblowing' (Ellsberg.net, 8 January 2013) http://www.ellsberg.net/archive/secrecy-national-security-whistleblowing accessed 7 December 2014.
[3] Ibid.
[4] Vaughn R., *Successes and Failures of Whistleblower Laws* (Edward Elgar Publishing, 2012) 292.
[5] Griffith J., 'The Official Secrets Act 1989' (1989) 16 *Journal of Law and Society* 273, 276.

that the individual is expected to fulfil. The second way to penalise leaks is to criminalise disclosures that relate to a specific area of information, for instance, information relating to 'defence' or 'intelligence'. Finally, there is what Griffith calls the 'contents principle' where the focus is on "what was said? was it important? did it injure the national interest? If so, did it do so seriously or only remotely? Was there a countervailing public interest in disclosure? If so, how strong was it?"[6] Here, a criminal penalty is passed down in response to a specific damage or harm emanating from the disclosure, which requires evidence of such damage.

The Official Secrets Act in its various incarnations has combined the above principles presented by Griffith, to secure the prosecution and conviction of those who without lawful authority proceed to disclosures of information. However, leaks continue to occur. Whether such disclosures, as Vincent argues, are evidence that "civil servants no longer trusted Ministers to make responsible use of the vast powers of controlling information vested in them by the Official Secrets Act",[7] or are simply an inevitable occurrence in a particularly secretive state, it is important to question whether the balancing of interests that official secrecy legislation opts for, is effective in ensuring the security of the state without impinging on liberties and 'right to know' values without justification.

Before proceeding to examine the compatibility of the Act with freedom of expression and questioning whether the treatment of security services

---

[6] Griffith at 276-277.

[7] Vincent D., *The culture of secrecy: Britain 1832- 1998* (OUP, 1999) 264. On the relationship between Ministers and Civil Servants see Jacob J., 'From Privileged Crown to interested public' [1993] *Public Law* 121-150.

whistleblowers is in line with new developments in whistleblower protection on an international and regional level, the chapter will attempt to chart the evolution of Official Secrecy in the UK and will place the emphasis on the 1911 and 1989 versions of the Act. The central issue in relation to the compatibility of the act with freedom of expression, lies in the lack of a public interest defence in the OSA as it currently stands, and the chapter will attempt to present the justifications for its exclusion by focusing on the arguments on the issue presented at the time. It is important to note that as Bailin observes, "the Official Secrets Act 1989 was introduced whilst Cold War paranoia was still much in evidence",[8] thus the understanding of the intelligence official's role as it was perceived at the time, is important in appreciating how the OSA 1989 was constructed.

After examining the justifications of the lack of a public interest defence in the Act, the chapter will examine whether other defences under criminal law, namely the defence of duress or necessity could be used to acquit the services whistleblower. It will conclude that as the chance of a successful challenge of a conviction under such defences would be small, the OSA 1989 ultimately imposes a near absolute ban on external disclosures. These findings will be used in subsequent chapters to examine the compatibility of the Act with whistleblower protection.

[8] Bailin A., 'The last cold war statute' (2008) 8 *Criminal Law Review* 625, 625.

Official Secrecy in the UK

The intent of secrecy legislation has been to protect the UK from espionage and the release without authorisation of official information.[9] The first OSA statute of 1889 was the first instrument to allow for the prosecution and punishment under criminal law for those who proceed to unauthorised disclosures of official information.[10] The original version of the Act was ultimately considered ineffective as it was argued that under its provisions it was "difficult to prosecute espionage cases".[11] It was replaced by the OSA of 1911 which contained the notorious Section 2, a Draconian 'catch- all criminal provision' that severely punished unauthorised leaks and barred the receipt of official information.[12] The amendment to the 1889 Act thus imposed the "widest prohibition" on the unauthorised release of information and allowed in this way for disclosures both harmless and harmful to the public interest, to be penalised under criminal law.[13]

The OSA was again amended in 1989 and currently, under section 1, the act stipulates that it is an offence for former and current members of the Services - this would include current and former members of the MI5, the MI6 and the GCHQ- and all persons 'notified' that they are subject to the provisions of this section,[14] to disclose without lawful authority information

[9] Rupert K., 'Official Secrets Act' in Hastedt and Guerrier (ed.), *Spies, Wiretaps, And Secret Operations: An Encyclopedia of American Espionage* (ABC-CLIO, 2010).
[10] Birkinshaw P., *Freedom of Information The Law, the Practice and the Ideal* (4th edn, Cambridge University Press 2010) 82.
[11] Andrew C., *The Defence of the Realm: The Authorized History of MI5* (Penguin, 2010) 55.
[12] Birkinshaw P. , *Reforming the Secret State* (Open University Press, 1990) 1.
[13] Birkinshaw, *Freedom of Information The Law, the Practice and the Ideal* at 84.
[14] Official Secrets Act 1998 s1 (1) (b).

pertaining to the work of security and intelligence services,[15] In these cases the assumption is that revelations by such persons are *ipso facto* damaging,[16] and therefore, in order to secure a conviction the prosecution is not required to prove that there was some damage caused by the disclosure. Providing evidence that the information was released without authorisation by the defendant suffices to impose a penalty under criminal law.

Apart from current and former members of the Services, the individuals that are notified under section 1 of the act could include senior officials, certain members of the armed forces, crown servants who provide "regular professional support"[17] to the Services for their operation and activities, Ministers and more generally any person whose work is in any way comes across information "connected with the security and intelligence services and its nature is such that the interests of national security require that he should be subject to the provisions of that subsection".[18] Reasons on why a person is notified remain secret, although the government accepted that a notification could be judicially reviewed.[19] However, as Birkinshaw states, the possibility of a successful judicial review involving a matter of security and intelligence is extremely rare.[20] It is important to note that members of

---

[15] Ibid s1.
[16] Smith A. T. H., 'Security services, leaks and the public interest' (2002) 61 *Comparative Law Journal* 514, 515.
[17] Birkinshaw, *Reforming the Secret State* at 19.
[18] Official Secrets Act 1989 s1 (6).
[19] Birkinshaw, *Freedom of Information The Law, the Practice and the Ideal* at 102.
[20] Ibid at 103. After *R (on the application of A) v B* [2009] UKSC 12 this would fall under the responsibility of the Investigatory Powers Tribunal established in the Regulation of Investigatory Powers Act 2000, which will be examined in more detail in the following chapter on the accountability of the Services.

the Intelligence and Security Committee, the main oversight body related to the Services, are notified persons under the Act as well.[21]

Prosecutions and Convictions

The individuals prosecuted under the Official Secrets Act of 1911 and 1989 are many, however in the following part the chapter will present certain controversial instances under which the Official Secrets Act was employed to prosecute individuals.[22]

Under s1 of the 1911 Act, it was a criminal offence to enter and approach a prohibited area for any purpose prejudicial to the safety and interests of the state.[23] This provision was used to penalise members of the Campaign for Nuclear Disarmament who were intending to enter a military base and cause disruption in protest of nuclear weapons.[24] The defence that they were not committing acts of espionage, nor engaging in behaviour that would be considered prejudicial to the interests of the state, failed to convince the Law Lords who upheld their convictions under the Act.[25]

Sarah Tisdall, a civil servant working at the private office of then Defence Secretary Michael Heseltine, anonymously leaked to the Guardian newspaper two documents written by Heseltine that showed attempts to mislead Parliament in relation to the time of arrival of cruise missiles and

---

[21] Ibid at 48.
[22] See Rogers A., *Secrecy and Power in the British State: A History of the Official Secrets Act* (Pluto Press, 1997).
[23] Official Secrets Act 1911 s1 (1) (a).
[24] Stone R., *Textbook on Civil Liberties and Human Rights* (5th edn., Oxford University Press, 2004) 301.
[25] *Chandler v DPP* [1964] AC 763.

details as to how the Defence Secretary would make the announcement of their arrival in Parliament. After confessing the leak, Tisdall was prosecuted under section 2 of the OSA 1911 and was eventually given a custodial sentence of six months[26] in what the BBC called "a rare success for government enforcement of the Official Secrets Act".[27] However, as Moran observes, "since the disclosure had not damaged national security, the government was criticised for trying to make an example out of a principled individual, acting out of a problem of conscience".[28]

The most infamous case of prosecution under the OSA 1911, was that of Clive Ponting. Ponting was a high ranking civil servant in the Ministry of Defence who leaked documents to Labour MP Tam Dalyell revealing that ministers were actively trying to mislead a Select Committee that was looking into the events that lead to the sinking of the navy ship and had set up an elaborate cover up. This stunning revelation that ministers were intentionally trying to mislead a Select Committee with regards to the sinking of the General Belgrano, led Ponting to insist that his legally binding loyalty to Ministers as a civil servant could not be upheld when the ministers had "refused to answer questions, given misleading answers or refused to correct false statements to Parliament".[29] As Ponting clarified "my conscience is clear - A Civil Servant must ultimately place his loyalty

---

[26] Maer L. and Gay O., Official Secrecy (House of Commons Library, Parliament and Constitution Centre, 30 December 2008 Standard Note SN02023) found at < http://www.parliament.uk/business/publications/research/briefing-papers/SN02023/official-secrecy> last accessed 12 June 2014.

[27]--, 'Troubled History of the Official Secrets Act' (news.bbc.co.uk, 18 November 1998) http://news.bbc.co.uk/1/hi/uk/216868.stm accessed 7 December 2014.

[28] Moran C., *Classified: Secrecy and the State in Modern Britain* (Cambridge University Press, 2013) 336.

[29] Ponting C., *The right to know : the inside story of the Belgrano affair* (Sphere, 1985) 150.

to Parliament and the public interest above his obligation to the interests of the Government of the day".[30]

This stance did not find McCowan J in agreement. In *R v Ponting*[31] he famously asserted that state interest meant "in the interests of the State according to its recognised organs of government and the policies as expounded by the particular Government of the day".[32] As Birkinshaw maintains, a particular government should be distinguished from the idea of the state, the Crown in the UK, which is understood to be "representative of a larger collective weal which is bigger than any government".[33] The outcome of the Ponting prosecution allowed once again for the government to appear particularly vindictive in prosecuting "someone who had dared to embarrass it".[34]

Apart from such instances of leaking, the Act has been employed to prosecute individuals for breaches of secrecy that amount to espionage. The case of George Blake is a particularly clear example of the type of treasonous leaks that secrecy legislation legitimately seeks to inhibit. Blake was a member of the Secret Intelligence Service and had signed an undertaking under the OSA 1911 not to release any information he came across in the course of his employment.[35] Subsequently Blake became an agent for the Soviet Union and for about a decade provided the Soviets with

---

[30] Quoted in Bovens M., *The Quest for responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press, 1998) 147.
[31] [1985] Crim. L.R. 318.
[32] Ibid.
[33] Birkinshaw P., *Freedom of Information The Law, the Practice and the Ideal* at 101.
[34] Moran at 336.
[35] Case Comment, 'Media law: autobiography published by former Secret Intelligence Service agent' [2006] *European Human Rights Law Review* 86, 86.

highly classified information until he was sentenced under the Act and imprisoned.[36]

In his infamous memoir 'Spycatcher',[37] Peter Wright, a former MI5 agent, released information on the operational organisation, methods and personnel of the MI5 and also went on to disclose a number of illegal activities allegedly committed by the Security Service. The alleged MI6 plots to assassinate foreign heads of state, and alleged MI5 involvement in plots to bring down British prime minister Harold Wilson created a stir.[38]

Under the 1989 amendment, the most high profile case was that of David Shayler. Shayler was working for the MI5, when in a series of articles he disclosed information in breach of the OSA 1989. David Shayler's disclosures, revealed that the MI6 had participated in an attempt to assassinate Libyan head of state Gaddafi. Moreover, he alleged that the agency was mistrustful of left leaning politicians and was keeping them under close scrutiny. Shayler was eventually sentenced to prison when the House of Lords confirmed that there was no way to read a public interest defence in the Act.[39]

Finally, David Keogh was convicted under s3 of the Act for photocopying notes from a meeting between Tony Blair and George Bush and sending

---

[36] Ibid.

[37] Wright P., *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer* (Viking, 1987).

[38] The Spycatcher litigation will be dealt with in detail below. See also Turnbull M., *The Spycatcher Trial* (Random House Australia, 1989), Pincher C., *A Web of Deception: The Spycatcher Affair* (Sidgwick & Jackson Ltd, 1987) and Leigh I., 'The Security Service: the Press and the Courts' [1987] *Public Law* 12-21.

[39] G.R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2003) 306. The *Shayler* case will be dealt with in more detail in sebsequent chapters.

them to a political researcher working for anti-war Labour MP Tony Clarke. The notes contained information that Bush was proposing to attack the headquarters of the Al Jazeera news agency in Qatar. It is important to note that, in order to maintain the confidentiality of the document, sections of the trial were held in camera, and there is no comment in the judgment itself on the contents of the leaked document.[40] In this case the compatibility of the Act with Article 6 ECHR was discussed in relation to the burden of proof. The judges 'read down' the act to conclude that "if a person charged with these offences adduces evidence that they lacked knowledge or had no reasonable cause to believe that the disclosure would be damaging, the court or jury shall assume the defence is satisfied, unless the prosecution prove beyond reasonable doubt that it is not".[41]

What can be deduced from these prosecutions is that clearly, the use of the act to prosecute individuals is not limited to cases of espionage, where an intelligence official breaches secrecy to transfer information to foreign governments without permission or official authorisation,[42] but is extended to any unauthorised disclosure of information.

With the exception of Blake, the decision to prosecute and convict the aforementioned disclosers was divisive. This was reflected in legal scholarship, where the compatibility of the act with free speech was questioned while the government had consistently argued that a case by case

---

[40] *R. v Keogh (David)* [2007] EWCA Crim 528; [2007] 1 W.L.R. 1500 (CA (Crim Div)).
[41] Creaton J., 'Case Comment: Reverse Burden of Proof' (2007) 80 *Police Journal* 176.
[42] Lee W., 'Deep Background: Journalists, Sources and the Perils of Leaking' (2008) 57 *American University Law Review* 1453, 1467. For an interesting case where the OSA 1989 was used unsuccessfuly to prosecute an official see Bradley A., 'The Damien Green affair – all's well that ends well? [2012] *Public Law* 396-407.

proportionality test would be incompatible with secrecy requirements in the Services, and endanger the security and stability of the nation.

Support and Criticism

The near absolute nature of section 1 of the Act is highly controversial and has had many supporters and detractors. Sir David Omand for instance, a former Director General of the GCHQ, when asked why there should be no consideration of the possible public interest emanating from a disclosure that would justify the whistleblower's right to speak out against wrongdoing, replied that "You always find in retrospect that even criminal acts sometimes have unexpected benefits but that is not a justification for doing it".[43]

Omand based his opinion on the idea that even a well-meaning whistleblower "might not have a complete understanding of events"[44] and argued that unauthorised disclosures can be detrimental to an organisation's morale.[45] It is also held that the interest in ensuring that civil servants and members of the services do not act as umpires in political disputes and do not place their own interpretation of the public interest ahead of the interpretation of the superiors, is paramount in ensuring the effective performance of the of the civil service and the Security and Intelligence Community.[46]

---

[43] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 at Q132.
[44] Ibid at 10.
[45] Ibid at 15.
[46] Ibid at 11.

According to Thomas,[47] allowing for a public interest defence to be readily available to Crown servants who leak information would be contrary to British constitutional convention. If such a defence were to be provided for in the law, it would give non-elected officials significant executive power to make decisions on issues of public interest[48] and furthermore, it would allow courts to proceed with balancing exercises on issues of public interest, powers which traditionally fall under the prerogative of the Crown.[49]

Detractors argued that this approach was too absolute and critics saw the Act as "one of the Government's most obnoxious assaults on freedom of political expression".[50] As Palmer stated "it is a dangerous situation for a political democracy, when the executive branch of government has exclusive powers to protect and determine the criteria of official secrets"[51] especially in light of the fact that "disclosures of secret information have in the past served the public interest".[52] In a similar vein, Best insists that "[t]he ban on communicating any information regardless of whether it is damaging violates the right to freedom of expression since if the information is not actually damaging it is hard to understand how it justifies restrictions to the right".[53] Fenwick deconstructs the main arguments in favour of the current approach in the OSA 1989 and concludes that the

---

[47] Thomas R., 'The British Official Secrets Acts 1911-1939 and the Ponting case' [1986] *Criminal Law Review* 491 -510.
[48] Ibid at 507.
[49] Ibid.
[50] Turpin C. and Tomkins A., *British Government and the Constitution* (6th edn., Cambridge University Press, 2007) 786.
[51] Palmer S., 'In the interests of the state: the government's proposals for reforming section 2 of the Official Secrets Act 1911' [1988] *Public Law* 523, 531.
[52] Ibid.
[53] Best K., 'The control of official information: Implications of the Shayler affair' (2001) 6 *Journal of Civil Liberties* 18, 29.

reasons projected against the inclusion of a public interest defence in the act were "extraordinarily poor".[54]

On the international level, the act was also criticised by the Human Rights Committee, the UN body responsible for monitoring the implementation of the International Covenant on Civil and Political Rights in its 2008 Report on the State of Human Rights in the UK and Northern Ireland. The report noted that:

> The Committee remains concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public interest, and can be exercised to prevent the media from publishing such matters. It notes that disclosures of information are penalised even where they are not harmful to national security.[55]

The Report went on to suggest that:

> The State party should ensure that its powers to protect information genuinely related to matters of national security are

[54] Fenwick H., *Civil Liberites and Human Rights* (4th edn., Routledge-Cavendish, 2007) 598. See also Fenwick H. and Phillipson G., *Media Freedom Under the Human Rights Act* (Oxford University Press, 2006) Chapter 19 and Elliott M. and Thomas R., *Public Law* (2nd edn., Oxford University Press, 2014) 778.

[55] UN Human Rights Committee, Report on United Kingdom of Great Britain and Northern Ireland (21 July 2008, CCPR/C/GBR/CO/6) at [24].

> narrowly utilised and limited to instances where the release of such information would be harmful to national security.[56]

On the regional level, the Council of Europe's Parliamentary Assembly in its resolution on 'Fair trial issues in criminal cases concerning espionage or divulging state secrets', set the standards for official secrecy legislation and argued that:

> the state's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information, international scientific co-operation and the work of lawyers and other defenders of human rights... It recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority.[57]

It is clear that the most contentious aspect of the Act is the exclusion of a public interest defence. Therefore, it is important to provide further analysis on this in the following part.

Public Interest Defence

The most contentious aspect of the Act, and the one that seems to have sparked the greatest controversy is the lack of a public interest defence for

---

[56] Ibid.

[57] Council of Europe Parliamentary Assembly, Resolution 1551 (2007) 'Fair trial issues in criminal cases concerning espionage or divulging state secrets', text adopted 19 April 2007.

whistleblowers. This means that regardless of the nature of the information released and regardless of the impact it can have in a democratic society and informing the citizenry on potential abuses, the act of disclosing information remains criminal.

The idea behind the public interest defence is that it allows a defendant to claim that the disclosure has proven to benefit the public interest. Therefore this would permit courts to examine whether there was a 'pressing social need' to suppress the speech or to penalise the leaker, in line with human rights requirements under the ECHR and the Human Rights Act of 1998.

The significance of a public interest defence was extensively discussed before the 1989 amendment by the Law Lords during the Spycatcher litigation, where in *Attorney-General* v. *Guardian Newspapers Ltd. (No 2),*[58] Lord Keith citing Mason J in the High Court of Australia, argued that although the duty of confidentiality under civil law should be lifelong, such a duty could not be upheld by the courts unless the disclosure would prove harmful to the public interest.[59] Lord Keith's reference to the Australian judgment, where Mason J argued that "it is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action",[60] shows a stance that was eventually discarded in amending the Act.

[58] [1990] 1 AC 109, [1988] 3 W.L.R. 776.
[59] Ibid at 152.
[60] Ibid.

In Spycatcher, Lord Griffith went on to argue that the discloser should avoid revelations to the media and attempt at first to disclose the information "to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence". He noted however, that "the circumstances may be such that the balance will come down in favour of allowing publication by the media".[61] Lord Griffith spoke clearly in favour of a public interest defence, arguing that:

> if a member of the service discovered that some iniquitous course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger.[62]

As for the publication of such disclosures, Lord Griffiths argued that "[i]deally, of course, an editor would inform the Treasury Solicitor that he was in the possession of such information and intended to publish it. This would enable the Government to apply for an injunction so that a judge could decide whether the balance came down in favour of preserving secrecy or publication".[63]

---

[61] Ibid at pg 269.
[62] Ibid.
[63] Ibid at 279.

This position seemed to be discarded in subsequent disclosure cases. In *Attorney General v Blake*[64] it was was held that MI5 and MI6 officers owe a lifelong duty of confidentiality to the Crown[65] regardless of whether the information in question is secret or confidential. As the House of Lords stressed:

> It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. *An absolute rule against disclosure, visible to all, makes good sense.*[66]

This stance in Blake was used by Lord Hutton in *Shayler* as a response to a very obvious question placed by Shayler, who argued that:

> that whilst there are many matters relating to the work of the Security Service which require to be kept secret in the interests of national security, there are other matters where there is no pressing need for secrecy and where the prohibition of disclosure and the sanction of criminal punishment are a disproportionate response.

---

[64] [2000] UKHL 45.
[65] Birkinshaw, *Freedom of Information: The Law, the Pracice and the Ideal* at 445.
[66] *AG v Blake* (emphasis added).

information in the public interest, has been misrepresented in the paper as an argument that the whistleblower's motivation should constitute such a defence regardless of the damage caused by the disclosure,[84] whereas a public interest defence, as supporters of its inclusion in the Act define it, relates to a defence for penalties when the information revealed served the public interest.

However, due to the fact that the prevailing idea was that such a defence would 'muddy the waters' and make it difficult to accomplish the greatest amount of clarity possible in the law and its application, it was eventually discarded. Furthermore, it was stressed that decisions on what is in the public interest could not be left to individuals nor should the courts be involved in making political decisions as a robust public interest defence would require them to do.[85] Although the government conceded that individuals who release information in the public interest can do so driven by a genuine commitment to democratic values and accountability, this was considered irrelevant, as criminal law was not meant to focus on the motives of the persons responsible for criminal offences but "on the nature and degree of harm that their acts may cause".[86] These provisions were highly contested at the time.

[84] Fenwick, *Civil Liberties and Human Rights* 598.
[85] White paper on the Reform of Section 2 of the Official Secrets Act 1911, Cm. 408 (1988) at [60]. The Justice and Security Act 2013 brought changes to the Public Interest Immunity system, which will be examined in detail in the following chapter.
[86] Ibid at [59].

The amendment to the 1911 Act.

The amendment of the Act in 1989 limited secrecy to six specific areas of government held information thus significantly limiting the scope of the previous regime. Therefore, prosecutions can be initiated only if the disclosure relates to official information that falls under the following fields. Firstly, the act criminalises information relating to security and intelligence. This under s 1(2) also includes statements purporting to be a disclosure of intelligence information such as "vacuous 'big talk' or idle boasts by security and intelligence officers or former officers and notified persons".[87] Secondly, the act penalises disclosures relating to defence. In this instance disclosures are required to be damaging for the prosecution to be able to secure a conviction. Furthermore, in the area of defence, the OSA 1989 provides a clear definition and a specific list of information that would fall under this provision.[88] Thirdly the act protects information relating to international relations and any "confidential information, document or other article which was obtained from a State other than the United Kingdom or an international organisation".[89] Under this section, there must be proof of damage although it is presumed that those who proceeded to disclosures were aware of the damaging nature of the information, while for individuals covered by section 5 of the act (namely those who disseminate information that has been released to them without authorisation), it has to be established that they had knowledge that the information would cause damage.[90] The following restriction relates to disclosure of government information that

[87] Birkinshaw at 103.
[88] OSA s 2 (4).
[89] OSA s 3 (1) (b).
[90] OSA Section 5 and Birkinshaw at 109.

"results in the commission of an offence; or facilitates an escape from legal custody or impedes the prevention or detection of offences or the apprehension or prosecution of suspended offenders".[91] There is again in this case a defence which allows such disclosers of information to argue that "they did not know, or have any reason to believe that their disclosures would have such results".[92] The same section of the Act criminalises disclosures of information emanating from documents that have been obtained through 'special investigation powers' by warrant under the Interception of Communications Act 1985, the Security Service Act 1989, the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000.[93] Finally, the Act penalises the disclosure of information that relates "to security or intelligence, defence or international relations; and has been communicated in confidence by or on behalf of the United Kingdom to another State or to an international organisation".[94] As Birkinshaw observes, the section is "aimed at punishing a disclosure of information which has been leaked abroad, even if already published abroad without the authority of the state or international organisation to whom it was entrusted, or where the discloser otherwise has no authority".[95]

Although the limiting of official information to the six specific areas mentioned above was an important step in the direction of transparency, the act also contained elements that made it a "more fearsome weapon of control".[96] Apart form the lack of a public interest defence which had been

---

[91] OSA s 4 (2).
[92] OSA s 4 (4).
[93] Birkinshaw at 111.
[94] OSA 1989 s6 (1) (a) and (b).
[95] Birkinshaw at 112.
[96] Moran at 340.

relied on to acquit Ponting, the act also proceeded to criminalise for the first time the act of an unauthorised publication, thus providing that "a journalist could be prosecuted for publishing a story derived from secret information irrespective of whether or not there was any evidence of a classified document changing hands".[97]

Apart from members of the Services and notified persons, section 12 provides that other crown servants and government contractors are also subject to criminal penalties for disclosures, but only if information they make public is 'damaging'. Section 1(4) defines a damaging disclosure as one that "causes damage to the work of, or of any part of, the security and intelligence services"[98] or would be likely to cause such damage.[99]

If, as it has been established, a public interest defence is not available to services' whistleblowers, would it be feasible for them to seek protection under other defences under criminal law?

OSA 1989: A Defence of necessity

As a public interest defence is not applicable in these cases, if a member of the services is proven to have been responsible for leaking information, there seems to be no way of recourse. However, would the whistleblower be able to claim protection under a defence of duress or necessity?

---

[97] Ibid.
[98] OSA 1989 s1 (4) (a).
[99] OSA 1989 s1 (4) (b).

Necessity is a common law doctrine, defined as pressure of circumstances compelling one to commit an illegal act.[100] In a preparatory hearing under the Criminal Procedure and Investigations Act 1996 the judge ruled that Shayler could not rely on a defence of duress or necessity and the court of appeal upheld this decision for the reason that Shayler was "not in a position to identify any incident which was going to create a danger to the members of the public" and instead he was revealing information on "*past* conduct of individual members of and MI5 as a whole".[101] Furthermore, it was emphasised that Shayler's reasons for disclosing MI5's secrets were that he hoped that disclosure would generate improvements in the organisation's effectiveness and therefore benefit the nation to a greater extent than the potential damage caused by the disclosure. His actions therefore where not attempting to avert a present or imminent danger.[102] Furthermore, the judge ruled that it was clear that Shayler had not acted under duress of circumstances.

Katherine Gun was planning to use this defence if her prosecution had eventually gone forward and it would have been very interesting to see whether the courts could have accepted necessity and considered it a proportionate reaction to the harm Gun perceived as being imminent if the information was not disclosed. Therefore, if her prosecution could prove that the war in Iraq was illegal, they could argue that by disclosing the classified email, Gun was in fact attempting to prevent the unnecessary deaths that would inevitably occur in the conflict.

---

[100] *Oxford dictionary of law* (OUP, 1997).
[101] Smith J.C. and Rees T., 'Official secrets: defence of duress of necessity' [2001] *Criminal Law Review* 986, 987 [emphasis added].
[102] Gardner S., 'Direct action and the defence of necessity' [2005] *Criminal Law Review* 371, 372.

The fact that Gun's disclosures occurred before the alleged harm would take place make her chances of the necessity defence being accepted more likely. Gun unlike Shayler, could have made the case that she was preventing harm from taking place as she leaked information a few months before the eventual invasion of Iraq.

As Bailin argues, necessity "remains available as a defence to *all* offences under the 1989 Act".[103] Even though Shayler was not "within measurable distance"[104] of using such a defence, would it be an appropriate path for future leakers especially when their disclosures concern wrongdoing or abuses that have not yet or are about to be committed?

As was explained in Shayler, what needs to be established is that there in fact was a harm or danger that made the release of information necessary. One could argue that Gun's position in the GCHQ as a Mandarin translator did not make her capable of evaluating if indeed a threat existed as she was privy to only a fraction of intelligence information. However, in *Cairns* it was held that:

"... it was sufficient for [the defendant] to show that he acted as he did because he reasonably perceived a threat of serious physical injury or death; he was not required to prove that the threat with which he was confronted was an actual or real threat".[105]

---

[103] Bailin at 627 [emphasis in original].
[104] *R v. Shayler* [2002] UKHL 11 [17] per Lord Bingham.
[105] [1999] 2 Cr.App.R. 137, [2000] Crim.L.R. 473.

An important element of a necessity defence is that the 'illegal' act has to be proportionate to the harm that is intended to be avoided. In *Abdul – Hussein* the court held that "The act done should be no more than is reasonably necessary to avoid the harm feared and harm resulting from the act should not be disproportionate to the harm avoided".[106]

However, as the Home Office argued in relation to a defence of duress or necessity to the ISC, "duress would need to be direct and imminent for the defence to succeed. There would need to be a real and immediate threat to the defendant or someone for whom he is directly responsible".[107] Moreover, as Lord Bingham asserted in *R v Hasan*,[108] "where policy choices are to be made, [he was inclined] towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on".[109] This led the Home Office to conclude that there was little hope of such a defence being used effectively under the OSA 1989.

The only available defence is found in s 1 (5) of the Act and provides that:

> It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the

[106] Smith and Rees at 987 and *Abdul-Hussain and Others* [1999] Crim.L.R. 570 [64].
[107] Intelligence and Security Committee, Annual Report 2007-2008 Cm7542 pg 49.
[108] [2005] UKHL 22.
[109] Ibid at [22].

information, document or article in question related to security or intelligence.[110]

As Birkinshaw notes however, "[o]ne might be tempted to think that they would have to be singularly unintelligent intelligence officers to plead ignorance successfully in this context".[111] Such an argument by an intelligence officer cannot furthermore have any credence in the instances of whistleblowing this project is arguing for. The intelligence officer who discloses information on wrongdoing in the Services, especially in relation to policies that potentially involve severe human rights violations, cannot plausibly plead ignorance that such disclosures are related to security and intelligence. Perhaps in cases where the information released had blatantly no connection to intelligence matters, where the whistleblower reveals financial improprieties within the services for instance, or unnecessary wastage, this defence could be used in a more credible way but, its chances of successfully acquitting the whistleblower who is prosecuted for such a disclosure seem quite few.

Providing evidence

The absolute nature of the OSA 1989, and the need for secrecy in relation to security sensitive material, was restrained however, in cases where individuals covered by the Act would be expected to provide evidence to official inquiries that would involve the disclosure of information. In

[110] OSA 1989 s1 (5).
[111] Birkinshaw at 104.

relation to the Detainee Inquiry[112] for instance, that was headed by Sir Peter Gibson, the Attorney General proceeded to provide an undertaking to assuage concerns that testifying to the Inquiry in breach of the Act would result in a criminal prosecution under the OSA 1989. The Attorney General clarified that "No evidence a person may give before the Inquiry ... will be used against that person in any criminal proceedings",[113] while Gus O'Donnell who has Cabinet Secretary at the time, clarified that:

> Evidence which a person gives to the Inquiry could involve disclosure of information or documents under the Official Secrets Act (OSA). Provided that disclosures concern information relevant to the Inquiry's Terms of Reference and, as regards oral evidence, are made in accordance with advice in whether information can be dealt with in public or private, such disclosures will be regarded as having "lawful authority" for the purposes of the OSA.[114]

This form of 'witness protection' would allow members of the Services to report irregularities to the inquiry, which could potentially be released to the

---

[112] The Report of the Detainee Inquiry chaired by Sir Peter Gibson available at http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf accessed 7 December 2014.

[113] Undertaking of Attorney General (3rd November 2011) available at https://p10.secure.hostingprod.com/@spyblog.org.uk/ssl/foia/images/Attorney_General_to_Detainee_Inquiry_03Nov2011.pdf accessed 7 December 2014.

[114] Gus O' Donell, 'Detainee Inquiry: Undertaking to Government Witnesses' (21st November 2011 available at https://p10.secure.hostingprod.com/@spyblog.org.uk/ssl/foia/images/Sir_Gus_O_Donnell_letter_21Nov2011.pdf accessed 7 December 2014.

public, although the government would still retain the final say on which contents of the report would be released and scrutinised by the public.[115]

Further restrictions to security sensitive disclosures through regulation of the press.

Members of the public seem to have limited powers to satisfy their right to know on their own. Therefore, as Bok proposes. they have to extensively rely on certain "indispensable intermediaries"[116] to gain information on government activities. For Bok, such an intermediary is the press. As she notes, "When the government itself is at fault, or high officials within it, ... the public's right to know comes into play once again; the press's role as intermediary must then give way to a degree of probing and of suspicion ordinarily excessive".[117] The intervention of journalists who question secrecy however, is not necessarily welcomed. When the detainment at Heathrow airport of David Miranda, partner to the Guardian journalist Glenn Greenwald who published the information Snowden leaked, was brought to courts and the issue of whether Miranda could have been lawfully detained under the Terrorism Act 2000 for carrying stolen security service documents was discussed, Lord Justice Laws, relied among others on the argument that "the journalist may not understand the intrinsic significance of material in his hands; more particularly, the consequences of revealing this or that fact will depend upon knowledge of the whole

[115] http://www.parliament.uk/documents/commons-vote-office/July_2012/17-07-12/21-Justice-Detainee-Inquiry.pdf accessed 7 December 2014.
[116] Bok S, *Secrets: Concealment & Revelation* (Oxford University Press, 1984) 257.
[117] Ibid

"jigsaw" ... of disparate pieces of intelligence"[118] to dismiss the application for judicial review of the detainment.

In light of all these findings, it is important to address what the official channels of releasing security sensitive official information to the press are. The Defence, Press and Broadcasting Committee is responsible for issuing the 'Defence Advisory Notices' (DA notices) which aim to balance national security considerations with the need for safeguarding press independence and freedom.[119] There is a standing DA notice regarding Security and Intelligence Services and Special Services which recommends that the press should not report on certain agency related issues without first seeking advice. These include specific covert operations, sources and methods of the Security Service, SIS and GCHQ, including the interception of communications, and their targets; the identities, whereabouts and tasks of people who are or have been employed by these services or engaged on such work, including details of their families and home addresses, and any other information, including photographs, which could assist terrorist or other hostile organisations to identify a target; addresses and telephone numbers used by these services, except those now made public.[120] Notable cases where such notices were issued for agency related matters include the 1994 notice to stop publication of the name of MI5 agents killed in a helicopter accident in Kintyre and in 1999 a notice was served to stop publication of the names of MI6 officers that were published on a website and included the

[118] *David Miranda v The Secretary of State for the Home Department and The Commissioner of the Police of the Metropolis* [2014] EWHC 255 at [58].
[119] Birkinshaw at 357.
[120] United Kingdom Security & Intelligence Services & Special Services, D-Notice System available at http://www.dnotice.org.uk/danotices/danotice_05.htm accessed 12 December 2014.

website address itself.[121] Both these cases seem quite rational in their approach to sensitive issues and it is important to note that decision notices promote self regulation of the press and are not legally binding as they do not emanate from the OSA 1989 or other Acts of Parliament.[122] But disregarding a DA notice could lead to exclusion from receiving information in the future. As Birkinshaw notes, this quasi-public institution reflects "the corporatist tendencies in the distribution and exercise of power" that raise questions as how these networks that are set up by government can be transparent and open.[123]

Conclusion

The lack in the amendment to the 1911 act of the very defence which had exculpated Ponting, clarified that under the OSA 1989 it is "no longer possible for the heroic whistle-blower or brave newspaper to save themselves by arguing that disclosure was excusable because it exposed malfeasance of office".[124]

Although the arguments at the time focused on the importance of secrecy in the services and framed the OSA 1989 with the intention not to allow sensitive issues of public interest and national security to be considered by whistleblowers, juries and judges, this was not without considerable controversy.

---

[121] Birkinshaw at 358.
[122] Ibid at 357 and http://www.dnotice.org.uk/danotices/index.htm accessed 12 December 2014.
[123] Birkinshaw at 358.
[124] Moran at 340.

It is important to note that, a bill similar to the OSA 1989 that would criminalise disclosures of any classified information regardless of its effect or the reason for the disclosure, was vetoed in the United States by President Clinton. Clinton argued that "[a]lthough well-intentioned, [the bill] is overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy'[125]. Clinton argued that disclosures of secret information can be extraordinarily harmful to the nation's security,[126] however, he contended that "[w]e must always tread cautiously when considering measures that may limit public discussion, even when those measures are intended to achieve laudable, indeed necessary, goals".[127]

What is clear from the Official Secrets Act and its treatment of whistleblowing, is that potential wrongdoing and abuses of power are to be dealt with solely by the official oversight mechanisms that have been established for this purpose. The Act as it was interpreted in *Shayler*, does permit concerned individuals to raise any issues they come across in their work with mechanisms *within* the Services or seek official authorisation to disclose information they deem to be in the public interest. The question of whether such oversight bodies suffice to ensure the accountability of the services and whether the existence of internal mechanisms to raise concern justify the absolute ban on external, unauthorised disclosures, will be examined in the following chapter.

---

[125] Savage D., 'Clinton Vetoes Bill on Leaking of U.S. Secrets' (latimes.com, November 5 2000) found at http://articles.latimes.com/2000/nov/05/news/mn-47358 accessed 12 December 2014.
[126] Ibid.
[127] Ibid.

Chapter 3

The Accountability Structure of the UK Intelligence and Security Community.

Introduction

Sir Iain Lobban's assertion that 'secret' in the context of the Services does not mean 'unaccountable',[1] is the central issue in devising an effective accountability framework for the Services to function under. Such a framework is required to ensure that the Services operate within their statutory remit, collect and analyse intelligence while respecting human rights,[2] and the intelligence they produce is not manipulated or misrepresented to satisfy political objectives. Accountability of the Services however, must be achieved in a way that will not hamper or set serious obstacles to the work of the services, with the undesirable consequence of undermining their work in protecting national security.

An added barrier to effective accountability in the services is that since "hard" data, purely factual information, does not always suffice when

[1] Intelligence and Security Committee, Uncorrected Transcript of the Evidence by the Security Chiefs available at http://isc.independent.gov.uk/news-archive/7november2013-1 pg 14 accessed 12 December 2014.
[2] 'The Human Rights Act is at the centre and at the foundation of our work' Andrew Parker of the MI5 Ibid at 19.

making security related decisions, agencies have to also rely on *speculative* intelligence in order to determine which people are, or "are probably or possibly, threatening national security".[3] This is a highly subjective exercise and a degree of deference to agency decisions is required, as when it comes to striking these balances, the optimum way to deal with a potential threat "is not always straightforward, and reasonable people can differ on how to do it".[4] Combined with the fact that their efforts with regards to counter-terrorism are founded on a "preventive logic",[5] namely preventing terrorist attacks as opposed to simply bringing to justice those who were involved in them, a great degree of subjective calculation is to be expected.

The role of accountability mechanisms therefore, has been to ensure that the rule of law is upheld, the expenditure of the Services is reasonable[6] and that any cases of agency involvement in misconduct are addressed. The chapter will focus on the efficacy of these mechanisms. In order to argue that whistleblowers should be permitted as a means of last resort to make up for existing gaps in accountability[7] by disclosing information that is in the public interest, it is important for the thesis to identify these gaps, if they exist, in the UK services accountability framework. Instead of proving this

---

[3] European Commission for Democracy through Law (Venice Commission), 'Report on the Democratic Oversight of the Security Services' (2007) pg 18.

[4] UK Prime Minister Report to Parliament, 'A Strong Britain In an Age of Uncertainty: The National Security Strategy', October 2010 Cm7953 at pg 24.

[5] Foley F., 'The expansion of intelligence agency mandates: British counter-terrorism in comparative perspective (2009) 35 *Review of International Studies* 983, 994. See also Scott L., 'Sources and Methods in the Study of Intelligence: A British View' (2007) 22 *Intelligence and National Security* 185-205.

[6] The cost of the Security Services is estimated to be 2 billion pounds per year . Evidence by the Security Chiefs pg 2.

[7] The role of whistleblowers in making up for a deficit in transparency was discussed in Council of Europe Parliamentary Assembly, Report by Rapporteur D. Marty on Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations (7 December 2011) at [2] found at http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf accessed 12 December 2014.

point by simply providing details on specific instances where agency misconduct was not identified through mainstream accountability structures, the chapter will delve into the UK's accountability apparatus and present how these mechanisms are expected to function and their potential deficiencies. The chapter aims to evaluate whether the current regulatory system of ensuring the accountability of intelligence agencies is adequate and whether it can be relied upon to uncover, and make public wherever appropriate, abuses of the agencies themselves or the political persons they are related to.

Originally, the public was permitted to receive "only the barest, most conclusory justifications, which are supposed to be taken on trust"[8] in relation to the Services. Progressively however, agencies in the UK have reached a greater level of openness and transparency that has led to a considerable reduction of secrecy, making governments increasingly unable to rely on blanket refusals to comment on aspects of their policies.[9] Achieving full accountability of agencies however, still remains a difficult and at times elusive task.

The chapter will begin by briefly looking into the history of security and intelligence agencies in the US and the UK and analyse why regulation and accountability of agencies is a democratic imperative. It will present the standards for accountability of the Services as these have been set in the Council of Europe (COE) through the Venice Commission and the COE's

[8] L. Lustgarten and I. Leigh, *In from the cold: national security and parliamentary democracy* (Clarendon Press, 1994) 20.
[9] Gill P., 'The Politicization of Intelligence: Lessons form the Invasion of Iraq' in Born, Johnson and Leigh (ed.), *Who's watching the Spies : Establishing Intelligence Service Accountability* (Potomac Books 2005) 29.

Parliamentary Assembly Recommendation 1402 (1999). It will proceed to examine how domestic accountability structures have translated these standards into the UK context.

The paper will examine current statutory framework on agency accountability including the Security Service Act 1989, the Intelligence and Services Act of 1994, the Freedom of Information Act 2000, the Regulation of Investigatory Powers Act of 2000 and the Justice and Security Act of 2013, and the significant changes it brought about in relation to the Intelligence and Security Committee, the main body in the UK that is responsible for democratic oversight of the Services. Although the very existence of the ISC has given the agencies good reason to reflect on proposed actions in advance of undertaking them and has introduced significant accountability in relation to the agencies' finances, an area where previously transparency was minimal even at the ministerial level,[10] the paper will show that there are significant caveats to the ISC's powers to conduct full and effective supervision of the Services. The chapter will conclude by examining other methods of accountability and their potential to ensure that oversight of the services is not illusory.

Accountability is a particularly broad concept[11] in the context of the intelligence world. However, this paper will use the term to signify what is described by Oliver as the idea of "being liable to be required to give an account or explanation of actions and where appropriate, to suffer the

[10] Phythian M., 'The British experience with Intelligence Accountability' (2007) 22 *Intelligence and National* Security 75, 97.

[11] Cameron I., 'Beyond the Nation State: The influence of the European Court of Human Rights on Intelligence Accountability' in Born, Johnson and Leigh (ed.), *Who's watching the Spies : Establishing Intelligence Service Accountability* (Potomac Books 2005) 37

consequences, take the blame or undertake to put matters right, if it should appear that errors have been made"[12] based on the "fundamental precept of democratic theory"[13] that public consent needs to be secured and maintained for activities of the state.[14] The aspect of accountability that this paper will focus on, is accountability to the public through the availability of necessary information relating to the services, that will allow the public to evaluate their performance to the extent that the legitimate exemptions to access of information allow. Similarly, the terms 'effectiveness' and 'efficacy', when used with regards to legislation and practise of agencies, will focus on whether they are internally consistent and whether they align with the relevant principles of accountability and transparency. It is out of the scope of this paper to analyse effectiveness or efficacy of the services with regards to their institutional design, their ability to work within a reasonable budget and the general theory of public bodies that seek to produce maximum output with minimum input.[15]

Security and Intelligence agencies

The practice of governments to collect intelligence is far from novel. It is in fact a practice "as old as governments themselves".[16]

---

[12] Oliver D., *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press 1991) 22.
[13] Born H. and Caparini M., *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Ashgate, 2007) 3.
[14] Ibid.
[15] Oliver at 29.
[16] Walton C., *Empire of Secrets: British Intelligence, the Cold War and the Twilight of Empire* (Harper Press, 2013) 1.

However, intelligence work in the modern context is a product of the 20th century. First established in 1909 and operating under royal prerogative powers,[17] the 'Secret Service Bureau' was Britain's response to the threat of German naval espionage[18] and the first attempt at creating an advanced intelligence agency. The Secret Service Bureau was replaced by the Secret Service (MI5), which is responsible for internal national security threats, and the Secret Intelligence Service (SIS or as it is commonly referred to MI6), protects Britain from foreign threats.[19] Finally, the Government Communication Headquarters (GCHQ) is responsible for intercepting and subsequently analysing communications.

These high requirements for secrecy resulted in a significant delay in placing the Services under statutory control and establishing the mechanisms to ensure that they remained accountable to the public. It was not until 1985 and the period until 1996[20], that steps were made to open up the Services to scrutiny and mechanisms responsible for accountability and their powers of oversight have not remained static since.

The role of intelligence services is mainly to produce "meaningful, timely information" on domestic and foreign developments "after a careful analysis of secret and open sources".[21] In the UK, intelligence services have tackled many fields including organised crime, money laundering, narcotics and

---

[17] Starmer K., 'Setting the record straight: human rights in an era of international terrorism' (2007) 2 *European Human Rights Law Review* 123, 128.
[18] Security Service, 'History: Origins' <https://www.mi5.gov.uk/output/origins.html> accessed 12 December 2014.
[19] Secret Intelligence Service, 'What we Do' <https://www.sis.gov.uk/about-us/what-we-do.html> accessed 12 December 2014.
[20] Starmer at 129.
[21] Marchetti V. and Marks J., *The CIA and the Cult of Intelligence* (Jonathan Cape 1974) 295.

international fraud.[22] The central objective however, is clearly the protection of national security from external and internal threats. More specifically, in the 2010 report on the UK's national security strategy, it was stressed that:

> Most national security threats arise from actions by others: states or non-state actors, who are hostile to our interests. There is much we can do to reduce the likelihood of such risks occurring, on our own or with partners. We will directly disrupt adversaries such as terrorists; we will promote cooperation to reduce the motivation of states to be hostile to us; we will build alliances that make hostile acts against us more risky to their perpetrators.[23]

The succession of external threats, from the Nazis, to the Soviets to terrorism and more recently cybercrime, allow for the existence of such agencies that are, to a great extent, independent and greatly influential institutions that operate in strictly secret procedures with minimal public pressure for revelations. Such agencies in the US and UK in fact enjoyed immense public support in their endeavours.[24] It is exactly this secrecy pervading the intelligence agencies that seems to create an air of mystery that adds to their authority in the eyes of the public.[25] With the exception of the scandals that have reached the public sphere, the general portrayal of intelligence agencies through the media, cinema and literary fiction has

---

[22] Birkinshaw P., *Freedom of Information The Law, the Practice and the Ideal* (4th edn, Cambridge University press 2010) 37.
[23] A Strong Britain pg 26.
[24] Galnoor I., *Government Secrecy in Democracies* (New York University Press 1977) 125.
[25] Ibid.

passed on the idea of powerful and effective organisations where secrecy is key to protecting national interests.[26]

Security agencies are thus entrusted with extensive powers with the mandate of protecting freedoms, but these powers can be easily, and have often been, abused.[27] In portraying the potential dangers of abuse, Lustgarten and Leigh point out that intelligence agencies have been used to produce information to harm the reputation of political opponents and if left uncontrolled or without any firmly established limits or guiding principles as to the means they can utilise to fulfil the goals that are set out for them, they can "run rampant" in the political system as an "independent power centre".[28] As they conclude, in order for these concerns to be addressed what is required is for controls to be placed both on the intelligence services themselves and also their masters.[29]

Abuses and misconduct

The 'protection of national security' mandate is understood as including protection from threats from "espionage, terrorism and sabotage, from the activities of foreign powers" and from acts of subversion aimed at overthrowing "parliamentary democracy".[30] The particularly wide definition of subversion caused significant criticism as it is "wide open to subjective

---

[26] An interesting treatise of intelligence agencies as portrayed in popular culture and how in turn that shapes public perception of their work can be found in Black J., 'The geopolitcs of James Bond' in Scott and Jackson (ed.), *Understanding Intelligence in the Twenty - First Century: Journeys in Shadows* (Routledge 2004) 135 et seq.
[27] Lustgarten and Leigh at 363.
[28] Ibid at 365 and 366.
[29] Ibid at 372.
[30] S1 (2)

interpretation".[31] As Norton –Taylor shows, in the 1960's and 1970's, at the peak of the Cold War, the MI5 collected files on individuals and groups whose potential of subverting parliamentary democracy was arguably insignificant. These included among others, homosexuals and lesbians, owners of vehicles parked near houses where 'controversial' people resided as well as anyone who wrote letters to newspapers that were critical of government policies or the security services.[32] Other MI5 targets included the National Council for Civil Liberties, trade unions, journalists and lawyers.[33] Such a widespread network of individuals under surveillance purportedly for reasons of national security and the virtually uncontrollable status of the agencies at the time are a good example of security agencies undermining democratic values where effective oversight is minimal or non existent. It is the lack of accountability which allowed agencies to work without any outside effective control at the time, prompting Clive Ponting's assessment of MI5 senior officers as being "utterly reactionary, tucked away in their little world of their own".[34] As the Home Affairs Committee report on the accountability of the services reiterated, "the British taxpayer was obliged to rely on leaks from disaffected former employees and the work of investigative journalists"[35] to get any information on activities of the services.

The services were not free from strong public concern as to the legitimacy of their activities. As Phythian claims, "left-wing critics argued that MI5

[31] Norton – Taylor R., *In defence of the realm? : the case for accountable security services* (Civil Liberties Trust, 1990) at 29.
[32] Ibid at 81.
[33] Ibid.
[34] Ibid at 122.
[35] House of Commons Session 1998-1999, Select Committee on Home Affairs Third Report HC 291 (1998-9) [2] and Birkinshaw at 43.

saw its primary allegiance as being to the Crown rather than the elected government of the day"[36] and such allegations seemed to be vindicated, after revelations by MI5 member Cathy Massiter "that future Labour government ministers Harriet Harman and Patricia Hewitt had been placed under surveillance"[37] as a consequence for participating in human rights groups. Even Prime Minister Edward Heath was reported to have complained that it was "a very real problem"[38] that he could not always know what was going on in the intelligence agencies. In his infamous memoir 'Spycatcher', Peter Wright, a former MI5 agent, released information on the operational organisation, methods and personnel of the MI5 and also went on to disclose a number of illegal activities allegedly committed by the Security Service. The alleged MI6 plots to assassinate foreign heads of state, and alleged MI5 involvement in plots to bring down British prime minister Harold Wilson created a stir. In a similar vein, David Shayler revealed that the MI6 had participated in an attempt to assassinate Libyan head of state Gaddafi and he alleged that the agency was also mistrustful of socialist politicians keeping them under close scrutiny. More recently, allegations of the agencies producing information to suit governmental decisions in the Iraq war led to inquiries in both the UK and USA. The Butler review concluded that the release of a Joint Intelligence Committee dossier relating to allegations that Iraq had and was willing to use Weapons of Mass Destruction (WMDs) "had the result that more weight was placed on the intelligence than it could bear".[39] Finally, disclosures by

---

[36] Phythian at 76.
[37] Ibid at 77.
[38] Bennett G., *Six Moments of Crisis: Inside British Foreign Policy* (Oxford University Press, 2013) 127.
[39] Lord Butler, Review of Intelligence on weapons of mass destruction, HC 898 (2003-4) [21].

NSA member Edward Snowden revealed that fears of transgression in electronic surveillance by the UK and US Services were justified.[40]

Intelligence, like security,[41] is a highly politicised affair,[42] as it can be used to fit many purposes. The controversy surrounding the 'Iraq dossier' is a perfect illustration of intelligence information exploitation and its use to further political party objectives. The dossier was released to journalists in early 2003 and it stressed that Iraq was in possession of weapons of mass destruction that posed a grave threat to the security of the western world.[43] The crux of the controversy surrounding the dossier were the allegations that Alastair Campbell, Director of Communications and Strategy under the Blair administration, had specifically asked for the intelligence findings to be exaggerated to produce evidence that was seemingly conclusive when it fact it was not.[44] Gill insists that such practices are not rare. He stresses that when governments collect information "they do so in order to inform and pursue policies, to cement their rule, and to further their interests and designs at home and abroad".[45] But it is important to clarify whether this means that the agencies themselves would produce reports that would appease the government they work for, or if they would simply provide

---

[40] On the impact of the disclosures at the European level see Wright D. and Kreissl R., 'European Responses to the Snowden revelations' in Wright D. and Kreissl R. (ed.), *Surveillance in Europe* (Routledge, 2014) pp 6-50.

[41] Buzan B., *People, states and fear : an agenda for international security in the post-cold war era* (2nd edn, Harvester Wheatsheaf, 1991) 12.

[42] Gill P., 'The Politicization of Intelligence: Lessons form the Invasion of Iraq' in Born, Johnson and Leigh (ed.), *Who's watching the Spies : Establishing Intelligence Service Accountability* (Potomac Books 2005) 12.

[43] --, Iraq- its infrastructure of concealment deception and intimidation (Document removed form official websites) accessed at http://www.iraqfoundation.org/reports/pol/2003/bfeb/7_concealment.html accessed 12 December 2014.

[44] Yeung K., 'Regulating Government Communications' (2006) 65 *Cambridge Law Journal* 53, 65.

[45] Gill at 12.

intelligence as they receive it. Omand seems certain that in the UK, agencies would in all probability not succumb to pressure by politicians to exaggerate intelligence as doing so would "quickly become counter- productive".[46] Although it is improbable that there will ever be a conclusive verdict as to whether the Iraq dossier was a case of 'policy – based evidence' or simply a case of bad intelligence that misled the Blair administration, it is a textbook example of sensitive intelligence being subject to many different interpretations that are in turn heavily influenced by politics. As Glees purports "Britain's system of intelligence evaluation...exists to ensure that the product that reaches policy makers is always drafted in such a way as to allow its readers to pick up the range of uncertainty attached to an assessment".[47] The driving force in this area is that the finished product of intelligence must be "balanced in perspective" and "objective in presentation"[48] and it must not advise a particular course of action or seek to dictate foreign policy.[49]

A more recent example of the agencies engaging in potentially illegal behaviour that featured heavily in the public discourse was the release of information on the practice known as 'extraordinary rendition'. Under this scheme, suspects were kidnapped by US intelligence agencies and transported to countries with extremely poor human rights records where torture is a "common practice",[50] and were held there in secret detention centres unlawfully without a charge or a trial. This abduction and

[46] Cited in Glees A., 'Evidence - Based Policy or Policy – Based Evidence? Hutton and the Government's use of Secret Intelligence' (2005) 58 *Parliamentary Affairs* 138, 139.
[47] Ibid at 138.
[48] Marchetti and Marks at 295.
[49] Ibid.
[50] Council of Europe Parliamentary Assembly Doc. 11302 rev. 11 June 2007 found at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11302.htm> .

subsequent torture outside US territory aimed to avoid the implementation of US due process rights and the prohibition against torture.[51] Jack Straw vehemently denied British participation in such acts.[52] The inquiry of the treatment of detainees chaired by Lord Gibson released a report in December 2013 which intended to highlight "particular themes or issues which might be the subject of further examination", concluded that it was likely that MI6 agents had not reported breaches of the Geneva Conventions and may have turned a blind eye to torture of detainees.[53]

Such scandals usually trigger remedial action to assuage public concerns. This, however, can result in what Johnson calls the 'cyclical pattern of stimulus and response'. As he explains:

> A major intelligence scandal or failure... transforms the perfunctory performance of oversight into a burst of intense program scrutiny. This burst is followed by a period of reasonably attentive oversight activities that yields remedial legislation or other reforms designed to curb inappropriate intelligence operations in the future. Then comes the third

---

[51] Bantekas I. and Nash S., *International Criminal Law* (3rd edn Routledge – Cavendish, London 2007) 352.

[52] Mr Straw said: "The United States authorities have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia (an overseas territory of the UK where allegedly detainees where passed in transit) or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government are satisfied that their assurances are correct." Comments from UK Foreign Secretary Jack Straw found at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040621/text/40621w13.htm#40621w13.html_wqn9 accessed 12 December 2014.

[53] http://www.theguardian.com/world/defence-and-security-blog/2014/mar/12/cia-mi6-rendition-torture-congress-parliament last accessed 12 December 2014. The findings of the Gibson inquiry will be examined in more detail below.

phase of the shock cycle: a return to a middling practice of oversight.[54]

Arguing for the need for accountability of security and intelligence agencies

As the Butler report stressed, governmental decisions and actions, when information is obstructed or not readily available to decision - makers, have to be based on secret sources.[55] This is done by agencies that are responsible for collecting, disseminating, evaluating and ultimately passing on intelligence to the decision – makers. Therefore by design these agencies are not meant to operate in the open and by definition have to employ tactics and methods that in many cases cannot be expected to be reported publicly. Non-disclosure of certain information is considered legitimate, as it may prove harmful to individuals, to relations between nations and to national security. Therefore, asking for accountability in security and intelligence agencies is a complicated task that must balance the need to protect agencies' effective performance with safeguards against abuse and misconduct.

However, what do we mean when we refer to accountability? The Seven Principles in public life as expressed by the Nolan Committee 'to promote high standards of behaviour in the public sphere[56], provide that all "holders of public office are accountable for their decisions and actions to the public

[54] Johnson L., *National Security Intelligence* (Polity, 2011) 160.
[55] Lord Butler, Review of Intelligence on weapons of mass destruction, HC 898 (2003-4) at [466].
[56]Committee on Standards in Public Life website < http://www.public-standards.org.uk/ >.

and must submit themselves to whatever scrutiny is appropriate for their office".[57]

According to Erman, within liberal democratic theory, the concept of democratic accountability represents "an aggregate method for linking political decisions to citizens' preferences through representative institutions".[58] Schauer understands accountability of government officials as "criticism and examination of their official acts"[59] and considers the right to criticise and examine government policy an integral part of freedom of expression. Democratic accountability is thus a broad term that encompasses accountability for finances, accountability for fairness towards citizens by establishing rules, procedures and standards that ensure that public employees deal with citizens fairly, and finally, accountability for a government's performance by focusing on the consequences and expected outcomes of government policy.[60]

The problems of applying these definitions to the Services are further compounded by the nature of their work. As the main oversight body of the UK intelligence world stressed, "Unlike other parts of Government, intelligence and security matters cannot be effectively scrutinised in Parliamentary debates, or by a normal departmental Select Committee, the

---

[57] Seven Principles of Public Life < http://www.public-standards.org.uk/Library/The_seven_principles_of_public_life.pdf > accessed 12 December 2014.

[58] Erman E., 'Rethinking accountability in the Context of Human Rights' (2006) 12 *Res Publica* 249, 249.

[59] Schauer F., *Free Speech : a philosophical enquiry* (Cambridge University Press, 1982) 95.

[60] Behn R., *Rethinking Democratic Accountability* (The Brookings Institution, 2001) 8.

media, academia or pressure groups. Only a body with powers to access highly classified information can fulfil such a role".[61]

The driving force in the area, seems to be the perception that if the collection, evaluation, dissemination and transmission of information to decision-makers is done without supervision and governments are not expected to engage with the public in some explanation and debate,[62] then intelligence can easily be manipulated.

The side for accountability also argues that the legal regime governing the agencies has to be "clear, foreseeable and accessible"[63] ensuring that any discrepancies will not be left uncovered and unpunished. Furthermore, they have insisted that it should be a cause of concern to have a government agency that was able spend taxpayers' money without prior parliamentary approval.[64] Oversight bodies therefore, apart from ensuring the legality of practiced and operations, can work to secure the cost-effectiveness of the services[65] as has been proven by the ISC's annual reports that dedicate a significant portion of their findings to how money provided to services is spent.

Furthermore, any department immune to oversight, does not have an effective way to deal with incompetence of its members. Pincher insists that before there was any oversight of the agencies in the UK, incompetence

---

[61] Intelligence and Security Committee, Annual Report 2012-2013 HC 547 at [131].
[62] Gill at 13.
[63] Born H. and Johnson L.K., 'Balancing Operational Efficiency and Democratic Legitimacy' in Born, Johnson and Leigh (ed.), *Who's watching the Spies : Establishing Intelligence Service Accountability* (Potomac Books 2005) 228.
[64] Norton – Taylor at 125.
[65] Pincher C., *Too Secret too Long* (Sidgwick and Jackson, 1984) 583.

flourished in the services to a degree that "would not have been tolerated in other Government departments".[66] If there is no way to make those responsible accountable and answerable for their actions it is only through the publication of damaging scandals that abuses could be brought to public attention and actions taken to address them. An ongoing oversight body -as opposed to one that functions retrospectively- can be beneficial in improving services' performance by pointing out the areas that require reform and enhancement. Such an oversight body could also ensure that the Parliament could not easily be misled by ministers "making facile use of secrecy as a means of protecting secret services or themselves".[67] It is therefore important to insist that executive oversight does not suffice to keep agencies within the remit of the law. In liberal democracies, it is democratic oversight encompassing all actions of the agencies that can guarantee accountability.[68]

Detractors claim that it is the very nature of intelligence activities that necessitates secrecy. Intelligence is 'a real struggle with human opponents' the ultimate goal being to gain an advantage over them. These opponents are naturally inclined to set many obstacles to such activities as "one side's intelligence failure is likely to be another side's counterintelligence success".[69] Breaking down the opponent's security barriers to obtain information requires utmost secrecy during the planning, the execution and while assessing the results and therefore excessive demands of publicity can hamper operations. However, this view of intelligence as a process akin to

---

[66] Ibid. .
[67] Ibid at 585.
[68] Birkinshaw P., *Reforming the Secret State* (Open University Press 1990) 46.
[69] Shulsky A. and Schmitt G., *Silent Warfare: Understanding the World of Intelligence* (3rd edn. Brasseys, 2002) 172.

armed conflict, has the danger of allowing agencies to succumb to an 'ends-justify-the-means' instrumental rationality, that could turn agencies into a vehicle for governments to circumvent domestic and international law and achieve their policy objectives without any hope of recourse or accountability.

As former CIA Director Stansfield Turner claims, oversight helped the CIA to keep in touch with public opinion and the national mood.[70] He argued for a body outside the executive branch to ensure that "the executive is not over-enthusiastic in seeking to obtain information important to the national interest".[71] However, those that subscribe to the line of reasoning that insists that complete secrecy is inextricably linked with such agencies, to such a degree that their effective functioning is unthinkable without it, have consistently rejected the idea of outside, independent bodies to oversee the services. As they have pointed out, even if such oversight bodies did exist, they would inevitably not be allowed to overcome the so-called 'barrier of secrecy'. If a body was inside this theoretical barrier it would not be allowed to communicate any information outside it, and if it was itself not inside the barrier then it could not be granted access to certain significant information. This cyclical problem was long considered to be the stumbling block to creating an independent oversight body which would keep agencies accountable to the people. As Palmer maintains, "the executive branch of government cannot be effectively supervised or held accountable if those who supervise its actions have no access to the relevant information".[72]

---

[70] Norton – Taylor at 122.
[71] Ibid.
[72] Palmer S, 'Tightening Secrecy Law: the Official Secrets Act 1989' [1990] *Public Law* 243, 244.

But how can an effective system of accountability coexist with the legitimate secrecy requirements the Services operate under? This issue was tackled on the Council of Europe level, through the publication of a Venice Commission report on the democratic oversight of the Services. The following part will examine the report and proceed to compare the existing mechanisms in the UK with the optimum accountability structure as recommended on the regional level. The mechanisms that have been established to make agencies accountable and regulate their conduct will be analysed next.

Venice Commission Report on the democratic oversight of the Agencies and the COE's Parliamentary Assembly Recommendation 1402 (1999).

In an effort to examine the standards for accountability of agencies dealing with security and intelligence matters in the Council of Europe, it would be valuable to examine the Venice Commission findings on the issue which were published in its 2007 report and the Parliamentary Assembly's recommendation on 'Control of Internal Security Services in Council of Europe Member States'. The Venice Commission is the Council of Europe's advisory board on constitutional matters and it provides legal opinions on draft legislation or legislation already in force which is submitted to it for examination. It also produces reports studies and reports on issues of importance in the COE region.[73] The Commission tackled the difficulties of

[73] http://www.venice.coe.int/WebForms/pages/?p=01_Presentation accessed 12 December 2014.

achieving maximum accountability while ensuring the legitimate secrecy requirements the services function under.

Accountability according to the Commission, should encompass all areas of public activity and the services should not in principle be exempt from being accountable like other public authorities.[74] The Commission found that the Security Services should establish the appropriate mechanisms to ensure their accountability which it defined as "being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matter right, if it should appear that errors have been made".[75]

The Commission broke down state accountability into four separate forms: judicial accountability, parliamentary accountability, expert accountability and the existence of adequate complaints mechanisms.[76] These will be examined separately below.

a) Courts

In assessing the role of the judiciary, the report stressed that Courts are usually hindered in securing democratic oversight of the agencies due to procedural devices such as public interest immunity or lack of access to secret documents.[77] Furthermore, as they cannot act proprio motu, they can only intervene in the instances where an appropriate case is brought before

[74] European Commission for Democracy through Law (Venice Commission) , 'Report on the Democratic Oversight of the Security Services' (2007) CDL-AD (2007) 016.
[75] Ibid at 6.
[76] Venice Commission at 7.
[77] Ibid at 10.

them.[78] Courts would also be reluctant to openly question policy decisions in relation to national security as traditionally that area belongs to the executive. Although the Strasbourg court in *Chahal v UK* held that national authorities cannot be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved[79] striking the proper balance has proven difficult. Further difficulties barring the Courts from effective oversight arise, according to the report from the fact that, during the process of monitoring the assessment of intelligence itself, "what needs to be checked is not only hard data (purely factual information) but also and more importantly subjective assessments as to whether facts or people constitute a present or future threat to national security".[80] This is far from an objective assessment and courts would rightly defer such decisions to the relevant authorities.

However, the importance of judicial oversight was not overlooked by the Commission. It noted that courts must ensure the legality of intelligence activities before or after these are undertaken through "prior authorisation in a pre-trial phase or post ad hoc review of special investigative measures".[81] Furthermore as the Commission noted "investigating magistrates, often specialists in security issues, may be given a general supervisory control over ongoing security investigations"[82]. Finally, "judges may also be given a role in chairing ad hoc commissions of inquiry, or serving or retired judges may sit on expert bodies, but this should be regarded as a form of

[78] Ibid at 18.
[79] *Chahal v UK* (App. no. 22414/93, 15 November 1996) at [131].
[80] Venice Commission at 5.
[81] Ibid.
[82] Ibid at 7.

expert rather than judicial control".[83] The Parliamentary assembly noted furthermore that the judiciary can exercise control over complaints that interference with rights by the agencies were in line with the Convention. Therefore they play a key role in agency accountability over human rights violations and "have the right to determine whether there was undue harassment of the individual or abuse of discretionary administrative powers in his or her regard".[84]

b) Parliament

Parliamentary should have powers to ensure oversight of the Services, as any authority or legitimacy of the agencies, "is derived from legislative approval of their powers".[85] Oversight by the parliament ensures that the security agencies will serve the state and uphold constitutional order and not be led by partisan politics thus serving "narrow political or sectional interests".[86] Although the Commission stressed that overly relying on Parliament could lead to the agencies becoming "a political football",[87] it supported the idea of a "standing, continuous, method of control by a parliamentary oversight body, however designated, designed to deal with security and intelligence matters in particular".[88] The US intelligence agencies have from the outset been subject to Congressional oversight.[89] Congressional oversight committees are found in both Houses, with the

---

[83] Ibid at 5.
[84] Council of Europe, Recommendation 1402 (1999) on the 'Control of Internal Security Services in Council of Europe Member States', text adopted 9 April 1999. at C. [3].
[85] Venice Commission at 32.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] R. Norton – Taylor at 105.

mandate to authorise funding for intelligence activities and conduct investigations, audits and inquiries relating to the intelligence community.[90]

The role of the Parliament as the Parliamentary Assembly Recommendation argued, is to "pass clear and adequate laws putting the internal security services on a statutory basis, regulating which kind of operational activities carrying a high risk of violation of individual rights may be used in which circumstances, and providing for adequate safeguards against abuse".[91] It must also ensure that the executive does not extend the objectives of security services, and ensure that only those laid down by law are followed.

c) The Executive

Security services are expected to receive and carry out instructions from the executive. The nature of the services usually means that government control over the services is much greater than that of Parliament. Therefore, accountability mechanisms must ensure that the executive will not be able to manipulate its position and use the Services to further political objectives unrelated to the public interest and subsequently insulate itself from criticism. The Venice commission noted that due to the fact that government departments are both taskmasters and consumers of intelligence[92] "a degree of statutory or constitutional insulation from day to day governmental or

[90] House of Commons Session 1998-1999, Select Committee on Home Affairs Third Report <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmhaff/291/29107.htm> accessed 12 December 2014.
[91] Recommendation 1402 (1999).
[92] Venice Commission at 24.

ministerial control"[93] is necessary. This is meant to lessen the influence the government of the day can have on intelligence activities while also ensuring that they are kept in check. Leigh however, subscribes to the idea that the executive should maintain "prime responsibility"[94] over the Services as it has been "delegated by citizens and their representatives to enforce national policies"[95] and "is responsible for the actions of agencies placed under its authority".[96] Under a model where the executive retains primary oversight of the Services, they are not only as Leigh maintains "tigers to be tamed, but thoroughbred horses to be bred".[97]

Expert Bodies

The Commission argued that accountability of the Services could also be entrusted to expert bodies, comprised of individuals with legal training and the capability to provide effective oversight of the services.[98] Such bodies have the advantage of not being as politically charged in discharging their functions, however, they can lack the legitimacy of a Parliamentary body.[99]

Adequate mechanisms for complaint.

Finally, the Commission suggested the existence of robust complaints mechanisms, in line with Article 13 of the ECHR, that secures the right to

---

[93] Ibid.
[94] Leigh I., 'Accountability and intelligence cooperation: Framing the issue' in Born, Leigh and Wills (ed.), *International Intelligence Cooperation and Accountability* (Routledge, 2011).
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Venice Commission at 7.
[99] Ibid.

an effective remedy for violations of the convention. Article 13 is not used independently in this regard but can be used in conjunction with Article 8[100] to create a positive obligation for states to have mechanisms that can examine whether activities interfering with protected rights under the convention where taken in accordance with the law and allow individuals to seek redress for alleged violations of their rights by the agencies.[101]

In this respect, the Parliamentary Assembly Recommendation went further to argue for a right of access to personal information collected and stored by the Services with national security exemptions to this access defined by law, and recommended that "all disputes concerning an internal security service's power to bar disclosure of information be subject to judicial review".[102]

Thus, on the regional level, accountability is understood to be a complex process, where many bodies exert control over the policies of the Services and oversight is not restricted to 'self-regulation',where accountability is achieved through internal bodies and internal reports. In light of this suggested framework, it would be important to examine in the following part, the UK accountability structure pertaining to the Services, and attempt to assess whether and how the various forms of accountability suggested on the regional level have translated into the domestic context.

---

[100] *Klass v. Germany* (App no. 5029/71, 6 September 1978), *Weber and Saravia v. Germany* (App no. 54934/00, admissibility) , *Leander v. Sweden* (App no 9248/81, 26 March 1987), *Segerstedt-Wiberg v. Sweden* (App no. 62332/00, 6 June 2006).

[101] See *Malone v United Kingdom* (App. No. 8691/79, 2 August 1984) where the ECtHR found that a lack of clear and discernible limits to interception powers, meant that "the minimum degree to which citizens are entitled under the rule of law in a democracy is lacking". *Malone* at [79].

[102] Recommendation 1402 (1999).

Accountability of agencies in the UK and its efficacy

In attempting to build effective mechanisms that can regulate and guarantee the accountability of intelligence agencies, it is important to resolve a number of important issues, namely to whom agencies will be accountable, for which of their activities and will this oversight be merely retrospective or will it also apply to activities before they are undertaken.[103]

As the green paper on justice and security stressed "Oversight must be effective, but it also must be seen to be effective – in other words credible in the eyes of Parliament and the general public".[104] Therefore, an established system of oversight must be built in a way to achieve maximum responsibility of the services and also assuage concerns of the public that the enormous funds entrusted to them are put to good use.

The European Convention on Human Rights has provided for a right to privacy under Article 8, a right to an 'effective remedy' (Article 13) in domestic law for any breaches of the Convention that can be attributed to a state party as well as a right to freedom of expression from which a right of access to information can be derived, although this is not fully developed and is still largely nascent in the COE context.[105] Consequently, any regulatory mechanisms aiming to provide oversight of agencies' activities

[103] Leigh I, 'More closely watching the spies: Three decades of experiences' in Born, Johnson and Leigh (ed.), *Who's watching the Spies : Establishing Intelligence Service Accountability* (Potomac Books 2005) 7.
[104] Green Paper on Justice and Security, Cm 8194, (2011-2012) at 3.2.
[105] See *Tarsasag v Hungary* (App no. 37374/05, 14 April 2009).

must ensure that they are compatible with these obligations stemming from the ECHR.

As far as surveillance powers of agencies are concerned, the European Court of Human Rights in *Amman v Switzerland* stated that there need to be provisions in a state party's domestic legislation that clearly indicate "the persons concerned by such measures, the circumstances in which they may be ordered, the means to be employed or the procedures to be observed".[106]

a) Statutory and Parliamentary Control

Significant developments in the UK agencies' accountability are a product of the past 25 years, as before the regulatory constraints of intelligence agencies in the UK where virtually nonexistent. The 'Maxwell – Fyfe Directive' a one – page administrative directive issued by the Home Secretary Sir David Maxwell – Fyfe in 1952 was the basis on which the MI5 operated for decades[107] as it was renewed by each incoming Home Secretary of whatever party,[108] until the Security Service Act of 1989 was passed. This was the first piece of legislation in the long history of the agencies to make an attempt to regulate their activities within a statutory framework. As Jeffreys-Jones asserts, a series of cases brought against the UK at the ECtHR in the early 80's meant that "for the MI5 to eavesdrop in the interest of national security, it was necessary for it to become a legal

[106] *Amman v Switzerland* (App no. 27738/95, February 16 2000) at [58].
[107] Chesterman S., ' "We can't spy…if we can't buy!": the privatization of intelligence and the limits of outsourcing "inherently governmental functions" ' (2008) 19 *European Journal of International Law* 1055, 1069.
[108] Rimington S., *Open Secret* (Arrow Books, 2002) 88.

entity covered by legislation"[109]. In an effort to illustrate that services are apolitical and accountable[110] the Act clarified that the Director General would be responsible to ensure "that the Service does not take any action to further the interests of any political party".[111] But apart from this, any inappropriate instructions from ministers could not be effectively thwarted as no safeguards seemed to be provided for in the act.[112]

The Intelligence and Services Act of 1994, established a body which has evolved to become of central importance in the UK services accountability framework, the Intelligence and Security Committee (ISC). It is comprised of nine parliamentarians from both houses and reports annually to the Prime minister who in turn submits the report to Parliament after necessary redactions for security purposes. Its powers were extended significantly under the Justice and Security Act of 2013.[113] Under the previous framework, the ISC was responsible for "examining the expenditure, administration and policy of the security and intelligence services and the GCHQ".[114] This excluded any authority to oversee the operational activities of the Services. The Committee's remit extends further to cover the Joint Intelligence Organisation and the National Security Secretariat in the Cabinet Office; Defence Intelligence in the Ministry of Defence; and the Office for Security and Counter-Terrorism in the Home Office.[115]

---

[109] Jeffreys-Jones R., *In Spies We Trust: The Story of Western Intelligence* (Oxford University Press, 2013) 172.
[110] Security Service, 'Statutory Basis' <https://www.mi5.gov.uk/output/statutory-basis.html> accessed 12 December 2014.
[111] Security Service Act 1989 s 2 (2) (c).
[112] Birkinshaw, *Freedom of Information* at 52.
[113] This will be examined in detail below.
[114] Birkinshaw, *Freedom of Information* at 48.
[115] Intelligence and Security Committee, Annual Report 2012-2013 HC547 pg 4.

Members of the Committee are subject to section 1(1)(b) of the Official Secrets Act and therefore routinely have access to highly classified material in carrying out their work.[116] As the Home Affairs Committee reported though, the ISC "suffered from the obvious drawback that it was a *statutory* and not a *parliamentary* committee".[117] Furthermore, for critics, the fact that the ISC itself operates within the barrier of secrecy is evidence that oversight in the British context does not mean 'public scrutiny', but merely 'scrutiny by the ISC'.[118] The Committee does not investigate individual complaints as these fall into the jurisdiction of the RIPA tribunal which will be examined in detail below. The Intelligence Services Act 1994 provides that Agencies are required to disclose information to the Committee in order to discharge their statutory functions properly. There are provisions allowing the Agencies, in rare circumstances, to refuse to disclose certain "sensitive" information. However, to date no request for information made to the Agencies by the ISC has been denied on these grounds.[119] The green paper on Justice and Security recommended that it should be the Secretary of State and not the heads of the agencies that should be able to exercise this veto[120] although, under the framework prior to the JASA (2013), the secretary of state could overturn a refusal to disclose information by the heads of the agencies on public interest grounds.[121] Because the ISC operates within the aforementioned ring or

[116] The Intelligence and Security Committee, <http://isc.independent.gov.uk/FAQ> accessed 12 December 2014.
[117] House of Commons at [4].
[118] Glees A. and Davies P., 'Intelligence, Iraq and the Limits of Legislative Accountability during Political Crisis' (2006) 21 *Intelligence and National Security* 848, 852.
[119] <http://isc.independent.gov.uk/FAQ>.
[120] Green Paper on Justice and Security at 3.36.
[121] Ibid.

barrier of secrecy[122] there are certain constraints on what the Committee can do with the information it receives and it has very little control over the extent to which its conclusions are made public. This can seriously hamper the effectiveness of the ISC as an oversight mechanism. Select committees also allow for procedures that can exclude material whose publication might be harmful. As the Home affairs report stressed when referring to the two procedures:

> Under both procedures therefore—the ISC's statutory procedures and the select committee procedure-there is again a practice of negotiation as to what should be published and what should not. The key difference is that under the statutory procedure the final word rests with the executive , whereas under the select committee procedure the final word rests with parliament[123].

The green paper on justice and security strongly criticised the framework under which the ISC functioned. The paper pointed out that the ISC was "insufficiently independent, that it does not have sufficient knowledge of the operational work of the Agencies and that the process by which the ISC is appointed, operates and reports is insufficiently transparent".[124]

---

[122] Bradley AW and Ewing KD., *Constitutional and Administrative Law* (13th edn., Longman, 2003) 600.
[123] House of Commons at [35].
[124] Green Paper on Justice and Security (n. 76) at 3.14.

The ISC had also highlighted that the arrangements pertaining to its remit and powers were outdated.[125] It called for the The Intelligence and Services Act of 1994 to be amended to allow the ISC to require, rather than simply request as it did then, information from the agencies. The ISC insisted that its remit should be appropriately expanded to reflect the fact that its role is not limited to "examining policy, administration and finances, but encompasses all the work of the Agencies".[126]

Problems in communication between the Services and the ISC were many. In recent reports, the ISC disclosed that it had been 'inadvertently misled' as certain discrepancies were found to exist between evidence by the MI5 prepared for the Inquests in relation to the terrorist attacks of 7/7 and the evidence provided to the Committee.[127] Although the Director General of the MI5 insisted that these were due to human error and the "complexity and unsatisfactory state of our records"[128] and the ISC seemed partly to accept this, the Committee also pointed out that there were instances where the Service "did not provide the ISC with the relevant information at the time, or did not explain the information correctly"[129] and this was "extremely frustrating for the Committee and for those who rely on our reports".[130] However, this was not the first case where bad record-keeping was used as an excuse so certain information would not be released to the ISC. In the 2008-2009 the Committee reported that the Security Service claimed that it had failed to discover all documentation relating to the case of Binyam

[125] Intelligence and Security Committee, Annual Report 2010 – 2011, Cm8114 2010/11 at [273].
[126] Ibid at 274 JJ.
[127] Ibid at para 238.
[128] Ibid.
[129] Ibid at para 240.
[130] Ibid at CC.

Mohamed's allegations of MI6 involvement in torture under the scheme of extraordinary rendition.[131] Eventually after pressure from the Committee the documents were located and the Director General of the security service responded by stating that he could not "fully explain why it was not discovered in our records"[132] while the SIS claimed it could not respond to the Committee's inquiry on rendition "because of the search parameters used".[133] The ISC went on to state that "we regret that neither the Security Service nor the SIS identified the relevant documentation... There is no convincing explanation as to why this information was not made available to this Committee".[134] These failures in record-keeping were not mentioned in the green paper on justice and security[135] although in its response to the report the Government concurred that "good record keeping is crucial to the work of the Agencies"[136] and assured the ISC that "significant resource is being dedicated, within both organisations, to improve record keeping and information management".[137]

The Justice and Security Act, makes significant changes to the ISC which will be presented below. Although these make for an improvement in its powers to keep the Services accountable, it is still far from being genuinely independent and effective in its oversight of the Services. The government and the Prime Minister specifically retain control on which information will

[131] Intelligence and Security Committee, Annual Report 2008-2009, Cm7807 2008/9, at [159].
[132] Ibid at para160.
[133] Ibid at para161.
[134] Ibid at Para X.
[135] NGO Justice, 'Consultation Response to Justice and Security Green Paper' (Justice.org.uk 11 January 2012) < http://www.justice.org.uk/resources.php/314/secret-evidence-in-civil-proceedings-unnecessary-unfair-and-unjustified-justice-responds-to-governme> [58] accessed 12 December 2014.
[136] Government Response to the Intelligence and Security Committee's Annual Report 2008 2009, Cm7808 2008/9 para Y.
[137] Ibid at X.

be released to Parliament, making any disclosure of information that is embarrassing to the government or the services easily concealable.

Although the ISC had suggested that the Committee be made into a Parliamentary committee, the Act makes it a Statutory Parliamentary Committee. Members will be drawn from both the House of Commons and the House of Lords[138] and each member will be appointed by the House of Parliament from which he or she is drawn.[139] Ministers of the Crown are not eligible to become members of the ISC.[140] A total of nine members will be appointed and they will be able decide who will be assigned as Chair of the ISC.[141] The caveat in this process seems to be that, although the members are elected by the Houses of Parliament, they must first be nominated for membership by the Prime Minister. This could raise questions as to their genuine independence from influence from the executive, although the Leader of the Opposition must be consulted in deciding whether a person will be nominated for membership;[142] the final decision however, rests with the Prime Minister.

Another important advancement is the significant expansion of the ISC's remit in overseeing the agencies. Prior to the Act, the ISC was limited in examining only the expenditure, administration and policy of the Services. Under the new reforms, the operations of the Services can now also be scrutinised by the ISC and their powers are not only limited to the three

[138] Justice and Security Bill 2013 HL Bill 27 s. 1 (2) .
[139] Ibid at (3).
[140] Ibid at (4) (b).
[141] Ibid at (6).
[142] Ibid at (5).

Services, but extend to "other such activities of Her Majesty's Government in relation to intelligence or security matters".[143]

The extension of the ISC's remit to the operational activities of the services is a significant step forward but does not come without noteworthy limitations. Excluded from the ISC's scrutiny are "ongoing intelligence or security operations".[144] This means that only retrospective accountability is authorised for operational activities. Furthermore, the Act provides that consideration of particular operational matters will only be permitted in cases where the ISC and the Prime Minister are satisfied that there is significant national interest, and the "consideration of the matter is consistent with any principles set out in, or other provisions made by, a memorandum of understanding"[145] that is agreed between the Prime Minister and the ISC and is published and laid before Parliament.

The memorandum of understanding seems to be a key document in this process. It can include other provisions about the functions of the ISC and must be made in agreement with the Prime Minister and can be replaced or altered with the agreement of both parties.[146] This memorandum will also lay down the procedure according to which the heads of the services will disclose to the ISC information that they have been asked to present and similar procedures by which Ministers of the Crown can release information when it is sought to the ISC.

---

[143] Ibid at s. 2 (1) and (2).
[144] Ibid at (3) (a) (i).
[145] Ibid at (3) (a) (ii) and (4).
[146] Ibid at s. 4 .

The ISC is to produce an annual report to Parliament but can also make other reports for issues arising from any aspect of its functions when the committee considers this appropriate.[147] Draft reports must be sent to the Prime Minister who, after consulting the ISC, can redact any passages and information when the publication of such matters could be "prejudicial to the continued discharge of the functions of the Security Service, the Secret Intelligence Service, the Government Communication Headquarters or any person carrying out activities"[148] for the Services. This seems to be a broader exemption than national security considerations and it seems to allow the Prime Minister great powers in exempting information from the reports. The consultation with the ISC will probably be of little value as the Prime Minister is the one to make the final decision on potential redaction. However, s. 3(5) provides that "a report by the ISC to Parliament must contain a statement as to whether any matter has been excluded from the report".[149] The Act also allows the ISC to make a report to the Prime Minister "in relation to matters which would be excluded [...] if the report were made to Parliament".[150]

The Green paper had included suggestions on establishing an Inspector General who would be appointed by and be answerable to the Prime Minister but this proposal was eventually abandoned and no such position was created in the Act. This was mainly due to the fact that the government

[147] Ibid at s. 3 (1).
[148] Ibid at (4).
[149] Ibid at s. 3 (5).
[150] Ibid at s. 3(7).

in its response to the Green Paper argued that such a figure would be difficult to coexist with the broadened remit that was provided to the ISC.[151]

The Act however, did extend the remit of the Intelligence Services Commissioner. It amends the Regulation of Investigatory Powers Act 2000 by providing the Commissioner with additional review functions over an intelligence service, the head of an intelligence service or "any part of Her Majesty's forces, or of the Ministry of Defence, so far as engaging in intelligence activities".[152] The prime minister seems to have effective control over the powers of the Commissioner, as in the Act the Commissioner is expected to act 'so far as directed to do so by the Prime Minister'. The Act stipulates that "Directions under this section may, for example, include directions to the Intelligence Services Commissioner to keep under review the implementation or effectiveness of particular policies of the head of an intelligence service regarding the carrying out of any of the functions of the intelligence service".[153] Such directions and any revocations by the Prime Minister need to be published although exemptions for publication exist when it would be contrary to the public interest or prejudicial to national security, prevention or detection of serious crime, the economic well-being of the UK or the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Intelligence Services Commissioner[154]. Although the powers of the Commissioner are extensive, the fact that as a figure the

[151] Green Paper at 3.48.
[152] Justice and Security Bill 2013 HL Bill 27 at s. (5).
[153] Ibid at s. 5 (4).
[154] Ibid at s. 5 (5).

Commissioner is not disengaged for the Prime Minister's discretion makes for a weak accountability mechanism.

In the green paper it was stated that the ISC had proposed that the heads of the Agencies should not be able to withhold information that the ISC requested.[155] In the Intelligence community, the Heads of the Agencies also have substantial powers. Although the Prime Minister has the overall responsibility within government for issues of Security and Intelligence, day to day ministerial responsibility for the MI5 lies with the Home Secretary and the Foreign Secretary for the MI6 and the GCHQ.[156] The heads of the agencies are required to report to the Prime Minister and each agency head is under a separate statutory requirement to produce an annual report related to the work of the organisations to the Prime Minister and the relevant Secretary of State.[157] However, "the agency heads have a statutory responsibility for the operational work of their Agencies and are operationally independent from Ministers".[158] In the existing regime the heads of the agencies can refuse to disclose sensitive information and this refusal to disclose information after a request by the ISC can be overturned by the relevant secretary of state on public interest grounds.[159] The Justice and Security Act provides that the heads of the agencies must make information available to the ISC when it is requested from them and the decision to refuse disclosure now rests with the Secretary of State.[160] The broader remit if the ISC to oversee other government departments under the

[155] Green paper at 3.15.
[156] Ibid at 3.10.
[157] Ibid at 3.11.
[158] Ibid.
[159] Ibid at 3.36
[160] Bill Schedule 1 at s. 3 (1) (b).

Act means that Committee can request information from Ministers although in this case the refusal to disclose information that is sought rests with the Minister.[161]

In the above cases, refusal to disclose information by the Secretary of State or a Minister of the Crown can only be justified if the information requested is 'sensitive'. Schedule 1 to the Act explains which information would fall under this category and it includes any information "which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods"[162] available to the Services. Although as mentioned above, the ISC's remit has been extended to include retrospective oversight of the agencies' operational activities, the schedule includes "information about particular operations which have been, are being or are proposed to be undertaken"[163] under sensitive information which can justifiably be withheld from the Committee. Furthermore, Ministers can decline to release information "which, in the interests of national security, should not be released to the ISC"[164] or information "of such nature that if the Minister were requested to produce it before a Departmental Select Committee of the House of Commons, the Minister would consider (*on grounds which were not limited to national security*) it not proper to do so".[165]

Finally, information is considered sensitive if it is "provided by, or by an agency of, the Government of a country or territory outside the United

[161] Ibid at s. 3 (2) (b).
[162] Ibid at s. 4 (a).
[163] Ibid at s. 4 (b).
[164] Ibid at s. 3(a) (ii).
[165] Ibid at s.3 (b) emphasis added.

Kingdom where that government does not consent to the disclosure of information".[166] This refers to exchanges of intelligence information between governments or security agencies of different governments. It is a fundamental principle of intelligence sharing that such exchanges are kept confidential. Publication of other countries' intelligence material, whether sensitive or otherwise, undermines the key principle of confidentiality on which relations with foreign intelligence services are based and has the potential to cause serious harm to future intelligence cooperation and thereby undermine the national security of the UK. This is known as the 'control principle' and stipulates that " if a country shares intelligence with another, that country must agree before its intelligence is released".[167] As Leigh argues, existing "legislation does not adequately address even the most basic of questions concerning international intelligence co-operation"[168] thus allowing for the possibility of serious human rights abuses going unchecked. In his response to the green paper, the chair of the ISC Malcolm Rifkind stressed that "Put simply, if we do not respect the confidentiality of the sensitive information we receive, we won't get given any".[169]

These changes to the oversight regime were welcomed by the ISC. In its 2012-2013 report, the Committee presented its view that it will now "have greater access to information, including primary material held within the

---

[166] Ibid at s. 4 (c).
[167] Norton – Taylor R., 'Binyam Mohamed torture evidence must be revealed, judges rule' (Guiardian.co.uk, 10 February 2010) <http://www.guardian.co.uk/world/2010/feb/10/binyam-mohamed-torture-ruling-evidence> accessed 12 December 2014.
[168] Leigh I., 'Changing the rules of the game: some necessary legal reforms to United Kingdom intelligence' (2009) 35 *Review of International Studies* 943, 955.
[169] Sir Malcolm Rifkind MP, Intelligence and Security Committee Chairman, 'Green Paper on Justice and Security: ISC Response' ISC 4/1/023 7 Decemeber 2011.

Agencies, and it will have increased research and analysis resources at its disposal – including staff working more closely with the Agencies and able to inspect primary material at the Agencies' premises".[170] Overall, the ISC stressed that the new Act will "radically improve the ability of the ISC to oversee the work of the Agencies"[171] and it concluded that the "changes will lead to much improved oversight of the UK intelligence community".[172]

In assessing these new developments it is important to acknowledge that they are a significant step in the right direction. However, where they do not succeed is in limiting governmental control over the ISC. As Justice noted, the ISC's "composition, its publications and ultimately the conduct of its day to day work"[173] are still directly under the supervision of the Prime Minister, the Secretaries of State and Ministers. Ministers in particular have significantly broad powers to refuse disclosure of information.

The effectiveness of the Intelligence Services Commissioner and the Interception of Communications Commissioner is also questionable. There have been complaints that their efficacy is seriously undermined due to lack of sufficient time and resources which would make it unlikely that they would be able to provide useful scrutiny and keep the agencies accountable when one considers the breadth of the operational practices of the Agencies that the Commissioners are expected to oversee.[174] Overall, critics argue that although the ISC is responsible for overseeing both the efficacy and

[170] ISC Annual Report 2012-2013 at [127].
[171] Ibid at [128].
[172] Ibid at [131].
[173] Justice response to green paper at [61].
[174] Ibid at [64].

propriety of the Services, "one would have to conclude that the ISC has so far paid far greater attention to the former than the latter".[175]

The ISC itself however, has fervently dismissed claims that it is insufficiently independent and critical of the Services, in light of the allegations of their complicity in gross human rights violations. In an open letter to Human Rights Watch, the former chair of the ISC Kim Howells, argued that:

> The fact that the Intelligence and Security Committee does not launch full-scale attacks on the UK security and intelligence services does not indicate that we are not independent. The Committee chooses to present reasoned discussion rather than going for the sensationalist media sound bite as others do. Whilst we cannot conduct our work openly (taking evidence from the security and intelligence agencies in public would be self-defeating) I can assure you that giving evidence before us is not a comfortable experience for anyone. The questioning is robust, often combative, issues are returned to, further explanations demanded, documents examined and the end results are often critical, albeit not sensationalist.[176]

---

[175] Gill P. and Phythian M., *Intelligence in an Insecure World* (Polity Press, 2012) 165.
[176] Kim Howells, Open Letter to Human Rights Watch on 'Allegations of Complicity in Torture', 19 February 2010 available at http://www.extraordinaryrendition.org/document-library/finish/6-uk-committees/72-isc-letter-to-hrw-19-02-10.html accessed 12 December 2014.

The Joint Intelligence Committee (JIC) is responsible for the co-ordination of the Services.[177] After raw intelligence is collected from human and technical sources and after it is assessed as to its quality and reliability it is passed on to the staff in the Cabinet Office who pull it together for consideration by the JIC. This body meets on a weekly basis. Thus, according to Davies, the JIC is "the overseer, arbitrator and nominal formulator of the country's national intelligence requirements and priorities".[178]

b) Executive Accountability

The Home Secretary is responsible for the security services and is accountable to Parliament for its conduct. S/he decides on the appointment of the Director General in conjunction with the Prime Minister.[179] Finally it is the Prime Minister who has 'ultimate responsibility' for the agencies although due to the fact that Parliament remains largely uninformed on details regarding the agencies and can only question the prime minister on a very broad basis, this responsibility becomes largely irrelevant.[180] In fact multiple reports by the ISC have pointed out they meet with the Ministerial Committee on Intelligence in which the Prime Minister is chair very infrequently and recommended that they meet at least on an annual basis.[181] As Birkinshaw asserts traditionally "ministers do not concern themselves with the detailed information which may be obtained by the Security

[177] Birkinshaw, *Freedom of Information* at 37.
[178] Davies P., *MI6 and the Machinery of Spying* (Frank Cass, 2004) 254.
[179] Security Service, 'Ministerial Oversight' <https://www.mi5.gov.uk/output/ministerial-oversight.html>.
[180] Birkinshaw, *Freedom of Information* at 41 citing Drewry, 'The House of Commons and the Security Services'.
[181] Ibid.

Service except the necessary information needed for them to provide guidance on the services' activities"[182].

These accountability mechanisms however, cannot be approached by individuals alleging mistreatment or human rights violations by the Services. The body responsible for this that ensures that the right to an effective remedy is upheld is the Investigatory Powers Tribunal which will be examined next.

c) The RIPA 2000, judicial oversight and the right to an effective remedy through an individual complaints procedure.

In order to protect national interests, agencies are given extraordinary powers that may infringe on privacy rights such as telephone tapping, bugging, visual surveillance, e-mail and other forms of electronic interceptions[183] that require strict guidelines to ensure that they are proportionate to the aim that the agency is trying to achieve and "weighed against the possible damage to civil liberties and democratic structures".[184]

In the past, the ability of the judiciary to question policies relating to national security was challenged. In *Council of Civil Service Unions v Minister of State for the Civil Service* (the *GCHQ* Case), for instance the

---

[182] Ibid.

[183] See Todd P. and Bloch J., *Global Intelligence: The World's Secret Services Today* (Zed Books, 2003) Chapter 2 pp 35-70. On invasion of property in order to palce a bugging or eavesdropping device See Ewing KD and Dale-Risk K., *Human Rights in Scotland: Text, Cases and Materials* (3rd edn., W. Green, 2004) 255.

[184] Lustgarten and Leigh at 45. See also Eijkman Q. and Weggemans D., 'Visual surveillance and the prevention of terrorism: What about the checks and balances?' (2011) 25 *International Review of Law, Computers & Technology* 143-150.

Court held that "national security is the responsibility of the executive government, what action is needed to protect its interests is [...] a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves".[185]

However, such a blanket deference to the executive's will has been overcome. An important step in regulating the intelligence services through judicial oversight and enhancing their accountability in line with European Courts' demands was the Regulation of Investigatory Powers Act (RIPA) 2000 which incorporated many and significant changes to the pre existing regime in the Interception of Communications Act 1985.[186] The act aimed to set the standards for interceptions, surveillance and other investigations following the premise that if there is to be state surveillance, then it should be delivered in accordance with the law and limitations must be precise and accessible.[187] Section 5 of the Act however, allows the Secretary of State to issue a warrant for interception "in the interests of national security".[188] The RIPA also provided for a position of an Interception of Communications Commissioner appointed by the Prime Minister under s.57 and an Intelligence Services Commissioner under s59. The Commissioners draft an annual report for the Prime Minister. Although their reports, unlike those of

---

[185] *Council of Civil Service Unions v Minister of State for the Civil Service* (the *GCHQ* Case) [1985] A.C. 374 HL at 406-407 per Lord Diplock.
[186] Ormerod D. and McKay S., 'Telephone Intercepts and their Admissibility' [2004] *Criminal Law Review* 15, 15.
[187] Akdeniz Y, 'Regulation of Investigatory Powers Act 2000: Part 1: BigBrother.gov.uk: state surveillance in the age of information and rights' [2001] *Criminal Law Review* 73, 74.
[188] Regulation of Investigatory Powers Act 2000, s 5 (3) (a). See also Home Office, *Interception of Communications Code of Practice* (TSO London, 2002) Chapters 4 and 5.

the ISC, are not redacted, classified information is contained in a separate Annex which is not published.[189] According to its 2010- 2011 report, the ISC has asked to review these annexes but the Government has so far refused access despite the fact that both Commissioners have not objected to this request.[190]

After the Court of Justice of the European Union found[191] the Data Retention Directive 2006/24/EC, which allowed the retention of personal data for the purposes of prevention, investigation, detection and prosecution of criminal offences, to be incompatible with the rights to respect family life and the protection of personal data, the government fast-tracked passing the Data Retention and Investigatory Powers Act 2014. The Act amends RIPA and strengthens government powers to require phone and internet companies to retain personal data for a year and hand it over to the security services.

In an effort to ensure responsibility of the services for their actions, RIPA established the Investigatory Powers Tribunal for those affected by the intelligence services where human rights complaints could be lodged. The Tribunal would have jurisdiction over "proceedings against any of the intelligence services"[192] or "any other person in respect of any conduct, by or on behalf of any of those services".[193] This would include former members who wished to disclose information and were refused the right to

[189] ISC Report 2010- 2011 at para 279.
[190] Ibid at para 280.
[191] In joined cases *Digital Rights Ireland Ltd v Minister for Communications and others* and *Kärntner Landesregierung and others v Minister for Communications and others* C-293/12 and C-594/12.
[192] Regulation of Investigatory Powers Act 2000 s65 (2) and (3).
[193] Ibid.

do so. All organisations that have investigatory powers have a legal obligation to provide the Tribunal with assistance to conduct its investigations.[194] Under section 68 (6) of the Act, all organisations holding powers under RIPA must provide the Tribunal with all information requested by it[195] and the Tribunal can ask for further explanations or clarifications regarding the information received.[196]

It is important to note that in a Supreme Court decision[197] it was held that the RIPA Tribunal had the sole jurisdiction to hear an application concerning a claimant who sought to challenge the refusal of the Director of the Security Service to authorise publication of his memoirs due to national security considerations by bringing an application under Article 10 of the ECHR.

Although the RIPA tribunal could develop into a potent a way to make intelligence services accountable, an interesting aspect of the Investigatory Powers Tribunal is that it meets largely in private. In assessing the lack of open hearings, the ECtHR stressed that there is no absolute obligation for oral and public hearings and therefore national security considerations can justify private proceedings if there is danger of sensitive information being released without breaching Article 6 of the convention.[198] Although it would be difficult to make an accusation that the RIPA tribunal is not fair in its judgments, the lack of openness combined with a lack of an appeals

---

[194] ISC Report 2010- 2011 at para 281.
[195] RIPA 68(6).
[196] http://www.ipt-uk.com/sections.asp?pageID=1&sectionID=0&type=faq accessed 12 December 2014.
[197] *R (on the application of A) v B* [2009] UKSC 12
[198] *Kennedy v UK* (App. No. 26839/05, 18 August 2010) at [188].

procedure[199] to its decisions which would provide an opportunity for any "potential deficiencies in the initial hearing to be remedied at a later stage"[200] could easily make parties wishing to complain about security services reluctant and sceptical of its efficacy.

Another stumbling block to the tribunal's effectiveness is the fact that any interception of communications is not revealed to the subject of the interception. This amplifies concerns that abuses will remain concealed[201] as in most cases the subject of interception will discover that such actions were taken against him or her only if criminal proceedings follow the interception.[202] Furthermore, the RIPA Tribunal does not give a clear response to a complainant and can simply state whether the determination is favourable or not. This means that it will not reveal if in fact interception has occurred.[203] It is also a matter of concern that the tribunal is inevitably retrospective in nature. As Ferguson and Wadham assert, "retrospective review is likely to be less rigorous than prior scrutiny and it may well be easier to satisfy the requirements of necessity and proportionality when armed with the incriminating results of the surveillance".[204]

Judicial oversight of the Services is also provided by the Commissioners. It is important to note that the Intelligence Services Commissioner "does not have blanket oversight of the intelligence services and is not authorised to

---

[199] Regulation of Investigatory Powers Act 2000, s67 (8).
[200] Ferguson G. and Wadham J., 'Privacy and surveillance: a review of the Regulation of the Investigatory Powers Act 2000' [2003] *European Human Rights Law Review* 101, 106.
[201] Akdeniz at 78.
[202] Ferguson and Wadham at 106.
[203] Regulation of Investigatory Powers Act 2000, s68 (4).
[204] Ferguson and Wadham at 105.

keep under review all the activities of the intelligence services".[205] His remit is specifically limited to keeping under review the Secretary of State's powers firstly, to issue, renew or cancel warrants for entry into property or interference with wireless telegraphy, secondly, to issue authorisations under section 7 of the ISA 1994 for acts of the agencies outside the UK, and finally his powers to grant authorisations for intrusive surveillance and the investigation of electronic data protected by encryption in relation to the activities of the intelligence services.[206] The Commissioner can also review acts of members of the Services that grant authorisation for directed surveillance and furthermore, can give the RIPA tribunal "all such assistance as it may require in connection with its investigation, consideration or determination of any matter".[207]

The Interception of Communications Commissioner keeps under review the Secretary of State's role in issuing warrants for the interception of communications as well as the procedures adopted by those agencies involved in interception under warrant, to ensure they are in full compliance with RIPA 2000.[208] The Commissioners remit does not solely extend to the agencies, but covers all the procedures also adopted by any other organisations that assist the agencies in warranted interception.[209] Finally, the Commissioner provides oversight after the collection of surveillance material by reviewing the adequacy of arrangements made by the Secretary

---

[205] The Intelligence Services Commissioner's Office http://isc.intelligencecommissioners.com/default.asp accessed 12 December 2014.
[206] Ibid.
[207] Ibid.
[208] Interception of Communications Commissioner's Office http://www.iocco-uk.info/ accessed 12 December 2014.
[209] Ibid.

of State for the handling and protection of intercepted material.[210] Similarly to the Intelligence Services' Commissioner, the interception Commissioner assists the RIPA tribunal by providing any relevant information required.

The most controversial development in relation to the judiciary's authority to keep the services accountable on issues that relate to national security, was the extension of Closed Material Procedures (CMP), through the JASA 2013.[211] The act was passed in response to two important cases relating to the use of CMPs. In *Al Rawi v Security Service,*[212] a number of individuals alleged that the UK security services had been complicit in their torture and degrading treatment while they were held by foreign forces at Guantanamo among other places. The government, claiming that certain elements of the evidence could not be released to them due to national security considerations aimed to initiate a closed materials procedure through the use of the Special Advocates regime. Lord Mance and Lady Hale in the *Al Rawi* decision seemed to favour that in order to avoid his or her claim being struck out, the claimant could concede to a CMP.[213] However, this would create a new set of problems is it would be difficult to consider such a consent on the claimant's part as freely given or informed.[214]

Ultimately, the Supreme Court held that it did not have the authority to allow the use of CMPs in the context of civil trials and it was only Parliament that could activate an extension of CMPs after considering how

---

[210] Ibid.
[211] See Jackson J., 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] *Public Law* 720-736.
[212] [2011] UKSC 34.
[213] *Al Rawi* at [46].
[214] Hughes K., 'The right to know the case against you in civil claims' (2012) 71 *Cambridge Law Journal* 21, 22.

this would affect open justice in the process of full democratic deliberation. Lord Dyson stressed that "the common law principles [...] are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all it is better to be done by Parliament after full consideration and proper consideration of the sensitive issues involved".[215] Therefore, as the Joint Committee on Human Rights noted in the legislative scrutiny of the Bill in relation to such an extension of CMPs, "radical departures from fundamental common law principles or other human rights principles must be justified by clear evidence of their strict necessity".[216]

The case eventually settled out of Court but the Supreme Court provided an important addition to the arguments on CMPs.

In *Tariq v Home Office*[217] it was held that a CMP in the employment tribunal was not incompatible with fair trial rights protected under Article 6 of the European Convention on Human Rights, in cases where disclosure of the allegations against the claimant would prejudice national security. Tariq worked for the Home Office as an immigration officer but his security clearance was withdrawn when close relatives of his were arrested as suspects in a failed terrorist attack on a transatlantic aircraft. Lord Dyson stressed that it was the nature of the case (security vetting of an employee) that would allow such a conclusion. As he asserted "In other classes of civil case which are outside the surveillance/security vetting context, the balance

[215] *Al Rawi* at [48].
[216] Human Rights Joint Committee, 'Legislative Scrutiny: Justice and Security Bill' http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/59/5904.htm accessed 12 December 2014.
[217] *Tariq v Home Office* [2011] UKSC 35.

between the individual's article 6 rights and other competing interests may be struck differently [...] In principle, article 6 requires as much disclosure as possible. It is very easy for the state to play the security card. The court should always be astute to examine critically any claim to withhold information on public interest grounds".[218]

The issues that arise when attempting to preserve open and fair justice while not endangering national security by releasing evidence to terrorist suspects was the driving force that seems to have lead to this extension, whereby evidence could be presented to a judge without being disclosed to the defendant or claimant. The initial proposals for such measures presented in the Green Paper on Justice and Security[219] where highly criticised by human rights groups[220] that echoed the views of many of the Law Lords that had cautioned of "the damage done by a closed procedure to the integrity of the judicial process and the reputation of English justice".[221]

The Green paper on Justice and Security which among others dealt with closed material procedures, tried to balance security requirements and the public interest, in cases that are "so saturated in sensitive material that an ordinary trial would be impossible".[222] That would mean that the most important aspects of the trial would take place in closed session and result in

---

[218] Ibid at [161].
[219] Justice and Security Green Paper, Cm 8194 (October 2011).
[220] Liberty, 'For their eyes only. FAQs about the Government's Justice and Security Bill' http://www.liberty-human-rights.org.uk/campaigns/for-their-eyes-only/for-their-eyes-only-faqs.php accessed 12 December 2014.
[221] *Al Rawi* at [83] per Lord Brown.
[222] Otty T., 'The slow creep of complacency and the soul of justice: observations on the proposal for English courts to adopt 'closed material procedures' for the trial of civil damages claims' (2012) 3 *European Human Rights Law Review* 267, 270.

a 'closed' decision.[223] As Otty purports "this is a matter of particular concern if, as contemplated by the Green Paper and supported by some, a Closed Material Procedure could be ordered even without the parties and the Court testing the full extent of ordinary disclosure available by the conventional application of public interest immunity (PII) rules".[224] At a time where a great number of allegations of misconduct have been brought forth against intelligence agencies of the US and the UK, this seems to be a particularly controversial development as it would allow the Services not to disclose information they held about torture or gross human rights violations against terrorist suspects in the context of a civil trial for damages.

In the UK the driving force of the Court system has long been that "publicity is the very soul of justice".[225] In cases where the public interest in secrecy and the public interest in justice seem to be in collision the mechanism employed to ensure that sensitive information would not be made public was application for public interest immunity (PII). Public bodies can withhold information from courts on the grounds that it is not in the public interest for the information to be released and can deny allowing public officials or representatives answering questions in a court where this would be against the public interest.[226] In such cases public interest immunity can be invoked. PII aims to protect the "interests of the state as a whole and not just the executive branch of the government".[227] It is essentially a rule of evidence found in common law "whereby one party to proceedings argues that certain documents that it has in its possession

[223] Ibid.
[224] Ibid.
[225] Birkinshaw, *Freedom of Information* at 402.
[226] Ibid at 450.
[227] Ibid.

should not be disclosed to the other party because it would be prejudicial to the "public interest" to do so".[228] A Minister must certify that the release of specific evidence would contravene the public interest and subsequently the court must decide whether it agrees.[229] The balancing act required by the court is to decipher whether the damage of disclosing the sensitive information outweighs the damage to the administration of justice.[230] Therefore, as Hughes observes, "PII differs from CMP, because under PII undisclosed evidence cannot be adduced during the proceedings, whereas under CMP a party can rely upon evidence that has not been disclosed to the other side".[231]

An interesting development in the issue of PII was in *Carnduff v Rock*[232] where the Court of Appeal by a majority struck out a claim "by a police informer for money said to be due under an alleged contract to supply information".[233] This case was alluded to in the *Al Rawi* judgment. As Lord Mance stressed referring to *Carnduff v Rock*:

> ...a successful claim for PII can make an issue untriable, so that the court will simply refuse to adjudicate upon the case. In some circumstances, therefore, the court is faced not with a binary choice, between trial with or without the material for which PII has been claimed, but with a trinary choice: the third

[228] Public Interest in UK courts http://publicinterest.info/public-interest-immunity accessed 12 December 2014.
[229] Chamberlain M., 'Legislative comment: The Justice and Security Bill' (2012) 31 *Civil Justice Quarterly* 424, 425.
[230] Ibid.
[231] Ibid.
[232] [2001] EWCA Civ 680.
[233] Chamberlain at 425.

> possibility is no trial at all—whoever happens to be the claimant then has no access to the court at all.[234]

This seems to pose an interesting set of questions. The introduction of CMPs would mean that in such cases striking out a case would not be necessary, but as of 2012, *Carnduff v Rock* was the only reported case of a claim being struck out by a court over the application of PII principles.[235] However, the green paper did point out that in cases such as *Carnduff* 'which involve substantially all and only sensitive material, justice seems barely to be served as the case is struck out for a lack of a mechanism with which to hear it.[236] The paper concluded that the application of PII is much less successful in those "exceptional cases where a large proportion of the sensitive material is of central relevance to the issues in the proceedings-judgments in these cases risk being reached based only on a partial and potentially misleading picture of the overall facts".[237]

The plans for reform set out in the Justice and Security Act regarding the ISC and CMPs were altered from their initial incarnation, after they were first brought to public attention in October 2011 through the green paper on Justice and security. The paper was widely contested as being too restrictive. The Human Rights Joint Committee in its report of the green paper demanded that there should always be "full judicial balancing of the public interests at play, both when deciding the appropriate procedure and when deciding whether a particular piece of evidence should or should not

---

[234] *Al Rawi* at [108].
[235] Chamberlain at 425.
[236] Green paper 1.52.
[237] Ibid.

be disclosed. [...] It should be for the courts to make the determination..."[238] and heavily criticised the government for not having "demonstrated by reference to evidence that the fairness concern on which it relies in this part of the Green Paper is in fact a real and practical problem".[239] The Joint Committee argued that in the absence of such specific evidence, "the Government had fallen back on vague predictions about the likelihood of more cases being brought in future in which intelligence material will be relevant, and spurious assertions about the catastrophic consequences of information being wrongly disclosed".[240]

d) The use of expert bodies

Expert bodies for keeping the Services accountable do not exist in the UK on the official level and on a permanent basis. However, it is common practice for the establishing of official inquiries led by senior judges that intend to produce reports on specific events or policies. Apart from the Butler and Hutton reports, the most recent inquiry led to publication of the Gibson report that covered issues of mistreatment of detainees, or complicity in such mistreatment, by the UK intelligence services.

Although the Report was intended to be used to set the groundwork for a future inquiry by examining all available documents on the allegations it reached certain conclusions that could be damning to the Services.[241] The

[238] The Justice and Security Green Paper - Human Rights Joint Committee: Conclusions and Recommendations [13].
[239] Ibid at [10].
[240] Ibid.
[241] '[I]n some instances UK intelligence officers were aware of inappropriate interrogation techniques and mistreatment or allegations of mistreatment of some detainees by liaison

Inquiry was inconclusive as to "whether the legality of the detainees' detention abroad and the Agencies' own methods of questioning were subject to sufficient scrutiny and consideration".[242] Similarly the question of whether "the Government and the Agencies may have become inappropriately involved in some cases of rendition"[243] remains unanswered.

The conclusions of the report point to a problematic response on behalf of the Agencies to information that UK intelligence officers or their US counterparts were employing illegal practices to interrogate and detain suspects. The Report stressed that:

> The documents received by the Inquiry raise the question whether the Agencies could have identified possible patterns of detainee mistreatment more quickly, from the various reports they received. The Inquiry would have wished to investigate whether procedures should have been put in place earlier than they were to collect such reports and ensure that senior managers were notified of them. The Inquiry would have wished to examine whether the Agencies should have done more to consult Ministers on issues related to detainee mistreatment, and whether Ministers, in turn, should have required the Agencies to report more about those issues as and when they arose. The Inquiry would also have wished to

---

partners from other countries. Many of these instances were reported to Agency Head Offices. The Inquiry would have wished to examine whether that reporting was adequate and, in particular, whether the Agency Head Offices then responded adequately or, in some cases, at all. Lord Gibson, The Report of the Detainee Inquiry, December 2013 at 89.

[242] Detainee inquiry at 89.

[243] Ibid.

> examine whether Government could and should have done more to secure the earlier release of detainees from Guantanamo. Finally the Inquiry would have wished to clarify how the Government and Agencies went about providing information to the ISC, in response to its investigations into the handling of detainees and into rendition. The documents received by the Inquiry raise the question whether the ISC received complete, timely and accurate information in relation to detainee treatment issues, including rendition, from Government and the Agencies, or sometimes whether they were notified at all.[244]

The possibility that the Services were involved in questionable practices that could be in breach of the UK's obligations under the ECHR and this involvement was subsequently kept under wraps from the ISC is of particularly great concern. It remains to be seen whether the extension of the ISC's remit through the Justice and Security Act 2013, which now allows oversight of the agencies' operational activities could ensure that similar practices are avoided in the future.

However, the results of the inquiry point to the limited contribution that inquiries or expert bodies of this of this kind can have to effective accountability in the UK context. Depending on the mandate they are given, the degree of cooperation they can expect from the services and their ability to make recommendations, their effectiveness can significantly vary.

[244] Detainee inquiry at 90.

Although they can present an impartial account of events and provide recommendations that can have an impact to policy or provide redress for violations, their overall input in the accountability framework in minimal.

e) Accountability through Access to Information: The FOIA 2000 and comparisons to the equivalent US system.

According to Jackson, "Information is the essential lubricant of any system of accountability and control".[245] The Freedom of Information Act 2000 (FOIA 2000) was therefore considered a defining moment in making information more accessible by putting an end to the notorious secrecy associated with British government. Despite the fact that the Act provides for a general right of access to information held by public authorities, it establishes exemptions for numerous bodies including all the security and intelligence services, the Security Vetting Appeals Panel and the National Criminal Intelligence Service.[246] Unlike its UK counterpart, the US FOIA of 1966 includes all intelligence agencies mentioned in the National Security Act of 1947[247] (albeit the expected security exemptions to the release of information apply). It is only foreign governments and international governmental organisations that are currently barred from making FOI requests from all agencies that comprise the US intelligence community.[248] The US intelligence agencies – at least in theory – have from the outset been

---

[245] Jackson P., *The Political Economy of Bureaucracy* (Barnes & Noble Books-Imports, Div of Rowman & Littlefield Pubs. Inc, 1983) 246.
[246] Chapman R. and Hunt M. (ed.), *Open government in a theoretical and practical context* (Aldershot: Ashgate, 2006) 143.
[247] Mackenzie A., *Secrets: the CIA's war at home* (University of California Press, 1997) 12.
[248] This was provided for by the The Intelligence Authorization Act of 2002 amending the FOIA 1966.

subject to Congressional oversight.[249] Congressional oversight committees are found in both Houses, with the mandate to authorise funding for intelligence activities and conduct investigations, audits and inquiries relating to the intelligence community.[250]

f) Accountability through the press

The relationship between journalists and intelligence agencies is an important aspect of achieving agency accountability. What is interesting to note is that the agencies have certain officials who are allowed to talk to journalists on intelligence related issues. As the Foreign Affairs Committee stated in it's 2002-03 report, Alastair Campbell confirmed that "there are systems that allow the press to make inquiries of the intelligence community".[251] Due to the fact that the agencies play a vital role in the defence of the realm, neither the Prime Minister nor the Home Secretary respond to detailed questions about the services.[252] Formally, inquiries from the press about MI5 and MI6 are handled by the Home Office and the Foreign Office respectively, while the GCHQ has its own press officer.[253] The Cabinet Office handles the media contacts for the JIC and the Ministry of Defence is in charge for media connections to the Defence Intelligence Staff.[254] It is also widely known that journalists "cultivate their own sources

[249] Norton – Taylor at 105.
[250] House of Commons Session 1998-1999, Select Committee on Home Affairs Third Report.
[251] House of Commons Foreign Affairs Committee, 'The Decision to go to war in Iraq' Ninth Report of Session 2002-03 HC813-I 2002/3 [151].
[252] Birkinshaw, *Freedom of Information* at 40.
[253] Gill at 27.
[254] Intelligence and Security Committee, 'Iraq Weapons of Mass Destruction – Intelligence and Assessments' Cm 5972 2003/4, [138].

within the intelligence community".[255] The Hutton report to a large degree dealt with the relationship of press and agencies and contained some observations on how the press should deal with intelligence information they come across.

The report of the Hutton Inquiry was very critical of the BBC for broadcasting that the report on WMDs was intentionally exaggerated, especially with relation to the claim that Iraq would be able to deploy such weapons within 45 minutes. The inquiry was established to look into the the suicide of David Kelly, an expert on chemical and biological warfare who was identified as the source of a leak to the BBC as he was alleged to have shared his reservations on the genuineness of the 45 minute claim to a BBC reporter. The report rebuked the editors of the BBC for not having looked with greater detail into the allegations before they aired them and stressed that they should always "give careful consideration to the wording of the report and to whether it is right in all the circumstances to broadcast or publish it".[256] The report went on to conclude that Kelly's meeting with BBC journalist Andrew Gilligan "was unauthorized and in meeting Mr. Gilligan and discussing intelligence matters with him, Dr Kelly was acting in breach of the Civil Service code of procedure which applied to him".[257]

The Foreign Affairs Committee, established to report on the decision to go to war in Iraq did point out though, that arrangements similar to those that exist for the press are not in place for Members of Parliament. This could

---

[255] Gill at 27.
[256] Lord Hutton, 'Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G.', HC 247 2003/4 pg 322.
[257] Ibid at 321.

make the government's accountability to Parliament problematic over security issues. Nonetheless, it also went to clarify that "leaking of information and breaches of security they entail should not be permitted"[258] but conceded that there was a need for agencies to brief the press on occasion within very strict guidelines "to correct inaccurate stories or speculation".[259]

The role of the press was central in the debate over the Guardian newspaper's decision to publish leaked information from NSA intelligence official Edward Snowden which among others, revealed that the GCHQ worked closely with the NSA to spy on foreign leaders and EU officials. However, the role of the press in uncovering such alleged abuses as a legitimate additional safeguard has been vehemently rebuffed by the Intelligence Chiefs. As Sir John Sawyers, the current chief of MI6 argued, "I am not sure that the journalists who are managing this very sensitive information are particularly well placed, actually, to make those judgments. What I can tell you is that the leaks from Snowden have been very damaging. They have put our operations at risk. It is clear that our adversaries are rubbing their hands with glee. Al-Qaeda is lapping it up".[260]

Conclusion

The chapter has attempted to present the accountability mechanisms established to ensure that the Services work within their proscribed remit. It

[258] House of Commons Foreign Affairs Committee, 'The Decision to go to war in Iraq' Ninth Report of Session 2002-03 HC813-I 2002/3 [152].
[259] Ibid.
[260] Evidence of Security Chiefs pg18.

has examined how these standards suggested in the COE, require the cooperation of all branches of government and the potential pitfalls to oversight that are presented to the judiciary and Parliament when national security issues are involved. In the UK context, the paper has analysed the legislation that allows for scrutiny of the Agencies and has analysed the role of the ISC and how it has been significantly strengthened under the Justice and Security Act 2013. However, it has cautioned that the powers of Ministers and the Prime Minister to keep information under wraps overall remains intact.

The role of the member of the Services in this equation is clear. Any members who in the course of their work come across instances of wrongdoing, are barred from making public disclosures. Their role is not to keep the services accountable but is limited to serving the agencies and by extension the government of the day. However, in the case of *Shayler,*[261] the Law Lords argued that concerned individuals are not completely excluded from ensuring that the Services work within their remit. While they fell short of recognising a right to publicly blow the whistle under Article 10 of the European Convention on Human Rights, they argued that there was a long list of individuals and bodies within the services, that would allow concerned individuals to raise their grievances or seek permission to disclose information. The following chapter will examine the efficacy of these mechanisms and compare them to the standards for such internal whistleblowing mechanisms that have been set in the COE and by the ECtHR.

[261] *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247.

Chapter 4

Whistleblowing in the Security and Intelligence Community in the UK: Do internal mechanisms for raising concern justify an absolute ban on external disclosures?

Introduction

After examining the accountability structure of the Services, the next step in discussing the extension of whistleblower protection to current and former members of the Services, is to examine the validity of the argument that if the service member can raise concern about misconduct internally, to independent bodies within the organisation, then providing protection for external disclosures under free speech would be superfluous. In order to critically analyse this argument, it will be necessary in this chapter, to examine how COE standards for whistleblower protection through freedom of expression deal with the issue of the exhaustion of internal mechanisms before allowing the whistleblower to proceed to public disclosures.

Under the European Convention of Human Rights, and the Human Rights Act 1998, the free speech restriction on security and intelligence officials, which requires them to refrain from unauthorised disclosures of information is usually justified on two grounds. Firstly, on the basis that information

relating to security and intelligence can legitimately be withheld from the public.[1] Requirements for secrecy are therefore much higher for the intelligence official than for other civil servants and in the context of the ECHR, states retain a wide margin of appreciation in assessing which disclosures could pose a national security threat.[2] Secondly, due to the fact that such agencies have internal mechanisms that are purportedly capable of dealing with any misconduct and provide an effective avenue for a concerned individual to report wrongdoing without fear of reprisals, any disclosures made to a wider audience without authorisation cannot be construed as having been made in good faith.[3] It is a principle of whistleblower protection through free speech that whistleblowers are expected to have exhausted all internal remedies if they existed and were effective, before making any information public.[4]

As discussed in previous chapters, in the UK, whistleblowers from the intelligence community are penalised under the Official Secrets Act of 1989 (OSA 1989) which for this class of individuals, bans any external communication of information, regardless of the possible public interest in the disclosure.[5] This issue of the compatibility of the OSA 1989 with

---

[1] See *Esbester v. United Kingdom* (App. No. 18601/91, Commission decision of 2 April 1993), *Murray v United Kingdom* (App. No. 14310/88, 28 October 1994), *Vereniging Weekblad Bluf v. The Netherlands* (App. No. 16616/90, 9 February 1995), *Telegraaf Media Nederland and others v. Netherlands* (App. No. 39315/06, 22 November 2012).

[2] *Hadjianatassiou v Greece* (App No. 12945/87, 16 December1992).

[3] For an analysis of the good faith requirement in the ECtHR case law see Bowers John and others, *Whistleblowing: Law and Practice* (Oxford: Oxford University Press, 2012) paragraph 11.140 . This will be discussed in more detail in the subsequent chapter on freedom of expression and whistleblowing.

[4] *Guja v Moldova* (App. No. 14277/04, 12 February 2008) [77]. See also Bowers J. and Lewis J., 'Whistleblowing: freedom of expression protection in the workplace' (1996) 6 *European Human Rights Law Review* 637, 638.

[5] Official Secrets Act 1989, s1 (1) (a) (b).

freedom of expression, was seemingly resolved in the case of *Shayler*.[6] In this instance, the Law Lords held that an absolute ban on external reporting of wrongdoing for current and former members of the Services and other notified persons under the act, was not an undue restriction on their free speech rights. The Law Lords relied on the existence of internal mechanisms to argue that a concerned employee could report any information to a superior, or to individuals that are specifically appointed in the services for such purposes, thus making an absolute prohibition on external disclosures -to an MP or the press for instance- justifiable and compatible with Article 10 of the European Convention on Human Rights (ECHR) on freedom of expression.[7] They refused to look into how these mechanisms work in practice although they did argue, that if the member of the services remained dissatisfied from such mechanisms that did not allow him or her to proceed to public disclosures of information, judicial review of the decision not to disclose could be sought.[8]

The chapter aims to question the efficacy of these mechanisms and argue that an absolute ban on external leaks is incompatible with recent developments in whistleblower protection under free speech. It will argue that although such internal avenues can be invaluable in keeping the services accountable and should be the first step the responsible whistleblower should take in reporting wrongdoing, there are certain disclosures where arguably internal mechanisms would produce little if any results in addressing the problem. Whistleblowers in the services should be

[6] *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247.
[7] Ibid at [27] per Lord Bingham. See also Merris A., 'Can we speak freely now? Freedom of expression under the Human Rights Act' (2002) 6 *European Human Rights Law Review* 750, 760.
[8] Ibid per Lord Bingham.

afforded protection for external reporting when the nature of the disclosure makes it unlikely for internal mechanisms to work, or in cases where after initial internal reporting no action was undertaken to rectify the alleged wrongdoing. Using the personal testimonies of whistleblowers Katharine Gun and Derek Pasquill to the parliamentary committee on whistleblowing,[9] as well as Intelligence and Security Committee (ISC) reports, the chapter will stress that there are serious deficiencies in the current system of internal reporting and therefore an absolute ban on external disclosures due to the existence of internal mechanisms is questionable as to its consonance with free speech standards.

The first part of the chapter will begin by presenting how protection is provided to whistleblowers under free speech in the Council Of Europe (COE). It will focus on how the role of internal mechanisms has been interpreted in COE Resolutions and Recommendations relating to whistleblowers, and the circumstances under which disclosures to a wider audience would be justified. It will then proceed to examine how this was eventually applied by the European Court of Human Rights (ECtHR) in the two cases relating to whistleblowers it has so far examined. The ECtHR allowed for external disclosures in cases where internal mechanisms were 'clearly impracticable', however, it did not provide comprehensive guidelines as to when this would be the case. Therefore, in order to gain a better understanding of the standards that such internal mechanisms need to follow to be credible, the chapter will focus on how such mechanisms are expected to function in the UK for whistleblowers that are not part of the

[9] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83.

services and compare them with the existing avenues available to services' members to raise concern.

The final part will revisit the *Shayler* judgment and reexamine the arguments the Law Lords employed to justify the compatibility of the Act with free speech in light of recent developments in whistleblower protection. The chapter will conclude that these developments in the 12 years since *Shayler* call for a reassessment of the OSA 1989 in relation to whistleblowers in the Services, and propose that an opportunity to rebut the presumption that internal mechanisms in the Services have functioned properly should be provided to Services' whistleblowers.

Free speech protection for whistleblowers with 'special duties and responsibilities' in the COE.

Free speech in the contracting parties to the ECHR is to a great extent informed by Article 10 of the ECHR and the case law of the ECtHR. Article 10 of the convention provides that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to *receive and impart information* and ideas without interference by public authority and regardless of frontiers.[10]

Freedom of expression in not an absolute right and as the convention provides:

[10] Council of Europe, European Convention on Human Rights and its Five Protocols (1950) Article 10 emphasis added.

The exercise of these freedoms, since it carries with it *duties and responsibilities*, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, [...] [and] for preventing the disclosure of information received in confidence...[11]

In relation to civil servants and especially employees of the intelligence community and the military, the Strasbourg Court has held on many occasions that 'special duties and responsibilities' apply under the Convention. Although this does not mean that their free speech rights are eradicated upon entering the workplace,[12] the Court in its interpretation of the Convention has allowed for a greater degree of restrictions.

In *Engel and others v Netherlands*[13] for instance, a case involving two soldiers against whom disciplinary action was taken for their participation in the writing and distribution of material that was thought to undermine military discipline, the ECtHR argued that it was the specific responsibilities of certain individuals that would allow them to be treated differently than others in free speech issues.[14] This was affirmed in *Hadjianastassiou v Greece*,[15] where the ECtHR held that contracting parties to the convention enjoyed a wide margin of appreciation when the protection of national

[11] Ibid at 10(2) emphasis added.
[12] *Vogt v Germany* (App. No. 17851/91, 26 September 1995).
[13] (App. Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976).
[14] Ibid at [103].
[15] (Application No. 12945/87, 16 December 1992).

security and the disclosure of military secrets were at stake[16] even if the information revealed was "of minor importance".[17]

That is not to say that the ECtHR has not found violations of Article 10 against individuals who have had such duties and responsibilities. In *Grigoriades*[18] for instance, Greece was found in violation of Article 10 for penalising a conscript for sending a letter to his superior in which he frankly expressed his anti-military views.[19] However, it is important to note that in this instance the ECtHR found that there hadn't been a pressing social need to suppress the speech because "the letter was not published by the applicant or disseminated by him to a wider audience".[20]

These special duties and responsibilities however, did not hinder the Court from extending freedom of expression protection to civil servant whistleblowers. In the landmark case of *Guja*, which was the "first to deal explicitly with the practice of whistleblowing"[21] the ECtHR allowed for Article 10 protection for whistleblowers by asserting that "the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence".[22] The Court held that individuals who in good faith disclose information that is in the public interest should enjoy protection from employment related sanctions and criminal prosecutions for alerting the public to wrongdoing that occurred in

---

[16] Ibid at [47].
[17] Jacobs F., White R. and Ovey C., *The European Convention on Human Rights* (Oxford University Press, 2010) 441.
[18] *Grigoriades v Greece* (App. No. 24348/94, 25 November 1997).
[19] Ibid at [14].
[20] Ibid at [47].
[21] Jacobs, White and Ovey at 442.
[22] *Guja v Moldova* at [74]. See also *Fressoz and Roire v France* (App. No. 29183/95, 21 January 1999).

the past or is about to take place.[23] Although the Court weighed the "special duties and responsibilities of employees towards their employers" in reaching its decision, it found that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not "necessary in a democratic society".[24]

However, what role does the existence of internal mechanisms play in affording such free speech protection? Would individuals who proceed to public disclosures be protected when robust internal avenues exist where they can raise their concerns? The chapter will next attempt to respond to these questions by examining how the various soft law instruments in the COE aiming to protect whistleblowers dealt with internal mechanisms and subsequently proceed to analyse the ECtHR's take on the issue. The focus will be on how these standards that have been set by the COE would apply to services' whistleblowers and the recent recognition of the important role they play in relation to the democratic accountability of these institutions.

Whistleblower protection and the use of Internal mechanisms in COE Resolutions and Recommendations for Services' whistleblowers.

Until recently, there was great scepticism regarding the role whistleblowers could play in keeping the services accountable. As discussed in the previous chapter, this is a task largely entrusted to oversight bodies that are expected to inform the executive, and where appropriate Parliament, on the services'

[23] Ibid at [84].
[24] Ibid at [97].

conduct. Blowing the whistle was thus considered incompatible with the role of an intelligence official.[25]

However, allegations that the UK and US services were complicit in committing grave human rights violations against terrorist suspects prompted both the UN Human Rights Council and the COE Parliamentary Assembly[26] to stress the importance of whistleblowers from Security and Intelligence community in ensuring that such human rights violations come to public attention and are effectively addressed.

But in which cases are external disclosures justified according to COE standards? A number of instruments in the form of Resolutions or Parliamentary Assembly Recommendations have provided insight in relation to internal mechanisms and public disclosures. The Parliamentary Assembly Resolution 1729 (2010) on the protection of whistleblowers for instance, which included members of the armed forces and special services in its ambit of protection,[27] thus not differentiating between various types of whistleblowers, urged state parties to adopt whistleblower legislation that would "protect anyone who, in good faith, makes use of existing internal

---

[25] See *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247 [84] per Lord Hope.

[26] See UN Human Rights Council, Report of the Special Rapporteur on Protection of Human Rights while Countering Terrorism, Martin Scheinin, A/ HRC/10/3 4 February 2009 at [77], also on the COE level "The *fundamental role played by whistleblowers must not be forgotten* [...] It is therefore justified to say that whistleblowers *play a key role in a democratic society* and that they contribute to making up the existing deficit of transparency" Council of Europe Parliamentary Assembly, Report by Rapporteur D. Marty Explanatory notes for Resolution 1838 (2011) on Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations (7 December 2011) at available at http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf accessed 12 December 2014 emphasis added.

[27] Council of Europe, Parliamentary Assembly Resolution 1729 (2010) on the 'Protection of Whistleblowers' at 6.1.2..

whistle-blowing channels from any form of retaliation".[28] Thus it is safe to deduce that internal mechanisms are viewed as the initial avenue for whistleblowers to raise concern. The resolution however, went further to stress that:

> [W]here internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.[29]

Therefore, the mere fact that internal whistleblowing mechanisms exist, does not suffice to argue that an absolute prohibition on external reporting can be justified.

The view that alerting the media should be a viable avenue even for whistleblowers in the Services was further solidified in the COE's Parliamentary Resolution 1838 (2011) 'On the Abuse of State Secrecy and National Security' which provided that:

> The media play a vital role in the functioning of democratic institutions, in particular by investigating and publicly denouncing unlawful acts committed by state agents, including members of the secret services. They rely heavily on the co-operation of "whistle-blowers" within the services

[28] Ibid at 6.2.1..
[29] Ibid at 6.2.3..

> of the state. The Assembly reiterates its calls for adequate protection...for whistleblowers.[30]

Similarly, the COE's Venice Commission report on the 'Democratic Oversight of the Intelligence and Security Services' included whistleblowers in the means of keeping the services accountable and called for procedures where whistleblowers could raise concern outside their organisation.[31] Parliamentary Assembly Resolution 1954 (2013), provided that "[a] person who discloses wrongdoings in the public interest (whistle-blower) should be protected from any type of retaliation, provided he or she acted in good faith and followed applicable procedures".[32] Applicable procedures would therefore refer to the use internal mechanisms when these are available and public disclosures only in cases where these mechanisms fail. Finally, in April 2014, the Committee of Ministers released a recommendation to member states of the COE on the protection of whistleblowers.[33] In relation to internal mechanisms, the recommendation provided that they should be used as a first avenue to raise concern, it acknowledged however, the need to protect "disclosures to the public, for example to a journalist or a member of parliament".[34] Very importantly, the Recommendation noted that "the individual circumstances of each case will

---

[30] Council of Europe, Parliamentary Assembly Resolution 1838 (2011) on 'Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations', text adopted 6 October 2011 at 8.
[31] European Commission for Democracy through Law (Venice Commission) , 'Report on the Democratic Oversight of the Security Services' (2007) at 146.
[32] Council of Europe, Parliamentary Assembly Resolution 1954 (2013) on 'National Security and Access to Information', text adopted on 2 October 2013 at 9.7..
[33] Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies.
[34] [14].

determine the most appropriate channel"[35] for raising concern. Prior to the adoption of the Recommendation, the European Committee on Legal Co-operation, the intergovernmental body working under the auspices of the Committee of Ministers, and is responsible for the standard-setting activities of the Council of Europe in the field of public and private law,[36] held a meeting with key stakeholders on whistleblowing issues. In relation to internal mechanisms the stakeholders pointed out that there was lack of clarity as to the threshold that had to be reached for the whistleblower to be able to argue that internal mechanisms had proven ineffective.[37]

But how have these resolutions been implemented in practice? In its recent case law, the ECtHR had the opportunity to examine free speech restrictions on whistleblowers and identify the cases when external disclosures would be justified.

The use of internal mechanisms as an element of the whistleblower's good faith in the ECtHR

In *Guja v Moldova*, the ECtHR relied heavily on Parliamentary Assembly resolution 1729 in discussing the use of internal procedures in relation to whistleblowing. The ECtHR asserted that turning to internal mechanisms before proceeding to public disclosures is an element of the good faith

---

[35] Ibid.

[36] http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/default_en.asp accessed 12 December 2014.

[37] European Commitee on Legal Co-operation (CDCJ), Meeting to Consult Key Stakeholders on
Protecting Whistleblowers 30-31 May 2013. Available at http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/Consultation%20meeting%20on%20Whistleblowers%20-%20Report%20of%20the%20Rapporteur_E.pdf accessed 12 December 2014.

whistleblowers are required to have shown while reporting wrongdoing in order to qualify for protection under Article 10. The applicant in this case was an employee of the Prosecutor General's Office and was dismissed after sending two documents to newspapers which disclosed attempts of a high – ranking politician to interfere in pending criminal proceedings.[38] The Government argued in this case that a disclosure was not made to a competent authority first and that Guja had acted "hastily".[39] He had bypassed attempting to contact "the top echelons of the Prosecutor General's Office and thereafter the Parliament"[40] and since these internal disclosures were not made as a first step, Guja was not entitled to make a disclosure externally.

The ECtHR held that due to the particularly strong duty of fidelity that civil servants owe to the governments they serve, "disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is *clearly* impracticable that the information could, as a last resort, be disclosed to the public".[41] The Court did not attempt to analyse or provide a test on when such mechanisms would be 'clearly impracticable'.

Eventually in *Guja,* the ECtHR dismissed the government's claim that there were adequate internal procedures in place, due to the fact that there were no provisions in Moldovan legislation concerning the reporting of irregularities by employees or any specific prescribed pathway for the reporting of

[38] *Guja v Moldova* at [3].
[39] Ibid at [67].
[40] Ibid.
[41] *Guja v Moldova* at [73] emphasis added.

misconduct.[42] The Court concluded that "it has not been presented with any satisfactory evidence to counter the applicant's submission that none of the proposed alternatives would have been effective in the special circumstances of the present case".[43] Therefore, since a pathway for raising concern did not exist in this case, the ECtHR did not examine or set the standards of how internal mechanisms would be expected to function in order to justify retaliation against external whistleblowers.

The second whistleblowing case that reached the Strasbourg Court however, provides more insight into the Court's expectations from internal mechanisms. The case of *Heinisch v Germany* involved a nurse working in the private sector, at a nursing home for the elderly, who was dismissed after lodging a criminal complaint against her employers alleging that the conditions in the nursing home where far from satisfactory. As Heinisch argued, "[s]ince all her attempts to draw the management's attention to the situation had been to no avail, she had been led to assume that further internal complaints would not constitute an effective means of obtaining an investigation of and remedy for the shortcomings in the care provided".[44] In response the ECtHR referred to German case law on the issue - which it found to be similar to the reasoning behind the Council of Europe's parliamentary assembly resolution - that stipulates that "if the employer failed to remedy an unlawful practice even though the employee had previously drawn his attention to that practice, the latter was no longer bound by a duty of loyalty towards his employer".[45] In following this

[42] Ibid at [81].
[43] Ibid at [83].
[44] *Heinisch v. Germany* (App. No. 28274/08 21 July 2011) at [56].
[45] Ibid at [73].

avenue, the ECtHR asserted that although internal mechanisms need to be contacted before the whistleblower is allowed to proceed to more public means of raising concern, their failure to effectively address a situation brought to their attention, permits the whistlebower to breach the duty of loyalty.

Finally in *Matúz v Hungary*,[46] the applicant who was a journalist for the Hungarian state television, published a book containing confidential information and allegations of censorship against the national broadcaster. He had previously expressed his concerns to the company's president and to the board of the television company, without receiving a response.[47] This sufficed for the Court to be " satisfied that the publication of the book took place only after the applicant had felt prevented from remedying the perceived interference with his journalistic work within the television company itself – that is, for want of any effective alternative channel".[48]

Would this approach however, also apply to whistleblowers in the security and intelligence community? The answer according to the ECtHR is in the affirmative. A more recent case argued before the ECtHR,[49] involved an official of the Romanian Intelligence Services, who disclosed information to the press relating to the "illegal telecommunication surveillance of journalists, politicians and business men"[50] by the Romanian services. The

[46] (App. No. 73571/10, 21 October 2014).
[47] Ibid [7] and [8].
[48] Ibid at [47].
[49] *Bucur and Toma v Romania* (App. No 40238/02, 8 April 2013).
[50] Voorhoof D., *'The Right to Freedom of Expression and Information under the European Human Rights System : Towards a more transparent democratic society* (European University Institute, 2014)

whistleblower in this instance had approached internal procedures before disclosing the information publicly and was deterred from taking the issue further. While the government in this instance argued that Bucur could have proceeded to forward the complaint to further internal mechanisms, as Voorhoof notes, 'the Court was not convinced that that a formal complaint to a Parliamentary Commission would have been an effective means of tackling irregularities'[51] within the Romanian Services. Thus the penalties Bucur faced for his public disclosure were held to be Article 10 violations.

Consequently, relying on the ECtHR case law,[52] one could argue that the existence of internal mechanisms that are genuinely independent of the line management chain and can approached by whistleblowers without fear of retaliation would negate the need for a whistleblower to use public means of reporting wrongdoing, by approaching the press for instance. However, in recognition of the inherent limitations of official reporting channels, the Court has found the fact that such mechanisms are in place does not suffice to justify an absolute ban in internal disclosures. If the nature of the information at hand made it unlikely for internal mechanisms to respond appropriately, if the internal mechanisms have a history of not addressing instances of such internal whistleblowing, or if they refuse to examine the whistleblower's allegations, external disclosures are permitted under the

---

http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS_2014_12.pdf?sequence=1 18/22 accessed 12 December 2014.

[51] Ibid 18/22.

[52] *Guja* [80-84], *Heinisch* [72-76]. However, in *Kudeshkina v. Russia* (App. No. 29492/05, 14 September 2009) the ECtHR provided protection to a whistleblower who had not approached such mechanisms, prompting judges Kovler and Steiner to stress in their dissenting opinion that the Court was in error to provide protection in spite of the fact that the applicant had not used "any other effective means of remedying the wrongdoing".

ECtHR whistleblowing protection regime.[53] In *Heinisch* and *Bucur* for instance, the whistleblowers had approached their superiors to the report illegal activity they had uncovered, but no concrete action was taken to address the issue. When they subsequently proceeded to a public disclosure they were provided with free speech protection.[54] Therefore, even if such mechanisms exist, they do not suffice to bar the whistleblower from proceeding to a public disclosure and courts from proceeding the ad hoc test of whether they functioned properly in that particular instance and whether the disclosure was in the PI.

After examining the stance towards internal mechanisms in the COE, it would be important to analyse how such mechanisms are expected to work domestically. The chapter will therefore proceed to critically examine the criteria set for internal mechanisms in the UK for 'non-services' whistleblowers and present the outcomes of research that has been conducted as to their efficacy.

Internal mechanisms for whistleblowers in the UK and their deficiencies

A helpful indication of how internal mechanisms are expected to function can be attained by analysing the standards that have been set in the UK for whistleblowers not belonging to the Security and Intelligence community. Such individuals are currently afforded protection in line with COE standards through the Public Interest Disclosure Act 1998 (PIDA 1998), as it was recently reformed under the Enterprise and Regulatory Reform Act

[53] Resolution 1729 [6.2.3.].
[54] *Heinisch* [72-76], *Bucur* [97].

2013 (ERRA 2013). Before these amendments were passed, although the act heavily relied on internal mechanisms and included them in the assessment of the whistleblower's good faith, it did allow for external disclosures in specific instances. Failures of internal mechanisms were therefore taken into account and allowed for concerned individuals to disclose information to external bodies in three instances. Firstly if "at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer",[55] in cases where "the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer"[56] and finally, if "the worker has previously made a disclosure of substantially the same information"[57] and no effective measures were undertaken to address the issue. Under the new regime of the ERRA 2013, the good faith requirement is removed altogether and replaced with a public interest defence.[58]

The UK Committee on Standards in Public Life has provided further insight on the elements required in order for internal mechanisms to be considered successful. In its report the Committee stated that:

> An effective internal system for the raising of concerns should include: A clear statement that malpractice is taken seriously in the organisation and an indication of the sorts of matters

[55] Employment Rights Act (1996) s 43G (2) (a) as inserted by Public Interest Disclosure Act (1998) s1.
[56] Ibid at s 43G (2) (b).
[57] Ibid at s 43G (2) (c).
[58] Enterprise and Regulatory Reform Act 2013 s 18. Also see Explanatory notes to the Act 108-112 at http://www.legislation.gov.uk/ukpga/2013/24/notes/division/5/2/7/3 accessed 12 December 2014.

> regarded as malpractice; Respect for the confidentiality of staff raising concerns if they wish, and an opportunity to raise concerns outside the line management structure.[59]

However, the problems inherent in an absolute dependence on internal mechanisms are not resolved if the mechanisms seemingly function properly for the reason that there are many other causes that would make potential whistleblowers reluctant to use them. Near and Miceli argue, that although internal mechanisms may be available in an organisation, there is no guarantee that the whistleblower will opt to rely on them. As they stress, "when internal complaints have failed, when [whistleblowers] fear the results of internal complaints, when they believe that internal complaints will not be as effective in changing the situation, or when they do not know the procedure for making internal complaints"[60] individuals will most likely turn to external channels of raising concern. Similarly, if the organisation does not have a history of responding favourably to internal reporting of employees and has failed to take concrete action after reports were made, or if whistleblowers feel that the nature of the information revealed will require public backing to persuade the organisation to alter its policy, internal mechanisms will not be considered optimal by the whistleblower.[61] As Gobert and Punch opine:

---

[59] UK Committee on Standards in Public Life, *Second Report*, May 1996, page 22 as cited by Dehn G. in 'Whistleblowing and Integrity: a New perspective' found at http://www.cfoi.org.uk/pdf/corruptiongd.pdf accessed 12 December 2014.
[60] Near J. and Miceli M., 'Organizational Dissidence: The case of Whistle-Blowing (1985) 4 *Journal of Business Ethics* 1, 11.
[61] Ibid.

> In some cases the whistleblower is simply ignored; in others he/she is co-opted by institutional commendation (or even a promotion) for bringing the problem to the employer's attention, with nothing in fact being done about the problem. Sometimes what is done is merely cosmetic. Internal disclosures may lend themselves to a redress of symptoms rather than causes, as the whistleblower may have little insight into the dynamics that led to the malpractice, and may be satisfied simply by the rectification of the particular instance of impropriety that he/she has identified.[62]

Research into the efficacy of whistleblowing in bringing about institutional reform or addressing wrongdoing has also shown that "internal whistleblowers were usually ineffective whistleblowers, while external whistleblowers often triggered investigations, remedial actions or other changes by the organisation".[63] Similarly the research has indicated that "external whistleblowers are more effective in eliciting change, but they experience more extensive retaliation than internal whistleblowers".[64] In his seminal work on national security whistleblowers, Sagar argues that internal whistleblowing carries the danger that the wrongdoing may remain unaddressed. As he stresses, "senior officials may ignore or suppress a whistleblower's complaint in order to hide their complicity or to avoid a

---

[62] Gobert J. and Punch M., 'Whistleblowers, the public interest and the Public Interest Disclosure Act 1998' (2000) 63 *Modern Law Review* 25, 43.
[63] Dworkin T.M and Baucus M., 'Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes', (1998) 17 *Journal of Business Ethics* 1281, 1295.
[64] Ibid at 1296.

scandal",[65] an internal report could leave the whistleblower without "external support in the event that her colleagues and managers retaliate against her",[66] and finally, using official channels without external pressure "could provide wrongdoers with the opportunity to destroy incriminating evidence".[67] Finally, according to Morse, internal reporting "may also result in superficial fixes without deep reform",[68] fixes meant to placate the whistleblower but lacking in bringing about genuine results to rectify the misconduct. Research based on whistleblower case studies has also consistently shown that "without the aid of the media and the relevant government agencies, it is easy for a large organisation to isolate and defame a lone whistleblower".[69]

Finally, in its recent study, Public Concern at Work (PCAW), an independent body that works as a whistleblowing charity in the UK, found that "the vast majority of whistleblowers say they have received no response from management and their concern is ignored at point of contact".[70]

Therefore, internal whistleblowing mechanisms have their limitations and many inherent disadvantages. Although they are the initial channel whistleblowers are expected to use since they can allow for a prompt

---

[65] Sagar R., *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton: Princeton University Press, 2013) 133. See also Johnson's criticism of whistleblowing hotlines in Johnson R., *Whistleblowing: When it Works- And Why* (London: Lynne Rienner Publishers, 2003) 107.

[66] Sagar, *Secrets and Leaks*, 133.

[67] Ibid.

[68] Morse M., 'Honor or betrayal: The Ethics of Government Lawyer Whistleblowers', (2010) 23 *Georgetown Journal of Legal Ethics* 421, 449.

[69] Rothschild J., "Freedom of Speech Denied, Dignity Assaulted: What the Whistleblowers Experience in the US" (2008) 56 *Current Sociology* 884, 894.

[70] Public Concern At Work, 'Report on 'Whistleblowing: The Inside Story' found at http://pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf pg 5 accessed 12 Decemver 2014.

investigation of the allegations and provide employers the opportunity to rectify any wrongdoing without the organisation suffering the great cost to its reputation that public whistleblowing usually brings,[71] there is risk of a cover up. Especially if the internal systems report to the employers or the heads of the institution, the trust that whistleblowers could have in them would justifiably be limited.

How do these standards for internal mechanisms however, apply to the Security and Intelligence Services? The next part will look at the OSA 1989 and critically examine the efficacy of the means reporting persons are expected to use to alert their superiors to wrongdoing.

The OSA 1989

As described in chapters one and two, the OSA 1989 makes it a criminal offence for current and former members of the services to proceed to any external disclosures of information relating to their work. There is no damage test provided to such persons in the Act, which means that the prosecution does not have to prove that there was some damage caused by the disclosure to national security or other state interests,[72] Additionally, a lack of a public interest defence in the act ensures that the defendant cannot argue that the public interest in disclosing the information outweighed the public interest in keeping the information secret. This effectively makes external whistleblowing a crime for this class of individuals.

---

[71] Dworkin T.M., 'SOX and whistleblowing' (2007) 105 *Michigan Law Review* 1757, 1760.
[72] Official Secrets Act 1989, s 1 (1). For commentary on the OSA 1989, see Bailin A., 'The last cold war statute' (2008) 8 *Criminal Law Review* 625 and G.R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2003) 306.

Chapter two of the thesis discussed why the absolute restriction on disclosures reflects the idea that permeates the intelligence community and dictates that publicly releasing information is incompatible with the role of an intelligence employee. Intelligence officials have the obligation to keep information they come across in their line of work secret and in contrast with other government employees, public discussion even of misconduct and improprieties is not possible without there simultaneously being a gross violation of classification rules and the professional ethics of the intelligence officer.[73]

However, which mechanisms are available to to Services' whistleblower to raise concern internally? The following part will examine these systems and provide insight as to their efficacy.

Internal mechanisms in the Security and intelligence community.

In assessing the compatibility of the OSA 1989 with Article 10, the Law Lords argued that information on Security and Intelligence could legitimately be kept from public scrutiny.[74] The same position has been reiterated by the Strasbourg Court in many occasions.[75]

However, the Law lords were called to justify how such a restriction could extend to reports concerning wrongdoing and misconduct that was in the

[73] See for instance Hulnick A.S. and Mattausch D.W., 'Ethics and Morality in United States Secret Intelligence' (1989) 12 *Harvard Journal of Law and Public Policy* 509, 522.
[74] *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247 [26] per Lord Bingham.
[75] These are mentioned by Lord Bingham in *Shayler* at [26] also see fn 4.

public interest to be released. Why should disclosures that reveal gross mismanagement, waste, incompetence or complicity of the services in grave human rights violations be penalised?

The main argument employed in *Shayler* in response to this, was that the OSA 1989 was compliant with Article 10 provisions due to the fact that there were robust mechanisms in the Services themselves that could assuage an employee's concerns about their activities and also be used to uncover abuses and ensure that violations are not committed with impunity. Lord Bingham asserted that there is a long list of individuals that persons with concerns could approach including among others a staff counsellor, the Attorney General, the Director of Public Prosecutions or the Commissioner of Metropolitan Police, the Home Secretary, the Foreign Secretary, and the Prime Minister.[76]

As there is very little information as to how such mechanisms have worked in practice, the chapter will use the personal testimonies of whistleblowers Katharine Gun and Derek Pasquill who were both prosecuted under the Act which were given before a parliamentary select committee[77], as well as information that has been released through ISC reports in order to examine the credibility and efficacy of these mechanisms.

Gun was a GCHQ employee who in 2003 leaked an e-mail to the press sent by the US National Security Agency, which asked the British intelligence

[76] Ibid at [27] per Lord Bingham.
[77] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83.

agency for assistance in spying on UN delegates before a crucial vote in the UN on the legality of the war in Iraq.[78] Gun was prosecuted under the OSA 1989 but her prosecution was subsequently dropped[79] without any explanations although it is presumed that the government wanted to avoid the embarrassment of the prime minister being cross-examined on the legality of the Iraq war.[80] This was due to the fact that Gun was planning to use a defence of necessity by claiming that her disclosures were aiming to stop the imminent threat of British involvement in an illegal war.[81]

Derek Pasquill was a Foreign Office civil servant who was prosecuted under the OSA 1989 for disclosing internal documents to the Observer and the New Statesman magazine[82]. The documents contained information of what the British government knew on the US practice of secret transportation of terrorist suspects to states where there was great risk that they would be subjected to torture or inhuman and degrading treatment, and they also contained guidance on which Muslim organisations within the UK, ministers should embrace.[83] As Pasquill was not a member of the Services nor a notified person under the OSA 1989, the prosecution would be expected to prove that these disclosures where damaging to national

---

[78] Oliver M., 'GCHQ whistleblower cleared' http://www.theguardian.com/uk/2004/feb/25/iraq.pressandpublishing?INTCMP=ILCNETTXT3487 accessed 12 December 2014.
[79] Ibid.
[80] Birkinshaw at 97.
[81] Bright M, 'The woman who nearly stopped the war' http://www.newstatesman.com/blogs/martin-bright/2008/03/katharine-gun-iraq-war-gchq accessed 12 December 2014.
Accessed 4 June 2014 also see Smith J.C. and Rees T., 'Official Secrets: defence of duress of necessity' (2001) *Criminal Law Review* 986. The questionable success for such a defence under the OSA 1989 was discussed in Chapter 2.
[82] Norton – Taylor R., 'Civil servant who leaked rendition secrets goes free' http://www.theguardian.com/media/2008/jan/10/pressandpublishing.medialaw accessed 12 December 2014.
[83] Ibid.

interests and, when it became exceedingly obvious that this could not be proven, the prosecution was dropped.[84]

The driving force in the UK relating to agency members revealing wrongdoing has indeed been focused on internal examination of any complaints of misconduct with the exclusion of external inquiries.[85] A staff counsellor for the security and intelligence service has been appointed for this purpose with the mandate of dealing with complaints of intelligence agency staff whenever they decide not to take any issues or concerns they may have to their superiors.[86] First appointed in November 1987 by the Thatcher administrations, the counsellor is an ombudsman-like figure for the members of the Services[87]. The staff counsellor, a high ranking former civil servant available to be consulted by anyone who has anxieties relating to their work is considered an authorised person to whom disclosures can be made.[88] The MI6 website describes the staff counsellor as "a point of contact for any members of the security and intelligence agencies who have anxieties relating to the work of their Service which it has not been possible to allay through the ordinary processes of management or staff relations".[89] The staff counsellor is appointed by the Prime Minister.[90] However, the staff counsellor has limited powers as he or she can only make recommendations to the heads of MI5 and MI6 and reports to the Home Secretary, the Foreign

---

[84] Ibid.
[85] Birkinshaw at 45.
[86] Ibid at 46.
[87] Andrew C., *The Defence of the Realm: The Authorized History of MI5* (Penguin, 2010)636.
[88] Wadham J. , 'Official Secrets Act: at last a right to disclose for spooks?' (2002) 152 *New Law Journal* 556, 558.
[89] Secret Intelligence Service (MI6) webpage https://www.sis.gov.uk/careers/working-for-us/well-being.html accessed 12 December 2014.
[90] Ibid.

Secretary and the Prime Minister.[91] His or her independence from the line management chain is therefore questionable. Would the staff councellor have powers to order disclosure of classified information when allegations are made to him / her in light of the fact that the counsellor is not a figure that is appointed independently? As the GCHQ whistleblower Katharine Gun, explained when asked why she did not follow this procedure before leaking highly classified information, she argued that she "honestly didn't think that would have had any practical effect".[92] The whistleblower Derek Pasquill similarly argued that such mechanisms are of little significance and alleged there was a widespread "patronising attitude by people at the top departments towards those lower down who raise concerns".[93]

However, in a circular released by Manningham - Buller in April 2006, staff were urged to raise any qualms internally, with Manningham – Buller stressing that "the idea that airing concerns on the proper channels risks damage is a myth".[94] As Andrew purports, "there is no evidence that staff with ethical concerns felt inhibited from raising them".[95]

Such procedures however, cannot ensure that any reporting will not have adverse effects on the complainant's career. As Carne Ross, an employee of the Foreign and Commonwealth Office explained in the Public Administration Select committee's report on whistleblowing, although he

---

[91] Wadham J, at 558
[92] Transcript of the Katharine Gun interview, <http://news.bbc.co.uk/1/hi/programmes/newsnight/3489568.stm> accessed 12 December 2014.
[93] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 27.
[94] Security Service archives, cited by Andrew at 924.
[95] Andrew at 925.

felt that the government was misrepresenting facts in the lead up to the war in Iraq, concerns about his employment relationship did not allow him to raise certain issues with them. As the report found, "it was inconceivable that a mid-level diplomat like himself could have raised his concerns internally in a way that would have had an impact with ministers. Indeed raising them could have damaged his career".[96]

In its 2007 – 2008 report, the ISC noted that the MI5 had also established an 'Ethical Counsellor', who provides the Secret Service members with the opportunity to raise internally any ethical concerns they may have with their work.[97] Between 2006, when the post was first created, and the publication of the ISC report in 2008, twelve MI5 employees had approached the counsellor.[98] The identity of the Ethical Counsellor was not released, although the report mentioned that the post was given to a former Deputy Director General of the Service.[99] As there is no equivalent position for the GCHQ and the MI6, the report mentioned that for such ethical considerations of their work, members of the GCHQ and MI6 could turn to the Staff Counsellor who is similarly an "externally appointed independent senior figure".[100]

The ISC reported that concerns individuals have raised include "whether the Service had adequate mechanisms to evaluate the mental and physical risks to ICT agents [...], whether it was ethical for the Government to seek to

[96] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 27.
[97] Intelligence and Security Committee, Annual Report 2007-2008 Cm 7542 (March 2009) at [66].
[98] Ibid.
[99] Ibid.
[100] Ibid.

alter the ideological views of its citizens [...] and whether there were sufficient controls for sharing information with countries that do not comply with international standards for the treatment of those in detention".[101]

The staff and ethical counsellors seem to be figures that are directed more at providing psychological support to security and intelligence officials than being effective avenues for 'external' whistleblowing. Their remit seems to be more related to the responsibility of the well-being of services' members and it is not designed as a mechanism to keep the services accountable or to conduct a thorough examination of allegations. The fact the so few employees of the MI5 had turned to the Ethical Counsellor was interpreted by the ISC as being "reassuring",[102] however, it could also be an indicator that for serious concerns such a figure is not considered effective by employees or that the culture of secrecy in the Secret Service does not promote speaking out about one's concerns.

In fact the behaviour towards whistleblowers and their revelations has been hostile. The ISC notoriously refused to investigate or allow Shayler to testify before the Committee panel on his allegations regarding the plot to assassinate Gaddafi. As Phythian claims:

> Despite the fundamental nature of the allegations, despite some support within the ISC for undertaking an investigation, and despite the fact that Foreign Secretary Robin Cook had been

[101] Ibid.
[102] Ibid. 'Summary of Conclusions and Recommendations at C pg 50.

> willing to see the ISC investigate [...], the ISC has failed to address the issue.[103]

According to West "the committee declined to see Shayler, taking the view that he was a disgruntled ex-employee and not a whistle-blower"[104] and similarly the issues raised through Katharine Gun's allegations of UK involvement in espionage aimed at UN delegates "have been avoided"[105] by the ISC.

If internal avenues of raising concern are not independent of the line management chain and are comprised by individuals who, as Gun claimed, would automatically support the government line,[106] their efficacy becomes highly questionable. Furthermore, if such individuals that comprise the internal structure for reporting wrongdoing have a "monopolistic control over the information which goes to those higher up"[107] as is the case under the current regime, what is to be expected is that "as with any monopoly, one weak link - be it a corrupt, lazy, sick or incompetent person - will break the communication chain and stop those in charge receiving information which could be critical to the organisation".[108]

---

[103] Phythian M., 'The British experience with Intelligence Accountability' (2007) 22 *Intelligence and National Security* 75, 96.
[104] Guardian.co.uk, 'Are MI5 and MI6 a waste of time and money?: A debate between Michael Randle and Nigel West 29 July 2000 http://www.guardian.co.uk/theguardian/2000/jul/29/debate accessed 12 December 2014.
[105] Phythian at 96.
[106] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 31.
[107] Dehn G. in 'Whistleblowing and Integrity: a New perspective' http://www.cfoi.org.uk/pdf/corruptiongd.pdf accessed 12 December 2014.
[108] Ibid

Another drawback is that internal mechanisms are perceived as being lengthy in producing results. It would be important to acknowledge that in many cases the public interest is served only by an immediate release of information, for instance on criminal activity that is about to take place. There is little to be gained from the release of information that has become stale and of failures that have already occurred and could have been prevented. The importance of timing in a disclosure was emphatically stressed by both Pasquill and Gun. Pasquill argued that he was motivated by a sense of urgency to publicise the information while Gun felt it was necessary to blow the whistle in the run up to the parliamentary decision on the war in Iraq.[109] As the select committee's report stressed "for whistleblowing procedures to be credible they have to be as fast as is necessary. It is of little use if a whistleblower's concerns are vindicated six months after the effective decisions are taken".[110] Gun explains this in arguing that she felt "we were running out of time, I felt the rhetoric was accelerating and that invasion was absolutely imminent".[111]

Another contentious aspect of the internal mechanisms approach, is that members of the services are not adequately informed about them. Gun emphasised that it is not GCHQ policy to include in the introduction process any information for members of the services starting their careers on which appropriate methods to use when they come across information that they feel breaks the law but it is instead "bludgeon[ed] into your head that you

[109] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 32.
[110] Ibid.
[111] Ibid.

should never ever upon death speak to anyone outside the GCHQ about what you do".[112]

Shayler had similarly argued that "to complain to a staff counsellor was to risk being branded as having personal problems and would be damaging to the complainant's career; and to complain to the police or a Minister about the workings of the Security Service would have very much the same effect".[113] Shayler went on to insist that for instance, a disclosure to a staff counsellor relating to MI6 officers providing funds to Libyan dissidents aiming to assassinate Head of State Colonel Gadaffi in a plot that went wrong and resulted in the deaths of innocent civilians,[114] would have arguably done little to ensure that this information would not be kept under wraps. As he contended, "to suggest that effective action would result from making a complaint to other officials about these kinds of allegations in the absence of public and media pressure is unrealistic",[115] Furthermore, this method has added drawbacks as it neglects to address those cases in which corruption is very high up in the hierarchical ladder. It is in such cases that raising concerns within an organisation becomes a redundant endeavour. Palmer makes the wholly convincing argument that if complainants remain unsatisfied after initiating this procedure they should be afforded the

---

[112] Ibid.
[113] Wadham at 558.
[114] Ibid.
[115] Ibid. Katharine Gun also explained that "I felt that really going to my line manager, as efficient and lovely a woman as she was, subsequently upon my revealing that it was me, all GCHQ would have done would have been to have taken a sort of, "Oh, yes, dear. Thank you for telling us, dear. We will bear this in mind", and just drawn it out and swept it under the carpet and, on top of that, put me on the top watch-list of most dangerous persons in the organisation. It would not have gone outside GCHQ and certainly would not have made any difference whatsoever". House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 92.

alternative of releasing information and be able to use a public interest defence if prosecuted.[116]

But how did the Law Lords respond to these claims of inefficiency of internal mechanisms? By revisiting the arguments provided in *Shayler*, the chapter seeks to refute their claim, in light of recent developments, that the efficacy of these mechanisms should not be reviewed on a case by case basis.

Examination of internal mechanisms in Shayler and in comparison to Strasbourg case law.

Such arguments as to the limits of internal mechanisms were brought before the Law Lords in *Shayler*, but failed to convince them that potential shortcomings of the internal mechanisms system could in certain instances justify a more public disclosure. Thus the Law Lords refrained from conducting a thorough examination of these mechanisms in spite of the fact that Shayler had argued that if members of the Services had carried out illegal activities that were sanctioned by their superiors, any attempts to raise concern would in all likelihood "be met by the eventual response that the activities complained of had been investigated and that no wrongdoing had been discovered".[117] In order to justify the refusal to examine such mechanisms Lord Hutton turned to the ECtHR's jurisprudence.

---

[116] Palmer S, 'Tightening Secrecy Law: the Official Secrets Act 1989' [1990] *Public Law* 243, 252.
[117] *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247 [104].

Hutton made reference to *Klass and others v Federal Republic of Germany*[118] in which the ECtHR was attempting to establish whether the state surveillance of correspondence and telephone conversations would constitute a breach of Article 8 of the ECHR which protects private and family life. The government argued that there were sufficient administrative procedures in place that were effective safeguards against improper surveillance, while the applicants argued that their efficacy was questionable as there was no protection provided against the potential dishonesty or negligence of these supervising officials. Although the ECtHR acknowledged that the possibility of negligence and dishonesty on the part of officials "can never be ruled out whatever the system"[119] it went on to argue that "in the absence of any evidence or indication that the actual practice followed is otherwise, the ECtHR must assume that in the democratic society of the Federal Republic of Germany, the relevant authorities are properly applying the legislation in issue".[120] This 'carte blanche' approach is to be expected as the ECtHR is not equipped to carry out close scrutiny of how internal administrative mechanisms function within a specific party to the convention. In *Klass* the ECtHR stressed that due to its subsidiary nature, it was "certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in the field".[121]

The ECtHR must therefore work under the presumption that unless there is tangible evidence to the contrary these internal mechanisms operate

[118] (App. No. 5029/71, 6 Septmeber 1978).
[119] Ibid at [59].
[120] Ibid.
[121] Ibid at [49].

sufficiently however, "contracting parties could not be afforded an unlimited licence but had to satisfy the Court that adequate and effective safeguards were in place".[122] In this instance the ECtHR held that the existence of parliamentary supervision, and an independent board "under the chairmanship of a person qualified to hold judicial office... was an adequate protection against abuse".[123]

Has the ECtHR departed from this position in *Klass* in relation to whistleblowers and internal mechanisms with *Guja*? There could only be a satisfactory response to this if and when the Court establishes a clear test as to when mechanisms are 'clearly impracticable' in order to justify their circumvention by the whistleblower. It remains to be seen if the ECtHR would refrain from an exhaustive examination of how specific internal mechanisms worked in specific cases. However, the demand that these mechanisms are not clearly impracticable implies that a degree of examination is necessary before justifying retaliation against a whistleblower. Perhaps the ECtHR would defer to the domestic judge for such an examination, but a downright refusal to evaluate the mechanisms as in *Shayler* should be rejected.

The thesis explicitly does not seek to argue that the potential inefficiency of internal mechanisms in the Services should be used as a justification for whistleblowers to bypass internal reporting and proceed to external disclosures in every case. Instead, it would perhaps be more feasible and

---

[122] Jacobs, White and Ovey at 330.

[123] Harris D., O'Boyle M, and Warbrick C., *Law of the European Convention on Human Rights* (Oxford University Press, 2009) at 410. See also *Leander v Sweden* (App. No. 9248/81, 26 March 1987) at [65].

more in line with the serious national security considerations that come with disclosures of information relating to the services, to propose for courts to operate under a rebuttable presumption that the mechanisms are effective when dealing with such whistleblowing cases. The onus would be on the whistleblowers to prove that they had already approached these mechanisms to no avail, or explain why the nature of the information compelled them to seek a more public forum for reporting wrongdoing. This would ensure that whistleblowers are aware that external reporting is a means of last resort and also make honest attempts to approach internal reporting systems where this is realistic. Such an approach would also allow for a case by case, ad hoc examination of whether a free speech restriction against a Services' whistleblower is proportionate and necessary, instead of the current 'in abstracto' position that characterises *every* restriction on disclosure as proportionate under the ECHR.

Added safeguards: The possibility of judicial review and the consent of the Attorney General

Another way to challenge the internal mechanisms when these would seek to suppress information reported to them by a concerned individual, would be to allow the whistleblower to seek authorisation to disclose the information and in cases where this authorisation was rejected without adequate justification, to allow the possibility of judicial review of the decision not to disclose. According to Lord Bingham in *Shayler*, this is a course of action "which the OSA 1989 does not seek to inhibit".[124]

[124] *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247 [32] per Lord Bingham.

The option for a judicial review however, was subsequently hindered as the Supreme Court in *R (on the application of A) v B*[125] held that the only avenue available to the security service member was the Investigatory Powers Tribunal. The case dealt with a former senior member of the MI5 who in the process of publishing memoirs sought authorisation and the consent of the services as is required. The Director General of the MI5 did not allow certain parts of the manuscript to be included and the applicant initiated proceedings against this decision on the grounds that it was "unreasonable, vitiated by bias and contrary [...] the freedom of expression".[126] However, there was disagreement as to which the appropriate forum would be to decide on the eventual disclosure of the information contained in the memoirs.

The Law Lords in this instance interpreted the Regulation of Investigatory Powers Act 2000 (RIPA 2000) as excluding other courts from "proceedings against any of the intelligence services"[127] thus allowing for disputes regarding disclosures to be decided solely by the IPT tribunal, the potential shortcomings of which were discussed in the previous chapter in relation to the accountability of the Services.

Lord Bingham also argued that the fact that any prosecution under the OSA 1989 requires the Attorney General's approval means that prosecutions will not be unsubstantiated. As he opined:

---

[125] [2009] UKSC 12; [2010] 2 WLR 1.
[126] Ibid at [1].
[127] Regulation of Investigatory Powers Act (2000) s 65 (3) (a).

> The Attorney General will not give his consent to prosecution unless he judges prosecution to be in the public interest. He is unlikely to consent if the disclosure alleged is trivial or the information disclosed stale and notorious or the facts are such as would not be thought by reasonable jurors or judges to merit the imposition of criminal sanctions. The consent of the Attorney General is required as a safeguard against ill-judged or ill-founded or improperly-motivated or unnecessary prosecutions.[128]

This stance, however, raises many questions. Firstly, information that is considered stale or notorious is not of the utmost importance to reach the public and its release can only have negligible impact. Furthermore, as it has been pointed out, the Attorney General, as a member of the government is a figure whose impartiality is highly questionable.[129] Relying on a government appointed official to decide on the prosecution of an agency member that publishes information that is embarrassing or damaging to the government cannot be considered an effective safeguard against malicious and vindictive prosecution.

Conclusion

The sensitive issue of national security requires careful and educated consideration before any potential reforms are made relating to disclosures

[128] *R. v Shayler* [2002] UKHL 11; [2003] 1 AC 247 [35].
[129] Birkinshaw at 99 and 100.

by current or former members of the services. What this chapter has attempted to show however, is that the existence of internal mechanisms does not suffice to argue whistleblowers' free speech rights are not violated whenever they are penalised for proceeding to external disclosures of wrongdoing and misconduct as a means of last resort.

Recent developments on an international and regional level, have highlighted the role that whistleblowers can play in instances where more "mainstream" accountability structures fail to produce results. As the UN Human Rights Council stressed, in such cases it is up to individuals employed within the services to alert their superiors when wrongdoing occurs or to approach internal mechanisms that are specifically appointed to deal with wrongdoing.[130] The ECtHR has stressed in its recent case law that these internal mechanisms need to be evaluated as to their competence, before arguing that the whistleblower did not act in good faith by proceeding to external disclosures.[131]

The chapter has argued that in the UK, the justification the Law Lords employed to allow for an absolute ban on external disclosures under the OSA 1989, is outdated and does not stand up to current free speech standards. Closer scrutiny of these mechanisms reveals that their status as reliable safeguards is questionable as they are not independent of the line management chain, they are perceived as lengthy in producing results and employees are not provided with guidance as to how and when to use them.

---

[130] UN Human Rights Council, Report of the Special Rapporteur on Protection of Human Rights while Countering Terrorism, Martin Scheinin, A/ HRC/10/3 4 February 2009 [77].
[131] *Guja v Moldova*, *Heinisch v Germany* and especially in *Bucur and Toma v Romania* discussed above.

Although they should be the initial step for whistleblowers to take, reporting persons should be able to argue before courts that the nature of the information they were attempting to disclose did not allow for contacting internal mechanisms or that after these mechanisms where approached, no attempts were made to address the alleged misconduct.

An argument to extend whistleblower protection to members of the security and intelligence community however, also needs to address the obvious question concerning whether whistleblowing is in fact the appropriate avenue to deal with accountability problems in an organisation. What are the consequences, legal and otherwise, of such an act and what does whistleblower protection aim to achieve? These issues will be critically analysed in the following part.

Chapter 5

Blowing the whistle: Retaliation, Morality and Motivation

Introduction

Before proceeding with the discussion of a whistleblower's 'right' under free speech to serve the public interest by breaching a duty of confidence, it is necessary to provide clarity on the various themes and issues that surround the discourse on whistleblowing. When referring to acts of unauthorised disclosures in the public interest, we are describing an altogether well known phenomenon. An individual uncovers that misconduct has occurred, or is about to occur, or is underway in the institution he or she is employed by. The employee feels that this information on wrongdoing is of vital importance to the public. However, he or she is usually bound under the contract of employment not to uncover such information and adhere to the policies and decisions of his or her superiors.[1] As the accepted paradigm of whistleblowing dictates, the whistleblower's conscience propels him or her to disclose the information through a public forum in the hope of either bringing about change to certain policies, or causing the cessation of illegal activities, or finally, to

[1] If the employee has the capacity to rectify the wrongdoing or change the policy of the institution then it would be difficult to place him or her under the pattern of whistleblowing the chapter aims to dicuss.

ensure that perpetrators will be held accountable for wrongdoing that has occurred in the past.

There are various types of misconduct that usually prompt unauthorised disclosures. As Vaughn observes, in the United States the most common form of wrongdoing that features in whistleblowers' disclosures relates to the violation of law, however, illegal activity on part of an institution is only one of many forms of wrongdoing that instigates whistleblowing.[2] As he explains, "the three other most frequent are disclosures regarding governmental waste, substantial and specific dangers to public health or safety, and abuse of authority".[3] Such activity is likely to result in various retaliatory actions against the whistleblower, mostly in the form of employment related sanctions or criminal prosecutions. A potential whistleblower therefore has to consider that he or she could face "the prospect of dismissal, warning, official reprimand, lack of promotion or a combination of these sanctions"[4] and therefore be disinclined to be involved in such a process. Many states, including the UK which is considered to have one of the most developed whistleblower protection systems among Council of Europe (COE) state parties,[5] have adopted measures to protect such whistleblowers who serve the public interest with the goal of ensuring that they do not suffer adverse consequences for their disclosures. The Public Interest Disclosure Act 1998 (PIDA 1998), the main instrument of

---

[2] Vaughn R., 'State whistleblower statutes and the future of whistleblower protection', (1999) 51 *Administrative Law Review* 581, 592.
[3] Ibid.
[4] Cripps Y., The Legal Implications of Disclosures in the Public Interest (2nd edn, Sweet & Maxwell, 1994) at 146.
[5] Public Concern at Work, Report on 'WikiLeaks, Whitehall and Whistleblowers' found at http://www.pcaw.org.uk/files/WikiLeaks,%20Whitehall%20and%20Whistleblowers.pdf accessed 12 December 2014.

whistleblower protection in the UK was recently amended to provide broader protection for whistleblowers, while in 2013, health secretary Jeremy Hunt, proceeded to announce government plans to abolish gagging clauses that were used to restrict departing NHS employees from disclosing information relating to patient safety or care.[6]

Such advances in protection however, do not reflect a general or widespread support of unauthorised disclosures as evidenced by the controversy surrounding cases of whistleblowing that feature prominently in the media. The treatment of NSA whistleblower Edward Snowden for example ranged from unequivocal support for his decision to blow the whistle,[7] to derision and scorn for betraying the trust he was shown by his organisation and possibly exposing the US' and the UK's intelligence methods to terrorists.[8]

This is due to fact that whistleblowing, when viewed as an act of defiance to organisational authority, poses a series of important questions. As Contu observes the questions that inevitably arise when one is faced with an act of an unauthorised disclosure usually revolve around the following issues:

> Are their motives "pure?" Can we trust them? How do we know that they have evaluated correctly the nature of public

[6] Smartt F., 'Reforms take effect but spotlight stays on whistleblowing', (2013) 143 *Employment Law Journal* 22, 23.
[7] See for example Zizek's view http://www.theguardian.com/commentisfree/2013/sep/03/snowden-manning-assange-new-heroes accessed 5 December 2014.
[8] Moore compares Snowden to the British spy Geroge Blake who was employed by the services while being in full cooperation and revealing state secrets to the Soviet Union. Moore argues that the best way to deal with Snowden would be to "let him eat the free peanuts in the transit lounge of life, and learn, too late, what is needed to defend a free people" http://www.telegraph.co.uk/technology/internet-security/10162351/Edward-Snowden-is-a-traitor-just-as-surely-as-George-Blake-was.html accessed 12 December 2014.

> interest? Where is their professional responsibility? What about their *real* motives? They might be trying to "save their own skin" as, after all, in the moment of disclosure they assign responsibility to others.[9]

Answers to such questions vary significantly, however, they are crucial when building a system of protection for whistleblowers. How critical should the motives of the whistleblower be in assessing their protection under freedom of expression? How much weight must be given to the duty of loyalty to one's organisation? How do these considerations affect the assessment of whether a disclosure was in the public interest, especially in cases where national security considerations are at play? Should such protection be solely based on the content of the information released, or should the whistleblower's conduct also be a contributing factor to his / her protection?

This disparity in views reflects the differing moral evaluations of the act of whistleblowing. This chapter therefore, aims to address the ethics and morality of disclosing information without authorisation and argue for the significance of whistleblowing, even in organisations that are to a great degree meant to function in secret.

However, when arguing for whistleblower protection it is first necessary to mention the types of reprisals that whistleblowers face. The chapter will

[9] Contu A., 'Rationality and Relationality in the Process of Whistleblowing: Recasting Whistleblowing Through Readings of Antigone' (2014) 23 *Journal of Management Inquiry* 393, 395.

therefore begin by examining the various forms that retaliation against whistleblowers can take in order to justify why effective protection is required from such retaliatory measures. However, arguments in favour of whistleblower protection can only be made, and free speech protection for whistleblowers can only be triggered, if the act of whistleblowing itself is in principle found to be an acceptable and ethical response to wrongdoing. The chapter therefore continue by looking into the literature on the ethics of whistleblowing and attempt to contest the main argument that is used from ethicists that perceive that whistleblowing represents a tension between the moral duty to the truth and the duty of loyalty to one's institution. The chapter will argue that wrongdoing on a grand scale invalidates this duty of loyalty, and therefore the dilemma that is often presented in the literature is a false one.

Retaliation to acts of whistleblowing

For Martin, whistleblowing usually involves a "twofold injustice". As he explains, "First is the problem- corruption, abuse, a hazard to the public- about which a person speaks out. Second is the treatment of the whistleblower".[10] In most cases of whistleblowing, the organisation's response to the employee who proceeds to a public disclosure of information that portrays the institution in a bad light, is to take measures against the specific employee. It is well recorded that "[m]ost whistleblowers suffer adverse effects - almost all in the short term, and

[10] Martin, B., *Justice Ignited: The Dynamics of Backfire* (Rowman & Littlefield, 2007) 68.

many in the long term".[11] It can be deduced that the objective of such retaliatory measures, is not only to punish the specific whistleblower, but also to discourage other individuals in the organisation from proceeding to future disclosures. Immediate action against whistleblowers can also be seen an attempt to discredit them and the veracity of their revelations in the eyes of the public.

Although the term whistleblower is thought to refer only to individuals who disclose information publicly usually through the media, whistleblower protection from retaliation also applies to individuals who use internal mechanisms for raising concern.[12] This would include the individuals who simply reach out to their immediate superiors or those who approach other independent oversight bodies to report wrongdoing, as they can too be victimised in their place of work.

In its recent study, Public Concern at Work (PCAW), an independent authority that works as a whistleblowing charity, found that "the vast majority of whistleblowers say they have received no response from management and their concern is ignored at point of contact".[13] As PCAW 2013 report stressed, "fear of reprisal or inertia on management's part or lack of feedback may lead an employee to blow the whistle externally. However, overall these statistics show that there is a reluctance to raise the

[11] Francis R. and Armstrong A., 'Corruption and whistleblowing in international humanitarian aid agencies' (2011) 18 *Journal of Financial Crime* 319, 332.
[12] Hobby for example, views whistleblowing as a "deliberate, non – obligatory act in the public interest" regardless of the medium used to issue a warning about the potential wrongdoing http://www.ier.org.uk/sites/ier.org.uk/files/Catherine%20Hobby%20Paper.pdf.
[13] Public Concern At Work, Report on 'Whistleblowing: The Inside Story' found at http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf pg 5 accessed 12 December 2014.

concern externally".[14] Although external whistleblowing is considered to be more effective in bringing about results,[15] "external whistleblowers [...] experience more extensive retaliation than internal whistleblowers".[16]

Retaliation can take many forms as the PCAW study highlights. It could come in the form of reprisals which are informal in nature and thus harder to detect, in cases where for instance the whistleblower is subjected to closer monitoring, ostracisation or verbal harassment, or the whistleblower has his or her access to resources blocked, in instances when his or her superiors obstruct for instance "access to emails, information, training hours".[17] Retaliation could furthermore come through more formal measures that would include relocation, demotion, reassignment of the whistleblower's responsibilities to another employee, indefinite suspension, internal disciplinary hearings or ultimately, the whistleblower's dismissal from the organisation altogether.[18] Breach of confidence could also lead to criminal prosecutions for the whistleblowers, as is the case of members of the Security and Intelligence community that can be prosecuted under the Official Secrets Act of 1989.

The Council of Europe's Civil Law Convention on Corruption, takes a particularly broad approach in defining the scope of retaliatory measures that whistleblowers need to be protected against. The Convention states that protection should be afforded for any unjustified sanctions against

---

[14] Ibid at 8.
[15] Dworkin T.M and Baucus M., 'Internal vs. External Whistleblowers: A Comparison of Whistleblowering Processes', (1998) 17 *Journal of Business Ethics* 1281, 1295.
[16] Ibid at 1296.
[17] PCAW study at 9.
[18] Ibid.

whistleblowers, examples of which may be "a dismissal or demotion of these persons or otherwise acting in a way which limits progress in their career".[19] In *Guja* the ECtHR found that the Moldovan government's decision to terminate the employment contract of a whistleblower who worked for the government for speaking out against alleged interference of ministers with prosecutions "undoubtedly is a very harsh measure".[20] The ECtHR went on to recognise that such forms of retaliation do not only affect the whistleblower. As the court stressed "This sanction not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct. Moreover, in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees".[21] In the subsequent whistleblowing case of *Heinisch v Germany*, the Court reiterated that "[t]his chilling effect works to the detriment of society as a whole and also has to be taken into consideration when assessing the proportionality of, and thus the justification for, the sanctions imposed on the applicant".[22]

The consequences for whistleblowers that come across such forms of reprisals are obvious. Whistleblowers can be left feeling particularly disillusioned[23] when realising that in spite of the existence of whistleblower protection instruments, they still are exposed to various levels of sanctions.

---

[19] Explanatory Report of the Council of Europe's Civil Law Convention Against Corruption (1999) Analysis of Article 9 of the Convention at [69].
[20] *Guja* at [95].
[21] Ibid.
[22] *Heinisch v Germany* (Application no. 28274/08, 21 July 2011) at [91].
[23] Rothschild J., 'The Fate of Whistleblowers in Nonprofit Organizations' (2013) 42 *Nonprofit and Voluntary Sector Quarterly* 886, 892.

As Near and Miceli argue, even seemingly less severe sanctions have their toll on the whistleblower and as they stress "the same form of retaliation may actually be experienced differently by different whistle-blowers".[24] They argue that the focus should not be on the severity of the reprisals themselves but on how these affect the particular whistleblowers. As they conclude, "comparing the severity of any particular form of retaliation requires unwarranted assumptions about the effects of the retaliation on the particular whistle-blower in question".[25]

Research has shown that there are three factors which influence whether retaliation will be taken against a whistleblower and which forms this retaliation will take. These are, "the supervisory status of the whistleblower; the degree of wrongdoing; and whether the whistleblower discloses to an external body".[26] As Rothschild and Miethe claim, the severity and likelihood of the sanctions increase the lower the level the whistleblower occupied in the organisation, the more severe the misconduct that was disclosed was, and if the whistleblower did not use internal mechanisms that were available in a specific organisation.[27] In fact as Sawyer et al observe, "[t]he incidence of retaliation against external whistleblowers is on average 10-15 percent higher than for internal whistleblowers".[28]

---

[24] Near J. and Miceli M., 'Whistle-Blowing: Myth and Reality', (1996) 22 *Journal of Management* 507, 518.
[25] Ibid.
[26] Sawyer, Johnson and Holub, ' The Necessary Illegitimacy of the Whistleblower', (2010) 29 *Business and Professional Ethics Journal* 85, 89.
[27] Rothschild. J and Miethe T., 'Whistle-Blower Disclosures and Management Retaliation', (1999) 26 *Work and Occupations* 107-128.
[28] Sawyer, Johnson and Holub at 90.

One would expect that media exposure for the whistleblower who disclosed information in the public interest would vindicate his or her claims and provide a degree of immunity from sanctions, since it would perhaps be further disadvantageous to the reputation of organisations that had the whistle blown against them, to publicly retaliate against a whistleblower. However, the studies show that "the media offers no protection for the whistleblower against retaliation and blacklisting".[29] Conversely, "exposure in the media increases the risk profile of the whistleblower, and decreases their probability of re-employment".[30] Furthermore in their vast majority, international, regional and domestic whistleblower protection instruments, provide protection to media whistleblowers only in cases where they can prove that speaking to the media was a means of last resort to raise concern, in cases where other, less extreme measures would have clearly failed to produce concrete results. This, however, overlooks the fact that "the media is often the only door open to the whistleblower determined to expose wrongdoing. It is also common knowledge that government often will only move on allegations once they have been aired in the media".[31] Thus the deficient protection from retaliation that is provided for whistleblowing in the media, which is particularly evident where whistleblowers in the security and Intelligence community in the UK are concerned, becomes a significant barrier to sufficient whistleblower protection, in light of the aforementioned inadequacies of internal reporting mechanisms that were highlighted in the PCAW report.

---

[29] Ibid at 93.
[30] Ibid.
[31] De Maria, W., *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia* (Adelaide: Wakefield Press, 1999).

Since media whistleblowing arguably exposes the whistleblower to the danger of retaliation, the alternative of anonymous leaks is in need of evaluation. Anonymity in disclosures, whereby the individual secretly leaks information to the press without revealing his or her identity to the broader public or even the media outlet itself, is a practice which is quite common. When examining the shortcomings of whistleblower protection in practice, it should be no surprise that certain individuals would altogether opt to avoid any potential retaliation or sanctions and disclose the information without taking public responsibility for their actions. This is was the main premise under which the WikiLeaks website was founded. It provides individuals with a means to submit documents or information in a way where the source of the leak cannot be electronically traced. In this way, whistleblowers would be emboldened to send classified documents they deem to be in the public interest, without having to face any of the expected repercussions. As the WikiLeaks webpage advertises "[u]nlike other outlets, we provide a high security anonymous drop box fortified by cutting-edge cryptographic information technologies. This provides maximum protection to our sources".[32]

Such an approach is understandable,[33] and would perhaps embolden the whistleblower to be "more comprehensive and incisive"[34] in his or her disclosures, however, it comes with many inherent drawbacks. Although it

[32] http://wikileaks.org/About.html accessed 12 December 2014.

[33] The Watergate scandal was famously leaked by an anonymous whistleblower, only known as "Deep Throat". His identity was eventually revealed many years after the disclosures had taken place, in 2005 <http://www.vanityfair.com/politics/features/2005/07/deepthroat200507> accessed 5 December 2013.

[34] Vernon Jensen J., 'Ethical Tension Points in Whistleblowing' (1987) 6 *Journal of Business Ethics* 321, 323.

can be argued that this anonymity is justified "if it increases the number who with good reason blow the whistle, that is, if anonymity promotes the practice of effective warranted whistleblowing",[35] it is also much easier to discredit as anonymous reporting can seriously undermine the credibility of the information released and also work to destabilise the trust amongst employees within a specific institution. If a great number of anonymous leaks to the public occur systematically from an organisation, this would create a situation where all employees with access to the specific information would be treated with mistrust and face possible retaliation. However, the thesis would not attempt to argue that protection should be afforded only to whistleblowers who reveal their identity, nor should anonymity in the disclosure be considered an aggravating factor if the whistleblower's identity is eventually revealed. As Elliston concludes, "blowing the whistle publicly may be ideal, but one cannot demand it",[36] Therefore, it would be optimal to provide whistleblowers with a level of protection that would guarantee them that they could proceed to their public interest disclosures without fear of unwarranted retaliation.

But what can whistleblower protection be said to achieve in practice? As Vaughn observes referring to the US system:

> [P]revailing whistleblowers are entitled to back pay, repayment of fringe benefits and other lost employment benefits. Reinstatement is a common remedy but often is discretionary; as

[35] Elliston F., 'Anonymity and Whistleblowing' (1982) 1 *Journal of Business Ethics* 167, 172.
[36] Ibid.

> a result, a prevailing whistleblower may not be returned to her previous position. In addition, under some provisions whistleblowers may receive actual damages; other provisions specifically permit recovery for mental pain and suffering, emotional harm, and other similar types of damages.[37]

However, if as the thesis argues, whistleblowers are worthy of protection from such retaliatory measures, it is important to discuss whether the breach of one's duty of confidence to an organisation is a morally justifiable act. The literature on the ethics of whistleblowing in organisations is extensive and ethicists approach the issue on the basis that whistleblowing represents a tension between a moral obligation to truth and an obligation to be loyal to one's institution. After presenting these views, the chapter will proceed in the following part to question whether this is indeed a sound basis upon which the morality of whistleblowing can be discussed and argue that an act of wrongdoing by an institution which subsequently denies to address it, would nullify a duty of loyalty by its employers.

The whistleblower's moral dilemma: Between Loyalty and Fairness

The act of breaching a duty of confidence to proceed to public disclosure of information represents a very specific dilemma for the potential whistleblower. An employee who comes across information on wrongdoing is asked to choose between the values of fairness and a commitment to truth on the one hand, and loyalty to one's organisation on the other. Speaking

[37] Vaughn at 612.

out against wrongdoing therefore, inevitably involves a degree of 'perfidy', as it is a form of disobedience to the official policy that an institution has opted to follow.[38] As Waytz et al explain, "Whereas fairness norms typically require that people report and punish wrongdoing, loyalty norms – even in the abstract – indicate that reporting another person to a third party may constitute an act of betrayal, associated with potential repercussions".[39] As they show, "people describe real-life decisions to blow the whistle as motivated by concerns for fairness more than loyalty, whereas they describe decisions to not blow the whistle as motivated by concerns for loyalty more than fairness".[40] Furthermore whistleblowers have to consider the impact of proceeding to unauthorised disclosures for themselves, since, as was analysed above, "there is a high personal cost associated with whistle blowing that too often includes job loss, retaliation and career blacklisting".[41]

In a similar vein, Bok argues that "a would-be whistleblower must weigh his responsibility to serve the public interest against the responsibility he owes to his colleagues and the institution in which he works".[42] As she explains, "the whistleblower hopes to stop the game; but since he is neither referee nor coach, and since he blows the whistle on his own team, his act is seen as a violation of loyalty...Loyalty to colleagues and to clients comes to be pitted against loyalty to the public interest, to those who may be injured

[38] Elliston F., 'Civil disobedience and Whistleblowing' (1982) 1 *Journal of Business Ethics* 23-28.
[39] Waytz, Dungan and Young, 'The Whistleblower's dilemma and the fairness-loyalty trade off' (2013) 49 *Journal of Experimental Social Psychology* 1027, 1028.
[40] Ibid.
[41] Arce D., 'Corporate virtue: Treatment of whistleblowers and punishment of violators', (2010) 26 *European Journal of Political Economy* 363, 370.
[42] Bok S., 'Whistleblowing and Professional responsibility' in Tittle and Peg (ed.) *Ethical issues in business: inquiries, cases, and readings* (Broadview Press, 2000) at 70.

unless the revelation is made".[43] This loyalty is particularly compelling to the whistleblower according to Bok, as the act of an unauthorised disclosure, apart from the injury that it can be expected to bring between the whistleblowers and their superiors or the institution itself, also has a great effect on how they will be perceived by their colleagues. As she stresses, "colleagues of the whistleblower often suspect his motives: they may regard him as a crank, as publicity-hungry, wrong about the facts, eager for scandal and discord, and driven to indiscretion by his personal biases and shortcomings".[44] This duty of loyalty for Bok is a legitimate reason for a whistleblower who has access to damning information, not to proceed to a disclosure. As she concludes, the whistleblower should only disclose information after he or she is certain "that he has sought as much and as objective advice regarding his choice as he can *before* going public; and that he is aware of the arguments for and against the practice of whistleblowing in general, so that he can see his own choice against as richly detailed and coherently structured a background as possible".[45] Therefore, for Bok, the misconduct of the institution is not in itself adequate to morally justify the act of disclosure. This duty of loyalty is compounded by the national security considerations

This analysis of whistleblowing inevitably results in influencing the perception the public has for whistleblowers themselves. Depending on whether one assigns greater moral weight on loyalty or fairness, views on whistleblowing will differ greatly, from it being perceived as an "ethical or

[43] Ibid at 72.
[44] Ibid at 73.
[45] Ibid at 76.

even praiseworthy act, which is required to expose abuses of all kinds and avoid moral complicity in them"[46] to an understanding of whistleblowing such as the one provided by those who compare whistleblowers to informers, "who betray colleagues and the organisations they work for"[47] and argue that "violent tyrannies were the first to encourage informers".[48] This position seems to be particularly prominent in the Security and Intelligence community as evidenced by the former Director General of the MI5 Stella Rimington, who in her memoirs argues that "whistleblowing revelations tend to reveal more about the whistleblower than about the organisation".[49] She depicts whistleblowers as anti-social, disgruntled employees motivated by personal grudges with mainly monetary incentives who are immediately given excessive attention by the press which is always in search of sensational headlines.[50] Near and Miceli however, argue that "research results based on large-scale surveys suggest that whistle-blowers are not unusual people. They are, more likely, people who find themselves in unusual circumstances, forced to play a part in the dynamic and complex process of whistle-blowing".[51]

This view of whistleblowing as an ethical choice between loyalty and the truth is not, however, universally accepted. Lindblom for instance argues

---

[46] Hersh S., 'Whistleblowers - Heroes or traitors? Individual and Collective Responsibility for Ethical Behaviour', (2002) 26 *Annual Reviews in Control* 243, 244.
[47] Ibid.
[48] Ibid. Also see "In popular culture the term is often pejorative; associated with tattletales, disloyal employees or individuals seeking self-aggrandizement and/or revenge" (Arce at 370) compared to the view that "A whistleblower is, in essence, a person who believes that truth should prevail over power: a successful whistleblower brings down corrupt people in high places purely by exposing information. An often cited analogy is to the emperor with no clothes" in Martin B., 'Illusions of Whistleblower Protection' (2003) 5 *UTS Law Review* 119, 122.
[49] Rimington S., *Open Secret* (Arrow Books 2002) at 186.
[50] Ibid.
[51] Near and Miceli at 523.

that the tension between serving the public interest and loyalty to a potentially corrupt institution is in fact a false dilemma. As he opines, "In a potential whistleblower situation, there is no need for further loyalty conditions on the permissibility of whistleblowing, because even if the the institution of a workplace incurs a duty of loyalty, the right to free speech overrules this duty".[52] Loyalty to one's institution is thus considered to be a misplaced loyalty. Therefore, according to Lindblom the wrongdoing itself negates the need for loyalty and triggers the whistleblower's free speech right to expose this misconduct as a means of last resort. The whistleblower for Lindblom does not need to balance these conflicting loyalties –the loyalty to truth and the loyalty to the institutions- as the solution is clearly in favour of speaking out against injustice. Paeth's view of whistleblowing is similar in the sense that he argues for the supremacy of truth over the loyalty to ones institution, however, for him, whistleblowers when faced with the dilemma between speaking out and suppressing the information, would opt for the former in order not to be complicit to the institution's wrongdoing, by virtue of being members of this institution. As he stresses, "the truth that we tell when we engage in whistleblowing requires us to make transparent precisely the guilt in which we participated as representatives of the institutions to which we belong".[53] A similar approach is followed by Alford. As he argues, "it is mistaken to think of whistleblowing as an issue of group loyalty versus individual transgression by the whistleblower. Instead it is an issue of organisational transgression

[52] Linblom L., 'Dissolving the Moral Dilemma of Whistleblowing' (2007) 76 *Journal of Business Ethics* 413, 424.
[53] Paeth S.R., 'The Responsibility to Lie and the Obligation to Report', (2013) 112 *Journal of Business Ethics* 559, 566.

versus individual transgression".[54] Therefore, the act of transgression of the whistleblower, the breach of a duty of confidence, should be juxtaposed with the organisation's transgression, namely the wrongdoing that the whistleblower is alleging was committed, and not abstract moral obligation of loyalty to one's organisation.

This position on the supremacy of the truth over the need for loyalty was best articulated in *Gartside v Outram*[55], where Wood V-C argued that:

> there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part.[56]

For Vaughn the dilemma is also resolved by focusing on the need to preserve the rule of law. As he suggests:

> Protecting disclosures regarding violations of the law confirms our commitment to the rule of law. Illegality cannot as easily be hidden in the presence of whistleblowing, and the disclosure of illegal acts reduces the corrosive effects to

[54] Alford, C.F., *Whistleblowers: Broken Lives and Organizational Power* (Ithaca, NY: Cornell University Press, 2001) 128.
[55] (1857) 26 Ch 113 (Ch).
[56] Ibid at 114.

> our political system where legal standards secure private and public rights.[57]

A similar interpretation of this dilemma is evident in the US civil service. In stark opposition to the UK view of civil servants where the weight is placed on the duty to serve one's minister,[58] the US approach differs. The code of ethics for individuals employed by the government provides that "[a]ny person in Government service should: Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department".[59]

When discussing whistleblowers in the Security and Intelligence Community however, one could argue, that the dilemma between loyalty and communicating the truth has another very important dimension. A whistleblower from the Services is faced with the added predicament that the information he or she intends to reveal could cause serious harm, not only to the reputation of the institution itself, but to national security. In the environment of intelligence collection and security related work, "any form of dissent [is] equated with disloyalty".[60] It is this added element that is used to differentiate the Services' whistleblowers and the protection they can

---

[57] Vaughn at 586.

[58] The current civil service code in the UK demands that servants must not "use information acquired in the course of [their] official duties to further [their] private interests' or 'disclose information without authority" in Civil Service Code of Conduct UK version of 11 November 2010 found at http://www.civilservice.gov.uk/wp-content/uploads/2011/09/civil-service-code-2010.pdf accessed 12 December 2014.

[59] Code of Ethics for Government Service passed by the U.S. House of Representatives in the 85th Congress (1958) retrieved at http://usacefgs.blogspot.co.uk/ accessed 12 December 2014.

[60] Weiskopf R. and Willmott H., 'Ethics as Critical Practice: The "Pentagon Papers", Deciding Responsibly, Truth-telling, and the Unsettling of Organizational Morality' (2013) 34 *Organization Studies* 469, 479.

expect under free speech from other forms of whistleblowing.[61] The dangers are therefore not limited to the revelation of trade secrets, or cases of mismanagement of funds or abuses of power that expose an institution to scrutiny or cause potential adverse financial effects due to public backlash in cases where the institution is private. Disclosures emanating from the services could conceivably have additional and more damaging repercussions, namely weakening the security of a nation, or exposing identities of intelligence officials, as well as intelligence methods and techniques that are necessary for the security and intelligence apparatus to function effectively. In recognition of the importance to protect national security in a democratic society, freedom of expression among other rights, can be limited where it could cause harm to legitimate security interests.[62]

However, the discussion on the national security consequences from unauthorised disclosures when arguing for whistleblower protection in the services can end up diverting from the main issue at hand. Whistleblower protection in general is provided to individuals who disclose information in the public interest. It is this public interest that introduces the free speech dimension and the idea that certain disclosures are to be protected from retaliation. Therefore, what this project aims to discuss is not disclosures

[61] This will be developed in detail in the subsequent chapters on free speech protection for whistleblowers, and national security restrictions to free speech.

[62] European Convention on Human Rights and Fundamental Freedoms Article 10 (2). Schauer also recognises that "a threat to national security is commonly held to be a danger of sufficient magnitude that the interest in freedom of speech must be subordinated" in Schauer F., *Free Speech : a philosophical enquiry* (Cambridge University Press, 1982) 197.

that are treasonous or cause harm, but those that are in the public interest and have been kept under wraps to escape scrutiny and accountability.[63]

However, another problem remains unsolved. Some would argue that whistleblower protection for disclosures in the public interest originating from individuals who fall under section 1 of the OSA 1989, would be seen as an encouragement that would allow well-meaning or overzealous intelligence officials to make assessments on the public interest and national security and disclose information that could cause harm. This is not an altogether unwarranted concern. Particularly broad whistleblower protection for such individuals could be misinterpreted as allowing them to become legitimate assessors of the public interest, and their duty of secrecy conditional on their political persuasions, their views on morality and personal interpretations of what the public needs to know. This would clearly be detrimental to the effective functioning of the services.

The project will argue that the optimal way to resolve this tension is to amend the OSA 1989 in a way similar to other whistleblower protection instruments that list which disclosures will be protected under free speech. Therefore, the potential whistleblower working for the services will have guidance as to in which cases the public interest in disclosure would override the duty of secrecy, and therefore allow as a means of last resort for the information to be communicated through a public medium.[64]

---

[63] The issue of whether the intelligence official whistleblower can make assessments on the public interests in relation to national security will be discussed and developed in the chapter on the Public Interest in disclosures.

[64] This will also be discussed in detail in the chapter relating to the public interest in disclosures.

The argument that loyalty to one's institution is not to be taken seriously into account when examining the morality of unauthorised disclosures in the public interest, does not fully answer the question of whether the act of whistleblowing is a morally acceptable practice worthy of protection. If we argue that one's loyalty to the truth is what justifies a breach of confidence, should individuals who disclosed information in the public interest for less than honourable reasons also be included under whistleblower protection schemes? The following chapter will discuss the arguments of those who distinguish between the self-serving whistleblowers,[65] who released information by expecting some personal gain and those who have wholly altruistic intentions and whose allegiance to the democratic values of openness and accountability was the sole motivating factor of the disclosure. Should freedom of expression afford the same protection to the former as to the latter?

Conclusion

The chapter has attempted to examine the ethics of whistleblowing. Whistleblowers is in most cases are faced with some form of retaliation. Protection from such retaliation through freedom of expression is provided

[65] By 'self-interest' in whistleblowing, the thesis is referring to public interest disclosures in which there is some benefit for the whistleblower. This could be monetary compensation for blowing the whistle, or where public interest disclosures are used as a means for a disgruntled whistleblower to exact revenge on his or her institution. Such disclosures should be differentiated from disclosures where there is no public interest, but only a *personal* interest of the worker is served, for instance where the worker discloses information that he or she was wrongfully not promoted or did not receive the agreed holiday pay. The lack of a *public* interest in such a disclosure means it would not fall under the whistleblowing paradigm, although one could argue that extremely harsh working conditions or systemic mistreatment of employees in an organisation could reach a point where there would be a public interest in the disclosure. For a discussion on personal vs private interest see Explanatory notes to the Enterprise and Regulatory Reform Act 2013, Note 108 of Section 17.

in recognition of the fact that the act itself serves a specific purpose in a democratic society and is a legitimate means to uncover wrongdoing, abuses of power, illegality and other forms of misconduct. The chapter has attempted to disprove that whistleblowing should be perceived as an ethical dilemma between the two conflicting duties to truth and loyalty to one's organisation. In cases where an organisation acts in a manner that is contrary to public interest and other means of addressing wrongdoing are unavailable, the duty of loyalty cannot be said to be a particularly strong counter incentive that whistleblower needs to consider before exposing the wrongdoing to a public audience. Especially in cases where the wrongdoing is an instance of illegal activity of a government, upholding the rule of law takes precedence over other concerns.

Building on this analysis, the following chapter will proceed to examine how whistleblowing is protected under freedom of expression. It will seek to justify the idea that unauthorised disclosures of information can be viewed as a form of expressive conduct worthy of free speech protection and subsequently present the evolution of the European Court of Human Right's perception on whistleblowing. Finally, the chapter will examine the role of the whistleblower's motives in granting whistleblower protection. If we accept that in cases where an institution has been involved in the cover up of misconduct, the duty of loyalty to one's institution carries less of a moral weight than the duty to disclose information, it would be important to discuss, where individuals who opt to disclose information but do so to serve their own self-interest fall under this paradigm. The narrative of the selfless heroic whistleblower is often juxtaposed to that of the antisocial and

disgruntled leaker who intended to somehow benefit from the disclosure or was acting in the intention of causing harm to the reputation of the institution. This classification spills over into the protection whistleblowers can expect under free speech. In many states, including the soft law whistleblower protection instruments in the COE and the case law of the ECtHR, protection is afforded only to the wholly honourable and selfless whistleblower, as the whistleblower's motivation is an element of the good faith whistleblowers are expected to have shown during the disclosure in order to qualify for protection.[66] The chapter will therefore examine whether this approach is justified under freedom of expression and the consequences of making whistleblower protection conditional on the whistleblower's conduct.

[66] *Guja* at [77].

Chapter 6

Freedom of expression and whistleblowing

Introduction

After examining the nature and ethics of whistleblowing, and arguing that calls for whistleblower protection carry a special validity, the thesis will next tackle the question of how and why freedom of expression protection is afforded to whistleblowers both on the theoretical level and in practice. This will serve as the starting point to discuss in the following chapter the free speech issues and national security restrictions that arise in the context of the OSA 1989. Presenting the theoretical background is important, firstly to explain why, if a disclosure is in the public interest, penalising the whistleblower due to their status of being a notified person under OSA s.1 makes little sense and secondly to provide the appropriate tools to criticise the stance by the ECtHR to allow states to include the purity of motives of the whistleblower in the assessment over whether or not they qualify for protection.

When attempting to argue that breaching a duty of confidentiality in an employment relationship can be a form of communication that is worthy of

protection under freedom of expression provisions, it is important to turn to 'the free speech principles', namely the justification used in free speech scholarship to explain why states have an obligation not to restrain speech. Why should the act of an unauthorised disclosure be provided with the same protection that is afforded to those speakers who communicate ideas, information, criticism and opinions? The chapter will argue that relying on 'liberty theories' or theories of autonomy, that regard free speech solely as a means to protect the self development and self fulfilment of the speaker, create difficulties when applied to unauthorised disclosures as the whistleblower is merely acting as a conduit, communicating information to the public. Instead, the chapter will argue that theories that focus on the social dimension or the audience interest in the speech as a reason for its protection are better suited to argue for whistleblower protection. These theories focus on the content of the speech and its value in a democratic society. [1] Therefore, if the information whistleblowers disclose in good faith, triggers a specific audience interest, then this would allow for free speech protection to be 'activated' and defend whistleblowers from retaliatory measures. Thus, if the content of the speech serves a specific public interest, in that it informs the audience of gross human rights violations in the Services for instance, freedom of expression protection need not be withdrawn due to the fact that the speaker is a security and intelligence official.[2]

[1] Warburton N., *Free Speech: A Very Short Introduction* (Oxford University Press, 2009) 16.

[2] The national security concerns as a reason to limit freedom of expression will be addressed in the following chapter.

In practice this protection is afforded on an international and regional level through a variety of instruments that ask states to ensure that whistleblowers who in good faith disclose abuses are not met with unjustified employment related sanctions or criminal prosecutions. After examining these in detail, the chapter will focus on the European Court of Human Rights and its recent case law that has recognised the contribution such information can have to political dialogue and extended free speech protection to whistleblowers for this purpose. Although the ECtHR did not overtly refer to an audience interest as a basis for protection, the reliance on the public interest in the information released points to that direction.

The final part of the chapter will discuss the special weight that is placed on the whistleblower's motive. A common method to argue against the need for whistleblower protection in the Services is to question the motives and true intentions of whistleblowers.[3] The ECtHR included the motives of the whistleblower in its assessment of the whistleblower's good faith. The chapter will question this approach and argue that an exhaustive examination of the whistleblowers' motives could result in making whistleblower protection inadequate for a significant number of individuals who release information in the public interest.

[3] Peter Wright allegedly decided to write Spycatcher after being denied a full pension Rimington S., *Open Secret* (Arrow Books 2002) at 186.

PART 1: The 'Audience Interest' in the Speech as a reason to justify freedom of expression protection for whistleblowers.

Freedom of expression can be said to serve two purposes. It is firstly meant to protect the individual speaker's autonomy in communicating his or her opinions from arbitrary interference.[4] This freedom is an integral component of the individual's self realisation and self development, and a prerequisite for members of a democratic state to become "self governing" citizens.[5] Therefore there are important reasons to support this self development by setting limits to the state's ability to restrict speech. However, an equally important element of speech, that justifies the need for it to be protected, is that it "supports the human dignity of the audience as well as the speaker".[6] Consequently, speech that promotes democracy, uncovers abuses and advances political, artistic and commercial development,[7] does not only benefit the speaker, but has a vital 'social component' to it, that makes the speech in question important for the development of society as a whole. These justifications of free speech protection are not mutually exclusive.[8]

---

[4] Vickers L., *Freedom of Speech and Employment* (Oxford University Press, 2002) 17.

[5] Meiklejohn A., *Free Speech and its Relation to Self-Government* (The Lawbook Exchange Ltd, 2004). As Larry Alexander asserts, this family of free speech theories that attempt 'to justify freedom of expression by pointing to the various good consequences that such a right will bring about...[such as] truth, autonomy and virtue' can be classified as consequentialist free speech theories and are different from deontological theories where free speech is protected due to a moral reasoning, regardless of considerations of possible beneficial consequences of the speech. See Alexander L., *Is there a Right to Freedom of Expression?* (Cambridge University Press, 2005) 127 and Warburton N., *Free Speech: A Very Short Introduction* (Oxford University Press, 2009) 16.

[6] Vickers at 20.

[7] Jacobs, White and Ovey, *The European Convention on Human Rights* (Oxford University Press, 2010) at 426.

[8] Rowbottom J., 'In the shadow of the big media: freedom of expression, participation and the production of knowledge online' [2014] *Public Law* 491, 495.

The power of free speech and its contribution in alerting the audience to abuse is best illustrated in the Pentagon Papers case. The mass leak of documents to newspapers pertaining to the US government's conduct prior to and during the war in Vietnam had an enormous impact on the public discourse over the war.[9] However, such a profound public response should not be seen as a prerequisite to prove that a disclosure has an audience / social interest. Freedom of expression protection is disengaged from how 'interested' the public may be in accessing specific information.[10]

Although these components of speech, the individual and the social, can be said to compliment each other,[11] scholars have differing views as to where the emphasis should be placed.[12] Schauer for instance goes so far as to consider the speaker's autonomy as a reason to protect speech, as entirely secondary to the audience's need to be exposed to ideas and information. He argues that protecting the speaker is simply the method we use to ensure that the content of the speech reaches the audience.[13] Exposing the recipients of the speech to the ideas or information the speaker wants to convey is thus the principal purpose of freedom of expression. As he purports "If we wish to have ideas expressed, we must protect those who would express them,

---

[9] Maggee J., *Freedom of Expression* (Greenwood Publishing Group, 2002) 208.
[10] "There is a wide difference between what is interesting to the public and what it is in the public interest to make known" *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1168 per Lord Wilberforce.
[11] According to Ramsay, "The hearer's right to receive is no less fundamental than the speaker's right to express" in Ramsay M., 'The status of hearers' rights in freedom of expression' (2012) 18 *Legal Theory* 31, 68.
[12] Shiner for instance rejects the idea of an audience right to free speech in Shiner R., *Freedom of Commercial Expression* (Oxford University Press, 2003) as opposed to Alexander who considers "freedom of expression the right of the audience" in Alexander L., *Is There a Right of Freedom of Expression?* (Cambridge University Press, 2005) 8.
[13] Schauer , *Free Speech : a philosophical enquiry* (Cambridge University Press, 1982) 159.

even if those people are not the primary object of our concern".[14] Similarly as Moon notes, the purpose of speech itself is to communicate an idea to a listener. In fact as he observes, "the communicative act will be successful only if the audience recognises the speaker's intentions and is able to understand the meaning of the act".[15] When applied to whistleblowers in the Services, this would mean that they would be provided with protection not in recognition of a 'right' to disclose information on policies they disagree with, but 'in exchange' for providing the audience with information that is of a certain value to them as citizens.

Barendt seems to partly disagree with this assertion, but recognises that in cases of whistleblowing, it is the audience interest that triggers protection. As he states, although Article 10 is designed in a way so it "covers the interest of both speaker and recipient"[16] in reality courts would be reluctant to use this view as a principle when deciding on free speech cases. He stresses that from a court's perspective "in practice the speaker's interest in a particular communication is stronger than that of the audience".[17] He concedes nevertheless, that in relation to whistleblowing, basing free speech protection of unauthorised disclosures made in breach of secrecy laws on "a civil servant's interest in disclosing the contents of government files, is much less attractive".[18] According to Barendt, the civil servant who leaks classified information in such cases can only be afforded a "parasitic"[19] free speech claim as the genuine free speech protection is directed towards the

[14] Schauer at 106.
[15] Moon R., *The Constitutional Protection of Freedom of Expression* (University of Toronto Press, 2000) 28.
[16] Barendt E., *Freedom Of Speech* (2nd edn, Oxford Univeristy Press, 2005) 26.
[17] Ibid at 27.
[18] Ibid at 25.
[19] Ibid at 195.

public. Therefore, for Barendt, the reason protection can be extended to whistleblowers is that they will alert the public to necessary information that citizens can then disseminate in realisation of their role as members of a democratic society. Therefore the primary justification for extending Article 10 protection to whistleblowers lies in the fact that their communicative conduct aims to serve a specific audience interest.

In a similar vein, as Gilmore explains,

> the ultimate interests at stake that are taken to justify such freedom are those that individuals have *qua citizens* or members of a democratic polity engaged in collective determination, not the interests they have *qua speakers* aiming to express and convey their views. That is, in the self-government theories, an individual does have an interest in her own speech being free but this is construed only as an indirect consequence of her primary interest in the preservation and legitimacy of a democratic system.[20]

Other scholars however, choose to focus solely on speech as a means to serve the individual's liberty. As they argue,

> speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the

[20] Gilmore J., 'Expression as realization: speakers' interests in freedom of speech' (2011) 30 *Law & Philosophy* 517, 523.

> protected conduct fosters individual self-realisation and self-determination without improperly interfering with the legitimate claims of others.[21]

This approach to free speech, would seemingly make it more difficult to justify the inclusion of whistleblowers in free speech protection. The whistleblower does not proceed to disclosures as a means of self-development. The objective here is not for the whistleblower to express his opinions or to offer criticism- although criticism of an organisation's policies is perhaps inferred from an unauthorised disclosure- but to alert the public to misconduct.

However, Baker has tried to reconcile whistleblowing with individual liberty and personal autonomy theories on freedom of expression through the following theoretical construct. According to him, the speaker in such cases aims not only to pass on information that benefits the public, but to ask for the cessation of a specific activity or policy of an institution that is contrary to his or her values. The whistleblower therefore, primarily wants to stop corruption and illegal activities of an organisation or to ask for authorities to pursue the same values that the speaker holds in its policies.[22] To accommodate such actions, Baker applies the liberty model of free speech to whistleblowing which argues that "people must be able to use speech as part of the activity of pursuing or implementing their substantive values".[23] He uses the example of "non-coercive whistle-blowing"[24] as a

---

[21] Edwin Baker C., 'Scope of the First Amendment Freedom of Speech', (1977-1978) 25 *UCLA Law Review* 964, 966.
[22] Baker C.E., *Human Liberty and Freedom of Speech* (Oxford University Press, 1989) 61.
[23] Ibid.

particular instance of this argument. Thus, he contends that whistleblowing "involves using speech directly to make the world correspond to the speaker's substantive values".[25]

The discussion on where the weight should be placed, is not merely one of a scholarly nature. Focusing on different aspects of the justification for free speech protection would lead to different interpretations as to which types of speech are worthy of protection. As Vickers stresses, "although personal autonomy can be served by protecting speech which is true or false, serious or trivial, audience autonomy is only really served by that which is worth hearing".[26] This approach is not foreign to UK free speech jurisprudence. In *Gaunt v Ofcom*[27] for instance, Lord Neuberger argued that a radio presenter's insulting comments to one of his interview subjects justified a reprimand by the communications regulator and eventual dismissal without constituting a free speech violation, due to the fact that the insensitive and vulgar comments did not contribute to the audience interest in the speech.[28]

The value of the content of the speech is thus a factor to which courts both in the UK and Strasbourg have attached great importance. Hate speech and speech that is gratuitously insulting for instance, are deemed as speech of low value, and thus enjoy limited free speech protection under the ECHR

[24] By using the term 'non coercive', Baker wants to exclude cases where an individual blackmails an organisation that he or she will proceed with leaks unless given money. In this case according to Baker a freedom of speech protection cannot be afforded.
[25] Ibid at 61.
[26] Lewis D., 'Freedom of Speech and Employment by Lucy Vicker, Publication Review' (2003) 32 *Industrial Law Journal* 72, 73.
[27] [2011] EWCA Civ 692; [2011] 1 W.L.R. 2355; [2011] E.M.L.R. 28; [2011] H.R.L.R. 33.
[28] Ibid at [42] per Lord Neuberger.

framework.[29] Conversely, political speech or speech that communicates issues of great public interest is considered to be of high value[30] and thus courts would be expected to engage in close scrutiny of any interference with the speaker's freedom of expression.

An approach to speech that is primarily driven by 'what is worth hearing',[31] in cases of unauthorised disclosures means that restrictions would apply when the content of the message that is communicated to an audience causes harm.[32] If there no such harm,[33] but conversely a significant interest that is served, than an interference with freedom of expression would be wholly unjustifiable regardless of other factors, such as the 'position' the speaker holds- in our case a notified person under the OSA 1989- and regardless of their conduct while disclosing the information, namely their motivation for disclosing the information.

---

[29] Rowbottom J., 'In the shadow of the big media: freedom of expression, participation and the production of knowledge online' [2014] *Public Law* 491, 492. The idea of examining the value of the speech is stronly contested in the context of the First Amendment in the USA. Indicatively see Alexander L., 'Free Speech and Speaker's Intent' (1995) 12 *Constitutional Comment* 21-28 and

[30] Ibid. The importance of the public interest in the disclosure for whistleblowers to enjpy free speech protection will be discussed in chapter eight.

[31] An approach to freedom of expression that is content – neutral, that does not to an extent assess the *value* of the speech is according to Stephan "indefensible", even under more robust First Amendment protection in the USA. See Stephan PB., 'The First Amendment and Content Discrimination' (1982) 68 *Virginia Law Review* 203-251, Hare I., 'Method and objectivity in free speech adjudication: lessons from America' (2005) *International and Comparative Law Quarterly* 49-87 and Singh R., 'The indirect regulation of speech: a time and a place for everything' [1988] *Public Law* 212-231.

[32] Alexander at 56.

[33] The ECtHR has clearly used a more restrictive approach and recognises qualifications to a 'content- neutral' approach by allowing for interferences with racist speech or incitement to hatred for instance. See *Gündüz v Turkey* (App. No. 35071/97, 4 December 2003). For blasphemy as a content based restriction see Nathwani N., 'Religious cartoons and human rights - a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad' (2008) 4 *European Human Rights Law Review* 488-507.

The Inter-American Court of Human Rights (IACHR) provides the clearest example of a human rights court utilising the interaction between the individual and audience dimensions in free speech adjudication, and has relied extensively on the audience interest to justify protection through free speech provisions. The IACHR has taken the stance that "[b]oth aspects [of freedom of expression] are equally important and must be guaranteed in full simultaneously in order to grant total effectiveness to the right".[34] The IACHR furthermore, seems to have been the pioneer in discussing the importance of access to government held information through freedom of expression, a conclusion it reached by focusing on the benefit this would have for the audience of the speech. In *Marcel Claude Reyes et al. v Chile*[35] the IACHR found that freedom of expression as protected in the Inter-American Convention on Human Rights has an individual and a social dimension[36] and this makes it possible to "deduce... a series of rights that are protected by ... Article [13]".[37]

The distinction between an individual and social dimension to free speech was a breakthrough as the court stated that "the delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it".[38] This is central to the idea that the free speech right is not only provided with a view to protecting the speaker, but there is an equally important social component

[34] I.A. Court H.R., *Case of López-Álvarez v. Honduras*, Judgment of February 1, 2006 at [163].
[35] I.A. Court H.R., *Case of Marcel Claude Reyes et al. v Chile,* judgment of September 19, 2006.
[36] Schonsteiner, Puga and Lovera, 'Reflections on the human rights challenges of consolidating democracies: recent developments in the Inter-American system on human rights' (2011) 11 *Human Rights Law Review* 362, 378.
[37] *Reyes* at [75].
[38] *Reyes* at [77]. This is an entirely different approach from the Law Lords' position in *Kennedy v Charity Commission* [2014] UKSC 20.

to it. Although this judgment clearly refers to information that is provided to an individual through legal means and not through acts of leaking, the recognition that a vital social interest in information triggers protection, and is in fact the reason that this protection is provided, is useful tool for whistleblowers. As Vaughn observes, this analysis by the IACHR on a right of access to information through free speech:

> imposes an affirmative obligation on governments to provide a legal structure to fulfil that responsibility. The human rights perspective permits similar justifications for the enactment of a whistleblower law. Such a law not only protects free expression, but also access to information that supports that expression.[39]

This analysis would fall under the understanding of human rights protection given by Raz. Raz presents the idea of rights as common goods[40] and argues that "the weight given to the interests of the right-holder in determining whether his interest is protected by a right, and how extensive that protection is, reflects not only our concern for the individual, but also our concern for the public interest that will be served by protecting the interest of the right-holder".[41] In a similar vein whistleblower protection is afforded on the basis that there is a great public interest served by ensuring that those who speak against wrongdoing and corruption are not victims of retaliation and are thus confident to disclose the information in question. As Raz

[39] Vaughn R., *The Successes and Failures of Whistleblower Laws* (Edward Elgar Publishing 2012) 296.
[40] Raz J., 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27, 39.
[41] Ibid.

explains "it is the protection of that common good which gives special stringency to my right, a stringency it might not have enjoyed had my interest in it been the sole reason for it".[42] Raz's understanding of rights as common grounds extends specifically to freedom of expression.[43] As he argues "vesting speakers with a right to free expression is an efficient way of protecting freedom of expression in the community".[44]

Thus, what can be deduced, is that focusing on the interest of the audience in the speech, the public interest it serves, is the appropriate vehicle to rely on, to extend free speech protection to whistleblowers.

However, it would be important to examine how and whether the act of whistleblowing can be reconciled with other justifications for free speech. The chapter will therefore proceed to examine whether protection for whistleblowers can be derived from those who view free speech as a means to criticise government, and it will finally assess whether the 'marketplace of ideas' theory can also include whistleblowing.

The value of protecting speech in a democracy is particularly evident in relation to speech that is critical of how a government operates. Barendt names this free speech argument, the 'argument from suspicion of government' and considers it of fundamental importance, when arguing for a right of access to government held information through free speech. The

---

[42] Raz at 34.
[43] Raz J., 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303-324.
[44] Ibid at 323.

argument he formulates is that governments that keep secrets without clear justifications and legislative control are to be seen with suspicion.[45]

This is a primary argument of how freedom of expression can only be fully realised when the speaker has access to the necessary information to have an informed and educated opinion. Schauer explains that:

> Freedom of speech is based on large part on a distrust of the ability of the government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of government power in a more general sense.[46]

This leads Schauer to conclude that any government's ability to control speech should be considerably less than its powers in other areas of governance.[47] Schauer's viewpoint is that any conduct that places "emphasis on the deliberative process, and on the accountability of government officials through criticism and examination of their official acts, is tied to communication"[48] and as such, worthy of free speech protection. This is of course a primary justification for protecting whistleblowers who disclose information on government misconduct, however, it cannot be used to justify a whistleblower disclosing wrongdoing of a private corporation for instance.

---

[45] Raz, 'Rights and Politics' at 34.
[46] Schauer at 86.
[47] Ibid.
[48] Schauer at 95.

The marketplace of ideas theory or 'the argument from truth' which was developed by John Stuart Mill, argues that the free circulation of ideas must be permitted as it allows for truth to be discovered "through its competition with falsehood for acceptance".[49] As Barendt mentions, it is difficult to use this argument to support the need to minimise secrecy in democracies or to support whistleblowers. Barendt maintains that in democracies disclosure of information is not restricted "because the government fears the disclosure of information which is false".[50] On the contrary, information which is leaked to the press by a civil servant for instance "is outlawed because it reveals true facts which the government wishes to keep confidential".[51] He contends that Mill's argument is more fitting to speech representing beliefs and theories about "political, moral, aesthetic and social matters".[52] Wragg also uses the *Shayler* judgment as an example to argue that in cases relating to state secrecy breaches, the fact that the information disclosed was truthful "adds little in resolving the free speech claim".[53]

After justifying the inclusion of whistleblowers in free speech protection on the theoretical level, it would be important to examine how this protection is provided in practice. The following part will chart whistleblower protection as it is provided through various instruments on the international (United Nations) and regional level (Council of Europe) with particular emphasis on the case law of the ECtHR.

---

[49] Baker, 'Scope of the First Amendment' as above pg 967.
[50] Barendt at 10.
[51] Ibid.
[52] Ibid at 11.
[53] Wragg P., 'Mill's dead dogma: the value of truth to free speech jurisprudence' [2013] *Public Law* 363, 372.

Part 2: Free Speech on the international and regional level and the protection provided to whistleblowers.

Freedom of Expression is a protected right under the Universal Declaration on Human Rights.[54] Similarly, the International Covenant on Civil and Political Rights (ICCPR), which aimed to adapt provisions of the Declaration into "legally binding obligations",[55] provided for protection of the right of free speech which includes the right to "seek, receive and impart information".[56]

On the international level, the UN Convention against Corruption (2003) aiming to promote "integrity, accountability and proper management of public affairs and public property"[57] contained provisions on protection of reporting persons, urging state parties to take measures against "any unjustified treatment for any person who reports in good faith and on reasonable grounds [...] offences established in accordance with this Convention".[58]

The UN Special Rapporteur on freedom of opinion and expression has also contributed to the increasing international recognition of the primary significance of whistleblowers. He went further in the 2000 annual report to note the particular instances where unauthorised disclosures can be

[54] Article 19 provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
[55] Steiner H., Alston P. and Goodman R., *International Human Rights In Context* (3rd edn Oxford University Press, 2007) 263.
[56] Article 19 (2) ICCPR
[57] UN Convention Against Corruption, General Assembly Resolution 58/4 of 31 October 2003 Article 1 (c).
[58] Ibid Article 33.

protected. If a disclosure would fall into one of prescribed categories, then courts would be justified to extend freedom of expression protection. The report stated that :

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[59]

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has also focused on the primary role of whistleblowers in alerting the public on misconduct in the healthcare system,[60] while the Special Rapporteur on the situation of human rights defenders in her 2013 report found that "[t]hose who disclose information of public interest about wrongdoing or illegal activities (whistle-blowers), particularly concerning issues of corruption of public officials, face a high risk of retaliation"[61] and stressed that "Articles 32 and 33 of the United Nations Convention against Corruption underscore the need to protect the rights of whistle-blowers and witnesses of corruption".[62]

---

[59] UN Economic and Social Council- Commission on Human Rights 56th session. 'Civil and Political Rights including the question of Freedom of Expression' E/CN.4/2000/63 18 January 2000 [44].
[60] http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-15_en.pdf [26] accessed 7 December 2014.
[61] http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-47-Add-3_en.pdf [92] accessed 7 December 2014.
[62] Ibid.

In the Council of Europe, the Civil Law Convention on Corruption provides that "[e]ach Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities".[63] Furthermore, the Parliamentary Assembly of the COE with Resolution 1729 (2010) on the protection of whistleblowers, recognised the connection between "concerned individuals who sound an alarm" and the objective of strengthening accountability and bolstering "the fight against corruption and mismanagement, both in the public and private sectors".[64] It prompted member states to adopt comprehensive whistleblowing legislation and demanded that the burden of proof be placed on the employer to show that any measures taken against the whistleblower were not related to the action of the whistle-blowing.[65] The Resolution did not refrain from including members of the armed forces and special services in its ambit of protection,[66] thus not making whistleblower protection conditional on the area of government the whistleblower works for.

The resolution recommended that state parties enact legislation that would "first and foremost provide a safe alternative to silence and not offer potential whistle-blowers a "cardboard shield" that would entrap them by giving them a false sense of security".[67] This was the first resolution devoted to whistleblowers in the COE, although references had been made

[63] ETS 174 Art 9 http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm accessed 7 December 2014.
[64] Council of Europe Parliamentary Assembly, Resolution 1729 (2010) 'On the protection of whistleblowers'.
[65] Ibid at [6.3].
[66] Ibid at [6.1.2].
[67] Ibid at [5].

before in Resolution 1551 of 2007 which called on the ECtHR "to find an appropriate balance between the state interest in preserving official secrecy on the one hand, and freedom of expression [...] and society's interest in exposing abuses of power on the other hand"[68] and, in a similar vein, in Resolution 1507 of 2006 which called for member States to "ensure that the laws governing state secrecy protect the whistle-blowers, that is persons who disclose illegal activities of state organs from possible disciplinary or criminal sanctions".[69]

In relation to whistleblowers in the services specifically, Parliamentary Resolution 1838 (2011) 'On the Abuse of State Secrecy and National Security' went further to provide that:

> The media play a vital role in the functioning of democratic institutions, in particular by investigating and publicly denouncing unlawful acts committed by state agents, including members of the secret services. They rely heavily on the co-operation of "whistle-blowers" within the services of the state. The Assembly reiterates its calls for adequate protection...for whistleblowers.[70]

---

[68] Council of Europe Parliamentary Assembly, Resolution 1551 (2007) 'Fair trial issues in criminal cases concerning espionage or divulging state secrets', text adopted 19 April 2007 at [9].

[69] Council of Europe Parliamentary Assembly, Resolution 1507 (2006) on 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states', text adopted 27 June 2006.

[70] Council of Europe Parliamentary Assembly, Resolution 1838 (2011) on 'Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations'.

Finally, in 2014, the Committee of Ministrs released a Recommendation pertaining to whistleblower protection in the member states noting that "that freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy"[71] and recognising that whistleblowers "can contribute to strengthening transparency and democratic accountability".[72] The Recommendation did concede, however, that a "special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order or international relations of the State".[73]

The European Court of Human Rights

The primacy of free speech in a democratic society is well established in the ECtHR case law. In *Handyside* the Court noted that "The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man".[74] The Court has since affirmed this position on many occasions[75] and the

[71] Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies.
[72] Ibid.
[73] Ibid at [5].
[74] *Handyside v UK* (App. No. 5493/72, 7 December 1976) at [48].
[75] See for instance *Steel and Morris v United Kingdom* (Application no. 68416/01, 15 February 2005), *Guja v Moldova* (App. No. 14277/04, 12 February 2008), *Hertel v Switzerland* (Application no. 59/1997/843/1049, 25 August 1998), *Lingens v. Austria* (Application no. 9815/82, 8 July 1986), *Jersild v. Denmark* (Application no. 15890/89, 23 September 1994).

protection provided has covered all forms of expression through any medium.[76]

The ECtHR has also established the importance of free speech in ensuring that the press fulfils its function as a "public watchdog" in a democracy,[77] and has held that "the national margin of appreciation is limited when the author of the expression in question is a journalist, fulfiling his social duty to impart information and ideas on matters of public concern",[78] Thus, the ECtHR can be said to give "a pre-eminent place to freedom of the press at the expense of the other interests involved".[79] Strong justifications for restricting the speech of those who criticise government conduct will also be required.[80]

The Court has dealt with cases relating to disclosures in the public interest but only recently passed judgments on cases overtly related to whistleblowing.

In *Morissens v Belgium*[81] a teacher turned to the Court when she was suspended without pay after a TV appearance in which she alleged that she was the victim of discrimination in her workplace and was not promoted to a superior position due to her sexual orientation. In this case the Commission held that Morissens' Article 10 rights were not violated and

---

[76] Jacobs, White and Ovey at 426.
[77] *Goodwin v UK* (App. No. 17488/90, 27 March 1996) at [39].
[78] Jacobs, White and Ovey at 433 and *Prager and Oberschlick v Austria*, (1996) 21 EHRR 1 at [38].
[79] Verpeaux M., *Freedom of Expression: In Constitutional and International Case Law* (Council of Europe, 2010) 60.
[80] *Castells v Spain* (App. No. 11798/85, 23 April 1992) at [46].
[81] (1988) 56 D.R. 127.

noted that the use of a television programme "the impact of which is both wide and immediate"[82] to make her statements was a breach of her professional responsibilities. The Commission in this case considered that Morissens' dismissal was in pursuance of the legitimate aim of the protection of the reputation of those she had implicitly accused of discrimination. Therefore the means of communication seem to play an important part in the Court's decision-making process. Although the Court has consistently spoken about the role of the press as a watchdog in imparting information and ideas, it has not held this stance when concern is expressed by employees about their employer.[83]

In *Dupuis v France* [84] however, the Court confirmed that punishing journalists for including information that had been obtained through a breach of professional confidentiality in a published book, information that the Court found to be of a considerable public interest, was a breach of Article 10. The information involved revelations that the telephone lines of certain high profile journalists and lawyers had been illegally placed under surveillance. In *Peev v Bulgaria,*[85] an employee of the Supreme Cassation Prosecutor's Office, issued a letter to the press containing serious allegations against the Chief Prosecutor. His subsequent dismissal was found again by the Court to be in violation of his free speech rights, although in this instance the court forwent an exhaustive analysis of the possible public interest in the disclosure, relying instead on the fact that the

[82] Ibid.
[83] Bowers and Lewis, 'Whistleblowing: freedom of expression protection in the workplace' (1996) 6 European Human Rights Law Review 637, 646.
[84] (App no. 1914/02, 12 November 2007).
[85] (App no. 64209/01, 26 July 2007).

interference was not prescribed by law. In *Tillack v Belgium*,[86] a journalist was asked to reveal the source that had provided confidential documents from the European Anti-Fraud Office. The documents revealed irregularities in various European institutions. The journalist went on to reveal information on the internal investigations that had been carried out against these allegations, due to the fact that there was suspicion that the documents had been disclosed as a result of bribery. After internal investigations did not manage to provide adequate proof that such acts of bribery had taken place, the court found that requiring the journalist to reveal the source of the leak was a violation of Article 10.

Protection is not provided however, when there is blatantly no public interest in a disclosure.[87] In the recent case of *Pasko v Russia*,[88] the court held that criminal proceedings against a naval officer who was apprehended while attempting to transfer confidential military information to Japan was justified. As the Court held, "the disclosure of the information concerning military exercises which the applicant had collected and kept was capable of causing considerable damage to national security"[89] therefore, the restriction of his freedom of expression rights was considered proportionate. The lack of the public interest in the disclosure triggered Article 10 (2) thus allowing for restrictions to his free speech due to serious national security considerations.

[86] (App no 20477/05, 27 November 2007).
[87] See *Hadjiannastassiou* for instance, discussed in chapter 4.
[88] (App no. 69519/01, 22 October 2009).
[89] Ibid at [86].

In the landmark case of *Guja*, which was the "first to deal explicitly with the practice of whistleblowing",[90] the ECtHR dealt with a civil servant who was employed as the Head of the press department of the Prosecutor General's office in Moldova. Guja, who leaked two letters to the press without prior consultation with the heads of his department and was subsequently dismissed, turned to the Court alleging that he had been the victim of an Article 10 violation.

While recognising that the very nature of civil service requires that "a civil servant is bound by a duty of loyalty and discretion",[91] the Court held that

> a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.... Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully

[90] Jacobs, White and Ovey at 442.
[91] *Guja* at [70].

verify, to the extent permitted by the circumstances, that it is accurate and reliable.[92]

As is obvious the Court also demanded that the leaked information was authentic, accurate and reliable in order to be worthy of freedom of expression protection. As the Court stressed, disclosed information that is "formulated in bad faith"[93] or contains "excessively defamatory accusations devoid of foundation" cannot fall under the banner of free speech and trigger Article 10 protection.

In *Guja* the ECtHR stated that the motives of the whistleblower are a determinant factor in deciding whether a disclosure should be protected or not.[94] The Court held that leaks based on "personal grievances or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection".[95] The court demanded that a whistleblower must act in good faith and in the belief that the information was true, he or she must must have disclosed information that was in the public interest and more discreet means of remedying the wrongdoing were not available.[96]

With the case of *Heinisch v Germany*[97] the Court reiterated that whistleblowers are meritorious of strong free speech protection. The case dealt with a nurse employed in nursing home for the elderly, who after

[92] Ibid at [72] and [75]. See also Bowers et al., *Whistleblowing: Law and practice* (Oxford: Oxford University Press, 2012) at 11.140 and 11.141..
[93] Ibid at [75].
[94] Ibid at [77].
[95] Ibid. The issue of motives will be further developed in the final part of this chapter.
[96] Ibid.
[97] (Application no. 28274/08, 21 July 2011).

unsuccessfully trying to initiate a criminal investigation on the health institution alleging deficiencies in care, went public with the information and was ultimately dismissed. Although the case involved an individual employed in the private sector, the court emphasised that a penalty (in this case a dismissal from the workplace) for the unauthorised release of information in the public interest after other legitimate means to address the problem failed, constituted a freedom of expression violation. Once more, the Court required that the whistleblowers considered the information released to be genuine, that they had acted in good faith and they chose to use the method of leaking as an ultimate, extreme measure after exhausting all other remedies available to them.[98]

In *Sosinowska v Poland*,[99] a doctor made allegations against another doctor to her superiors and was subjected to disciplinary measures. The Court argued that the issues were of a 'socially justified interest',[100] and thus such measures constituted a violation of Article 10. Finally, in *Bucur and Toma v Romania,*[101] the court held that penalising an intelligence officer for disclosing information on illegal interception of communications was a free speech violation, while in *Matúz v Hungary*,[102] a journalist who published a book detailing censorship attempts at the state television company was likewise provided with Article 10 protection as a whistleblower.

---

[98] Ibid.

[99] (App no. 10247/09, 18 October 2011). In *Raichinov v Bulgaria* (App no 47579/99, 20 April 2006) the applicant, an employee of the Ministry of Justice, was sentenced for accusing publicly during a meeting, the deputy Prosecutor-General of financial improprities in his presence. The Court found this to be an Article 10 violation.

[100] [83].

[101] The case was discussed in chapter 4 in relation to the use of internal mechanisms to raise concern by an intelligence official.

[102] (App. No. 73571/10, 21 October 2014). See also *Fuentes Bobo v Spain* (App. No. 39293/98, 29 February 2000) where it was held that the state has a positive obligation to protect such speech in the relationship between private persons as well and *Wille v Liechtenstein* (App. No. 28396/95, 28 October 1999).

In order to justify the inclusion of whistleblowing in free speech, the ECtHR in *Guja* took the stance that whistleblowing is an aspect of speech worthy of protection on the basis that it contributes to political discourse. The Court claimed in reference to the information Guja disclosed, that "[t]here is no doubt that these are very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate".[103] It went further on to argue that "open discussion of topics of public concern is essential to democracy and regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters".[104] In the subsequent whistleblowing case of *Heinisch* the court reiterated the "the importance of the right to freedom of expression on matters of general interest".[105] Therefore, the Court can be said to view whistleblowing as a contribution to political dialogue. This infers that the Court is aiming to protect the audience interest, ie the ability of individuals to make their contribution to public discourse by having access to the relevant factual information. Although the Court did not explicitly refer to this 'audience interest' in free speech in the way the Inter American Court of Human Rights did in *Reyes*, and bypassed discussing the "social dimension" of free speech, it regarded whistleblower protection under freedom of expression in relation to the public interest that is served and not the self development or self fulfilment of the whistleblower.

---

[103] *Guja* at [88].
[104] Ibid at [91].
[105] *Heinisch* at [93].

However, while recognising that the contribution of information relating to misconduct in the public discourse is the driving force and the main reason for extending free speech protection to whistleblowers, the Court included an additional, subjective element in assessing whether the whistleblower would be provided with protection. It argued that a violation of Article 10 will be recognised as such only for those whistleblowers, whose sole intent to disclose the information, was to serve the public interest, to the exclusion of whistleblowers who proceeded to disclosures with ulterior motives in mind. Questioning the motives of security sector whistleblowers is a common practice in the attempt to discredit their disclosures. The following part will examine this approach in light of the discussion in the previous chapter of the conflicting duties of loyalty and truth that the whistleblower is confronted with, as well as the audience interest in the speech discussed above.

The motives of the whistleblower as a determining factor in free speech protection

The media have traditionally cast individuals who leak information in the role of the 'reluctant hero'. They are seen as employees who have a particularly strong institutional commitment and a value system that compels them to take the risk of endangering their employment relationship by speaking out against wrongdoing. However, this is not always the case. It would not be incorrect to acknowledge that many whistleblowers, may have other, less honourable reasons for proceeding to disclose information. In fact, whistleblowers can sometimes be driven by motives of revenge on

their institution, especially in cases where they perceive themselves as being the victims of mistreatment in the workplace or a wrongful discharge.[106] In such cases, the whistleblower is less interested in bringing about institutional reform and merely seeks to punish or 'get back' at the organisation.[107] In other cases the incentives can be strictly of a pecuniary nature. Apart from actually 'selling' the information to the press, the publicity and media attention that unauthorised disclosure cases usually garner makes the publication of memoirs or revelatory articles very profitable for the whistleblower. 'Spycatcher' for instance, the memoir written by former MI5 member Peter Wright, was estimated to have sold more than two million copies internationally shortly after its release.[108] Disclosures that are made to a wider audience inherently raise suspicion of monetary incentives and immediately would make us wonder as to why the whistleblower did not opt for other means of shedding light on abuses or misconduct. As Gobert and Punch conclude, the image of the whistleblower driven by selfless motives can be somewhat simplistic as in many cases "the motivation driving whistleblowers may be mischievous, malevolent or even near pathological".[109]

There is also the danger that certain whistleblowers will use unauthorised disclosures to protect themselves from "legitimate criticism, pending

---

[106] Gobert and Punch, 'Whistleblowers, the public interest and the Public Interest Disclosure Act 1998' (2000) 63 Modern Law Review 25, 31.
[107] Vandivier K., 'Why Should My Conscience Bother Me?' in Ermann M. and Lundman RJ.(eds), *Corporate and Governmental Deviance* (2nd ed. Oxford University Press 1982).
[108] '1998 Government loses Spycatcher battle' http://news.bbc.co.uk/onthisday/hi/dates/stories/october/13/newsid_2532000/2532583.stm accessed 12 December 2014.
[109] Gobert and Punch at 30.

disciplinary proceedings or a threatened termination of employment".[110] These are the perceived reasons why whistleblower protection instruments and courts have included the motives of the reporting individual as an element of good faith in order for them to be considered worthy of protection under free speech. Requiring honourable motives to make certain that the disclosure was made in good faith ensures that the provisions will not be misused so the whistleblowers can manipulate and exploit the law to their advantage.

However, the examination of the whistleblower's motives as an element of reporting in good faith, as well as the good faith requirement itself vary significantly among states that have adopted whistleblower legislation. This can be attributed to the fact that the different traditions of government openness, transparency and accountability have a significant impact on how states legislate on state secrecy and whistleblower protection.

In establishing what constitutes a disclosure in good faith the COE Resolution stressed that:

> Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.[111]

[110] Ibid at 32.
[111] Parliamentary Resolution 1729 at [6.2.4].

This stance has been confirmed in the ECtHR judgments, where the court made whistleblower protection under free speech conditional, on the purity of the whistleblower's motives.[112] It is important to note however, that although in *Sosinowska v Poland,* the Court reprimanded the Polish medical authorities for refusing to examine the veracity of allegations due to the fact that they questioned the motives of the whistleblower,[113] in the subsequent case of *Bucur and Toma* it once again found that the disclosures had been made in good faith due to the fact that the court found no reason to believe that the whistleblower had acted out of the desire to gain a personal benefit, or a personal grievance or had another hidden agenda.[114] The importance the Court attaches to the whistleblower's motives was further confirmed in the more recent case of *Matúz v Hungary,*[115] where again the Court highlighted the importance of the whistleblower's intentions in relation to the protection under free speech they can expect.[116]

However, there could be said to be a degree of inconsistency in the Court's approach. In both the *Goodwin*[117] and *Financial Times*[118] cases, the Court held that the improper motives or the bad faith of the source of the leak of confidential information were not a decisive factor to be considered in

---

[112] See *Guja*, *Bucur* and *Heinisch*.
[113] "[T]he Court does not share the Government's conviction that the background to that conflict automatically divested the negative statements made by the applicant about her superior of all objectivity and legitimacy. It should be noted that the case before the medical authorities did not concern any negative statements about W.R.K.'s character or gratuitous attacks against her. The domestic courts did not find that the applicant had personally insulted the head physician in any way. The applicant was penalised essentially for the fact that she had expressed concerns, to persons working in the ward, to the hospital's authorities and to the regional consultant, about the quality of medical care given to patients on her superior's orders". *Sosinowska* at [79].
[114] *Bucur* at [117].
[115] (App. No. 73571/10, 21 October 2014).
[116] Ibid at [45] – [47].
[117] *Goodwin v UK* (App. No. 17488/90 , 27 March 1996).
[118] *Financial Times Ltd and Others v UK* (App. No. 821/03, 15 December 2009).

relation to the free speech protection of journalists and the protection of the confidentiality of journalistic sources.[119] Thus, preserving the role of the press as a public watchdog was an interest outweighing the potentially malicious conduct of the sources of the information leak.[120]

In his explanatory memorandum of the Council of Europe's parliamentary Assembly Resolution, rapporteur Omtzigt recognises that there is no clear explanation of what disclosures made in good faith entails even though it is found in most existing whistleblower legislation.[121] He acknowledges that sometimes it seems 'that the emphasis is rather put on the motives of the "whistle-blower" rather than on the veracity of the information itself'.[122] Nevertheless he supports the idea that "as a matter of ethics and credibility of the information divulged, "whistleblowers" should not be paid".[123]

Good faith in legislation usually requires of whistleblowers to attempt to raise any concerns internally in their organisation and proceed to disclosures to the police, members of Parliament or the press only when internal mechanisms are inadequate or do not provide an appropriate response. The whistleblower must believe that the information released is true, but is not expected to conduct a thorough investigation.[124] There does not seem to be clear consensus however, amongst states that have adopted whistleblower legislation, on whether the good faith requirement also includes the

[119] *Goodwin* at [15] and [38], *Financial Times* at [66].
[120] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (3rd edn., Oxford University Press, 2014) 641.
[121] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Doc. 12006 report on 'The protection of whistle-blowers' at [g].
[122] Ibid.
[123] Ibid.
[124] GRECO, *Seventh General Activity Report of Greco* (2006) pg 13, available at http://www.coe.int/t/dghl/monitoring/greco/documents/2007/Greco%282007%291_act.rep06_EN.pdf accessed 12 December 2014.

requirement that the whistleblower's motives are "wholly virtuous".[125] German courts for instance have stated that the whistleblower's sole intent to harm the employer means that the disclosure cannot be interpreted as having being made in good faith.[126] Romanian legislation includes a presumption that the whistleblower has acted in good faith unless the employer challenges this with convincing evidence, while in Norway the whistleblower's bad faith does not make the unauthorised disclosure illegitimate.[127] The Swedish Freedom of the Press Act dating back to 1776 allows public servants to release information in the public interest without authorisation to anyone, including the press, without following internal mechanisms,[128] although as Lewis purports the exceptionally open access to government held documentation in Sweden means that unauthorised disclosures are quite infrequent.[129]

In the US, the motivation of the whistleblower was not included in federal whistle-blowing provisions in an effort not to "erect barriers to disclosures that will limit the necessary flow of information from employees with information of government wrongdoing".[130] The Senate specifically criticised a 1986 decision by the U.S. Court of Appeals for the Federal Circuit, where an employee's unauthorised disclosures were found not to be protected because the employee's primary aim was not for the public good,

---

[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Lewis D, 'A civil service act for the United Kingdom' [1998] *Public Law* 463, 476.
[129] Ibid.
[130] Congressional Research Service, 2007 Report 'The Whistleblower Protection Act: An Overview' http://www.fas.org/sgp/crs/natsec/RL33918.pdf pg 6 accessed 12 December 2014..

but rather for personal reasons[131]. Furthermore, under the recent Dodd-Frank Wall Street Reform and Consumer Protection Act[132], whistleblowers who bring violations of securities or commodities law to the attention of government authorities are entitled to between 10% to 30% of any government recovery in excess of $1 million depending on the help they provided to the authorities.[133]

As mentioned above, in the Council of Europe, Norway and Sweden have enacted legislation that does not take whistleblowers good faith and therefore their motives into consideration. There the bad faith or the ulterior motives of the whistleblower do not make the disclosure unlawful.[134] The Group of States Against Corruption (GRECO) which is the Council of Europe's anti-corruption monitoring body noted that Norway's legislation was a step in the right direction but insisted that the introduction of good faith requirements are a helpful way to signal that whistleblowing legislation is not misused.[135]

But are the motives of the speaker given any weight in free speech in general? As Greenawalt purports, "in respect to most justifications for free speech the speaker's motives for saying what he truly believes are not intrinsically relevant".[136] Barendt similarly asserts that "a rigorous

---

[131] Ibid.
[132] Pub.L. 111–203 H.R. 4173 (2009-2010)
[133] Kerschberg B., 'The Dodd – Frank Act's Robust Whistleblowing Incentives' (Forbes.com, April 14 2011) http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/ accessed 12 December 2014.
[134] Act Relating to Working Environment, Working Hours and Employment Protection (Working Environment Act) Section 2.4 and 2.5 last amended on 19 June 2009 available at www.arbeidstilsynet.no/binfil/download2.php?tid=92156 accessed 12 December 2014.
[135] Greco Report at 13.
[136] Greenawalt K., *Speech, Crime, and the Uses of Language* (Oxford University Press, 1992) 47.

examination of motives to exclude speech made for profit would leave little immune from regulation"[137] as the speaker's profit is something that the recipient of the speech does not take into account when presented with speech that "contains valuable ideas or information".[138] Barendt asserts that this argument is particularly relevant to political speech but concedes that this may not be the case for commercial speech and sexually explicit speech that falls short of being considered obscene.[139] Benkler also supports the idea that "the motivation driving any given individual [...] is entirely irrelevant to the core question".[140] As he explains, "inquiring into the political or personal motivations of speakers opens the door to the most pernicious form of censorship-the definition of some political motivations as legitimate bases for speech and others as illegitimate and not eligible for protection".[141]

Meiklejohn[142] famously disagreed with the view that a motive to make profit was irrelevant to free speech. He argued that the raison d' etre of free speech was to enrich communication and this endeavour could only be seen as mutually exclusive with the objective of making a profit.[143] Meiklejohn insisted that his theory of speech was to promote the listener's perspective and protect the audience interest in the speech, therefore any self interest of the speaker, especially when there is an underlying commercial motive, could not be classified as protected speech under the First Amendment.

[137] Barendt at 24.
[138] Ibid.
[139] Ibid.
[140] Benkler Y., 'A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate' (2011) 46 *Harvard Civil Rights – Civil Liberties Law Review* 311, 361.
[141] Ibid.
[142] Meiklejohn A., *Free speech and its relation to self-government* (The Lawbook Exchange Ltd, 2004).
[143] Ibid.

Using the example of the radio which according to his view did not qualify as speech worthy of protection, Meiklejohn was adamant that "the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe about the general welfare".[144] Meiklejohn's refusal that speech that is the result of the speaker's intention to profit from it, can deliver information to the audience that is necessary for democratic decision-making and the process of self- government, seems to contradict his entire theory of speech.[145] Although he discarded the idea of censoring speech out of disdain for the central idea it expresses, however contemptible this idea may be, as Redish and Mollen note, "instead of discriminating on the ground of personal disagreement with the substantive message, Meiklejohn excludes expression from the First Amendment's reach because of his own normative distaste for the self-interested motivation of the speaker".[146] Furthermore, Meiklejohn's assertion that freedom of expression is primarily protected to ensure that the listener is able to receive and disseminate the content of the speech should make the examination of the speaker's motives entirely irrelevant.

Meiklejohn's view has not been reflected by US Supreme Court decisions that have extended free speech protection to speakers with clearly commercial motivations. In *Murdock v Pennsylvania*[147] it was questioned whether the sale of religious literature instead of its distribution free of

---

[144] Ibid at 104.
[145] Reddish M. and Mollen A., 'Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy In the Theory of Free Expression' (2009) 103 *Northwestern University Law Review* 1303, 1318.
[146] Ibid.
[147] 319 U.S. 105 (1943).

charge would allow for it to be protected under the First Amendment. The Supreme Court insisted that profit from speech was not a reason to reduce protection as "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way".[148]

Similarly, in the Council of Europe context, the court has held that Article 10 "applies to all kinds of information or ideas or forms of expression including when the type of aim pursued is profit-making or relates to a commercial activity of an applicant".[149]

But an approach to free speech like the one Schauer supports, an approach that perceives the interests of the speaker "not primarily as an end but only instrumentally to the public interest in the ideas presented",[150] would certainly make the motives of the speaker irrelevant. Freedom of expression protection is indeed provided to many profit making institutions such as newspapers, television stations etc, therefore as Schauer stresses, when talking of motives, or whether certain individuals are 'worthy' or 'deserving' of free speech protection, we are assuming that free speech protection is intended solely for the benefit of the speaker.[151] Therefore what should be considered in these cases is not the potential benefit for the speaker or the whistleblower, but whether the information released is in fact in the public interest. If it is, then any ulterior motives should be considered extraneous, at least as far as the legal protection of the individual is

[148] Ibid at 111.
[149] See *Casado Coca v. Spain* (App. No. 15450/89, 24 February 1994) at [35], *Barthold v. Germany* (App. No. 8734/79, 25 March 1985) at [42], *Stambuk v. Germany* (App. No. 37928/97, 17 October 2002) at [43-52] and *Frankowicz v. Poland* (App. No. 53025/99, 16 December 2008) at [39].
[150] Schauer at 159.
[151] Ibid at 160.

concerned. As Schauer insists "in dealing with free speech problems it is especially important that we look to the value of the product more than we look to the motives of the producer".[152]

However, it would be important to look at what the demand for a lack of ulterior motives will in fact achieve. If a whistleblower is only concerned with his or her own self interest, an absolute denial to extend Article 10 protection would ensure that such a whistleblower would not proceed with the unauthorised disclosures of information in the public interest. On the other hand, it will also discourage whistleblowers who worry that their motives will be misconstrued or misrepresented[153] especially if their relationship with their institution has been a rocky one. This conflicts with the main objective that was set out in the Parliamentary assembly Resolution of the Council of Europe to provide "a safe alternative to silence".[154] It is this silence that needs to be avoided and the incentives for raising concern when wrongdoing occurs strengthened. As Gobert and Punch opine "the public interest is best served by the disclosure of all serious malpractice or wrongdoing within an organisation, regardless of whether the person making the disclosure is acting in good faith".[155] This view was reflected in the 2006 GRECO report that encouraged the existence of a good faith requirement on the one hand, but also acknowledged that "if a true report is made in bad faith – because for example the employee holds a grudge against the manager – it will nevertheless be in the employer's or

[152] Ibid.
[153] Gobert and Punch at 41.
[154] Parliament Assembly Resolution 1729 at [5].
[155] Gobert and Punch at 41.

public interest that the report should be made".[156] Although 'chequebook journalism' may not be the most advantageous method to expose wrongdoing, as Lewis argues "if a financial incentive enables one disaster to be avoided, isn't disclosure in the public interest?"[157]

This "deep need to project onto whistleblowers our need for heroism, when revenge and anger are often what drive them",[158] shifts the focus from the importance and veracity of the information released to the conduct and ethics of the whistleblower.[159] Indeed, for individuals who ultimately blew the whistle, Henik found that anger was often a vital motivator despite some fear of retaliation.[160] Although it seems contradictory to afford whistleblowers who have less than honourable motives and whistleblowers who at great personal cost reveal information solely to serve the public interest, with the exact same level of protection, there are great dangers in making protection under human rights in general and freedom of expression in particular, only available to individuals who meet a certain ethical standard. Our normative distaste for whistleblowers with less than honourable motives should not affect their protection as otherwise, whistleblowers who are worried that their motives could be misrepresented or misconstrued, would be reluctant to speak out.[161] As Vaughn et al assert,

---

[156] GRECO at 13.
[157] Lewis D. and Homewood S., 'Five years of public interest disclosure legislation in the UK: are whistleblowers adequately protected?' (2004) 5 *Web Journal of Current Legal Issues* 1, 3.
[158] Short J., 'Killing the messenger: The use of Nondisclosure Agreements to Silence Whistleblowers' (1998-1999) 60 *University of Pittsburgh Law Review* 1207, 1234.
[159] Pubic Concern at Work, 'A guide to the PIDA 1998', available at http://www.pcaw.org.uk/guide-to-pida accessed 12 December 2014.
[160] Gephart et al, 'Silenced by fear: The nature, sources and consequences of fear at work', (2009) 29 *Research in Organisational Behaviour* 163, 181.
[161] It would be important to note that a whistleblower who discloses information in exchange for a profit to a newspaper or publishes memoirs for instance, is not necessarily acting out of malice. Whistleblowers are usually expected to face retaliation that can

"The view of the whistleblower as hero, although often true, disables protection and, perversely, may discourage disclosures by sending the message that only the pure and extraordinarily courageous are worthy whistleblowers".[162] As they argue, a "whistleblower law should encourage a focus on the information disclosed by whistleblowers and not upon the whistleblowers themselves. Selfless or even good motive should not be necessary for protection if the information is credible and significant for the public welfare".[163]

This view was reiterated by Dame Janet Smith in her report on the Shipman case. When trying to justify why no one had attempted to alert the public to the activities of Shipman, a doctor who was eventually convicted for the murder of 15 of his patients, Dame Smith looked into what the perceived weaknesses of whistleblowing legislation in the UK were. As she noted:

> If, therefore, a member of the practice staff employed by Shipman had reported concerns about his conduct, she would not have enjoyed the protection of the PIDA if her main reason for making the report had been personal dislike of Shipman. This is despite the overwhelming public interest in the disclosure that he might be murdering patients... The public

include the loss of employment and pension funds while simultaneously getting involved in lengthy and costly litigation.

[162] Vaughn, Devine and Henderson, 'The whistleblower statute prepared for the Organization of African States and the global legal revolution protecting whistleblowers', (2003) 35 *George Washington International Law Review* 857, 863.

[163] Ibid.

> interest would be served, even in cases where the motives of the messenger might not have been entirely altruistic.[164]

If the whistleblower followed the appropriate procedures to disclose information that is of benefit to the public, an examination of purity of motives is superfluous. Although as mentioned above, the whistleblower's motives are taken into account on the COE level with regards to their protection, in the UK the recent amendment of the Public Interest Disclosure Act 1998 (PIDA 1998) through the Enterprise and Regulatory Reform Act of 2013 (ERRA 2013) removed the good faith requirement altogether[165] from the PIDA 1998 and instead gave courts the power to reduce compensation of the whistleblower employee for any retaliation he or she faced due to the disclosures by 25%, when the disclosures were found to be made in bad faith.[166]

Conclusion

The chapter has aimed to chart the relationship between whistleblowing and freedom of expression. It has argued that free speech protection in instances of unauthorised disclosures is triggered to allow the public to disseminate information relating to wrongdoing, and it is this audience interest that makes it a form of speech worthy of protection. The contribution of such information to the political discourse has led to a growing recognition of whistleblowing as a legitimate practice worthy of protection, with the recent

[164] Dame Janet Smith, Fifth Report on The Shipman Inquiry, Chapter 11, Cm 6394 – I.
[165] Section 18 ERRA.
[166] ERRA s18 (5) (b).

case law of the ECtHR being a decisive step forward for whistleblowers in the COE. However, the decision of the court to focus on the whistleblowers' motives as an element of their good faith detracts from what has been accomplished and allows courts to make protection conditional on ethical considerations of the whistleblower's conduct. The chapter has argued that the public interest in the disclosure should be the decisive element in affording protection, as factors that are extraneous to the importance of the information to the public interest can result in distracting form the message the whistleblower is attempting to convey and allowing for attacks on his or her personality to become a legal means of retaliation.

When calling for free speech protection for members of the security and intelligence community however, another very important factor comes into play. National security is a legitimate reason to restrict free speech under the ECHR and therefore any calls for extension of whistleblower protection to members of the British Services require further analysis as to how the freedom of expression rights of intelligence officials can be balanced with the need for secrecy in the Services.

Chapter 7

National Security and Freedom of Expression: A Separate Framework for national security whistleblowers?

Introduction

The previous chapter has highlighted how freedom of expression has been used to provide protection to whistleblowers who disclose information in the public interest in the COE. Freedom of Expression however, is not an absolute right and can legitimately be limited in order to protect national security. Therefore, for whistleblowers from the intelligence and security community, there is an added reason apart from the breach of a duty of confidence, to limit free speech. This additional national security dimension means that services' whistleblowers would only enjoy protection if the information disclosed was in the public interest and moreover, when their disclosures do not expose their state to danger, significantly weaken the efficacy of its security apparatus or reveal the identities of individuals involved in the collection and dissemination of intelligence material.

This potential threat to national security from a disclosure, is the rationale behind bans or harsher sanctions for individuals who disclose information

relating to the services.[1] However, although such restrictions to free speech are legitimate under the Convention, they have to satisfy the three part test the court applies when deciding on whether a convention right or rights have been violated. Therefore in order to justify such restrictions, states must be able to show that there was a legal provision for restricting the right, this restriction serves a legitimate aim, and finally, the restriction was proportionate to the intended aim and necessary in a democratic society.[2]

The chapter aims to assess the impact of national security as a reason to limit rights, to whistleblowers' free speech claims both on the regional level and in the UK.

The chapter will begin by briefly presenting the theoretical framework behind national security restrictions to human rights. It will subsequently focus on the case law of the European Court of Human Rights (ECtHR), in relation to interferences with Article 10 that are based on national security considerations. Although the Court has stressed that states are to be provided with a certain degree of latitude in defining what poses a threat to their national security, such claims do not make the state immune from supervision from the Court or the test of proportionality.[3]

Finally the chapter will examine how the developments on the COE level would apply in the context of the UK and it will set the stage for the

[1] The ECtHR's case law on the issue will be discussed in detail in the chapter below.
[2] See Christophersen J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Court of Human Rights* (Brill, 2009). In the case of the OSA 1989, the first two parts of the test are satisfied. It is the third aspect that would create complications.
[3] Arai Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

following chapter, where methods to amend the Act will be critically examined.

Overview and Background

As Zedner argues, "security is a promiscuous concept"[4] that does not have a "single, immutable"[5] meaning. In relation to free speech, international and regional human rights instruments provide that freedom of expression is not an absolute right. The International Covenant on Civil and Political Rights allows for restrictions to freedom of expression "for the protection of national security or of public order, or of public health or morals".[6] Similarly, Article 10 of the European Convention on Human Rights provides among others, that the enjoyment of free speech "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security".[7]

In attempting to define when national security limitations to rights would apply, the U.N. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, allow for national security to be invoked "to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its

[4] Zedner L., *Security* (Routledge, 2009) 9. According to Zedner, after the Second World War there was a noticeable expansion of what was considered to affect national security, with the inclusion of "matters as diverse as international trade, manufacturing techniques, natural resource supplies, social unrest and even meteorological conditions".
[5] Ibid.
[6] International Covenant Civil Political Rights Article 19 3 (b).
[7] European Convention on Human Rights Article 10 (2).

territorial integrity or political independence against force or threat of force".[8]

Kempees provides a helpful summary of when such restrictions would be justified in the context of the ECHR, as he argues that the scope of national security limitations to human rights under the Convention only includes measures protecting "the safety of the state against enemies who might seek to subdue its forces in war or subvert its government by illegal means".[9]

In legal scholarship national security is considered a legitimate reason to curtail free speech. Schauer recognises that "a threat to national security is commonly held to be a danger of sufficient magnitude that the interest in freedom of speech must be subordinated".[10] Especially in cases of national emergency, freedom of speech can be legitimately curtailed when the security of the nation is at stake. As Metcalfe eloquently explains, "if, as is said, the first duty of a government is to protect its citizens, then the first price paid by the citizenry in the bargain [...] is to forgo some individual liberty, including the right to know what is going on".[11]

For Schauer, a legitimate state of emergency that would permit for limitations to free speech, can occur in instances where "there is not time to

---

[8] Available at http://www1.umn.edu/humanrts/instree/siracusaprinciples.html at [29] accessed 12 December 2014.

[9] Kempees P., ' "Legitimate aims" in the case-law of the European Court of Human Rights' in Mahoney P. and others, *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal* (Carl Heymanns, 2000) at 662.

[10] Schauer F., *Free Speech : a philosophical enquiry* (Cambridge University Press 1982) 197.

[11] Metcalfe D., 'The Nature of Government Secrecy' (2009) 26 *Government Information Quarterly* 305, 307.

trust the deliberative process for separating truth from error" because due to the danger "the conditions for deliberation do not exist".[12] Consequently what is required, is for the expressive conduct to create a danger that is highly probable, more than likely to be immediate and significantly great in scale.[13]

However, this could leave great leeway for states to abuse the national security concept. As Buzan claims, the use of national security as the alleged reason to conceal information on policies and decisions that would otherwise require justification, "is a political tool of immense convenience" as it offers "scope for power-maximising strategies to political and military elites".[14]

Therefore, although a restriction to freely communicate information that is secret and would severely harm national security if released is understandable and fully in compliance with free speech standards, can such restrictions legitimately apply to disclosures of information that reveal gross incompetence, intentional misconduct and complicity in human rights violations when the disclosure of such information was a means of last resort for the whistleblower?

The next part will look into the jurisprudence of the Strasbourg Court on national security restrictions to human rights, and then proceed to examine

---

[12] Schauer at 198.
[13] Schauer at 199.
[14] Buzan B., *People, states and fear : an agenda for international security in the post-cold war era* (2nd edn, Harvester Wheatsheaf, 1991) at 11.

the UK position, mainly focusing of the weight given to national security in the *Shayler* judgment.

Free speech and national security in the ECHR.

The issues arising from the conflict between speech and security are far from new. The ECtHR has long dealt with such national related cases which also raise questions as to the powers of an international court to question the member states as to their national security assertions. In relation to the UK, as was discussed in chapter 4, the ECtHR's judgments have been highly influential, both in the regulation of the Services and for the creation of a legal framework for surveillance.[15]

A question central to Court's role in the COE and its subsidiary nature, is the degree of deference it can afford contracting parties in relation to their assessment of whether national security reasons justify an interference with a right. In the context of freedom of expression for instance, is it the task of the reviewing court, at the national or international level, to determine "whether it was reasonable for the legislature to proscribe a certain type of speech as likely in the abstract to constitute a clear and present danger, or should the court ask itself whether prosecution was justifiable on this ground on the particular facts"?[16] The responses the Court has given to this question through its judgments, and these will be examined in detail in the

[15] *Malone v UK* (App. No. 8691/79 , 2 August 1984) and *Halford v UK* (App. No. 20605/92, 25 June 1997). For the unclear regime surrounding the UK services' surveillance practices outside the UK, see Glover P., 'Legal uncertainty surrounding the acquisition by UK intelligence-gathering bodies of communications intercepted outside the UK' (2014) 18 *Edinburgh Law Review* 114-119.

[16] Barendt E., 'Arrowsmith v The United Kingdom' (1981) 1 *Oxford Journal of Legal Studies* 279, 283.

chapter, lacks consistency. Some critics argue that the Court is quick to take at "face value"[17] governments' claims that restrictions to rights were justified due to national security considerations.

The Court has however, recognised from the outset that since contracting parties can find themselves "threatened by highly sophisticated forms of espionage and by terrorism",[18] they are permitted to take measures that may involve human rights limitations in the interest of security. However, even in the most extreme of cases, where the state participates in military action and therefore, national security considerations are much greater, the Court has stressed that "the protections offered by human rights conventions does not cease"[19] even in times of armed conflict.

When faced with the challenge of assessing whether an interference with a right that is meant to serve another public interest is in line with Convention standards, the ECtHR is expected to apply a three part test. Firstly, an interference needs to be prescribed by law. Therefore, the court will examine whether there is a law on the national level imposing this restriction, and it will assess whether the law is easily accessible and enacted in a way that allows individuals to reasonably foresee the consequences of a certain activity.[20] Secondly, the Court will examine whether the interference with the right fulfils a legitimate aim under the

---

[17] Noorlander P., 'Fighting Words – The War on Terror and Media Freedom' in Amos M. et al. (ed.), *Freedom of Expression and the Media* (Martinus Nijhoff Publishers / Brill Academic, 2012) at 229.

[18] Jacobs, White and Ovey, *The European Convention on Human Rights* (Oxford University Press, 2010) 318.

[19] Guild E., *Security and European human rights: protecting individual rights in times of exception and military action* (Wolf Legal publishers, 2007) 1. See the recent case of *Hassan v United Kingdom* (App. No. 29750/09, 16 September 2014).

[20] Jacobs, White and Ovey at 312.

convention, namely one or more of the reasons the respective article of the convention names as a legitimate reason for a right to be restricted.[21] Finally, the measure that interferes with the right needs to "necessary in a democratic society".[22] This requires the state to prove that "action taken is in response to a pressing social need, and that the interference with the rights protected is is no greater than is necessary to address that pressing social need".[23] Thus, as De Schutter notes,

> The measure creating the interference (i) must be appropriate to the fulfilment of the legitimate aim pursued ... and (ii) it must not go beyond what is strictly required by the need to achieve that aim, i.e. it must be necessary to attain the objective justifying the interference.[24]

Articles of the Convention that provide for restrictions to rights are to be narrowly construed, however, states enjoy "a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention".[25] Deciding on whether a policy that interferes with a right is proportionate is not always clearly objective task. As McHarg notes that this is an area in which "the political or value-laden nature of the choices

---

[21] Ibid at 315.
[22] Ibid.
[23] Ibid at 325.
[24] De Schutter O., *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) 313.
[25] *Silver v UK* (App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 25 March 1983) at [97]. In the context of free speech jurisprudence this was the stance the Court famously took in *Handyside v UK* (App. No. 5493/72, 7 December 1976).

facing the court is most obvious, raising questions as to the legitimacy of judicial rather than democratic decision-making".[26]

National security is a legitimate reason to limit certain rights under the Convention.[27] The ECtHR has proven to be prepared to allow the interest in protecting national security to override individuals rights, due to the fact that, without "a certain level of national and personal security nobody's rights are safe".[28] As McHarg proceeds to explain however, "to allow interferences on these grounds beyond what is strictly necessary would be to sanction potential oppression".[29]

The ECtHR has accepted that security and intelligence services require a much higher degree of secrecy to function effectively than other public authorities. In a case dealing with disclosure of classified information of the Dutch internal security services (the BVD) in a newspaper, the Court accepted that in such cases free speech could be legitimately restricted and stated that:

> The court recognises that the proper functioning of a democratic society based on the rule of law may call for institutions like the BVD which, in order to be effective, must operate in secret and be afforded the necessary protection. In this way a state may protect itself against the

[26] McHarg A., 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (2003) 62 *Modern Law Review* 671, 695.
[27] National security as a reason to limit rights appears under Articles 8, 10 and 11.
[28] McHarg at 688.
[29] McHarg at 688.

> activities of individuals and groups attempting to undermine the basic values of a democratic society. In view of the particular circumstances of the case and the actual terms of the decisions of the relevant courts, the interferences were unquestionably designed to protect national security, a legitimate aim under article 10(2).[30]

However, the ECtHR, has itself quite understandably given states a wide margin of appreciation when dealing with national security cases. The margin of appreciation doctrine which appears prominently in many security-related cases, maintains that state parties are "entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests".[31] This translates in practice to a sometimes significant "judicial self-restraint" on the part of the Strasbourg Court as "it serves to trace the dividing line between judicial law-making in Strasbourg and the proper responsibility of the democratic institutions of the ECHR countries".[32] As Leigh mentions, decisions of the Court "have sometimes given a surprising breadth to national authorities to decide for themselves, [...] whether the domestic situation falls within one of the permissible grounds of restriction under article 10(2)".[33] Thus national security concerns are an area where the court has proven to be particularly deferential to national authorities, a stance it has similarly followed when contracting

[30] *Vereniging Bluf Weekblad v The Netherlands* (App. No. 16616/90, 9 February 1995) at [35] and [36].
[31] Benvenisti E. , 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *NYU Journal International Law & Policy* 843.
[32] Mahoney P. and Early L., 'Freedom of Expression and National Security: Judicial and Policy Approaches under the European Convention on Human Rights and Other Council of Europe Instruments' in Fitzpatrick J. et al. (ed.), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Martinus Nijhoff Publishers, 1999) at 116.
[33] Leigh I., 'Case Comment : Spycatcher in Strasbourg' [1992] *Public Law* 200, 203.

parties to the Convention claim that there is a state of emergency that justifies derogation under Article 15 ECHR.[34]

The Strasbourg Court has in the past affirmed that states can restrict freedom of expression not only in relation to speech deemed damaging to national security but also in cases of requests to access state held information. In *Leander v Sweden*[35] the Court clarified that there was no positive obligation to release information to the applicant after he was refused employment with the Swedish Naval Museum for the reason that he was considered a security risk. The applicant was denied a request to review and defend himself against the information held against him. The Court confirmed the state's discretion in this matter and claimed that:

> The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.[36]

---

[34] Draghici C., 'The Human Rights Act in the shadow of the European Convention: Are copyists errors allowed?' (2014) 2 *European Human Rights Law Review* 154, 166. See *Brannigan and McBride v. United Kingdom* (App. No. 14553/89 and 14554/89, 25 May 1993) and *A and others v United Kingdom* (App. No. 3455/05, 19 February 2009).
[35] (App. No. 9248/81, 26 March 1987).
[36] Ibid [74].

In the Spycatcher case, a memoir highly critical of the Services written by former MI5 counterintelligence officer Peter Wright, excerpts of which various newspapers sought to publish, the Strasbourg Court dismissed claims of the UK that publication such excerpts would threaten national security. The UK government in the domestic proceedings, in its attempt to secure an injunction, had argued that publication of the memoirs would be damaging to national security. However, this initial position underwent a "curious metamorphosis"[37] according to the ECtHR and the government later argued the threat to national security would stem from the damage to the morale and reputation of the Services, the preservation of the confidence third parties had in the service and also deterring other former members of the services from proceeding to publish information without prior authorization.[38] The ECtHR in this instance held that these were not sufficient reasons to halt publication as the UK government would have hoped. As Leigh observes however, the ECtHR "stopped short of saying that these considerations could never fall legitimately under the heading of national security".[39] In its justifications of the Article 10 violation, the Court "did not question whether a British ban on the memoirs of a former secret agent served a national security goal".[40] The defence of prior publication was thus considered the primary reason for the Court's ruling in this instance. The fact that the memoirs had already been published in the US and copies of the book entered the UK, any potential damage had already

[37] *The Sunday Times v. UK (No. 2)* (Application No. 13166/87, 24 October 1991) at [55] The Court, however, had held that before the book was published in the US, the injuctions seeking to restrain newspaper coverage of information revealed in the book were justified *Observer and Guardian v UK* (App. No. 13585/88, 26 November 1991).
[38] Ibid.
[39] Leigh I., 'Case Comment : Spycatcher in Strasbourg' [1992] *Public Law* 200, 204.
[40] Noorlander P., 'Fighting Words – The War on Terror and Media Freedom' in Amos M. et al. (ed.), *Freedom of Expression and the Media* (Martinus Nijhoff Publishers / Brill Academic, 2012) at 229.

been caused[41]. Whether in abstracto this would be a national security threat was not discussed.

The ECtHR has since held that there is little danger to national security in disclosing information on government misconduct that has already occurred many years in the past. The Court affirmed this in *Vereniging Weekblad Bluf! v The Netherlands*.[42] In this case, a weekly magazine published a confidential security service report and before publication authorities confiscated the entire print-run. The magazine reprinted the issue in question and it was circulated in Amsterdam until the domestic courts ordered its withdrawal.

The Court found that the government was in breach of Article 10 in this instance as, before the issue was withdrawn for a second time from circulation, it had sold a substantial amount of copies and was also widely reported on by other media in the Netherlands. Therefore the interference with free speech could not be seen as necessary.[43] As far as the threat to national security was concerned, the fact that the leaked document was originally put together six years before the leak, combined with the fact that it represented a low degree of secrecy – it was simply marked 'Confidential'- made the Court dismiss the claims that the public circulation of the document could pose a threat to national security as the information included could not easily be perceived as sensitive.[44] Barendt concludes that this decision signifies that the Court "would be willing to review the

[41] *Observer v UK* at [66]
[42] (App. No. 16616/90, 9 February 1995).
[43] Ibid at [44].
[44] Ibid at [41].

classification of material by national authorities"[45] and insists that there would be "unacceptable risks to freedom of speech if the courts allow the political branches of government unfettered discretion to proscribe the disclosure of official secrets".[46]

In *Erdogdu and Ince v Turkey*,[47] the ECtHR held that there had been an Article 10 violation when the Turkish state prosecuted a journalist for publishing an interview with a sociologist who argued in favour of the Kurdish cause. The Turkish government argued in this instance that the publication of "separatist propaganda" would endanger national security[48]. The Court again reiterated the central role of the press in a democratic society and stressed that "Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders".[49]

In the more recent case of *Telegraaf Media Nederland and others v Netherlands*,[50] the Court held that an order to a newspaper to surrender leaked documents belonging to the Dutch security and intelligence services so that they in turn could identify the source of the leak was in violation of Article 10.

---

[45] Barendt, *Freedom Of Speech* (2nd edn, Oxford Univeristy Press, 2005) at 197.
[46] Ibid.
[47] (Application nos 25067/94 and 25068/94, 8 July 1999).
[48] [41].
[49] Ibid at [48]. A similar stance was taken by the Court in *Lingens v Austria* (App. No. 9815/82, 8 July 1986) but this time in relation to libel laws and not national security.
[50] (App. No. 39315/06, 22 November 2012).

The newspaper had published documents that showed that classified information from investigations of the secret service had been leaked and circulated to the criminal circuit of Amsterdam, including the drugs mafia.[51]

The government in this case argued that "If it was found that secret classified information had been leaked from the AIVD [the Dutch security and intelligence service], its ability to operate reliably was at stake and hence national security as well".[52] The government further argued that "details published had included the code names of two informants and contextual information capable of identifying them, which had compromised both their safety [...] and national security".[53]

The Court did not look into whether such a disclosure would in fact prove harmful to national security, basing its decision instead on the fact that:

> Although the full contents of the documents had not come to the knowledge of the general public, it is highly likely that that information had long been circulating outside the AIVD and had come to the knowledge of persons described by the parties as criminals. Withdrawing the documents from circulation could therefore no longer prevent the information which they contained – including the code names and other information identifying AIVD informants – from falling into the wrong hands.[54]

---

[51] Ibid at [10].
[52] Ibid at [76].
[53] Ibid at [108].
[54] Ibid at [130].

This affirms the Court's stance in Spycatcher that once secrecy has already been breached, states can no longer claim that a potential threat to national security justifies free speech restrictions in the press reproducing information that has been made public.

However, the Court has not provided a similar narrow approach when it comes to free speech restrictions of individuals who disclose military or intelligence related secrets. What will be examined below is how the Court has dealt with expression of individuals who according to the Court have special duties and responsibilities and how this was subsequently employed in *Shayler*, to argue that the OSA 1989 was compatible with Article 10 of the Convention.

The ECtHR has in many cases pointed out the specific free speech restrictions that can apply to certain individuals due to the nature of their work. In *Arrowsmith v UK*[55] the ECtHR held that a prosecution for distribution of leaflets at an English army base encouraging soldiers to abandon the forces or refuse to serve in Northern Ireland, was not an Article 10 violation "since the desertion of soldiers can, even in peacetime, create a threat to national security".[56] A similar stance had also been adopted in the case of *Engel v Netherlands*.[57] In *Engel*, a case of two soldiers against whom disciplinary action was taken for their participation in the writing and distribution of material that was thought to undermine military discipline, the ECtHR also argued that it was the specific responsibilities of certain

[55] (App. No. 7050/75, 12 June 1979).
[56] Ibid at [85].
[57] (App. No. 5100/71, 8 June 1976).

individuals that would allow them to be treated differently than others in free speech issues. As the judgment asserted "the court emphasises that the distinction at issue is explicable by the differences between the conditions of military and of civil life and, more specifically, by the 'duties' and 'responsibilities' peculiar to members of the armed forces in the field of freedom of expression".[58] National security was also deemed as a reason to uphold a ban on political activities and party affiliation by police officers in Hungary as this was considered necessary by the ECtHR to protect "national security and public safety and the prevention of disorder".[59]

This was affirmed in *Hadjianastassiou v Greece*,[60] a case concerning an aeronautical engineer employed by the Greek Air Force who had provided a technical study on guided missiles to a private company, the Court held that "[F]reedom of expression...applies to servicemen just as it does to other persons...Moreover information of the type in question does not fall outside the scope of Article 10, which is not restricted to certain categories of information, ideas or forms of expression".[61] However, the court once again took into account the special duties and responsibilities attached to military life and their effect on freedom of expression.[62] Furthermore, the Court held that contracting parties to the convention enjoyed a wide margin of appreciation when the protection of national security and the disclosure of military secrets were at stake.[63]

---

[58] Ibid at [103]. See also Cameron I., *National Security and the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2000) 370 et seq.
[59] *Rekvenyi v Hungary* (App. No. 25390/94, 20 May 1999) at [41].
[60] (App. No. 12945/87, 16 December 1992).
[61] Ibid at [39].
[62] Ibid at [46].
[63] Ibid at [47].

This argument was also presented by Lord Hutton in the *Shayler* case, who argued that Shayler had signed a declaration of confidence under the OSA 1989 upon entering and when leaving the Security Service and these special conditions attached to life in the Security Service [...] unlike the great majority of other citizens'[64] made a free speech restriction on national security grounds acceptable.

In the case of *Vogt v Germany*,[65] the Court held that the dismissal of a civil servant due to her allegiance with the German Communist Party was a free speech violation and this had not betrayed the relationship of trust between her and her employer. It clarified that 'free speech rights are not eradicated upon entering the workplace'[66] and has since reiterated that 'the protection of article 10 extends to the workplace in general and to public servants in particular'[67]. However, the Court clarified that 'Mrs Vogt was a teacher of German and French in a secondary school, a post which did not intrinsically involve any security risks'[68].

In the Spycatcher cases, the court refrained from asserting protection for whistleblowers who reveal security sensitive information. Whistleblower protection under the Convention was subsequently discussed in the *Guja* and *Heinisch* cases which were discussed in the previous chapter, but in both instances issues of national security did not come into play. Although the court did not exclude any class of employees from its interpretation of

---

[64] *Shayler* at [95].
[65] (App. No. 17851/91, 2 September 1996).
[66] Bowers and Lewis, 'Whistleblowing: freedom of expression protection in the workplace' (1996) 6 *European Human Rights Law Review* 637, 640.
[67] *Guja v Moldova* (App. No. 14277/04, 12 February 2008) at [52].
[68] *Vogt* at [60].

whistleblower protection under Article 10, and the parliamentary assembly resolution it heavily relied on included members of the services in its protective ambit,[69] there is was until recently no clear indication on whether and how the special duties and responsibilities of the intelligence official would affect their protection even for disclosures in the public interest. That is not to say that the ECtHR has not found violations of Article 10 against individuals who have had such duties and responsibilities. In *Grigoriades*[70] for instance, Greece was found in violation of Article 10 for penalising a conscript for sending a letter to his superior in which he frankly expressed his views that the army 'is an apparatus opposed to man and society'[71]. However, it is important to note that in this instance the ECtHR found that there hadn't been a pressing social need to suppress the speech because 'the letter was not published by the applicant or disseminated by him to a wider audience'[72].

The question of whether the special duties and responsibilities that apply to military personnel and service members would hamper their free speech protection was to a great degree answered in *Bucur and Toma v Romania.*[73] In this instance, a member of the Romanian intelligence services revealed information to the press on illegal telecommunication surveillance of journalists, politicians and other public figures. Bucur had first contacted the head of his department with the information at hand but was discouraged from making official allegations. In finding a violation of Article 10 in this

[69] Parliamentary Assembly Resolution 1729 [1] on the Protection of Whistleblowers text adopted on 29 April 2010 at 6.1.2..
[70] *Grigoriades v Greece* (App. No. 24348/94, 25 November 1997).
[71] Ibid at [14].
[72] Ibid at [47].
[73] *Bucur and Toma v Romania* (App. No 40238/02, 8 April 2013).

instance, the ECtHR seems to distinguish between the disclosure of military secrets (as in *Hadjianasstassiou*) or the expression of anti-military views (as in *Engel*), where the margin of appreciation is wide, and public interest disclosures as in *Bucur*. The public interest in being informed about irregularities that threaten the democratic foundations of the state outweighed in this case competing considerations of national security and maintaining public confidence in the institution. Therefore, while in cases like *Pasko*,[74] where a Russian naval officer was sanctioned for attempting to communicate military secrets to the Japanese, the Court will allow the contracting party a great degree of latitude in asserting whether a disclosure posed a serious national security threat, in cases like *Bucur*, the Court indicated that the margin will be narrow based on the public interest in the disclosed information. This places the arguments on which the OSA 1989 is premised, and the subsequent *Shayler* decision under a new perspective. The court not only examined in detail the efficacy of the internal mechanisms in the Romanian services, which the Law Lords refused to do in *Shayler* as was discussed in the chapter on internal whistleblowing, but applied the proportionality test while maintaining that practices of the Services that threaten the democratic foundations of society do not qualify for 'state secrets' protection and the public interest lies in favour of disclosure.[75]

After analysing the framework in the COE, it would be valuable to examine national security as a reason to limit rights in the context of the UK. The focus of the following part will be on freedom of expression in the UK in

[74] *Pasko v Russia* (App no. 69519/01, 22 October 2009).
[75] See also Resolution 1954 (2013) on National security and access to information, discussed in more detail in the following chapter.

the post HRA 1998 era, and particular attention will be given to national security arguments employed by the Law Lords in *Shayler.*

Freedom of Expression and National Security in Britain.

In the UK, freedom of speech is considered "the lifeblood of democracy",[76] and has enjoyed recognition and protection long before the HRA 1998 came into force. According to Salmon LJ, free speech has been viewed as "one of the pillars of individual liberty... which our courts have always unfailingly upheld",[77] while Lord Bingham stressed the contribution to "a modern participatory democracy"[78] of a "free, active, professional and inquiring"[79] press. This notion of participatory democracy could be said to include the citizenry's right for *informed* participation under Article 10, due to the fact that, "democratic engagement may be undermined if the available information is partial or absent".[80] In spite of developing case-law on the issue in Strasbourg,[81] the Supreme Court in the *BBC v Sugar*[82] judgment was not convinced that an Article 10 ECHR violation would occur whenever a public authority would refuse access to its documents.[83] This would confirm Sedley's approach that Article 10 ECHR has little to do "with your right to know" and is more related to "my right to tell you what I

[76] *R v Home Secretary, ex p Simms* [2000] 2 AC 115 at p. 126 per Lord Steyn.
[77] *R v Metropolitan Police Commissioner ex p Blackburn (no2)* [1968] 2 QB 150, 155. See also *R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd* [1992] 1 WLR 1289 per Laws J..
[78] *McCartan Turkington Breen v Times Newspapers Ltd.* [2001] 2 AC 277, 290-1. See also on press freedom in the UK, *R v Attorney General (ex parte Rusbridger)*[2003] UKHL 38, [2004] 1 AC 357.
[79] Ibid.
[80] Knight CJS., 'Article 10 and a right of access to information' [2013] *Public Law* 468-477.
[81] *Társaság a Szabadságjogokért v Hungary* (App No. 37374/05, 14 April 2009) and *Kennedi v Hungary* (App. No. 31475/05, 26 May 2009).
[82] *BBC v Sugar* [2012] UKSC 4; [2012] 1 W.L.R. 439.
[83] Ibid at [94] per Lord Brown.

think you ought to know".[84] In relation to whistleblowing however, in *Clyde and Co LLP and another v Bates van Winkelhof,*[85] Lady Hale made extensive reference to the ECtHR case law on whistleblowing recognising that "article 10 operates as a protection for whistleblowers who act responsibly".[86]

In relation to national security and human rights, as Greer observes, the HRA 1998, "has proved to be a powerful corrective to what might otherwise have been violations of human rights in the name of national security".[87] What ECHR and domestic case law has shown, is that national security arguments by the government in relation to interferences with human rights can only go so far. The *Chahal*[88] and *A and others v Secretary of state for the Home Department*[89] cases required the government to rethink its policies in relation to immigration and imprisonment without trial, and showed that claims of national security and terrorism can be rigorously examined by the courts. As Arden noted, the *A* case "may well be the first time that a court of the United Kingdom has dealt such a body blow to legislation conferring powers on the executive to meet a threat to national security".[90] This seems to be a significant change of stance compared to *Liversidge v Anderson,*[91] where the majority held that the balancing of national security with

---

[84] Sir Sedley S., 'Information as a Human Right' in Beatson J. and Cripps Y. (eds), *Freedom of Exression and Freedom of Information: Essay in honour of Sir David Williams* (Oxford University Press, 2000) 240.
[85] [2014] UKSC 32.
[86] Ibid at [41]. The whistleblowing element was also present but not central in the case of *Cream Holdings Ltd v Banerjee* [2004] UKHL 44
[87] Greer S., 'Human rights and the struggle against terrorism in the United Kingdom' (2008) 2 *European Human Rights Law Review* 163, 171.
[88] *Chahal v UK* (App. No. 22414/93, 15 November 1996)
[89] [2004] UKHL 56.
[90] Arden M., 'Human Rights in an Age of Terrorism (2005) 121 *Law Quarterly Review* 604, 605.
[91] [1942] AC 206. See also *R v Home Secretary ex parte Brind* [1991] 1 AC 696.

competing interests was the sole prerogative of the Home Secretary,[92] and perhaps illustrates how courts and the executive should interact in the post-HRA era. Now, according to Arden "balancing of those interests by the Secretary of State could be reviewed by the courts to ensure that appropriate regard was paid to the human rights considerations".[93] Thus, now that through the HRA 1998 freedom of expression is a fully fledged "fundamental constitutional right"[94]and not merely a "freedom",[95] national security related interferences to the right require rigorous justification.

In relation to free speech however, and especially in relation to the issue of unauthorised disclosures, this has had little impact.[96] Looking at the *Shayler* judgment, the Law Lords seemed resistant to the idea of finding the OSA 1989 incompatible with Article 10 due to the fact that it prevents rigorous evaluation of whether it is *necessary* in the meaning of the proportionality exercise, for the speech in question (the publicly disclosed information), to be suppressed and the whistleblower penalised.

As has been extensively discussed, the OSA 1989 is premised on the idea that it is not necessary to examine the content of a disclosure in order to

---

[92] Sunkin, Le Sueur and Murkens, *Public Law: Text, Cases and Materials* (Oxford University Press, 2014) 796.
[93] Arden at 617.
[94] Lord Lester of Herne Hill, 'Free Speech Today' available at http://www.odysseustrust.org/lectures/FreeSpeechTodayFeb2014FINAL.pdf accessed 12 December 2014.
[95] Ibid.
[96] See for instance Roach's criticism of *Sheldrake v DPP* [2004] UKHL 43, a case related to the proscription of groups as terrorist organisations. Lord Bingham asserted that the interference with freedom of expression and association arising from proscription does not constitute an Article 10 violation due to the fact that "the necessity of attacking terrorist organisations is clear" (at [54]). This justification was reached, according to Roach, in a particularly casual manner, and was not given the weight it deserved in the judgment. Roach K., *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 258.

restrict free speech on the basis of national security. This position as the thesis has noted was presented and explained in the White paper preceding the OSA 1989,[97] which per Lord Bingham in *Shayler* "bears directly to the interpretation of the Act",[98] and reflected the government's position in relation to disclosures by current and former members of the services. The paper argued that such disclosures are harmful to national security and should be criminalised "because they carry a credibility which the disclosure of the same information by any other person does not, and because they reduce public confidence in the services' ability and willingness to carry out their essentially secret duties effectively and loyally".[99] The paper went on to add that "those who become members of the services know that membership carries with it a special and inescapable duty of secrecy about their work".[100] Summing up the government's positions, the paper concluded that in relation to the collection of information by the services "no information relating to this process can be disclosed without the possibility of damaging this essential weapon against terrorism and crime and vital safeguard of national security".[101] The fact that the paper stressed that no information could be disclosed without authority, seemed to make the argument that it is the *act* of disclosure itself, as opposed to its *content*, that is considered prejudicial to national security.

This understanding of a national security threat emanating from the very act of disclosure and not the message the disclosure communicates was eventually adopted in the act. Thus, the OSA 1989 provides that current and

[97] White Paper, Reform of Section 2 of the Official Secrets Act 1911. 1988. Cm. 408.
[98] R. v *Shayler* [2002] UKHL 11; [2003] 1 A.C. 247 at [11].
[99] White Paper at [41].
[100] White paper at [41].
[101] Ibid at [53].

former members of the Services are barred from proceeding to unauthorised disclosures of information. As the thesis has analysed, there is no damage test provided for this class of individuals which means that the prosecution only has to prove there was indeed an unauthorised disclosure and does not have to demonstrate that this disclosure was damaging to national interests. There is also a lack of a public interest defence in the act which means that the defendant cannot argue that the public interest in disclosure outweighs the public interest in keeping the information in question secret.

This view was arguably, inadequately challenged by the Law Lords, when the OSA 1989 was brought under scrutiny as to its compatibility with Article 10 of the Convention. In *Shayler*,[102] the House of Lords at the time did not depart from the intentions set out in the white paper as to what would constitute a threat to national security. Lord Hope seemed to subscribe to the opinion that an unauthorised disclosure by a service member was by definition a threat to national security regardless of its content. Lord Hope argued that even the most well intentioned current or former member of the security and intelligence services does not have access to sufficient information to be able to effectively make a decision as to whether a disclosure of information would be damaging or not.[103] He also argued that due to the fact that even a successful prosecution against a leaker will do little to repair any damage that has occurred, and "the gathering together and disclosure of evidence to prove the nature and extent of the damage may compound its effects to the further detriment of national

[102] *R v Shayler* [2002] UKHL 11.
[103] Ibid at [84] per Lord Hope.

security",[104] he accepted the government line that unauthorised disclosures can be restricted on national security grounds regardless of content without their being a simultaneous violation of Article 10. This was in line with Lord Griffith's view in *Attorney General v Guardian Newspapers Ltd (No 2)*[105] who held that:

> The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency.[106]

Based on the discussion in preceding chapters, and the significance of *Bucur and Toma v Romania* for intelligence official whistleblowers when read in conjunction with the COE Resolutions and Recommendations on whistleblowers, national security and access to information[107] it is safe to say that the *Shayler* approach is inconsistent with new developments.

---

[104] Ibid at [85].
[105] [1990] 1 AC 109.
[106] Ibid at pg 269.
[107] These are discussed in detail in previous chapters

The key question that needs to be determined however, is what the effect of an inclusion of a public interest defence in the OSA 1989 would be. Would it resolve all issues raised in connection to the OSA 1989 in the thesis? One could argue, that an amended OSA 1989 with a public interest defence for s1 individuals, would allow courts to apply the proportionality test and authoritatively decide on a case by case basis whether a criminal penalty under the OSA 1989 would be justified. If the disclosed information did not harm national security and provided valuable insight into issues of public interest, then the interference with the whistleblower's free speech would be considered a violation if he / she had acted in good faith.

This however, would seem to be an overly simplistic solution to the very complex issues at hand. If, for instance the Snowden disclosures originated from an individual covered by s1 OSA 1989, how would courts assess whether the extensive surveillance that seems to have been part of GCHQ policy, was in fact unlawful, thus 'permitting' an unauthorised disclosure as a means of last resort? While it has been argued in legal scholarship that the activity of the GCHQ that Snowden leaked was illegal,[108] the heads of the services have maintained that the surveillance policies revealed were lawful and, that the disclosures themselves have caused significant, if not irreparable, harm to the security apparatus of the UK.[109] Furthermore, the ISC unequivocally stated their support for the legality of the GCHQ's

[108] Stratford J. and Johnson T., 'The Snowden 'Revelations': Is GCHQ Breaking the Law?' (2014) 2 *European Human Rights Law Review* 129-141.
[109] Intelligence and Security Committee of Parliament, 'Uncorrected transcript of the evidence given by Sir Iain Lobban (Director, GCHQ), Mr Andrew Parker (Director General, MI5), and Sir John Sawers (Chief, MI6)' available at http://isc.independent.gov.uk/news-archive accessed 12 December 2014.

actions in relation to surveillance.[110] Even if the GCHQ overstepped its statutory mandate, would the courts have to also consider that these disclosures of illegality reveal the surveillance methods and techniques used, by the Services thus significantly weakening British security? As Barro argues, "even a useful disclosure is likely to be bound up in an array of harmful ones".[111] Would this perhaps require a judicial process held at a closed hearing, where the government could establish why the information published caused harm to security without the public participating in this process?[112]

In light of the JASA 2013 and *R v Keogh*,[113] where in camera hearings were held to determine whether the unauthorised disclosure of notes from a private meeting between Bush and Blair was damaging, it does not seem too unlikely an outcome if a public interest defence was included in the OSA 1989, to allow judges to discuss the merits of a specific whistleblowing case in a closed hearing. In *Chahal*, the ECtHR clearly stated that "there are techniques falling short of disclosing the case against one that can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord a substantial

---

[110] To quote the official statement released by Sir Malcolm Rifkind, "We have reviewed the reports that GCHQ produced on the basis of intelligence sought from the US, and we are satisfied that they conformed with GCHQ's statutory duties... Further, in each case where GCHQ sought information from the US, a warrant for interception, signed by a Minister, was already in place, in accordance with the legal safeguards contained in the Regulation of Investigatory Powers Act 2000". http://isc.independent.gov.uk/news-archive/17july2013 accessed 12 December 2014.

[111] Jash Barro quoted in WW., 'Whistleblowers and national security: A case for clemency for Snowden' (economist.com, 10 January 2014) http://www.economist.com/blogs/democracyinamerica/2014/01/whistleblowers-and-national-security accessed 12 December 2014.

[112] The *Al Rawi* and *Tariq* cases and the subsequent Justice and Security Act 2013 discussed in the chapter on the accountability of the Services are important here as well.

[113] [2007] EWCA Crim 528; [2007] 1 W.L.R. 1500 (CA (Crim Div))..

measure of procedural justice".[114] While the context of that case differed greatly to whistleblowing, it seems clear that the qualified nature of Article 6 that protects the right to a fair trial, allows for parts of the judicial process to remain secret for security purposes, if sufficient safeguards exist. The same conclusion was reached by the ECtHR in *Kennedy v UK*[115] in relation to the procedure before the RIPA tribunal. Thus, in order to protect sensitive intelligence information, it is likely that an amended OSA would be counterbalanced with special judicial arrangements, that would allow the government to argue against the disclosure with evidence the public disclosure of which would jeopardise security. Such arrangements of secret evidence-giving however, coupled with a lack of a public justification or statement of reasons for decisions reached by courts, would do little to assuage concerns that national security was not being used as a pretext to bar the disclosure of embarrassing information and retaliate against the whistleblower. Thus, it is questionable whether such a system for services' whistleblowers would be necessary or desirable. Therefore, what the thesis argues, is that there are inherent limitation to how far courts can go in implementing ECHR standards in the context of British national security leaks.

While it is out of the scope of the thesis to provide concrete advice on how to establish a framework for the judiciary to evaluate whether threats to national security from the unauthorised disclosure outweigh the public's right to know, the following part will attempt to examine ways in which

[114] *Chahal* at [131].
[115] (App. No. 26839/05, 18 May 2010).

courts in the UK could examine free speech claims in the context of national security.

Free Speech and National Security in the UK courts.

Building on the arguments above, this section attempts to provide a response to the pressing question of whether and how UK courts would be able to deal with a balancing exercise between the whistleblower's free speech rights, and the countervailing considerations of national security and potentially the rights of others that may be harmed from the unauthorised disclosure.[116]

While it is out of the scope of the thesis to fully build up and propose a detailed procedure under which national security whistleblowers could present human rights arguments for courts to consider, it would be important to examine potential avenues for human rights claims to be brought forward. It is important to note that this discussion is taking place amidst a "recent trend of departure from traditional criminal due process requirements in the 'terrorism era' [and the] the increased use of 'closed court' hearings in relation to the introduction of evidence considered particularly sensitive with respect to national security".[117] Therefore, the question of how a national security whistleblower can bring forward a human rights challenge to a penalty for disclosing information in the public interest needs to be addressed in this context.

---

[116] How rights of others can be affected by disclosures and the concomitant positive obligations this would create for states will be discussed in more detail in the subsequent chapter.

[117] Anthony Gray, 'A Comparison and Critique of Closed Court Hearings' (2014) 18 *The International Journal of Evidence and Proof* 230, 230.

As the thesis has discussed, it is appropriate for courts to demonstrate a degree of deference to the security services. This deference is premised on the idea that it is the agencies that have been empowered to ensure the 'security of the realm' and thus have the necessary expertise to evaluate which disclosures harm national security. This means that courts are perceived as being in a comparably poorer position to make complicated national security assessments of the nature that whistleblowing would require. This could potentially set a limit for courts to question the conduct of the services under a human rights context. As the thesis has examined in Chapter 4, however, the demands for accountability for human rights violations by the UK services has been addressed through the creation of a specialised tribunal that has the authority to provide judicial supervision and ensure that the Services do not violate rights while discharging their functions.

As the thesis has explored before, the Investigatory Powers Tribunal is the body with the responsibility and structure to examine any human rights claims against the Services. Therefore the issue of deference is partially resolved through the existence of a specialised tribunal empowered to make such assessments. The tribunal's primary purpose under RIPA 2000 has been to ensure that the services act in ways that are compatible with the Human Rights Act 1998.[118] By virtue of RIPA section 69(6)(b), the Tribunal is required by law not to disclose material provided to it "which would threaten the national interest, national security, operations against serious

[118] Investigatory Powers Tribunal, Functions- Key Role available at http://www.ipt-uk.com/section.aspx?pageid=1 .

crime or any functions of the intelligence agencies".[119] Thus, a specialised tribunal created for the purpose of ensuring the agencies' human rights compliance, resolves the primary objection that the judiciary is by definition excluded from such assessments.

This central issue of demarcating the degree of judicial intervention into security matters is of course not resolved simply through the establishment of a specialised tribunal. The central claim the thesis is attempting to make raises a host of other concerns that need to be addressed. If, as the thesis argues, the OSA 1989 should be amended in a way that would empower judges to balance the public interest in disclosures with the competing considerations of national security and the rights of others, it is important to acknowledge and address the difficulties that would arise from such a position. The following part will attempt to highlight and address these issues.

Firstly, an issue that needs to be addressed is the *degree* of harm caused by the disclosure that the services must prove to justify penalising the whistleblower. Would proof that the unauthorised disclosure would *potentially* cause harm suffice, or would the services be required to demonstrate concrete evidence that harm was *in fact* caused by the disclosure (actual harm). Looking at the ECHR case law it is clear that the court has upheld interferences with Article 10 on grounds of national security without requiring states to point to actual harm caused by the

[119] http://www.ipt-uk.com/section.aspx?pageid=8

speech in question.[120] This however was in relation to interferences with free speech that amounted to fines, censorship and other mostly administrative penalties that the applicant had to face. In the case of national security whistleblowing where the penalties can also include prison sentences[121] and taking into account the importance the ECtHR assigns to the severity of the penalty when deciding on whether to find an Article 10 violation,[122] it is safe to deduce that the harm required to convict the whistleblower should not be entirely theoretical. There is, however, notably a lack of uniformity in the degree of harm required to penalise a breach of official secrecy amongst states. For instance, many COE states accept that a lack of actual harm is a mitigating circumstance for an individual who leaked official secrets.[123] Other states, as Nasu reports, require the disclosure to 'substantially harm' national security while for others it is sufficient that the disclosure 'is likely to' or 'could reasonably be expected to' harm national security.[124] Taking into account the wide margin of appreciation states enjoy in the relation to state secrecy however,[125] and the ECtHR's recent whistleblowing case law, the degree of harm required to be demonstrated by the government should not be entirely abstract.

---

[120] *Hadjianastassiou v Greece* (Application No. 12945/87, 16 December 1992), *Zana v Turkey* (Application No. 18954/91, 25 November 1997).
[121] Shayler and Richard Tomlinson both served sentences for breaching the Act.
[122] See for instance *Vejdeland and Others v. Sweden* (Application No. 1813/07, 09 February 2012) at [58].
[123] Amanda Jacobsen. 'National Security and the Right to Information in Europe' http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen_nat-sec-and-rti-in-europe at pg 49. This can be compared to the 'clear and present danger' test required in the USA.
[124] Nasu provides an exhaustive analysis of the regulation of state secrecy and national security worldwide in Hitoshi Nasu, 'State secrets law and national security' (2015) 64 *International & Comparative Law Quarterly* 365, 379.
[125] *Stoll v Switzerland* (App. No. 69698/01, 10 December 2007).

Secondly, concern is raised on the issue that American courts have framed as the 'mosaic question', an issue echoed in *Shayler* by Lord Hope.[126] The mosaic issue was best illustrated in the *Marchetti* case where judge Haynsworth defined the problem as follows:

> "The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area".[127]

This of course drastically changes the degree of deference and the level of scrutiny to be demonstrated by the courts in relation to services' justifications for penalising the whistleblower.

As Pozen explains, under this theory "the mosaic, not the document, becomes the appropriate unit of risk assessment."[128] This argument as expressed above in *Marchetti* is a justification to trigger judicial deference to the services and allow for the whistleblower to be penalised even when there is no obvious harm caused by the information that was part of the

---

[126] *R v Shayler* [2002] UKHL 11 at [84] per Lord Hope.

[127] *United States v. Marchetti* 466 F.2d 309 at 1318. (4th Cir. 1972) per Judge Haynsworth see also Meredith Fuchs, 'Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy' (2006) 58 *Administrative Law Review* 131.

[128] David Pozen, 'The Mosaic Theory, National Security, and the Freedom of Information Act' (2005) 115 *The Yale Law Journal* 628, 633. Pozen is extremely critical of this approach in his article. As he argues in relation to the judiciary's reluctance to question 'mosaic-type' arguments: "Practically, delegation permits weak, irrebuttable arguments to justify nondisclosure; it invites agency opportunism and abuse; it lacks theoretical limits; it facilitates excessive secrecy; and it impairs the courts' institutional integrity" at pg 668.

specific disclosure. There is of course concern that if the tribunal were "to reward more speculative, more categorical, more extreme mosaic claims with additional deference", free speech protection would become illusory. As Pozen warns citing US cases, "the mosaic trope came to assume a talismanic quality in national security jurisprudence, threatening the sceptical judge with unknown vulnerabilities, unknown evils".[129] In spite of the potential for abuse by the services this theory generates, however, it would be simplistic to discard it as a further reason that would pragmatically require courts to be restrained when examining the impact the disclosure had on national security.

When this mosaic argument is viewed from the perspective of the IPT tribunal, or any other procedure where evidence is not presented in an open hearing, the obstacles it could pose to judicial intervention in security matters is significantly mitigated. The mosaic argument is premised on the idea that courts lack "the "broad view" with which to contextualize these items [of information] and thereby glean their true significance".[130] The closed hearing, although questionable as to its compatibility with the principles of natural justice,[131] has the advantage that it enables judges to require more thorough justifications in relation to the harm caused by the disclosure. Therefore, they will be able to assess whether the 'broad view' of the harm caused by the disclosure, as it would be presented by the government, would suffice to override the benefit to the public interest from the disclosure.

---

[129] Pozen at 653.
[130] Ibid at 639.
[131] This will be discussed below and was more developed in Chapter 4 in the context of criticism to the Justice and Security Act 2013.

The final area of concern, is that in practice it would be "virtually impossible for individual litigants to counter the opinions of agency personnel"[132] on the harm caused by the disclosure. This argument has two sides. Firstly, how can the government present evidence that a disclosure was damaging in the context of a trial? Secondly, how can the whistleblower effectively question government evidence that their disclosure proved harmful or that the contribution of this information to the public interest outweighed any harm caused? The outcome of this balancing assessment is vital to the whistleblower, as it could be the basis on which his or her penalty will be justified.

While the IPT tribunal through the holding of evidence in secret would be able to receive evidence from the services without the danger of further disclosures, the complainant whistleblower is left with the following hurdles to overcome. Firstly, it is clear that in the context of the tribunal 'the complainant has no automatic right [...] to see the evidence against him [...]. Hence, there is no opportunity to test the evidence by cross-examination".[133] Secondly, the IPT is not obliged to give any reasons for its judgment and the complainant has no right of appeal against the IPT's decision, meaning that an application to the ECtHR would be the only avenue to challenge the IPT's findings.

---

[132] Fuchs at 164.

[133] Oliver Gayner, 'Case Comment: A v B [2009] UKSC 12 – the Jurisdiction of the Investigatory Powers Tribunal' available at http://ukscblog.com/case-comment-a-v-b-2009-uksc-12-the-jurisdiction-of-the-investigatory-powers-tribunal/ This is a particular characteristic of the RIPA tribunal and as discussed in chapter 4, both the ECHR and the UK Supreme Court have found that this does not infringe the complainant's fair trial rights under Article 6.

However, setting up a system outside the IPT would also be a possibility. The development of Closed Material Procedures (CMPs), discussed in Chapter 4, offer another viable alternative that would allow courts to engage with questions of national security and have access to materials of evidence that would not be presented publicly. This would allow for evidence to be placed before the court in a closed session, namely a session where the defendant whistleblower, his or her legal counsel and the broader public, would be excluded.[134] CMPs can be adopted by judicial bodies in various circumstances.[135] After *Bank Mellat v HM Treasury (No. 1)*,[136] where the Supreme Court determined that it could itself adopt a CMP,[137] and the *Al Rawi*[138] and *Tariq*[139] cases discussed in chapter 4, there are clear indications as to how such a system could be adapted for the needs of national security whistleblowing.

If this appoach would be followed for national security whistleblowers, it could be faulted for the same reasons that CMPs have overall been controversial in their application. The problems that Lord Hope presented in his minority opinion relation to CMPs in *Bank Mellat* also apply here. As he stressed, inaccessibility to material from one side "Result[s] in every case in an inequality of arms between the State, [...] and the other party against whom the State has taken action and to whom access to that material is

[134] C. Forsyth, 'Principle or Pragmatism: Closed Material Procedure in the Supreme Court' UK Const. L. Blog (29th July 2013) (available at http://ukconstitutionallaw.org)
[135] For instance see Terrorism Prevention and Investigation Measures Act 2011Schedule 4 or the Counter-Terrorism Act 2008, Part 6.
[136] [2014] AC 700, [2013] UKSC 38.
[137] Crossing the Rubicon pg 179.
[138] *Al Rawi v Security Service* [2011] UKSC 34.
[139] *Tariq v Home Office* [2011] UKSC 35.

always denied."[140] It is also important to note that, in the context of whistleblowing, this evidence that will be kept closed is not evidence that is incriminating to the whistleblower himself or herself. Instead it is evidence that demonstrates whether the *disclosure* is so harmful, either to national security or the rights of others, that its public dissemination would be contrary to the public interest. It is questionable whether the whistleblower would have any convincing arguments to make against this assertion. However, under a scheme of this kind, courts would at least be able to receive and evaluate evidence as to why the unauthorised disclosures caused harm.

This raises another issue. Would a CMP-type procedure require the courts to follow the special advocate route, which would allow the whistleblower to express some counter-arguments to the evidence presented in relation to the harm caused by the disclosure? Would the whistleblower be provided with the 'gist' of the evidence presented against his or her disclosure to fulfil the 'minimum requirement' as envisaged by the House of Lords in Secretary of *State for the Home Department v AF and others* in the context of control orders?[141] It is worth noting that in relation to individuals placed under control orders, the ECtHR required that they be given "sufficient information about the allegations" against them, to enable them "to give effective instructions in relation to those allegations".[142]

---

[140] *Bank Mellat v HM Treasury (No. 1)* at [96] per Lord Hope.
[141] [2009] UKHL 28.
[142] A and others v the United Kingdom (App. No. 3455/05, 19 February 2009) 49 E.H.R.R. 29 at [220].

Could a similar procedure allow the whistleblower to potentially challenge evidence presented through the use of a special advocate?[143] The special advocate is appointed by the court and has access to the 'closed' evidence but is not able to present it to the defendant and take instructions on how to rebut it.[144] This would again provide a greater degree of fairness to the proceedings.

This process was very much supported by Lord Hope in the context of control orders. As he argued:

The special advocate procedure too provides an opportunity for questions as to the weight to be attached to undisclosed evidence [....] to distinguish between sensitive material the withholding of which will not result in substantial unfairness and core material to which weight cannot be given unless it is made public. This is the kind of approach that the Strasbourg court appears to have had in mind in *Chahal v United Kingdom* [...],illustrating that there are techniques that can be employed which both accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice.[145]

Lord Dyson was more critical of this system, arguing that "the use of a [special advocate] is [...] never a panacea for the grave disadvantages of a

[143] The special advocate procedure is extensively used as part of the Special Immigration Appeals Commission https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421503/Consolidated_text_of_SIAC_Rules_2003.pdf [36]

[144] C. Forsyth, 'Principle or Pragmatism: Closed Material Procedure in the Supreme Court' UK Const. L. Blog (29th July 2013) (available at http://ukconstitutionallaw.org)

[145] *RB (Algeria) and another v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 A.C. 110 at [233] per Lord Hope.

person affected not being aware of the case against him"[146], while Lord Steyn stressed that the "special advocate procedure strikes at the root of the prisoner's fundamental right to a basically fair procedure".[147]

In the context of whistleblowing however, it seems to be an approach that contains the most reasonable avenue for the government to be able to make its case for the (potential) harm caused by the disclosure, and also for allowing the whistleblower a degree of participation in potentially addressing the evidence against his disclosure. It is, however, important to mention a qualification in the use of this process in the context of whistleblowing. As stated above, the evidence that will be 'closed' in this circumstance is not evidence that incriminates the whistleblower in relation to being the source of the leaked information. At this stage in the whistleblowing process, it will be clear that the defendant whistleblower was behind the unauthorised disclosure. Here the closed material does not relate to the conduct of the whistleblower but on whether the information disclosed caused (or is likely to cause) harm. Therefore, it is questionable whether the whistleblower through his defence or even the use of a special advocate will have the capability to contest such claims put forth by the government. Moreover, it does not resolve the central issue of whether an amendment to the OSA 1989 that would allow for a public interest defence, would 'open the floodgates' and allow whistleblowers to become assessors of the public interest. Therefore it is important to address this issue from the perspective of how, if at all, a public interest defence could be incorporated in the OSA 1989. The following part will address this issue.

---

[146] *Roberts v Parole Board* [2005] UKHL 45 at [60].
[147] Ibid at [93].

Conclusion

The chapter has attempted to look into national security restrictions in free speech debates in an attempt to ascertain how Article 10 of the Convention could be employed to protect individuals that fall under Article 1 (1) of the OSA 1989. Although the court has progressed in the past few years to claim that whistleblowers can be protected Article 10, it was unclear whether this could extend to members of the intelligence community. However, the inclusion of whistleblowers from the services in COE parliamentary assembly recommendations and resolutions relating to whistleblower protection, and the recent case of *Bucur* demonstrate the Court's willingness to extend free speech to national security whistleblowers, and intelligence officials as well.

In the British context, the HRA 1998 has allowed the courts to more readily question state assertions on national security. In landmark cases, the courts have openly questioned security claims, thus heralding a new era for human rights in the UK. The chapter has argued however, that the Shayler judgment is closer in tone to the pre-HRA arrangements, and developments under the ECHR regime have undermined the main arguments in favour of the OSA 1989 that had been put forth by the Law Lords.

If, however, the OSA 1989 should be amended to include a provision that would allow for the balancing of the public interest in disclosure with the public interest in security on a case by case basis, it would be important to

examine in which cases this public interest in disclosure would in fact outweigh competing concerns. This will be dealt with exhaustively in the next chapter. Furthermore, the following chapter will attempt to identify possible avenues for a public interest defence to be included in the act in a way that both ensures the OSA's compatibility with free speech and that legitimate security concerns will be taken into account.

Chapter 8

The Whistleblower as an assessor of the Public Interest: Suggestions on how to reform the OSA 1989

Introduction

As the thesis has analysed, recent developments in whistleblower protection through freedom of expression, call for a reevaluation of the protection provided to the national security whistleblower. The thesis has examined how the ECtHR in its recent case law, and the COE through Recommendations and Resolutions, have been setting standards for the protection of whistleblowers under freedom of expression that have included protection for members of the military and the security and intelligence community.[1] The free speech protection from reprisals that is afforded to good faith whistleblowers in the COE, is the result of a balancing exercise between the public interest in disclosure and the public interest in maintaining secrecy. When the former outweighs the latter, restrictions to the whistleblower's free speech rights cannot be justified, if the whistleblower acted in good faith.[2] This balancing exercise, however, when applied in the context of whistleblowing that affects national security,

[1] These will be examined in detail in below.

[2] For an analysis of the good faith requirement in the ECtHR case law see the previous chapters on internal mechanisms and the the motives of the whistleblower. See also Bowers John and others, *Whistleblowing: Law and Practice* (Oxford: Oxford University Press, 2012) paragraph 11.140 .

presents a series of complications. If contracting parties to the ECHR, are to take this balancing into consideration in order to secure compliance with the Convention, their secrecy laws pertaining to the unauthorised public disclosure of security related information must be framed in a way that allows for them to take into account the possible public interest in an unauthorised disclosure before handing down any sanctions to the intelligence official.

The thesis has so far questioned the compatibility of the OSA 1989 as it stands today, with free speech standards. It has argued that the lack of a damage test and a public interest defence in the act, which results in the non-differentiation between damaging leaks that would constitute grave national security threats and disclosures that expose that wrongdoing has occurred and has not been addressed, put into question the validity of the arguments employed by the Law Lords in *Shayler*.

When following this argument, however, we are confronted with the following conundrum. How can the public interest be incorporated into the OSA 1989, in a way that both ensures that it will not weaken the legitimate secrecy requirements that the Services function under, and at the same time afford maximum free speech protection to those who in good faith expose abuses? Considering that protection from retaliation is provided to whistleblowers only on the condition that their disclosures are in the PI, it is important to enact legislation that provides a clear understanding of which disclosures will be protected and which will be found to be damaging.

The chapter therefore seeks to identify how it is best to include whistleblower protection in the OSA 1989 so that it facilitates whistleblowers in this assessment and also ensures that they have a great degree of certainty that the specific disclosure to which they are about to proceed will be protected. This is arguably extremely important to take into account, as the public interest in disclosures is a notoriously nebulous concept that can have many conflicting, yet equally valid, interpretations.[3]

In order to do this, the chapter aims to examine three approaches that laws relating to whistleblowing adopt to circumvent the problem of competing interpretations of the public interest, and it will argue that although the outcomes from these methods are not always satisfactory, an amendment to the OSA 1989 which identifies specific exemptions from the duty of confidentiality would perhaps be best suited to ensure the OSA's compatibility with free speech standards.

The three approaches that will be examined differ as to how the public interest is included in the law. The first approach, which is the one the OSA 1989 currently follows, does not allow whistleblowers to assert their PI interpretation, as it considers the act of an unauthorised disclosure itself to be contrary to the public interest. This is premised on the idea that employees of an organisation are not be able to make any assessments on the public interest, as disclosing information would be contrary to the duties and responsibilities they incur while working for the organisation. If

[3] See McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671 and Rivers, 'Propotionality and variable intensity of review' (2006) 65 *Cambridge Law Journal* 174.

prosecuted, such whistleblowers cannot argue that the public interest in the disclosure outweighs the interest in keeping the information secret. However, as the thesis has argued, this can come to the detriment of democratic accountability, and the whistleblower's free speech rights.

The second approach would provide whistleblowers with a general public interest defence that does not identify what is in the public interest in the law itself, but simply provides protection from sanctions when the disclosure is found to be of such great interest that it outweighs competing security considerations. Although this would be the most progressive approach that would allow a proportionality test on an *ad hoc* case by case basis, the chapter will argue that it could result in creating uncertainty for the whistleblower as to whether the disclosure will be protected. In such cases, the decision would ultimately lie with the judiciary. In practise however, courts have been notoriously reluctant to challenge state assertions on the public interest in disclosures, especially where issues of national security are concerned.[4] Furthermore, the lack of pre-visibility and certainty in the law means that whistleblowers will have to take the risk that their own understanding of the public interest will not be confirmed by the courts. This can potentially be rectified by protecting whistleblowers who have a reasonable belief that their disclosure is in the public interest,[5] even if it is found eventually not to be. This, however, is not an acceptable solution where disclosures that affect national security are concerned as even the well-meaning whistleblower can cause significant damage by proceeding to

[4] As Birkinshaw argues national security can become 'an unanswerable plea to immunity and confidentiality' Birkinshaw P., *Freedom of Information The Law, the Practice and the Ideal* (4th edn, Cambridge University Press 2010) at 33.

[5] This is the standard that currently applies in the UK under the Public Interest Disclosure Act 1998.

a disclosure that ultimately is against the public interest. Therefore, there are obvious dangers in not providing potential whistleblowers in the security sector with specific guidelines as to which disclosures will not seriously hamper the efforts and the work of the Services.

The final approach includes specific definitions or categories of wrongdoing that would allow the whistleblower to proceed to public disclosures as a means of last resort, either in the form of specific exemptions to secrecy or as categories of protected disclosures in a whistleblower protection instrument. This approach, where the balancing exercise between national security and the interest in disclosure is enshrined in law, allows whistleblowers a greater degree of certainty that their disclosures will be protected and ensures that they will not proceed to arbitrary public interest assessments. However, this has the drawback that whistleblower protection becomes conditional on the 'generosity' of lawmakers in their interpretation of the public interest in the law. Therefore, if lawmakers follow a particularly narrow approach, there is danger that whistleblowers' free speech rights will not be in line with nascent free speech standards. Furthermore, the lack of consensus on the international level as to which specific disclosures would be deemed important enough to outweigh national security concerns and allow for public disclosures as a means of last resort, would make the implementation of such a system questionable as to its feasibility in the security sector. However, the paper will conclude that this approach offers the most reasonable solution to the issue at hand, and along with strengthened regional standards on whistleblower protection and vigilance on behalf of the judiciary, would provide concrete protection to

whistleblowers while ensuring that security concerns are adequately addressed.

Before proceeding with a more detailed discussion, however, it is important to make a critical observation. By championing free speech and arguing for public interest assessments, the thesis does not seek to undermine the importance of state secrecy. As Nasu observes,[6] national security is a dynamic concept. New threats arise that require states to be vigilant in protecting the rights and interests of the public. The modern threat of terrorism requires states to take transnational action, to exchange intelligence and to cooperate across borders. This requires mutual respect and understanding of the importance of each individual state's secrecy laws, and this is secured through the 'control principle' discussed in chapter 4.[7] Furthermore, when discussing this public interest in disclosure, it is important to note that is would be an oversimplification to frame it as a balancing exercise exclusively between the harm caused to national security and the perceived benefit the disclosure would have to the public. In determining the former, a host of other issues needs to be taken into account. Article 10 also permits interference with speech to protect the rights of others.[8] This is ofcourse another important aspect of the overall balancing exercise. For instance, there is great probability that disclosures of the nature the thesis has focused on, may also endanger individuals who

[6] Hitoshi Nasu, 'State secrets law and national security' (2015) 64 *International & Comparative Law Quarterly* 365, 375.
[7] See S Chesterman, *Shared Secrets: Intelligence and Collective Security* (Lowy Institute for International Policy, 2006) 19.
[8] Council of Europe, European Convention on Human Rights and its Five Protocols (1950) Article 10 para 2.

work in the field,[9] either through the disclosure of their identities or the nature of their operational activities, thus targeting them for retaliation. Consequently, their position triggers the state's positive obligations to ensure the protection of their right to life under Article 2 ECHR,[10] as well as their right to privacy under Article 8 ECHR.[11] This would be a further reason to supress the disclosure. This further dimension of the public interest exercise, requires courts to apply proportionality in a manner that encompasses a host of determining factors apart from the simple test of 'does the public interest in the disclosure outweigh the potential harm caused to national security'. Therefore, when discussing the balancing exercise at hand, the thesis refers to the overall balancing of all competing considerations that can be weighed against the interest in disclosure.

The chapter will begin by examining the process by which whistleblowers, through the unauthorised disclosure, project their own interpretation of the PI that in most cases will differ from that of their superiors in the organisation they are working for. It will argue that whistleblower legislation must provide some guidance as to what the PI in disclosures is, in order for whistleblowers to know which types of disclosures justify a breach of their duty of confidentiality. It will attempt to analyse the strengths and weaknesses of the three possible ways in which the PI can become part of whistleblower legislation and conclude that the approach that provides a broad identification of issues on the PI in the law would be best suited for the OSA 1989. The final part, will attempt to examine which

[9] Katie Connolly, 'Has release of Wikileaks documents cost lives?' (bbc.co.uk, 1 December 2010) available at http://www.bbc.co.uk/news/world-us-canada-11882092 .
[10] See indicatively *Öneryıldız v. Turkey* (Application No. 48939/99, 30/11/2004).
[11] See indicatively *M.C. v. Bulgaria* (Application No. 39272/98, 4 December 2003).

disclosures could feasibly be included in the OSA by looking at how various jurisdictions deal with security disclosures and examining developing COE and international standards.

Attempting to define the public interest in disclosures.

Although the PI plays a central role in public administration, a concrete definition of what is in or against the PI remains elusive. In political philosophy, the idea of converting the multiple competing interests of individuals into a "some notion of common good"[12] is considered the final objective of the entire political process, however, providing a concrete definition of the PI is an arduous task. As Flathman explains the "public interest is a normative standard, and it raises the whole panoply of problems associated with standards in general".[13]

Although there is no generally accepted definition of what the PI is, as Feintuck observes, some common elements that are found in PI theories include the ideas of "an intimate connection with community, general welfare, human dignity, and the maintenance of conditions which support an ongoing social order".[14] Furthermore, when one considers that human rights are premised on the idea that "the avoidance of violation of human

[12] 'Public Interest in UK courts : A website funded by the ESRC to research how the term 'public interest' is used in public law proceedings in UK courts' http://publicinterest.info/public-interest-political-philosophy-and-study-public-administration accessed 15 December 2014.
[13] Flathman R., *The public interest: An essay concerning the normative discourse of politics* (Wiley 1966) 13.
[14] Feintuck M., *The public interest in regulation* (Oxford University Press, 2004) 42.

rights is a matter of supreme public interest",[15] the need for a degree of coherence and consistency in the application of the PI becomes all the more compelling.

Nevertheless, in political terms, the PI is a highly divisive standard. Luban claims that since "people disagree fundamentally over what the public interest is", it is to be expected that "those on opposite ends of the political spectrum are likely to insist that they are practising law in the public interest but their counterparts on the other side are not".[16] This is particularly prominent in unauthorised disclosures of government held information, where public servant whistleblowers in many cases are labelled as heroes or traitors depending on political affiliation and the ideology that led to the disclosure of information that is damning to government policies.

In relation to disclosures of government held information specifically, there are two competing public interests at play, the legitimate public interest in keeping certain information secret and the interest in a well-informed citizenry that has access to government held information. However, courts have stressed the difference between "information that may be of interest to the public" and information that is in the public interest to make known.[17] Striking the appropriate balance between these competing interests that could either lead to the suppression of the whistleblowers' speech or their

[15] Crow, 'What price a room with a view? Public Interest, private interests and the Human Rights Act' [2001] *Journal of Planning & Environmental Law* 1349, 1356.
[16] Luban, 'Taking out the adversary: The Assault on Progressive Public-Interest Lawyers' (2003) 91 *California Law Review* 209, 210.
[17] *Hyde Park Residences v Yelland* [2000] EWCA Civ 37 and Information Commissioner guidance to the Public Interest test available at http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx pg 6 accessed 12 December 2014.

vindication, is an exercise that does not always guarantee an objective result.

Balancing these competing interests, is part of the course in the Freedom of Information Act 2000, where public authorities, when dealing with information requests that fall under 'qualified exemptions', have to proceed to disclosure, only if this would be in the PI. In providing guidance to authorities covered by the Act as to how the PI test works, and when the balance would be in favour of disclosure, the Information Commissioner stressed that there is:

> A public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.[18]

When it comes to information that relates to national security however, this conflict is all the more difficult to resolve. It is therefore understandable that intelligence and security agencies are permitted to function under a greater degree of secrecy with stricter rules on disclosure when compared to other

[18] Information Commissioner guidance to the Public Interest test available at http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx pg 5 accessed 12 December 2014.

public authorities. However, as the thesis has stressed, this cannot mean that agencies should remain exempt from democratic accountability through a limitless duty of confidentiality of the intelligence official. Therefore, governments are required to set up mechanisms that will ensure that instances of illegality, misconduct and inefficiency in the Services will not remain unchallenged.

In relation to disclosures made without authorisation by individual whistleblowers, lawmakers and courts seem to have accepted the fact that there are certain situations that would allow public interest concerns to override secrecy requirements and allow employees whose work exposes them to sensitive information to make this information known.[19] The ECtHR has applied the test of proportionality to whistleblowing cases to assess whether the interest in specific disclosures can override a duty of secrecy, or the damage caused to the reputation of an institution by disclosures.[20] In the UK there is legislation to protect such employees from penalties when they disclose information without prior authorization and studying such legislation could give us an idea as to the types of disclosures that are considered so important to accountability, that the law considers those making them worthy of special protection.

---

[19] Public Interest Disclosure Act 1998 and in the Spycatcher litigation it was held that a duty to maintain confidentiality is not limitless but is subject to balancing with the counterveiling public interest requiring disclosure of information *Attorney-General* v. *Guardian Newspapers Ltd. (No. 2)* [1988] 3 W.L.R. 776. These issues are developed elsewhere in the thesis.

[20] *Guja, Heinisch, Bucur and Toma* cited above. Proportionality in relation to whistleblowers is discussed in detail in the chapter relating to free speech and unauthorised disclosures.

However, before proceeding to examine how the PI can be incorporated into the OSA 1989, it would be worthwhile to briefly examine the process under which the whistleblower, by deciding that certain information is in fact deserving of exposure, becomes in fact an assessor of the public interest. By conducting a public interest test to ascertain whether the interest in releasing the information at hand outweighs competing security considerations, national security whistleblowers become engaged in a complex balancing exercise, the outcome of which is not necessarily objective.

The whistleblower as an assessor of the Public Interest

The thesis submits that an act of an unauthorised public disclosure can be further analysed into a two - step process. Initially, the whistleblower makes an evaluation that certain information he or she has come across relates to wrongdoing.[21] Subsequently, the whistleblower decides, after finding that an internal report would be ineffectual, that it would be beneficial to make this instance of misconduct public. Both these steps however, contain an assessment that relates to the public interest.

In the first step, according to the whistleblower's understanding, there is a specific activity of an organisation that contravenes the public interest. In the national security context, such a balancing exercise when conducted by the whistleblower is fraught with dangers. Although in some cases it is self-evident that the information the whistleblower comes across relates to

[21] Near and Miceli refer to this step as the 'triggering event' and define it as ''an activity that is considered *wrongful*, rather than an acceptable but not optimal organizational activity' in Miceli M. and Near J., *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees* (Lexington Books, 1992) 17 (emphasis added).

wrongdoing, for instance where there is clear evidence of corruption or state complicity in gross human rights violations, this is not always the case. In the context of national security especially, the work of the intelligence community and the war against terrorism, it may not always be simple for the potential whistleblower to discern between legitimate conduct of a public authority, and wrongdoing.[22] The services by their nature infringe on human rights, namely the right to privacy protected under Article 8 ECHR, by monitoring communications for instance in order to collect intelligence.[23] For a whistleblower to ascertain whether specific instances of such monitoring constitute misconduct, he or she must perform a balancing exercise to assess whether in these 'suspicious' cases the intelligence agency is acting within the remit of the law or not. Thus, a public interest balancing between national security and the privacy of the monitored individual must take place before the whistleblower decides to proceed with a disclosure.

The second step involves a decision on whether the perceived wrongdoing is so severe, as to warrant a public disclosure. The whistleblower therefore decides to disclose the information in an act that in fact 'overrides the judgment of the executive authority'.[24] This means that the whistleblower asserts, contrary to the judgment of his or her superiors, that the public interest will be best served by full disclosure of the information at hand and

[22] For further analysis on this process see Sagar Rahul, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press, 2013) 103-26.
[23] Venice Commission Report, 'Oversight of Security Services', 4.
[24] Sagar Rahul, 'On Combating the Abuse of State Secrecy' (2007) 15 *The Journal of Political Philosophy* 424.

this interest outweighs conflicting interests in security.[25] Although the decision to 'go public' could in many cases be motivated by the fact that the whistleblower was unable to address the issue using more discreet measures, an assessment of the public interest is required, as the whistleblower would be reluctant to breach his or her duty of confidentiality to reveal information that is trivial and of little importance to the public discourse. As Morse notes, "not all violations of law are equally important to make public".[26] Therefore the balancing exercise between the interest in security and the interest in the disclosure is in such circumstances entrusted to the individual whistleblower. As Jubb purports, "a prospective whistleblower, having first recognised the conflict, must choose between these values, a risk laden decision to choose a courageous confrontation or compliance that may make one complicit".[27] Apart from deciding not to comply with a practise he or she disapproves of, the whistleblower must also undergo a process whereby he or she calculates that there is great importance in making information relating to specific wrongdoing public. He or she understands that the disclosure will have an important public benefit and indeed not speaking out will be harmful to the PI because the illegitimate practise will continue, or because wrongdoing that has occurred will not be addressed, or finally because wrongdoing will occur with some degree of certainty in the future.

Due to the public interest being a particularly nebulous concept which lacks a concrete and universally accepted definition that can be applied in every

[25] See also Bok S., 'Whistleblowing and Professional responsibility' in Tittle and Peg (eds.), *Ethical issues in business: inquiries, cases, and readings* (Broadview Press, 2000) 70.

[26] Morse M., 'Honor or betrayal: The Ethics of Government Lawyer Whistleblowers' (2010) 23 *Georgetown Journal of Legal Ethics* 421, 448.

[27] Jubb P., 'Whistleblowing: A Restrictive Definition and Interpretation' (1999) 21 *Journal of Business Ethics* 77, 78.

case,[28] it is an arduous task for the whistleblower to assess whether this evaluation and judgment that leads to a disclosure is indeed in the public interest.[29] This could result in creating problems when granting free speech protection, as any restrictions to the whistleblower's free speech that are due to damage caused to national security by the disclosure, could be justified under Article 10 (2). Therefore, it is vital for secrecy laws or whistleblower protection instruments pertaining to national security whistleblowers, to take this balancing exercise into account and examine ways to protect the whistleblower while ensuring that overzealous employees are not encouraged to proceed to complicated public interest and national security assessments that result in harmful disclosures.

The question that this chapter aims to respond to in relation to the services' whistleblower however, is how official secrecy legislation can be amended in order to ensure that the whistleblower's assessment on the PI is less of an instinctual process and is instead based on legislation that provides guidance and makes certain that the whistleblower will indeed serve the PI, thus enjoying free speech protection from retaliation. The following part will examine the three forms that legislation relating to disclosures of information can take. These approaches are characterised either by an absolute prohibition of disclosures, when the act of disclosure itself is deemed to be contrary to the PI, by protection for any disclosure that is in

[28] Flathman R., *The public interest: An essay concerning the normative discourse of politics* (Wiley 1966) 13.

[29] One could argue that this assessment on the public interest in public disclosure is made by the whistleblower in conjunction with the medium that will publish it. On the potential role of the press as an assessor in the public interest, see the recommendations by Chamberlain in Chamberlain, 'Where now? The Leveson Report and what to do with it' (2013) 18 *Communications Law* 21, 22.

the PI or finally by inclusion of the specific areas of information that would justify a disclosure in the PI in the legislation.

The first approach: A blanket ban on disclosures

The method currently favoured under the OSA 1989 seeks to exclude discussion of a possible PI in disclosures, by using criminal law to prosecute those who proceed to any disclosures of information.

Under such an interpretation of whistleblowing, civil servants or other employees are not in a position to make assessments on the PI and in an act of dissent to their superiors, proceed to disclosures of information without authorisation. Therefore, the public interest is not included in the legislation, and whistleblowing, regardless of the information disclosed, becomes a criminal offence.

The lack of a public interest defence was justified, according to the government at the time the act was amended, due to the fact that such a defence could undermine the efforts "to achieve maximum clarity in the law and its application".[30] The government insisted the OSA 1989 was "designed to concentrate the protection of the criminal law on information that demonstrably requires its protection in the public interest".[31] The act seems to have been drafted based on the assertion that public and national

[30] Ewing K. D., *Bonfire of the liberties: New Labour, Human Rights and the Rule of Law* (Oxford University Press, 2010) 176.
[31] Ibid.

interest is indistinguishable to that of the government of the day.[32] As Lord Bingham seemed to assert in *Shayler*, the primary public interest in such cases of breaches of the OSA 1989, was to be located in the need for "a security and intelligence service to feel secure".[33] This could only be achieved through an absolute ban on disclosures from its members as "the commodity in which such a service deals is secret and confidential information".[34]

For sceptics, the ability of the individual leaker to ascertain what is in the public interest is highly questionable. The First Division Association (FDA), the union representing the rights of civil servants, does not accept that leaks can be justified and argues that the role of the Civil Service should be limited to providing support to the government of the day and not to assume the role of an "impartial umpire" in political disputes.[35] The FDA has stressed that "for a civil servant to disclose official information without authority means that the civil servant is seeking to put their interpretation of the public interest above that of their civil servant manager [...] and above the judgment of Ministers".[36]

Similarly in the Select Committee's report on leaking and whistleblowing senior civil servants testified that there is "a stronger public interest in the preservation of an impartial Civil Service and of the values contained in the

---

[32] R. Norton – Taylor, *In defence of the realm? : the case for accountable security services* (Civil Liberties Trust, 1990) at 5. Also see *R v Ponting* discussed elsewhere in the thesis.
[33] [2002] UKHL 11 at [25].
[34] Ibid.
[35] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 11.
[36] Ibid.

Civil Service Code than that in information leaked by civil servants"[37] as leaks of information undermine the trust that is necessary between civil servants and the government they are meant to serve.[38]

Such a position is all the more relevant when discussed in relation to the services and has been avidly supported by Sir David Omand, a former Director General of the GCHQ. As mentioned before in the thesis, when asked why there should be no consideration of the possible public interest emanating from a disclosure that would justify the civil servant's right to speak out against wrongdoing, Omand replied that "You always find in retrospect that even criminal acts sometimes have unexpected benefits but that is not a justification for doing it".[39]

An absolute ban on external disclosures under penalty of criminal law ensures that the whistleblower will not proceed to public interest assessments, particularly in issues that touch upon the security of the state. An absolute restriction on disclosures relies on the idea that the interests of maintaining public confidence in these institutions, the fact that such disclosures carry with them a particularly strong credibility, and the heightened duty of secrecy of intelligence officials outweigh any potential benefit from a public disclosure.[40] Thus the value of the information disclosed to the public interest is not part of the proportionality equation, and any information, however trivial, when disclosed can justify criminal sanctions or other forms of retaliation if the authorities decide to prosecute.

---

[37] Ibid.
[38] Ibid at 13.
[39] Ibid at Q132.
[40] Fenwick H., *Civil Liberties and Human Rights* (Routledge – Cavendish, 2007) 597.

Thus the 'balancing exercise' of the interest in the information and national security is altogether discarded as 'the protection of secrets is synonymous with the public interest'.[41]

This approach seems to be irreconcilable *prima facie* with the established COE whistleblower and free speech standards examined in the chapter on whistleblowing and freedom of expression in the COE. However, the fact that *public* whistleblowing, to the media, is protected only when more discreet means of remedying the situation are not available to the whistleblower,[42] could provide contracting parties to the ECHR with the necessary justification to ban external disclosures. If a state chooses to follow such an approach, in order to secure the compatibility of the law with free speech, it would have to counterbalance the absolute ban on external disclosures by establishing a robust system of independent and effective internal mechanisms, where whistleblowers could report their concerns and be protected from reprisals while also being assured that the issues they have raised will be addressed appropriately. The project has discussed in chapter four why this approach in the UK context has its limitations. As the recent Committee of Ministers Recommendation on Whistleblowers stressed in relation to the use of internal mechanisms as a prerequisite to grant the whistleblower free speech protection from retaliation, "the individual circumstances of each case will determine the most appropriate channel".[43]

---

[41] Freivogel W., 'Publishing National Security Secrets: The Case For Benign Indeterminacy', (2009) 3 *Journal of National Security Law and Policy* 98.
[42] *Guja* at [73]. See also ECtHR, *Morissens v. Belgium* (App. No. 11389/85, Commission decision 3 May 1988).
[43] Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers [14].

The project has discussed elsewhere why such a limited view of the PI, that considers that any and all disclosures cannot serve the PI, is incompatible with recent developments in free speech standards and comes to the detriment of democratic accountability. Allowing the executive to retain the final say on secrecy, is a highly problematic concept. As Sagar asserts "asking officials to calculate the harm [to the public interest] caused by disclosure is like asking the suspect [in the criminal trial] to provide the evidence".[44]

The following part will therefore seek to discuss the first alternative on how the PI can become part of the OSA 1989.

Second approach: The introduction of a public interest test or defence

The project has argued that the lack of a public interest defence in the OSA 1989 that does not allow whistleblowers to justify their disclosures and seek protection from retaliation under criminal law when the public interest in disclosing the information could be proven to outweigh the interest in keeping the information secret, makes the act questionable as to its compatibility with free speech. This part seeks to discuss how the inclusion of such a defence would affect Services' whistleblowers. Such a form of a public interest defence when used in whistleblowing cases would require the judiciary to examine all the circumstances of the case at hand and weigh the interest in disclosing the information to the interest of maintaining secrecy.

[44] Sagar R. 'On Combating the Abuse of State Secrecy' (2007) 15 *The Journal of Political Philosophy* 404, 408.

This involvement of the judiciary however, is not free from criticism. As Simon Brown LJ notes, this approach fails to recognise:

> ...the importance of confining any public interest defence in this area of the law within strict limits, lest [...] it becomes not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, in the fact overall, it is better to respect or to override the obligation of confidence.[45]

Under common law however, there is such a "long-established public interest defence to an action for breach of the duty not to disclose confidential information acquired in the course of employment".[46]

Supporters of such an approach argue that official secrecy laws should make for an exception for disclosures emanating from a breach of secrecy that are in the public interest.[47] This would allow the intelligence official whistleblower who is facing criminal proceedings for an unauthorised disclosure for instance, to employ a public interest defence, and to argue that the interest in the disclosure outweighs the interest in keeping the information secret. Such a defence that would exonerate national security whistleblowers where they could prove their disclosures were in the public

---

[45] *R v Department of Health ex p. Source Informatics* [2001] QB 424 at [52], per Simon Brown LJ.

[46] Carr and Lewis, 'Combating corruption through employment law and whistleblower protection' (2010) 39 *Industrial Law Journal* 52, 77. See also *Gartside v Outram* (1857) 26 Ch 113 (Ch) [114] mentioned in chapter five.

[47] Palmer for instance was a prominent supporter of this approach and argued that if internal mechanism fail, intelligence officials should be permitted to use a public interest defence if prosecuted. Palmer S, 'Tightening Secrecy Law: the Official Secrets Act 1989' [1990] *Public Law* 243, 252.

interest, would also ensure that the UK was in line with freedom of expression standards on whistleblower protection.

An example of this approach could apply in practice can be found in Canada, where the Security and Information Act 1985[48] provides in relation to unauthorised disclosures that breach secrecy that "no person is guilty of an offence ... if the person establishes that he or she acted in the public interest".[49] The Act does not contain a definition of wrongdoing but allows judges to make assessments on whether to grant protection based on the whistleblower's conduct and good faith, the gravity of the reported offence, the public interest in the disclosure and the possible harm it caused.[50] This approach has the added benefit that it allows for a future expansion of the understanding of the types of conduct that constitute wrongdoing, as courts can take into account novel developments without being restricted to a stringent definition of wrongdoing in the law.

Such a system that would require courts to balance the whistleblower's free speech rights and the interest of the citizenry in the information disclosed on the one hand, with the potential harm the disclosure may cause to national security on the other, when viewed from the viewpoint of the whistleblower's freedom of expression, amounts to the test of proportionality. Since proportionality "seeks to police the justification of state interference with human rights",[51] it would thus require courts to

[48] (R.S.C., 1985, c. O-5).
[49] Ibid. s.15.
[50] Ibid.
[51] Legg A., *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012) 178. See also, Cameron I., *National*

consider whether any retaliation against a national security whistleblower could be defended based on the damage caused to national security by focusing on the content of the disclosure. This is the approach followed on the COE level by the Court. As the ECtHR has stressed, "the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient".[52]

In order to gain a better understanding of how such a public interest assessment would work in practice for the national security whistleblower, it would be worthwhile to examine the case law of the ECtHR with regards to whistleblower protection and disclosures in the public interest in general. In the whistleblowing cases cited so far in the thesis, the Court has provided a useful illustration of how the balancing of the interest in the disclosure and competing concerns that favour non - disclosure can be exercised, when assessing whether there has been a freedom of expression violation. The chapter will therefore revisit these cases and examine them this time from the perspective of how the Court assessed whether the unauthorised disclosure served a matter of public interest that outweighed competing concerns.

In *Guja*, the ECtHR held that the public interest involved in the information disclosed is a determinant factor in assessing the proportionality of an

---

Security and the European Convention on Human Rights (Kluwer International Law, 2000) 35, Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism', (2008) 4 *Columbia Journal of Transnational Law 73,* 98.

[52] *Dupuis and others v. France* (App. No. 1914/02, 7 June 2007). [37].

interference with a whistleblower's free speech rights.[53] The Court took a broad approach in its interpretation of the PI in this instance, by arguing that "in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion".[54] Thus, the existence of speech that relates to matters of public interest, limits the margin of appreciation states can be granted by the Court. In assessing whether freedom of expression protection would be extended to the applicant in this particular case, which involved a public disclosure of information that showed evidence of political interference in the administration of justice from the Moldovan Prosecutor General's Office, the ECtHR proceeded with the usual proportionality test. In order to make the calculation on whether the disclosure had an important benefit to the public at large, the Court looked into the background of the disclosure and the overall political context under which it was made[55] before concluding that "[t]here is no doubt that these are very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate".[56] These concerns in the view of the Court overrode the interests in maintaining public confidence in the Prosecutor General's Office.[57]

In *Bucur and Thoma v Romania*, a case concerning the disclosure of information by a member of the Romanian security services to a newspaper,

---

[53] *Guja* at [74].
[54] Ibid.
[55] *Guja* at [87]
[56] *Guja* at [88].
[57] Latimer P. and Brown A.J., 'Whistleblower Laws: International Best Practice' (2008) 31 *UNSW Law Journal* 766, 782.

the ECHR in balancing the competing interests held that "the general interest in the disclosure of information revealing illegal activities ... was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution".[58] The government's national security arguments against disclosure in *Bucur*, led the Court to argue that protecting national security cannot come at the price of destroying democracy[59] and it proceeded to criticise the domestic courts for not taking into account the applicant's arguments relating to the public interest of the information disclosed.[60] In *Voskuil* v. *Netherlands* the court stressed that "in a democratic state governed by the rule of law the use of improper methods by a public authority is precisely the kind of issue about which the public has the right to be informed",[61] while in *Heinisch* it argued for an even broader understanding of the PI by stating that "there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest".[62] In this case the ECtHR held that the public interest in receiving information about shortcomings in the provision of institutional care for the elderly by a State-owned company was so important in a democratic society that it outweighed the interest in protecting the latter's business reputation and interests.[63] Similarly, in *Dupuis*, the ECtHR took into account, the fact that in France, the revelation of extensive wiretapping of political figures in the media which were revealed in a book published by two journalists, had already "aroused a

---

[58] Dirk Voorhoof, *'The Right to Freedom of Expression and Information under the European Human Rights System : Towards a more transparent democratic society* (European University Institute, 2014) pg 18.
[59] *Bucur* at [102].
[60] Ibid.
[61] *Voskuil* v. *Netherlands* (App No. 64752/01, 22 November 2007).
[62] *Heinisch* [66], *Dupuis* [40], ECtHR., *Surek v. Turkey (no. 1)* (App. No. 26682/95, 8 July 1999)[61].
[63] *Heinisch* [90].

considerable degree of emotion and concern among public opinion".[64] Thus, the interest already expressed in France over the revelations was a factor to be considered by the ECtHR in its balancing of the interest in disclosure with competing interests.

It is important to note that proof of the Court's case by case approach is found in the fact that the circumstances of every contracting party are taken into account during the proportionality test when assessing the public interest in the disclosure. This is prevalent in issues concerning national security. As Cameron observes, security in the COE is "both dynamic and relative: what 'vulnerability' is will vary from state to state and from time to time".[65] In *Bucur* for instance, the Court stressed that illegal surveillance by the security services was undeniably a matter of public interest,[66] especially in a state which had experienced extensive surveillance under the previous communist regime. Thus, Romania's historical past was viewed as a contributing factor to accept that there was a pressing public interest need in the disclosure, a public interest that was viewed as compelling enough to override the intelligence official's duty of secrecy.

This type of assessment, on a case by case basis, seems to be the optimum way for domestic courts to establish the proportionality of an interference with free speech, in cases where a national security whistleblower has experienced retaliation. However, when examined from the viewpoint of domestic legislation regarding national security whistleblowing and official

---

[64] *Dupuis* [41]. See also ECtHR, *Fressoz and Roire v. France* (App. No. 29183/95, 21 January 1999).
[65] Cameron, *National Security*, 42.
[66] *Bucur* [101].

secrecy, a 'general' public interest exception to the duty of confidentiality that does not define in a more broad or narrow manner which disclosures would be in the public interest and outweigh security considerations, would potentially result in seriously jeopardising both security and the whistleblower. Without interpretation or guidelines of what the public interest is, such legislation would not provide any assurances to the potential whistleblower that their disclosures will be protected. In political terms, the public interest is a highly divisive standard. What recent national security related disclosures have confirmed is that "people disagree fundamentally over what the public interest is",[67] as evidenced by the fact that such whistleblowers in many cases are simultaneously labelled as heroes or traitors depending on which of the possible public interest interpretations of their disclosures one chooses to subscribe to.[68] Thus, when the whistleblower becomes an assessor of the public interest, there is no guarantee that his or her interpretation of the public interest in this instance will be confirmed by the courts.[69]

Such disputes when transferred to the context of a disclosure emanating from the intelligence community can also come to the detriment of national security. If the whistleblower's disclosures are the result of an instinctual response that perceived wrongdoing should be reported in the public interest, there is no certainty that irreparable damage will not be caused. It

[67] Luban, 'Taking out the adversary: The Assault on Progressive Public-Interest Lawyers' (2003) 91 *California Law Review* 209, 210.

[68] See also Hersh M., 'Whistleblowers - Heroes or traitors? Individual and Collective Responsibility for Ethical Behaviour' (2002) 26 *Annual Reviews in Control* 243, 244, Arce D., 'Corporate virtue: Treatment of whistleblowers and punishment of violators' (2010) 26 *European Journal of Political Economy* 363, 370 and Martin B., 'Illusions of Whistleblower Protection' (2003) 5 *UTS Law Review* 119, 122.

[69] In the Snowden case for instance, a federal judge held that the policy of the intelligence agencies that Snowden disclosed was lawful. See *ACLU v. Clapper* (No. 13-3994, S.D. New York 28 December 2013).

would in fact be impossible for the intelligence community to function effectively under such an environment, where public interest decisions on disclosure are made at every level by any and every employee with access to information. Thus, as Sagar observes, under such a scheme, "we will have to lay our faith in the judgment of officials, reporters and publishers responsible for making such disclosures".[70]

Furthermore, even in cases where one could argue that whistleblowers were prudent in their interpretation of the public interest, it is questionable whether this would be accepted by the judiciary in favour of the interpretation projected by public authorities. Domestic courts have to a great degree shown reluctance to question the executive on matters of national security.[71] Would the methods employed by the Investigatory Power Tribunal under the RIPA 2000[72] ensure that the appropriate balance would be struck in assessing these competing public interests?

As many proponents of whistleblowing propose, a way to overcome these potential problems is to set the threshold for protection not on whether the disclosure is in fact in the public interest but on whether the whistleblower acted under the 'reasonable belief' that he or she was uncovering

[70] Sagar, *Secrets and Leaks*, 113.

[71] This is not limited to the UK. As Popelier and Van De Heyning note, constitutional and supreme courts in Europe, tend to "readily accept public safety and security concerns proposed by public authorities as legitimate objectives with a considerable weight, without scrutinizing the danger ... threats actually pose". Thus, a great degree of deference is given to decision-makers or the executive in assessing which information should remain secret. See Popelier P. and Van De Heyning C., 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 *European Constitutional Law Review* 230, 238.

[72] Based on the judgment in *A v B* [2009] UKSC 12, this would in all likelihood be the forum where whistleblowers from the Services would argue for the public interest in their disclosures.

wrongdoing that was in the public interest.[73] Protection, it is argued, should also cover disclosures made "in honest error"[74] when the information on wrongdoing that is publicly revealed is inaccurate but the whistleblower acted in good faith when proceeding to the disclosure. This has the benefit of disengaging protection from whether the information was in fact in the public interest, but when applied to the national security whistleblowers, could be said to create more problems than it resolves. Firstly, setting the bar at reasonable *belief* that wrongdoing was committed would require the whistleblower to proceed to a more thorough examination of the wrongdoing he / she is alleging was committed. This in many cases would not be possible to do or could potentially be harmful to the whistleblower and could thus further dissuade concerned individuals from proceeding to the disclosure. As Lewis proposes, perhaps requiring reasonable *suspicion*, as opposed to reasonable *belief*, would be a better approach as "the great advantage of this would be that it would highlight the fact that it is the recipient's job to investigate concerns and not that of the potential whistleblower".[75] However, it is questionable that in the context of national security whistleblowers this approach would be realistic. Keeping in mind the heightened demands for secrecy the services function under, extending free speech protection to disclosures where the concerns for national security would outweigh the interest in disclosure would be difficult to

---

[73] See Open Society Foundations, The Global Principles on National Security and the Right to Information 2013 (Tshwane Principles) available at http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf last accessed 12 December 2014. Principle 40 argues that "the "reasonably believed" test is a mixed objective-subjective test. The person must actually have held the belief (subjectively), and it must have been reasonable for him or her to have done so (objectively) ... [I]t is ultimately for an independent court or tribunal to determine whether this test has been satisfied so as to qualify the disclosure for protection".

[74] Transparency international, 'Whistleblower Laws', 7.

[75] Lewis D., 'Enterprise and regulatory reform – whistleblowing aspects' (2012) 110 *Employment Law Bulletin* 5.

reconcile with Article 10(2) ECHR. These are the dangers inherent in legislation that would not enumerate specific areas of concern that would guide the whistleblower during his or her PI assessment.

Thus, providing protection for public interest disclosures without defining the public interest in the law, ensures that the law will allow for a balancing of national security and competing interests on a case by case basis and thus will not collide with free speech standards. At the same time however, such an approach has the potential to prove more damaging for both the whistleblowers, who will have to navigate the nebulous concept that is the public interest without guidance, and also security as the duty of secrecy will become conditional on the PI assessments of any employee that handles confidential information.

Thus, if the OSA 1989 included such a broad public interest defence without interpretation of what the PI is, it would not provide any guidance or assurances to the potential whistleblower that their disclosures will be protected. Even in the context of court judgments, there can be significant disagreement and uncertainty over the PI.[76] It is questionable furthermore that such judgments relating to the work of the intelligence community could be made in an open court.

The inclusion in the law of a general public interest defence would "muddy the waters" in this respect. The ultimate decision would lie with the

[76] As evidenced in the recent case of a FOI request for disclosure of letters Prince Charles sent to Ministers. The interpretation of the PI in this case remains unresolved pending judicial review. See *Evans v Attorney General* [2014] EWCA Civ 254.

judiciary which has notoriously proven reluctant "to contest the executive's assessment of the likely harm caused by disclosure" as when examining such issues, courts' evaluations of disclosures have been "typically limited to using procedural rather than substantive criteria to gauge the legitimacy of state secrets".[77]

It is important to note however, that an approach similar to this was established in the UK in 2013 for non – services whistleblowers. It would be valuable to examine therefore, how the inclusion of a public interest test was accepted in scholarship and by whistleblower protection groups in the wake of the amendments made to the Public Interest Disclosure Act of 1998. These will be analysed below.

The public interest test and the amendments to PIDA 1998.

The concerns stated above about the potential pitfalls of a general public interest defence were pointed out when amendments were made to whistleblower protection in the UK. The existing framework under the PIDA 1998, that specified areas where disclosure would be in the PI[78], was recently amended under the Enterprise and Regulatory Reform Bill 2013, which included the provision for a public interest test. The reason for this was purportedly the use of the PIDA in support of whistleblowing claims that were not originally intended when the Act was drafted. In *Parkins v Sodexho Ltd*[79] for instance, the court held that the failure of the employer to

[77] Sagar at 412.
[78] The Public Interest Disclosure Act 1998 and the specific areas it introduced where disclosure would be justified will be examined in detail in the following part.
[79] [2001] UKEAT 1239_00_2206.

follow through on contractual obligations towards his employers, could be perceived as a failure to comply with a legal obligation, a reason under the Act that can allow for a disclosure. This protection under PIDA was provided in spite of the fact that the whistleblower would be serving a *personal* and not a *public* interest by proceeding to the disclosure. The inclusion of a public interest test requires "individuals bringing a claim at the Employment Tribunal to show a reasonable belief that their disclosure was made in the public interest".[80]

Ian Murray vehemently opposed the introduction of such a test and made a failed attempt to amend the Act in this respect by arguing that instead of a public interest test, an amendment that would bar the use of the act for private contractual issues would suffice.[81] As he argued in relation to the PI test:

The definition is so subjective that the implication will be that case law will again determine what is in the public interest and may mean that we are back in a *Parkins v. Sodexho* situation to determine that.[82]

The Commission on whistleblowing[83] recommended a non exhaustive list in the act that provided "helpful examples of the types of wrongdoing"[84] that

[80] The Whistleblowing Commission, 'Report on the effectivenss of existing arrangements for workplace whistleblowing in the UK' http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf pg 16 accessed 12 December 2014.
[81] PBC 3 July 2012 c382 http://www.publications.parliament.uk/pa/cm201213/cmpublic/enterprise/120703/pm/120703s01.htm
[82] Ibid.
[83] 'an expert independent commission to review all aspects of whistleblowing' established by Public concern at work, a whistleblowing charity in the UK.

the facts as he thought them to be, that it was in the public interest.[86]

These concerns are not altogether unwarranted and have been criticised for in fact being "an additional hurdle for workers".[87] Indeed, the lack of foreseeability in relation to whistleblower protection can be a major disincentive that would make whistleblowers question whether speaking out would be in their interest. Only a system of guaranteed protection can ensure that whistleblowers will have the utmost confidence to proceed to disclosures when they uncover wrongdoing.

The problem of the whistleblower "getting it wrong" is not a minor one. As the OECD report reveals, in Germany whistleblowers "could face a legal dismissal if they fail to correctly outweigh the public interest versus their loyalty obligation"[88] and are thus expected to approach internal mechanisms before proceeding to public disclosures.

The next part will proceed to examine the third alternative approach, and the one most commonly found in whistleblowing instruments around the world. It involves either an exhaustive inclusion of disclosures that are in the PI in the instrument itself, or clear and precise suggestions and guidelines as to when a disclosure would be in the PI. Although this approach is not devoid of drawbacks, the chapter suggests that in light of the heightened secrecy requirements of the services, it is the best approach to follow.

---

[86] http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf pg 18
[87] http://www.pcaw.org.uk/files/Informants%20threat%20_%20The%20Times.pdf accessed 12 December 2014.
[88] Ibid at 25.

Third approach: An specific list of which disclosures are in the public interest included in the whistleblower protection instrument.

The final available method is to provide whistleblower protection only to specific types of disclosures that are enumerated in the whistleblower protection instrument or appear as exemptions to the duty of confidentiality in official secrecy legislation. This has the benefit that the whistleblower has a greater degree of certainty that the disclosure he or she is considering to make will be perceived to be in the public interest, a public interest that will override security concerns. Therefore protection is provided if the wrongdoing disclosed falls under one or more types of misconduct enumerated in the law that allow for limits to the duty of confidentiality as a means of last resort. Thus, in this approach, the balancing between national security and the public's right to know is included in the law instrument and the function of the judiciary is limited to examining whether a specific disclosure falls under one or more categories described in the law.

The inclusion of a prescribed list of disclosures however, especially in relation to national security, raises the obvious and important question of *which* types of wrongdoing should qualify for protection in order to ensure that contracting parties to the ECHR uphold their freedom of expression obligations. Although many claims can be made as to what should or should not constitute a permissible public disclosure for an intelligence official, in order to make suggestions that are grounded in reality and take into account existing and developing whistleblower protection standards, it would be

valuable to firstly examine, whether there is an international consensus on how whistleblowing and secrecy laws deal with definitions on wrongdoing and the public interest in disclosures, secondly, whether there are developing international standards on when *national security* related disclosures would be in the public interest, and finally whether nascent ECHR and COE standards on whistleblowing could provide contracting parties with the necessary guidelines on how to draft their secrecy legislation, and thus provide a valuable framework for the OSA.

According to Banisar, there are more than 30 countries around the world that have adopted some form of whistleblower protection,[89] and most "create comprehensive definitions of what constitutes wrongdoing".[90] Others limit it to one area, usually crimes related to corruption, while others provide protection for the disclosure of "a wide variety of issues including violations of laws, good practises, and ethics".[91] Furthermore, due to the fact that "the definition of "public interest" varies across different jurisdictions",[92] there are no established international standards or a consensus as to what qualifies as a public interest disclosure.[93]

---

[89] Banisar, "Whistleblowing: International Standards and Developments" in Sandoval I.E. (ed.) *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, (World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180 pg 2 accessed 12 December 2014.
[90] Ibid at 23.
[91] Ibid.
[92] Latimer and Brown, 'Whistleblower Laws', 785.
[93] However, the UN Rapporteur on Freedom of Opinion and Expression has attempted to define certain areas where disclosures ought to enjoy protection. If a disclosure would fall into one of those categories then courts would be justified to extend freedom of expression protection. The report stated that: "Individuals should be protected ... for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body". UN Economic and Social Council- Commission on Human Rights 56th session. 'Civil and Political Rights including the question of Freedom of Expression' E/CN.4/2000/63 18 January 2000 [44].

This in turn allows states a degree of flexibility in deciding which areas are most important to protect based on their specific needs. In fact, circumstances that are specific to certain states seem to play an important part in deciding which areas of wrongdoing will be included in a whistleblower protection instrument. As Banisar[94] observes, the South African Act for instance "includes unfair discrimination"[95] as a category where public interest disclosures apply, while the Japanese equivalent "specifically names food and health laws, clean air and waste disposal, and personal information laws".[96] The US approach seems particularly all encompassing[97] as the federal Whistleblower Protection Act of 1989 protects government employees from sanctions for reporting violation of "law, rule and regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety".[98] Furthermore, in the US there are whistleblower protection schemes found in laws relating to a more specific context. As Dworkin explains, "an individual who reports illegal water pollution, for instance, is protected from retaliation by the Safe Water Drinking Act".[99] As Banisar observes, there is agreement however, in that states "typically require that the action is not trivial in nature and has not previously been disclosed or addressed".[100]

---

[94] Banisar, 'Whistleblowing International Standards', 25.
[95] South African Protected Disclosures Act 2000, http://www.justice.gov.za/legislation/notices/2011/20110831_gg34572_n702-disclosure-guidelines.pdf pg .4 accessed 12 December 2014.
[96] Banisar, 'Whistleblowing International Standards', 25
[97] Callahan, Dworkin and Lewis, 'Australia, U.K., and U.S. approaches to Disclosure in the Public Interest'(2003-2004) 44 *Virginia Journal of International Law* 879, 886.
[98] 5 U.S.C. § 2302(b)(8)(A)(ii) (2003).
[99] Callahan, Dworkin and Lewis at 886 and 42 U.S.C. § 300j-9(i) (2002).
[100] Banisar, 'Whistleblowing International Standards', 25.

In the UK, the PI with regard to disclosures features prominently in the Public Interest Disclosure Act 1998. In the act the law provides a fairly extensive list of protected disclosures. For a disclosure to be considered qualifying, the worker making it must have the reasonable belief that a criminal offence has been or is about to be committed, someone has failed to comply with a legal obligation, a miscarriage of justice has occurred, the health and safety of an individual has been endangered, there is damage to the environment or finally, information referring to the aforementioned events is likely to be or has been concealed.[101]

Although the list provided by the PIDA 1998 seems broad, it does exclude protection for individuals reporting 'beneficial' information as opposed to wrongdoing. As Vickers illustrates in an interesting example, there are cases where reporting that is arguably vital to the PI would not be protected, for instance "where a worker reports that an employer has discovered a cure for a fatal disease but will not go public with it until it is commercially profitable to do so. Such a revelation would not be a qualifying disclosure under Section 43 of the Employment Rights Act 1996 (ERA 1996) and any dismissal is likely to be for a fair reason under Section 98 ERA 1996 (conduct or 'some other substantial reason')".[102]

In the search for international standards on the reasons that would allow for public disclosures of wrongdoing, Transparency International has made a

[101] S. 43B
[102] Lewis, 'Freedom of Speech and Employment by Lucy Vicker, Publication Review' (2003) 32 *Industrial Law Journal* 72, 73.

significant contribution to the discussion by arguing in its 2013 International Principles for Whistleblower Legislation that in relation to national security:

> External disclosure (i.e. to the media, civil society organisations) would be justified in demonstrable cases of urgent or grave threats to public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals.[103]

In a similar vein, the Tshwane Principles on National Security and Access to Information (2013)[104] also attempted to deal with the issue of national security whistleblowers and the balancing between national security concerns and their free speech rights. The Principles were endorsed by the UN and OSCE Rapporteurs on Freedom of Expression and were the basis for the COE's Parliamentary Assembly Resolution 1954 (2013) which will be examined below.[105]

The principles provide a more specific list as to which types of wrongdoing could trigger public disclosures when left unaddressed by internal mechanisms and allow for protection under free speech for the whistleblower. Among others these include, violations of International Human Rights and Humanitarian Law, the prevention of torture, violations

[103] Transparency Internation. 'Whistleblower Laws', 10.
[104] Available at http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf accessed 12 December 2014.
[105] Resolution 1954 [7].

of the right to life, decisions to use military force or acquire weapons of mass destruction, mass surveillance, constitutional and statutory violations, abuses of power and issues relating to public health, public safety or the environment.[106]

Adapting these principles to the COE level, the Parliamentary Assembly in its 2013 Resolution on National Security and Access to Information stated that an overriding public interest can typically be found where the publication of the information in question would make "an important contribution to an ongoing public debate, promote public participation in political debate, expose serious wrongdoings, including human rights violations, other criminal offences, abuse of public office and deliberate concealment of serious wrongdoing, ... benefit public health or safety".[107] The Resolution added that "information about serious violations of human rights or humanitarian law should not be withheld on national security grounds in any circumstances".[108]

The resolution would be applicable to whistleblowers provided they "acted in good faith and followed procedures",[109] although read in conjunction with Resolution 1720 (2009), this could be interpreted as providing protection for public whistleblowing as well in cases where internal methods of reporting wrongdoing proved ineffective.[110]

---

[106] Tshwane Principles, Principle 37.
[107] Resolution 1954 (2013) at [9.5.].
[108] Ibid.
[109] Parliamentary Assembly, 'Call for protection of whistleblowers who reveal state wrongdoing' http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=4669&lang=2&cat=8 accessed 12 December 2014.
[110] Resolution 1729 at [6.2.3.].

In the U.S., the emphasis seems to be placed on the interest in an informed legislative body thus allowing disclosures to be made under specific circumstances. The 1999 Intelligence Community Whistleblower Protection Act only allows national security related disclosures to be made to the House and Senate Intelligence Committees and the agency's Inspector general, "providing limited protection for intelligence employees".[111]

The approach in the US is premised on the idea that in order "to perform its legislative and constitutional functions, Congress depends on information (domestic and national security) available from the executive branch... Balancing this legislative need for information with the protection of sensitive national security information remains a continuing policy issue... Whistleblowers have helped uncover agency wrongdoing, illegalities, waste, and corruption. The interest of Congress in maintaining an open channel with agency employees is demonstrated through such statutes as Lloyd-LaFollette, the appropriations riders on the nondisclosure policy, the Military Whistleblower Protection Act, and the Intelligence Community Whistleblower Act".[112]

The Lloyd-LaFollette Act specifically, protects intelligence members from dismissals or other penalties when they attempt to approach Congress with information.[113] In relation to which PI reasons would warrant such actions

---

[111] http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf pg26 accessed 12 December 2014. However, a comparison with the UK standards, where service members do not have access to the ISC is interesting.

[112] Fisher, National Security Whistleblowers (Report for the Congressional Research Service, Library of Congress 2005) http://www.fas.org/sgp/crs/natsec/RL33215.pdf pg 45 accessed 12 December 2014.

[113] "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish

by a service member, another statute provides specific guidelines. The Intelligence Community Whistleblower Protection Act of 1999, went further to allow this communication between agency members and Congress and provided the prerequisites for when protection would be afforded. Reports to Congress would be permitted where there was an 'urgent concern'[114] of the intelligence member that related to:

A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinion concerning public policy matters"; (2) "A false statement to Congress, or a willful withholding from Congress, or an issue of material fact relating to the funding administration, or operation of an intelligence activity.[115]

Such an approach is not, however, free from further problems. The fact that a disclosure falls under one of enumerated categories does not mean that it could not also be damaging. For instance, as discussed above, information regarding state complicity in gross human rights violations would be an issue that would allow for a public disclosure to occur. Protection would arguably not be provided however, if the information as it was released included the identities of intelligence officials or made them easily identifiable and thus placed them in danger.

---

information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with." The justification for this measure was premised on the idea that if Congress only had access to information stemming from agency heads, there would be great potential for concealment and abuse http://www.fas.org/sgp/crs/natsec/RL33215.pdf pg 8.

[114] 112 Stat. 2413-14, § 701 (1998) http://www.fas.org/sgp/crs/natsec/RL33215.pdf pg 38.

[115] http://www.fas.org/sgp/crs/natsec/RL33215.pdf pg 38 and 39.

Furthermore, the fact that the principles mentioned above are derived from non-binding instruments means that they can serve only as an indication or suggestion for legislators. Therefore, when allowing the types of wrongdoing that warrant public disclosure as a means of last resort to be enumerated in the OSA, whistleblower protection in national security cases becomes conditional on how generous lawmakers will be in their interpretation of the public interest in the whistleblower protection instrument or the secrecy law. This problem is not limited to national security whistleblowers. In stark opposition to the broad protection provided to federal whistleblowers in the US mentioned above for instance, in France, the French Labour Law code provides protection only for disclosures relating to allegations of corruption.[116] Although corruption is a particularly broad term, such legislation would still preclude a significant number of whistleblowers whose disclosures are arguably in the public interest from seeking protection from retaliation. Although the extent to which legislators will agree that certain national security disclosures warrant specific protection can be indicated by their free speech obligations, they would still be permitted great latitude when translating free speech standards for national security whistleblowers into the domestic context.

Finally, the existence of a prescribed list of disclosures does not mean that the whistleblower will still not be required to make public interest

[116] French Labour Code Article L 1161-1 found in Guyer and Peterson 'The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project' 2013 American Bar Association Section Of Labor & Employment Law International Labor & Employment Law Committee found at http://www.whistleblower.org/storage/documents/TheCurrentStateofWhistleblowerLawinEurope.pdf pg15 accessed 12 December 2014.

assessments. Is it feasible to expect every intelligence official to be able to discern whether specific 'suspicious' conduct constitutes "a constitutional or statutory violation"[117] which the Tshwane Principles regard as a legitimate reason for public disclosures? Although this is true of every whistleblower, in security related cases the adverse results of an incorrect assessment are arguably more profound. Thus it is entirely questionable whether, in the realm of the intelligence community, where decisions are made on sometimes fragmented intelligence in a highly compartmentalised environment, this approach in essence manages to overcome the problems cited in the second approach examined in the previous part. Furthermore, as was mentioned in the introduction, it is important to note that due to the fact that "hard" data, purely factual information, are not always sufficient for security-related decision making, intelligence agencies have to also extensively rely on speculation in order to determine which individuals are potentially posing a threat national security".[118] This speculation is highly subjective in nature and a degree of deference to agency decisions is required, as when it comes to striking these balances, the optimum way to deal with a potential threat "is not always straightforward, and reasonable people can differ on how to do it".[119] Thus, this final method to frame secrecy laws, does not entirely resolve the dangers that can arise from well-meaning yet overzealous national security whistleblowers. To illustrate this aspect more clearly, it would be useful to return to the example of the standards set by the Tshwane principles.

---

[117] Tshwane Principles, Principle 37.
[118] Venice Commission Report, 'Oversight of Security Services', 18.
[119] UK Prime Minister Report to Parliament, 'A Strong Britain In an Age of Uncertainty: The National Security Strategy', October 2010 Cm7953 at 24.

The obvious focus of the Tshwane principles is the violation of human rights. The reporting of gross human rights violations would in all cases, according to the principles, trump national security concerns and allow for the national security whistleblower to be protected from retaliation. The Tshwane Principles in particular are drawn in a way that validates recent high-profile security- related whistleblowing cases;[120] however, they could be viewed as overly ambitious, as one would expect from a document aiming to provide broad international guidelines on whistleblower protection. A strikingly bold step for instance, is the inclusion of decisions on the use of military force as a protected category, where there would be a 'high presumption'[121] in favour of disclosure. This, according to the Tshwane Principles, would include protection for disclosure of 'information relevant to a decision to commit combat troops or take other military action, including [...] its general size and scope'.[122] Thus, according to the principles, reporting general information on size and scope would suffice, and a disclosure need not contain 'all of the details of the operational aspects of the military action'[123] to satisfy the PI in accessing the information. Without doubt, disclosing information during the decision-making process leading up to combat would be valuable to the PI if there were deliberate attempts from the executive and the intelligence services to mislead the legislature and the public[124] on the necessity of combat or its

[120] Chelsea Manning's disclosure of a video of US crew killing Iraqi civilians would fall under the protected category of a violation of international humanitarian law, Snowden's disclosures would fall under mass surveillance, while National Security Agency (NSA) employee Thomas Drake's revelations of waste of funds in the NSA would fall under waste of resources.

[121] Tshwane Principles, Principle 10.

[122] Ibid., at D1.

[123] Ibid.

[124] An example of this would be David Kelly, an employee of the Defence Intelligence Staff in the UK, who leaked information to the press that refuted the official government line on the rationale behind the war in Iraq. After the disclosure Kelly committed suicide

rationale. A more realistic approach however would argue that it would be destructive to make combat-related decisions under the glaring eye of publicity and to allow anyone with access to the specific information to make assessments on which of the operational details could be reported in the PI. This example of information on the use of military force as a protected category of disclosure, illustrates the fact that the existence of a prescribed list of disclosures does not relieve the whistleblower from the responsibility of proceeding to complicated PI assessments, much like in the second approach we described. Is it feasible to expect every intelligence official to be able to discern which operational aspects of an upcoming or ongoing combat are worth reporting or whether specific 'suspicious' conduct constitutes 'a constitutional or statutory violation'[125] which the Tshwane Principles regard as a legitimate reason for public disclosures? Although this is true of every whistleblower, in security related cases the adverse results of an incorrect assessment are arguably more profound. Consequently, a list of protected disclosures as broad as the Tshwane Principles or the ones cited in Parliamentary Assembly Resolution 1954, can be further criticised for being ambiguous and vague in nature. This is compounded by the fact that, for security whistleblowers it is 'impossible [...] to obtain independent legal or other advice before making a disclosure'.[126] This again highlights that this final method, does not entirely resolve the complicated issues of the whistleblower being entrusted to

---

and an inquiry was established over the circumstances of his death. Lord Hutton, 'Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G.', HC 247 2003/4.

[125] Tshwane Principles, Principle 37.

[126] Benjamin Buckland and Aidan Wills, 'Whistleblowing in the Security Sector', available at www.whistlenetwork.files.wordpress.com/2014/01/bucklandwills-chapter.pdf .

deliver a series of sensitive, complicated and controversial PI assessments before releasing the information.

However, it would be unfair to entirely discard this approach on these grounds. The Thswane principles discussed above, are intentionally drafted as broadly as possible, reflecting trends in legislation and court judgments globally. It is clear that on the domestic level, states would have the ability to draft such disclosure categories in a less ambiguous terms, and like all other whistleblower schemes, this approach could only reach its full potential through appropriate training[127] and the strengthening of internal mechanisms. While the potential for arbitrary assessments cannot be completely eradicated under any whistleblower protection regime, as the thesis has argued, the standard it needs to be compared against is the approach of a blanket ban on disclosures.

In spite of these drawbacks therefore, this seems to be the most reasonable avenue that an amended OSA could follow in relation to national security and disclosures. A strict prohibition on disclosures with exemptions where the public interest would override secrecy requirements in line with COE and ECtHR free speech standards and COE guidelines, combined with the strengthening of the independence of intelligence oversight bodies and official reporting mechanisms as well as adequate training of officials as to what the responsible whistleblowing procedures are, would ensure compatibility of domestic laws with Article 10 without weakening the

[127] For the importance of appropriate training as the key ingredient to the success of any empirical scheme see Jeanette Ashton, '15 years of whistleblowing protection under the Public Interest Disclosure Act 1998: are we still shooting the messenger?' (2015) 44 *Industrial Law Journal* 29, 45.

secrecy that is necessary for the intelligence community to function. The further development of standards in whistleblower protection on the COE level, through the Assembly and the ECtHR, would allow the courts to challenge overly excessive punishment of good faith whistleblowers while the ECtHR would retain its supervisory role in cases where unwarranted retaliatory measures were taken against whistleblowers whose disclosures are not damaging to national security and contain information that makes a significant contribution to the public interest.

Conclusion

The chapter has attempted to tackle the issue of how the PI could be incorporated into the OSA 1989 as a defence against criminal prosecutions for unauthorised disclosures of information. Whistleblowing involves an assessment on the PI by the individual whistleblower who in most cases does not possess the legal or overall knowledge to effectively predict whether a disclosure is indeed in the PI. This creates problems especially where whistleblowers in the Services are concerned, as their disclosure of state secrets can be seriously damaging to national security.

The paper has examined the three ways the PI can be regulated in whistleblower legislation. The current approach of disallowing any discussion on the PI that the OSA 1989 opts for has been compared to the two alternative approaches, a 'general' PI defence, and the system currently

employed for whistleblowers in the UK not covered by the OSA 1989, which involves an exhaustive list of disclosures deemed to be in the PI in the whistleblower protection law. The paper has argued that this system is best suited to OSA 1989 as it ensures that whistleblowers can be certain that they are proceeding to a protected disclosure, while at the same time wrongdoing that is reported will not have an adverse effect on the work that the security and intelligence community are expected to carry out. Therein however, lies the weakness of this proposition. If a hypothetical amendment to the OSA 1989 identified very few types of information as qualified disclosures, whistleblowers in their majority would still remain disadvantaged.

Chapter 9

Breaching the OSA 1989 in the public interest: An act of Civil Disobedience?

Introduction

The project has so far argued that the absolute ban on external disclosures of information imposed by the Official Secrets Act 1989 under criminal law is questionable as to its compatibility with freedom of expression as it is protected in the Council of Europe through the European Convention on Human Rights. It has charted recent developments, particularly through instruments of the COE and judgments of the ECtHR, pertaining to the protection of members of the armed forces and the Security and intelligence community when they proceed to disclosures of information that are in the public interest. Based on these developments, the thesis has attempted to argue that a blanket prohibition on disclosures and punishment of whistleblowers, regardless of the public interest in the disclosed information, not only lags behind new COE guidelines on whistleblower protection, but can also be said to constitute a violation of their free speech rights.

In light of these findings, the chapter aims to examine the status of the services whistleblower. Such individuals face an all too familiar 'catch-22' dilemma. What is the appropriate path to follow when an individual comes across damning information, relating to war crimes or torture for instance, when it is clear that such disclosures are prohibited and revelation of such information is a punishable offence? If the whistleblower exhausts internal avenues and these fail to redress the issue, is the whistleblower who speaks outside his or her institution to report to the public criminal activity in the services, which has occurred in the past or is impending, to be treated as a common criminal?

The chapter will argue that individuals who as a means of last resort breach secrecy laws to inform the public on misconduct that remains illegitimately under wraps could be perceived as committing an act of civil disobedience. The theory of civil disobedience which refers to a "public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government",[1] will be analysed in this part and applied to instances of conscientiously motivated whistleblowers from the services who uncover and proceed to disclose information relating to wrongdoing in the services.

According to the theory of civil disobedience, the disobedient individual argues that he or she is following a "higher law", which could be a moral, religious or a constitutional mandate, which in his or her view invalidates the 'subordinate' law and justifies the breach he or she is attempting. By

[1] Rawls J., *A Theory Of Justice* (Universal Law Publishing Co Ltd, 2010) 364.

pointing to such principles the individual does not aim to avoid the penalty attached to breaking the law, but wishes to raise concern and awareness about a specific injustice in the law or its application.

So far, the thesis has methodologically relied on doctrinal analysis of the tension between human rights and secrecy laws. This chapter will depart from a strict 'black letter law' approach and examine this same tension from a different perspective. The contribution of this departure to the thesis' argument can be briefly summed up as follows and will be further developed in the body of the chapter.

The thesis has examined the tension between free speech and secrecy by employing the language of 'balancing' and 'proportionality' - as the term is used by the European Court of Human Rights. It has done this to argue that interferences with the whistleblower's freedom of expression through the criminalisation of unauthorised disclosures, should be proportionate to the aim of protecting national security and the rights of others that may be harmed by the disclosure. Thus, as was argued, a blanket ban on disclosures should be seen as difficult to reconcile with emerging free speech standards.

This section aims to examine this core argument from the perspective that human rights, as overarching principles, may in certain circumstances "override the law as it is currently applied"[2] or be

[2] Turenne S., 'Judicial responses to civil disobedience: a comparative approach' (2004) 10 Res Publica 379, 382.

employed as tools to alter it. In the British constitutional order, this statement comes with an important qualification. The judiciary in the UK, does not possess the power to override the will of the UK Parliament or to strike down laws as other Supreme or Constitutional Courts are able to do. Parliamentary sovereignty limits their powers to making declarations of incompatibility and importantly, to interpret laws, as far as they are able to do so, in a way that is compatible with the Human Rights Act 1998.[3] This latter capability of the courts does not extend to the possibility of a judicial alteration of the fundamental features[4] of any piece of legislation based on human rights arguments, however, it illustrates the role of human rights as an avenue for altering or challenging existing interpretations of the law.

This special characteristic of human rights has been used by scholars to connect them to the concept of civil disobedience. As Turenne claims, civil disobedience can be used to challenge existing interpretations of the law and by employing the language of human rights, it "secures legal adjudication" on the issues the disobedient hopes to bring attention to. This constant challenge and call for revision of existing understanding of the law on human rights grounds is what makes civil disobedience according to Habermas 'the pace-setter for long overdue corrections and innovations because law and policy depending on principles are in a constant process of adaptation and revision'.[5]

---

[3] Human Rights Act 1998 s3.
[4] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[5] Hambermas J., 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 Berkeley Journal of Sociology 95at 104.

The thesis in this part will employ the work of Turenne, Habermas and the study by Nobles and Schiff on civil disobedience in connection to the Debbie Purdy case, to examine what the contribution of such a statement to the discussion can be. By classifying those who under the *current legal regime* in the UK, disclose information in the public interest as individuals who are engaged in an act of civil disobedience as opposed to common criminals, this chapter will argue that their act of proceeding to an unauthorised disclosure can also be said to contain a further meaning and a further purpose- that of challenging existing interpretations of secrecy and free speech.

Thus, while the previous chapters identified a problem in the OSA 1989 and subsequently attempted to discuss how this problem could be resolved to pragmatically ensure the compatibility of secrecy legislation with freedom of expression, this section seeks to address the question of whether the use of free speech arguments and breach of the law as an act of civil disobedience could be the avenue to a judicial challenge to the OSA 1989, which in the context of the UK could lead to a declaration of incompatibility or, less likely in this context, the 'reading down' of the act.

This of course should not be read as an invitation to breach the law, which in this case could have catastrophic consequences on security. Instead, it is meant to frame the issue of unauthorised, security-related disclosures in the public interest not simply as an activity that breaches criminal law, but as a challenge to the existing understanding of secrecy

and human rights in the UK. Therefore the argument this chapter is making is that, while breaking secrecy laws is not to be endorsed, if such an illegal act were to occur in the public interest, this action should be classified as an act of civil disobedience.

Applying such a theory to acts of disclosures raises important objections. Can a breach of secrecy laws which could potentially seriously hamper the efforts of the services to keep the nation secure, be justifiable due to the whistleblower's moral principles? Is it part of the services' officer's mandate to make moral judgments on the practices and policies that the services follow? Is it acceptable to argue that the legitimate secrecy requirements intelligence officers are bound by, should be conditional on their views on morality and ethics? Finally, what is the appropriate judicial response for such individuals who break secrecy laws in an effort to inform the citizenry on wrongdoing that has occurred in the past or is about to take place?

The chapter is divided into three parts that aim to address these issues. It will begin by analysing how civil disobedience has been used to justify actions of specific whistleblowers and argue that there is further analysis required to ascertain whether indeed such practices have the necessary requirements to fall under the disobedience paradigm. It will then proceed to provide a background on the various strands of civil disobedience theory, emphasising on the works of Rawls, Dworkin and Habermas and analysing theories that view disobedience as a form of conduct that is inextricably

linked with the act of asserting one's own right that in his or her view has been wrongfully restricted.

In the second part, the chapter will argue that the 'higher law' that such whistleblowers follow should not be viewed as an abstract moral or religious judgment. Instead, the chapter proposes that the higher law in this instance relates to the free speech values that the whistleblower is serving, namely the audience interest in accessing specific information.[6] By looking at more recent interpretations of disobedience, the chapter will argue that the disobedient individual can be seen as enacting a legitimate human right and using the act of disobedience as a means to ask for a re-evaluation of the law based on a 'plausible interpretation' of a human rights standard that differs from the official interpretation.

However, how can such acts influence judges? The judiciary's mandate does not include making moral judgments on the law. The third part will highlight the practical implications that claims of disobedience can have in the process of adjudication. The reluctance of UK courts to engage in discussions of disobedience was evident in the case of *Jones*[7] where the House of Lords seemed to take a dismissive approach to such claims. However, in *Purdy*[8] the Law Lords, conceded that certain breaches of the Suicide Act 1961, which makes it a criminal offence to provide any assistance to individuals willing to commit suicide, would be justifiable and asked the Director of Public Prosecutions to clarify the circumstances under

[6] The connection between free speech, the audience interest in disclosures and whistleblowing is be discussed elsewhere in the thesis.
[7] *R v Jones* [2006] UKHL 16.
[8] *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

which individuals who assisted those seeking to terminate their lives for health reasons would not be prosecuted. Although the House of Lords did not have an intention to justify acts of disobedience, the recognition that the Suicide Act cannot apply indiscriminately to all cases of assistance in suicide was reached based on the applicant's human rights considerations under Article 8 for the convention.

Therefore, what this chapter aims to achieve with the discussion on disobedience is to showcase that unauthorised disclosures in the public interest emanating from the services should not be viewed as a treasonous act that aims to destabilise the UK's security apparatus, as the law and judges currently perceive it. Instead such an act should be seen as a form of protest to a specific policy and an assertion of the whistleblower's right to impart information to the public on wrongdoing thus ensuring that the values of transparency and accountability of all public institutions are served. What the services whistleblower is attempting must therefore be distinguished from common criminal activity as the whistleblower's intention is to protect democratic values through an assertion of a free speech right.

Disobedience and whistleblowers.

Proponents of whistleblowing have in many cases attempted to justify the breach of secrecy laws by arguing that high profile whistleblowers of information that attract public attention to wrongdoing in the military or the Services are not in fact common criminals but rather individuals

committing an act of civil disobedience. The term was employed for NSA whistleblowers Edward Snowden[9] and Thomas Drake[10], while Daniel Ellsberg has also used it to describe his actions relating to the disclosure and publication of the 'Pentagon Papers' that revealed the extent of governmental attempts to mislead the public in the lead up to the Vietnam War. The term has also been used in reference to the mass publication of leaked classified documents on the WikiLeaks website[11] and in relation to the US soldier Chelsea (formerly Bradley) Manning, who leaked information on the alleged commission of war crimes by the US forces in the Iraq war.[12]

Such claims of disobedience however, are not exclusive to the US. In the UK, Crisp has argued that disclosures in the public interest are "in effect equivalent to civil (that is, non-violent) disobedience: breaches of the law committed in the name of the public interest. Since most people accept that, ordinarily, there are strong moral reasons to obey the law, such disobedience

---

[9] Scheuerman W., 'Whistleblowing as civil disobedience: The case of Edward Snowden' (2014) 40 *Philosophy & Social Criticism* 609-628. As the Guardian newspaper reported in its interview with US civil rights activist John Lewis in relation to the Snowden disclosures "When it was pointed out to Lewis that many in Washington believed that Snowden was simply a criminal, he replied: 'Some people say criminality or treason or whatever. He could say he was acting because he was appealing to a higher law. Many of us have some real, real, problems with how the government has been spying on people'." http://www.theguardian.com/world/2013/aug/07/john-lewis-civil-rights-edward-snowden Accessed 12 December 2014.

[10] Radack J., 'Too Classified to Try Myth in failed Drake Prosecution' (dailykos.com 11 June 2011) http://www.dailykos.com/story/2011/06/11/984192/--Too-Classified-to-Try-Myth-in-Failed-Drake-Prosecution accessed 12 December 2014.

[11] Ellsberg D., 'Secrecy and National Security Whistleblowing' (ellsberg.net 8 January 2013) http://www.ellsberg.net/archive/secrecy-national-security-whistleblowing accessed 12 December 2014.

[12] Madar C., ' Why massive national security leaks are good for us' (aljazeera.com 23 February 2013) http://www.aljazeera.com/indepth/opinion/2013/02/201322315561328240.html and Greenwald G., 'Finally: hear Bradley Manning in his own voice' (guardian.co.uk 12 March 2013) http://www.guardian.co.uk/commentisfree/2013/mar/12/bradley-manning-tapes-own-words accessed 12 December 2014.

is justified if and only if the moral reasons in favour of disobedience are stronger still".[13]

Such parallels seem justified when one considers that there is a strong ideological background to whistleblowing in the public interest. Whistleblowing in this context is perceived as a "political act designed to alter some aspect of organisational structure of performance" and not simply a "free-floating discontent and hostility directed at anything that symbolises the organisation"[14] by individuals that are "misanthropes who hate their organisation, do not identify with its goals, and would do anything to harm its performance".[15] This powerful ideologically and conscientiously driven act is a statement by the agency whistleblower that they can no longer be complicit in what they consider to be a grave injustice or blatantly illegal and unconstitutional behaviour.

The parallels between whistleblowing and civil disobedience were first drawn by Ellison[16] who argued that expressing dissent to an organisational authority by publicly revealing instances of wrongdoing was a similar technique to the one disobedient individuals used to challenge state authority or unjust laws by disobeying them. Public whistleblowing signifies a challenge and an expression of dissent to an organisation's authority structure with the hope of bringing about cessation of what the

---

[13] Crisp, 'To Leak or not to Leak?' University of Oxford blog on Practical Ethics (ox.ac.uk 1 December 2008) http://blog.practicalethics.ox.ac.uk/2008/12/to-leak-or-not-to-leak/ accessed accessed 12 December 2014.

[14] Perruchi et al., 'Whistle-blowing: Professional's Resistance to Organizational Authority' (1980) 28 *Social Problems* –published by the University of California Press- 149, 155.

[15] Ibid.

[16] Elliston, 'Civil disobedience and Whistleblowing' (1982) 1 *Journal of Business Ethics* 23-28.

whistleblower perceives to be wrongdoing or retrospectively to keep an organisation accountable for an activity or policy that is in the public interest to make public.[17] It is perceived as a "political action an organisation member may take against an organisation".[18] By definition the whistleblower is not in a position nor has the authority to correct the perceived wrongdoing himself or herself.[19] This element of a political motivation, the motivation to serve democratic values through public interest disclosures, is what differentiates such breaches of the secrecy law from treasonous disclosures aimed to facilitate the enemy.

Sagar on the other hand ardently rejects that the leaker of security sensitive information can claim the he or she is committing an act of disobedience. The stumbling block for Sagar is that such an action does not adhere to the prerequisite of non-violence that characterises acts of civil disobedience. As he contends "by violating the directives of public officials authorised to manage national security, the circumventor puts the security of other citizens at risk. In doing so, the circumventor assumes a political authority he is not entitled to".[20] As he argues, since leaking information by definition cannot be done publicly, the requirement of civil disobedience, that the act is open and public cannot be fulfiled. As he asserts, "The secretive nature of circumvention, [...] undermines moral evaluation of the act and therefore challenges the ability of citizens to legitimise it retrospectively".[21] But other theorists accept that publicity is not always required before the act of

[17] Near and Miceli, 'Organizational Dissidence: The case of Whistle-Blowing (1985) 4 *Journal of Business Ethics* 1, 5.
[18] Ibid at 9.
[19] Ibid at 7.
[20] Sagar R. 'On Combating the Abuse of State Secrecy' (2007) 15 *The Journal of Political Philosophy* 404, 425.
[21] Ibid at 425.

disobedience is committed. "Unannounced or covert disobedience is sometimes preferable to actions undertaken publicly and with fair warning"[22] as the disobedients would then face the challenge of overcoming legal authorities who would try to stop the act from taking place. Therefore, circumvention in the case of secrecy can still be considered open and public, if it is immediately followed "by an acknowledgment of the act and the reasons of acting".[23] This problem of publicity that Sagar mentions therefore, is overcome in cases where the whistleblower publicly takes responsibility for the disclosure.

However, arguing that a disclosure of such information could constitute a form of civil disobedience would first require an analysis of the prerequisites for civil disobedience in a liberal democracy and the acknowledgement that such a right to disobey is not universally accepted in theory nor in practice. The following part will track the various strands of civil disobedience theory, and attempt to examine whether a connection to whistleblowing indeed exists.

What is civil disobedience?

As the breach of secrecy laws to serve the public interest has, as was demonstrated, been in many instances interpreted as an act of disobedience, it is important to examine the theory of when and how it is morally permissible to break the law in a democratic society. If a claim is to be made

[22] Stanford Encyclopedia of Philosophy, 'Civil Disobedience' (plato.stanford.edu 23 December 2009) http://plato.stanford.edu/entries/civil-disobedience/ accessed 12 December 2014.
[23] Ibid.

that whistleblowers are not common criminals but are instead attempting to serve higher democratic values, what is required is to delve into the theories attempting to resolve the inevitable conflict or inconsistency that arises when arguing that one can break the law for moral reasons in order to protect democratic order and justice.

What becomes immediately apparent when discussing such ideas is that there is a lack of consensus or a "single agreed-upon concept"[24] in theory on the prerequisites and the nature of civil disobedience. In scholarship views vary from an outright rejection of a 'right' to disobedience in liberal democracies[25] to Habermas' assertion that "Every constitutional democracy that is sure of itself considers civil disobedience as a normalised- because necessary- component of its political culture".[26] Although different times and different challenges in different regions[27] have led to various interpretations of the concept, which was broadened or narrowed down to fit in with the needs for each movement, as Milligan observes, this "change in the way in which civil disobedience has been understood need not to be read as a process in which a succession of quite different concepts have replaced each other while parading under the same shared name".[28] It is clear however, that the various theorists were highly influenced by the needs of the movements they were focusing on in their theoretical analysis when constructing a theory of civil disobedience. The Rawlsian account was

[24] Milligan T., *Civil Disobedience: Protest, Justification and the Law* (Bloomsbury Academic, 2013) 13.
[25] The Razian view that will be examined below
[26] Hambermas J., 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 *Berkeley Journal of Sociology* 95, 99.
[27] Racial segregation, the Vietnam war and the Occupy Wall Street movement in the US, the suffragettes and the Nuclear Disarmament movement in the UK, Ghandi in India.
[28] Milligan at pg 13.

delivered "against the backdrop of student politicisation in the 1960's and protest over the war in Vietnam",[29] the work of Zinn and Honderich who were "radical activists and politically engaged academics"[30] followed an entirely different basis in its construction, while the understanding of civil disobedience by Tolstoy, Gandhi and Martin Luther King was heavily influenced and strongly associated "with a Christian-derived concept of love"[31] which is entirely different from the secularised Rawlsian approach.

What there is general agreement on however, is that an act of disobedience in this context, is not a revolutionary act as it does not seek to overthrow the political system. On the contrary, it recognises the legitimacy of a political system and in actuality seeks to reinforce and protect this legitimacy by placing limits on the authorities by refusing to unconditionally surrender to immoral or blatantly illegal decisions and policies.[32] If viewed in this way, civil disobedience can work to "correct"[33] a political system's failures. As Smith maintains, civil disobedience itself can thus constitute "an exercise in deliberative contestation and therefore forms part of the democratic process more broadly conceived, provided that it assumes a form that keeps faith with the general principles of deliberative democracy".[34] Finnis for instance also argues that our obligation to obey the law is both generic and presumptive. In order for the law to effectively resolve "coordination problems"[35] and bring "predictability and order into human affairs"[36] our

[29] Milligan at 14.
[30] Ibid.
[31] Ibid at 17.
[32] Jones P., 'Introduction: law and disobedience' (2004) 10 *Res Publica* 319, 320.
[33] Ibid at 327.
[34] Ibid.
[35] Duke G., 'Finnis on the authority of Law and the common good' (2013) 19 *Legal Theory* 44, 48.

obligation to obey the law "must be regarded as generic or in relation to each law as an instance of law independently of its content".[37] However, this obligation to obey is presumptive in the sense that "it may be defeated by strong countervailing moral considerations in obvious or exceptional cases of injustice".[38]

Thoreau's approach to civil disobedience is by far the most militant one and originates from a strong libertarian viewpoint which is essentially mistrustful of any state power over the individual as expressed through the power of government. His stance therefore maintains that individual conscience is to be placed above the law and he favours a duty of citizens to be "men first, and subjects afterward".[39] This, according to Thoreau, means that citizens who disagree with unfair policies have an obligation to resist them. As he asserts "those who, while they disapprove of the character and measures of a government, yield to it their allegiance and support are undoubtedly its most conscientious supporters, and so frequently the most serious obstacles to reform".[40] As he concludes "What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn".[41] Therefore, according to Milligan's analysis of Thoreau's work, for Thoreau "there is both a moral entitlement to sometimes break the law, and under at least some circumstances there is a duty to do so".[42]

---

[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Thoreau H. D., *Walden; or, life in the woods; and, On the duty of civil disobedience* (Holt Rinehart, 1948) 282.
[40] Ibid at 288.
[41] Ibid at 290.
[42] Miligan at 62.

Thoreau's understanding of civil disobedience seems particularly extreme to be practically implemented in the context of a modern liberal democracy. Civil servants in particular, who are still viewed as providing assistance to the government of the day, and whose opinions on policy are meant to be irrelevant to them performing their duties could not rely on such a radical view of disobedience to justify proceeding to any unauthorised disclosures. The very nature of the civil service requires civil servants to remain impartial and compliant to their superiors and Thoreau's extreme focus on the individual's own beliefs and values seems incompatible with this task.

Rawls' theory of civil disobedience could potentially be more pertinent to a current understanding of the extent to which the individual would be allowed to take a more militant role in protecting democratic values. Rawls' construct of civil disobedience requires the unlawful act to be a way for the disobedient to ask for "a change in law or policies of government".[43] This would fit in with the case of Shayler for instance; whose reasons for disclosing MI5's secrets in a series of articles published in a magazine were that he hoped that disclosure would generate improvements in the organisation's effectiveness and therefore benefit the nation to a greater extent than the potential damage caused by the disclosure.[44] However, Rawls seems to emphasise more on the distinction between majority and minority in a democracy and perceives civil disobedience as a way for the latter to protest the "infringement of the fundamental equal liberties"[45] by the former. Therefore, Rawls' understanding of civil disobedience is more

[43] Rawls at 364.
[44] S. Gardner, 'Direct action and the defence of necessity' [2005] *Criminal Law Review* 371, 372.
[45] Rawls at 366.

suited to cases such as that of Rosa Parks, the African American woman who challenged segregation laws in the US by refusing to sit in the back of the bus, rather than that of leaking secret documents.

This does not necessarily mean that Rawls' construct of civil disobedience is completely foreign to the disclosure of information aiming to expose wrongdoing or bringing those responsible to justice and affirming democratic values. Acts like that of Rosa Parks, apart from advocating change and highlighting unjust laws, also seek to protect the legitimacy of a democratic system. A law that discriminates against a minority is also an affront to the liberal principles of a democracy and therefore the act of disobedience can be said to contain a twofold objective. On the one hand it aims to protest and eventually eradicate the injustice of the law or policy towards a minority, and on the other it aims to protect the fundamental democratic values and the democratic regime itself. The practice of unauthorised leaking documents can be said to have that second aim, in the case where the documents uncover abuses and policies that contravene the tenets of democratic government, or when classification laws are manipulated to keep information that is in the public interest under wraps.

The idea of civil disobedience, as promoted by Rawls therefore, seems to be intrinsically connected with liberal values and is too narrow to cover any form of protest that does not relate to an oppressed minority that is protesting a specific law it considers unjust. This account of disobedience is based on the idea that "Governments, including democratic governments, that violate fundamental rights overstep their authority, and when the

violations are grave enough, those whose rights are violated or others who make common cause with them may justly resist, including by disobeying the law".[46] This is particularly relevant to the civil rights movement in the US which was an avenue for the disenfranchised to protest the oppression of the white majority, and views civil disobedience as the method to fight against inequality to promote liberty. However, protests against the Vietnam War or nuclear weapons do not as easily fall under this paradigm. As Markovits notes:

> These protests are increasingly difficult to cast as liberal efforts to protect fundamental rights against overreaching governments. Although the Vietnam War may have been unwise and even wicked, the decision to wage a war to rid a foreign nation of a hostile and repressive regime plausibly falls within the scope of a democratic government's political authority. Although the aggressive deployment of nuclear missiles, including American missiles, in Europe may have been reckless, the decision to deploy them in order to deter attack by hostile neighbours probably falls within the scope of a democratic government's political authority.[47]

Markovits argues that such instances of dissent could not be part of the Rawlsian liberal understanding of civil disobedience. He introduces a concept of disobedience that "can provide for the broader political process

[46] Markovits D., 'Democratic Disobedience' (2004-2005) 114 *Yale Law Journal* 1897, 1899.
[47] Ibid at 1901.

by correcting democratic deficits in law and policy that inevitably threaten every democracy".[48] When in a democracy, certain public policies become entrenched "against democratic re-evaluation",[49] then a democratic deficit is created which in turn allows for disobedience. According to Markovits "Such disobedience is a necessary part of every well-functioning democratic politics and not merely a defence against authoritarian oppression. It is distinctively democratic disobedience".[50]

Other theorists who have tackled civil disobedience seem much more closely related to acts of unauthorised disclosures. Zinn's broader definition of civil disobedience for example, as the "deliberate, discriminate violation of law for a vital social purpose"[51] could easily be applied to disclosures in the public interest, as the 'vital social purpose' he demands would be the public interest in the information released. Zwiebach has also clearly illustrated that there is a strong connection between disobedience and accountability. He perceives disobedience as one of many methods to achieve government responsibility for its actions. As he claims:

In some instances, acts of disobedience have focused public attention upon particular injustices or invasions of rights and have impelled sometimes recalcitrant public officials to move toward correcting them. In other cases acts of disobedience have made it possible to litigate serious questions

[48] Ibid at 1902.
[49] Ibid at 1949.
[50] Ibid.
[51] Zinn H., *Disobedience and Democracy* (Random House, New York 1968) 119.

which [...] could not be brought to the attention of courts in more traditional ways.[52]

This view, that argues that disobedience can be beneficial by bringing a controversial issue to the attention of the courts and therefore the public, has also been adhered to by Russell. Linking this to unauthorised disclosures, a leaker can also aim to gain a judicial hearing on a matter of "supreme importance".[53] The Ponting trial for example prompted discussion and debate not only on the Belgrano sinking itself but also on the role of civil servants in a democratic society and in relation to Official Secrets legislation[54] – albeit the judge in the case was adamant in summing up the case to the members of the jury that it is the government of the day that decided what the public interest is and this should not be ascertained by the individual leaker of information. Correspondingly, if the prosecution of Katherine Gun had gone forward, it would in all likelihood have raised questions and potentially given answers on the legality of the Iraq invasion and the intelligence surrounding it.

However, it is important to note that not all theorists readily accept a moral right to disobedience. Raz for instance claims that civil disobedience cannot be part of a democratically run society and should only be acceptable in regimes that are blatantly unjust due to the fact that in such regimes the

[52] Zwiebach B., *Civility and Disobedience* (Cambridge University Press, 1975) 130.
[53] This phraseology is attributed to Bertrand Russell in Singer P, *Democracy and Disobedience* (Clarendon, 1973) 74.
[54] The amendment by the Thatcher administration of the OSA 1911 to its current form which excludes a public interest defence for disclosures was seemingly made in response to the Ponting case http://www.newstatesman.com/blogs/the-staggers/2011/04/israel-serpico-manning-ponting accessed on accessed 12 December 2014.

citizens' "moral right to political participation"[55] is not recognised in law. Therefore, if according to Raz, a political system adequately protects a citizen's right to political activity, a moral right to civil disobedience cannot be afforded to him or her. If an agent wishes to bring about change he is she is expected to use only those mechanisms that are within the boundaries of the law. Raz is concerned that such a right "extends tolerance to people to indulge in civil disobedience even when it is wrong to do so".[56] He does concede that there can be a rational support for disobedience by those who support it and approve of the action the disobedient individual attempts, however, civil disobedience cannot be used as a claim for tolerance by the authorities.[57]

Nevertheless, Raz also recognised that governments do not enjoy unlimited authority that citizens are blindly expected to accept. As he observes, in many cases "the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude".[58]

Dworkin has also contributed extensively to the theory of civil disobedience. He reiterates Rawls' position that citizens' duty to obey the law should be extended to even to institutions that are not perfectly just "at least when the sporadic injustice lay in decisions reached by fair,

---

[55] Raz J., *The Authority of Law* (2nd edn Oxford University Press, 2009) at 273.
[56] Haksar V., 'The right to civil disobedience' (2003) 41 *Osgoode Hall Law Journal* 408, 413.
[57] Ibid.
[58] Raz J., *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Clarendon Press, 1994) 335.

majoritarian institutions".[59] He clarifies that society cannot endure if it tolerates all disobedience "it does not follow, however, nor is there evidence, that it will collapse if it tolerates some".[60] Central to his discussion on civil disobedience, was viewing such acts as a way for the individual to assert a human right. For Dworkin there is no 'separate right' to disobedience and dissent. What we have instead in such cases is simply the individual's reaction to a wrongful governmental invasion of his or her fundamental rights.[61] Therefore this disobedience is in fact an enactment of right that has been wrongfully suppressed.

Habermas has supported that disobedience is acceptable in a liberal democracy, however, he cautions that "The disobedient must scrupulously examine whether the adoption of extraordinary means is really appropriate to the situation, and does not in fact originate in an elitist attitude or a narcissistic impulse and therefore remains sheer pretence".[62]

In stark opposition to Sir David Omand's assertion before the parliamentary committee on leaking and whistleblowing in Whitehall where the former Director of the GCHQ argued that "You always find in retrospect that even criminal acts sometimes have unexpected benefits but that is not a justification for doing it", Habermas clearly differentiated between the commission of a common crime and civil disobedience. As he asserts:

---

[59] Dworkin R., *Law's empire* (Harvard University Press, 1986) 193.
[60] Dworkin R., *Taking rights seriously* (Duckworth, 1978) 206.
[61] Ibid at 192.
[62] Habermas at 105.

> The authorities have sufficient latitude to decide whether charges should be brought and a trial initiated, whether a sentence is necessary, and how the punishment is to be measured when that case arises. In each case, however, the courts should let it be known that civil disobedience is not just another common crime.[63]

As Flacon Y Tella argues, "It might perhaps be more acceptable to consider that civil disobedience is neither completely legal, as some maintain, nor completely illegal, as other argue[...] In this sense, an act of civil disobedience is of the nature of a benign illegality or, one might say, a technical but not substantial illegality".[64]

In these accounts of civil disobedience therefore, breaking the law is an attempt for the disobedient individual "to show that a law whose application is immoral is not really a law at all, or at least not one that establishes a legal duty".[65]

As is evident in the aforementioned analyses of civil disobedience, what is a central and vital prerequisite for the legitimacy of such acts is for the individual to be able to point to a higher value or higher law when asked to justify why he or she disobeyed the law. Examining this from the perspective of whistleblowers there is a danger that whistleblowers will use their own normative distaste of practices of policies as a justification for

---

[63] Ibid at 106.
[64] Falcon y Tella, *The Erik Castren Institute of International Law and Human Rights: Civil Disobedience* (Martinus Nijhoff Publishers, 2004) 25.
[65] Nobles and Schiff, 'Disobedience to Law - Debbie Purdy's case' (2010) 73 *Modern Law Review* 295, 296.

disclosures, or that their evaluation that certain actions constitute wrongdoing will be based on abstract and ambiguous moral concepts. The need for secrecy in the Services cannot rely on such vague considerations of the security official. If secrecy was conditional on the personal ethics of security officials, there would be little hope of effectiveness in the services. The following part therefore, seeks to examine in depth the idea of the 'higher law' and argue that instead of relying on conceptual and intangible ideas about morality, whistleblowers instead could be said to be asserting a free speech right that justifies breaches of secrecy as a means of last resort when all other mainstream means of achieving accountability have failed to produce tangible results.

Human rights as the 'higher law' that can justify a breach

The previous part examined the various strands of civil disobedience theory that allow in certain cases for laws to be breached in order to serve a specific public interest, higher purpose, or higher law. But what is the higher law that the disobedient individual should rely on in order to be provided with the necessary justification to break a specific law? Various theorists have used different avenues to resolve this tension. Tolstoy for instance spoke of the "law of love",[66] Gandhi refers to "obedience to the higher law of our being",[67] while Martin Luther King makes reference to "our Judeo Christian heritage"[68] on a religious level and federal law or the constitution

[66] Tolstoy, *Writings on Civil Disobedience and Nonviolence* Aylmer Maude (trans.) (Philadelphia New Society Publishers, 1987) 389.
[67] Ghandi, An Autobiography: The Story of My Experiments with Truth Mahadev Desai (trans.) (Penguin, 2007) 374.
[68] Milligan at 137.

as a higher authority on the secular level.[69] Through the act of disobedience therefore, the disobedient individual is arguing that 'something else' trumps the specific law that he or she is breaking. This may be according to Milligan "a legal consideration (another law) or an extra-legal consideration (such as morality, or the general consent of the community or special instruction from the god of one's choice)".[70] The type of disobedience this project seeks to examine, however, falls strictly into the first category. The services' whistleblower may feel morally distraught by the information he or she has uncovered, and reveals information about wrongdoing because it is the 'moral' thing to do, but this disobedience relates to misuse of secrecy legislation for nefarious purposes. The disclosure of illegality, human rights violations, negligent behaviour or other improprieties that in the end serves the public interest, ultimately relies on the disobedient individual's allegation that the democratic process has been deficient in ensuring transparency and accountability of state representatives. The practices of the Services and the information they choose to keep secret are not aspects of public life that are democratically endorsed. There is in most cases no consent from Parliament on the Services' activities and the information the Parliament receives about such practices is heavily filtered and redacted. Such acts in most cases will either reflect decisions made by the executive or the services themselves. The Services' whistleblower therefore, is not deciding whether a specific act of the Services is moral or immoral based strictly on ethical considerations, but he / she is asserting that information that is vital to public discourse is being kept under wraps through the abuse of legitimate secrecy considerations.

---

[69] Ibid.
[70] Ibid.

The higher law that the Services' whistleblower defers to in order to justify secrecy law breaches are the values of transparency, accountability and the fight against impunity which are all foundational values of the democratic process. Furthermore, with recent developments that the thesis has referred to in previous chapters in relation to the connection between freedom of expression, whistleblowing and a burgeoning right of access to information, human rights standards on free speech provide the 'higher law' justification that services' whistleblowers could turn to. Thus their disobedience is justified not on a moral basis but should be viewed in relation to them "protesting against the transgression of valid constitutional principles".[71]

This, however, has an important result. While claims of disobedience based on moral considerations or religious doctrine are not valid reasons for judges not to uphold the law and acquit the disobedient individuals, claims that the whistleblower acted by asserting his or her rights would require a proportionality test to determine whether the restriction on the whistleblower's speech rights, through criminal law or employment related sanctions, were proportionate to the interest in making the information public. This is exactly the type of assessment the OSA 1989 prohibits through an absolute ban on disclosures as opposed to a case by case analysis of each separate instance of whistleblowing. However, whenever human rights are asserted, a re-evaluation of legislation under the light of human rights law is required. This constant re-evaluation of laws to assess their

[71] Habermas at 107.

compatibility with human rights is not foreign to the democratic process. As Habermas asserts:

> The fact that many mechanisms for self-correction have been built into our constitutional order- from the three-fold reading of a parliamentary bill to the process of judicial review- speaks only for the understanding that the constitutional state reckons with a high demand for revision, not for the notion that further possibilities for revision should be eliminated.[72]

Habermas goes on to argue that "the constitutional state which prosecutes civil disobedience as a common crime falls under the spell of an authoritarian legalism".[73]

If we are therefore to assume that transparency and freedom of expression and information are fundamental human rights,[74] bypassing authoritarian measures that effectively stifle access to information where such access is necessary can be seen as an enactment of a specific right. This enactment of a right intends to expose the public to a controversial piece of legislation that contravenes the guiding democratic principles of accountability. Zwiebach goes so far as to argue in favour of the idea that the existence of human rights can in turn create a 'right to disobey'. As he maintains "this disobedience, because it cannot be separated from the act of asserting a right, is a right in itself [...] My disobedience consists merely in doing

---

[72] Ibid at 104.
[73] Ibid at 112.
[74] Birkinshaw P, 'Freedom of Information and Openness: Fundamental Human Rights?' (2006) 58 *Administrative Law Review* 177.

something I have a right to do".[75] Singer's understanding of civil disobedience follows the same path. As he asserts "the very nature of the democratic process involves the existence of rights, the violation of which invalidates the reasons for obedience to which the democratic process normally gives rise".[76]

Turenne similarly tries to connect civil disobedience to claims of human rights violations. As she proposes, "the disobedient must be able to point to some principle or principles which, in his view, over-ride the law as currently applied and which open that law to more than one interpretation".[77] According to her, the appropriate vehicle to achieve this is for the disobedient individual to call upon the implementation of human rights standards. Turenne argues that the flexibility of the language found in human rights law (she refers to the European Convention on Human Rights specifically) allows for individuals to argue for their own interpretation of the law in the Courts. This of course does not mean that the judges would be swayed or persuaded by such interpretations, but Turenne purports that there is a great value in having these ideas heard by the public at large and even the views of dissenting judges in agreement with the disobedient individual could be a form of victory. She calls this 'intra-legal' civil disobedience, where individuals aim "to challenge existing interpretations of the law by securing legal adjudication of their alternative [but plausible] interpretations".[78] The disobedience therefore is not an abstract moral claim

[75] Zwiebach at 147.
[76] Singer P, *Democracy and Disobedience* (Clarendon, 1973) 68.
[77] Turenne S., 'Judicial responses to civil disobedience: a comparative approach' (2004) 10 *Res Publica* 379, 382.
[78] Ibid at 398.

against the law, but is based on the presumption that the law in its current form is in violation of a specific human right.

Since the European Court of Human Rights has taken many steps to recognise that whistleblowers are protected under Article 10 of the convention,[79] and any punishment for disclosures in the public interest and in good faith is considered a violation of Article 10 by state parties, it could perhaps follow that the violation of overly harsh secrecy laws where there is a strong public interest in the information and the individual has acted in good faith as the Court requires, is an enactment of such a right. In light of the aforementioned demands within the Council of Europe for human rights violations and blatant illegality of the Services not to be left with impunity and the open support for whistleblowers in the Services makes this avenue all the more relevant.

As there is no other available viable alternative, such cases are a clear instance where the form of disobedience Turenne promotes could prove valuable. Making a case for civil disobedience would allow a leaker to contest the provisions of the OSA 1989 and assert his or her own free speech rights. The greater the public interest in the information revealed, the more straightforward it would be for Services whistleblowers to argue about the necessity of their actions. As Turenne argues, "The presentation of a plausible interpretation of a human or constitutional right that departs from the established interpretation renews the need for justification of the

[79] This was discussed in detail in previous chapters.

established interpretation"[80] thus keeping the democratic state in a constant state of re- evaluating its laws to ensure their consonance with human rights standards. This in turn allows for acts of disobedience to be the driving force that can alert the public or officials to question existing interpretations of the law. Therefore, the law is not only broken to test its constitutionality, but to create public discussion on a controversial issue. It is the method used intentionally for the individual to ignite a public discussion on a controversial topic. As Olsen proposes, for the disobedient individual, "breaking the law and subjecting himself to punishment could be important to communicating his message".[81]

But in light of this analysis, what is the appropriate judicial response to claims of disobedience based on human rights standards? Civil disobedience is premised on the idea that claims to disobedience are not meant to be exculpatory for the whistleblower. In fact, central to the theory of disobedience is the idea that by claiming that the actor is defying the law for a moral purpose, he or she is not attempting to evade the punishment that the criminal activity incurs. As Martin Luther King famously argued in his letter from Birmingham City Jail, "an individual who breaks a law that conscience tells him is unjust and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law".[82]

---

[80] Turenne at 398.
[81] Olsen, 'Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience' (1983-1984) *Georgia Law Review* 929, 960.
[82] Reproduced as cited in Mitchell, Harcourt and Taussig, *Occupy: Three Inquiries in Disobedience* (University of Chicago Press, 2013) 46.

However, not all theorists agree that accepting the penalty should be a decisive element that differentiates civil disobedience from other types of common criminal behaviour. Olsen argues that the intentional distinction that is drawn between the moral reasons that lead to the criminal behaviour and the legal repercussions that follow the criminal act can end up being used as a pretext "for evading the substance of issues raised by acts of civil disobedience".[83] Courts therefore resign themselves to simply assess whether a violation of criminal law has occurred without attempting an exploration of the alleged injustices the disobedient individual is protesting against.

This requirement to accept the penalty may explain why according to Milligan "many activists are in no great hurry to advance a claim of civil disobedience because the latter is assumed to pick out a form of protest that is overly deferential, overly respectful of existing laws, overly accepting of existing institutions".[84] It would be more sensible for such activists to argue that it is the institution they are protesting against that is not following the rules, for instance when an ecological group takes action against a corporation that has caused pollution to the environment.

It is also important to note that severely punishing a whistleblower for releasing information that is blatantly in the public interest can end up weakening a government's standing. After the jury famously acquitted Ponting in spite of the judge's obvious summing up for a guilty verdict, the UK has been more cautious in dealing with similar high profile

[83] Olsen at 929.
[84] Milligan at 25.

whistleblowing cases. The prosecutions of Katharine Gun and Derek Pasquill for instance were eventually dropped. In Gun's case it was apparent that an exhaustive discussion on the merits of invading Iraq at a time where the idea of going to war was highly questionable and unpopular in British public opinion would have seriously hurt government interests. Gun was aiming to use a defence of necessity and therefore, a possible acquittal by the jury similar to the one in Ponting would have set a precedent in an OSA case or potentially forced the Labour government to reform the Act.[85] Pasquill similarly asserted that it "would have been embarrassing for the Government, for ministers [...] to be called to give evidence and for them to admit to having been influenced, [...] about government policy [...]. I think that would have been a huge embarrassment to the Government at the time".[86]

Ponting's case is an instance of jury nullification and can be perceived as a good example of the ways in which an act of disobedience can inspire a response in the public that can end up exonerating the accused. Jury nullification occurs when a jury disregards a court's legal instruction and nullifies the law as it applies to the case in question.[87] This act of jury nullification is indicative of the jury's recognition that the pressing circumstances faced by Ponting made circumventing the law an imperative. What is important to note is that the verdict of a nullifying jury still counts as a verdict.[88] It is also deduced that one of the reasons Katharine Gun's

[85] House of Commons Public Administration Select Committee, 'Leaks and Whistleblowing in Whitehall: Tenth Report of Session 2008-09' HC 83 pg 93.
[86] Ibid at 94.
[87] Jones at 330.
[88] Ibid.

prosecution was dropped was that it was highly likely that given the circumstances the jury would refuse to convict.[89]

As the chapter has argued, although civil disobedience is not meant to be used as a defence to avoid a criminal conviction, it seeks to ask judges to reconfirm a law's consonance with human rights standards. The following part will look into two such cases in which the Law Lords entertained ideas of disobedience as a form of protest in the first case and as a plea to clarify whether breaking the law would result in prosecution in the second. Although their approach was dismissive to such claims in the first of the cases that will be analysed, they indirectly and perhaps inadvertently touched upon specific circumstances where individuals could breach a law by asserting a human right and not be prosecuted in the second case.

The Law Lords' responses to disobedience: Jones and Purdy.

In *Jones*, the House of Lords seemed to agree that civil disobedience could be considered as a reason to make punishment less harsh for a disobedient but rejected its importance in questioning the legality or morality of a law.[90] The scope of justification for acts of civil disobedience was tested in this case that involved activists causing damage to an RAF base to avert the imminent attack against Iraq which they perceived to be illegal.[91] The

[89] Ibid.

[90] It is important to note that while it was relevant to the cases, civil disobedience was not discussed in *DPP v Jones (Margaret)* [1999] 2 AC 240, *Austin v Commissioner of Police of the Metropolis* [2009] UKHRR 581 or in *City of London v Samede and Others* [2012] EWHC 34 (QB). It was also not examined in *Westminster City Council v Brian Haw* [2002] EWHC 2073 (QB) in relation an anti-war campaigner who was camping in Parliament Square in protest of the Iraq war.

[91] [2006] UKHL 16.

conscientious civil disobedience for your Lordships to say that there will seldom if ever be any arguable legal basis upon which these forensic tactics can be deployed".[98] The approach by Lord Hoffmann should not be viewed as surprising. In the context of the British public law system and due to parliamentary sovereignty, judges are expected to apply the law and not proceed to complex moral evaluations of whether it should apply in a specific circumstance.

In a subsequent case however, the House of Lords took an entirely different approach when indirectly dealing with issues relating to breaking the law on moral grounds. In the case of *Purdy*,[99] the Law Lords were called to answer whether a husband who wanted to assist his wife, a sufferer of multiple sclerosis, to end her life by helping her in her journey to Switzerland where assisted suicide is lawful, would be in breach of the Suicide Act of 1961. Since the Act makes it a criminal offence to provide any assistance in another's suicide and does not recognise exemptions, it was clear that there was no legal right to disobey the law.[100] In a similar previous case, a motor neurone disease sufferer, had unsuccessfully sought an undertaking from the Director of Public Prosecutions confirming that her husband would not be prosecuted under the Suicide Act for facilitating her suicide.[101] This precedent meant that in *Purdy*, if the husband provided assistance to his wife to travel to Switzerland to terminate her life, he would be committing an act of disobedience to the law and would be punished for it. In *Purdy*, the

---

[98] [93].

[99] *R(on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45. The issue of assisted suicide was brought again before the Supreme Court in *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[100] Nobles and Schiff at 297.

[101] *R. (ex parte Pretty) Pretty v Director of Public Prosecutions and Secretary of State for the Home Department (Interested Party)* [2001] UKHL 61.

Law Lords concluded that the DPP would be required to "promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act".[102]

In their analysis of the case, Nobles and Schiff argue that the law Lords "could point to no basis on which it was authorised to overturn the statutory provision, or to insert exceptions into an offence which appeared to them to have been drawn up with the deliberate intention of allowing none".[103] The judges relied heavily on the Human Rights Act 1998 and ECtHR case law in relation to the right to private and family life under Article 8 of the Convention. As Baroness Hale noted, the ECtHR has argued that a blanket ban on assisted suicide must be coupled with "a system of enforcement and adjudication which allows due regard to be given *in each particular case* to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence".[104] Therefore, the Law Lords chose to focus not on a general right to disobey the law for moral reasons, but on a right to "learn when one would face prosecution for disobeying the law".[105] As Nobles and Schiff observe "the list of human rights situations where similar specific guidance might be required cannot be closed off, and can be expected to generate further litigation".[106] While the Purdy judgment steers clear from creating a right to disobey the law, it does discuss a right

[102] *Purdy* at [56] per Lord Craighead.
[103] Nobles and Schiff at 298.
[104] *Pretty v United Kingdom* (App. No., 2346/02, 29 April 2002) at [76] (emphasis added).
[105] Nobles and Schiff at 298.
[106] Ibid at 299.

not to be "liable to legal sanction for so doing".[107] As they observe, Lord Brown was a proponent of this view when in quite explicit terms he argued that:

> The underlying premise . . . must surely be that, whatever mitigation may be available in any given case, behaviour contrary to the criminal law is invariably to be deprecated if not always to be prosecuted . . . For my part, however . . . I seriously question whether one should always deprecate conduct criminalised by section 2(1).[108]

Nobles and Schiff see this as an instance where "their Lordships were forced to grapple with the possibility that there might be legal wrongs which it will be legally wrong to prosecute".[109]

In their view:

> Something cannot be both legal, and illegal, at the same time. A person, who successfully claims a right to disobey law, has simply shown that the law that required her/his obedience is not valid. As such, her/his right of legal disobedience is a belated recognition that the law which, at an earlier period, appeared to require obedience (for example, on the basis of its

[107] Ibid.
[108] *Purdy* at [83].
[109] Nobles and Schiff at 300.

> interpretation by prosecuting officials and lower courts) does not in fact require her/him to obey.[110]

In discussing whether such a development gives rise to a "right" to civil disobedience, Nobles and Schiff conclude that:

> it is difficult to understand offence specific restrictions as anything other than a change in the law. But if these restrictions were, for example, formulated in terms of a general duty to have regard to particular moral arguments when deciding whether to prosecute, we could perhaps describe the situation in terms of legal rights of disobedience...it might be more meaningful to articulate this situation in terms of a right of disobedience that overrides substantive legal provisions at the point of prosecution, rather than attempt to articulate each and every substantive criminal law with these moral exceptions included.[111]

This analysis can potentially have important implications for whistleblowers. Although it is doubtful that the Law Lords would take a similar stance when national security considerations are concerned, the dilemma that whistleblowers face has many similarities with the Purdy case. They are faced with a law that criminalises specific behaviour and does not recognise exemptions. However, there are free speech issues involved that have been significantly developed since the Shayler case, to raise legitimate concerns about current secrecy legislation and provide potential

[110] Ibid at 297.
[111] Ibid at 303.

whistleblowers with a plausible interpretation of free speech which would allow them to disclose information in line with COE requirements.

Conclusion

The chapter has aimed to discuss the contribution that the theory of civil disobedience can have to the discussion of breaches of secrecy laws to serve the public interest. Civil disobedience is premised on the idea that even in liberal democracies, individuals can challenge unjust laws or other forms of injustice by resorting to public, non-violent acts that violate the law. The objective is to bring public attention to such injustices and also to secure a judicial hearing in the hope of bringing about reform. To support their claims of disobedience, such individuals are expected to point to a higher law that propels them to proceed with their act of dissent. Various theorists have proposed that this higher law could refer to religious or moral principles, or overarching values (such as equality for instance), however, the chapter argues that such claims by whistleblowers in the services would do little to convince of the necessity of their secrecy breach. Instead, the chapter has opted to follow the theorists who defend civil disobedience by viewing it as a means for individuals who have no other democratic alternative available to assert their own rights.

If a human rights claim based on free speech and the public interest in accessing information, the act at hand is only ostensibly an act of disobedience, as in fact it seeks to reinforce the law, either by inviting

judges to adopt a new interpretation or allowing them to reaffirm the consonance of a specific law with human rights.

In the UK, claims of disobedience have been largely dismissed by courts that have argued that, with the exception of perhaps a smaller penalty for perpetrators, breaking the law in order to protect democratic values is not a practice that can be seen as acceptable. It is important to note, however, that in the case of Purdy, which did not directly deal with disobedience, the law lords acknowledged that although there could be no exceptions to the Suicide Act 1961 that criminalises providing assistance to individuals wishing to terminate their life, in certain cases and in view of Article 8 of the Convention, the DPP should not proceed to prosecutions and provide clarification on the instances in which prosecutions would not be filed. The importance of this case is the acknowledgement not that there should be moral conditions placed upon the enforcement of laws, but that human rights requirements can allow for leniency in certain special situations and authorities would not prosecute.

Concluding Remarks

At the time of writing, in the aftermath of Edward Snowden's revelations of the mass surveillance conducted by the NSA and the GCHQ, the ISC has launched a 'Privacy and Security' Inquiry,[1] which aims to examine "the laws which govern the intelligence agencies' ability to intercept private communications."[2] The mandate of the inquiry is not limited to assessing the effectiveness of the current statutory framework governing access to private communications, but will extend to an examination of whether the current balance between the individual right to privacy and the collective right to security is appropriate.[3] The commissioner for human rights at the COE, released a report condemning the "secret, massive and indiscriminate" surveillance practised by the GCHQ and the NSA.[4] At the same time, various NGOs have lodged an application to the European Court of Human Rights against the UK, to ascertain whether the mass surveillance practices of the Services are compatible with Article 8 ECHR which protects the right to privacy.[5] The Investigatory Powers Tribunal found the mass surveillance by the GCHQ to be legal in principle, arguing that "the current regime [...]

---

[1] http://isc.independent.gov.uk/news-archive/17october2014 accessed 12 December 2014.
[2] http://isc.independent.gov.uk/news-archive/11december2013 accessed 12 December 2014.
[3] Ibid.
[4] Bowcott O., 'Mass surveillance exposed by Snowden 'not justified by fight against terrorism' (Guardian.com, 8 December 2014) http://www.theguardian.com/world/2014/dec/08/mass-surveillance-exposed-edward-snowden-not-justified-by-fight-against-terrorism accessed 12 December 2014.
[5] "The European Court has completed its preliminary examination of the case and has communicated it to the British government, asking it to justify how GCHQ's practices and the current system of oversight comply with the right to privacy. The court has also awarded the case a rare priority designation." http://www.pen-international.org/01/2014/english-pen-legal-challenge-to-mass-surveillance-receives-priority-status/?print=print accessed 12 December 2014.

is lawful and human rights compliant"[6]. On the European Union level, the Commission has begun a process of setting standards for internet governance, in order to "safeguard the open and unfragmented nature of the internet",[7] while on the international level, an independent international commission has been launched with the same purpose.[8] The Snowden disclosures have also led Barack Obama to publicly announce extensive reforms to the NSA's surveillance apparatus.[9]

These developments are indicative of the far-reaching consequences of whistleblowing in the public interest. Although it is yet to be determined whether Snowden's disclosures will significantly alter the current surveillance framework in the US and the UK, they have required officials to justify once again the necessity of current measures and re-examine existing policies while igniting a public dialogue on the balancing of privacy and security.

What seems to be lacking, however, is an equally fervent discussion on the status of national security whistleblowers. The OSA 1989 has not featured in the discourse surrounding Snowden, and there seems to have been little

---

[6] *Liberty and others v The Government Communications Headquarters and others* [2014] UKIPTrib 13_77-H at [156] per Justice Burton.

[7] Traynor I., 'Internet governance too US-centric, says European commission' (Guardian.com, 12 February 2014) http://www.theguardian.com/technology/2014/feb/12/internet-governance-us-european-commission accessed 12 December 2014.

[8] MacAskill E., Independent commission to investigate future of internet after NSA revelations' (Guardian.com, 22 January 2014) http://www.theguardian.com/world/2014/jan/22/independent-commission-future-internet-nsa-revelations-davos accessed 12 December 2014.

[9] Winograd D., 'Snowden: Obama's NSA Reforms 'Incomplete' (Time.com, 25 March 2014) http://time.com/37940/snowden-obama-nsa-reform/ accessed 12 December 2014.

discussion on how a UK intelligence official who proceeded to similar disclosures would be treated.

This is the main research question that the thesis aims to provide an answer to. Does the OSA 1989 comply with freedom of expression standards for whistleblower protection under the ECHR? It has argued that recent developments in whistleblower protection in the COE make it clear that a future evaluation of the Act by domestic courts or in Strasbourg, would require the government to overcome many more hurdles in proving that the punishment of good faith whistleblowers does not constitute a freedom of expression violation. The thesis acknowledges, however, that an amendment to the OSA would in itself create a great number of difficulties, as the simple inclusion of a public interest defence in the Act for individuals covered by section 1, would satisfy COE free speech requirements, but potentially have adverse and unforeseeable effects on security. The thesis examined various methods a public interest assessment, between security and the right to know, could be added in the Act and argued for the inclusion of a specific (yet broad in nature) list of instances where the whistleblower would be justified to proceed to public disclosures as a means of last resort. Finally, it examined whether breaking the law to reveal information on wrongdoing could be viewed as an act of civil disobedience.

The following part will summarise the key findings of the thesis and provide further insight into the original contribution to the field.

The starting point of the thesis was to examine the background under which the OSA was amended in 1989, to gain a better understanding of why it was adopted in its current form. The thesis argued that the OSA 1989 was a by-product of a now outdated understanding of state secrecy and a Cold War approach to the regulation of the Intelligence Community. While since 1989 significant leaps have been made in relation to the accountability of the Services and access to government information in the UK, the lack of a public interest defence for public disclosures by officials under OSA 1989 s1, has ensured that intelligence officials remain confined to a duty of confidence that has not been affected or updated by recent developments. Thus, chapter one of the thesis provided the background of state secrecy in the UK and compared it to 'official secrecy' standards established in the COE through resolutions and recommendations and the case law of the ECtHR. The aim was to illustrate how the occasions under which secrecy could be breached, as provided for in the COE standards, was not translated into the domestic context under the OSA 1989.

The second chapter attempted to explain the reasons that led to an exclusion of a public interest defence in the law, that would allow whistleblowers from the Services to argue that the interest in disclosure outweighed competing considerations. The impetus for the exclusion of the public interest defence seemed to be the deep mistrust towards members of the services, and their ability to proceed to complicated assessments on the public interest. At the same time, in light of the *Ponting* case, the Act was an attempt to bar the judiciary, judges and juries, from evaluating the public interest in disclosures from intelligence officials.

When discussing unauthorised disclosures, however, as a means to make up for existing accountability gaps, it is vital to first examine the deficiencies of the current oversight framework in the intelligence community. Chapter three provided an exhaustive assessment of how accountability for the Services is achieved in the UK. The focus was on the work of the ISC, the impact of the JASA 2013, and the impact that new closed material procedure arrangements will have for public knowledge of intelligence activities. It was argued that the current framework is a vast improvement on the previous, virtually non-existent, accountability regime and recent developments have also strengthened the role and powers of oversight bodies. However, to a great extent, the executive retains great control over the release of ISC reports and the information that will be included in them, creating in this way a "safe zone", where the Agencies remain immune from public disclosure of their actions. The intelligence official is, not surprisingly, excluded from the overall accountability arrangements,[10] and any issues he/she may come across in the course of his/her work that raise concern are to be reported internally.

The following chapter was dedicated to the examination of these internal mechanisms for raising concern. Under free speech standards, the existence and effectiveness of internal mechanisms is central in assessing whether whistleblowers acted in good faith when proceeding to public disclosures.

[10] In the US, intelligence officials are part of the accountability and oversight structure as they are permitted to approach the House and Senate Intelligence Committees with national security disclosures under the Military Whistleblower Protection Act, and the Intelligence Community Whistleblower Act. See Fisher, National Security Whistleblowers (Report for the Congressional Research Service, Library of Congress 2005) http://www.fas.org/sgp/crs/natsec/RL33215.pdf pg 45 accessed 12 December 2014.

The chapter presented the current system of internal disclosures in the UK services and compared the approach the Law Lords had in *Shayler* towards internal mechanisms, with that in the ECtHR case law, and the various recommendations, resolutions and other instruments of the COE. The conclusion was that, the Law Lords' refusal for an in depth examination of the effectiveness internal mechanisms would have had in the Shayler leaks, contravenes the now well-established ECHR standard that "the individual circumstances of each case will determine the most appropriate channel"[11] for reporting wrongdoing.

The following part of the thesis was dedicated to justifying the importance of whistleblowing as an additional safeguard to gaps in the accountability of institutions.[12] Chapter five began by examining the ethics of whistleblowing, and attempted to contribute to the discussion on the conflict between the whistleblowers' duty of loyalty to their organisation and the duty to inform the public on organisational misconduct that remains unaddressed. For the thesis, this approach represents a false dilemma. Especially, in relation to public authorities, the need for accountability to the public invalidates competing concerns of loyalty and should allow for a public disclosure as a means of last resort when more discreet means of remedying the situation are not available to the whistlebower.

The importance of whistleblowing as an added safeguard against institutional misconduct has been further recognised through the protection

[11] Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies at [14].
[12] Council of Europe Parliamentary Assembly, Resolution 1729 (2010) 'On the protection of whistleblowers'.

whistleblowers can claim under freedom of expression. Chapter six therefore, was dedicated to charting the evolution of whistleblower protection, primarily under the ECHR regime, and presenting the standards that apply to disclosures in the public interest. Specific attention was paid to the justification in legal scholarship, on how, through the protection of whistleblowers' free speech rights, we are in fact aiming to protect the audience's right to know the information that the whistleblower shared. This was then applied to critically examine the ECtHR whistleblower standards, and to argue that the construction of standards that focus on the purity of motives of the whistleblower have little justification under free speech theory and can result in a further obstacle to free speech protection for the whistleblower. The chapter argued that it is the public interest in the disclosure that should be the driving force when assessing whether free speech protection against retaliation will be granted.

After examining the developing free speech standards, however, it was important to assess how the national security component of intelligence leaks would affect their application in the context of the OSA 1989. Thus, after presenting the Court's assessment of national security as a reason to restrict free speech, chapter seven turned to the domestic level to examine the impact these free speech developments could have in the UK for intelligence whistleblowers. The chapter concluded that while the HRA 1998 has allowed domestic courts to question to a greater extent than before national security claims by the government, in the specific case of national security leaks, their role would be extremely complicated if they were to

make public interest assessments on the harm caused by an intelligence related disclosure.

With this in mind, and taking into account the objections against the inclusion of a public interest defence when the 1989 amendments to the OSA were being decided, the thesis attempted to examine possible avenues for a public interest defence to be included in the OSA. The thesis concluded in chapter eight, that an amendment to the Act that would include specific exemptions to the duty of secrecy (similar to the way the PIDA 1998 provides a list of permissible disclosures) would allow whistleblowers to foresee whether their disclosures would be found to be in the public interest and thus enjoy protection. Such an approach would furthermore allow the legislature to indicate to the courts which disclosures would be prejudicial to national security. Thus, in opposition to the current framework that considers all disclosures to be prejudicial, the thesis argues for a system where disclosures in the public interest are defined in a broad manner in the law itself.

The final chapter sought to examine whether conscientiously motivated whistleblowers, who in breach of secrecy laws disclose information in the public interest, could be said to be engaging in an act of civil disobedience. After reviewing the literature on the topic, the chapter concluded that the objectives of civil disobedience, namely to bring public attention to injustices and also to secure a judicial hearing in the hope of bringing about reform, can be found in national security whistleblowing. The legal ramifications of this analogy are, however, uncertain. In *Jones*, the Law

Lords rejected that claims of disobedience could be of any legal significance, although Lord Hoffmann mentioned that they could be taken into account in relation to the penalty the disobedient individual can expect for breaking the law. However, the chapter relied heavily on Nobles' and Schiff's analysis of the *Purdy* judgment, to make analogies to the OSA 1989. While in *Purdy* the Law Lords refrained from recognising a 'right' to disobey the law in specific circumstances, Lord Brown did indicate that in some cases it would be difficult to condemn conduct that was in breach of the law.

The contribution of this thesis has therefore been to add to the literature by examining how in the years since *Shayler*, a framework for whistleblower protection under free speech has developed, and in light of this, to revisit the arguments the Law Lords projected in that case for the compatibility of the OSA 1989 with freedom of expression. The thesis has gone beyond a simple comparison between ECHR and domestic standards on this issue, to assess ways in which the OSA 1989 can be amended in light of these developments, and also to examine the status of the national security whistleblower, by arguing that they could be perceived to be acting under the doctrine of civil disobedience.

Many issues remain to be examined however. Firstly, the thesis has not provided a case study of mass whistleblowing organisations, such as Wikileaks for instance. Their unclassifiable nature[13] produces many novel

[13] They are neither members of the press on the strict sense nor whistleblowers as they simply reproduce material of whistleblowers. See Benkler Y., 'A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate' (2011) 46 *Harvard Civil Rights – Civil Liberties Law Review* 311, 361.

legal challenges and requires extensive reconsideration of how rules relating to press freedom for instance would apply (if at all) to such organisations that function as an intermediary between the whistleblower and the press.

Another important aspect the thesis does not address is how contracting parties to the Convention can create mechanisms that will ensure that governments are able to effectively argue why the harm emanating from a specific disclosure outweighs the public interest, without publicly releasing sensitive intelligence information to corroborate this claim. This represents an enormous challenge for governments and the Convention. Are secret courts and the evidence presented in secret compatible with Article 6 on the right to a fair trial? What are the safeguards required to ensure that judges are able to examine effectively the evidence in favour of and against disclosure without harming security? Perhaps as the CMP procedure is expanded, more concrete information on the effectiveness of such an approach can be attained.

However, a final thought to conclude the thesis, would be to address what the future of the OSA 1989 is in the British constitutional order. A challenge to the Act in Strasbourg, where a whistleblower would question the compatibility of the current framework with Article 10 would perhaps make the most serious and convincing case for reform. An 'adventurous' Supreme Court could likewise find the Act to be incompatible with Article 10 based on recent developments in the ECtHR case law. It is important to note, however, that in the process of making the UK a global leader in

transparency,[14] the OSA 1989 will continue to be a remnant of darker times, when the idea of citizen participation in government's inner workings was considered anathema.

[14] --, 'David Cameron: We are creating a new era of transparency' (Telegraph.co.uk, 6 July 2011) http://www.telegraph.co.uk/news/politics/david-cameron/8621560/David-Cameron-We-are-creating-a-new-era-of-transparency.html accessed 12 December 2014.

BIBLIOGRAPHY

BOOKS

Aldrich R., *GCHQ: The Uncensored Story of Britain's Most Secret Intelligence Agency* (Harper Press, 2011)

Alexander L., *Is there a Right to Freedom of Expression?* (Cambridge University Press, 2005) 127

Alford, C.F., *Whistleblowers: Broken Lives and Organizational Power* (Cornell University Press, 2001)

Amos M. et al. (ed.), *Freedom of Expression and the Media* (Martinus Nijhoff Publishers / Brill Academic, 2012)

Andrew C., *The Defence of the Realm: The Authorized History of MI5* (Penguin, 2010)

Arai Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002)

Baker C.E., *Human Liberty and Freedom of Speech* (Oxford University Press, 1989)

Bantekas I. and Nash S., *International Criminal Law* (3rd edn Routledge – Cavendish, London 2007)

Barendt E., *Freedom Of Speech* (2nd edn, Oxford Univeristy Press, 2005)

Bennett G., *Six Moments of Crisis: Inside British Foreign Policy* (Oxford University Press, 2013)

Birkinshaw P., *Reforming the Secret State* (Open University Press, 1990)

Birkinshaw P., *Freedom of Information The Law, the Practice and the Ideal* (4th edn, Cambridge University Press 2010)

Birkinshaw P. and Varney M., *Government and Information: The Law Relating to Access, Disclosure and their Regulation* (4th edn, Bloomsbury Professional, 2011)

Beatson J. and Cripps Y. (eds), *Freedom of Exression and Freedom of Information: Essay in honour of Sir David Williams* (Oxford University Press, 2000)

Born, Johnson and Leigh (ed.), *Who's watching the Spies: Establishing Intelligence Service Accountability* (Potomac Books, 2005)

Born H. and Caparini M., *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Ashgate, 2007)

Bok S, *Secrets: Concealment & Revelation* (Oxford University Press, 1984)

Bovens M., *The Quest for responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press, 1998)

Bowers J. et al, *Whistleblowing: Law and Practice* (Oxford University Press, 2012)

Bradley AW and Ewing KD., *Constitutional and Administrative Law* (13th edn., Longman, 2003)

Buzan B., *People, states and fear : an agenda for international security in the post-cold war era* (2nd edn, Harvester Wheatsheaf, 1991)

Cameron I., *National Security and the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2000)

Chapman R. and Hunt M. (ed.), *Open government in a theoretical and practical context* (Aldershot: Ashgate, 2006)

Christophersen J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Court of Human Rights* (Brill, 2009)

Cole, Fabbrini and Vedaschi (eds.), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar, 2013)

Cripps Y., The Legal Implications of Disclosures in the Public Interest (2nd edn, Sweet & Maxwell 1994)

Davies P., *MI6 and the Machinery of Spying* (Frank Cass, 2004)

De Maria, W., *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia* (Wakefield Press, 1999)

De Schutter O., *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010)

Dworkin R., *Law's empire* (Harvard University Press, 1986)

Dworkin R., *Taking rights seriously* (Duckworth, 1978)

Elliott M. and Thomas R., *Public Law* (Oxford University Press, 2014)

Ermann M. and Lundman RJ. (eds), *Corporate and Governmental Deviance* (2nd ed. Oxford University Press 1982)

Ewing KD and Dale-Risk K., *Human Rights in Scotland: Text, Cases and Materials* (3rd edn., W. Green, 2004)

Ewing KD., *Bonfire of the liberties: New Labour, Human Rights and the Rule of Law* (Oxford University Press, 2010)

Falcon y Tella, *The Erik Castren Institute of International Law and Human Rights: Civil Disobedience* (Martinus Nijhoff Publishers, 2004)

Feintuck M., *The public interest in regulation* (Oxford University Press, 2004)

Feldman D., *Civil liberties and Human Rights in England and Wales* (2nd edn. Oxford University Press, 2002)

Fenwick Helen, *Civil Liberties and Human Rights* (Routledge – Cavendish, 2007)

Fenwick H. and Phillipson G., *Media Freedom Under the Human Rights Act* (Oxford University Press, 2006)

Fitzpatrick J. et al. (ed.), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Martinus Nijhoff Publishers, 1999)

Flathman R., *The public interest: An essay concerning the normative discourse of politics* (Wiley 1966)

Galnoor I., *Government Secrecy in Democracies* (New York University Press 1977)

Ghandi, An Autobiography: The Story of My Experiments with Truth Mahadev Desai (trans.) (Penguin, 2007)

Gill P. and Phythian M., *Intelligence in an Insecure World* (Polity Press, 2012)

Goldman J., *Ethics of spying: a reader for the Intelligence Professional* (Scarecrow Press, 2006)

Greenawalt K., *Speech, Crime, and the Uses of Language* (Oxford University Press, 1992)

Greenwald G., *No Place to Hide: Edward Snowden, the NSA and the Surveillance State* (Hamish Hamilton, 2014)

Guild E., *Security and European human rights: protecting individual rights in times of exception and military action* (Wolf Legal publishers, 2007)

Harris et al., *Harris, O'Boyle & Warbrick Law Of The European Convention on Human Rights* (3rd edn., Oxford University Press, 2014)

Hastedt and Guerrier (ed.), *Spies, Wiretaps, And Secret Operations: An Encyclopedia of American Espionage* (ABC-CLIO, 2010)

Hennessy P., *Whitehall* (Secker & Warburg, 1989)

Hennessy P., *The secret state preparing for the worst: 1945 – 2010* (Penguin, 2010)

Hooper D., *Official Secrets: The Use and Abuse of the Act* (Martin Secker & Warburg Ltd., 1987)

Jackson P., *The Political Economy of Bureaucracy* (Barnes & Noble Books-Imports, Div of Rowman & Littlefield Pubs. Inc, 1983)

Jacobs F., White R. and Ovey C., *The European Convention on Human Rights* (Oxford University Press, 2010)

Jeffery K., *MI6: The History of the Intelligence Service 1909-1949* (Bloomsbury Paperbacks, 2011)

Jeffreys-Jones R., *In Spies We Trust: The Story of Western Intelligence* (Oxford University Press, 2013)

Johnson L., *National Security Intelligence* (Polity, 2011)

Johnson R., *Whistleblowing: When it Works- And Why* (London: Lynne Rienner Publishers, 2003)

Kellner and Lord Crowther-Hunt, *The Civil Servants, An Inquiry into Britain's Ruling Class* (Macdonald, 1980)

Leigh D., *The frontiers of secrecy: closed government in Britain* (Junction Books, 1980)

Legg A., *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012)

Lewis D., *A global approach to public interest disclosure: What can we learn from existing whistleblowing legislation and research?* (Edward Elgar, 2010)

Lustgarten L. and Leigh I., *In from the cold: national security and parliamentary democracy* (Clarendon Press, 1994)

Macdonald J. and Jones C., *The Law of Freedom of Information* (OUP 2003)

Mackenzie A., *Secrets: the CIA's war at home* (University of California Press, 1997)

Maggee J., *Freedom of Expression* (Greenwood Publishing Group, 2002)

Mahoney P. and others, *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal* (Carl Heymanns, 2000)

Manningham – Buller E., *Securing Freedom: The Former Head of MI5 on Freedom, Intelligence, the Rule of Law, Torture and Security* (Profile Books, 2012)

Marchetti V. and Marks J., *The CIA and the Cult of Intelligence* (Jonathan Cape 1974)

Martin, B., *Justice Ignited: The Dynamics of Backfire* (Lanham, MD: Rowman & Littlefield, 2007)

Meiklejohn A., *Free Speech and its Relation to Self-Government* (The Lawbook Exchange Ltd, 2004)

Metcalfe D., 'The Nature of Government Secrecy' (2009) 26 *Government Information Quarterly* 305

Miceli M. and Near J., *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees* (New York: Lexington Books, 1992)

Milligan T., *Civil Disobedience: Protest, Justification and the Law* (Bloomsbury Academic, 2013)

Mitchell, Harcourt and Taussig, *Occupy: Three Inquiries in Disobedience* (University of Chicago Press, 2013)

Moon R., *The Constitutional Protection of Freedom of Expression* (University of Toronto Press, 2000)

Moran C., *Classified: Secrecy and the State in Modern Britain* (Cambridge University Press, 2013)

Moynihan D., *Secrecy: the American Experience* (Yale University Press, 1998)

Norton – Taylor R., *In defence of the realm? : the case for accountable security services* (Civil Liberties Trust, 1990)

Oliver D., *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press 1991)

Pincher C., *A Web of Deception: The Spycatcher Affair* (Sidgwick & Jackson Ltd, 1987)

Pincher C., *Too Secret too Long* (Sidgwick and Jackson, 1984)

Prados J. and Porter M. (eds), *Inside the Pentagon Papers* (University Press of Kansas, 2005)

Ponting C., *The right to know : the inside story of the Belgrano affair* (Sphere, 1985)

Rawls J., *A Theory Of Justice* (Universal Law Publishing Co Ltd, 2010)

Raz J., *The Authority of Law* (2nd edn Oxford University Press, 2009)

Raz J., *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Clarendon Press, 1994)

Rimington S., *Open Secret* (Arrow Books, 2002)

Roach K., *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011)

Rogers A., *Secrecy and Power in the British State: A History of the Official Secrets Act* (Pluto Press, 1997)

Sagar Rahul, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton: Princeton University Press, 2013)

Sandoval I.E. (ed.) *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, (World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011)

Schauer F., *Free Speech : a philosophical enquiry* (Cambridge University Press 1982)

Scott and Jackson (ed.), *Understanding Intelligence in the Twenty - First Century: Journeys in Shadows* (Routledge 2004)

Shiner R., *Freedom of Commercial Expression* (Oxford University Press, 2003)

Shulsky A. and Schmitt G., *Silent Warfare: Understanding the World of Intelligence* (3rd edn. Brasseys, 2002)

Singer P, *Democracy and Disobedience* (Clarendon, 1973)

Snepp F., *Irreparable harm: a firsthand account of how one Agent took on the CIA in an epic battle over secrecy and free speech* (Random House, 1999)

Steiner H., Alston P. and Goodman R., *International Human Rights In Context* (3rd edn Oxford University Press, 2007)

Stone GR., *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, 2003)

Stone R., *Textbook on Civil Liberties and Human Rights* (5th edn., Oxford University Press, 2004)

Sunkin, Le Sueur and Murkens, *Public Law: Text, Cases and Materials* (Oxford University Press, 2014)

Tant A. P., '*British government and the triumph of elitism: a study of the British political tradition and its major challenges* (Aldershot, 1993)

Thomas R., *Espionage and Secrecy: the Official Secrets Act 1911 – 1989 of the United Kingdom* (Routledge, 1991)

Thoreau H. D., *Walden; or, life in the woods; and, On the duty of civil disobedience* (Holt Rinehart, 1948)

Thurlow R., *The Secret State: British Internal Security in the Twentieth Century* (Wiley, 1995)

Tittle and Peg (ed.) *Ethical issues in business: inquiries, cases, and readings* (Broadview Press, 2000)

Todd P. and Bloch J., *Global Intelligence: The World's Secret Services Today* (Zed Books, 2003)

Tolstoy, *Writings on Civil Disobedience and Nonviolence* Aylmer Maude (trans.) (Philadelphia New Society Publishers, 1987)

Turnbull M., *The Spycatcher Trial* (Random House Australia, 1989)

Turpin C. and Tomkins A., *British Government and the Constitution* (6th edn., Cambridge University Press, 2007)

Vaughn R., *Successes and Failures of Whistleblower Laws* (Edward Elgar Publishing, 2012)

Verpeaux M., *Freedom of Expression: In Constitutional and International Case Law* (Council of Europe, 2010)

Vickers L., Freedom of Speech and Employment (Oxford University Press, 2002)

Vincent D., *The culture of Secrecy: Britain 1832- 1998* (OUP, 1999)

Voorhoof D., *'The Right to Freedom of Expression and Information under the European Human Rights System : Towards a more transparent democratic society* (European University Institute, 2014)

Walton C., *Empire of Secrets: British Intelligence, the Cold War and the Twilight of Empire* (Harper Press, 2013)

Warburton N., *Free Speech: A Very Short Introduction* (Oxford University Press, 2009)

Wilson H., *Governance of Britain* (Harper & Row, 1976)

Wright P., *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer* (Viking, 1987)

Wright D. and Kreissl R. (ed.), *Surveillance in Europe* (Routledge, 2014)

Zedner L., *Security* (Routledge, 2009)

Zinn H., *Disobedience and Democracy* (Random House, New York 1968)

Zwiebach B., *Civility and Disobedience* (Cambridge University Press, 1975)

JOURNAL ARTICLES

Akdeniz Y, 'Regulation of Investigatory Powers Act 2000: Part 1: BigBrother.gov.uk: state surveillance in the age of information and rights' [2001] *Criminal Law Review* 73

Alexander L., 'Free Speech and Speaker's Intent' (1995) 12 *Constitutional Comment* 21

Arce D., 'Corporate virtue: Treatment of whistleblowers and punishment of violators', (2010) 26 *European Journal of Political Economy* 363

Arden M., 'Human Rights in an Age of Terrorism (2005) 121 *Law Quarterly Review* 604

Anderson D., 'Shielding the compass: how to fight terrorism without defeating the law' (2013) 3 *European Human Rights Law Review* 233

Bailin A., 'The last cold war statute' (2008) 8 *Criminal Law Review* 625

Barendt E., 'Arrowsmith v The United Kingdom' (1981) 1 *Oxford Journal of Legal Studies* 279

Benkler Y., 'A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate' (2011) 46 *Harvard Civil Rights – Civil Liberties Law Review* 311

Benvenisti E. , 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *NYU Journal International Law & Policy* 843

Best K., 'The control of official information: Implications of the Shayler affair' (2001) 6 *Journal of Civil Liberties* 18

Birkinshaw P, 'Freedom of Information and Openness: Fundamental Human Rights?' (2006) 58 *Administrative Law Review* 177

Bodei R., 'From Secrecy to transparency: Reason of state and democracy' (2011) 37 *Philosophy and Social Criticism* 889

Bowers J. and Lewis J., 'Whistleblowing: freedom of expression protection in the workplace' (1996) 6 *European Human Rights Law Review* 637

Bradley A., 'The Damien Green affair – all's well that ends well? [2012] *Public Law* 396

Carr and Lewis, 'Combating corruption through employment law and whistleblower protection' (2010) 39 *Industrial Law Journal* 52

Chamberlain M., 'Legislative comment: The Justice and Security Bill' (2012) 31 *Civil Justice Quarterly* 424

Chesterman S., ' "We can't spy...if we can't buy!": the privatization of intelligence and the limits of outsourcing "inherently governmental functions" ' (2008) 19 *European Journal of International Law* 1055

Contu A., 'Rationality and Relationality in the Process of Whistleblowing: Recasting Whistleblowing Through Readings of Antigone' (2014) 23 *Journal of Management Inquiry* 393

Creaton J., 'Case Comment: Reverse Burden of Proof' (2007) 80 *Police Journal* 176.

Crow, 'What price a room with a view? Public Interest, private interests and the Human Rights Act' [2001] *Journal of Planning & Environmental Law* 1349

Draghici C., 'The Human Rights Act in the shadow of the European Convention: Are copyists errors allowed?' (2014) 2 *European Human Rights Law Review* 154

Duke, 'Finnis on the authority of Law and the common good' (2013) 19 *Legal Theory* 44

Dworkin T.M and Baucus M., 'Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes', (1998) 17 *Journal of Business Ethics* 1281

Dworkin T.M., 'SOX and whistleblowing' (2007) 105 *Michigan Law Review* 1757

Edwin Baker C., 'Scope of the First Amendment Freedom of Speech', (1977-1978) 25 *UCLA Law Review* 964

Eijkman Q. and Weggemans D., 'Visual surveillance and the prevention of terrorism: What about the checks and balances?' (2011) 25 *International Review of Law, Computers & Technology* 143

Elliston F., 'Anonymity and Whistleblowing' (1982) 1 *Journal of Bussiness Ethics* 167

Elliston F., 'Civil disobedience and Whistleblowing' (1982) 1 *Journal of Business Ethics* 23

Ellsberg D., 'Secrecy and National Security Whistleblowing: Reflections on Secret-Keeping and Identity' (2010) 77 *Social Research: An International Quarterly* 773

Erman E., 'Rethinking accountability in the Context of Human Rights' (2006) 12 *Res Publica* 249

Ferguson G. and Wadham J., 'Privacy and surveillance: a review of the Regulation of the Investigatory Powers Act 2000' [2003] *European Human Rights Law Review* 101

Foley F., 'The expansion of intelligence agency mandates: British counter-terrorism in comparative perspective (2009) 35 *Review of International Studies* 983

Foster S., 'Are we becoming afraid of free speech?' (2013) 18 *Coventry Law Journal* 92

Francis R. and Armstrong A., 'Corruption and whistleblowing in international humanitarian aid agencies' (2011) 18 *Journal of Financial Crime* 319

Freivogel W., 'Publishing National Security Secrets: The Case For Benign Indeterminacy', (2009) 3 *Journal of National Security Law and Policy* 98

Gardner S., 'Direct action and the defence of necessity' [2005] *Criminal Law Review* 371

Gephart et al, 'Silenced by fear: The nature, sources and consequences of fear at work', (2009) 29 *Research in Organisational Behaviour* 163

Gilmore J., 'Expression as realization: speakers' interests in freedom of speech' (2011) 30 *Law & Philosophy* 517

Glees A., 'Evidence - Based Policy or Policy – Based Evidence? Hutton and the Government's use of Secret Intelligence' (2005) 58 *Parliamentary Affairs* 138

Glees A. and Davies P., 'Intelligence, Iraq and the Limits of Legislative Accountability during Political Crisis' (2006) 21 *Intelligence and National Security* 848

Glover P., 'Legal uncertainty surrounding the acquisition by UK intelligence-gathering bodies of communications intercepted outside the UK' (2014) 18 *Edinburgh Law Review* 114

Gobert J. and Punch M., 'Whistleblowers, the public interest and the Public Interest Disclosure Act 1998' (2000) 63 *Modern Law Review* 25

Greer S., 'Human rights and the struggle against terrorism in the United Kingdom' (2008) 2 *European Human Rights Law Review* 163

Griffith J., 'The Official Secrets Act 1989' (1989) 16 *Journal of Law and Society* 273

Hambermas J., 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 *Berkeley Journal of Sociology* 95

Hare I., 'Method and objectivity in free speech adjudication: lessons from America' (2005) *International and Comparative Law Quarterly* 49

Hersh S., 'Whistleblowers - Heroes or traitors? Individual and Collective Responsibility for Ethical Behaviour', (2002) 26 *Annual Reviews in Control* 243

Hughes K., 'The right to know the case against you in civil claims' (2012) 71 *Cambridge Law Journal* 21

Hulnick A.S. and Mattausch D.W., 'Ethics and Morality in United States Secret Intelligence' (1989) 12 *Harvard Journal of Law and Public* Policy 509, 522.

Hood C., 'From FOI World to Wikileaks World: A New Chapter in the Transparency Story?' (2011) 24 *Governance* 635

Jackson J., 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] *Public Law* 720

Jacob J., 'From Privileged Crown to interested public' [1993] *Public Law* 121

Jaconelli J., 'The Franks Report on Section 2 of the Official Secrets Act 1911' (1973) 36 *Modern Law Review* 68

Jones P., 'Introduction: law and disobedience' (2004) 10 *Res Publica* 319

Jubb P., 'Whistleblowing: A Restrictive Definition and Interpretation' (1999) 21 Journal of Business Ethics 77

Knight CJS., 'Article 10 and a right of access to information' [2013] *Public Law* 468

Latimer P. and Brown A.J., 'Whistleblower Laws: International Best Practice' (2008) 31 *UNSW Law Journal* 766

Lee W., 'Deep Background: Journalists, Sources and the Perils of Leaking' (2008) 57 *American University Law Review* 1453

Leigh I., 'The Security Service: the Press and the Courts' [1987] *Public Law* 12

Leigh I., 'Case Comment : Spycatcher in Strasbourg' [1992] *Public Law* 200

Lewis D., 'Freedom of Speech and Employment by Lucy Vicker, Publication Review' (2003) 32 *Industrial Law Journal* 72

Lewis D, 'A civil service act for the United Kingdom' [1998] *Public Law* 463

Lewis D. and Homewood S., 'Five years of public interest disclosure legislation in the UK: are whistleblowers adequately protected?' (2004) 5 *Web Journal of Current Legal Issues* 1

Lewis D., 'Enterprise and regulatory reform – whistleblowing aspects' (2012) 110 *Employment Law Bulletin* 5

Linblom L., 'Dissolving the Moral Dilemma of Whistleblowing' (2007) 76 *Journal of Business Ethics* 413

Luban, 'Taking out the adversary: The Assault on Progressive Public-Interest Lawyers' (2003) 91 *California Law Review* 209

Markovits D., 'Democratic Disobedience' (2004-2005) 114 *Yale Law Journal* 1897

Martin B., 'Illusions of Whistleblower Protection' (2003) 5 *UTS Law Review* 119

Mayne S., 'Whistleblowing: protection at last' (1999) 10 *International Company and Commercial Law Review* 325

McHarg A., 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (2003) 62 *Modern Law Review* 671

Merris A., 'Can we speak freely now? Freedom of expression under the Human Rights Act' (2002) 6 *European Human Rights Law Review* 750

Morse M., 'Honor or betrayal: The Ethics of Government Lawyer Whistleblowers', (2010) 23 *Georgetown Journal of Legal Ethics* 421

Nathwani N., 'Religious cartoons and human rights - a critical legal analysis of the case law of the European Court of Human Rights on the protection of

religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad' (2008) 4 *European Human Rights Law Review* 488

Near J. and Miceli M., 'Organizational Dissidence: The case of Whistle-Blowing (1985) 4 *Journal of Business Ethics* 1

Near J. and Miceli M., 'Whistle-Blowing: Myth and Reality', (1996) 22 *Journal of Management* 507

Nobles and Schiff, 'Disobedience to Law - Debbie Purdy's case' (2010) 73 *Modern Law Review* 295

Olsen, 'Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience' (1983-1984) *Georgia Law Review* 929

Ormerod D. and McKay S., 'Telephone Intercepts and their Admissibility' [2004] *Criminal Law Review* 15

Otty T., 'The slow creep of complacency and the soul of justice: observations on the proposal for English courts to adopt 'closed material procedures' for the trial of civil damages claims' (2012) 3 *European Human Rights Law Review* 267

Paeth S.R., 'The Responsibility to Lie and the Obligation to Report', (2013) 112 *Journal of Business Ethics* 559

Palmer S., 'In the interests of the state: the government's proposals for reforming section 2 of the Official Secrets Act 1911' [1988] *Public Law* 523

Palmer S., 'Tightening Secrecy Law: the Official Secrets Act 1989' [1990] *Public Law* 243

Perruchi et al., 'Whistle-blowing: Professional's Resistance to Organizational Authority' (1980) 28 *Social Problems*

Phythian M., 'The British experience with Intelligence Accountability' (2007) 22 *Intelligence and National* Security 75

Popelier P. and Van De Heyning C., 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 *European Constitutional Law Review* 230

Ramsay M., 'The status of hearers' rights in freedom of expression' (2012) 18 *Legal Theory* 31

Raz J., 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27

Raz J., 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303

Reddish M. and Mollen A., 'Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy In the Theory of Free Expression' (2009) 103 *Northwestern University Law Review* 1303

Rivers, 'Propotionality and variable intensity of review' (2006) 65 *Cambridge Law Journal* 174

Rothschild J., "Freedom of Speech Denied, Dignity Assaulted: What the Whistleblowers Experience in the US" (2008) 56 *Current Sociology* 884

Rothschild. J and Miethe T., 'Whistle-Blower Disclosures and Management Retaliation', (1999) 26 *Work and Occupations* 107

Rothschild J., 'The Fate of Whistleblowers in Nonprofit Organizations' (2013) 42 *Nonprofit and Voluntary Sector Quarterly* 886

Rowbottom J., 'In the shadow of the big media: freedom of expression, participation and the production of knowledge online' [2014] *Public Law* 491

Sagar Rahul, 'On Combating the Abuse of State Secrecy' (2007) 15 *The Journal of Political Philosophy* 424

Sawyer, Johnson and Holub, ' The Necessary Illegitimacy of the Whistleblower', (2010) 29 *Business and Professional Ethics Journal* 85

Scheuerman W., 'Whistleblowing as civil disobedience: The case of Edward Snowden' (2014) 40 *Philosophy & Social Criticism* 609

Schonsteiner, Puga and Lovera, 'Reflections on the human rights challenges of consolidating democracies: recent developments in the Inter-American system on human rights' (2011) 11 *Human Rights Law Review* 362

Scott L., 'Sources and Methods in the Study of Intelligence: A British View' (2007) 22 *Intelligence and National Security* 185

Short J., 'Killing the messenger: The use of Nondisclosure Agreements to Silence Whistleblowers' (1998-1999) 60 *University of Pittsburgh Law Review* 120

Singh R., 'The indirect regulation of speech: a time and a place for everything' [1988] *Public Law* 212

Smartt F., 'Reforms take effect but spotlight stays on whistleblowing', (2013) 143 *Employment Law Journal* 22

Smith A. T. H., 'Security services, leaks and the public interest' (2002) 61 *Comparative Law Journal* 514

Smith J.C. and Rees T., 'Official secrets: defence of duress of necessity' [2001] *Criminal Law Review* 986

Stratford J. and Johnson T., 'The Snowden 'Revelations': Is GCHQ Breaking the Law?' (2014) 2 *European Human Rights Law Review* 129

Starmer K., 'Setting the record straight: human rights in an era of international terrorism' [2007] *European Human Rights Law Review* 123

Stephan PB., 'The First Amendment and Content Discrimination' (1982) 68 *Virginia Law Review* 203

Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism', (2008) 4 *Columbia Journal of Transnational Law 73*

Turenne S., 'Judicial responses to civil disobedience: a comparative approach' (2004) 10 *Res Publica 379*

Thomas R., 'The British Official Secrets Acts 1911-1939 and the Ponting case' [1986] *Criminal Law Review* 491

Vaughn R., 'State whistleblower statutes and the future of whistleblower protection', (1999) 51 *Administrative Law Review* 581

Vaughn, Devine and Henderson, 'The whistleblower statute prepared for the Organization of African States and the global legal revolution protecting whistleblowers', (2003) 35 *George Washington International Law Review* 857

Vernon Jensen J., 'Ethical Tension Points in Whistleblowing' (1987) 6 *Journal of Business Ethics* 321

Wadham J., 'Official Secrets Act: at last a right to disclose for spooks?' (2002) 152 *New Law Journal* 556

Weiskopf R. and Willmott H., 'Ethics as Critical Practice: The "Pentagon Papers", Deciding Responsibly, Truth-telling, and the Unsettling of Organizational Morality' (2013) 34 *Organization Studies* 469

Worthy B., 'The Future of Freedom of Information in the United Kingdom' (2008) 79 *The Political Quarterly* 100

Wragg P., 'Mill's dead dogma: the value of truth to free speech jurisprudence' [2013] *Public Law* 363

Yeung K., 'Regulating Government Communications' (2006) 65 *Cambridge Law Journal* 53

--, 'Media law: autobiography published by former Secret Intelligence Service agent' [2006] *European Human Rights Law Review* 86

ARTICLES IN THE PRESS

Bowcott O., 'Mass surveillance exposed by Snowden 'not justified by fight against terrorism' http://www.theguardian.com/world/2014/dec/08/mass-surveillance-exposed-edward-snowden-not-justified-by-fight-against-terrorism

Bright M, 'The woman who nearly stopped the war' http://www.newstatesman.com/blogs/martin-bright/2008/03/katharine-gun-iraq-war-gchq

Gallagher R., 'Eight modern-day whistleblowers (part II)' http://www.newstatesman.com/blogs/the-staggers/2011/04/israel-serpico-manning-ponting

Greenwald G., 'Finally: hear Bradley Manning in his own voice' http://www.guardian.co.uk/commentisfree/2013/mar/12/bradley-manning-tapes-own-words

Kerschberg B., 'The Dodd – Frank Act's Robust Whistleblowing Incentives' http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/

MacAskill E., Independent commission to investigate future of internet after NSA revelations'

http://www.theguardian.com/world/2014/jan/22/independent-commission-future-internet-nsa-revelations-davos

Madar C., ' Why massive national security leaks are good for us' http://www.aljazeera.com/indepth/opinion/2013/02/201322315561328240.html

Moore C., 'Edward Snowden is a traitor, just as surely as George Blake was' http://www.telegraph.co.uk/technology/internet-security/10162351/Edward-Snowden-is-a-traitor-just-as-surely-as-George-Blake-was.html

Norton – Taylor R., 'Binyam Mohamed torture evidence must be revealed, judges rule' http://www.theguardian.com/world/2010/feb/10/binyam-mohamed-torture-ruling-evidence

Norton – Taylor R., 'Civil servant who leaked rendition secrets goes free' http://www.theguardian.com/media/2008/jan/10/pressandpublishing.medialaw

O'Connor J., 'I'm the Guy They Called Deep Throat' http://www.vanityfair.com/politics/features/2005/07/deepthroat200507

Oliver M., 'GCHQ whistleblower cleared' http://www.theguardian.com/uk/2004/feb/25/iraq.pressandpublishing?INTCMP=ILCNETTXT3487

Radack J., 'Too Classified to Try Myth in failed Drake Prosecution' http://www.dailykos.com/story/2011/06/11/984192/--Too-Classified-to-Try-Myth-in-Failed-Drake-Prosecution

Sawyers J., 'Sir John Sawers's speech – full text' 'http://www.theguardian.com/uk/2010/oct/28/sir-john-sawers-speech-full-text

Syal R., 'David Cameron criticised for attacks on Freedom of Information Act' http://www.guardian.co.uk/politics/2012/jul/16/david-cameron-freedom-of-information

Traynor I., 'Internet governance too US-centric, says European commission' http://www.theguardian.com/technology/2014/feb/12/internet-governance-us-european-commission

Winograd D., 'Snowden: Obama's NSA Reforms 'Incomplete' http://time.com/37940/snowden-obama-nsa-reform/

Zizek S., 'Edward Snowden, Chelsea Manning and Julian Assange: our new heroes' http://www.theguardian.com/commentisfree/2013/sep/03/snowden-manning-assange-new-heroes

--, 'Troubled History of the Official Secrets Act' http://news.bbc.co.uk/1/hi/uk/216868.stm

--, 'Are MI5 and MI6 a waste of time and money?: A debate between Michael Randle and Nigel West 29 July 2000 http://www.guardian.co.uk/theguardian/2000/jul/29/debate

--, '1998 Government loses Spycatcher battle' http://news.bbc.co.uk/onthisday/hi/dates/stories/october/13/newsid_2532000/2532583.stm

--, 'Whistleblowers and national security: A case for clemency for Snowden' http://www.economist.com/blogs/democracyinamerica/2014/01/whistleblowers-and-national-security

--, 'David Cameron: We are creating a new era of transparency' http://www.telegraph.co.uk/news/politics/david-cameron/8621560/David-Cameron-We-are-creating-a-new-era-of-transparency.html

TABLE OF CASES

EUROPEAN COURT OF HUMAN RIGHTS

Goodwin v UK (App. No. 17488/90, 27 March 1996)

Grigoriades v Greece (App. No. 24348/94, 25 November 1997)

Guerra and others v Italy (App. No. 14967/89, 19 February 1998)

Guja v Moldova (App. No. 14277/04, 12 February 2008)

Gündüz v Turkey (App. No. 35071/97, 4 December 2003)

Hadjianatassiou v Greece (App No. 12945/87, 16 December 1992)

Halford v UK (App. No. 20605/92, 25 June 1997)

Handyside v United Kingdom (App. No. 5493/72, 7 December 1976)

Heinisch v. Germany (App. No. 28274/08 21 July 2011)

Hertel v Switzerland (Application no. 59/1997/843/1049, 25 August 1998)

Hirst v UK (No2) (App. No. 74025/01, 6 October 2005)

Jersild v. Denmark (Application no. 15890/89, 23 September 1994)

Kennedi v Hungary (App. No. 31475/05, 26 May 2009)

Kennedy v UK (App. No. 26839/05, 18 August 2010)

Klass and others v Germany (App. No. 5029/71, 6 September 1978)

Kudeshkina v. Russia (App. No. 29492/05, 14 September 2009)

Leander v Sweden (App. No. 9248/81, 26 March 1987)

Lingens v. Austria (Application no. 9815/82, 8 July 1986)

Malone v United Kingdom (App. No. 8691/79, 2 August 1984)

Matúz v Hungary (App. No. 73571/10, 21 October 2014)

McGinley and Egan v UK (App. No. 21825/93 23414/94 , 9 June 1998)

Morissens v. Belgium (App. No. 11389/85, Commission decision 3 May 1988)

Murray v United Kingdom (App. No. 14310/88, 28 October 1994)

Observer and Guardian v UK (App. No. 13585/88, 26 November 1991)

Pasko v Russia (App. No. 69517/01, 22 October 2009)

Peev v Bulgaria (App no. 64209/01, 26 July 2007)

Pretty v United Kingdom (App. No., 2346/02, 29 April 2002)

Raichinov v Bulgaria (App no 47579/99, 20 April 2006)

Rekvenyi v Hungary (App. No. 25390/94, 20 May 1999)

Sdruzeni Jihoceske Matky v Czech Republic (App. No 19101/03, 10 July 2006)

Segerstedt-Wiberg and Others v Sweden (App. No. 62332/00, 6 June 2006)

Silver v UK (App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 25 March 1983)

Sosinowska v Poland (App no. 10247/09, 18 October 2011)

Stambuk v. Germany (App. No. 37928/97, 17 October 2002)

Steel and Morris v UK (Application no. 68416/01, 15 February 2005)

Stoll v Switzerland (App. No. 69698/01, 10 December 2007)

Sunday Times v UK (No. 2) (App. No 13166/87, 26 November 1991)

Surek v. Turkey (no. 1) (App. No. 26682/95, 8 July 1999)

Tarsasag v Hungary (37374/05, 14 April 2009)

Telegraaf Media Nederland and others v. Netherlands (App. No. 39315/06, 22 November 2012)

Tillack v Belgium (App no 20477/05, 27 November 2007)

Vereniging Weekblad Bluf v. The Netherlands (App. No. 16616/90, 9 February 1995)

Vogt v Germany (App. No. 17851/91, 26 September 1995)

Voskuil v. *Netherlands* (App No. 64752/01, 22 November 2007)

Weber and Saravia v. Germany (App no. 54934/00, admissibility)

Wille v Liechtenstein (App. No. 28396/95, 28 October 1999)

UNITED KINGDOM

A and others v Secretary of state for the Home Department [2004] UKHL 56

Abdul-Hussain and Others [1999] Crim.L.R. 570

R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd [1992] 1 WLR 1289

Al Rawi v Security Service [2011] UKSC 34

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109

Attorney General v Blake [2000] UKHL 45

R v Attorney General (ex parte Rusbridger)[2003] UKHL 38

R (on the application of A) v B [2009] UKSC 12

Austin v Commissioner of Police of the Metropolis [2009] UKHRR 581

BBC v Sugar [2012] UKSC 4

Cairns (Robert Emmett) [2000] Crim LR 473

Carnduff v Rock [2001] EWCA Civ 680

Chandler v DPP [1964] AC 763

Clyde and Co LLP and another v Bates van Winkelhof [2014] UKSC 32

Cream Holdings Ltd v Banerjee [2004] UKHL 44

David Miranda v The Secretary of State for the Home Department and The Commissioner of the Police of the Metropolis [2014] EWHC 255

R v Department of Health ex p. Source Informatics [2001] QB 424

Evans v Attorney General [2014] EWCA Civ 254

Gartside v Outram (1857) 26 Ch 113

Gaunt v Ofcom [2011] EWCA Civ 692

R v Hasan [2005] UKHL 22

R v Home Secretary ex parte Brind [1991] 1 AC 696

R v Home Secretary, ex p Simms [2000] 2 AC 115

Hutchinson v Newbury Magistrates' Court [2000] EWHC QB 61

Hyde Park Residences v Yelland [2000] EWCA Civ 37

DPP v Jones (Margaret) [1999] 2 AC 240

R v Jones [2006] UKHL 16

R v Keogh (David) [2007] EWCA Crim 528

Kennedy v Charity Commission [2014] UKSC 20

Liberty and others v The Government Communications Headquarters and others [2014] UKIPTrib 13_77-H

Liversidge v Anderson [1942] AC 206

London v Samede and Others [2012] EWHC 34

McCartan Turkington Breen v Times Newspapers Ltd. [2001] 2 AC 277

R v Metropolitan Police Commissioner ex p Blackburn (no2) [1968] 2 QB 150

R. (on the application of Nicklinson) v Ministry of Justice [2014] UKSC 38

Parkins v Sodexho Ltd [2001] UKEAT 1239_00_2206.

R v Ponting [1985] Crim. L.R. 318

R. (ex parte Pretty) Pretty v Director of Public Prosecutions and Secretary of State for the Home Department (Interested Party) [2001] UKHL 61

R (on the application of Purdy) v Director of Public Prosecutions [2009] UKHL 45

R. v Secretary of State for the Home Department Ex Parte Anderson [2002] UKHL 46

R. v Shayler [2002] UKHL 11

Sheldrake v DPP [2004] UKHL 43

Tariq v Home Office [2011] UKSC 35

Westminster City Council v Brian Haw [2002] EWHC 2073 (QB)