

**Dialectics of Transparency and Secrecy in the Information Age:
The Role of Whistleblowing Legislation in the Regulatory Governance of
Markets and in National Security**

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List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
CCSDN	Commission consultative du secret de la défense nationale
CIA	U.S. Central Intelligence Agency
CME	Coordinated Market Economy
CNCTR	Commission de Contrôle des Activités de Renseignement
CPP	French Code of Penal Procedure
CSR	Corporate Social Responsibility
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FBI	U.S. Federal Bureau of Investigation
FISC	U.S. Foreign Intelligence Surveillance Court
FOIA	U.S. Freedom of Information Act
GRI	Global Reporting Initiative
ICCPR	International Covenant on Civil and Political Rights
ICWPA	U.S. Intelligence Community Whistleblower Protection Act
ISC	UK Intelligence and Security Committee
LME	Liberal Market Economy
NPM	New Public Management
NSL	National Security Letters
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OLC	U.S. Office of Legal Counsel
OSCE	Organization for Security and Co-operation in Europe
PIDA	U.K. Public Interest Disclosure Act
PPD-19	Presidential Policy Directive 19
QPC	Question Prioritaire de Constitutionnalité
SEC	U.S. Securities and Exchange Commission
SOX	Sarbanes-Oxley Act
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
WPA	U.S. Whistleblower Protection Act
WPEA	U.S. Whistleblower Enhancement Act

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1. Introduction

1.1. The rise of whistleblowing to prominence and the transparency discourse

Since the early 2010's, 'whistleblowing' has become an internationally recognizable phenomenon. Initially owing its reputation to people like Chelsea Manning and Edward Snowden, whistleblowing has been identified with revelations of serious wrongdoing from organizations' insiders. The type of wrongdoing can vary significantly, ranging from violations of human rights,¹ to tax evasion,² corruption and fraud scandals,³ environmental scandals,⁴ reckless use of personal data,⁵ etc. The increasing number of scandals disclosed by employees with proximity to the source of misconduct has elevated whistleblowing to a catalyst for widespread public debate and occasionally for political reform.⁶ Whistleblowing has also fascinated popular culture⁷ and often provoked diametrically opposed reactions, with some seeing whistleblowers as heroes in the pursuit of justice, while others seeing them as self-

¹ Chelsea Manning, former U.S. soldier, leaked thousands of reports to Wikileaks, including footage of airstrikes that indiscriminately targeted civilians and journalists and to war logs revealing violations of human rights. *See*, Section 3.2.4.3

² Hervé Falciani disclosed multiple instances of tax evasion facilitated by the bank HSBC. 'Profile: HSBC whistleblower Herve Falciani' *BBC* (9 February 2015) <<http://www.bbc.com/news/world-europe-31296007>>. *See*, also the LuxLeaks disclosures by Antoine Deltour regarding tax avoidance schemes in Luxembourg, 'Antoine Deltour: LuxLeaks whistleblower's long legal battle continues' (2017) <https://www.transparency.org/news/feature/antoine_deltour_luxleaks_whistleblowers_long_legal_battle_continues>

³ This is a very broad category with many examples, one of the most well-known being that of Sherron Watkins, who disclosed the Enron fraud scandal, see Lesley Curwen, 'The corporate conscience: Sherron Watkins, Enron whistleblower' *The Guardian* (21 June 2003) <<https://www.theguardian.com/business/2003/jun/21/corporatefraud.enron>>.

⁴ Geoffrey Smith, 'VW's Latest Revelations Came From A Whistleblower' *Fortune* (4 November 2015) <<http://fortune.com/2015/11/04/vw-emissions-whistleblower/>>

⁵ This is the example of the very recent case of Christopher Wylie from Cambridge Analytica. *See*, Carole Cadwalladr, 'I made Steve Bannon's psychological warfare tool': meet the data war whistleblower' *The Guardian* (18 March 2018) <<https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump>>

⁶ Indicatively, the USA Freedom Act, which dissolved the NSA bulk data collection program was passed in 2015 following Edward Snowden's revelations, while the Sarbanes-Oxley Act of 2002 was also motivated by the financial scandals revealed by whistleblowers.

⁷ For example, Edward Snowden has been the protagonist of the documentary *Citizenfour*, directed by Laura Poitras, while he has inspired the movie *Snowden*, directed by Oliver Stone. In 2002, the magazine *Time* named three whistleblowers as persons of the year – Sherron Watkins of Enron, Coleen Rowley of FBI, and Cynthia Cooper of WorldCom.

centred traitors to their organizations and perhaps to their country.⁸ Yet, a common notion is that “whistleblowers voluntarily proceed in the face of personal suffering in order to disclose misconduct and to pursue their allegations”.⁹ Indeed, the fear of retaliation is well founded, often leading to underreporting, as underlined by the European Commission. The Commission’s 2016 Global Business Ethics Survey, covering more than 10 000 workers in 13 countries, showed that while 33 % of the workers observed misconduct, only 59 % of them reported it, with 36 % of the reporters experiencing retaliation.¹⁰

At the same time, whistleblowing has progressively been institutionalized by national legislatures and also supported by soft law international instruments, primarily inspired by the aim of improving enforcement, limiting corruption, and influencing corporate behaviour. Most recently, in April 2018, the EU Commission published a proposal for strengthening the protection of persons reporting on breaches of Union law, highlighting the relevance of whistleblowing for EU governance. Furthermore, the introduction of whistleblowing in the legislative framework is not limited to protection for whistleblowers reporting directly to regulatory agencies; corporations, under the auspices of national frameworks and wary of potential reputational costs, have increasingly installed internal reporting mechanisms for the reporting of wrongdoing, in an effort to improve compliance by enhancing their self-regulatory capacities.¹¹ However, the legal definition of ‘whistleblowing’ does not necessarily follow the on-going political discussions, where whistleblowing’s definition is coloured with moral or ethical undertones. I will come back to this below, in the section on definitions.

Whistleblowing has been an important element of the transparency discourse. The emergence of non-traditional media entities dedicated to radical transparency, such as Wikileaks, as well as the digitalization of media and the ease of data dumps and leaking have fuelled a general debate over the meaning of transparency and its value. On one hand,

⁸ Nate Fick, ‘Was Snowden hero or traitor? Perhaps a little of both’ *The Washington Post* (19 January 2017) <https://www.washingtonpost.com/opinions/was-snowden-hero-or-traitor-perhaps-a-little-of-both/2017/01/19/a2b8592e-c6f0-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.ae0606867e7f>; According to Chris Robichaud, lecturer at Harvard Kennedy School, students were almost evenly divided on the permissibility of Edward Snowden’s actions, ‘Edward Snowden: Hero or Traitor?’ <<https://www.hks.harvard.edu/news-events/news/articles/edward-snowden-hero-or-traitor>>

⁹ Robert G Vaughn, *The successes and failures of whistleblower laws* (Edward Elgar 2012) 207

¹⁰ European Commission, ‘Communication COM(2018) 214 on strengthening whistleblower protection at EU level’ (23 April 2018) 2

¹¹ A significant step for this approach was the Sarbanes Oxley Act of 2002, although codes of conduct or ethics which encouraged the internal reporting of malpractices had been progressively introduced already since 1995, David Lewis, ‘Whistleblowers and Job Security’ (1995) 58(2) *The Modern Law Review* 208, 210.

transparency is celebrated as a fundamental liberal value and as an ultimate method for controlling power, drawing from Jeremy Bentham's idea that transparency functions as 'security against misrule',¹² while it even posits itself as a new social ideal.¹³ This cultural prevalence of the 'transparency ideal' has involved an increase in the discourse on the merits of transparency, as well as significant institutional reforms. The examples are plentiful and range from declarations of principles and policies,¹⁴ to new laws changing the institutional structure.¹⁵ On the other hand, the discourse of transparency has also encountered a more sceptical reception in some quarters, including critiques of its effectiveness, its costs, or even its potentially contradictory consequence of rendering the citizens less, rather than more informed. Furthermore, transparency has been understood as part of a structural shift in contemporary governance, reflecting tectonic changes in the functioning of administrations and in the process of regulation, changes which are not unrelated to neoliberal economic rationalities. Yet, while transparency appears as a governmental rationality, it also, and perhaps contradictorily, signals a new social critique. According to Marchel Gauchet, transparency, together with rights, constitute a new critique, which is nevertheless limited, decentralized, and without a holistic proposition.¹⁶

However, the move toward transparency should not obscure the persistence of governmental –and corporate– secrecy. Even if corporate secrecy, in the form of the protection of trade secrets, has been understood as compatible with robust whistleblowing protection in both the U.S. and the EU, governmental secrecy in national security and disclosures of

¹² James E Crimmins, 'Jeremy Bentham' [2018] The Stanford Encyclopedia of Philosophy <<<https://plato.stanford.edu/archives/sum2018/entries/bentham/>>>

¹³ For a discussion on the cultural positioning of transparency as a superior form of disclosure, see Clare Birchall, 'Radical Transparency?' (2014) 14(1) Cultural Studies ↔ Critical Methodologies 77

¹⁴ There seems to be a consensus that transparency is an integral component of good governance. Indicatively, see global governance institutions such as the IMF, International Monetary Fund, 'Transparency at the IMF' (2017) <<https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/35/Transparency-at-the-IMF>>, or the World Bank, World Bank, 'Transparency in Public Finance' (2015) <<http://www.worldbank.org/en/topic/governance/brief/transparency-in-public-finance>>. At the same time, questions of legitimations seem inextricably connected to the principle of transparency. For example, U.S. President Barack Obama defended the NSA's activities after Snowden's revelations, calling them transparent, Mollie Reilly, 'Obama Defends 'Transparent' NSA Program' *The Huffington Post* (17 June 2013) <https://www.huffingtonpost.com/2013/06/17/obama-nsa-surveillance_n_3455771.html>, and when he promised to reform the surveillance programs a year later, he placed the emphasis on increased transparency, The White House, *Remarks by the President on Review of Signals Intelligence* (2014).

¹⁵ Indicatively, in the different fields of public administration and economic regulation, see the Digital Accountability and Transparency Act of 2014 in the U.S. and the Directive 2014/95/EU on non-financial reporting in the EU.

¹⁶ Marchel Gauchet, *La démocratie contre elle-même* (Gallimard 2002) 360

wrongdoing remain an unresolvable point of contention. National security secrecy has in fact expanded since the outbreak of the ‘war on terror’, as is evident from intensified counter-terrorist policies, over-classification, the invocation of non-disclosure privilege in court proceedings, and the introduction of new surveillance practices.¹⁷ In the U.S., this expansion has been topped with a prosecutorial approach toward leakers and whistleblowers who disclose classified information, even if they reveal serious wrongdoing. The *prima facie* paradoxical move toward both transparency and secrecy and the place whistleblowing occupies in this nexus animates my project and its research questions.

1.2. The dualism hypothesis: Research questions

As I will show throughout the text, the gradual introduction of whistleblowing protection in national and supranational legislative frameworks, especially in the fields of financial and corporate regulation, is contrasted by the lack of provisions for whistleblowers in national security and a prosecutorial approach towards disclosures of classified information. In the context of regulation of market actors, where a certain level of transparency is necessary to guarantee market integrity, whistleblower protection schemes, which often involve significant financial incentives, are institutionalized. On the contrary, in the context of national security, where the executive branch strives to maintain control over the information flow, whistleblowing entails administrative and often also criminal sanctions.

This hypothesis of a dualism in the legal reception of the phenomenon of whistleblowing structures the fundamental research question of the project, which is how the role of whistleblowing in contemporary society can be conceptualized from a legal perspective. Is whistleblowing a human right, an aspect of freedom of expression and the right to information, in other words, a recent extension of the first generation of liberal rights? The European Parliament, in its recent Resolution 2016/2224 of 24 October 2017 supports such an approach and sees these fundamental rights as the desired legal basis for the expansion of whistleblower protection.¹⁸ But does this approach reflect the current institutionalization of whistleblower protection? Or does whistleblowing’s institutionalization centre on its function in securing the optimal level of transparency in the functioning of the markets, while minimizing governmental

¹⁷ See, Section 3.1.1.3

¹⁸ Resolution 2016/2224(INI) 24 October 2017 (European Parliament) [A]

intrusion? Is the institutionalization of whistleblowing, in this sense, an instrument of regulation, rather than an extension of human rights? An intermediary position might be drawn from the concept of societal constitutionalism. The premise of societal constitutionalism is the notion that contemporary society lacks an apex or a centre,¹⁹ which leads Gunther Teubner to the conclusion that a transformative project of society passes through the incorporation of a plurality of societal rationalities within different social systems.²⁰ This means that the global economy must be infused with ‘public’ rationalities –beyond mere economic rationalities– that relate to society at large and guarantee the possibility of dissent. This role, fulfilled in the past by collective bargaining, co-determination, and the right to strike, is now meant to be fulfilled by ethics commissions and external mechanisms of support for whistleblowers.²¹ In this sense, whistleblowing could be considered a right, but a right conceived in a functional way as a counter-institution for the expansion of the rationalities of social systems.²² This conceptualization, regardless of the overall questionability of its transformative character, especially in the context of the economy, could constitute an axis for reform in situations where whistleblowing does not receive any substantial protection, such as national security.

In the process of answering the broad theoretical question on the role and nature of the institution of whistleblowing in contemporary democracies, a transitional set of questions must be posed, and these are necessarily interlinked with the methodology of this study. Through an approach that is both doctrinal and comparative, my study aims to elucidate the specific attributes of whistleblowing protection and incentivization, their interaction with the overall normative framework, and their reception and interpretation by the judiciary. The comparative lens organizes this set of transitional questions around the similarities and differences between the different models of whistleblowing protection, in particular here the U.S. model and the European model –including the internal comparison from which it could be asserted whether or not there is in fact a ‘European model’. In answering these questions, generally applicable principles can be drawn which can, with a certain level of caution that is inherent in social sciences and especially in inductive reasoning, be used for the level of abstraction that is

¹⁹ Niklas Luhmann, *Political Theory in the Welfare State* (De Gruyter 1990), 43

²⁰ Gunther Teubner, *Constitutional fragments: Societal constitutionalism and globalization* (Oxford University Press 2012) 34

²¹ *ibid* 88-89

²² For the conceptualization of rights as mechanisms for the protection and stabilization of the functionally differentiated society *see*, Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (2. Aufl. Duncker & Humblot 1974)

necessary for answering the original question. In that direction, an initial hypothesis of transatlantic convergence can be formulated. The history of whistleblowing protection points to the United States. Originating as an institution already from the era of the Civil War through the False Claims Act, whistleblowing gained significant traction in the 1970s as a “last line of defence”²³ of ordinary citizens against powerful institutions, being consistent with the emerging trend of deregulation and widespread scepticism that the government is in the best position to remedy social ills.²⁴ In Europe, scepticism towards whistleblowing²⁵ and generally stronger employment protection in contrast to the U.S. led to whistleblowing provisions arriving much later²⁶ and becoming a topic of EU law only in the past few years.²⁷ The adoption, however, of whistleblower protection for the reporting of infringements of the Market Abuse Regulation,²⁸ which seems to mirror regulatory developments in the U.S. and specifically elements of the Dodd-Frank Act, as well as the proposal for a general EU directive on the protection of reporting persons seem to suggest a potential bridging of the continental divide.

Another set of questions arises from the place whistleblowing occupies in the context of parallel and simultaneous moves towards both transparency and secrecy. The paradoxical situation where the self-proclaimed ‘most transparent administration in history’ prosecuted more disclosers of classified information than all the previous administrations combined²⁹ may

²³ Ralph Nader, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Grossman Publishers 1972) 7

²⁴ Daniel P Westman and Nancy M Modesitt, *Whistleblowing: The law of retaliatory discharge* (2nd ed. Bureau of National Affairs 2004) 1-12

²⁵ According to Danièle Lochak, ‘Les lanceurs d’alerte et les droits de l’Homme : réflexions conclusives’ (2016) 10 *La Revue des Droits de l’Homme* <<https://journals.openedition.org/revdh/2362#tocto2n5>>, referring to a “bureaucratization” of whistleblowers in France and to a transformation to “collaborators” of public authorities, indicating some of the scepticism resulting from the experience of informants in totalitarian regimes across Europe.

²⁶ The adoption of the Public Interest Disclosure Act (PIDA) of 1998 in the UK was pioneering.

²⁷ In 2013, Transparency International reported that whistleblowing legislation in the EU Member States was overall weak, Transparency International, ‘Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU’ (2013) 12. Since then, several Member States, including France and Ireland, amended their legal frameworks, expanding whistleblower protection. The introduction in EU law took place through the Implementing Directive (EU) 2015/2392 for the, nevertheless, limited field of market abuse.

²⁸ Commission Implementing Directive (EU) 2015/2392 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation 17 December 2015

²⁹ Jason R Arnold, ‘Has Obama delivered the ‘most transparent’ administration in history?’ *The Washington Post* (16 March 2015) <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/16/has-obama-delivered-the-most-transparent-administration-in-history/?utm_term=.6d7c882401e5>, Rashed Mian, ‘Obama’s

be neither a failure to keep political promises, nor as paradoxical as it initially appears. It could signify a broader trend to protect whistleblowers as carriers of information: As long as the information is useful for a specific purpose and regulatory goal (i.e., to protect the integrity of the market from corruption and fraud), whistleblowers are protected from retaliation and incentivized to disclose misconduct, while as soon as information is not valuable for a regulatory goal and can instead only damage the reputation of an institution, secrecy is preferred and whistleblowers face employment-related and even criminal sanctions. What would such an *'à la carte'* protection of whistleblowers reveal for the relationship between the institutionalization of transparency and secrecy? My hypothesis is that transparency and secrecy do not describe opposing values but instead ideal-types of control of the information flow. In other words, they describe functionalities that are meant to optimize the operation of the systems wherein they are employed.

The final research question has its roots in the described dualism, but looks beyond, toward a new normative framework. Specifically, taking into consideration that protection of whistleblowers and public disclosures in national security does not appear to be robust, what would be the framework that would allow to maximize their protection, without sacrificing the constitutional value of national security? In other words, how can whistleblowing and national security interests be balanced? Considering that disclosures of violations of law and abuse of authority within national security are important for the public interest and that not all forms of state secrecy can be understood as democratically legitimate, it is necessary to outline the principles of *democratic secrecy* and how individuals who disclose instances of illegitimate secrecy may be protected. Such a project of reform could be concretized following the model of societal constitutionalism and reflexive law, which would imply understanding the conflict over national security whistleblowing as not primarily a conflict over subjective liberties versus public interest, but as a question of limiting the national security system from a possibly dangerous expansion of its rationalities –in brief, as a question of democratic control over security politics.

This is a project on the comparative institutionalization of whistleblowing in the regulatory governance of the markets and in national security. I will therefore not discuss the place of whistleblowing in ethics and political philosophy or whether it could constitute a form of civil

disobedience.³⁰ I will also not engage in a sociological analysis of the motivations of whistleblowers, or with empirical studies on the effectiveness of different approaches to whistleblower protection.³¹ I also do not address, but only incidentally and in context, the case of investigative journalism and its claim to freedom of press and freedom of opinion, the protection of journalistic sources, or the general conflict between government secrecy and freedom of the press.³² Lastly, I do not conduct a detailed analysis of specific whistleblowing protection provisions that relate to other specific domains or sectors (e.g. provisions in specific environmental regulations or regarding public procurement, etc).³³ Before unfolding the methodology through which I approach my research questions, and particularly the overarching question of a legal-theoretical conceptualization of whistleblowing, I define key concepts of my study.

1.3. Definitions and distinctions

1.3.1. Whistleblowing

First of all, some clarity is needed in relation to the term ‘whistleblowing’ itself. According to Transparency International’s guiding definition, whistleblowing is “the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organizations (including perceived or potential wrongdoing) –which are of concern to or threaten the public interest– to individuals or entities believed to be able to effect action”.³⁴ Unpacking this definition, the most important elements are: a) the existence of wrongdoing that threatens the public interest within organizations, b) the disclosure of this wrongdoing to individuals or entities able to effect action. A whistleblower is “any private or

³⁰ E.g., William E Scheuerman, ‘Whistleblowing as civil disobedience: The case of Edward Snowden’ (2014) 40(7) *Philosophy & Social Criticism* 609

³¹ E.g., Yuval Feldman and Orly Lobel, ‘Decentralized enforcement in organizations: An experimental approach’ (2008) 2(2) *Regulation & Governance* 165

³² E.g., Geoffrey R Stone, ‘Government Secrecy vs. Freedom of the Press’ (2007) 1 *Harvard Law and Policy Review* 185

³³ For books covering whistleblowing protections in national contexts overall, see Westman and Modesitt (n 24); Jeremy Lewis and others, *Whistleblowing: Law and practice* (Third edition, Oxford University Press 2017).

³⁴ Transparency International (n 27) 87

public employee or worker” who discloses this type of information.³⁵ This definition constitutes a good starting point, but it must be noted that it does not represent a globally accepted standard. France, for instance, incorporates different elements in the legal definition of whistleblowers: “A whistleblower is a natural person who reveals or reports, disinterestedly and in good faith, a crime or an offense, a serious and manifest violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law or regulations, or a serious threat or harm to the public interest, of which he or she has been personally aware”.³⁶ This time elements such as good faith or the specification of what constitutes wrongdoing enter the definition. The UK Public Interest Disclosure Act (PIDA) of 1998 did not provide an encompassing definition, but instead specified the set of circumstances and conditions that entitle protection to employees reporting on wrongdoing. For the purposes of this project I do not construct my own normative definition of whistleblowing, but instead, following a socio-legal and comparative-functionalist approach, I examine whistleblowing based on what is understood as such in the legal framework of the examined countries. I elaborate on my comparative approach in the Section on Methodology.

Whistleblowing must, nevertheless, be distinguished from leaking. Leaking, according to Björn FASTERLING and David Lewis, “commonly refers to the situation where an insider gives (“leaks”) an organization's confidential or unpublished information to an outsider”.³⁷ However, considering that whistleblowers also give inside information to outsiders, the possibilities of overlapping with whistleblowing blur the distinction.³⁸ In fact, the differentiation takes place at the level of the legal definitions of the conditions that grant protection to public interest disclosures. Whistleblowers are then those who a) follow the designated procedures for reporting, while b) the content of their disclosures must refer to the protected categories, meaning that they must be disclosing some type of wrongdoing. Leakers, on the other hand,

³⁵ Transparency International opts for a broad definition of employees, including “consultants, contractors, trainees/interns, volunteers, student workers, temporary workers, and former employees”, *ibid* 87

³⁶ Loi n° 2016-1691 du 9 décembre relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, art 6.

³⁷ Björn FASTERLING and David Lewis, ‘Leaks, legislation and freedom of speech: How can the law effectively promote public-interest whistleblowing?’ (2014) 153(1) *International Labour Review* 71, 73

³⁸ *See, ibid*, the uncertainty of the authors regarding the criteria of distinction. For news agencies characterizing Edward Snowden differently *see*, Erik WEMPLE, ‘Edward Snowden: ‘Leaker,’ ‘source’ or ‘whistleblower?’’ *The Washington Post* <https://www.washingtonpost.com/blogs/erik-wemple/wp/2013/06/10/edward-snowden-leaker-source-or-whistleblower/?utm_term=.a1b39d192cee>

are those who step out of the institutional framework to make in principle anonymous disclosures that are not content-specific –they do not necessarily reveal wrongdoing. Yet, the institutionalization of reporting mechanisms being often restrictive, certain categories of disclosures that content-wise would fit into the broader understanding of whistleblowing (they fulfil criterion b) actually bypass the designated framework (they do not fulfil criterion a). For example, in the U.S., as most of the prominent leaks that arguably revealed wrongdoing, such as those of Manning, Snowden, and earlier that of Ellsberg did not follow the designated procedures, the term whistleblower, in its broad sense as the disclosure of wrongdoing to protect the public interest, became disconnected with its legal status in the Whistleblower Protection Act or the related statutes. Therefore, in order to preserve the ethical core of the term ‘whistleblowing’, which has to do with the reporting of wrongdoing in the public interest, without at the same time rendering the distinction performed by the law between disclosures that follow a procedure to deserve protection (whistleblowing) and disclosures that do not follow the set framework (leaking) meaningless, an intermediary category needs to be conceptualized. For the sake of clarity, I propose a tripartite terminological distinction: *stricto sensu* whistleblowers, for those who follow the legal procedures to report on wrongdoing, *lato sensu* whistleblowers, who also disclose wrongdoing but not through the prescribed channels, but for instance to the press, and *leakers*, who disclose classified information not to the prescribed mechanisms and not involving wrongdoing. I discuss this distinction in greater length in Section 3.1.2.1.

My project focuses on the comparative institutionalization of whistleblowing in corporate and financial regulation and in national security. Due to the relative weakness of relevant provisions in the latter, I use the abovementioned tripartite distinction to discuss the possibility for protection for *lato sensu* whistleblowers.

1.3.2. Regulatory governance

Regulation is a concept that has drawn different definitions, with the most important dividing line being whether it should be limited to state-made rules or whether it should remain open to non-state actors. According to the more restricting understanding of regulation suggested by David Levi-Faur, “regulation is the promulgation of prescriptive rules, as well as the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors”, as long as the rules are not formulated directly by the

legislature or the courts.³⁹ This view limits ‘regulation’ to administrative rule making. A broader definition is offered by Colin Scott, according to whom regulation can be defined as “any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed-back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime”.⁴⁰ This definition is compatible with the developments of ‘new governance’ and it takes into consideration the contemporary relevance of regulatory pluralism.

Regulatory governance, for the purposes of this project, denotes governance through regulation, with regulation being understood broadly as a set of processes that generates rules which exert some form of social control, monitoring and feedback, and enforcement. Whistleblowing protection provisions, as I will show throughout the text and in particular in Chapter 2.2, can be part of a state-centred approach of enhancing enforcement against various instances of market abuse, institutionalizing then channels of reporting directly to regulatory agencies;⁴¹ or they can be part of a ‘new-governance’ approach that aims to enhance the self-regulatory capacities of corporations by prioritizing internal reporting and resolution of the issue.⁴² Regulation and governance theories are connected by the fundamental idea of a profound shapeability of social phenomena.⁴³ In that direction, whistleblowing protection provisions represent a way to steer corporate behaviour away from practices that may threaten the integrity of the markets and potentially lead to major socio-economic crises.

As market is conventionally understood “the means by which the exchange of goods and services takes place as a result of buyers and sellers being in contact with one another, either directly or through mediating agents or institutions”.⁴⁴

³⁹ David Levi-Faur, ‘Regulation and regulatory governance’ (Jerusalem Papers in Regulation and Governance 2010) 7

⁴⁰ Colin Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ [2001] Public Law 283, 283. *See, also*, Julia Black, ‘Critical reflections on regulation’ (2002) 27 Australian Journal of Legal Philosophy 1, 29-34 for a broad definition of regulation encompassing law as one of its techniques.

⁴¹ These are the examples of the Dodd-Franck Act or, to a lesser extent as the individual retains the possibility of reporting internally, of the Directive 2015/2392 on the reporting of infringements of the market abuse Regulation.

⁴² These are the examples of the Sarbanes Oxley Act and of the proposed Directive on the protection of individuals reporting on breaches of the EU law.

⁴³ Alfons Bora, ‘Semantics of ruling: reflective theories of regulation, governance, and law’ in Regine Paul and others (eds), *Society, Regulation and Governance* (Edward Elgar 2017) 19

⁴⁴ Joan V Robinson, ‘Market’ [1998] Encyclopaedia Britannica <<https://www.britannica.com/topic/market>>

1.3.3. National Security

According to the U.S. Supreme Court, ‘national security’ relates to activities directly concerned with the nation's safety, as distinguished from the general welfare.⁴⁵ It is conventionally understood as covering both national defence, including the existence of armed forces, and foreign policy, while it is often understood as functionally encompassing “economic security, monetary security, energy security, environmental security, military security, political security and security of energy and natural resources”.⁴⁶ It has long since been pointed out that the term ‘national security’ carries significant ambiguity.⁴⁷ For the purposes of this study, national security is understood as a constitutional value⁴⁸ that is valid transnationally, even if national interpretations of its exact content might differ. It is therefore its normative status that is more interesting for this project, rather than its substantive content, a course of study usually undertaken by political scientists. At the same time, as I elaborate in Section 3.1.1.2, national security should be also understood as a subsystem of the political system, having its own functionally differentiated code of communication which is constituted by the process of classification and the existence of secrecy.

1.3.4. Transparency, secrecy, and dialectics

Defining transparency *a priori* would limit the scope of the project, part of the goal of which is to determine what is meant by ‘transparency’ in governance and its relationship to secrecy. It was already highlighted that transparency draws much traction as a liberal value, a method to control power, or even a social ideal. Indeed, the information age is for many also

⁴⁵ *Cole v. Young* 351 U.S. 536, [1956] (US Supreme Court) [544]

⁴⁶ U.S. Legal Inc. ‘National Security Law and Legal Definition’ <<https://definitions.uslegal.com/n/national-security/>>

⁴⁷ For example, Arnold Wolfers, ‘"National Security" as an Ambiguous Symbol’ (1952) 67(4) Political Science Quarterly 481

⁴⁸ Richard A Posner, ‘National Security and Constitutional Law Précis: The Constitution in a Time of National Emergency’ (2009) 42 Israel Law Review 217, 218

the “age of transparency”.⁴⁹ Information has now become a sub-discipline of economics⁵⁰ and market competition can only be said to be fair and free and thus able to permit the optimal allocation of resources under the condition that there are no major information asymmetries. Lack of transparency can be seen as being at the root of market failures, as for example was the case, according to the United States’ and the IMF’s argumentation, with the 1997 financial crisis, which resulted from, among other things, the lack of transparency in East Asian countries.⁵¹ As I will argue, transparency in governance is accordingly fuelled by instrumental considerations of delineating the ideal flow of information within markets; enough to guarantee market integrity and a level playing field for private actors, while at the same time reducing state coercion to a minimum. Therefore, an initial definition is that transparency does not describe an absolute openness but one possible level of restriction of the information flow. The decision as to what remains visible is open to political contestation. Similarly, secrecy in governance is also fuelled by reasons of functionality. Confidentiality represents a method of control of the information flow from the administration. However, as I will show, secrecy should also not be understood as total opacity. Therefore, the initial definition of transparency applies to secrecy as well, meaning that it also describes one possible level of restriction of the information flow.

This brings to the foreground the question of dialectics. The dialectical method, as it was employed by G.W.F. Hegel, is constructed upon the initial contradiction of two opposing sides. This opposition leads to the development of a new, more sophisticated view of the topic addressed by the original contradictory views. Dialectics, for the purposes of the title of the dissertation, is meant to indicate the progressive passing from a simplified conceptualization of transparency and secrecy as opposing values, to a more nuanced understanding of the commonality of the two as different managements of visibilities, the employment of which is based on a substratum of functionality. In short, the dialectics referred to in this work invite the reader to see transparency and secrecy as functionalities of governance.

⁴⁹ Indicatively, from different perspectives and fields, Micah Sifry, *Wikileaks And The Age Of Transparency* (Counterpoint 2011), Don Tapscott and David Ticoll, *The Naked Corporation: How the age of transparency will revolutionize business* (Viking Canada 2003), Sean Larkin, ‘The Age Of Transparency: International Relations Without Secrets’ *Foreign Affairs* (2016) <<https://www.foreignaffairs.com/articles/world/2016-04-18/age-transparency>>

⁵⁰ See, Joseph E Stiglitz, ‘Information And The Change In The Paradigm In Economics’ (2002) 92(3) *The American Economic Review* 460

⁵¹ *ibid* 487

1.3.5. Information age

The information age, for the purposes of this work, is understood as the time period in which the technologies of communication and information processing have become central to knowledge generation and to economic, cultural, and political processes on a global scale. The first wave of cybernetics emphasized that while the industrial revolution was based on the transformation and transmission of energy, the twentieth century marks a shift by being based on the transformation and transmission of information.⁵² Manuel Castells also reproduces this dichotomy, stressing that the industrial mode of development centred on economic growth and output, while the informational model is oriented toward the accumulation of knowledge and higher levels of complexity in information processing.⁵³ According to the sociologist, the most decisive historical factor accelerating the information technology paradigm has been the process of capitalist restructuring originating in the 1980s, including the globalization of markets, which necessitated technological innovation and organizational change to be carried out successfully.⁵⁴

My purpose is not to give an account of the different sociological and historical examinations of what constitutes the information age,⁵⁵ but to contextualize my research in time. Indeed, the research on transparency and secrecy is a research on the restrictions to the flow of information. Whistleblowing, especially in the form of public disclosures, is linked to the provision of information where information was lacking, challenging institutionalized channels of information sharing. This provision of information might lead, depending on the legal framework and the particular procedures followed by the whistleblower, from financial rewards to criminal sanctions and imprisonment. At the same time, methods of acquisition and channels of dissemination of confidential information have become more sophisticated and

⁵² Ronald R Kline, *The cybernetics moment: Or why we call our age the information age* (John Hopkins University Press 2015) 73

⁵³ Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture* (Wiley-Blackwell 2009) 17

⁵⁴ *ibid* 18. Regarding this restructuring, *see* the emphasis on the shift from vertical bureaucracies to the horizontal corporation at 176. *See*, also, Sections 2.1.1.2 and 2.1.1.3.

⁵⁵ Beyond the sources already cited, *see* indicatively, Melvin Kranzber, ‘The information age: evolution or revolution?’ in Bruce R Guile (ed), *Information Technologies and Social Transformation* (National Academy of Engineering 1985), Daniel R Headrick, *When information came of age: Technologies of knowledge in the age of reason and revolution, 1700-1850* (Oxford University Press 2000), and Ronald E Day, *The modern invention of Information: Discourse, history, and power* (Southern Illinois University Press 2008).

more accessible respectively, creating an environment where ‘leaks’ and ‘public interest disclosures’ take place on a regular basis, affecting social and political debates globally.

1.4. Methodology

Comparative legal study has gained prominence in the era of globalization, as a result of the structures of interdependence and global governance, the global integration of markets, the transnational operation of corporate entities, and the intensified social and cultural relationships between states. Comparative law is meant to provide important insight in historical and philosophical legal research, while it could also be useful for improving national law, or for understanding foreign institutions, potentially improving international relations and cooperation.⁵⁶ The methodology of comparative law I follow in this work is informed, on a first level, by comparative functionalism, with a sociological theoretical orientation.⁵⁷ According to Günther Frankenberg’s discussion of ideal-types of comparative legal methodologies, comparative functionalism performs a functionalist analysis as method of comparison, which means that it posits analogous problems and presents their respective solutions, taking into consideration, as John Reitz points out, the possibility of functional equivalence.⁵⁸ The pivotal methodological principle determining the choice of the laws to be compared, the scope of the comparison, and the evaluation of the findings is functionality.⁵⁹

In that direction, I compare the legislations outlining whistleblowing protections bearing in mind their functionality for the respective legal system. The basic comparison between the U.S. and the EU was chosen because they represent societies at similar stages of socio-economic

⁵⁶ René David and John E C Brierley, *Major legal systems in the world today: An introduction to the comparative study of law* (2d ed. Free Press 1978) 4

⁵⁷ Bearing in mind Ralf Michaels’ insightful criticism that comparative functionalism is a misnomer and that there is not one single functionalism, Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2012). In that direction, my methodology absorbs elements from functionalism, while maintaining a critical perspective.

⁵⁸ John C Reitz, ‘How to Do Comparative Law’ (1998) 46(4) *The American Journal of Comparative Law* 617, 620. For an overall critical presentation of comparative functionalism, as well as its juxtaposition with other comparative law methodologies, see Günther Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26(2) *Harvard International Law Journal* 411, 428, 434-440. For a more nuanced discussions, arguing that the functionalist approach “is strong as a tool for understanding, comparing, and critiquing different laws, but a weak tool for evaluating and unifying laws”, see Michaels (n 57)

⁵⁹ Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (n 58) 436

development which have in the past decade dealt in depth with whistleblowing, producing new legislation and theoretical frameworks. Within the EU, I will examine the cases of the UK, France, and Ireland. The UK has been a pioneer in the protection of whistleblowers through the Public Interest Disclosure Act (PIDA) of 1998, which served as a prototype and source of inspiration of newer legislations, including that of Ireland. Despite the ‘Brexit’ process, in terms of whistleblowing legislation the influence and significance of UK’s legislation would make it hard to decide not to include it in the comparison. France presents a special interest as a country of civil law that recently (2013-2016) enacted several laws protecting whistleblowers, challenging traditional aspects of its legal culture and provoking discussions within its academic community. Ireland was chosen because its legislation of 2014 constitutes the highest and most encompassing standards for protection of whistleblowers.

Through the investigation of functional equivalence between the said countries, comparative analysis can achieve broader levels of abstraction.⁶⁰ In its turn, this abstraction can be instrumental in questioning legal formalism and legocentrism by uncovering the political underpinnings of legal doctrines, thus “working towards a political theory of law”.⁶¹ In that sense, my project follows the perspective of critical comparisons, avoiding a pure functionalism.⁶² Frankenberg attacks functionalism because of its starting point of the sameness of problems⁶³, which constitutes its “first transcendental moment”.⁶⁴ This critique, however, seems to underestimate the materiality of transnational relations under conditions of globalization and how a number of distinct and concrete ‘problems’ appear, albeit in different contexts, across borders. However, this material condition of transnationality need not necessarily lead to a formalistic understanding of the law as a technical instrument for conflict resolution, obscuring its partiality under a guise of neutrality and objectivity, as critics attribute to comparative functionalism.⁶⁵ Throughout my project, I aim to connect the developments in whistleblowing legislation with particular developments of the political economy or with the

⁶⁰ Reitz (n 58) 625-626

⁶¹ Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (n 58), 452. *See*, also Jonathan Hill, ‘Review: Comparative Law, Law Reform and Legal Theory’ (1989) 9(1) *Oxford Journal of Legal Studies* 101, 115.

⁶² *See*, Günter Frankenberg, *Comparative law as critique* (Edward Elgar Publishing 2016)

⁶³ As long as institutions are non-universal, only problems can play the role of the invariant, Michaels, *The functional method* 367

⁶⁴ Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (n 58) 436

⁶⁵ For an overview of the critiques, *see* Ugo Mattei, ‘Comparative Law and Critical Legal Studies’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2012)

specific political interests of the executive power, thus denying the notion that law may be conceived as solely technical means for ‘problem-solving’ and instead highlighting its dependence on political decisions and on hegemonic understandings of economic efficiency. This is how the topics of markets and national security were chosen. Being representative of two extreme ends of institutional approaches to whistleblowing, these two fields of regulation inevitably raise the question why they address reporting organizational misconduct in such distinctly opposing fashions. The potency of this question only grows when the similarity of the approach between different countries and legal cultures is considered. The functionality of the whistleblowing legislation, as it has been implemented across both sides of the Atlantic, is in fact the instrument through which the uncovering of the political underpinning of law is achieved.⁶⁶ Hence the merging of functionalist methodological elements and a critical perspective. At a second level, the critique against functionalism’s implied universalism entails a reduced understanding of ‘function’ from the perspective of comparative functionalism. It is indeed possible that comparisons may not be able to grasp the multiplicity of functions of law in a specific framework. It is difficult to consider all the possible aspects of historical and conceptual diversity between compared countries, but self-reflection, self-awareness of one’s vantage point, and international co-operation in the examination of particular issues can constitute an initial, at least, answer to this type of ‘post-modern critique’.⁶⁷ It could be criticized that, to the extent that my approach on the question of how to balance whistleblowing in the public interest and national security contains a normative element, there lies an implicit universalism –inherent in normative arguments– that contrasts the legal sociological outlook of previews chapters of the dissertation. In any case, apart from canalizing the universalism of a normative legal argument through contextualization,⁶⁸ my distancing from the logics of a supposedly unflinching objectivity or of an undialectical concretization of Reason, might present an answer to this type of critique.

⁶⁶ This answers to David Kennedy’s point of reevaluating ideological agnosticism, David Kennedy, ‘The Methods and the Politics of Comparative Law’ in Pierre Legrand and R. J C Munday (eds), *Comparative legal studies: Traditions and transitions* (Cambridge University Press 2003) 345.

⁶⁷ For a response to the post-modern critiques against the objectivity, universality, and neutrality of comparative law, see Anne Peters and Heiner Schwenke, ‘Comparative Law Beyond Post-Modernism’ (2000) 49(04) *International and Comparative Law Quarterly* 800, citing Karl S Popper, *The Open Society and its Enemies* (Princeton University Press 1950) 403 on the idea that international cooperation should be replacing the quest for a supposed objectivity.

⁶⁸ See, Section 3.1.4.3

An important aid in comparative research, where the lack of full knowledge of the compared institutional cultures is an inherent obstacle of the undertaking, is the employment of an interdisciplinary approach. Legal orders are comprised not only of a system of norms, but of a nexus of institutional arrangements which must be examined in order to achieve a better understanding of the issue under scrutiny.⁶⁹ Accordingly, I have employed elements from systems theory in order to elucidate the role transparency and secrecy fulfill in different social systems, as well as derivatives of systems theory, such as the concepts of societal constitutionalism and reflexive law stemming from Gunther Teubner's work in order to delineate a form of democratic secrecy in the context of national security and to fuel my suggestion for an institutional reading of the conflict over whistleblowing. I have also imported conclusions from political science and the research field of the regulatory state, which I employ to better understand whistleblowing's different forms of institutionalization and their connection to contemporary forms of governance. I have followed doctrinal legal reasoning in the analysis of several cases of international law, especially in the context of the European Court of Human Rights. Klaus Hoffmann-Holland stresses that a systematic interdisciplinary debate covering questions of exchange between different legal traditions, and especially with respect to global issues like human rights, is lacking.⁷⁰ The comparative approach adopted in this project, infused with elements of interdisciplinarity, might constitute a small contribution to the broader task of constructing such channels of exchange.

In line with the broader aim of legal theory and sociology of law to theorize the role of law in modern society, the project aims to conceptualize the role of whistleblowing legislation in the regulatory governance of the markets and in national security. Drawing from comparative law, legal theory, sociology of law, and international law, the dissertation offers a theoretical account of the development of whistleblowing legislation that has so far been lacking. Legal research on whistleblowing has been broadly divided into two main directions: On one hand research on the scope and nature of whistleblowing protections contained in the main whistleblowing protection instruments, such as the Dodd-Frank Act, the Sarbanes-Oxley, or the PIDA, and on the other hand research on the conflict of whistleblowing and national security secrecy. The first stream of research deals with questions such as the judicial

⁶⁹ Janet E Ainsworth, 'Categories and Culture: On the 'Rectification of Names' in Comparative Law' (1996) 82 *Cornell Law Review* 19, 28

⁷⁰ Klaus Hoffmann-Holland, 'Ethics and Human Rights in a Globalized World: An Interdisciplinary Approach' in Klaus Hoffmann-Holland (ed), *Ethics and human rights in a globalized world: An interdisciplinary and international approach* (Mohr Siebeck 2009) 5

interpretation of the scope of legal statutes,⁷¹ with socio-legal questions on the motivations of whistleblowers and on the potential efficacy of financial incentives,⁷² or with the efficiency of reporting and its importance for corporate governance.⁷³ The second stream predominantly addresses questions of civil liberties, and specifically freedom of speech, vis-à-vis a protected public interest.⁷⁴ The almost complete lack of conversation between these camps⁷⁵ has obstructed for an overall conceptualization of the substratum of the current institutionalization of whistleblowing protections. Furthermore, this division of the relevant scholarship has obscured the political and economic underpinnings of whistleblowing legislation, as well as the relationship of whistleblowing protection with the consolidation of transparency as a mode of regulation. In turn, this renders the discussion in the field of regulatory governance of the markets rather technical, where there is an almost complete consensus that extensive whistleblowing protection is necessary, and the only differentiations have to do with the degree and the modalities of protection, while it draws back the discussion in the field of government secrecy into the classic debate between civil libertarians and those arguing for variations of a unitary executive theory. At first, this study's contribution consists in revisiting some of the

⁷¹ Indicatively, David B Lewis (ed), *A global approach to public interest disclosure: What can we learn from existing whistleblowing legislation and research* (Edward Elgar Pub 2010), Samuel C Leifer, 'Protecting Whistleblower Protections in the Dodd-Frank Act' (2014-2015) 113 *Michigan Law Review* 121, Valerie Watnick, 'Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique' (2007) 12 *Fordham Journal of Corporate and Financial Law* 831

⁷² Indicatively, James Gobert and Maurice Punch, 'Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998' (2000) 63(1) *Modern Law Review* 25, Elleta S Callahan and Terry M Dworkin, 'Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act' (1992) 37 *Villanova Law Review* 273

⁷³ Indicatively, Wim Vandekerckhove, *Whistleblowing and organizational social responsibility: A global assessment* (Ashgate 2006), Alexander Dyck, Adair Morse and Luigi Zingales, 'Who Blows the Whistle on Corporate Fraud?' (2010) 65(6) *The Journal of Finance* 2213, Orly Lobel, 'New Governance As Regulatory Governance' in David Levi-Faur (ed), *The Oxford handbook of governance* (Oxford University Press 2012)

⁷⁴ Indicatively, Mary-Rose Papandrea, 'Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment' (2014) 94 *Boston University Law Review* 449, Heidi Kitrosser, 'Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers' (2015) 56 *William & Mary Law Review* 1221, Patricia L Bellia, 'WikiLeaks and the Institutional Framework for National Security Disclosures' (2012) 121 *Yale Law Journal* 1448, Dimitrios Kagiros, 'Protecting 'national security' whistleblowers in the Council of Europe: an evaluation of three approaches on how to balance national security with freedom of expression' (2015) 19(4) *The International Journal of Human Rights* 408, Geoffrey R Stone, 'Free Speech and National Security' (2009) 84 *Indiana Law Journal* 939

⁷⁵ See, a notable exception by Stephen C Tily, 'National Security Whistleblowing vs. Dodd-Frank Whistleblowing: Finding a Balance and a Mechanism to Encourage National Security Whistleblowers' (2015) 80(3) *Brooklyn Law Review* 1191. For a collection of republished articles –many of which have been cited from their original sources in different parts of this dissertation– discussing whistleblowing law from different angles, including the ones evoked here, see Robert G Vaughn (ed), *Whistleblowing law* (Edward Elgar Publishing Limited 2015)

arguments unfolding within the first research camp, especially in the context of the new developments in EU law. Furthermore, my project aims to challenge the so far unbridged gap between these accounts through a unified understanding of whistleblowing legislation as a transparency reform of a functionalist undertone, designed to maintain the optimal level of transparency for the functioning of the respective system. In the regulatory governance of the markets, this approach fortifies whistleblowers' protection as their reporting (and secondarily their disclosures) serve as deterrents for corporate misconduct and have the potential of enhancing trust in the integrity of the markets. In national security, reporting or disclosure of wrongdoing is not equally valuable –and thus protected– because it threatens the executive's dominance over the flow of information that relates to national security.

Drawing this time also from normative jurisprudence, my project reconstructs the arguments for and against expanding protection to *lato sensu* whistleblowers and offers an institutional conceptualization of whistleblowing in national security as predominantly a question of democratic control over security politics, mirroring to a certain extent the functional understanding of whistleblowing in the regulatory governance of the markets. Therefore, the added value of my contribution on the question of balancing whistleblowing and national security, as compared to the general stream of civil libertarian scholarship with which I share the main normative concerns, is that I shift the focus from the subjective perspective of the whistleblower to the social value of the disclosure. Understanding human rights as social and legal counter-institutions that limit the expansive tendencies of social systems suggests that the ultimate value to be protected in cases of unauthorized disclosures of classified information is the question of democratic control, as well as the institutional system of rule of law, separation of powers/checks and balances, and political liberalism. Therefore, I construct my legal argumentation based on the legitimacy of the secrecy disclosed, rather than on the balancing between the whistleblower's freedom of speech and the constitutional value of national security.

1.5. Plan

The dissertation is divided into two main Parts, besides the Introduction and the Conclusions: The first Part is dedicated to the functional approach to transparency and to the role of whistleblowing in the regulatory governance of the markets, while the second one examines the permanence of government secrecy and the place of whistleblowing in national

security. Each Part is divided into two Chapters. Each Chapter is divided into four Sections and every Section is then divided to three or four Subsections. Each Part, Chapter, and Section is preceded by a concise summary of its main findings. The dissertation is concluded by the general conclusions.

I will proceed in the following way: *Chapter 2.1* discusses the functional rationale for the emergence of transparency in contemporary governance and regulation. It is comprised of two introductory Sections, exploring first, the historical context that laid the foundations for the shift in the understanding of democratic legitimacy and in the governmental rationalities that paved the way for the rise of transparency to prominence; and second, the theoretical connection of transparency to contemporary democratic theory –progeny to a significant extent of the discussed historical processes– through discourse theory and the deliberative paradigm. Then, a third Section focuses on the role of transparency in contemporary governance, which is to generate legitimacy for the political system and to enhance the efficiency of its communications, meaning its binding prescriptions to other systems, in conditions of increased privatization and restructuring of public administrations. The fourth Section investigates the function of transparency in corporate and financial regulation, suggesting that transparency is intertwined with the advent of Corporate Social Responsibility and the regulatory approach of ‘new governance’, developments which invite social and market dynamics to play an important role in regulation.

Chapter 2.2 begins with an examination of whistleblowing as a transnational regulatory instrument and its place in international law. I then proceed to analyze the framework of whistleblowing protection in the U.S. as it is outlined by the most far-reaching provisions of federal legislation on the topic in the private sector: the Sarbanes-Oxley Act and the Dodd-Frank Act. Special focus is put on the difference in the modalities of protection between the two pieces of legislation, with Sarbanes-Oxley giving emphasis to internal reporting and Dodd-Frank prioritizing external disclosure to the Securities and Exchange Commission. The third Section shifts the focus to the developments within Europe and in EU law. After examining the main issues of whistleblower protection in the UK, France, and Ireland, I turn to the initiatives at the level of the EU and in particular to the instrumental approach of the Implementing Directive of the Market Abuse Regulation of 2014 and the features of the newly-published proposal for a Directive on strengthening protections for individuals reporting on breaches of EU law. For both the U.S. and the EU, I underline how whistleblowing protection has been made compatible with trade secrecy. Lastly, I attempt to integrate whistleblowing provisions within the concept of the regulatory state and the regulatory shift to ‘new governance’ and to

show how whistleblowing constitutes a way of ‘governing-at-a-distance’ for the regulatory governance of the markets.

The second Part, as I mentioned, discusses the permanence of government secrecy and the place of whistleblowing protection in this framework. In *Chapter 3.1*, I outline an overview of the role of secrecy in national security and how its use has expanded since the outbreak of the ‘war on terror’. I discuss whether disclosures of wrongdoing that involve classified information are legally possible in the U.S. and what constitutes the framework for protected whistleblower activity, focusing on the broad scope of the Espionage Act and the limited scope of whistleblowing protection for national security employees. Following the plan of the first Part, I then turn to Europe and to the compared Member States, highlighting the strict legislative framework favouring criminal prosecution for public disclosures and providing very few channels for internal reporting and remedy within the organization. In the last Section of the Chapter, I propose the principles that would support a protective framework for national security whistleblowing, based on the notion of democratic secrecy and countering the arguments that attempt to attribute a totally exceptional (and thus justifiable unprotected) status to national security whistleblowing.

Chapter 3.2 deals exclusively with *lato sensu* whistleblowing, that is, public disclosures of wrongdoing within national security, the protection of which, as I argue in the previous Chapter, should be expanded –under conditions– as it constitutes the ultimate safety valve for maintaining the democratic character of secrecy. I start by presenting the legal debate on the balancing between national security and disclosures in the public interest and on whether whistleblowers in such cases should be entitled to the constitutional protection of freedom of speech. I then outline the social value of whistleblowing, which is connected to the right of the people to know about government’s activities unless these are legitimately secret. However, the current balancing test for government and national security whistleblowers in the U.S. and the EU does not adequately consider the social value of whistleblowing, framing instead the conflict as an issue of subjective rights versus public interest. Based on a latent shift in the case-law of the ECtHR, which progressively attributes more importance to objective criteria, I propose a jurisprudential model for the protection of *lato sensu* whistleblowers and its balancing with national security secrecy.

2. The functional approach to transparency: Whistleblowing in regulatory governance

In this Part I study the move toward transparency in governance and regulation, examined in particular through the diffusion and reinforcement of whistleblowing legislation in the US and the EU. I argue that transparency reforms are fuelled by a rationale of functionality, which corresponds to contemporary governmental rationalities. Transparency, describing a particular management of visibilities that involves information sharing, rather than an ideal state where everything is rendered clear and visible, exerts its functionality by generating legitimacy for the political system and by enhancing the efficiency of the communications of the respective social system. For example, the economic system benefits from an information flow that allows the maximum freedom for economic actors (meaning therefore the minimum state coercion), while at the same time guaranteeing the maximum level of trust in the integrity of the market. Following the same pattern of functionality, whistleblowing is first and foremost institutionalized as a regulatory instrument, rather than an employee or human rights protection mechanism. A comparative examination of the systems of whistleblower protection and incentivization indicates that the protection is provided as an adjunct to the main objective, which is no other than to secure market integrity. Transparency and whistleblowing legislation represent a way for governments to maintain oversight and secure market conditions by governing ‘smartly’ through the decentralization of regulatory functions or to regulate through social dynamics and reputational costs, placing increasing confidence in the capacity of markets to self-regulate.

In Chapter 2.1, I address the functional character of transparency and I trace its emergence as an institution and mode of governance. I suggest that its prevalence is historically connected with the rise of individualism and the deliberative democratic paradigm. The historical shift of the 1970s and 1980s also paved the way for the advent of a new form of polycentric governance, of which transparency becomes an organizing principle and a source of public accountability. I proceed to show how in this paradigm of governance legitimacy is progressively tied to accountability and therefore how transparency becomes essential for the legitimacy of the political system. I highlight that transparency should be understood as one type of control of the flow of information, a form of ordering that could theoretically optimize the functioning of the respective social system. In that direction, I demonstrate how transparency is integrated within a paradigm of regulation that stresses communication and social dynamics, reinforcing market autonomy.

In Chapter 2.2, I explore the diffusion of whistleblowing legislation in the comparative framework of the U.S. and the EU, focusing on the role of whistleblowing in corporate and financial regulation. This has been the field where whistleblowing protection mechanisms have been reinforced the most in recent years, indicating their utilitarian substratum. Indeed, my main argument is that the institutionalization of whistleblowing in the examined countries is distanced from a rights-based approach. After discussing the role of international law in the diffusion of transparency and anti-corruption policies, among which the increase of whistleblower protection, I analyse the current models of whistleblowing protection in the U.S. and the EU. The progressive convergence of the different models indicates that the need to devise decentralized regulatory solutions in the context of the globalized economy and the functionality of whistleblowing in that regard can lead to transcending the differences of legal cultures. In that sense, whistleblowing becomes an important part of the (post-) regulatory state.

2.1. Whence transparency? The functional rationale for the emergence of transparency in contemporary governance and regulation

In this Chapter, I explore the genealogy of transparency and I highlight its functional character. Despite its *prima facie* status as a liberal value and a condition for the legitimacy of norms in the deliberative paradigm, transparency's institutionalization has been closely intertwined with neoliberal imperatives and with shifts in the understanding of governance and regulation. These shifts trace their roots in the changes of the social fabric of western democracies in the 1970s and 1980s. The advent of individualism, the fragmentation of social classes, the success neoliberalism, and the prevalence of 'sub-politics', as opposed to holistic projects of social transformation, laid the foundations for a new ideal of democratic legitimacy, for a type of governance that places increasing emphasis on accountability, and for a type of regulation that aims to minimize governmental intrusion and eventually purports to enhance the internal self-regulatory capacities of corporations. These were all key developments for the emergence of transparency and its rise to prominence as an integral element of contemporary democracies of the Global North. The deliberative democracy paradigm elevated transparency as a prerequisite for the legitimacy of norms. This theoretical background was readily incorporated into the changes in public administration and governance. As the provision of services was progressively privatized, the political system had to draw the legitimacy necessary for its reproduction from its role in the coordination of services, that is, from accountability. Transparency as public accountability generates legitimacy by limiting corruption, improving performance, and institutionalizing countervailing powers within civil society. At the same time, transparency is also functional in enhancing the efficiency of the regulatory framework, through the triggering of reputational sanctions for private actors. Transparency often appears as a supra-ideological value, a reform of technical character that should be welcome with unanimous consent. Contrary to this oversimplified discourse, I suggest that transparency should not be understood as the ideal state where everything is clear and visible, but rather as one particular management of visibilities. Understanding transparency as a governmental rationality, a way of controlling the information flow in order to optimize the functioning of the respective social system, re-introduces politics in the discussion, as the question becomes one of assessing what type visibility management is the most optimal in relation to certain expected outcome.

In Section 2.1.1, I discuss the historic shift of the 1970s and the 1980s that contextualizes the changes in governmental rationalities that include the move toward transparency. I show how the critique to the paternalistic, welfare state was co-opted by the neoliberal project and resulted in an emphasis on flexibility and individual freedom. At the same time, the nexus created by the erosion of collective identities, combined with the weakening of the party system and the loss of faith in major social transformation, led to a society of particularity and individualism, where ‘sub-politics’ of small-scale reform became prominent. These changes led to differentiated understanding of the State, as I will show in Chapter 2.2, and of business and its relation to society. They also necessitated a new theoretical consecration of democratic legitimacy, which came in the form of deliberative democracy.

In Section 2.1.2, I examine the relationship between deliberative democratic theory and transparency. Seen as it would be impossible for the purposes of this project to examine all the variations of deliberative democracy, in this Section I discuss the Habermasian model and the connection between transparency and discourse theory. Under this model, transparency is a necessary prerequisite for the legitimacy of norms, since only these norms are valid, to which all possibly affected persons could agree as participants in rational discourses. Participation takes the form of the use of communicative freedoms within the deliberative and the decisional processes. Transparency, then as the optimal information flow, assures the participation of citizens in informal deliberations that produce communicative power, bound to be translated into administrative power via the means of legislation. In this sense, this deliberative paradigm foregoes a form of abstract participation in informal deliberations over active engagement in the decision-making process; this blunts its critical angle, making it much more of a theorization of current institutional structures than a transformative project.

In Section 2.1.3, I conceptualize transparency as a governmental rationality – a governmentality. I show how the move toward an increased –at least nominally– governmental and institutional transparency is integrated within the shift from government to governance. In this model legitimacy is defined progressively through accountability, a role that transparency is meant to fulfil. Transparency is then understood as an antidote to democratic deficits. Beyond the generation of legitimacy, transparency’s function also extends to the enhancement of the efficiency of the political system’s communications. In an era where public and private actors must collaborate for effective social regulation, centralized bureaucracies that sought to maximize their power by monopolizing knowledge have fallen to dismay. Yet, institutionalized transparency does not amount to radical transparency, the ideal state where everything is

visible; instead, transparency, by directing the gaze to parts of the problem and necessarily concealing others, transcribes a form of ordering and control.

Transparency's function is also to enhance the efficiency of the regulatory framework. In Section 2.1.4, I discuss the role of transparency in corporate regulation and in securing market conditions. After examining transparency's important role in corporate governance as a way to ameliorate stock returns performance and to facilitate attracting external capital, I show how transparency becomes entangled with the advent of Corporate Social Responsibility and the regulatory approach of 'new governance'. The advent of non-financial disclosures, combined with the 'comply or explain approach', indicate that it is the social dynamics, in terms of investor and consumer disapproval, that should act as a catalyst of regulation. New governance in that sense conveys the partially self-imposed impotence of the central State to control the globalized economy and the belief in market self-regulation. Transparency, either if it is prompted by market forces or if it is prescribed by sanction-backed State regulation, is important for the economic system, to the extent that it describes not an absolute visibility, but in fact the ideal level of information flow: the one that will permit the maximum freedom for economic actors (meaning therefore the minimum state coercion), while at the same time guaranteeing the maximum level of trust in the integrity of the market.

2.1.1. The historical shift laying the foundations for a new conceptualization of democratic legitimacy and governance

In this Section I trace the changes in the social fabric and the historical shift of postmodernity that laid the foundations for a new conceptualization of democratic legitimacy. This new conceptualization, as well as the simultaneous changes in the society and the economy, accentuated the importance of transparency as a fundament for democratic governance and an organizational principle for systems of governance. The tendency of postmodernity toward scepticism regarding the totalizing nature of metanarratives and their reliance on some form of transcendent and universal truth¹ led to a ‘society of particularity’ that necessitated new forms and theories of democratic legitimacy. In Subsection 2.1.1.1, I briefly analyse the classic paradigm of legitimacy through representation. In Subsection 2.1.1.2, I show how the counter-culture movement, the New Left, and the artistic critique to capitalism, led to a rise of individualism and a critique toward the ‘society of generality’. This critique was incorporated and further developed by the neoliberal political project. In Subsection 2.1.1.3, I deal with the results of this process, namely the erosion of collective identities and the individualization of the workforce. The advent of ‘sub-politics’, which I address in Subsection 2.1.1.4, paved the way for deliberative democracy and the focus on transparency.

2.1.1.1. Legitimacy through representation

“No taxation without representation”, the slogan of the American colonists in the 1750s and the 1760s proved to be the precursor of the democratic project of modernity. The democratic revolutions of the 18th century sought to modernize democracy and to make republican government feasible within the entirety of the nation-state through representation.

Representation was not only a practical answer to the question of scale,² but also a theoretical approach of legitimacy for governmental action. The renewed political consent was the cornerstone of the democratic project, distinguishing it from older ideas, such as these of

¹ See, Jean-François Lyotard, *La Condition Postmoderne: Rapport sur le savoir* (Les Éditions de Minuit 1979)

² Although this was part of the argumentation: See, Thomas Jefferson, ‘Thomas Jefferson To Isaac H. Tiffany, 26 August 1816’ (1816) <<https://founders.archives.gov/documents/Jefferson/03-10-02-0234>>, “A democracy [is] the only pure republic, but impracticable beyond the limits of a town”.

Thomas Hobbes, for whom legitimacy was achieved even with a “once and for all” transfer to some entity of the right to govern. The periodicity of political consent did not rule out, however, oligarchical elements such as the principle of distinction, expressed eloquently by James Madison, who suggested that “the aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust”.³ Thus the complete characterization of the republican mode of designating rulers is that it leaves it to the people to select through election the wisest and most virtuous.⁴ Nevertheless, as the quoted passage clarifies, the wisdom or the capabilities of the representatives alone is not enough; they have to be constrained by the people and accountable to the people through the functioning of the political and governmental institutions, the most important of which are the elections. Thus, the prospect of the electoral judgement will restrict the representatives and force them to act upon consideration of their constituents’ interests, rather than their own. In this way, the separation that the representation effectuates between the two bodies, the government and the people, not only does not hinder the rule of the people, but it also concretises a bond of legitimacy through accountability. This is further accentuated by the fact that representative governments do not authorize the imperative mandate or discretionary revocability of representatives, which inevitably increases the representatives’ independence. Hence, the representatives were bound to strive for the common good as they saw fit, while representing a totality, a fictional generality: the general will of the people.

However, the emergence of massive political parties and political programs during the second half of the 19th century deeply transformed representation itself. The newly emerged ‘party government’ differed from its predecessors in involving mostly ordinary citizens, arisen to the top of the parties through a militant and devoted career in them, and in restricting the autonomy of the representatives to a party platform. The elections were seen as an instrument for social transformation and increasing emphasis was placed on the input legitimacy of the citizenry, through their affiliation to a specific party. This led in many cases to a relevant

³ James Madison, ‘Federalist n. 57’ in Alexander Hamilton, James Madison and John Jay (eds), *The Federalist Papers [1787-8]* (Penguin 1961) 350

⁴ Bernard Manin, *The Principles Of Representative Government* (Cambridge University Press 1997) 117

stability of electoral outcomes,⁵ as people would vote for a party consistently. Parties were supposed to represent social classes, fractions of the whole, something the revolutionaries of the 18th century would probably find dangerous and terrifying.

This transformation of representation and the legitimacy it enjoyed was not to remain unchallenged. The end of the Second World War found the potent industrial economies of the past in the need of an urgent recovery, not only in economic terms, but also in terms of a new social contract that would guarantee social peace and provide some utopian substratum of a social cohesion to come. While the latter was supposedly found in the welfarist promise, the economic recovery that followed brought about changes that challenged the ‘society of generality’⁶ assured by the industrial economy. The most important democratic institution, that of elections, seemed to undergo a process of ‘desacralization’, resulting from the blurring of confrontation lines and theoretical differences between the parties, as well as from the weakening of party ties. Political preferences ceased to be in direct correlation with the social, economic, and cultural characteristics of the voters and instead became a response to the choices offered to the electorate.⁷ Voting became a reactive procedure as the voters seemed henceforth to *respond* to the terms offered to them, rather than to *express* their socio-political identity through their vote.⁸

This seems to indicate that the legitimacy of the ‘majority’ faded away and representation ceased to be as theoretically robust as it was once considered. Yet, the renewal of democratic legitimacy was not a radically new project but rather the continuation of the unfinished project of liberal representative government. Indeed, the concept of deliberative democracy that arose as a response to the legitimation deficiency draws theoretical background from the liberal quests of the 18th century. It maintains the rule of accountability while taking into consideration, in an abstract manner, every specific individual.⁹ The basis for this new conception of democracy was laid by a period of rapid changes in the decades of 1970 and

⁵ See, Bernard Berelson, Paul F Lazarsfeld and William N McPhee, *Voting: A study of opinion formation in a presidential campaign* (Midway reprint ed. University of Chicago Press 1986, 1954); Angus Campbell, *The American voter* (Unabridged ed. University of Chicago Press 1980, 1960)

⁶ Pierre Rosanvallon, *Democratic Legitimacy* (Princeton University Press 2011) 61

⁷ See, O. V Key, *Public Opinion And American Democracy* (Knopf 1961), and Gerald M Pomper, *Voters' Choice* (Dodd, Mead and Co. 1975). More recently in France: Daniel Gaxie, *Explication Du Vote* (Presses de la Fondation Nationale des Sciences Politiques 1989)

⁸ Manin, *The Principles Of Representative Government* (n 4) 222

⁹ See, Section 2.1.1.2

1980 that reshaped the social fabric and restructured traditional institutions and concepts, resulting in an age of individualism.

2.1.1.2. *Criticizing a State of “unfreedom” and the neoliberal project*

The roots of this procedure can be traced in the economic and political currents that dominated in the western prosperous democracies in the third decade after the end of the war. The dominant view in the 1960s was that long-term growth depended only on supply and that the macroeconomic influence of the government depended solely on demand.¹⁰ So the state had to regulate the business cycle to match the long-term trend as closely as possible in order to maintain full employment, using a combination of budgetary and monetary measures.¹¹ This idea was challenged in the 1970s, as the voices against macroeconomic intervention by the State grew stronger, especially in the context of the 1973 crisis that the Keynesian model was unable to prevent and for which a new response was supposed to be found.

However, the rising opposition to a strong role of the State, more than being simply economically driven, was in fact two-fold: on one hand it translated the emergence of libertarian, anti-systemic critique that combined the opposition to traditional society and levelling societal norms with the accentuation of liberal ideals long embedded in western national traditions, in particular individual freedom; on the other hand, it became the spearhead of a neoliberal economic and political movement committed to the pursuit of political power for the corporation and to the minimization of regulation and state control.

In a society that was experiencing radical changes, starting from the death of the peasantry,¹² the urbanization, the gradual emancipation of women, the technological progress, the mass production of goods, and the steep rise of university graduates,¹³ a new critique against

¹⁰ Michel Aglietta, ‘Capitalism At The Turn Of The Century: Regulation Theory And The Challenge Of Social Change’ (1998) 232 *New Left Review* 41, 59

¹¹ *ibid*

¹² A once integral part of all western economies, the peasantry reduced itself to less than 10% of the population in any country west of the Iron Curtain in the early 1980s. Technological developments centred on mechanized agriculture, agricultural chemistry, and modern transportation led to increased production and to an unparalleled abundance that permitted people to leave the countryside, leading to urbanization. *See*, Eric J Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914-1991* (Michael Joseph 1994) 289

¹³ Indicatively, in France the number of students enrolled in Universities almost quadrupled between 1946 and 1971, from 123 313 to 596 141. *See*, Pierre Bourdieu, Luc Boltanski and Monique D S Martin, ‘Les Stratégies de Reconversion: Les Classes Sociales et le Système D’Enseignement’ (1973) 12(5) *Social Science Information* 61

the establishment was being formed. An expressive moment of this process can be traced in the events of May 1968, which effectively capture the essential elements of what has been called an ‘artistic critique’¹⁴ of capitalism, shared not only by the students, but by the whole current of ‘counter-revolution’ of the 1960s. The cardinal idea of this libertarian critique against capitalism was the demand for more autonomy. Contrary to the traditional discourse of the workers and the communist left, focusing on exploitation, monopolies, and oligarchy, the artistic critique aimed at the regimes of oppression, dehumanization under technocracy, authoritarianism, paternalism and patriarchal organization of family life, hierarchical power and loss of autonomy.¹⁵ “A comfortable, smooth, reasonable, democratic unfreedom prevails in advanced industrial civilization, a token of technical progress. Indeed, what could be more rational than the suppression of individuality in the mechanization of socially necessary but painful performances”;¹⁶ this is how Herbert Marcuse’s *One-Dimensional Man* begins, one of the emblematic works of the New Left of the 1960s. Written in a time of solidification of the welfare state, this critique of the consumerist culture evokes the totalitarian nature of various mechanisms of social. According to Marcuse’s thought, the private space, as a dimension of individuality, the space where the ‘self’ is created, is now permeated and dominated by a society which shapes aspirations, hopes, fears, and values. *One-Dimensional Man* concretizes a critique against the decline of individuality in advanced industrial society.

The artistic critique to capitalism, in its first steps, found significant leverage in the contradiction between the rising expectations of the youth, resulting from an increased level of education, and the inertia of a production still organised in taylorian terms, separating conception and execution, alienating the worker from the final product, providing no opportunity for personal intervention and creativity.¹⁷ The subsequent feeling of frustration, apart from its actual potency in the social dynamics, bore the seed for the advent of an individualism based on meritocracy and social distribution according to individual performances. At the same time, it reflected in a concrete way the hypothesis that the more increased the level of individual specialization, the greater the dependence of the worker upon society and the poorer the individual integration into the social system.¹⁸ The extensive social

¹⁴ See, Luc Boltanski and Eve Chiapello, *Le Nouvel Esprit Du Capitalisme* (Gallimard 1999)

¹⁵ *ibid* 245; Moreover, according to a report of OECD in 1972, “the industrial economies [...] are undergoing a revolution, which manifests itself in the “defiance of authority”, *ibid* 249

¹⁶ Herbert Marcuse, *One-Dimensional Man* (Routledge 2002) 3

¹⁷ Olivier Pastré, ‘Taylorisme, Productivité Et Crise Du Travail’ (1983) 18 *Travail et emploi* 43, 45

¹⁸ See, Émile Durkheim, *The Division Of Labor In Society* (Free Press of Glencoe 1964)

division of labour was not only unable to produce commons and shared values that would perpetuate a ‘society of generality’, but it also inhibited the individual’s awareness of his or her place in the new social structure of increased diversified activity.

The theoretical and practical influence of this newly sought paradigm proved pervasive in the years to follow. The discourse of the new political Left in the 1970s distanced itself from the traditional foci of critique, in particular exploitation and inequality, and focused on anti-statism and anti-totalitarianism. This shift can be traced in the works of philosophers such as Michel Foucault, in whose writings power becomes the central question and the light is directed to the ways of controlling individual behaviour.¹⁹ The goal becomes to destabilise power mechanisms through “*révoltes de conduite*”,²⁰ revolts of conduct against power of control. The post-war welfare state, a governmental technique of generality *par excellence*, positing itself as a projection of a certain social and anthropological model, could not be left untouched by this sort of critique. Instead, it was parallelised with the religiously-connoted “pastoral” power that commands, but also protects, and directs the conscience of the people.²¹ François Ewald, Foucault’s disciple and assistant, puts it bluntly: “the welfare state accomplishes the dream of bio-power—.[it] is a state whose primary aim is no longer to protect the freedom of each individual—but rather to assume responsibility for the very manner in which the individual manages his life”.²² Fighting against the state and the shaping of the individualization it imposes, opens the way for an age of particularity and for a newly-found individuality that does not emanate from the State and its sources of knowledge or direction.

The artistic critique could readily be incorporated by the neoliberal political project and its rhetoric, with its foundational emphasis upon individual freedoms and the fear of a despotic State. The developing market ideology, originating from the historical developments of the 18th century and its important liberal thinkers, attributes to the market the capacity to create spontaneous order and to achieve the most efficient allocation of resources possible.²³ Central

¹⁹ Indicatively, Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978-79* (Palgrave Macmillan 2008) 84, Michel Foucault, ‘The Subject and the Power’ in James D Faubion (ed), *Power* (The New Press 2000) 341, Michel Foucault, ‘Governmentality’ in Graham Burchell and Colin Gordon (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991), Michel Foucault, ‘Governmentality’, in Graham Burchell and Colin Gordon (eds), *The Foucault Effect: Studies in Governmentality* (University Of Chicago Press 1991) 103

²⁰ Michel Foucault, *Sécurité, Territoire, Population* (Gallimard 2004) 201

²¹ Foucault, ‘The Subject and the Power’ (n 19) 333-335

²² François Ewald, ‘Bio-Power’ (1986) 2 *History of the present* 8

²³ Friedrich A Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (Routledge 1978) 63-64

to the neoliberal political project was the role of private initiative and of competition. Privatization of services was not necessarily seen as contradictory with the role that governments were supposed to play. The government was supposed to rule through regulation and supervision, rather than through the provision of services.²⁴ A contemporary, compromising idea is that as long as private actors do not distance themselves from public goals, private institutions can operate impartially and share ‘public’ concerns, creating thus the effect of publicization.²⁵ This line of thought, in its sheer functionalism, fails to grasp that the effect of privatization extends further than the economic field, as it cuts off the link between processes of decision-making and the citizens, thus eroding political engagement and public responsibility.²⁶ Depriving the institutions that provide everyday services and regulate the social life of the indirect democratic legitimacy ensured by popular participation in the electoral process reduces the spectrum of public accountability and renders the political system a cocoon, the internal activity of which is undertaken by private actors.

2.1.1.3. *The erosion of collective identities and the individualization of the workforce*

The focus on individual economic freedom and generally on individualism was taking place in parallel with a transformation of social classes. Most importantly, the working class came to an existential crossroad. The new technologies shrank the working-class population,²⁷ while prosperity, chances of social mobility, and privatization broke up the collective spirit of the largely public working-class life. The working class was accused of becoming “*embourgeoisée*”, privileged enough so that it was no more the subject of emancipatory politics or revolutionary act; instead, individuals were thought of as the principal actors of social change.²⁸ Pierre Rosanvallon makes the case that classes dissolved into an apparent homogeneity of social de-

²⁴ For example, when British telecommunications was deregulated in 1984, OfTel was created to regulate it; Ofgas with the regulation of a privatized gas industry in 1986, OFFER with electricity in 1989, OfWat with water in 1990, and the Office of the Rail Regulator for rail in 1993. John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222, 224

²⁵ Jody Freeman, ‘Extending Public Law Norms Through Privatization’ (2003) 116(5) *Harvard Law Review* 1285, 1285

²⁶ Avihay Dorfman and Alon Harel, ‘Against Privatisation As Such’ (2016) 36(2) *Oxford Journal of Legal Studies* 400, 400

²⁷ From 1973 until the late 1980s the total number employed in manufacturing in the six old-industrial countries of Europe fell by seven millions, or about a quarter, about half of which was lost between 1979 and 1983, Hobsbawm (n 12) 304

²⁸ See, André Gorz, *Adieux Au Proletariat* (Éditions Galilée 1980)

hierarchization centred on middle class. Nevertheless, this new society reorganised its modes of differentiation, which become henceforth individualistic.²⁹ The deconstruction of classes, had a toll for the party-type representative democracy. As the collective identities of the past decayed, so did their political representations, putting the legitimacy of the establishment in crisis.

The notion of collectivity received another blow in the field of unionization. Neoliberalism had been hostile to strong labour organization, a core element of working class life. In countries where it first succeeded as a political project, industrial activity was transferred,³⁰ strikes were responded to intransigently,³¹ and pro-labour legislation was reversed into anti-union employer protection law.³² However, even in countries where the neoliberal model was not yet predominant and the unions were still strongly protected, such as France, de-unionization increased exponentially.³³ The roots of this unexpected development lied in the consolidation of structural unemployment and in the increase of precarious work, but also in the mobility of workers and in the disintegration of the working community. The decline of unions in the prosperous, old-industrial countries marked the extent of a major social transformation and related to the individualization of the workforce both as a cause and as a symptom.

Besides, corporations adapted to the artistic critique to capitalism by modernizing their management, which took over the control of aspects of the working force that used to be under the auspices of the unions.³⁴ This triggered the emergence of principles such as work-linked democracy, or the *ringi seido* process of decision-making in Japan, which are supposed to be methods to increase democracy in the working place by taking into consideration, and

²⁹ Pierre Rosanvallon, *La Nouvelle Question Sociale* (Seuil 1995) 207-209

³⁰ [In the mid-1980s] transfer of industrial activity from unionized North-East and Midwest [USA] to the non-unionized and 'right-to-work' states of the south, if not beyond to Mexico and South-East Asia, became standardized practice, David Harvey, *A brief history of neoliberalism* (Oxford University Press 2007) 53.

³¹ For example the famous UK miners' strike (1984–85) and the Professional Air Traffic Controllers Organization strike of 1981 in USA.

³² On the Wagner Act and how it diminished the effectiveness of the strike, see Holly J McCammon, 'Legal Limits on Labor Militancy: U. S. Labor Law and the Right to Strike since the New Deal' (1990) 37(2) *Social Problems* 206.

³³ The unions in France saw their number of members drop more than 50% between 1976 and 1988, Pierre Rosanvallon, *La Question Syndicale* (Calmann-Lévy 1988) 14. For the United States, in 1956 one in three private sector workers were members of labour unions; by 1998, fewer than one in ten were members of unions, Henry S Farber and Bruce Western, 'Accounting For The Decline Of Unions In The Private Sector, 1973–1998' (2001) 22(3) *Journal of Labor Research* 459, 459.

³⁴ Chris Howell, *Regulating Labor: The state and industrial relations reform in Postwar France* (Princeton University Press 1992) 116

benefiting from the creativity of the workforce.³⁵ These developments led to a weakening of conflicts between the employer and the working force and to an emptying of purpose for the unions. The role of the direct supervisor in the evaluation of the employee became more prominent and so did the diffusion of bonuses, depending on the completion of goals.³⁶ The authoritative management of the past was being replaced by new rationalities of corporate governance, which coincided with the apparition of domains such as business ethics. At the same time, the democratization of the corporation became a case to run parallel to the case for democratic governance of the State.³⁷ As I will show later on, the institutionalization of whistleblowing can be partly contextualized within this move toward increased corporate transparency and accountability to parties outside the firm.

The changes in management reflected a bigger change that was taking place in the basis of the economy. The decades of 1970 and 1980 marked the beginning of the shift from an economy of stable, long-term employment, to an economy of flexibility. The economy of post-Fordism revolved around the ability of the workforce to adapt to a variety of tasks, to its mobility, and to precariousness, meaning the lack of contracts guaranteeing stable, long-term employment³⁸. Flexibility was the tool for corporations to adapt without delay their production to the changing demands of the market and also the key to a new understanding of efficiency. The fundamental ideology that traverses the postmodern structures of labour relations is based on the premise that monolithic systems of production and mass exchange hinder economic efficiency, while production systems that respond rapidly and differentiated market schemes that target specialized strategies enhance it.³⁹ These changes deeply affected the working identity and contributed to a *Zeitgeist* of individualism.

2.1.1.4. *The advent of sub-politics*

This profound individualization gave birth to a new understanding of the Political, which was antagonistic to the unchanged institutions of industrial society. The ‘expressionistic

³⁵ See, B. C Roberts, Hideaki Okamoto and George C Lodge, *Collective Bargaining And Employee Participation In Western Europe, North America And Japan* (The Commission 1979) 221

³⁶ Boltanski and Chiapello (n 14) 360

³⁷ See, in that direction, Robert A Dahl, *A Preface To Economic Democracy* (University of California Press 1985)

³⁸ See, Ash Amin, *Post-Fordism* (Blackwell 1994)

³⁹ Michael Hardt and Antonio Negri, *Multitude* (The Penguin Press 2004) 108

concept of politics' it introduced outlined the reversal of values that was taking place: the political constellation of industrial society was becoming unpolitical, while what was unpolitical in industrialism was becoming political in the process of post-modernization.⁴⁰ Tocqueville defined individualism as the "mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and friends, so that after he has thus formed a little circle of his own, he willingly leaves society at large to itself".⁴¹ Contrary to this definition, the resurgent individualism of postmodernity did not abandon the political field; instead, it explored new possibilities of intervention. Citizen-initiated groups grew more prominent, more emphasis was put on local action, and human rights grew to become one of the most influential legal and political concepts of its time.⁴² Henceforth, individual agents outside the political arena could compete for the Political, signalling the advent of 'sub-politics', where the individual can challenge the central rule approach, try to set the political agenda, and share in the arrangement of society.

The advent of 'sub-politics'⁴³ can be deciphered as an adaptive response to the neoliberal paradigm; a result of the disillusionment about the former utopias, including, but not limited to, that of socialism; and finally, as a supposed antidote to the declining public participation in the regulation of commons. The rise of human rights at this time is no accident; it translates the individualistic turn of politics, the 'non-political' turn of politics, such as the one conducted by the campaign of Amnesty International. As the ideas about appropriation of power by a social class and rapid, massive social change started to be marginalised, a minimalistic and pragmatic approach was favoured, as the only one fit to produce concrete results. The moral substratum of the human rights struggle structured the normative horizon of the public sphere.

Democracy, comprised of its institutions and its concepts, is not an immobile notion; instead it reflects and translates changes in the social fabric and in the understanding of the concept of the Political. Thus, what constitutes democratic government is prone to change according to the shifts in the economic basis of the society, as well as in the social superstructure. The turn to individualism marked by the convergence of different currents of

⁴⁰ Ulrich Beck, 'The Reinvention of Politics' in Ulrich Beck, Anthony Giddens and Scott Lash (eds), *Reflexive Modernization* (Stanford University Press 1994) 18

⁴¹ Alexis d Tocqueville, *Democracy In America* (vol. II, Vintage Books 1954) 104

⁴² See, Samuel Moyn's thesis about the explosion of human rights in the late 1970s through its canonization in the political language by the Carter Presidency and the grassroots human rights advocacy of organizations such as Amnesty International, Samuel Moyn, *The Last Utopia* (Belknap Press of Harvard University Press 2010)

⁴³ Beck (n 40) 18

thought and the strategic prevalence of the neoliberal project both in the economic field and in the field of ideas, with its focus on individual freedoms, free market, competition, and personal responsibility, caused friction with the institutions of a society of generality: the representational system, the Weberian administration, and the power of elections and of a fictional majority. The project that tried to offer a new account as to how we should be governed reflects the essentially Kantian idea that legitimacy comes from the notion that those who are subject to the law can see themselves as potential authors of the law. Based on a process of deliberation to construct and achieve this recognition, deliberative democracy dominated the field of democratic theory as it sought to bridge the gap between the Political and the private sphere and to deepen citizen participation. Its hegemony constitutes the background for the theoretical consolidation of transparency as a fundament of contemporary democracy and governance.

2.1.2. The crucial role of transparency in the deliberative democracy paradigm

In this Section I discuss the theoretical substratum and contemporary normative justifications for the rising importance of transparency. Considering the changes in the institutional superstructure and the tension between the factual production of law and its legitimacy, it is not surprising that the theory of deliberative democracy originally arrived as an account of legitimacy. The deliberative ideal developed through its opposition to aggregation and to the strategic behaviour encouraged by voting and bargaining.⁴⁴ In this way, it captured the rising influence of individualism, the growing distrust to traditional political tools, and a resurgence of liberalism. This leads to the analysis of Subsection 2.1.2.1, where I discuss the connection of deliberative democracy with classic liberalism. Although advocates of deliberative theory argue that it represents a distinct of the republican and the liberal tradition democratic model, the latent connection with the latter animates numerous aspects of deliberative democracy. This connection sets the basis for the contextualised understanding of Habermas's democratic theory, which I elaborate in Subsection 2.1.2.2. In Subsection 2.1.2.3, I highlight the connection between the Habermasian paradigm and the rising importance of transparency in the legitimacy of norms. Transparency is fundamental for the deliberative paradigm as it is a prerequisite for the discourse principle. According to this principle, just those norms are valid, to which all possibly affected persons could agree as participants in rational discourses; a condition that can be met only through the transparency of the public deliberations leading to the adoption of norms. In Subsection 2.1.2.4, I undertake a critical examination of deliberative democracy's emphasis on transparency, stressing that it foregoes a form of abstract participation in an informal deliberation over active engagement in the decision-making process; this blunts its critical angle, making it much more of a theorization of current institutional structures than a transformative project.

2.1.2.1. A paradigm shift? Deliberative democracy and classic liberalism

The ideological currents and the plethora of their ramifications that dominated in the decades of 1970 and 1980 had in common one basic assumption: that the individual should be

⁴⁴ James Bohman, 'Survey Article: The Coming Of Age Of Deliberative Democracy' (1998) 6 Journal of Political Philosophy 400, 400

allowed to pursue his or her objectives freely, without external coercion or interference. As the disintegration of homogenous groups and societies led to the questioning of a single definition of the public good, the aim of the political system was to be liberty, the only universal political principle that permits the achievement of a plurality of individual goals and upon which all could potentially agree. Liberalism as a political project traces its fundamentals in the idea of a unanimous agreement.

The classic social contract theorists accentuate the natural freedom of individuals and the necessity of their consent for any form of exercise of political power. According to John Locke, “men all being naturally free, equal, and independent, no-one can be deprived of this freedom etc. and subjected to the political power of someone else, without his own consent”.⁴⁵ However, the social contract can only function if individuals agree to submit themselves to the consent of the majority. Majority needs to be accepted as the “act of the whole of the *body politic*”⁴⁶ because it is “virtually impossible”⁴⁷ to have the consent of every single individual. Therefore, majority is in fact a pragmatic compromise to the impossibility of unanimity. The legitimacy problem is overcome by the fiction that every individual, by agreeing to form with others one body politic in order to live comfortably and safely, puts himself or herself in the obligation to accept the decisions of the majority as binding and legitimate.

Similarly, for Jean-Jacques Rousseau “there’s only one law that from its very nature needs unanimous consent, namely the social compact”.⁴⁸ Since individuals are born free, they cannot be subjected to any form of power without their consent. Their consent takes the form of the “general will”, which is the constant will of the citizenry. When a law is proposed, what is asked from the citizens is not their approval, but whether the law truly adheres to the general will. The result is that the majority expresses the general will. Any opinions against the formed majority were simply mistaken as to what the general will was.⁴⁹ Therefore, true legitimacy lies in fact in unanimity as the outvoted citizens still consent to the law. The theoretical construct of the “general will” permits unanimity to reflect on the majority, legitimizing thus the outcomes of the voting procedure.

⁴⁵John Locke, *Second Treatise of Government* (Online at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>), Chapter 8 [95]

⁴⁶ *ibid* [98]

⁴⁷ *ibid*

⁴⁸Jean-Jacques Rousseau, *The Social Contract* (Online at <http://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>), Book IV, Chapter 5 [55]

⁴⁹ *ibid*

The liberal ideal of unanimity seemed ill to fit the aspirations of an industrial society with solid class bonding and strong ideological currents of communitarianism, solidarism, and utilitarianism. The French jurist and administrative law scholar Léon Duguit, explaining the transformations of public law in France in the early twentieth century eloquently states: “A legal system of realistic and socialist order replaces the previous metaphysical and individualistic legal system”.⁵⁰ The State’s action is then legitimized by its social purpose, through the promotion of public service. The existence of law corresponds not only to the reality of the interdependence of individuals, but also to the demand for solidarity between them. The idea that the general interest expressed through the action of the State predominates over individual interests approaches the utilitarian notion of maximization of happiness: “the greatest happiness for the greatest number”.⁵¹ A law is subsequently legitimized by its effect on the social entity, which can be no other than the maximization of the happiness for the majority of the population. As a result, the procedure of majority rule is the most efficient in finding the solution that corresponds to the greatest happiness of the greatest number.⁵² Utilitarianism presupposes the possibility to sacrifice in certain cases the liberty of some, in order to maximize the social happiness of the majority. This syllogism formed the substratum of the juridico-political doctrines that accepted the supremacy of the collectivity over individuals and accepted the social role, or the duties, entailed by personal privileges.⁵³ The majority principle becomes thus in itself a source of legitimacy, without the fiction of a corresponding unanimity.

However, the eclipse of social contract theories was only temporal.⁵⁴ John Rawls’s effort to reconcile liberty with equality and to challenge utilitarian views assumes a similar to the contractual theories standpoint towards unanimity.⁵⁵ According to Rawls, “the original position is so characterized that unanimity is possible; the deliberations of any one person are typical of

⁵⁰ Léon Duguit, *Les Transformations Du Droit Public* (Librairie Armand Colin 1913) XI

⁵¹ John Bowring (ed), *The Works of Jeremy Bentham* (IX, Online at <http://oll.libertyfund.org/titles/bentham-works-of-jeremy-bentham-11-vols>) [5]

⁵² Bernard Manin, ‘On Legitimacy And Political Deliberation’ (1987) 15 *Political Theory* 338, 344

⁵³ According to Léon Duguit, “Son droit de propriété, je le nie, son devoir social, je l’affirme” (His right to property, I deny it, his social duty, I accept it), Léon Duguit, ‘Souveraineté et liberté – Douzième leçon: La liberté d’association et le syndicalisme’ [2016] *Revue Générale du Droit* <<http://www.revuegeneraledudroit.eu/blog/2016/02/04/souverainete-et-liberte-douzieme-lecon/>>

⁵⁴ Patrick Riley, ‘The Social Contract and Its Critics’ in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press 2006) 347–75

⁵⁵ See, Manin, ‘On Legitimacy And Political Deliberation’ (n 52) 340, who finds the similarities between theses of radical liberalism and Rawls’s search for an “Archimedean point” of universal consensus that provides his theory with an unshakable base.

all”.⁵⁶ Political legitimacy is as a result based on unanimity and “there is nothing characteristically idealist about the supposition of unanimity. This condition is part of the procedural conception of the original position”.⁵⁷ Through the construction of the veil of ignorance, behind which everyone is supposed to decide on principles of justice without knowing her position in society, the effort is concentrated on showing that there exist principles that can be met with unanimous consent and thus formulate a universalist theory of justice.

Although Rawls does not make the decisive step toward a deliberative theory of democracy, his work, the influence and importance of which can hardly be disputed, lays the seeds for a renewal and an updating of the liberal ideas of the 18th century that could better describe the society of individualism that was being formed. Joshua Cohen, himself a student of Rawls, drawing on his mentor’s reflections on features of democratic politics in just societies (alternative conceptions of the public good, egalitarian implications of equal access to political power, formation of a sense of justice), concludes that these features, instead of being based upon highly speculative sociological and psychological judgements, they comprise elements of an independent and expressly political ideal that is focused on the appropriate ways of arriving at collective decisions.⁵⁸ According to Cohen, “outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals”.⁵⁹

This represents a shift of focus from the different rationalities and predetermined will of different actors, to the procedure of deliberation itself.⁶⁰ The legitimate decision may not be the will of all, but it must be the result of the deliberation of all. According to Seyla Benhabib, “legitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern”.⁶¹ This premise sets the conditions for a return of unanimity. This time, the quest for unanimity is not expressed through some fictional equation with majority; instead, it is materialized through the participation of all individuals in a deliberative process that leads to the production of norms that govern the social and political life. Even further than this minimum requirement, deliberation’s ideal goal

⁵⁶ John Rawls, *A Theory of Justice* (Belknap Press 1999) 232

⁵⁷ *ibid* 233

⁵⁸ Joshua Cohen, ‘Deliberation And Democratic Legitimacy’ in Alan Hamlin and Philip Pettit (eds), *The Good Polity* (Basil Blackwell 1989) 18-19

⁵⁹ *ibid* 22

⁶⁰ Manin, ‘On Legitimacy And Political Deliberation’ (n 52) 352

⁶¹ Seyla Benhabib, ‘Toward a Deliberative Model of Democratic Legitimacy’ in Seyla Benhabib (ed), *Democracy And Difference* (Princeton University Press 1996) 68

remains, at least for some⁶², the formation of consensus: “Ideal deliberation aims to arrive at a rationally motivated consensus”.⁶³

It is beyond this project’s goals to fully elaborate on contemporary variations and theoretical differences of deliberative democracy. The “deliberative turn”⁶⁴ taken by democratic theory around 1990 can be best depicted for the purposes of this project through a brief examination of Jürgen Habermas’s influential analysis on the tension between facticity and validity of norms and his effort to reconstruct the fundamentals of democratic legitimacy.

2.1.2.2. *The Habermasian model of democratic principle and discursive participation*

Habermas sets forth to reconstruct contemporary normative understanding of the rule of law and to lay the foundations for legitimate law, starting from the unbridged tension between liberalism and civic republicanism. The two ideas of human rights and popular sovereignty have been the anchor of the normative self-understanding of constitutional democracies up to today and yet, these two concepts have not been integrated in an evenly balanced manner. Liberals invoke the primordial nature of human rights expressing the moral autonomy of the individual and seek to limit the power of government and avoid the danger of a “tyranny of the majority”. On the other hand, the proponents of civic republicanism highlight the value of self-organization and claim that human rights have a binding character for a political community if they emanate from a collective decision.⁶⁵

The genealogy of these views can be traced in the works of Immanuel Kant and Jean-Jacques Rousseau. For Kant, the system of natural rights is legitimated prior to its differentiation in the shape of positive law, on the basis of moral principles and therefore is not necessarily attached to the political autonomy of citizens. In other words, rights precede the will of the sovereign lawgiver.⁶⁶ For Rousseau, on the contrary, the sovereign will of the people inscribes in itself the right of each person to equal liberties. Thus, the exercise of political autonomy does not depend on the condition of natural rights. For Habermas, nevertheless,

⁶² John S Dryzek, *Foundations And Frontiers Of Deliberative Governance* (Oxford University Press 2010) 35

⁶³ Cohen (n 58) 23

⁶⁴ Dryzek (n 62) 3.

⁶⁵ Jürgen Habermas, *Between Facts And Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press in association with Blackwell Publishers 1996) 100

⁶⁶ *ibid* 10

Rousseau's argument fails to address the pragmatic conditions that establish how the political will is formed, meaning how this right to equal liberties becomes an integral part of the sovereign will of the people. In fact, it is the very mode of exercising political autonomy, a mode that is not secured simply through general laws but through the communicative form of discursive processes of opinion- and will-formation, that performs the connection between popular sovereignty and human rights.⁶⁷

For Habermas, the functional realignment of modern law as a guarantor of private autonomy needs to be compromised with the fact that private autonomy can appear as a real right (and not as one paternalistically enacted) only under the premise that the citizens can see themselves as authors of their own laws. Therefore, private autonomy presupposes public autonomy. At the same time, true public autonomy cannot exist without the private autonomy that legitimises its extent and impact. Habermas conclusion is that private and public autonomy have to be seen as co-original and their respective origins reside in the discourse principle (D), which applies to norms of both morality and law: "Just those actions norms are valid to which all possibly affected persons could agree as participants in rational discourses".⁶⁸ The equiprimordial relationship achieved through the interpenetration of the discourse principle and the legal forms permits the discourse theory to bridge the differences between liberalism and civic republicanism and is expressed through what Habermas calls the "logical genesis of rights":

"One begins by applying the discourse principle to the general right to liberties –a right constitutive for the legal form as such– and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. Hence the principle of democracy can only appear as the heart of the system of rights".⁶⁹

This is wherefrom the principle of democracy is derived. In the contemporary pluralistic societies, where natural law, once grounded in metaphysics or religion, has lost its potency and collective ethics and communal understandings of the "good" have disintegrated, only democracy can answer to the question of what constitutes the legitimacy of the law. The

⁶⁷ *ibid* 103

⁶⁸ *ibid* 107

⁶⁹ *ibid* 121

exercise of political autonomy itself means that legitimate law-making involves processes of public deliberation that influence the formal institutional decision-making process. According to the democratic principle proposed by Habermas, “only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legitimation that in turn has been legally constituted”.⁷⁰ The democratic principle provides a proceduralist understanding to the idea of self-determination. Contrary to the moral principle, which operates at the level of the internal constitution of an argument, the democratic principle indicates how the opinion- and will-formation can be institutionalized through a system of rights that guarantees equal participation in the legislative process. The democratic character of the legislative process should at least make consensus possible for all citizens. This ideal procedure conveys the presumption that reasoning in a procedure that embodies norms of freedom, equality, and publicity would produce an outcome that everyone in principle could accept.⁷¹ Thus, a more general feature of theories of deliberative democracy is highlighted: actual consensus being unattainable, the democratic principle refers more to a “warranted presumption of reasonableness⁷²”, which means that insofar as a the law-making procedure is institutionalized in a way so that its outcomes are reasonable products of the deliberation taking place in the public sphere, legitimacy is achieved.

The participation takes the form of the use of communicative freedoms within the deliberative and the decisional processes. It is a discursive participation. Universal human rights, or the ethical substance of a specific community, are not the guarantors of practical reason; instead, the exercise of practical reason is framed by the rules of discourse and by the forms of argumentation that borrow their normative content from the validity basis of action oriented to reaching an understanding. According to discourse theory, the success of deliberative politics depends on the institutionalization of the deliberative procedures and conditions of communication.⁷³ In fact, participation can take the form of either decision-orientated deliberation, which takes place in formal democratic institutions, or the informal form of opinion-formation that is diffused in the communicative networks of the public sphere.

This procedural understanding of popular sovereignty favours a decentred society, wherein the citizenry is seen neither as a macrosocial subject, nor as a dependent variable in power

⁷⁰ *ibid* 110

⁷¹ Bohman, ‘Survey Article’ (n 44) 402

⁷² James Bohman and William Rehg, ‘Jürgen Habermas’ [2017] *The Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/archives/fall2014/entries/habermas/>>

⁷³ Habermas, *Between Facts And Norms* (n 65) 298

processes. The importance of the philosophy of the subject fades away, while the “self” of the self-organizing legal community is being understood as “subjectless forms of communication”⁷⁴ that concretize the intersubjectivity of the processes of reaching understanding that take place through democratic procedures or in the communicative network of the public sphere. These “subjectless communications” are responsible for opinion- and will-formation for political matters, matters relevant to the entire society. The communicative power produced is then bound to be translated into administrative power via the means of legislation. This way, popular sovereignty retreats into the democratic procedure and power springs from legally institutionalized will-formation procedures.

Therefore, although only certain individuals will be able to participate in the formal decision-making process, the entirety of the demos can be engaged in the informal deliberation that takes place in the public sphere. The role of the informal deliberation is to generate public discourses that uncover topics of relevance to all society and to contribute to resolution of problems.⁷⁵ Informal participation has both a “signal” function, meaning communicating problems that must be addressed by the political system, and a function of “thematizing” these problems, meaning effectively reflecting upon them in order to contextualise them and to suggest solutions.⁷⁶

2.1.2.3. *Transparency as a prerequisite for the legitimacy of norms*

Deliberative democracy represents nowadays the dominant current in democratic theory.⁷⁷ The model elaborated by Habermas may be but one of the different perspectives, but it definitely represents a foundational work in the development and proliferation of theories or adaptations of deliberative politics. From the posited principle of democracy, according to which “only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legitimation that in turn has been legally constituted”, certain conditions of assent can be inferred. Among these, along with freedom, equality, lack of time constraints

⁷⁴ *ibid* 299. *See*, also Benhabib (n 61) 74 who speaks of an “anonymous public conversation” in “interlocking and overlapping networks and associations of deliberation, contestation, and argumentation”.

⁷⁵ Habermas, *Between Facts And Norms* (n 65) 307

⁷⁶ *ibid* 359

⁷⁷ John S Dryzek, ‘Democratic Political Theory’ in Gerald F Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (SAGE Publications Ltd 2004) 144

and others, the unhindered flow of full information seems to be of fundamental value. According to Habermas, “democratic procedure [...] grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed”.⁷⁸ This not only places transparency in the centre of the conditions for effective deliberation, but it also elevates it to a principle bound to lead to reasonable results through a relationship of cause and effect. Furthermore, since legitimacy can be achieved insofar as the institutionalization of the democratic process warrants the presumption that outcomes are reasonable products of a sufficiently inclusive deliberative process of opinion- and will-formation⁷⁹, then an equation of transparency with legitimacy begins to form. If deliberation under conditions of transparency is sufficient of a guarantee for reasonable or fair results, then legitimacy depends upon an unobstructed flow of information that permits the citizenry to meaningfully exercise their communicative freedoms and to participate in the formation of ‘subjectless communications’.

Besides, the prerequisite of transparency becomes evident from the discourse principle (D) as well. One could agree to an action norm only if he or she knows what constitutes this norm, what the different arguments are, or what its implications could be. For the discourse principle to apply to legal norms, transparency is therefore fundamental. Yet, transparency understood not only vertically, against the decision-making authorities, in the form of freedom of information, but also horizontally, within the public sphere, in the form of freedom of speech and dissemination of opinions. Transparency is essential for publicity and the creation of an informed public opinion, which in its turn assumes the role of “feeding” and “monitoring” the Parliament.⁸⁰

The requirement of transparency, even if not explicitly stated, traverses most theoretical models of deliberative democracy. According to Benjamin Page, a “rational public” is possible, seeing as “the public as a whole can generally form policy preferences that reflect the best available information”.⁸¹ The public has the role of the receptor of the proliferating information, sorting it in a way that it “thematizes” political and social problems, allowing for a more concrete reflection on policies to be formed and to influence the political agenda. John Parkinson’s account on the requirement of publicity is lucid: “publicity is the essence of

⁷⁸ Habermas, *Between Facts And Norms* (n 65) 296

⁷⁹ Jürgen Habermas, *Between Naturalism And Religion: Philosophical Essays* (Polity Press 2008) 103

⁸⁰ *ibid* 171

⁸¹ Benjamin I Page, *Who Deliberates?* (University of Chicago Press 1996) 5

deliberative democracy: it is its procedural foundation, the means by which information is brought into a deliberative moment”.⁸² In a similar tone, John Dryzek states that “legitimacy does not just mean acceptance, it also refers to moral rightness, as well as freedom, transparency, and competence in the process of acceptance”.⁸³

This is where whistleblowing, in the form of public disclosures, emerges as an unexpected factor in the quest for legitimacy. Whistleblowing, by removing the veil of secrecy of a specific policy or action, creates the conditions for a meaningful deliberation to take place within the public sphere, resulting in the legitimacy of norms and the restoration of public autonomy or in the triggering of accountability and the restoration of legitimacy through legality.⁸⁴ The act of blowing the whistle against violations of human rights, abuses of power, and corruption corresponds to transparency as an end in itself, a ‘right to know’ that is the root of the legitimacy of norms. Had it not been for the whistleblower’s intervention, “all possibly affected persons” could not only *not* give their consent, but they potentially would not even know they were affected. The example of the debate concerning NSA’s surveillance program is enlightening. Defending the legitimacy of the program after the revelations of the whistleblower Edward Snowden, U.S. President Barack Obama called it “transparent”.⁸⁵ Similarly, in his important speech on surveillance one year later, he promised to reform the surveillance programs in order to provide for greater transparency.⁸⁶ This argumentation highlights that the debate on legitimacy of contested policies is played on the terrain of transparency, which not only fortifies and in a way legitimizes the role of whistleblowers, but it also underlines deliberative theories’ success in capturing the essential element in the quest for legitimacy in current political systems: that of deliberation, which can be achieved only through transparency. Nevertheless, this also magnifies the deficit of the deliberative approach: by theorizing successfully the logic of *current* democratic practices, it can foster the notion that current democratic systems are in principle ideal, with only minor problematic issues. As Benhabib accurately observes, “the deliberative theory of democracy is not a theory in search of a practice; rather it is a theory that claims to elucidate some aspects of the logic of existing

⁸² John Parkinson, *Deliberating In The Real World* (Oxford University Press 2006) 99-100

⁸³ Dryzek, *Foundations And Frontiers Of Deliberative Governance* (n 62) 21

⁸⁴ In a deliberative context legality has to be seen as an aspect of legitimacy, *see*, Parkinson (n 82) 41. Besides, legality represents the deliberative outcomes of the past and thus, as long as it is not challenged, it constitutes a legitimate order.

⁸⁵ Mollie Reilly, ‘Obama Defends ‘Transparent’ NSA Program’ *The Huffington Post* (17 June 2013) <https://www.huffingtonpost.com/2013/06/17/obama-nsa-surveillance_n_3455771.html>

⁸⁶ The White House, *Remarks by the President on Review of Signals Intelligence* (2014)

democratic practices better than others”.⁸⁷ The potential for a more critical approach, building on the deliberative model, will be now discussed.

2.1.2.4. *Deliberation, new governance, and participation: The ambiguous mediating role of transparency*

One first problem deliberative democracy faces is the question of power. How can inclusive and rational deliberation be reconciled with the existence of a multiplicity of structural power relations and resource inequalities among the members of the citizenry? The regulative idea of communicative action is one more instance of the juridical presupposition that there is some place or procedure in which subjects are ‘sovereign’ – free of power and autonomous- and in which they agree on the conditions of their subjection.⁸⁸ According to Foucault, such an approach is mistaken:

“The problem is not trying to dissolve them [the relations of power] in the utopia of a perfectly transparent communication, but to give oneself the rules of law, the techniques of management, and also the ethics, the ethos, the practice of the self, which would allow these games of power to be played with a minimum of domination”.⁸⁹

Drawing from the idea that power relations can never be dissolved, contemporary critics of deliberative democracy have focused on the disjunction between the ideal processes of deliberation and the reality of global politics. Thus, according to Iris Marion Young “powerful elites representing structurally dominant social segments have significant influence over political processes and decisions” and in general those deliberating participate in a hegemonic discourse, which is a product of structural inequality.⁹⁰ Similar objections of inequality of power and resources can be raised regarding deliberative democracy’s conjunction with the ‘new governance’ regulatory model and its aim to render corporate political power permeable

⁸⁷ Benhabib (n 61) 84

⁸⁸ James Tully, ‘To Think and Act Differently’ in Samantha Ashenden and David Owen (eds), *Foucault Contra Habermas* (SAGE Publications Ltd 1999) 131

⁸⁹ James W Bernauer and David M Rasmussen (eds), *The Final Foucault* (MIT Press 1988) 18

⁹⁰ Iris M Young, ‘Activist Challenges to Deliberative Democracy’ in James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Wiley-Blackwell 2003) 108-115. See, also Lynn M Sanders, ‘Against Deliberation’ (1997) 25 *Political Theory* 347

to deliberation through transparency and voluntary codes of Corporate Social Responsibility (CSR). I will come back to this in Section 2.1.4.3

Besides, individual participation in the deliberative model takes the abstract form of a discursive participation that supposedly influences the decision-making process. Theorizing politics as a source of complexity, deliberative democracy often limits the instances of active participation. According to Habermas, the “communicative structures of the public sphere relieve the public of the burden of decision-making”,⁹¹ which for Mark Warren could be a benefit of the deliberative model, seeing as there is always the risk that individuals “find decision making so burdensome and inefficient that most will withdraw into a cynical apathy”.⁹² Similarly, for James Bohman the reality of pluralism and social complexity should lead in nuancing participatory ideals that were cultivated by Karl Marx and the early Frankfurt School.⁹³ In this sense, deliberative democracy is less critical than it suggests. Deliberative theorists largely following the Habermasian paradigm⁹⁴ dispense with the radical criticism of the early accounts of participatory democracy⁹⁵ and assume that the bases for deliberative democracy are nearly secure and the practice of deliberation needs only reforms and not sweeping changes.⁹⁶ In its search for a balance between liberalism and civic republicanism, Habermas’s democratic theory, and deliberative theory generally, has given in to a very liberal understanding of individuals as egalitarian units that rationally strive for fair solutions. Informal deliberation, combined with a version of the principle of distinction -this time materialised mostly through expertise and technocracy-, cannot always sustain the essence of public autonomy; that the citizens can see themselves as the creators of their own laws. Instead, while parts of the population are excluded from the decision-making process for reasons of limited resources and influence, contemporary institutional structures become more concessive to powerful private actors, the dialogue with whom theoretically fortifies the legitimacy of public policy in general.

⁹¹ Habermas, *Between Facts And Norms* (n 65) 362

⁹² Mark E Warren, ‘Deliberative Democracy And Authority’ (1996) 90 *The American Political Science Review* 46, 58

⁹³ James Bohman, *Public Deliberation* (MIT Press 1996) 9

⁹⁴ It must nevertheless be mentioned that deliberative democracy includes a number of different approaches, many of which have challenged the earlier Habermasian paradigm of consensus, e.g. Dryzek *Foundations And Frontiers Of Deliberative Governance* (n 62) 87

⁹⁵ See, for example Carole Pateman, *Participation And Democratic Theory* (Cambridge University Press 1970)

⁹⁶ Emily Hauptmann, ‘Can Less Be More? Leftist Deliberative Democrats’ Critique Of Participatory Democracy’ (2001) 33 *Polity* 396, 413

In this configuration, transparency is posed as the antidote against the feebly participatory structure of contemporary institutional frameworks. Instead of transforming societies, the energy is invested in making them more open; open to scrutiny, criticism, and potential reform. This is what Colin Crouch alludes to when speaking of the “negative activism” of blame and complaint, where the main aim of political controversy is to see politicians called to account, cultivating a passive approach to politics, which remain the realm of the elites.⁹⁷ The demand for more transparency is therefore also less critical than it pretends to be. Transparency becomes complementary to authority, be that political, economic or scientific, as the role of the citizenry is reduced to the controlling of the actions of others. According to Warren, the deliberative model enhances the discursive relationship between democracy and authority by increasing the pressure for authorities to publicly justify their actions.⁹⁸ A more participatory model on the contrary would not satisfy itself in increasing the pressure for more justifications; it would instead broaden the scope of inclusion and create the conditions for the concrete participation that would materialise the essence of public autonomy.

Beyond the demand for unhindered information flow as a prerequisite of a legitimate deliberation, transparency is also seen as grounding the presumption that reasonable results will be obtained from the deliberative process.⁹⁹ However, the underlying assumption of a universal rationality that will automatically lead to consensus, or to “reasonable”, or “fair” results on a plethora of issues as long as the proper information becomes available reflects a metaphysical notion of reason and a depoliticised public sphere that understands conflictual situations through the poles of rational/irrational. The transcendence of conflict as a social motor theoretically invites us to a ‘meta-history’ of the realm of reason, ignoring the variety of societal forces and interests that rest within society. Through its lack of ideological challenge, transparency has been integrated as a major legitimising factor for the actions of governance institutions, replacing, or blunting their connection with public participation. This will be explored in the next Section.

⁹⁷ Colin Crouch, *Post-Democracy* (Polity Press 2004) 13

⁹⁸ Warren (n 92) 58

⁹⁹ *See*, Section 2.1.2.3.

2.1.3. The function of transparency in contemporary governance: Between efficiency and legitimacy

After analysing the historical and theoretical shifts that framed the rise of transparency in contemporary governance, I proceed to examine its function in the generation of legitimacy and in the enhancement of the efficiency of the communications of the political system. In Subsection 2.1.3.1, I present some examples of the –at least nominal– increase of governmental and institutional transparency both in the national and in the international context. In Subsection 2.1.3.2, I show how this move toward transparency is integrated within a governance paradigm that features flexible modes of coordination and public and private collaboration. This is a model where legitimacy is defined progressively through accountability, a role that transparency is meant to fulfil. Transparency as public accountability is supposed to limit corruption, to improve performance, and to enhance democratic control by institutionalizing countervailing powers within civil society. In that sense, transparency fulfils its function of generating legitimacy. In Subsection 2.1.3.3, I conceptualize transparency as a governmental rationality, arguing that its current function in assuring the efficiency of the communications of the political system is informed by market-based approaches and the neoliberal *modus operandi*. Transparency is also understood as a holistic antidote to democracy deficits. However, I suggest that transparency should not be understood as the ideal state where everything is clear and visible, but rather as one particular management of visibilities. Understanding transparency as a governmental rationality, a way of controlling the information flow in order to optimize the reproduction of the political system through legitimacy and efficiency, rather than as a technical, supra-ideological reform, re-introduces politics in the discussion. The question then becomes how to arrange the management of visibilities in order to achieve specific aims.

2.1.3.1. A (nominal) increase of governmental and institutional transparency

The historical and the theoretical shifts examined set the frame in which transparency would become an important governmental rationality. The examples of its importance for contemporary governance are abundant.

Starting from the emblematic Freedom of Information Act of 1966, to the Government in the Sunshine Act of 1976, to reforms of the supermarket labelling in the 1970s, transparency

became integrated in the U.S. governance as part of the described advent of ‘sub-politics’ and pluralism.¹⁰⁰ In recent years, on the first day of his presidency, President of the U.S. Barack Obama issued the “Transparency and Open Government” memorandum, making clear that his Administration was “committed to creating an unprecedented level of openness in Government”.¹⁰¹ This symbolic beginning was followed by the Digital Accountability and Transparency Act of 2014, which aimed to improve transparency on public expenditures, by establishing common standards for financial data provided by all government agencies and publishing this data to the respective governmental website; the establishment of the web interface “data.gov”, as a repository for federal government information; the Reducing Over-Classification Act of 2010 to prevent over-classification of national security information; the Police Data Initiative, which aimed to enable law enforcement agencies to better use data and technology to increase transparency and accountability; the executive order on “Making Open and Machine Readable the New Default for Government Information”, which made open and machine-readable data the new default for government information, in order to make government-held data more accessible to the public and to entrepreneurs; and other initiatives in the domains of education, healthcare, and environmental protection.

In the European Union, transparency has gradually acquired the status of a guiding principle and a foundation of democracy in the Union.¹⁰² In that direction, the White Paper on Governance advocated for transparency as a means to enhance legitimacy through greater openness.¹⁰³ Seen as a way to instil confidence in complex institutions, openness becomes one of the fundamental principles of good governance, alongside participation, accountability, effectiveness and coherence.¹⁰⁴ This has been translated in a variety of regulations and directives, including the Regulation 1049/2001 on public access to European Parliament, Council and Commission documents and the creation of a European Ombudsman.¹⁰⁵

¹⁰⁰ For a series of case studies bringing the right to know into American political life, see Michael Schudson, *The rise of the right to know: Politics and the culture of transparency, 1945-1975* (The Belknap Press of Harvard University Press 2015).

¹⁰¹ The White House, Memorandum On Transparency And Open Government (2009)

¹⁰² Enshrined in art.1 TEU (“decisions are taken as openly as possible to the citizen”) and in art.15 TFEU (“EU’s institutions shall conduct their work as openly as possible”).

¹⁰³ Beate Kohler-Koch and Barbara Finke, ‘The Institutional Shaping Of EU–Society Relations: A Contribution To Democracy Via Participation?’ (2007) 3 *Journal of Civil Society* 205, 211

¹⁰⁴ Commission of the European Communities, ‘European Governance: A White Paper’ (COM(2001) 428, 25 July 2001), 8

¹⁰⁵ According to the EU Integrity System Report, conducted by Transparency International, “there is a good foundation in the EU system to support integrity and ethics; a foundation provided by the general policies and rules adopted to prevent fraud and corruption”, which is however undermined by practical considerations, such

Transparency has also become part of the regulatory framework in a plethora of domains, from nuclear safety to lobbying, tax evasion, and the regulation of the financial markets.¹⁰⁶ In fact, according to Alberto Alemanno, highlighting the functional, as opposed to right-based character of transparency in EU framework, “openness largely maintains an instrumental rationale, aimed at enhancing the quality of the regulatory outcome rather than at promoting a more inclusive process”.¹⁰⁷

In addition, the last decades have been a witness to a global expansion of freedom of information laws (FOI). Connected with political liberalism and constitutionalism,¹⁰⁸ the right to information was diffused throughout the world and transparency has been considered as a prerequisite for good governance and respect for human rights.¹⁰⁹ Parallel to FOI laws, legislative initiatives against fraud and corruption or intended improvements upon public administration functioning take the form of transparency reforms.¹¹⁰

The move toward greater transparency is also reflected in key aspects of international law and governance, especially financial institutions. The World Bank Research Observer argues that transparency is indispensable to the financial sector and that “greater openness and wider information sharing enable the public to make informed political decisions”.¹¹¹ This echoes the IMF’s statement that “transparency in economic policy and the availability of reliable data on economic and financial developments are critical for sound decision-making and for the smooth functioning of an economy” and that “greater openness and clarity by the IMF about its own policies and the advice it provides to its member countries contributes to a better

as “poor practice, lack of political leadership, failure to allocate sufficient staff and funding, and unclarity about to whom the rules apply”, Transparency International, ‘The European Union Integrity System’ (2014) 8-9

¹⁰⁶ See, indicatively, ‘Directive 2014/87/Euratom of 8 July 2014 amending Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations’, *OJ L 219* (2014) rec. 12, Proposal for a Interinstitutional Agreement on a mandatory Transparency Register 28 September 2016, COM(2016) 627 final (European Commission), European Commission, ‘Communication COM(2016) 451 on further measures to enhance transparency and the fight against tax evasion and avoidance’ (5 July 2016).

¹⁰⁷ Alberto Alemanno, ‘Unpacking The Principle Of Openness In EU Law: Transparency, Participation And Democracy’ (2014) 39 *European Law Review* 72, 72

¹⁰⁸ See, Roy Peled and Yoram Rabin, ‘The Constitutional Right to Information’ (2011) 42 *Columbia Human Rights Law Review* 357

¹⁰⁹ See, however, Jonathan Klaaren, ‘The Human Right to Information and Transparency’ in Andrea Bianchi and Anne Peters (eds), *Transparency in international law* (Cambridge University Press 2016) 225, arguing that the human right to information is neither necessary, nor sufficient for transparency.

¹¹⁰ See, for example in France Loi n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique.

¹¹¹ Tara Vishwanath and Daniel Kaufmann, ‘Toward Transparency: New Approaches And Their Application To Financial Markets’ (2001) 16 *The World Bank Research Observer* 41, 41

understanding of the IMF's own role and operations, building traction for the Fund's policy advice and making it easier to hold the institution accountable".¹¹² Luis Martínez draws the conclusion that international institutions (such as the World Bank and the International Monetary Fund) have made significant progress with regard to transparency, whereas informal structures (such as G-20 and the Financial Stability Forum) still prefer opacity and confidentiality.¹¹³ Transparency has also played a role in recent changes in international investment law¹¹⁴ and to different degrees influenced domains such as international intellectual property law, international environmental law and international human rights law. It should also be noted that Transparency International, an NGO aiming to combat corruption, has not only popularized the term 'transparency', but influenced policies and governmental standards worldwide.

In general, transparency has become a central policy issue both on an international and on a national level. The transfer of power to the international level, especially after the collapse of the Breton Woods system in the 1970s and increasingly ever since, led to calls for accountability, for which transparency is supposed to be an answer. Thomas Blanton argues that the international financial institutions face a legitimacy crisis, "within which the problem of secrecy is the threshold issue and perhaps the most promising opportunity for change".¹¹⁵ In national contexts, transparency is part of as an adaptive response to the changing nature of public administrations and seen as a key solution to problems of democratic legitimation. In fact, it is situated in the centre of the shift from government to governance and its main function is to ensure a form of public accountability, an assumption I will examine in the next Subsection.

¹¹² International Monetary Fund, 'Transparency at the IMF' (2017) <<https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/35/Transparency-at-the-IMF>>

¹¹³ Luis H Martínez, 'Transparency In International Financial Institutions' in Andrea Bianchi and Anne Peters (eds), *Transparency in international law* (Cambridge University Press 2016) 77

¹¹⁴ See, United Nations Commission on International Trade Law, 'Rules on Transparency in Treaty-based Investor-State Arbitration' (1 April 2014)

¹¹⁵ Thomas Blanton, 'The Struggle for Openness in the International Financial Institutions' in Ann Florini (ed), *The Right To Know* (Columbia University Press 2007) 244

2.1.3.2. *Transparency within governance: assuring legitimacy through public accountability*

In the paradigm of representative democracy, sovereignty flows through the vote to the elected officials, guaranteeing democratic legitimacy for their actions. The resulting structure of modern representative democracy could be described as a concatenation of principal–agent relationships.¹¹⁶ Elected officials confide their trust to a cabinet, which is responsible for supervision of the bureaucratic organizational structure, which, in its turn, is directly responsible for the provision of services to the public. The executive actors are therefore held accountable through the means of the institutionalized supervision and the deciding actors ultimately through the election process.¹¹⁷ This vertical and hierarchical “overhead democracy”¹¹⁸ has, to a large extent, been rendered obsolete by the advent of governance and flexible institutional schemes. The emergence of informal or semiformal networks of public and private actors addressing social problems, the outsourcing of formerly governmental responsibilities to private actors that now have discretionary power over the use of public authority and the spending of public funds,¹¹⁹ the changes in forms of regulation from a “command-and-control” system to a range of more flexible approaches;¹²⁰ all these changes signify a change of democratic paradigm and entail a more polycentric view regarding the sources of political legitimacy. In fact, there is an inversion of the provenance of legitimacy: legitimacy is less of a prior element, a prerequisite to the constitution of the political and administrative system, and more of the evaluation of the outcome of its endeavours. In other words, legitimacy comes to be mostly defined through accountability, where the deciding actor has an obligation to explain and justify his or her conduct, as part of the relation between government and performance; the authority of a political system to produce and enforce norms

¹¹⁶ Kaare Strøm, ‘Parliamentary Democracy and Delegation’ in Kaare Strøm, Wolfgang C Müller and Torbjörn Bergman (eds), *Delegation and accountability in parliamentary democracies* (Comparative politics. Oxford University Press 2003) 55

¹¹⁷ There are, of course, variations of this model depending on the different constitutional traditions of states.

¹¹⁸ Emmette S Redford, *Democracy In The Administrative State* (Oxford University Press 1969)

¹¹⁹ Lester M Salamon, ‘The New Governance and the Tools of Public Action: An Introduction’ (2001) 28 *Fordham Urban Law Journal* 1611, 1614

¹²⁰ See, for example terms such as “regulatory pluralism” in Neil Gunningham and Darren Sinclair, ‘Regulatory Pluralism: Designing Policy Mixes for Environmental Protection’ (1999) 21 *Law & Policy* 49, or “decentering regulation” in Julia Black, ‘Decentering regulation: Understanding the role of regulation and self-regulation in a ‘post-regulatory’ world’ (2001) 54 *Current Legal Problems* 103

is progressively tied to its functionality, its role in the coordination of services, and not its mere existence or its metaphysical priority in the constitution of the political community.

This development is to a certain extent the consequence of the prevailing liberal individualism described in Section 2.1.1, and the changes in the political economy from the 1970s onwards. However, neoliberalism and individualism only accentuated a tendency always present within liberal forms of government: that of a “frugal state”. According to Foucault, political liberalism is intrinsically connected with the passage from the question of right, or of the sovereign’s legitimacy, to questions of efficiency, to the preoccupation not to govern too much: “success or failure, rather than legitimacy or illegitimacy now become the criteria of governmental action”.¹²¹ The advent of governance has to be seen through this prism. Its aim is essentially utilitarian, to maximize its outcomes and its social utility, using the minimum of resources and interference to individuals and the markets. Nevertheless, it does not abandon the quest for legitimacy, which is a vital part for the durability and the reproduction of the political system. On the contrary, through the ideals of transparency, collaboration, interaction, and shared responsibility, governance is seen as better serving the goals of both efficiency and legitimacy.¹²²

Transparency, first of all, theoretically guarantees the integrity of public governance and it limits phenomena of corruption and fraud. It is used as a mechanism of control and prevention, while external agents, such as ‘social watchdogs’, assume the task of controlling the endeavours of public administration.

Second, transparency as a form of accountability is supposed to improve performance. Since the mid-1970s governmental bureaucracies have been facing an ever-increasing criticism about their inefficiency, inflexibility, and excessive expenditures. The quest to “reinvent the government”¹²³ and the public administration reforms it entailed centred on creating a ‘slim’ and effective state. Most of these reforms can be placed under the rubric of New Public Management (NPM). An umbrella term, signifying the marriage of new institutional

¹²¹ Michel Foucault, *The Birth Of Biopolitics* (Palgrave Macmillan 2008) 16

¹²² Jody Freeman, ‘Collaborative Governance in the Administrative State’ (1997) 45 *UCLA Law Review* 1, 6

¹²³ Indicatively, according to Osborne and Gaebler, “The kind of government that developed during the industrial era, with their sluggish, centralized bureaucracies, their preoccupation with rules and regulations, and their hierarchical chains of command, no longer work very well”, David Osborne and Ted Gaebler, *Reinventing government: How the entrepreneurial spirit is transforming the public sector* (Addison-Wesley Pub. Co 1992) 11-12.

economics and managerialism in the public sector,¹²⁴ NPM came as a renewal to the Weberian ideal-type of administration to emphasize economic norms and values and to promote professional management, contracts and out-sourcing, explicit standards of performance, and increased control on output of services. Accountability under NPM is based on output, competition, contractual relations, and transparency; it thus represents a departure from Weberian public administration, where various forms of accountability were based upon process and procedures, hierarchical control, trust, and cultural traditions.¹²⁵ The trend of privatization offers a market-based public accountability: The argument is that market forces will “compel private firms to act as though governed by public accountability rules”.¹²⁶ Private firms will then voluntarily disclose information, as competition will drive them to be transparent in order to succeed in finding investors and customers. The success of this market-oriented accountability is, however, dependent on citizens having sufficient resources to make their preferences felt in the market.¹²⁷

Third, and perhaps most important, transparency as public accountability is supposed to enhance democratic control, as it provides political representatives and voters with the necessary inputs for judging the fairness and efficiency of governance.¹²⁸ As the production of binding norms partially shifts from the constitutionally competent legislative power to regulatory parties that have no direct democratic legitimacy, transparency presents itself as “a new independent constitutional topos that could partly assume the protective role hitherto assigned to the principle of legality”.¹²⁹ Accountability becomes decentralized, diffused to “monitorial citizens”.¹³⁰ In theory, this transcribes a process of citizen empowerment, whereby public services respond directly to civil society, rather than to political decisions, drawing their

¹²⁴ Christopher Hood, ‘A Public Management for all seasons?’ (1991) 69(1) *Public Administration* 3, 5

¹²⁵ See, Tom Christensen and Per Laegreid, ‘New Public Management: Undermining political control?’ in Tom Christensen and Per Laegreid (eds), *New Public Management: The Transformation of Ideas and Practice* (Ashgate 2001)

¹²⁶ Michael J Trebilcock and Edward M Iacobucci, ‘Privatization And Accountability’ (2003) 116 *Harvard Law Review* 1422; Trebilcock and Iacobucci (n 126), 1448

¹²⁷ Tom Christensen and Per Laegreid, ‘New Public Management: Puzzles Of Democracy And The Influence Of Citizens’ (2002) 10 *Journal of Political Philosophy* 267, 287

¹²⁸ Mark Bovens, ‘Public Accountability’ in Ewan Ferlie, Laurence E Lynn and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (Oxford University Press 2007) 193, citing Adam Przeworski, Susan C Stokes and Bernard Manin, *Democracy, Accountability, And Representation* (Cambridge University Press 1999)

¹²⁹ Eugene Loos, ‘The digital constitutional state: Democracy and law in the information society’ (2002) 7 *Information Polity* 185, 195

¹³⁰ For the notion of ‘monitorial citizens’, see Michael Schudson, *The Good Citizen: A History of American Civic Life* (Free Press 1998)

legitimacy from their output. The prevailing idea is that transparency ensures a new form of accountability of political actors, since it institutionalizes countervailing powers within the civil society and permits adequate scrutiny under conditions of complexity and polycentric governance. The emphasis on the role of civil society as a monitor of state's endeavours through institutionalized processes other than the elections, sketches a picture of the citizenry as "overseers", rather than electors.¹³¹

Transparency then is meant to assure public confidence in government and bridge the gap between governed and government.¹³² In this sense, it fulfils an important function in the generation of the legitimacy that is necessary for the political system to reproduce itself. Taking this conceptualization a step further, I suggest that transparency needs to be understood as a governmental rationality.

2.1.3.3. *Transparency as governmental rationality*

A preliminary critique to the rise of transparency is necessarily a factual one: One that highlights that the increase of transparency is only nominal. This critique involves criticizing governments for only publishing data, rather than understandable analyses, criticizing the partiality of the information rendered visible,¹³³ or the information overload, questioning the real application of transparency provisions, or the extent of freedom of information laws. Part of this type of critique is also the view that transparency initiatives have commonly resulted in tighter central management of information in executive government, rather than the new "culture of openness" that was promised.¹³⁴ Parallel to this critique unfolds the pragmatic critique that transparency, even if institutionalized, does not deliver what it promises; it can be

¹³¹ Pierre Rosanvallon, *La Contre-Démocratie* (Seuil 2006) 18. See, Alemanno (n 107) 84, according to whom the participation entailed by principles of openness "being exclusively driven by the functional need to ensure the technical legitimacy of the regulatory outcome, [it] appears detached from normative considerations regarding the place of the citizen or the individual in the political system and their participation in the decisions of the representative bodies of a community".

¹³² Peter Aucoin and Ralph Heintzman, 'The Dialectics of Accountability for Performance in Public Management Reform' (2000) 66(1) *International Review of Administrative Sciences* 45, 49-52

¹³³ Ralph Nader, 'Casting Sunlight on Secret Government and Its Contractors' *The Huffington Post* (26 May 2014) <https://www.huffingtonpost.com/ralph-nader/government-secrecy_b_5036280.html>

¹³⁴ See, Alasdair Roberts, 'Dashed Expectations: Governmental Adaptation to Transparency Rules' in Christopher Hood and David Heald (eds), *Transparency: The Key To Better Governance?* (Oxford University Press 2006). This critique focuses on formal and mostly informal methods of resisting FOI requests.

easily be circumvented, and it may even have unintended and adverse consequences, rendering the citizens less, rather than more, informed.¹³⁵

The most essential critique however, in my opinion, must focus on the reasons behind transparency's rise and the goals that it serves. The –at least nominal– increase of transparency conveys a shift of governmental rationalities regarding the control of the flow of information; a change of governance paradigm that is in alignment with market-based approaches and the neoliberal *modus operandi*, rather than with democratic and egalitarian values, although at times these different directions might overlap.¹³⁶ This critique sees transparency less as the concretization of liberal values, and more as a functionality of government, or, to adopt a Foucauldian terminology, a governmental rationality –a governmentality.¹³⁷

The changes in political economy necessarily affected governmental rationalities. Neoliberalism directed governmental practice toward practices emphasizing individual freedoms and market-based approaches. The governance model imports features from the organization of the market into the public sphere, while trying to also convey public values into the newly expanded private-sector economy.¹³⁸ Government agencies are supposed to follow the practices of private organizational models and to centre their action on efficiency. This focus on efficiency conceals a de-politicization of governmental action, whereby policies are not judged according to their political significance and partiality, but according to supposedly universal standards of success and failure. Success is evaluated by the market; however, 'the market' is a different measure than 'the people', in that it features real inequalities in economic power and influence rather than an abstract, symbolic equality as ideally denominated by 'the people'. In this way, governance institutionalizes these structural inequalities, while it distances itself from the theoretical significance of the 'citizen' paradigm. The move toward transparency is integrated within this governance paradigm; it signals the progressive decay of centralized

¹³⁵ See, indicatively, Mark Fenster, *The transparency fix: Secrets, leaks, and uncontrollable government information* (Stanford Law Books 2017), Archon Fung, Mary Graham and David Weil, *Full disclosure: The perils and promise of transparency* (Cambridge University Press 2007), Haridimos Tsoukas, 'The tyranny of light: The temptations and the paradoxes of the information society' (1997) 29(9) *Futures* 827

¹³⁶ According to Christina Garsten and Monica L de Montoya, 'Introduction: Examining the Politics of Transparency' in Christina Garsten and Monica L de Montoya (eds), *Transparency in a new global order: Unveiling organizational visions* (Edward Elgar 2008) 3, transparency transcribes "a neoliberal ethos of governance that promotes individualism, entrepreneurship, voluntary forms of regulation and formalized types of accountability".

¹³⁷ Foucault, 'Governmentality' (n 19)

¹³⁸ Orly Lobel, 'The Renew Deal: The Fall Of Regulation And The Rise Of Governance In Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 343, 365. See, also Freeman, 'Extending Public Law Norms Through Privatization' (n 25)

bureaucracies that sought to maximize their power by keeping secrets and monopolizing knowledge,¹³⁹ to the networked forms of governance where the role of private initiative becomes more important and where private and public actors must collaborate in the quest for effective social regulation. This regulative ideal conveys disillusionment about the possibilities of progressive social change through the action of the state; it is now the market that must carry out any projects of reform, with the obvious consequences that this entails for radical projects of redistribution or other visions that would destabilize the status quo.¹⁴⁰

Behind the rise of transparency lies also the idea that it is the antidote for democratic deficits, especially, but not exclusively, of global governance institutions and supranational decision-making. This is tied to transparency's supposed function as generative of legitimacy. For instance, in the EU transparency has been presented as a type of holistic medicine designed to remedy many of the ailments the body of the EU is perceived to have.¹⁴¹ The idea is that the provision of information will enable citizens to understand and evaluate policies and possibly participate in the decision-making process. However, as opportunities for citizen participation are often extremely limited, especially in global governance institutions such as the IMF or the World Bank, transparency becomes the sole 'guarantee' of accountability for the designated norms or policies, the outcomes of removed decision-making processes. Civil society organizations and media sources assume the task of unpacking the often complicated or overly technical information and therefore become an integral part of attempts to somewhat democratize governance at the international and global levels. Within these processes of 'upward surveillance' and 'responsibilization' of civil society lies also whistleblowing. The role of 'monitorial citizens' is a pro-active, albeit a limited one. It is limited to the extent that these groups or individuals function only as evaluators of policies and not as active participants in their making.¹⁴²

¹³⁹ See, the well-known quote from Max Weber: "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of 'secret sessions': in so far as it can, it hides its knowledge and action from criticism", Max Weber, Hans Gerth and C. W. Mills, *From Max Weber: Essays In Sociology: Translated, Edited And With An Introduction By H.H. Gerth And C. Wright Mills* (Kegan Paul, Trench, Trubner & Co 1947) 233.

¹⁴⁰ See, Claire Birchall, according to whom transparency may be potentially complicit with neoliberal imperatives, while an appropriation of secrecy from the Left might constitute an 'interruption', which may pave the way for transforming democracy, Clare Birchall, 'Transparency, Interrupted: Secrets of the Left' (2011) 28(7-8) *Theory, Culture & Society* 60, 71-77

¹⁴¹ Deirdre M Curtin and Albert Meijer, 'Does Transparency Strengthen Legitimacy?: A Critical Analysis Of European Union Policy Documents' (2006) 11 *Information Polity* 109, 110

¹⁴² Besides, the 'monitoring' may be often motivated by personal profit, rather than democratic concerns. A telling example can be found in the U.S.A., where the corporate sector has become the biggest user of freedom of

Transparency should not be understood as the ideal state where everything is clear and visible, but rather as one particular of management of visibilities. It has been argued that there is an “intimate relationship between seeing, knowing, and governing”.¹⁴³ Indeed, transparency, by directing the gaze to parts of the problem and necessarily concealing others, transcribes a form of ordering and control. Most importantly, it fulfils a double function for the political system. It generates legitimacy and it enhances the efficiency of its communications, meaning it increases their chances of achieving the binding effect they are supposed to have. Legitimacy evolves as a result of the system’s adaptive evolution, which is due to the system cognitive openness.¹⁴⁴ In this case, I showed how legitimacy became intrinsically connected with accountability because of the predominance of neoliberalism, individualism, and pluralistic sub-politics. In terms of systems theory, the political system adapted its functionally differentiated communications to the ‘irritations’ of the environment, stemming for instance from the economic system. The same adaptation led to transparency being considered an enhancement of efficiency. Contrary to the centralization of information and the opaque bureaucracies, contemporary governance necessitates some level of information sharing, not only from the government, but also from other actors, as I will show in the next Section. When the sharing of information would not optimize the function of the respective system, as is the case for national security, then the management of visibilities is much more restricted.

Transparency is presented as a supra-ideological and inherently good reform, of a more technical than political character.¹⁴⁵ However, if understood as a governmental rationality, its seemingly neutral character becomes less convincing and politics re-enters the discussion.

information legislation. *See*, Margaret B Kwoka, ‘FOIA, Inc.’ (2016) 66 *Duke Law Journal* 1361. For a comment on the reactive character of FOIA legislation, resulting from its ad hoc nature, as well as from the fact that it empowers opponents of regulation and contributes to a culture of contempt surrounding the domestic policy bureaucracy while insulating the national security state from similar scrutiny, *see* David Pozen, ‘Freedom of Information Beyond the Freedom of Information Act’ (2017) 165 *University of Pennsylvania Law Review* 1097, 1100-1102

¹⁴³ Mikkel Flyverbom, ‘Disclosing and concealing: internet governance, information control and the management of visibility’ (2016) 5(3) *Internet Policy Review* 1, 1. The genealogy of this argumentation can be found in Bentham’s ‘inspective architecture’, meaning the idea that “the more strictly we are observed, the better we behave” and in Foucault’s disciplinary vision of the Panopticon. On the epistemology of ‘seeing’ and how the notion of visibility has become an important aspect of contemporary culture, *see* Andrea Brighenti, ‘Visibility: A Category for the Social Sciences’ (2007) 55(3) *Current Sociology* 323.

¹⁴⁴ Niklas Luhmann, *Legitimation durch Verfahren* (Suhrkamp 1983), 167. For a comprehensive summary of Luhmann’s views on legitimacy, *see* Chris Thornhill, ‘Niklas Luhmann: A Sociological Transformation of Political Legitimacy?’ (2006) 13 *Distinktion: Journal of Social Theory* 33

¹⁴⁵ Richard Calland, ‘Exploring The Liberal Genealogy And The Changing Praxis Of The Right Of Access To Information: Towards An Egalitarian Realisation’ (2014) 61 *Theoria* 70, 71

Because then, the question becomes how to arrange the management of visibilities in order to achieve a specific aim, or to rearrange them in order to achieve a different aim than the one currently pursued. For example, transparency in the form of e-government could make possible forms of direct citizen participation in the decision-making processes in the forms of referenda, continuous opinion polling, digital cities etc.¹⁴⁶ The ideas of interactive policy making and co-production of policies, or even neighbourhood budgets, are based upon the prerequisite of transparency about the legislative initiatives.

At the same time, transparency could also serve the vision of making the market the central agent in society,¹⁴⁷ emphasizing reputational accountability, self-regulation, and unmediated accountability of corporations to society at large. I will now address the function of transparency in corporate regulation and in the effort to secure market conditions.

¹⁴⁶ Ignace Snellen, 'E-government: A challenge for Public Management' in Ewan Ferlie, Laurence E Lynn and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (Oxford University Press 2007) 409

¹⁴⁷ Hans K Hansen, Lars T Christensen and Mikkel Flyverbom, 'Introduction: Logics of transparency in late modernity: Paradoxes, mediation and governance' (2015) 18(2) *European Journal of Social Theory* 117, 120

2.1.4. The function of transparency in corporate regulation: New governance, reputational accountability, and the optimal information flow for market economy

The steadily increasing focus on transparency is not limited to administration and public institutions but it also extends to the functioning of the markets and the regulation of corporations. In fact, transparency's functional character becomes even more evident in the context of the regulation of the economic system. In Subsection 2.1.4.1, I explore transparency's central role in corporate governance and its rationale of encouraging informed investor decision making and undeterred capital flow and ensuring shareholders' ability to exercise their ownership rights on an informed basis. In Subsection 2.1.4.2, I discuss, through a comparative perspective, the advent of Corporate Social Responsibility and the example of non-financial reporting. Acknowledging that transparency is perceived as a means of control and potential source of reputational sanctions that will deter certain types of conduct (corruption, environmental hazards, human rights violations, etc.), I maintain a critical outlook on the prospect of institutionalizing the dynamics of the market as a regulatory solution. In Subsection 2.1.4.3, I show how the use of transparency in regulation may fall under the regulatory paradigm of new governance. Contemporary regulatory theory stresses the importance of self-regulation and absence of coercion, which makes transparency a powerful regulatory instrument as it can use the social dynamics themselves to trigger self-regulation. I end the Subsection by theorizing the level of transparency that optimizes the functioning of market economy.

2.1.4.1. Transparency as fundamental for Corporate Governance

The need for transparency in the functioning of corporations becomes accentuated with the advent of "corporate governance". Corporate governance is a terminology born in the early 1970s, coinciding with the developments described in Section A.1 and with a general weakening of governmental action. Although no canonical definition of the notion exists, it could be loosely defined as the sets of relationships and structures that govern a corporation.¹⁴⁸

¹⁴⁸ See, OECD, 'G20/OECD Principles Of Corporate Governance' (2015) 9, referring to "a set of relationships between a company's management, its board, its shareholders and other stakeholders," as well as "the structure

The growing emphasis on corporate governance transcribes the idea that social welfare is connected to the internal governance of corporations, simultaneously recognizing their dominant role in the social and economic nexus. In this respect Mariana Pargendler correctly assumes that corporate governance had instantly a universal appeal due to its conciliatory character: “it appeals to progressives as a path for social and economic change in the face of political resistance to greater state intervention, while pleasing conservative forces as an acceptable concession to deflect greater governmental intrusion in private affairs”.¹⁴⁹

Transparency is a major component of corporate governance. According to the OECD Principles of Corporate Governance of 2015 “the corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company”.¹⁵⁰ Transparency had received attention already in the famous Cadbury Report of 1992, which first introduced the “comply or explain” principle,¹⁵¹ a principle that was to become pivotal for the role of transparency for corporate governance. What comply or explain means, is that instead of hard laws and direct control, governments should institute codes, which companies may comply with, or if they do not, explain publicly the reasons why. This way companies open themselves to the scrutiny of the markets.

The importance of transparency has also been integrated as a strategic point in the governance framework of the European Union. The 2012 Action Plan sets transparency enhancement as the prime line of action of the Commission in its effort to modernize the company law and corporate governance framework.¹⁵² In detail it suggests that “companies need to provide better information about their corporate governance to their investors and society at large. At the same time companies should be allowed to know who their shareholders are and institutional investors should be more transparent about their voting policies so that a more fruitful dialogue on corporate governance matters can take place”.¹⁵³ It promotes

through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined”.

¹⁴⁹ Mariana Pargendler, ‘The Corporate Governance Obsession’ (2016) 42(2) *Journal of Corporation Law* 359, 366

¹⁵⁰ OECD (n 148) 41

¹⁵¹ Committee on the Financial Aspects of Corporate Governance, ‘The Financial Aspects Of Corporate Governance’ (1992) [3.7]

¹⁵² European Commission, ‘Action Plan: European Company Law And Corporate Governance: A Modern Legal Framework For More Engaged Shareholders And Sustainable Companies’ (2012) 4

¹⁵³ *ibid*

disclosure of board diversity policies and management of non-financial risks; improving corporate governance reporting with regards to the explanations provided when companies depart from particular recommendations of the applicable code; shareholder identification; and strengthening transparency rules for institutional investors. The disclosure of such information could, according to the Action Plan, strengthen companies' accountability to civil society.¹⁵⁴

The Commission's effort to institute a common regulatory framework regarding mandatory disclosures spurred changes in continental European corporate governance.¹⁵⁵ France, for instance, following the European policy in the subject matter,¹⁵⁶ introduced the "comply or explain" principle in order to reinforce corporate transparency.¹⁵⁷ The "comply or explain" principle anchors corporate governance in a dimension that is henceforth quasi-normative.¹⁵⁸ This is because it conveys a presumption according to which the principles of governance included in the codes of governance constitute "*the* mode of good governance", and not just "*a* mode of good governance" among many potential others. Thus, it transcribes a value that is universal, transposable, and adaptable to any structure. Corporate governance acquires a normative dimension, signalling a shift in the understanding of normativity towards forms of "soft" regulation.

The initial economic rationale for increased transparency standards is two-fold: encourage informed investor decision making and undeterred capital flow and ensure shareholders' ability to exercise their ownership rights on an informed basis. Foucault states that "the economy creates public law";¹⁵⁹ the need to provide better stock returns performance and facilitate finding external capital is what drives, to a certain extent, the mandate for transparency. Information disclosure proves to be instrumental for corporations also regarding the agency problem, which can occur as a result of the potential asymmetries between the shareholders' and the management's goals. Briefly, it describes the hypothetical situation of unwillingness on behalf of the agents to increase the wealth maximization of shareholders, while working

¹⁵⁴ *ibid* 8

¹⁵⁵ See, Eilís Ferran, *Building An EU Securities Market* (Cambridge University Press 2004)

¹⁵⁶ France transposed the provisions of Directive 2006/46/EC of 14 June 2006 in their entirety, although the Directive permitted a much more restrictive transposition.

¹⁵⁷ Article L. 225-37, al. 7 of the 'Code de Commerce', as amended by the Loi n° 2008-649 du 3 juillet 2008 portant diverses dispositions d'adaptation du droit des sociétés au droit communautaire.

¹⁵⁸ Björn FASTERLING and Jean-Christophe DUHAMEL, 'Le Comply or explain: La transparence conformiste en droit des sociétés' (2009) t. XXIII, 2(2) *Revue internationale de droit économique* 129, 134

¹⁵⁹ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978-79* (Palgrave Macmillan 2008) 84

instead for their own interest. In other words, instead of long-term value maximization, agents may tend to focus on short-term profit, since their payment depends on the short-term performance of corporations.¹⁶⁰ Taking into consideration that the agent is better informed than the principal regarding company data, the principal (that is, the owner) may not realize whether or not the agent's performance is in accordance to the company's long-term goals.¹⁶¹ Corporate transparency blunts these information asymmetries, resulting in the provision of essential information to principals regarding their overall strategy and improving their decision rights, while at the same time reducing agency costs, since a high level of transparency creates an automatic monitoring system in a company.¹⁶²

2.1.4.2. *From Corporate Governance to Corporate Social Responsibility: The advent of non-financial disclosures*

Corporate Social Responsibility (CSR) signals the advent of a polyphonic view of corporate governance, one which stresses the importance of ethics and accountability to parties outside the firm, revealing the private sector's intensifying influence on public policy. According to the European Commission, "CSR offers a set of values on which to build a more cohesive society and on which to base the transition to a sustainable economic system".¹⁶³ Teubner suggests that CSR is not a new management ethic but the translation of external pressures into changes in the internal corporate structure, supposedly functioning as limits to the corporation's expansionist tendencies.¹⁶⁴ CSR is then projected as an antidote to the gaps in the capacity of governmental institutions to regulate globalizing markets and transnational actors.¹⁶⁵ The institutionalization of the company's role in wider policy domains via the form of mandatory disclosures and transparency requirements suggests an institutional expectation that corporations should succeed wherefrom government is retracting. In the spirit of CSR, which

¹⁶⁰ Jill F Solomon and Aris Solomon, *Corporate Governance And Accountability* (Wiley 2004) 17

¹⁶¹ See, Stephen A Ross, 'The Economic Theory of Agency: The Principal's Problem' (1973) 63(2) *The American Economic Review* 134

¹⁶² Reinier H Kraakman, *The Anatomy Of Corporate Law* (Oxford University Press 2009) 49

¹⁶³ Committee on the Financial Aspects of Corporate Governance (n 151) 3

¹⁶⁴ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 93

¹⁶⁵ Lilian Moncrieff, 'Karl Polanyi and the Problem of Corporate Social Responsibility' (2015) 42(3) *Journal of Law and Society* 434, 444

promises to balance corporate interests with the demands for sustainable growth and human rights protection, whistleblowing policies follow the development of ‘business in society’¹⁶⁶ by enhancing the firms’ self-regulatory capacities in the quest to limit adverse societal impacts or by disclosing to state organs the negative impact of organizational operations.

On the international level, the adoption of the Global Compact and the UN Guiding Principles marked the enshrinement of a ‘soft law’ approach toward the responsibility of corporations.¹⁶⁷ Effective operationalisation of the corporate responsibility to respect human rights depends on voluntary corporate uptake of social norms.¹⁶⁸ CSR Codes then become an integral part of international private regulation and of ‘global legal pluralism’.¹⁶⁹ The norms framing CSR centre on transparency because transparency is seen as a means of control and a potential sanction to the reputation of companies. The importance of reputational sanctions and rewards is attributed to the rise of global brands and the pervasiveness of branding, as well as the new technologies, the internet, the social media, and a culture of constant observation.¹⁷⁰

A characteristic instance of the interplay between voluntary CSR and public policy is the case of non-financial disclosures. Predicated upon the idea that corporations play an increasingly important role in global governance and that their activity is intrinsically connected to the social well-being, non-financial disclosure aims to open up corporate activity to public scrutiny in social or environmental issues. Hence, the EU has issued the 2014/95/EU Directive on nonfinancial reporting, following the two resolutions of the European Parliament of 6 February 2013 ‘Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth’ and ‘Corporate Social Responsibility: promoting

¹⁶⁶ Wim Vandekerckhove, *Whistleblowing and organizational social responsibility: A global assessment* (Ashgate 2006) 106-108

¹⁶⁷ See, also the trajectory of civil regulations and their effort to extend regulatory authority to global nonstate actors, e.g., David Vogel, ‘The Private Regulation of Global Corporate Conduct’ (2010) 49(1) *Business & Society* 68. Unlike traditional hard law enforcement regimes, ‘civil regulations’ are grounded in the ‘rule of reputation’, which ties accountability solely to reputational capital, or lack thereof, Kevin T Jackson, ‘Global Corporate Governance: Soft Law and Reputational Accountability’ (2010) 35 *The Brooklyn Journal of International Law* 41, 47.

¹⁶⁸ Nicola Jägers, ‘Will transnational private regulation close the governance gap?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 296, arguing that transparency becomes critical in the process of monitoring corporate behaviour.

¹⁶⁹ For a series of articles debating the ideal way of maximizing the regulatory effect of CSR Codes, see, *Indiana Journal of Global Legal Studies* Vol. 24, 2017.

¹⁷⁰ Jackson (n 167) 85-87

society's interests and a route to sustainable and inclusive recovery'.¹⁷¹ According to the Directive, "disclosure of nonfinancial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection".¹⁷² Indeed, the non-financial statements must cover environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters.¹⁷³ The Directive adopts the "comply or explain" principle, meaning that companies that fail to report on the above-mentioned issues will have to explain why in their annual reports.

National legislations of Member States had also turned their attention towards non-financial reporting even before the EU directive. In France, for instance, the Grenelle II Act required that listed companies have to provide details in their annual reports on how they take into account the social and environmental consequences of their activity and their social commitments in favour of sustainable development,¹⁷⁴ while in Germany the 2010 National Strategy for CSR aimed to increase the visibility and credibility of CSR, to anchor it more firmly in enterprises and public bodies and win over more small and medium-sized enterprises (SMEs) to CSR.¹⁷⁵

In the U.S., the economic ordeals of the last ten years have prompted a re-evaluation of the federal role in corporate governance.¹⁷⁶ Since the Sarbanes-Oxley Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, there is a greater degree of state authority in federal corporate governance, and less reliance on non-state law alone.¹⁷⁷ As a result of the financial scandals of the early 2000s (Enron, WorldCom etc.) and the crisis of 2008, U.S. corporate governance became gradually more state-centric, providing the Securities

¹⁷¹ See, also European Commission, 'Guidelines on non-financial reporting (methodology for reporting non-financial information): 2017/C 215/01' (2017)

¹⁷² 'Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups', *OJ L 330* (2014), recital 3

¹⁷³ *ibid* recital 7

¹⁷⁴ Loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement. See, also the recent, Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, which imposes on corporations due diligence obligations regarding human rights and the environment.

¹⁷⁵ Global Reporting Initiative, 'Sustainability Reporting Policy Initiatives In Europe' (2013). See, also the examples of Denmark, which has introduced mandatory reporting on human rights and climate-related issues through its Financial Statements Act of 2012 and of the UK, which introduced mandatory annual reporting on slavery and human trafficking in supply chains through the Modern Slavery Act of 2015.

¹⁷⁶ Stephen M Bainbridge, *Corporate Governance After The Scandals And The Financial Crisis* (Oxford University Press 2012) 21

¹⁷⁷ Dimity Smith, 'Governing The Corporation: The Role Of Soft Regulation' (2012) 35 *UNSW Law Journal* 378, 385

and Exchange Commission (SEC) with direct rule-making power over important corporate governance subject matters. The SEC, charged with enforcing federal securities laws and ensuring the compliance of publicly traded firms with a range of reporting requirements, has engaged in what has been characterized as a ‘therapeutic disclosure’, or designing disclosure provisions with the aim of influencing corporate behaviour through ‘social shaming’.¹⁷⁸ For example, the Dodd-Frank Act of 2010 included a section of specialized corporate disclosures, including mine safety, payments to governments by issuers engaged in resource extraction activities and the use by manufacturers of conflict minerals emanating from the Congo region of Africa, a measure designed to address the humanitarian crisis in the region.¹⁷⁹ These Specialized Corporate Disclosure provisions have received much criticism for representing a historic shift away from the SEC's mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.¹⁸⁰ However, according to Cynthia Williams, Congress intended disclosure not only to prevent fraud, but also to affect corporate conduct.¹⁸¹ Therefore, the contemporary effort to broaden the scope of SEC reporting requirements is consistent with the historical role of disclosure as a regulatory tool. Already in 1978 SEC embraced the idea that disclosure can affect corporate conduct and that such a development is in fact desirable:

“The legislative history of the federal securities laws reflects a recognition that disclosure, by providing corporate owners with meaningful information about the way in which their corporations are managed, may

¹⁷⁸ Bainbridge (n 176) 34

¹⁷⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, Title XV. The D.C. Circuit had held the statute and the rule to be partly unconstitutional as it deemed the requirement to report that a company’s products “have not been found to be ‘DRC conflict free’ a violation of the First Amendment, *Nat'l Ass'n of Manufacturers v. S.E.C.* 800 F.3d 518, [2015] (US Court of Appeals, District of Columbia Circuit).

In a similar way, the California Transparency in Supply Chains Act 2010 (CTSCA) requires that retail sellers and manufacturers disclose to what extent, if any, they take steps to eradicate slavery and human trafficking from their supply chains. Like the UK’s Modern Slavery Act, the CTSCA does not require that companies implement measures to ensure that their supply chains are free from human trafficking and forced labour. Instead, “the law only requires that covered businesses make the required disclosures – even if they do little or nothing at all to safeguard their supply chains”, State of California, Department of Justice, ‘The California Transparency in Supply Chains Act. A Resource Guide’ (2015) i.

¹⁸⁰ David Lynn, ‘The Dodd-Frank Act’s Specialized Corporate Disclosure: Using The Securities Laws To Address Public Policy Issues’ (2011) 6(2) *Journal of Business & Technology Law* 327, 330. *See also*, the claims for a “creeping federalization of corporate governance law”, Bainbridge (n 175) 21. *See also*, Jill Fisch, ‘Leave It To Delaware: Why Congress Should Stay Out Of Corporate Governance’ (2013) 37 *Delaware Journal of Corporate Law* 731.

¹⁸¹ Cynthia A Williams, ‘The Securities and Exchange Commission and Corporate Social Transparency’ (1999) 112(6) *Harvard Law Review* 1197, 1211

promote the accountability of corporate managers. Thus, while the federal securities laws generally embody a disclosure approach, it has long been recognized that disclosure may have beneficial effects on corporate behaviour (sic). Accordingly, although the Commission's objective in adopting these rules is to provide additional information relevant to an informed voting decision, it recognizes that disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct. This sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws".¹⁸²

This passage reflects the idea that disclosure intends to bring about pressure on corporate managers to exercise their power with a greater sense of fiduciary obligation, both toward shareholders and toward the public, an idea that was shared by prominent authors of the early 1900s, such as Louis D. Brandeis, Adolf A. Berle and Gardiner C. Means.¹⁸³ According to Brandeis's famous quote, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman".¹⁸⁴ The use of disclosure in the United States to indirectly achieve policy related-objectives dovetails with broader trends in regulatory thought that can be placed under the theoretical project of "new governance".¹⁸⁵ I will come back to that in the next Subsection.

Corporations respond overly positively to this legislative trend and appear to recognize the need and importance of non-financial disclosure to key stakeholders and the larger public.¹⁸⁶ Of the world's 250 largest corporations, 92% currently produce CSR reports, a number which starkly contrasts with 2005, when it rose up only to 64%.¹⁸⁷ Moreover, 74% of these companies issue corporate responsibility reports using the Global Reporting Initiative's (GRI) Sustainability Reporting Guidelines,¹⁸⁸ which is an international non-profit organization with mission to make sustainability reporting standard practice. Not surprisingly, the use of GRI is declining compared to 2013, when it was used by 81% of the largest corporations, partly due to the augmentation of mandatory disclosure regimes. According to the KPMG report of 2015,

¹⁸² Aaron Dhir, *Challenging Boardroom Homogeneity* (Cambridge University Press 2015) 93, citing SEC, 'Shareholders Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Securities Act Release No 15384' (6 December 1978) 3

¹⁸³ Williams (n 181) 1211

¹⁸⁴ Louis D Brandeis, *Other People's Money and How the Bankers Use it* (F.A Stokes 1914) 92

¹⁸⁵ Dhir (n 182) 94

¹⁸⁶ Transparency International, 'Transparency In Corporate Reporting' (2014) 6. According to the Report, "global companies themselves increasingly understand the benefits of corporate reporting on a range of corporate responsibility issues, including their anti-corruption programmes, as an essential management tool rather than a burdensome and costly exercise that is carried out to satisfy stakeholders".

¹⁸⁷ KPMG, 'Currents Of Change: The KPMG Survey Of Corporate Responsibility Reporting' (2015) 30

¹⁸⁸ *ibid* 42

the trend to increase the publication of CSR information can be attributed firstly to the shareholders' view that it is relevant for their understanding of a company's risks and opportunities, and secondly, to the requirements set by stock exchanges and governments for companies to report on CSR data in annual reports.¹⁸⁹ Indeed, a commitment to voluntary disclosure has the potential to further reduce information asymmetry between insiders and outside investors, which means that voluntary disclosure is likely to benefit the firm in the form of a lower cost of capital.¹⁹⁰

The notion that the availability of information will trigger societal pressures and subsequently corporate self-limitation denotes an evolving understanding of responsibility, subsumed under the category of *lex imperfecta*.¹⁹¹ There are no state sanctions for the transparency imperatives highlighted above: the sanctions must come from the consumers and potential investors. The advent of CSR entails structural changes in the understanding of the State and the function of the law, the discussion of which is beyond the purposes of this project. It suffices to say that CSR sets 'the people' as the ultimate controllers of a corporation's policies; though the people not as citizens or members of a political community, but the people

¹⁸⁹ *ibid* 36

¹⁹⁰ Tom Berglund, 'Corporate Governance And Optimal Transparency' in Jens Forssbaeck and Lars Oxelheim (eds), *The Oxford handbook of economic and institutional transparency* (Oxford University Press 2015) 362. See, also the 'disclosure principle' developed by R. A. Dye, according to which, if investors believe that a firm is withholding information they will infer that this information is worse than expected, as otherwise it would pay to release it. This inference will drive down the price until it is worthwhile for the firm to release the information. Ronald A Dye, 'Disclosure of Nonproprietary Information' (1985) 23(1) *Journal of Accounting Research* 123

¹⁹¹ Interestingly, this reputational accountability appears to be judiciable. In France, in the case *Conseil d'État, 3 mars 2014 (n° 362227)*, the citizens' association Forum for CRS requested the Council of the State to annul a decree regarding companies' obligations of transparency in social and environmental affairs. One of the arguments against the decree concerned the designation of the independent body that was supposed to audit the information procured by the companies. According to the decree, "the independent third party [...] is designated, as appropriate, by the General Manager or Chief Executive [...] of one of the bodies accredited for this purpose by the French Accreditation Committee (COFRAC)". For the Council of the State however, the fact that the third party is "appointed from accredited organizations for this purpose and subject to ethical requirements in the provisions of Article L. 822-11 of the Commercial Code" (cons. 5) was sufficient to recognize its independence.

The Council of the State chose therefore to ignore the paradoxical situation of allowing the controlled person to name the controller, rendering the scope of "independence" rather doubtful. In addition, neither the law, nor the decree, establish specific penalties in the event of an absence of appointment of auditors by the General Manager or the Chief Executive, approaching thus the category of *lex imperfecta*. The company may thus ultimately avoid the verification of social and environmental information included in the management report. The adoption of rules that can enter the *lex imperfecta* category suggests the conceptualization of a feebly normative responsibility that corresponds to reputational accountability. The basic premise is that when these rules are not followed, the sanction will come from the market. It is not necessary that the breach of a rule causes a state sanction, since the fear reputational sanctions will lead companies to meet the requirements of the decree.

as economic actors, as investors and consumers.¹⁹² In this sense, the elevation of reputational accountability to a control mechanism reflects the dominance of the economic form and the subsequent corrosion of the citizenry's constitution as a 'body politic' wherefrom legitimate control over private conduct is derived. Legitimacy is, in this paradigm, connected to the accountability assured by the exposure to the contingent and fluctuant dynamics of the markets, over which a large portion of the population has insignificant leverage, and can only react to, not control. It is a displacement of politics by economics and an effective evasion of the straightforward and unsurprisingly inequitable results of societal power relations. From a critical viewpoint, it could be argued that CSR, in its quest for 'embeddedness',¹⁹³ represents the idea of a 'frictionless capitalism', engulfing voices of discontent.¹⁹⁴ Indeed, if the implementation of CSR broadens the process of inclusion, responding to a wide range of public concerns, then some slight containment in the market could be a reasonable sacrifice. CSR infuses in society the idea of a fair market, whereby corporations become accountable and agents of human rights protection, environmental protection etc. This comes to compensate for their profit-maximizing orientation, as well as for the insufficiencies of modern states in regulatory capabilities, and to forestall voices of discontent for their worldwide expansion.

2.1.4.3. *Toward a 'new governance' paradigm*

It was mentioned that the use of transparency as a regulatory tool in regulatory compliance coincides with broader trends in regulatory thought that have both pragmatic and theoretical origins. The pragmatic affirmation is that the law follows the political economy and consequently, legal practice and thought must adapt to the new realities which are shaped by globalization, new patterns of production, and profound changes in communication and technologies.¹⁹⁵ The theoretical substratum draws from systems theory and the concept of autopoietic law. In particular, the economic system can be conceived as a social system. Following systems theory, social systems are autonomous and self-referential, operating

¹⁹² According to Sirgy and Su, "The idea is that consumers can serve society by engaging in rational decision making and wisely exercising their economic votes", M. J Sirgy and Chenting Su, 'The Ethics of Consumer Sovereignty in an Age of High Tech' (2000) 28(1) *Journal of Business Ethics* 1, 1

¹⁹³ For a discussion of CSR and reputational accountability as an attempt to embed the economy in social relations, see Moncrieff (n 165).

¹⁹⁴ Slavoj Žižek, *Violence: Six Sideways Reflections* (Profile 2008) 14

¹⁹⁵ Lobel (n 138) 357

according to their own codes of communication.¹⁹⁶ It follows that direct communication between systems is impossible. Systems change by self-evolution, which is understood to be happening within the system¹⁹⁷ and which can be triggered by ‘irritations’ caused by other functional systems.¹⁹⁸

The practical significance of this conceptualization is that the best way to trigger changes to the economic system is through creating the mechanisms and the structures that will enable efficient self-regulation. The welfare regulatory state invested in ‘command-and-control’ type of prescriptive regulation, supported by negative sanctions in case of non-compliance. Criticized for inflexibility, ineffectiveness, excessive hostility, and possible ‘regulatory capture’ command-and-control has fallen into dismay.¹⁹⁹ In new governance, flexibility, cooperation, ‘responsiveness’, and self-regulation come to the foreground. The foundational idea is, instead of adopting an adversarial approach, to afford a significant degree of discretion to the regulatory target.²⁰⁰

In order to enhance ‘internal self-regulatory capacities’,²⁰¹ coercion should be kept at the periphery and ‘moral suasion’ favoured.²⁰² Transparency and information disclosure are central to this approach regarding regulation.²⁰³ It is, in fact, the social dynamics themselves that should act as a catalyst of regulation; according to the theory, shaming, social expectation, and encouraged introspection have a greater potential of regulatory compliance than classic coercion.²⁰⁴ The goal is to produce behavioural shifts and to encourage corporations to face the results of their own actions, with the cost that this might entail for their public image. Unlike other regulatory approaches, targeted transparency policies employ communication as a

¹⁹⁶ See, Riley (n 54)

¹⁹⁷ Benhabib (n 61) 7-8

¹⁹⁸ Niklas Luhmann, *Law as a social system* (Oxford University Press 2004) 258

¹⁹⁹ For example, see Clare Hall, Christopher Hood and Colin Scott, *Telecommunications regulation: Culture, chaos and interdependence inside the regulatory process* (Routledge 2000)

²⁰⁰ Cary Coglianese and Evan Mendelson, ‘Meta-Regulation and Self-Regulation’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford handbook of regulation* (Oxford University Press 2010) 151

²⁰¹ Lobel (n 138) 365

²⁰² Ian Ayres and John Braithwaite, *Responsive regulation: Transcending the deregulation debate* (Oxford University Press 1992) 19

²⁰³ On how mandatory disclosures may help improve compliance with labour law and create a socially responsible workplace, see Cynthia L Estlund, ‘Just The Facts: The Case For Workplace Transparency’ (2011) 63 *Stanford Law Review* 351.

²⁰⁴ Marc Schneiberg and Tim Bartley, ‘Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century’ (2008) 4(1) *Annual Review of Law and Social Science* 31, 47

regulatory mechanism.²⁰⁵ The signals that will stir the direction of the organization are supposed to come directly from the market. This is a system the efficiency of which depends on consumer/investor knowledge and the possibility of the organization to receive and analyse the signals of the market.

At the same time, this approach is compatible with and informed by a set of ideas stemming from deliberative democracy. The idea that deliberative democracy is predominantly about “responsiveness and reflexiveness”, rather than about particular institutions, allows for flexibility on the issue of institutional arrangements and aims to render governance permeable to “people’s reasons, values, and stories”.²⁰⁶ Under this theoretical model, the State may also be conceived as having the role of the facilitator of the permeability of private organizational systems, including corporations. This means that the State should facilitate corporate transparency and encourage initiatives such as CSR. The notion that corporate political power must be permeable to deliberative democracy²⁰⁷ approaches Teubner’s normative suggestion of ‘polycontextuality’ and of democratizing the economic system from within.²⁰⁸ However, inequality of resources and power remain important counter-arguments against a normative model that depends on reputational sanctions and institutionalizes market dynamics as a regulatory force.²⁰⁹

Transparency can also be seen as a way to blunt governmental control of the compliance function. Through compliance the government dictates how companies must comply with the law. This is seen as an exogenous source of authority, foreign to the company and its needs. On the contrary, mandatory disclosures focusing on structural elements of compliance mechanisms, instead of more direct governmental interference, would, according to Sean Griffith, allow interested parties—compliance officers, policymakers, and enforcers—to learn what actually works in compliance, resulting in more effective detection and deterrence of corporate misconduct and would also enable capital market participants to distinguish between compliance programs at different companies.²¹⁰ This argumentation highlights the positive

²⁰⁵ Fung, Graham and Weil (n 135) 48

²⁰⁶ Christine Parker, *The Open Corporation* (Cambridge University Press 2002) 37-40, citing Philip Pettit, *Republicanism: A theory of freedom and government* (Clarendon 1997)

²⁰⁷ Parker (n 206) 40

²⁰⁸ *See*, Section 1.2.

²⁰⁹ *See*, also Section 2.1.2.4

²¹⁰ Sean Griffith, ‘Corporate Governance In An Era Of Compliance’ (2016) 57 *William & Mary Law Review* 2075, 2139

effect mandatory disclosures may have on corporate self-regulation, as they can be used as an alternative for a more exogenous state intervention.

However, transparency is also employed as an instrument of regulation in more ‘traditional’, state-centred understandings of regulation. For instance through mandatory disclosures a regulatory agency mandates what should be disclosed, inspects these disclosures, and penalises those who fail to conform to the regulations.²¹¹ The EU has adopted a framework of financial regulation through transparency requirements, expressed through the Directive 2013/50/EU,²¹² the aim of which is to ensure transparency of information for investors through a regular flow of disclosure of periodic and on-going regulated information and the dissemination of such information to the public.²¹³

New governance did not replace prescriptive forms of state-centred and sanction-backed regulation and transparency can figure in both approaches as an important instrument for regulation. As I will show in the next Chapter, the same is the case with whistleblowing. However, transparency within new governance does transcribe a certain ideological push. It conveys on one hand the partially self-imposed impotence of the central State to control a globalized economy that manifests new levels of complexity, heterogeneity, and unpredictability and on the other hand the belief in the power of the markets to self-regulate or to converge interests, producing a ‘synergetic effect of equitable results’²¹⁴ despite the power imbalances. This is expressed eloquently in the Consultative Document of the High Level Group of Company Law Experts produced for the European Commission in 2002, according to which “disclosure requirements can sometimes provide a more efficient regulatory tool than substantive regulation through more or less detailed rules. Such disclosure creates a lighter

²¹¹ Andrei Schleifer, ‘Understanding Regulation’ (2005) 11(4) *European Financial Management* 439, 442

²¹² ‘Directive 2013/50/EU amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC Text with EEA relevance’, *OJ L 294* (2013). Apart from the Transparency Directive, transparency requirements were also strengthened by other EU Law initiatives, such as the ‘Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings’, *OJ L 182* (2013) and the ‘Regulation (EU) No 596/2014 on market abuse’, *OJ L 173* (2014). According to the latter, market abuse “prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets”, recital 7.

²¹³ European Securities and Markets Authority, ‘Transparency Directive’ <<https://www.esma.europa.eu/regulation/corporate-disclosure/transparency-directive>>

²¹⁴ Jan Kooiman, ‘Findings, Speculations And Recommendations’ in Jan Kooiman (ed), *Modern Governance: New Government-Society Interactions* (SAGE Publications Ltd 1993) 251

regulatory environment and allows for greater flexibility and adaptability”.²¹⁵ However, even Lobel, who argues in favour of the new governance model, warns that the vision of new governance should resist the illusion of transparency as a panacea.²¹⁶ Expecting transparency to act as an automatic regulator places excessive faith in the self-regulative dynamics of the market.

The control of the information flow is fundamental for the optimal functioning of social systems. Market economy does not necessitate absolute transparency for its optimal functioning. Trade secrecy is an important part of market economy and firms may lack the incentives to disclose fully the attributes of their products. The level of transparency required is the one that will permit the maximum freedom for economic actors (meaning therefore the minimum state coercion), while at the same time guaranteeing the maximum level of trust in the integrity of the market. This functioning ideal of the economic system may be materialized through reflexive structures, such as whistleblowing mechanisms, that act as a valve of safety for entirety of the system, enhancing its self-regulatory capacities. A solid system of channels of disclosure and whistleblower protection operates as one more guarantee that instances of fraud and corruption will not be allowed to threaten the trust that is fundamental for the functioning of the market. In this way, whistleblowing remains functional ‘in its absence’, as an instrument of incessant, horizontal, and decentralized oversight over market processes. When the market system itself is not capable of providing the appropriate solutions, then state-centred regulatory approaches will provide the minimum of transparency necessary for the reproduction of the system by providing incentives, protection, and secure channels of reporting for the whistleblowers. I will proceed to the analysis of whistleblowing in regulatory governance in Chapter 2.2.

²¹⁵ The High Level Group of Company Law Experts, ‘A Modern Regulatory Framework For Company Law In Europe’ (2002) 7

²¹⁶ Lobel (n 138) 455

2.2. Effectuating transparency: The diffusion of whistleblowing legislation in the United States and the European Union and its function in securing market conditions

In this Chapter, I discuss the diffusion of whistleblowing legislation as part of a policy of transparency and corporate and financial regulation, undertaking a comparative analysis of the legal frameworks in the United States and the European Union with a focus on the private sector. Drawing from this comparative examination, but also from theoretical insights on the rise of the regulatory and the post-regulatory state, I conclude that whistleblowing is institutionalized first and foremost as a regulatory instrument, rather than as an employee or human rights protection mechanism. This is indicated by the proliferation of whistleblowing provisions and the solidification of whistleblower protection in the field of corporate regulation, contrasted by a scattered and often ineffective legal landscape where whistleblowing does not fulfil similar regulatory objectives. Protection against retaliation is provided as an *adjunct* to the statute's principal objectives, namely the maintenance of trust in the integrity of the markets through the fight against corruption and fraud. Furthermore, the progressive lowering of subjective standards, such as good faith, and the focus on the sole provision of information, points to this instrumental direction of whistleblowing provisions.

As a result of this functional approach to whistleblowing, different legal regimes, informed by different legal cultures, have progressively started to converge. The quest for efficiency in the face of a globalized economy and the export of a particular order disguised as “universal rationality” lead to this convergence, bridging the gap between the American and European approaches to whistleblowing. The legislative and regulatory reforms that constitute whistleblowing protection oscillate between state-centered and ‘new governance’ type of regulation, depending on the emphasis on external or internal reporting mechanisms respectively. In any case, whistleblowing legislation represents a way for the government to maintain oversight and secure market conditions by governing ‘smartly’ through the decentralization of regulatory functions and the incorporation of new actors in the process of regulation.

In Section 2.2.1, I describe the recent augmentation of whistleblowing legislation in a plethora of countries of the Global North and its status in international law. After sketching a brief history of whistleblowing provisions, I highlight the contemporary transnational nature of whistleblowing. Among other factors, international law has been important for this

development. The international initiatives aiming at institutionalising whistleblower protection have a “soft law” character but have been to a certain degree successful in triggering changes in national legislative frameworks.

In Section 2.2.2, I discuss the US model of whistleblower protection through an analysis of the most far-reaching federal provisions in the private sector, stemming from the Sarbanes-Oxley Act of 2002 and from the Dodd-Frank Act of 2010. The two Acts, adopted before and after the financial crisis of 2008 respectively, represent different regulatory strategies, as they exhibit different stances toward the question of the channels of reporting. The Sarbanes-Oxley Act has been much more welcoming to internal whistleblowing than the Dodd-Frank, which in its turn encouraged external reporting to the Securities and Exchange Commission through the establishment of important financial incentives and a better system of anti-retaliatory protection. This highlights the dependence of whistleblowing legislation on the political economy and on the contingent regulatory approach toward corporations and the markets. Moreover, the provision for protection of whistleblowing within the Defend Trade Secrets Act of 2016 indicates that whistleblowing can be symbiotic with trade secrecy.

In Section 2.2.3, I show that, despite some reluctance on the subject matter, whistleblowing legislation is also expanding in the EU. After examining the main issues and aspects of whistleblower protection in three different European states, I conclude that not only is there a progressive convergence between them, but also that the differences with the US model are blunted. In Europe, like in the US, it is the economy that triggers the changes in the legislative framework of whistleblowing. This is highlighted by the first pan-European framework of whistleblowing protection which came in the form of an Implementing Directive of the Market Abuse Regulation of 2014. The partial objective of the Directive indicates that its pursuit is much less to enhance employee protection and freedom of speech, but rather to protect whistleblowing as a ‘function’ that may amplify the efficiency of the regulatory strategy. Motivated by a similar concern of under-enforcement, the recent proposal for a Directive on the protection of persons reporting on breaches of EU law (April 2018) significantly expands whistleblower protection in areas where the financial interests of the EU are at stake, aiming to guarantee the ‘level playing field’ that is necessary for the functioning of the single market. Similar to the US, the EU has institutionalized whistleblowing as an exception from the protection of trade secrets in a way that is consistent with the objective of protecting the single market.

In Section 2.2.4, I discuss the role of whistleblowing provisions in the contemporary (post)regulatory state. Whistleblowing can be considered part of the reforms that make up the

regulatory state, reflecting a way of governing 'at-a-distance' over a progressively more expanded market and more privatized ownership of services. At the same time, it can also fit into the paradigm of new governance and its emphasis on harnessing the self-regulative capacities of organizations. Drawing from the comparison between the US and the EU approaches on whistleblowing legislation and the conclusion about the signs of convergence, I question the potential success of the transfer of the US regulatory model in Europe. Finally, I underline the duality of whistleblowing as both an individual liberty, rooted in freedom of expression, and a way of governing in the era of the regulatory state. This suggests the connection of whistleblowing legislation as a transparency mechanism with the Foucauldian analysis on governmentality, according to which governing involves the use of the freedom of the governed as a technical means of securing ends of government.

2.2.1. Whistleblowing as a transnational regulatory instrument

Facilitating whistleblowing and protecting whistleblowers are important parts of transparency reforms because they involve disclosures of information that those responsible for institutional malpractice would normally prefer to withhold. Drawing the limits of public knowledge and optimizing the information flow regarding organizational wrongdoings and illegalities is a key aspect of a public policy of transparency. In this Section, I examine the international character of whistleblowing protections and draw attention to its rising importance in both the US and the EU. In Subsection 2.2.1.1, I argue that the justification for whistleblowing protection follows the justification for transparency: On one hand, both of them represent a certain ideal of functionality and instruments in the regulatory process; on the other hand, they are supposedly also value-driven, connected with accountability, deliberative democracy, and the right to information. This dualism is also reflected in the history of whistleblowing legislation, which I discuss in Subsection 2.2.1.2. Whistleblowing-related provisions came as a result not only of the search for efficiency, but also of the rising importance of individualism in the construction of working relations. In Subsection 2.2.1.3, I underline that whistleblowing provisions have expanded in recent years in a plethora of countries and I examine the current state of whistleblowing protection in international law. It can be concluded that despite their “soft” nature, these international initiatives have been influential in the said expansion. In Subsection 2.2.1.4, I trace the reasons behind the continental divide of approaches regarding whistleblowing and I highlight that this divide is progressively being bridged due to the homogenising role of international law and, perhaps more importantly, due to the globalization of the economy.

2.2.1.1. Facilitation and protection of whistleblowing as transparency reform

Jens Forssbaeck and Lars Oxelheim in the Oxford Handbook of Economic and Institutional Transparency argue that the rationale for transparency is dual: Instrumental and value-driven.¹ As far as it concerns the instrumental objective, transparency is seen as a way to improve efficiency through the reduction of uncertainty and transaction costs, the safeguarding of

¹ Jens Forssbaeck and Lars Oxelheim, *The Oxford handbook of economic and institutional transparency* (Oxford University Press 2014) 10

market conditions and of a level playing field for competition, or the enhancement of self-regulation against potential reputational sanctions. The value-driven objective consists in the interconnection of transparency to accountability, legitimacy, deliberation, and the right to information.

Whistleblowing is legitimized through a recourse to the same objectives. On one hand, it is an instrument of governance, a tool of anticorruption policies and for the regulation of corporate behaviour. It is supposed to limit corruption, facilitate the exposure of fraud and wrongdoing, thwart market abuse, prevent environmental disasters, and impose forms of control to corporations, especially in the aftermath of the financial crisis of 2008. It is not a coincidence that both in the US and in the EU whistleblowing has received its most extensive protection and facilitation in the law of the capital markets. On the other hand, at least on the level of discourse, whistleblowing concretizes the call for transparency even in fields where efficiency might not demand it, such as national security. In this case, whistleblowing is connected with the deliberative ideal, according to which all those affected by a norm must give their approval through practical discourses, in which they can only participate if the information flow has not been obstructed. As I analysed in Section 2.1.2, whistleblowing in this case becomes an exhortation to more embedded and inclusive forms of democracy, occasionally by consciously breaking the law in the form of civil disobedience.

Facilitating whistleblowing and enhancing whistleblower protection goes to the heart of transparency reforms, as it centres on the disclosure of official information that those responsible for institutional malpractice would normally prefer to withhold.² Whistleblowing is therefore also a way to perpetuate trust in institutions by deliberately institutionalizing distrust.³ In the same way, whistleblowing creates a narrative of justice of the markets. Corruption's symbolic effect displaces public resentment from the political-economic system on to the misdeeds of individual wrongdoers.⁴ Through whistleblowing the blame for distribution-related ills and economic scandals of major and widespread consequences falls upon specific immoral actors, thereby protecting the politico-economic status quo from

² A. J Brown, Wim Vandekerckhove and Suelette Dreyfus, 'The relationship between transparency, whistleblowing, and public trust' in Padideh Ala'i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar 2014) 31

³ John Braithwaite, 'Institutionalizing distrust, enculturating trust' in V. A Braithwaite and Margaret Levi (eds), *Trust and governance* (Russell Sage Foundation 1998) 343-375

⁴ John Girling, *Corruption, Capitalism and Democracy* (Routledge 1997)

systemic questioning.⁵ As such, whistleblowing becomes an essentially reformist strategy, an accountability mechanism that treats the anomalies of the system, reinforcing the trust in its operations and in its ability to deliver justice. It comes as no surprise that, according to Brown et al., the empirical data suggests that the “support for whistleblowing, as a transparency mechanism, is also much higher than often believed”.⁶

As I will analyze in this Chapter, the great number of whistleblowing provisions adopted in the last years in both sides of the Atlantic are animated mostly by a utilitarian spirit, an instrumental rationale, and less by an idealistic pursuit of a right to know or of radical transparency. The goal is to regulate corporate behavior and to protect market integrity. Enhancing internal whistleblowing and encouraging codes of ethics and whistleblowing policies within businesses may be a way of soft regulation, while actively encouraging whistleblowers to step out of the organization and report wrongdoings is indicative of a more controlling form of regulation. Before going into the details of the current status of whistleblowing legislation and what it represents, it is worth briefly examining the historical background behind the contemporary rise of the importance of whistleblowing.

2.2.1.2. The history of whistleblowing protection: A nexus of efficiency and individualism

In 1971, the Conference on Professional Responsibility, organized by Ralph Nader and held in Washington D.C., sought to encourage whistleblowing as a law enforcing mechanism designed to prevent corruption, waste, or injuries, based on the perception that the traditional law enforcement mechanisms were not working.⁷ The ability of insiders to blow the whistle was seen as “the last line of defence”⁸ of ordinary citizens against powerful institutions. This development came at a time when the faith in the capacity of government to regulate the corporate world was being questioned and signalled the transition from a self-governance

⁵ Yves Gendron, Luc Paugam and Hervé Stolowy, ‘The contribution of whistleblowers’ stories to the perception of fairness in financial markets: A discourse analysis’ [2016] ESSEC Research Seminar Accounting & Management Control

⁶ Brown, Wim Vandekerckhove and Dreyfus (n 2) 53

⁷ Daniel P Westman and Nancy M Modesitt, *Whistleblowing: The law of retaliatory discharge* (2nd ed. Bureau of National Affairs 2004) 1-11

⁸ Ralph Nader, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Grossman Publishers 1972) 7

model of regulating the workplace to a rights-based employment law. As the New Deal era of the “command-and-control” system was withering away both at the level of corporate regulation and at the regulation of the workplace, whistleblowing resurfaced as part of the regulatory puzzle.

Before the 1970s there was little, if any, legal protection for whistleblowers. The 1863 False Claims Act that is generally recognized as the pioneer in that field, despite authorizing private citizens to sue, in the name of the United States, any company that partook in fraudulent activities with respect to the federal government, did not prohibit retaliation by employers against employees who would bring the charges. Its support was limited to the bounty guaranteed for the employee whose legal action would lead to the restoration of legality and the return of the illegally obtained money. This changed as a result of the amendments of 1986, which not only added protection against retaliation for whistleblowers, but also increased the damages that could be recovered and thus the financial incentive to pursue with the *qui tam* action.⁹

In the 1960s and 1970s, the era of the “rights revolution”,¹⁰ federal regulations expanded into areas of civil rights, workplace safety, consumer protection, environmental pollution, and public health, including some partial protection for whistleblowers.¹¹ Although these enactments represented major victories for organized labour, Cynthia Estlund is correct in pointing out that they foreshadowed the eclipse of the collective bargaining model and the centrality of collective action altogether.¹² Indeed, the upsurge of judicially enforceable individual rights coincided with the decline of worker participation in the shaping of the framework of the workplace, an emblematic characteristic of the New Deal and an integral component of the National Labor Relations Act of 1935.

Despite this move toward a ‘rights approach’, there was no uniform protection for whistleblowers until the Civil Service Reform Act of 1978. This Act, more than simply guaranteeing whistleblower protection, conveyed a change in bureaucratic ideology in line with the prevalent individualism that was already discussed in Section 2.1.1. According to Robert

⁹ For a legislative history of the False Claims Act, see Mary J Wilmoth, ‘False Claims Act Legislative History’ <<https://www.whistleblowers.org/component/content/article/101-changing-corporate-culture/1629-false-claims-act-legislative-history>>

¹⁰ Cass R Sunstein, ‘Interpreting Statutes in the Regulatory State’ (1989) 103(2) Harvard Law Review 405, 409

¹¹ Westman and Modesitt (n 7) 1-9

¹² Cynthia Estlund, ‘Rebuilding the Law of the Workplace in an Era of Self-Regulation’ (2005) 105(2) Columbia Law Review 319, 329

Vaughn, “whistleblower protection altered the scope of personal responsibility within government agencies, changed the character of employee loyalty, encouraged employee participation outside the chain of command, and rejected a view of government efficiency linked to preservation of the hierarchical control”.¹³ The New Deal model of administration stressed the importance of expertise and centralization, a view that was attacked in the late 1960s and 1970s as obstructing the information flow and hindering efficiency. The role of the individual was magnified, triggering a broader understanding of employee loyalty not only toward the hierarchy, but most importantly toward the organization. Besides, the Act also included a right to disobey orders, underlining that one of the goals of the reform was to protect employees from personnel authority. At the same time, the goal to make public service more effective was also expressed through the creation of merit pay provisions, increased power of managers to deal with poor performers, and regulation of federal sector labour relations.¹⁴ The nexus of efficiency and individualism created the substratum for the embedment of whistleblowing protection. It should also be noted that the publication of the Pentagon Papers in 1971 and the Watergate Scandal between 1972 and 1974 eroded the faith placed in governmental institutions, thusly playing a role in favour of civil service reform and in favour of encouraging whistleblowing.

The historical shift of these decades was expressed saliently through the trend of deregulation that dominated in the 1980s. The incidence of whistleblowing, perceived as a ‘last line of defence’, increased and it came to be a social phenomenon more and more discussed and supported. Whistleblowing was seen as a form of ethical resistance,¹⁵ not unlike the general move toward ethics and morality that was described in the first section of the first chapter. This atmosphere of support provided the background for the creation of civil society organizations such as the Government Accountability Project, which was founded in 1977 as advocacy organization for whistleblowers. Furthermore, it constituted the legitimizing factor for the increase of whistleblower protection, through the amendment of the False Claims Act in 1986 and the Whistleblower Protection Act of 1989 for federal employees. According to Nancy Modesitt et al., “the creation of legal protections for whistleblowing employees is consistent

¹³ Robert G Vaughn, ‘Whistleblower Protection and the Challenge to Public Employment Law’ in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (ANU E Press 2011), 162

¹⁴ *ibid* 158

¹⁵ Myron P Glazer and Penina M Glazer, *The whistleblowers: Exposing corruption in government and industry* (Basic Books 1989) 304

with the trend of deregulation, which is based on scepticism that the government is in the best position to remedy some social ills”.¹⁶ This process of “responsabilization” of individuals alludes to the Foucauldian analysis of the liberal governmentality. I will discuss this in the last section of this Chapter.

The progressive corrosion of top-down enforcement and the move toward self-regulation and cooperative compliance augmented the reliance on the ability of the individual actor to speak within the organization, and in extreme cases, to report externally.¹⁷ The reliance on private parties in order to prevent illegal behaviour necessarily entailed the need for legal protections for whistleblowers. As it was previously analysed, the new governance model that presents itself as a third way between regulation and deregulation stresses the need for transparency, decentralization, and pluralism of actors. Therefore, whistleblowing becomes part of the regulatory puzzle and its status is solidified and internationally recognized.

At the dawn of the 21st century, whistleblowing seems to be gaining momentum. In the U.S., major innovations were included in the Sarbanes-Oxley Act and Dodd-Frank Act, imparting whistleblowing a central role in the regulation of the private sector. Internationally, a plethora of countries, apart from the US and European States, including, Australia, New Zealand, Canada, South Africa, the Republic of Korea and more, have included provisions of protection in their legislative frameworks, while a number of international treaties against governmental corruption adopted a similar stance.¹⁸ Non-governmental organizations such as Transparency International and ARTICLE 19 focused some of their work on whistleblowing, while it recently gained international attention as an independent issue. The international status of whistleblowing will be explored in the next subsection.

¹⁶ Westman and Modesitt (n 7) 1-12

¹⁷ Orly Lobel, ‘Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations’ (2009) 97 California Law Review 433, 473

¹⁸ *See*, Criminal Law Convention on Corruption 27 January 1999 (Council of Europe), and Civil Law Convention on Corruption 4 November 1999 (Council of Europe); Inter-American Convention against Corruption 26 March 1996 (OAS)

2.2.1.3. *Whistleblowing in international law: A “soft law” approach that brings results*

Whistleblowing receives a partial recognition from international law, mostly in the form of soft law recommendations.¹⁹ The lack of binding provisions was hitherto accompanied by a low level of enforcement of the different types of recommendations within the domestic law of the signing parties. However, the initiatives taken at level of the UN, regional level (the European Council will be examined), the OECD, and international civil society, together with changes in understanding of governance, regulation, and public administration, have prompted a slow but progressive change in the legal framework of State parties toward more comprehensive whistleblowing protection. In this subsection I will briefly examine the international initiatives that led to the demand for whistleblowing protection gaining momentum.

The United Nations Convention Against Corruption (UNCAC) of 2005 encourages signing States to institutionalize protection mechanisms for individuals who disclosure information regarding fraud and corruption. According to Article 33, “each State Party *shall consider* incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”. This provision, despite being part of a UN Convention, approaches distinctively the category of soft law. The phrasing invites for a rather broad course of action on behalf of the signing States and includes not defined notions, such as “good faith”, the interpretation of which may lead to largely varying results. Its loose structure leaves an important margin of manoeuvre to the States (as for example with the mention of “appropriate measures” or “competent authorities”). Nevertheless, Article 33 aims to protect disclosures on a broad spectrum of information. It intends to cover “those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word”.²⁰ This

¹⁹ ‘Soft law’ has been a contested topic in international legal scholarship. For an account of the divide between those who view it as a pathology of international law and those who defend it, see Melaku Geboye Desta, ‘Soft Law in International Law: An Overview’ in Andrea Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012) 42–50. On the role of soft law as an analytic framework, see Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 15-28

²⁰ United Nations Office on Drugs and Crime, ‘Technical Guide to the United Nations Convention against Corruption’ 105

information about wrongdoing at an early stage can be helpful at triggering an investigation. The report of United Nations Office on Drugs and Crime (UNODC) of 2012 cited the “absence of specific regulations or systems for the protection of whistleblowers”²¹ as a common challenge for national legislative frameworks. On the contrary, the Resource Guide on Good Practices in the Protection of Reporting Persons of UNODC of 2015 reported that “an increasing number of States parties have some form of legal provision for the protection of reporting persons or even very specific stand-alone laws”.²² Indeed, whistleblowing protection, regardless of the different approaches stemming from different legal and political cultures and despite the normative gaps or implementation failures, becomes progressively normalized, as I will discuss in the next subsection.

In the Council of Europe a number of resolutions and recommendations have approached –often partially or as a side-note of other issues– the issue of whistleblowing protection.²³ In 2009, the Omtzigt Report that played a pivotal role in the effort to frame whistleblowing protection more comprehensively suggested the protection from all forms of retaliation for individuals both from the private and the public sector who made disclosures in good faith, even if they resorted to the media.²⁴ Good faith is defined in the Report as the reasonable belief of the whistleblower that the information was true and that his or her motivations were not unlawful or unethical. It is interesting to note that the Report, instead of a more objective, efficiency-driven perspective that sees whistleblowers simply as sources of information, assumes an ideological stance, declaring that “whistleblowing is a generous, positive act...whistleblowers are not traitors but people with courage”.²⁵ As I will show in the Section

²¹ Implementation Review Group, Conference of the States Parties to the UN Convention against Corruption, ‘Implementation of chapter III (Criminalization and law enforcement) of the United Nations Convention against Corruption’ (2012) CAC/COSP/IRG/2012/7/Add.1, 12

²² United Nations Office on Drugs and Crime, ‘Resource Guide on Good Practices in the Protection of Reporting Persons’ (2015) 15

²³ See, Resolution 1507 (2006) ‘Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States’ 27 June 2006 (Council of Europe Parliamentary Assembly) [19.5.], which calls for member states to “ensure that the laws governing state secrecy protect the whistleblowers, that is persons who disclose illegal activities of state organs from possible disciplinary or criminal sanctions”. See also, Resolution 1729 (2010) ‘Protection of Whistleblowers’ 29 April 2010 (Council of Europe Parliamentary Assembly) [1]; Resolution 1954 (2013) ‘National Security and Access to Information’ 2 October 2013 (Council of Europe Parliamentary Assembly) [9.7]

²⁴ Committee on Legal Affairs and Human Rights, ‘The protection of "whistle-blowers"’ (14 September 2009) Doc. 12006, 1

²⁵ *ibid* 6

2.2.3, this axiological standpoint on whistleblowing resonates through some of the legislative efforts to frame its protection in the European context, such as for example that of France.

The most recent development in the Council of Europe is the Recommendation CM/Rec(2014)7 of April 2014 of the Committee of Ministers. According to the recommendation, a whistleblower is “any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector”.²⁶ After affirming the importance of whistleblowing not only in the struggle against corruption, but also as a necessary component of a genuine democracy, the Recommendation goes on to suggest a nexus of provisions for the harmonization of the national legislations toward comprehensive whistleblowing protection. Despite stating that the material scope of protection depends on the different frameworks of member States, it affirms that this should “at least, include violations of law and human rights, as well as risks to public health and safety and to the environment”.²⁷ ²⁸ The exceptions should be limited, although it is specified that a special scheme should apply to national security.²⁹

As far as it concerns the channels for reporting, the Recommendation suggests that disclosures should be directed within the organization, to relevant public regulatory bodies, or to the media and the larger public. However, it does not adopt the “three-tier” system which implies an order of priority between the channels;³⁰ on the contrary, it clarifies that all channels should be interconnected without an order of priority.³¹ Nevertheless, this does not mean that the Recommendation considers all channels equivocal. In the explanatory appendix, it clarifies that internal whistleblowing (whistleblowing within the organization; to the employer, the organizational ombudsman, the union representative or other) does not violate any obligations of confidentiality and that the States should help employers understand the value of facilitating internal whistleblowing. The way to do this is to “implement a clear and strong legal framework

²⁶ Recommendation CM/Rec(2014)7 30 April 2014 (Committee of Ministers of the Council of Europe), Definitions, para a

²⁷ *ibid* [2]

²⁸ An indicative list of categories of information for which the whistleblower should be protected is the following: corruption and criminal activity; – violations of the law and administrative regulations; – abuse of authority/public position; – risks to public health, food standards and safety; – risks to the environment; – gross mismanagement of public bodies (including charitable foundations); – gross waste of public funds (including those of charitable foundations), *ibid* [37].

²⁹ *ibid* [5]

³⁰ Wim Vandekerckhove, ‘European whistleblower protection: tiers or tears?’ in David B Lewis (ed), *A global approach to public interest disclosure: What can we learn from existing whistleblowing legislation and research* (Edward Elgar Pub 2010) 15

³¹ Recommendation CM/Rec(2014)7 (n 26) [61]

that makes an employer liable for any detriment caused to anyone working for them for having exercised their right to report a concern or disclose information about wrongdoing according to the law”.³² Therefore, although there is no priority between the channels of disclosure, the Recommendation encourages internal whistleblowing as a component of good governance.

Furthermore, regarding the identity of the whistleblower, the Recommendation supports confidentiality but not anonymity. It explains that confidentiality (where the identity of the whistleblower is known by the recipient but not disclosed) should not be confused with anonymity (where the identity of the whistleblower is not known at all).

The Recommendation tries to achieve a holistic protection from retaliation, even in cases of mistakes from the whistleblowers. Principle 22, which draws from the conclusions of the report of 2009 regarding the requirement of good faith, states that “protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy”.³³ In this case, good faith and reasonable belief seem to overlap.³⁴ Protection should be guaranteed against retaliation of any form. Nevertheless, it should be noted that according to principle 24, if an employer has set up an internal reporting system, the decision of a whistleblower to ignore it and make his or her disclosure to the public may lead to a lessening of the protection as “the normative framework may recognise the legal value of an expectation to use the internal reporting system”.³⁵ This is a further indication of the value attributed to internal whistleblowing.

Finally, similarly to anti-discrimination law, the burden of proof for any detriment against the reporting individual falls upon the employer, who has to prove that the particular detriment was not a response to the disclosure.

Another enshrinement of whistleblowing protection in international law in the form of recommendations is found in the context of the Organisation for Economic Co-operation and Development (OECD). According to the Organisation, “whistleblower protection is integral to fostering transparency, promoting integrity, and detecting misconduct”.³⁶ Since 1998, the OECD has been committed to the cause of advancing whistleblower protection as evidenced

³² *ibid* [64]

³³ *ibid* [22]

³⁴ *See*, Section 2.2.3.1.3

³⁵ *ibid* [87]

³⁶ OECD, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016) 3

in the Recommendation on Improving Ethical Conduct in the Public Service.³⁷ In 2009 the OECD Anti-Bribery Recommendation also required Member countries to "protect from discriminatory or disciplinary action public and private sector whistleblowers who report [foreign bribery] in good faith and on reasonable grounds".³⁸ On the occasion of the Anti-Bribery Ministerial Meeting in 2016, the OECD published new findings and guidelines regarding whistleblower protection ("Committing to effective whistleblower protection in the public and private sectors"). It recognizes that whistleblowing protection has mostly been scandal driven and framed within an ad hoc context and seeks to promote a more inclusive framework. Therefore, the guidelines support an open and transparent organizational culture that would encourage employees to speak out, ask for the implementation of the 1998 Recommendation on Improving Ethical Conduct in the Public Service, suggest the adoption of internal regulatory mechanisms in order to avoid retaliation in line with the OECD 2010 Good Practice Guidance, the OECD Guidelines for Multinational Enterprises and the G20/OECD Principles of Corporate Governance, and avoid providing an extensive set of recommendations that would restrict varying approaches of different legal cultures.

Finally, although I will return to this soft law initiative when discussing national security whistleblowing, a brief note should already be made regarding the Global Principles on National Security and Freedom of Information of 2013 ("Tshwane Principles"). A number of organizations and academic centres collaborated in order to produce a detailed set of principles for whistleblower protection within national security. The principles have been welcomed by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media. International courts, including the European Court of Human Rights and the Inter-American Court of Human Rights, have made reference to the Global Principles on National Security and Freedom of

³⁷ OECD, 'Principles for Managing Ethics in the Public Service' (1998). Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service and it is necessary to have reliable procedures and resources for monitoring, reporting and investigating breaches of public service rules, as well as commensurate administrative or disciplinary sanctions to discourage misconduct (principles 4 and 12).

³⁸ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 21 November 1997 (OECD), IX, iii, 23

Information, demonstrating their international importance and their role as a source for judicial (and potentially also legislative) inspiration.

The adoption of legislative provisions protective of whistleblowers from a great number of States in the last years has not been unrelated to the mentioned international efforts. In fact, it would not be excessive to talk about a transnational trend concerning whistleblowing protection that is in dialectic relationship with the international framework.³⁹ Furthermore, it can be noted that despite the primordality and the influence of the US model as far as it concerns whistleblowing legislation, different States and legal cultures have adopted diverse ways of dealing with the issue. Although the variations are as numerous as the legislative frameworks, some major differences have caused theoreticians and academics to talk about a “continental clash”⁴⁰ between the US and Europe, two distinct ways of understanding whistleblowing and its subsequent need for protection. In the next subsection, I will attempt an explanation of this clash, which, however, becomes gradually less important, not only because of the initiatives on the level of international law, but also as a result of the economic necessities and the changes in legal thought.

2.2.1.4. Whistleblowing as a transnational phenomenon: Beyond the continental divide

Whistleblowing protection has progressively become a transnational phenomenon. Several European countries have adopted extensive whistleblower protection since 2013, including France, Belgium, Ireland, and Member States of the EU that have transposed the Directive 2015/2392 regarding reporting to competent authorities of infringements of the Market Abuse Regulation. At the same time, the European Parliament adopted in October 2017 a non-binding resolution, urging the Commission to present a “horizontal legislative proposal establishing a comprehensive common regulatory framework which will guarantee a high level of protection across the board, in both the public and private sectors as well as in national and European institutions, including relevant national and European bodies, offices and agencies, for whistle-

³⁹ In that sense, the adoption of whistleblowing binding norms by State Parties partially defies the (broader) critique towards the non-mandatory form of many of UNCAC’s provisions, according to which the inclusion of non-binding norms in a binding legal instrument forecloses the possibility of these developing into binding norms in the future, *see* Rose (n 19) 132.

⁴⁰ Lobel, ‘Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations’ (n 17), 436

blowers in the EU”.⁴¹ Therefore, taking also into consideration the Recommendation of the Council of Europe of 2014, the disposition toward whistleblowing has significantly shifted in comparison to the influential report of Transparency International of 2013, which found the level of protection of whistleblowing in EU Member States to be rather low.⁴² However, this is not to imply that current whistleblower protection in Europe is robust; the Resolution has yet to materialize to binding rules, many Member States do not yet have whistleblowing provisions except for the transposed Directive 2015/2392, and, in contrast to the US, whistleblower protection has often additional requirements, such as good faith.

The development of whistleblowing laws in Europe is slow compared to the US. A reason commonly brought to the foreground for this reluctance is the difference in legal cultures, inspired by the respective historical differences.⁴³ In particular, it is argued that countries that have experienced totalitarian regimes tend to view whistleblowers as informants, a form of thought police that creates a culture of suspicion. On the contrary, in the US, cooperation with the government and implementation of the law has not been equally negatively connoted. Furthermore, according to Vaughn, support for whistleblowers in the United States may stem in part from the country’s generally strong commitment to individualism and personal fulfilment.⁴⁴ This type of explanations may be present in the literature but, despite their merit, for the purposes of this chapter I would prefer to shed light on another explanatory path.

Another significant difference of legal cultures involves employment protection, as the US system of “at will” termination of working relations is contrasted by different levels of employment protection, such as the condition of the existence of “serious” cause for termination of employment.⁴⁵ Therefore, the need to protect whistleblowers in the Europe is less acute, as their already existing protection against retaliation is stronger. Further advancing the argument about employment protection, it could be argued that the more diffused existence of employee councils and unions, as well as the employee representation on boards (such as

⁴¹ Resolution 2016/2224(INI) 24 October 2017 (European Parliament) [1]

⁴² Transparency International, ‘Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU’ (2013)

⁴³ See, Committee on Legal Affairs and Human Rights (n 24), Paul Stephenson and Michael Levi, ‘A study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest’ (20 December 2012), Nicole M Meyer, ‘Le droit d’alerte en perspective : 50 années de débats dans le monde’ (2014) 39 AJDA 2247.

⁴⁴ Robert G Vaughn, *The successes and failures of whistleblower laws* (Edward Elgar 2012) 257-258

⁴⁵ Thad M Guyer and Nikolas F Peterson, ‘The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project’ (2013) 7

for example in Germany), activates non-institutionalized, yet accessible channels of communication for whistleblowers. This presents a more collective way of dealing with wrongdoings, internal problems, and malpractices and potentially reinforces the bonds of loyalty within the organization. Such an explanation is in line with Estlund's argument that the enshrinement of employee rights in the US in the form of labour standards already in the late 1960s came to the expense of worker participation; the "citizens" of the workplace were citizens without representation or participation in the decision-making processes.⁴⁶ Protecting whistleblowing as an individual right comes to recompense for the eclipse of collective forms of intervention on behalf of the workforce, which might explain why unions have not been strong supporters of whistleblowing procedures. Whistleblowing legislation reforms, even if to the benefit of workers' rights, take place amidst structural transformations in the laws of the workplace, which generally aim at labour liberalization and often entail flexibilization and casualization of labour.⁴⁷

However, the globalization of economic practices, the interconnectedness of markets, the exportation of the U.S. model, the need for uniform regulation especially for multinational corporations, as well as the prevalence of an individualistic perspective regarding relations of employment, have turned whistleblowing into a progressively important tool for corporate regulation but also employee protection. The changes in Europe are thus important, insofar as they indicate not only the degree of influence of the American model, but also the interpenetration of law and economics and how the latter triggers substantive changes of the institutional framework. It is the political economy that plays the decisive role in bridging the continental divide. Nevertheless, in order to understand the nature of the changes and the significance of the convergence of whistleblowing legislation, the US model needs first to be discussed.

⁴⁶ Estlund (n 12) 327-334

⁴⁷ *See*, the example of France, where at same year (2016) when the French Labour reform was initiated, new and expansive whistleblowing protection was also enacted.

2.2.2. Whistleblowing as function: The U.S. example of corporate and financial regulation

The U.S. framework on whistleblowing has served as a model and a source of inspiration for the diffusion of whistleblowing legislation worldwide. In this framework, whistleblowing is understood mostly as a function and far less as a form of employee empowerment or form of human rights protection: It is part of the regulatory process and a way to enforce corporate compliance. Whistleblowers are perceived as quasi-public actors and the protections from retaliation, as well as the financial incentives in the form of potentially large monetary awards, serve as instruments for the achievement of the main objective of ensuring market integrity and trust. In Section 2.2.2.1, I examine the breakthrough law on whistleblowing, the Sarbanes-Oxley Act of 2002, which not only enshrined solid whistleblowing protection for employees, but also encouraged internal whistleblowing and the establishment of anonymous internal whistleblowing channels in companies. In Section 2.2.2.2, I review the changes engendered by the Dodd-Frank Act of 2010, especially the large monetary awards for external reporting to the Securities and Exchange Commission and the ambiguity regarding whether its whistleblower protection applies to internal complaints. The two Acts represent different regulatory strategies, as internal and external whistleblowing reflect different levels of commitment to self-regulation or public enforcement respectively. They were also introduced in different economic and political contexts, with Dodd-Frank, an answer to the financial crisis of 2008, adopting a far more restricting approach toward the financial industry. The fact that whistleblowing protection and encouragement is dependent on the contingent regulatory approach toward corporations and the markets is also revealing of the instrumentality that characterises it. In Section 2.2.2.3, I briefly examine the recent Defend Trade Secrets Act of 2016 and its narrow provision on whistleblowing, which nevertheless shows that whistleblowing can be symbiotic with commercial secrecy and business innovation.

2.2.2.1. The Sarbanes-Oxley Act of 2002: The dawn of a new approach to whistleblowing protection

Envisioned as a reaction to a number of major and highly publicized corporate scandals, such as that of Enron and WorldCom, the passing of the Sarbanes-Oxley Act of 2002 (SOX) conveyed the idea that corporate finances are a matter of public interest and that fraud against

shareholders may potentially lead to severe disruptions of the social welfare.⁴⁸ In the view of solidifying corporate integrity and restoring the confidence in the markets, the Act aimed at enhancing transparency through new forms of regulatory oversight, among which the increased protections for whistleblowers.

Before SOX, the protection for whistleblowers in the private sector was relatively feeble.⁴⁹ Besides the False Claims Act, which applied in case of financial loss to the government,⁵⁰ only employees who raised concerns about public health or safety issues would be protected, a protection that was scattered in different legislative texts and often inefficient. It is important to highlight that there is no federal protection for private sector employees for reporting wrongdoing or illegalities in general; their access to protection depends on the existence or not of particular, domain-specific regulations that allow for such reporting.⁵¹ In a system where the majority of employees are employed “at-will” whistleblower provisions may delimit the employer’s discretionary authority over layoffs, but only if the employee’s reporting falls within the ambit of the regulation. More often than not these statutes (such as the Civil Rights Act of 1964) do not include the simple provision of information for violations of the respective statute as a cause for anti-retaliation protection, demanding on the contrary that the individual “opposed” an unlawful action or “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing”.⁵² This personalized, rights-based approach is contrasted with the instrumental approach of contemporary statutes on financial regulation which, in their goal to function as regulatory mechanisms for corporate oversight, protect

⁴⁸ As noted by Modesitt et al, before SOX “most laws did not protect private sector employees who raised concerns about fraud against shareholders because those issues had not been perceived as having a direct effect on public health or safety”. Westman and Modesitt (n 7) 4-4

⁴⁹ *ibid.* See, also Terry M Dworkin and Janet P Near, ‘Whistleblowing Statutes: Are they working?’ (1987) 25 American Business Law Journal 241, attributing the poor performance of state whistleblowing statutes to legislative drafting errors and ineffective judicial interpretation.

⁵⁰ 31 U.S. Code § 3730 - Civil actions for false claims. However, the FCA’s effectiveness was undermined as a result of abuse and amendments or judicial interpretations to the legislation, Elleta S Callahan and Terry M Dworkin, ‘Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act’ (1992) 37 Villanova Law Review 273, 303, citing *United States ex rel. Wisconsin v. Dean* 729 F.2d 1100, [1984] (US Court of Appeals, Seventh Circuit) [1103-1106] (discussing abuse of FCA and legislative and judicial response). According to the authors, “[b]y the mid-1980s, six or fewer claims a year were being brought under the FCA”, 303. The 1986 amendment to the FCA is considered successful, as “[i]n recent years, FCA litigation has resulted in blockbuster verdicts and settlements in the health-care, defense, and banking industries, among others”, Evan J Ballan, ‘Protecting Whistleblowing (and Not Just Whistleblowers)’ (2017) 116 Michigan Law Review 475, 482.

⁵¹ As for example in public health and safety statutes, such as the Consumer Product Safety Improvement Act 2008; in environmental protection, such as the Clean Air Act 1963; in employee-rights statutes, such as the Civil Rights Act 1964 or the Occupational Safety and Health Act (OSH Act) 1970

⁵² Civil Rights Act (n 51), 42 U.S.C. § 2000e-3(a) (2012)

whistleblower behaviour more thoroughly. According to Modesitt et al., “rather than focusing first on protecting employees’ rights, statues akin to Dodd-Frank [that includes its precursor SOX] identify their primary purpose as being to protect whistleblower behaviour”.⁵³

In this regulatory environment, SOX was hailed as “the gold standard in protection of employee whistleblowers”.⁵⁴ SOX provides for robust anti-retaliatory protection, including a private right of action for whistleblowers and criminal penalties for retaliating employers, as well as the establishment of procedures for anonymous, internal whistleblowing. I will now briefly unpack the main corpus of whistleblowing provisions outlined in SOX.⁵⁵

2.2.2.1.1. *The scope of protection: Subject of protection and type of conduct*

Section 806 provides a civil cause of action for employees of publicly traded companies, meaning companies that have registered their securities or file reports under the Securities and Exchange Act of 1934.⁵⁶ The protection against retaliation applies to all officers, employees, contractors, subcontractors, or agents. The broad extent of the provision was confirmed by the Supreme Court decision *Lawson v. FMR, LLC*, which interpreted the SOX provisions as including employees of private companies that contract with public companies, against the contrary argument of mutual fund companies.⁵⁷ Whistleblowers who have faced retaliation and career derailment may obtain proportional recoveries.

According to the same section, the procurement of any information regarding conduct that the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, securities fraud, or a violation of “any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders”⁵⁸ is protected. This

⁵³ Westman and Modesitt (n 7) 3-8. *See*, also Callahan et. al, according to whom, SOX ‘provides protection against retaliation as an *adjunct* to the statute’s principal objectives’. Elletta S Callahan and others, ‘Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment’ (2002) 40(1) *American Business Law Journal* 177, 193-194

⁵⁴ Estlund (n 12) 376

⁵⁵ An extensive literature exists on the whistleblowing provisions of SOX, including praise, critiques, and suggestions for amendments. Indicatively *see*, Westman and Modesitt (n 7), Valerie Watnick, ‘Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique’ (2007) 12(5) *Fordham Journal of Corporate & Financial Law* 831, Beverley H Earle and Gerald A Madek, ‘The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change’ (2007) 44(1) *Am Business Law Journal* 1, Miriam A Cherry, ‘Whistling in the Dark?: Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law’ 79 *Washington Law Review* 1029

⁵⁶ ‘Civil action to protect against retaliation in fraud cases: 18 U.S.C § 1514A, Pub. L. 107-204, title VIII, § 806(a) (2002)

⁵⁷ *Lawson v. FMR LLC* 571 U. S. [2014] (US Supreme Court)

⁵⁸ 18 U.S.C § 1514A (a)(1)

“reasonable belief test” means that even if the whistleblower was mistaken about the nature of the employer’s conduct, he or she is still protected if the belief was reasonable. The reasonableness is interpreted as having to be both subjective and objective. According to *Welch v. Chao*, the whistleblower must prove “both that he actually believed the conduct complained of constituted a violation of pertinent law and that a ‘reasonable person in his position would have believed that the conduct constituted a violation’”.⁵⁹

From this double requirement, the objective reasonableness has been far more controversial, and it had led to a series of adverse decisions for whistleblowing protection.⁶⁰ The adversity on the grounds of the “reasonable belief test” was part of a general trend dismissive of whistleblower complaints. Further restrictive interpretations, including the need for definite and specific relation of the complaint with one of the enumerated illegalities⁶¹ and for fraud on shareholders⁶² (even if shareholder fraud was only one of the mentioned categories), had led to the erosion of the protection promulgated by SOX.⁶³

This trend was reversed by the Administrative Review Board (ARB) in 2011, in the case *Sylvester v. Parexel*. In this case, two employees of Parexel International LLC, a company that performs clinical evaluations for pharmaceutical companies, complained about violations of the Food and Drug Administration’s (FDA) Good Clinical Practices, which Parexel failed to investigate. After months of hostility and harassment, the two employees were also terminated. Both the Occupational Health and Safety Administration (OSHA) and the Administrative Law Judge (ALJ) dismissed their claims for failing to adequately demonstrate protected activity. However, the ARB rejected the bases for ALJ’s dismissal. Breaking with its own former case-law, the ARB held that a complainant’s allegation need not “definitely and specifically” relate to violations of the statutes enumerates in Section 806(a)(1). Instead, the “critical focus [should be] on whether the employee reported conduct that he or she reasonably believes constituted a

⁵⁹ *Welch v. Chao* 536 F.3d 269, [2008] (US Court of Appeals, Fourth Circuit)

⁶⁰ For example, *Day v. Staples, Inc.* 555 F.3d 42, [2009] (US Court of Appeals, First Circuit) and *Reed v. MCI, Inc.* No. 06-126, ALJ No. 2006-SOX-71, [2008] (ARB).

⁶¹ *Platone v. FLYi Inc.* No. 04-154, ALJ No. 2003-SOX-27, [2006] (ARB), *Allen v. Administrative Review Board* 514 F.3d 468, [2008] (US Court of Appeals, Fifth Circuit)

⁶² *Livingston v. Wyeth, Inc.* 520 F.3d 344, [2008] (US Court of Appeals, Fourth Circuit). “[T]here is no suggestion in either the July 10 or July 29 memorandum that Wyeth or its employees had or even intended to mislead shareholders, as necessary to support a reasonable belief that the securities laws had been or were being violated”, [16].

⁶³ In 2008, out of 1273 SOX complaints filed with OSHA, 841 had been dismissed, and OSHA had found in favor of the complainant only 17 times. See, Jennifer Levitz, ‘Whistleblowers Are Left Dangling: Technicality leads Labor Department to dismiss cases’ *The Wall Street Journal* (4 September 2008) <<https://www.wsj.com/articles/SB122048878500197393>>.

violation of federal law”.⁶⁴ The objective reasonableness is “evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee”.⁶⁵ Furthermore, the ARB held that the ALJ erred in requiring the complaint to involve fraud on shareholders, as SOX was implemented “to address not only securities fraud [...] but also corporate fraud generally”.⁶⁶ In brief, a SOX whistleblower complaint should not be understood as a fraud complaint, but rather as a complaint for retaliation for the reporting of what the employee reasonably believes constitutes fraud.⁶⁷

Reporting one’s own misconduct is protected under the Act.⁶⁸ That contrasts the usual approach of discouraging employees from engaging in unlawful conduct in the first place, instead of providing a safety valve to those who only later have a change of heart. This highlights the Act’s instrumental approach, for which fraud detection is more valuable than one individual condemnation. Justice is thus subsumed under pragmatic considerations and regulatory goals. This is further accentuated by the provision for bounty rewards for complicit whistleblowers under the Dodd-Frank Act.⁶⁹

Besides the civil cause of action, Section 1107 of the Act imposes criminal penalties on “[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense”.⁷⁰ The choice of the term “whoever”, does not limit the scope of the provision to publicly traded companies and is consistent with other federal witness intimidation provisions.⁷¹

⁶⁴ *Sylvester v. Parexel International LLC* No. 07-123, ALJ Nos. 2007-SOX-39 and 42, [2011] (ARB) at 19

⁶⁵ *ibid* [13-14]

⁶⁶ *ibid* [20-21]

⁶⁷ Michael A Filoromo and Debra S Katz, ‘Whistleblower Protections Restored: Sylvester V. Parexel’ <<https://www.law360.com/articles/249513/whistleblower-protections-restored-sylvester-v-parexel>>

⁶⁸ *Tice v. Bristol-Myers Squibb Co.* 325 Fed.Appx. 114, [2009] (US Court of Appeals, Third Circuit) [22]

⁶⁹ Jennifer M Pacella, ‘Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code’ (2015) 17 *University of Pennsylvania Journal of Business Law* 345

⁷⁰ 18 U.S.C § 1513 (e)

⁷¹ Westman and Modesitt (n 7) 4-77

2.2.2.1.2.Procedure: Internal vs. External Whistleblowing (Part A)

According to the Act, the information must be provided to a) a federal regulatory or law enforcement agency, b) any member of Congress, or c) a person with supervisory authority over the employee.⁷² Leaks to the media are not protected by Sarbanes–Oxley's anti-retaliation provision.⁷³ The introduction of internal whistleblowing with the provision of (c) is crucial for the understanding of the Act's regulatory significance. The case of Enron, which was a motivation for the passing of SOX, also involved key whistleblowing actions through internal reporting.

The administrative enforcement of Section 806 was placed with the Department of Labor (DOL), which delegated the receipt and investigation of these complaints to OSHA,⁷⁴ the administrative process of which must be exhausted before pursuing claim in the DOL or the federal court. SOX entails a burden-shifting approach similar to anti-discrimination law, whereby once the employee makes a prima facie case,⁷⁵ it is up to the employer to demonstrate that he or she “would have taken the same unfavourable personnel action in the absence of that behaviour”.⁷⁶ It follows from Section 806 that the whistleblower does not need to report first to the employer in order to receive protection.

Sarbanes-Oxley received also attention for the establishment of internal procedures for whistleblowing. In particular, Section 301 of the Act provides that “[e]ach audit committee shall establish procedures for...the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters”.⁷⁷ The inclusion of anti-retaliation provisions within a framework of stronger corporate compliance mechanisms, independent audit committees, and anonymous reporting procedures was seen as a way to incentivize and strengthen internal compliance efforts.⁷⁸ The establishment of internal

⁷² 18 U.S.C § 1514A (a)(1)

⁷³ *Tides v. Boeing Co.* 644 F.3d 809, [2011] (US Court of Appeals, Ninth Circuit) [811]

⁷⁴ Code of Federal Regulations (CFR) - Title 29 §§1983. 103-1983-104 2013. This delegation has been criticized for the lack of experience of OSHA with financials matters. *See*, Earle and Madek (n 55) 3

⁷⁵ A prima facie case is constructed in three steps: a) the employee engaged in protected activity, b) the employer was aware of the employee engaging in protected activity, c) the employee suffered an adverse employment action, d) there was causal connection between the protected activity and the adverse employment action. 29 C.F.R §24.104 (2013)

⁷⁶ 49 U.S.C. § 42121(b)(2)(B)(ii). *See*, *Allen v. Administrative Review Board* (n 61)

⁷⁷ 15 U.S.C. §78j-1(m)(4)(2004)

⁷⁸ Steven J Pearlman, ‘New whistleblowing Policies and incentives: A paradigm shift from “oversight” to “insight”’ in RAND (ed), *For Whom the Whistle Blows, Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank* (2011) 6

procedures for private employees in whistleblowing statutes reflects the interests of the businesses and may be, according to Dworkin and Callahan, the result of their effective lobbying, as the internal route has consistently been considered the least harmful for their part, for reasons of reputational, litigation-related, and financial costs.⁷⁹

It is supported that external whistleblowing is better suited for the defending the public interest, as “extending protections for internal reporting does not further the public interest of detection and enforcement”⁸⁰. On the contrary, proponents of self-regulation see external whistleblowing as a disturbance to the self-adjustment of the markets and a major threat for corporate interests.⁸¹ Internal whistleblowing is also preferred for its more delicate balancing of the multiple loyalties an employee holds (toward his or her consciousness, the company, and society) and its pragmatic orientation toward problem-solving.⁸² At the state level, most whistleblower protection legislation protects only external whistleblowers. Therefore, the provisions for internal whistleblowing do not represent the pre-existing norm in U.S. legislation. Through SOX, Congress indeed adopted a “new approach to regulation that relies on internal monitoring, reporting, and problem solving”.⁸³ This is in accordance to Estlund’s point that “the Sarbanes-Oxley Act, relies less on new forms of regulatory oversight than on shoring up and revitalizing self-regulation”.⁸⁴

Promoting internal or external whistleblowing conveys an important decision about the general regulatory framework. In the early 2000s, in a more secure economic climate than the one in which Dodd-Frank was adopted, balancing society’s interests in fraud prevention and businesses’ interests in not excessive exposure and financial and reputational costs was thought of as possible through a reformist approach that allowed margins for self-regulation. This

⁷⁹ Callahan and others (n 53)

⁸⁰ Lobel, ‘Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations’ (n 17) 446

⁸¹ Kevin Rubinstein, ‘Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer’ (2007) 52 *New York Law School Law Review* 637. *See also*, Larry Ribstein, ‘Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002’ (2002) 28 *Journal Corporation Law*, arguing against the distrust introduced by whistleblowing provisions. “Second, more monitoring and liability may work counter to their intended goals by inhibiting the detection and reporting of fraud. Discovering fraud depends on communication among various levels of the organization which, in turn, depends to some extent on trust”, 42.

⁸² Callahan and others (n 53) 306 “[i]f . . . the primary goal of whistleblowing is reduction of wrongdoing rather than prosecution of wrongdoers, and the speed with which problems are addressed is significant, then internal whistleblowing should be preferred”

⁸³ Orly Lobel, ‘Lawyering Loyalties: Speech Rights and Duties within Twenty-First-Century New Governance’ (2009) 77 *Fordham Law Review* 1245, 1251

⁸⁴ Estlund (n 12) 374

approach changed in 2010, as a result of the financial crisis. The emphasis on external whistleblowing is a good indication of this change.

2.2.2.2. *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010:
A different approach to “problem-solving”*

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was a response to the financial crisis that began in 2008. Addressing concerns that financial markets had been too unrestrained in their pursuits, Dodd-Frank expanded regulation with new rules not only on whistleblowing, but also on debit cards, hedge funds, mortgages and other aspects of the financial industry. Building on the instrumental approach of Sarbanes-Oxley regarding whistleblowing, according to which the procurement of the information is the main regulatory objective and the protection of the procurer is ancillary to this fundamental purpose, Dodd-Frank further incentivized whistleblowing through financial rewards in case of securities law violations, such as market manipulation, fraud in the trading of securities, insider trading, or any violation that results in monetary sanctions imposed by the Securities and Exchange Commission (SEC). The changes that Dodd-Frank brought to whistleblowing law do not fundamentally alter SOX’s anti-retaliation philosophy, although they do demarcate a shift toward external whistleblowing.

2.2.2.2.1. *Financial incentives and the -resolved- ambiguity over internal whistleblowers*

Section 922 of Dodd-Frank requires the SEC to award hefty monetary awards (“bounties”) to those who provide original information to the SEC, resulting in monetary sanctions exceeding \$1 million.⁸⁵ The amount of the monetary award is in the discretion of the SEC but must be between 10 and 30% of the monetary sanction.⁸⁶ Original information is considered the information that is derived from independent knowledge or analysis of the whistleblower, is not known to the SEC from any other source, and is not exclusively derived from a source

⁸⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111–203 2010, §922(b). Before Dodd-Frank, the award of a whistleblower bounty was left to the discretion of the SEC and applied only in insider trading cases, Joseph M McLaughlin, ‘Dodd-Frank and Whistleblower Protection: Who Qualifies?’ (2013) August New York Law Journal <<https://www.law.com/newyorklawjournal/almID/1202614289609/doddfrank-and-whistleblower-protection-who-qualifies/>>

⁸⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111–203 (n 85) §922(b)(1)

of public knowledge, such as judicial hearings, governmental reports, or the news.⁸⁷ The information may be submitted anonymously but the identity must be disclosed prior to the payment of the award.⁸⁸ The SEC has, by 2016, already awarded more than \$111 million to 34 whistleblowers.⁸⁹

Section 922(h)(1) protects whistleblowers against retaliation through a private right of action. The protection is similar with the one guaranteed in the SOX, with the important difference that it initially appears to apply only to those who report externally, leaving the ones who report to their employer or who opt for the internal whistleblowing routes with the weaker protection of SOX.⁹⁰ This is indicated by the fact that the prohibition on retaliation only applies with respect to “whistleblowers” and according to the statute’s definition, “the term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*”.⁹¹ The protection of only external whistleblowers seemed to essentially create a two-tiered system of retaliation protection in which “whistleblowers may receive stronger, more robust protection if they report directly to the SEC, but weaker, less reliable protection if they report to the company”.⁹²

However, in the case *Berman v. Neo@Ogilvy* of 2015, the Second Circuit held that Dodd-Frank’s whistleblower protection applies to internal complaints. The court attributed *Chevron*

⁸⁷ *ibid* §922(a)(3)

⁸⁸ *ibid* §922(d)(2)(b)

⁸⁹ SEC, ‘2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program’ (2016) <<https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf>> 1. The efficiency of ‘bounty regimes’, such as the one implemented by the Dodd-Frank Act, has been the topic of empirical research. Most recently, Andrew Call et al., ‘Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions’ (2018) 56(1) *Journal of Accounting Research* 123 suggests that whistleblowers’ involvement in enforcement actions is correlated with higher monetary sanctions and the increased likelihood of the imposition of criminal sanctions.

⁹⁰ Dodd-Frank’s enhanced protection against retaliation also includes the provision that whistleblowers need not exhaust administrative remedies but can file directly a complaint alleging retaliation in district court, *see* §922(h)(1)(B)(i). It also doubles the statute of limitations from 90 to 180 days, *see* §922(c)(1)(A). Within the reliefs, Dodd-Frank also includes double back pay with interest, while SOX does not, *see* §922(h)(1)(C)(ii). In addition, the employer is prohibited from impeding the communication of the whistleblower with the Commission, 17 C.F.R. § 240.21F-17(a) (2017).

⁹¹ Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111–203 (n 85) §922(a)(6). Although §922(h)(1)(A)(iii) protects whistleblowers “in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002”, which by extent includes the disclosures addressed to the employer. The textual ambiguity was referred to by the Second Circuit at the case *Berman v. Neo@Ogilvy LLC* 801 F.3d 145, 147-148, [2015] (US Court of Appeals, Second Circuit)

⁹² ‘Dodd-Frank Act: Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC’ (2011) 124(7) *Harvard Law Review* 1830

deference⁹³ to the SEC’s interpretation that Dodd-Frank protects internal whistleblowers. SEC indeed has promulgated a regulation, where it defines whistleblowers as individuals who report possible securities violations not only externally to the SEC, but also internally to supervisors or managers and to governmental authorities other than the SEC.⁹⁴ Furthermore, according to the Court, there is an ambiguity between the definition of whistleblower on one hand and the description of “protected conduct” on the other, according to which SOX-protected disclosures (thus also reports to the employer and the supervisor) are also protected by Dodd-Frank.⁹⁵ This decision created a circuit split, as it directly contradicted the Fifth Circuit’s 2013 decision in *Asadi v. G.E. Energy (USA)*, which based its narrow interpretation of the provisions on textual and structural analysis and found that interpreting section 922 broadly would render SOX anti-retaliation provisions superfluous.⁹⁶ The issue ascended for resolution to the Supreme Court, which in *Digital Realty Tr., Inc. v. Somers* ruled that an “employee who did not report any securities-law violations to SEC did not qualify as a whistleblower, abrogating *Berman v. Neo@Ogilvy LLC*”.⁹⁷ The Court drew from the letter of the Dodd-Frank Act and its strict definition of a whistleblower, as well as from the Act’s ‘purpose and design’,⁹⁸ while it underlined that since Congress has spoken directly on the issue, attributing *Chevron* deference to SEC’s interpretation is out of question.⁹⁹

2.2.2.2.2. *Internal vs. External whistleblowing (Part B)*

It has been argued that internal whistleblowing is more efficient in tackling fraud and securities law violations and that the Dodd-Frank provisions are, from the perspective of public interest, less likely to achieve the regulatory aim.¹⁰⁰ Furthermore, it has been supported that the potential for enormous bounties might lead corporate insiders to let instances of fraud go undetected without reporting them internally, only to later bring them directly to the SEC in

⁹³ Following the administrative principle established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, [1984] (US Supreme Court) according to which courts should defer to agency interpretations of statutes that mandate agency action unless they are unreasonable.

⁹⁴ 17 C.F.R. § 240.21F-2(b)(1) (2011)

⁹⁵ *Berman v. Neo@Ogilvy LLC* (n 91)

⁹⁶ *Asadi v. G.E. Energy LLC* 720 F.3d 620, [2013] (US Court of Appeals, Fifth Circuit) [628–29]

⁹⁷ *Digital Realty Tr. Inc. v. Somers* No. 16-1276, 2018 WL 987345, [2018] (US Supreme Court)

⁹⁸ *ibid* [1-2]. Note, however, the concurring opinion of Justices Thomas, Alito, and Gorsuch, who base their judgement only on the text of the Dodd-Frank Act, rather than on its ‘purpose’ as the Court derives it from a Senate Report [15]

⁹⁹ *ibid* [3]

¹⁰⁰ See, for example, Westman and Modesitt (n 7) 4-74, claiming that the public interest might be undermined if the corporation would have acted more quickly than the SEC.

the hopes of securing a large financial award.¹⁰¹ The business roundtable, after acknowledging its own efforts in ameliorating corporate governance through soft law initiatives, claims that many companies have enhanced their control systems and whistleblowing channels, creating a culture of trust, which the SEC is corroding through the implementation of the Dodd-Frank.¹⁰² It therefore asks that the employees must first report internally, before reporting to the Commission.¹⁰³

However, following the subprime mortgage crisis and the diffusion of economic recession, it was Congress's belief that "financial institutions cannot be left to regulate themselves, and that without clear rules, transparency, and accountability, financial markets break down, sometimes catastrophically."¹⁰⁴ Whistleblowing provisions are part of this regulatory framework of transparency and accountability and they reflect the intent to closely oversee the financial industry. Moreover, they are based on the idea that corporate compliance programs have not been entirely successful, and that self-regulation is not sufficient.

In general, the introduction of whistleblowing provisions conveys some degree of experimentalism in corporate regulation, as it involves new agents and new methods of oversight and insight. Potentially, whistleblowing frameworks could alter corporate culture and create new pathways for public and private collaboration. Although the Dodd-Frank act distances itself from this model of cooperation by encouraging whistleblowers to step out of their firm, it still does not completely break with that model, as is indicated by SEC's attempt to strike a balance with corporate compliance programs and to include internal whistleblowers within the protective scheme of Dodd-Frank.¹⁰⁵ Internal and external whistleblowing seem as two different regulatory approaches and indeed they reflect different levels of commitment to self-regulation or public enforcement respectively. They should also be understood in their

¹⁰¹ Ken Daly and [President and CEO of the National Association of Corporate Directors], 'Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions' (Testimony before the House Subcommittee on Capital Markets and Government Sponsored Enterprises, 2011)

¹⁰² Business Roundtable to Ms. Elizabeth M. Murphy Secretary U.S. Securities and Exchange Commission (17 December 2010) 2-3

¹⁰³ *ibid* 2

¹⁰⁴ Michael S Barr, 'The Financial Crisis and the Path of Reform' (2012) 29(1) *Yale Journal on Regulation* 91, 92

¹⁰⁵ According to the report of SEC of 2016, "the Commission adopted strong incentives and protections for employees who choose to work within their company's own compliance structure because they believe that the employer's internal compliance function is an effective mechanism to address any potential wrongdoing". SEC, '2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program' (n 89) 4. *See also*, Securities Whistleblower Incentives and Protections 13 June 2011, 17 CFR 240 (SEC) 34359 [450]. This approach was dismissed in *Digital Realty Tr. Inc. v. Somers* (n 97).

historical, political, and economic context, something empirical researches on their efficiency should take into consideration. Yet, they are not completely antithetical to the extent that they both distance themselves from traditional command-and-control and they involve characteristics of the “post-regulatory state” and “new governance”. I will address this issue in Section 2.2.4.

2.2.2.3. *And trade secrets?*

A policy dilemma arises from the conflict between the regulatory objective of combatting securities laws violations and protecting sensitive commercial information under the category of trade secret. SEC’s interpretation of the Dodd-Frank asserts that “[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement...with respect to such communications”.¹⁰⁶ Confidentiality agreements that impede whistleblowers from bringing forward the crucial for the constitution of the violation information violate the SEC Rule 21F-17(a). Non-Disclosures agreements cannot impede disclosures to SEC.¹⁰⁷ Thus, it has been argued that the Dodd-Frank endangers trade secrets.¹⁰⁸

¹⁰⁶ Securities Whistleblower Incentives and Protections (n 105) § 240 21F-17(a)

¹⁰⁷ Considering that Rule 21F-17 does not provide employees with a private right of action, courts also rely on existing contract law to balance the public and private interests of these confidentiality agreements. For example, starting from the premise that a Confidentiality Agreement cannot be fully enforced when it is found contrary to public policy (*Kashani v. Tsann Kuen China Enter. Co.* 118 Cal.App.4th 531, [2004] (Court of Appeal, California) [540]), the U.S. District Court of California held that the strong public policy in favour of protecting whistleblowers could outweigh a company’s right to enforce confidentiality. *Erhart v. Bofl Holding, Inc.* No. 15-CV-02287-BAS-NLS, 2017 WL 588390, [2017] (District Court, California) [9-11]. For a contrary decision, see indicatively *JDS Uniphase Corp. v. Jennings* 473 F. Supp. 2d 697, [2007] (District Court, ED Virginia), where the appropriation of documents –‘theft’- justified the enforcement of confidentiality) or *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.* 637 F.3d 1047, [2011] (US Court of Appeals, Ninth Circuit), where a public policy exception from a NDA could not be supported in case of indiscriminate appropriation of data. For a discussion in the relevant scholarship, see Richard Moberly, Jordan A Thomas and Jason Zuckerman, ‘De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank’s Whistleblower Provisions’ (2014) 30 ABA Journal of Labor & Employment Law 87. Regarding the question whether employers may restrict whistleblowers from turning over to the SEC internal, confidential documents supporting the disclosure, see Jennifer M Pacella, ‘Silencing Whistleblowers by Contract’ (2018) 55 American Business Law Journal 261

¹⁰⁸ Thad Davis and Veronica Alegria, ‘Dodd-Frank Endangers Trade Secrets’ (2011) <<http://www.therecorder.com/id=1202509580512?keywords=Dodd-Frank+Endangers+Trade+Secrets>>

Addressing this policy dilemma, Congress introduced a provision for whistleblower protection within the Defend Trade Secrets Act of 2016 (DTSA).¹⁰⁹ According to this provision, whistleblowers are *immunized* from criminal and civil liability under any federal or state trade secret law for disclosure, *in confidence*, of trade secrets to government officials and attorneys for the purpose of reporting or investigating a suspected violation of law.¹¹⁰ This immunization is supposed to enable whistleblowers to come forward without fear of retaliation, without at the same time, thanks to the confidentiality of the process, compromising the trade secret. The efficiency of this provision is based on the –not always obvious– assumption that administrative entities “want access to, and will act upon, trade secret information that reveals problematic behaviours by regulated industries”.¹¹¹ It is apparent that the goal of spurring law enforcement is a major consideration for the legislator and that whistleblowers fulfil an important role in achieving this goal. Nevertheless, the provision does not go far enough to permit a disclosure to the press or the larger public.

The first court decision applying the whistleblower immunity provision, *Unum Group v. Loftus* (2016), “misapprehended the DTSA whistleblower protection scheme” and only treated it as an affirmative defence.¹¹² The court imposed upon the whistleblower the burden of proof regarding his intent to report or investigate potential violations. According to Menell, “under the court’s approach, any trade secret owner can require a whistleblower to defend a trade secret lawsuit merely by alleging that there is a dispute over the employee’s motivation for providing trade secret documents to their attorney”.¹¹³ Instead, it should be the trade secret owner that has to prove that the employee shared trade secret information outside of the protected categories or for an impermissible purpose.

It seems that the provision of whistleblowing is not only originally narrow, but it can be interpreted even more so by the judiciary. It is important to note the willingness of the legislators, amidst an Act that aims first and foremost to protect commercial secrecy, to provide for whistleblower protection, recognizing thus their value in corporate regulation and law

¹⁰⁹ For a discussion of the definition of trade secret under the Act and a broad outline, see Dennis Crouch, ‘A Comparison of the EU Trade Secrets Directive and the US Defend Trade Secrets Act’ (2016) <<https://patentlyo.com/patent/2016/05/comparison-secrets-directive.html>>

¹¹⁰ Exceptions to prohibitions, 18 U.S.C. § 1833 (US Congress)(B)(1)(A) (2012)

¹¹¹ Dave Levine, ‘The Defend Trade Secrets Act and Whistleblowers’ (2016) <<https://freedom-to-tinker.com/2016/04/20/the-defend-trade-secrets-act-and-whistleblowers/>>

¹¹² Peter S Menell, ‘Misconstruing Whistleblower Immunity Under the Defend Trade Secrets Act’ (2017) Article 4 Nevada Law Journal Forum 92, 95

¹¹³ *ibid*

enforcement. This provision highlights the role of whistleblowing as a function in contemporary regulation, a function that can be symbiotic with commercial secrecy and business innovation because it eventually aims at securing the larger context in which these practices are rendered meaningful: Market integrity and trust. As I will show in the next Section, the EU followed a similar logic in designing its own Trade Secret Directive. This is part of a larger convergence between the U.S. and the EU on the instrumental role of whistleblowing provision, a convergence that I will now discuss.

2.2.3. Protecting whistleblowers in the EU: A progressive expansion of the legislative framework and the dominant instrumental approach

This Section discusses the protection of whistleblowing within the EU and its Member States. My thesis is that whistleblowing legislation is expanding, while being founded on an instrumental approach that views whistleblowing as an efficient regulatory instrument and only secondarily as an employee protection mechanism. In Europe, like in the US, it is the economy that triggers the changes in the legislative framework of whistleblowing. Several Member States have updated and amended their legislation regarding whistleblowing and legislative efforts have institutionalized sectorial forms of whistleblowing protection on an EU level. Yet, whether this framework will be sufficient in practice to protect whistleblowers against retaliation remains to be seen. In Subsection 2.2.3.1, I examine the main issues and aspects of whistleblower protection in three different European states: The UK, France, and Ireland. Through the comparison of these cases and the developments in each country, not only a progressive proximity of the different models becomes apparent (as for example the convergence to a ‘three-tiered model’ regarding the channels of disclosure), but also the continental chasm with the U.S. appears less unbridgeable than it did only few years ago. This bridging of the gap, as I argue in Subsection 2.2.3.2, is further reinforced by the first pan-European framework of whistleblowing protection which came in the form of an Implementing Directive of the Market Abuse Regulation. The pursuit of the Directive is to protect whistleblowing as an instrument that may amplify the efficiency of enforcement against market abuse. In Subsection 2.2.3.3, I discuss the proposal for a Directive on the protection of persons reporting on breaches of EU law and its similar emphasis on enforcement and on the protection of the single market. In Subsection 2.2.3.4, I review the protection accorded to whistleblowers as an exception in the trade secrets Directive and I highlight that the protection of trade secrets and whistleblowing should not be understood as thoroughly contradictory projects.

2.2.3.1. Main issues aspects and issues of whistleblower protection in European states

In this subsection, I will briefly discuss some main aspects of whistleblower protection in three cases: the UK, France, and Ireland. As I already mentioned, whistleblowing can be seen as a measure of employee empowerment and a value in itself; a concretization of freedom of expression within an organization. Regardless of my critique that this works in parallel with

the flexibilization of the working relations and the decay of more collective forms of employee participation, whistleblowing legislation, in the current socio-economic situation, remains an important tool for persons who are eager to report wrongdoings without putting their career at stake. First (*a, b*) I will address two fundamental issues regarding whistleblower protection in Europe, namely the scope of protection and the channels of reporting. Secondly (*c-e*), I will discuss some of the controversial issues regarding whistleblowing, where some important differences between the American and the European model persist.

2.2.3.1.1. Scope of protection

In the UK, the Public Interest Disclosure Act of 1998 (PIDA), adopted after a series of tragic accidents that could have potentially been avoided had there been inside information, covers both private and public sectors. The protection is meant for employees¹¹⁴ whose disclosure of information tends to show one of the following:¹¹⁵ (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed. Any contractual duty of confidentiality preventing an employee from making a protected disclosure is void.¹¹⁶ Any employee who is dismissed for having made a protected disclosure shall be considered as unfairly dismissed.¹¹⁷ The relief sought typically includes injury to feelings, lost wages, and reinstatement.¹¹⁸ There is no specialized agency dealing with whistleblower complaints and these can be brought directly in front to a UK Employment Tribunal. The protection of public interest disclosures guaranteed by the PIDA has served as a pioneer for European standards. Nevertheless, it has also been criticized for gaps, such as the silence regarding the burden of proof, and for failing to tackle anti-

¹¹⁴ The Act does not apply to genuinely self-employed professionals (other than in the NHS), voluntary workers (including charity trustees and charity volunteers) or the intelligence services. Gov.UK, 'The Public Interest Disclosure Act' (2013) <<https://www.gov.uk/government/publications/the-public-interest-disclosure-act/the-public-interest-disclosure-act#how-does-the-act-protect-workers>>

¹¹⁵ Public Interest Disclosure Act 1998, s 43B (1)

¹¹⁶ *ibid* [43J]

¹¹⁷ *ibid* [103A]

¹¹⁸ Guyer and Peterson (n 45) 14

whistleblowing culture in the workplace adequately by not forcing employers to install a policy relating to disclosures.¹¹⁹ Furthermore, the notion of ‘detriment by the employer’ in 43B(1) has been criticized as vague, as it does not address the case where the detriment is caused not by the employer but by others (such as the co-workers) and it is not clear whether it could also involve potential psychological damage of the whistleblower.¹²⁰ Regarding the issue of burden of proof, the Employment Appeal Tribunal ruled in 2010 that “once a detriment has been shown to have been suffered following a protected act the employer's liability [...] is to show the ground on which any act or deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. [...] Put another way, the employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act”,¹²¹ making clear that the burden of proof falls upon the employer.

In France, since 2013, the developments regarding whistleblower protection have been significant.¹²² At the time, a series of laws established whistleblower protection in the fields of fiscal fraud and great economic and financial delinquency, corruption, conflicts of interest, and public health and environment. In general, the protection extended to both private and public sector employees and typically provided against any form of retaliation in the domains of recruitment, tenure, training, scoring, discipline, promotion, assignment and transfer. In December 2016, the law n° 2016-1691 on transparency, fight against corruption, and modernization of economic life (called “Sapin II”) was introduced, changing the scenery regarding whistleblower protection.¹²³ The legislation provides a definition of a whistleblower as “natural person who discloses, in a disinterested and *bona fide* manner, a crime or offense,

¹¹⁹ David Lewis, ‘Recent legislation. The Public Interest Disclosure Act 1998’ (1998) 27(4) *Industrial Law Journal* 325

¹²⁰ James Gobert and Maurice Punch, ‘Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998’ (2000) 63(1) *Modern Law Review* 25, 47

¹²¹ *Fecitt & Ors v. NHS Manchester* [2010] UKEAT/0150/10/CEA, [2010] (Employment Appeal Tribunal) [66]

¹²² It should be noted that before 2013 whistleblowers could already be protected through employment law (for the differences with the ‘at-will’ system, *see* above Section 2.2.1.4) and the protection of freedom of expression in the workplace. *See*, Code du travail art L1121-1, “Nobody may apply restrictions to civil liberties and individual and collective freedoms if they are not justified by the nature of the task to be accomplished or are not proportional to the purpose sought by the restriction”, (translation and brief discussion by Björn FASTERLING and David Lewis, ‘Leaks, legislation and freedom of speech: How can the law effectively promote public-interest whistleblowing?’ (2014) 153(1) *International Labour Review* 71, 79). For an extensive discussion on freedom of expression and protection of whistleblowing beyond statutes, *see* Chapter 3.2.

¹²³ *See*, also Loi n° 2016-483 du 20 avril 2016 relative à la déontologie et aux droits et obligations des fonctionnaires, on public employees reporting conflicts of interest.

a serious and manifest violation of an international obligation assumed by France, of a unilateral decision of an international organization made on the basis of such an obligation, of the law or regulation, or serious a threat or prejudice to the public interest, of which he or she has been personally aware”.¹²⁴ The same article excludes from the provisions of protection information related to national security, medical secrecy, or secrecy of the relations between a lawyer and a client. The law also alleviates from penal responsibility those who disclose secrets normally protected by law under the above-mentioned conditions and inserts protection of whistleblowers against retaliation in different codes (labour code, public administration code, military code). Furthermore, it dictates that the independent agencies responsible for market surveillance (*Autorité des marchés financiers* and *Autorité de contrôle prudentiel et de résolution*) implement procedures for reporting of any breach of obligations related to the law of financial markets. It is important to note that just like in anti-discrimination law, the burden of proof that the retaliation did not occur as a response to a protected disclosure falls upon the employer.

In Ireland, the Protected Disclosures Act of 2014 follows to a great extent the PIDA. Protection is wide and extends to “all workers”, meaning from public and private sector, as well as contractors. As a protected disclosure, apart from the cases referred to by the PIDA, it adds the information regarding unlawful or otherwise improper use of funds or resources of a public body and regarding oppressive or discriminatory actions of public bodies.¹²⁵ The Act further grants civil immunity from actions for damages and a qualified privilege under defamation law.¹²⁶ Moreover, in proceedings involving an issue as to whether a disclosure is a protected disclosure it is so presumed, until the contrary is proved.¹²⁷ The new legislation has been hailed as a positive contribution in the fight against corruption and as a step toward changing culture to more favourable to whistleblowing attitudes.¹²⁸

National security is always an exception to the main corpus of provisions dealing with public interest disclosures. I will come back to this in the next Chapter.

¹²⁴ Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, art 6

¹²⁵ Protected Disclosures Act 2014, s 5(3)(f)(g)

¹²⁶ *ibid* [14]

¹²⁷ *ibid* [5(8)]

¹²⁸ OECD, *Committing to Effective Whistleblower Protection* (n 36) 179

2.2.3.1.2. Channels and procedure

The question of the channels of disclosure and the debate over internal or external whistleblowing animate different legislative approaches. Arguing in favour of external whistleblowing, meaning addressing the disclosure to a regulatory agency unrelated to the organization or even to the media, whistleblower activists stressed the priority of society's interests.¹²⁹ On the contrary, employers have generally been protective of organizational secrecy and afraid of industrial espionage, thus traditionally favouring internal whistleblowing and dealing with the problematic situation within the organization. As I have also shown through the example of the US, the preference between internal and external whistleblowing also signals a different regulatory approach and indicates a difference between pro-self-regulation models and more state-driven models of control. Constructed upon the premise that a compromise between antithetical interests could be found, the PIDA established a model of raising concerns that addressed both ways. Besides, the idea has been that most employees who decide to blow the whistle generally perceive themselves as acting for the good of the organization.¹³⁰ The PIDA thus aimed to be inclusive in its definitions of protected disclosures. More specifically, although disclosures are first thought to be made to the employer,¹³¹ further possibilities remain open. Disclosures to prescribed regulators, as well as to Ministers, are also protected and the employee is able to choose his or her course of action insofar as the relevant failure for which the disclosure is made falls within scope of the regulator's duties.¹³² If the previous channels prove unsuccessful, or if the employee believes that disclosing to the employer will lead to the destruction of evidence or to retaliation, then wider disclosures can also be protected.¹³³ This system has been called the "three-tiered model"¹³⁴ and has been an influential paradigm for European legislations. However, the "tiers" do not favour internal whistleblowing as much as it is sometimes argued.¹³⁵ In fact, the employee is free to address his or her concern directly to the prescribed regulator, without having to go first to the

¹²⁹ Nader (n 8) vii

¹³⁰ Frederick A Elliston and Elliot D Cohen, 'Whistleblowing' (1986) 3(2) *International Journal of Applied Philosophy* 25; Marcia P Miceli and Janet P Near, *Blowing the whistle: The organizational and legal implications for companies and employees* (Lexington Books 1992) 28

¹³¹ Public Interest Disclosure Act (n 113) s 43C

¹³² *ibid* [43E, 43F]

¹³³ *ibid* [43G]

¹³⁴ Vandekerckhove (n 30) 17

¹³⁵ "This second tier [regulatory agencies] will be accessed when first-tier whistleblowing is unsuccessful, or in other words, when the organization fails to correct the malpractice for which it carries responsibilities", *ibid* 18

employer, as long as he or she believes that the specific regulatory agency has competence over this wrongdoing and that the information provided is substantially true. Therefore, although some further conditions must be met for accessing the second tier, the first and the second tiers work almost in parallel. Disclosing to the media is without doubt more complicated and either the mentioned conditions of a wider disclosure (43G), or the conditions of exceptionally serious failure accompanied with subjective requirements (43H) have to be met in order for it to be a protected disclosure. An example was offered by the Employment Tribunal in 2005, which judged the dismissal of a National Trust employee who disclosed to a newspaper a confidential report including potential public health hazards related to a contaminated landfill as unfair under the section 43H, ‘Disclosure of exceptionally serious failure’.¹³⁶

In France, the adoption of the law n° 2016-1691 introduced the three-tiered system of reporting in French legislation in a more fixed and standard way than in the PIDA. According to article 8 of the said law, the whistleblower must first report to the employer or the hierarchically superior. In case nothing is done to address the concern, then the whistleblower may report to the judicial or administrative authorities and if this also yields no result, then he or she can make the disclosure public, three months after the report to the authorities. This concludes a perfect example of a three-tiered model and aims at balancing the important function whistleblowers perform with the interests of the employers and with traditional administrative values. Favouring the organizational integrity, it gives priority to internal whistleblowing, although not without exceptions. In case of serious and imminent danger or if there is a risk of irreversible damage, then the whistleblower may directly report to the authorities or even make a wider disclosure to the public. This clause resembles the clause regarding “exceptionally serious failure” in the PIDA. It appears less demanding than the respective British legislation as it adds no subjective requirements of intent, yet it should be noted that the definition in article 6 already demands that whistleblower is disinterested and in good faith. Finally, the law states that specific procedures for receiving disclosures must be enacted by corporations of more than fifty employees, the administrative bodies of the State, the municipalities of more than 10 000 inhabitants, the departments and the regions of France.

Ireland also follows the tiered system and once more the guidance of PIDA. The employee may make the disclosure to the employer or may opt for a prescribed person, meaning a regulatory agency as defined by S.I. No. 339/2014 - Protected Disclosures Act 2014 (Section

¹³⁶ *Collins v. National Trust* ET/2507255/05, [2005] (Employment Tribunal)

7(2)) Order 2014.¹³⁷ The standards for external whistleblowing are also higher, similarly to the PIDA provisions, to the extent that the wrongdoing must fall under the competence of the respective regulator and that the employee reasonably believes that the information procured is substantially true. If the worker is employed by a public body, the disclosure may be made to the Minister. Following the PIDA, the disclosure is also protected if it is made in the course of obtaining legal advice. Accessing the third tier, meaning disclosing to a third party, such as a journalist, is possible if a number of conditions are met. These include: a) The belief of the employee the information is substantially true; b) that the disclosure is not made for personal gain; c) the belief of the employee that he or she will be subject to penalization by the employer if he or she makes the disclosure in the ways prescribed for the first and second tier, or the belief that the evidence will be lost and there is no prescribed regulator for the relevant wrongdoing, or that the employee has already made the disclosure to the employer or the regulator, or that the wrongdoing is of exceptionally serious nature; and d) that it is reasonable to make the disclosure, which depends on the channel where the disclosure is made, the compliance with any internal procedures set up by the employer, any relevant action the employer might have taken as a response, the seriousness of the wrongdoing, and the likeness of the wrongdoing to occur in the future.¹³⁸ Following almost precisely the PIDA of the UK in the structuring of this nexus of conditions, the Protected Disclosures Act makes disclosure to the press difficult, although not impossible to be protected.

The outline of the three-tiered system allows for the following conclusion: Internal whistleblowing is to be preferred, presumably for reasons of organizational loyalty, but also because it matches contemporary regulatory approaches that favour cooperation between the State and corporations in the forms of self-regulation or compliance. In this way, the corporation is given the time and the space to address the issue or to mitigate its reputational and litigation-related costs, while at the same time the State saves resources and avoids excessive coercion. At the same time, recognizing the limits of this approach, the legislators provide the alternative of disclosing directly to a regulatory agency. However, from all the examples above it is clear that disclosures to the press are discouraged. This indicates that whistleblowing, in its legal dimension, is envisaged less as an instrument of deliberation and

¹³⁷ This includes 72 agents and agencies for their respective prescribed field, featuring for example the Director of Corporate Enforcement, the Commissioner in the Commission for Aviation Regulation, and Members of the Sea Fisheries Protection Authority as potential receivers of the disclosure.

¹³⁸ Protected Disclosures Act (n 125) s 10

democratic dialogue and more as a regulatory strategy, enhancing enforcement and compliance. This will be further analysed in the last Section of this Chapter.

2.2.3.1.3. Public interest and good faith

In the UK, the Enterprise and Regulatory Reform Act (ERRA) of 2013 added a public interest test to the provisions of the PIDA. At the same time, it eliminated the requirement of good faith. Hence, 43B reads “a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, *is made in the public interest*, and tends to show one of the following” and 43C “a qualifying disclosure is made in accordance with this section if the worker makes the disclosure”, without the words “in good faith” before the list of conditions. Although in theory protected disclosures have always been related to public interest, the addition of a further legal test has been criticized. According to Lewis, “the requirement to get confirmation from others might penalize those whistleblowers who choose to act alone to safeguard themselves and others”.¹³⁹ The rationale behind this addition was to remove the opportunistic use of the legislation for private purposes,¹⁴⁰ which was, according to the Minister responsible for the Bill, the result of the decision in the case *Parkins v. Sodexho Ltd* in 2001. According to this decision, there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. This meant that individuals that make a disclosure about a breach of their own employment contract could then claim protection against unfair dismissal, although this is a “purely private matter rather public interest”, according to the Minister.¹⁴¹ In trying to interpret the “public interest test” in the case *Chesterton Global Ltd & Anor v. Nurmohamed*, the Employment Appeal Tribunal stated:

“It is clear to us that it cannot mean something which is of interest to the entirety of the public since it is inevitable from the kind of disclosures which arise from time to time such as disclosures about hospital negligence or disclosures about drug companies that only a section of the public would be directly affected.

¹³⁹ David Lewis, ‘Is a public interest test for workplace whistleblowing in society’s interest?’ (2015) 57(2) *Int Jnl Law Management* 141, 149

¹⁴⁰ *Chesterton Global Ltd & Anor v Nurmohamed UKEAT/0335/14/DM, [2015] (Employment Appeal Tribunal)* [19], citing Mr Norman Lamb, the Parliamentary Under-Secretary of State for Business, Innovations and Skills in the Committee debate on the Bill on 3 July 2012 .

¹⁴¹ *ibid* [19]

With this in mind, it is our view that where a section of the public would be affected, rather than simply the individual concerned, this must be sufficient for a matter to be in the public interest.”¹⁴²

Interpreted this way, the public interest test does not appear insurmountable for the whistleblower. Furthermore, disclosures in relation to contracts of employment may still be protected where “the breach in itself might have wider public interest implications”.¹⁴³

The ERRA removed the requirement of good faith, but gave to employment tribunals the power to reduce compensation by up to 25% when a disclosure is not made in good faith.¹⁴⁴ Good faith in this context is taken to mean not simply honesty regarding the procured information (this would overlap with the requirement of “reasonable belief”), but also having as the predominant motive the remedy of the wrongs identified in the PIDA and not some other, unrelated ulterior motive.¹⁴⁵ Good faith thus connotes a subjective standard, while reasonable belief an objective standard.¹⁴⁶ The persistence with the motives of the whistleblower is therefore progressively being attenuated and there is more focus on the message, through the public interest test, rather than the messenger, through the requirement of good faith.

In France good faith remains a requirement of the law.¹⁴⁷ Whistleblowers of good faith, according to the *Conseil d’État*, are first of all those “who had sufficient reasons to believe the exactitude of the facts and the risks they wished to report”.¹⁴⁸ This makes initially good faith similar to the “reasonable belief test”. If the whistleblower knowingly reports false information, he or she is subject to the law of defamation, but if the whistleblower honestly thinks the information provided is true (even if it is subsequently proven untrue) he or she is considered of good faith. Yet, the objective requirement of reasonable belief is intertwined with subjective requirements (intentions) of the whistleblower. Indeed, the *Conseil d’État* clarifies that whistleblowing should in no case take place “for the benefit of particular interests, by personal

¹⁴² *ibid* [14]

¹⁴³ *ibid* [19]. For a more extensive discussion of the case, see Jeanette Ashton, ‘When Is Whistleblowing in the Public Interest? Chesterton Global Ltd. & Another v Nurmohamed Leaves This Question Open’ (2015) 44(3) *Industrial Law Journal* 450

¹⁴⁴ Enterprise and Regulatory Reform Act 2013, s 8

¹⁴⁵ *Street v. Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964, [2004] (Court of Appeal (Civil Division)) [75]

¹⁴⁶ Gobert and Punch (n 120), 40

¹⁴⁷ Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (n 124), art 6: “Un lanceur d’alerte est une personne physique qui révèle ou signale, de manière désintéressée et de bonne foi [...]”

¹⁴⁸ Conseil d’État, ‘Le droit d’alerte: signaler, traiter, protéger’ (2016). Les études du Conseil d’État 8

animosity or with intent to harm, nor can it constitute a form of denunciation for persons liable to abuse it”.¹⁴⁹ This is the way of the *Conseil* to delimit whistleblowing only to the pursuit of the public interest.¹⁵⁰ In this sense, the subjective standards seem to be more elevated than the ones set in the UK. This renders the accordance of protection more difficult, but also signifies the least instrumental approach than those presented in this work, whereby whistleblowing is not reduced to its function in the process of regulation and law enforcement, but instead retains a personal character. Who reports and what motivation lies behind this reporting matter for the scope of protection. The reason for this development lies beyond the fear of defamation; it lies in the unjustifiable individual insurgencies and in the “generalized suspicion”¹⁵¹ that extended whistleblowing protection might encourage. Whistleblowing is still seen as something new and foreign to the French legal culture, it represents an Anglo-Saxon regulatory approach that is not yet fully integrated, but instead translated through a quasi rights-based perspective. The objective and subjective requirements are more elevated precisely due to this perspective; they are supposed to be a guarantee for it to remain within the boundaries of what is highly valued in French juridico-political thought: The abstract and equalizing public interest.

On the contrary, the term good faith does not figure at all in the encompassing Protected Disclosures Act of 2014 of Ireland. Having been adopted after the changes in the PIDA of 2013, the Protected Disclosure Act followed the tendency of eliminating subjective requirements. Furthermore, it did not include a public interest test, thus letting the reasonable belief test to be the only subjective requirement the whistleblower has to meet.¹⁵² This legislation, in contrast to France, follows the international developments in matters of whistleblowing protection, focusing on the value of the procured information and refraining from being overly demanding of the whistleblower.

The gradual withering away of the principle of good faith is also indicated by the Recommendation of the Council of Europe of 2014. According to the text adopted by the Committee of Ministers, “the principle [of protection against retaliation] has been drafted in such a way as to preclude either the motive of the whistleblower in making the report or disclosure or of his or her good faith in so doing as being relevant to the question of whether

¹⁴⁹ *ibid* 74

¹⁵⁰ *ibid*

¹⁵¹ *ibid* 11

¹⁵² A wider public disclosure must meet the requirement of objective reasonableness, Protected Disclosures Act (n 125) s 10(1)(d)

or not the whistleblower is to be protected”.¹⁵³ The elimination of this further requirement aims at facilitating whistleblowing protection. The reasonable belief test, meant to discourage malicious reporting and defamation, becomes the minimum requirement that is common in the different legal frameworks.

2.2.3.1.4. Financial incentives

Contrary to the US approach and despite the introduction of a relevant non-binding provision in the new Market Abuse Regulation with respect to whistleblowing protection that reads: “Member States may provide for financial incentives to persons who offer relevant information about potential infringements of this Regulation to be granted in accordance with national law where such persons do not have other pre-existing legal or contractual duties to report such information, and provided that the information is new, and that it results in the imposition of an administrative or criminal sanction, or the taking of another administrative measure, for an infringement of this Regulation.”,¹⁵⁴ no Member State has so far implemented financial incentives for whistleblowers.

Unlike the example of France, where the definition itself of a whistleblower as “disinterested” precludes the possibility of financial incentives, in the UK the matter was discussed but was not materialized after the conclusion of the Financial Conduct Authority and the Prudential Regulation Authority in 2014 that “providing financial incentives to whistleblowers will not encourage whistleblowing or significantly increase integrity and transparency in financial markets”.¹⁵⁵ The report states that there is no empirical evidence of incentives leading to an increase in the number or quality of disclosures, that the incentives in the US only benefit a small number of whistleblowers whose reports lead to successful enforcement action, that introducing financial incentives might increase moral hazards such as malicious reporting and entrapment, and that their introduction may discourage internal whistleblowing and the maintenance by firms of effective internal whistleblowing mechanisms.¹⁵⁶

¹⁵³ Recommendation CM/Rec(2014)7 (n 26) para 85

¹⁵⁴ ‘Regulation (EU) No 596/2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance’, *OJ 2 173/01* (2014) art 32 para 4, *see also* recital 74

¹⁵⁵ Financial Conduct Authority and Prudential Regulation Authority, ‘Financial Incentives for Whistleblowers: Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee’ (July 2014) [27]

¹⁵⁶ *ibid* [a-e]

In the relevant literature, the advantage of financial incentives is that whistleblowers, as rational actors, will only sound the alarm if the individual benefits of the reporting outweigh the anticipated negative consequences.¹⁵⁷ Besides, according to this view, access to inside information is the only efficient way to prevent capital market abuse.¹⁵⁸ This approach has not yet been successful in the EU, not only because of the mentioned disadvantages of such a regulatory approach, but also because of the scepticism against a “bounty culture” and the generalization of award schemes in exchange for information. The instrumental approach has not advanced so far.

2.2.3.1.5. Anonymity and data protection

The issue of anonymous reporting was first raised following the requirement of the Sarbanes-Oxley Act for US companies and their EU-based subsidiaries to establish “procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters [and] the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters”.¹⁵⁹ However, the implementation of schemes of anonymous reporting will necessarily involve collection, processing and transfer of personal data, including for example data of the accused individual. This creates a conflict between whistleblowing through anonymous channels and data protection rules (either on the EU or on the national level), as the former might deny the accused individuals the right to know the nature of allegations as well as the opportunity to defend themselves.¹⁶⁰ For example, in 2005 the French Data Protection Authority (CNIL) prohibited McDonalds and Exide Technologies, two SOX-regulated multinational companies, to operate whistleblowing anonymous hotlines because of the subsequent violation of the privacy of the data subject.¹⁶¹

¹⁵⁷ Holger Fleischer and Klaus U Schmolke, ‘Financial Incentives for Whistleblowers in European Capital Markets Law? Legal Policy Considerations on the Reform of the Market Abuse Regime’ [2012] ECGI - Law Working Paper No 189/2012 8

¹⁵⁸ Alexander Dyck, Adair Morse and Luigi Zingales, ‘Who Blows the Whistle on Corporate Fraud?’ (2010) 65(6) *The Journal of Finance* 2213, 2213

¹⁵⁹ Sarbanes-Oxley Act 2002 Section 301(4)

¹⁶⁰ David Lewis, ‘Whistleblowing And Data Protection Principles: Is The Road To Reconciliation Really That Rocky?’ (2011) 2(1) *European Journal of Law and Technology* <<http://ejlt.org/article/download/53/119>> accessed 30 January 2017

¹⁶¹ Délibération relative à une demande d'autorisation de MacDonald's France pour la mise en œuvre d'un dispositif d'intégrité professionnelle n° 2005-110, [2005] (CNIL)

The opinion 1/2006 of February 2006 by the Article 29 Working Party on Data Protection attempted to solve the problem by imposing certain preconditions on the introduction of internal whistleblowing schemes.¹⁶² These preconditions are based on the four broad principles of legitimacy, fairness, proportionality, and rights of the incriminated person. According to the Working Party, the proper application of data protection rules alleviates the risk of stigmatization and victimization of the incriminated person, who faces this risk even before aware of the accusations.¹⁶³ For a whistleblowing scheme to be lawful and legitimate, its establishment must be necessary either for compliance with a legal obligation or for the purposes of a legitimate interest pursued by the controller or by the third party to whom the data are disclosed.¹⁶⁴ Furthermore, in accordance with the previous Directive on Data Protection (95/46/EC), “personal data must be processed fairly and lawfully; they must be collected for specified, explicit and legitimate purposes and not be used for incompatible purposes. Moreover, the processed data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed”.¹⁶⁵ The data subjects must be informed about the existence, purpose and functioning of the scheme and the rights of the incriminated person, including his or her information rights, rights of access, rectification and erasure, must be balanced against these of the whistleblower and the needs of the investigation.¹⁶⁶ The Working Party advocates against the implementation of anonymous reporting mechanisms as they make investigations harder, they may raise suspicions regarding the reporting, and they may lead to the deterioration of the social climate within an organization.¹⁶⁷ Yet, it does recognize anonymous whistleblowing as a reality, depending on the whistleblower’s character and motivations. Unwilling to exclude the possibility of

¹⁶² ARTICLE 29 Data Protection Working Party, ‘Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime’

¹⁶³ *ibid* 7

¹⁶⁴ *ibid*

¹⁶⁵ *ibid* 9

¹⁶⁶ *ibid* 13-14

¹⁶⁷ *ibid* 10-11. Although it is not mentioned in the argumentation of the Working Party, it is worth taking into consideration that anonymous whistleblowing might pose an obstacle for the whistleblower’s protection against retaliation. The identity of the whistleblower being unknown to the receptor of the report, the claim to protection might prove harder to be supported in case retaliation does occur. This remains a possibility despite the anonymity, as the accused might have suspicions or indications as to who raised the alarm and may be in the position to take measures against him or her without further proof. For a discussion of moral arguments, *see* also Frederick A Elliston, ‘Anonymity and whistleblowing’ (1982) 1(3) *J Bus Ethics* 167

anonymous reports, the Working Party still views them as an exception and a complement to the standard confidential mechanism.

The EU issued a new Regulation and Directive on Data Protection in 2016. Inspired by the same principles as its predecessor, the Directive 2016/680 (EU) states that “any processing of personal data must be lawful, fair and transparent in relation to the natural persons concerned, and only processed for specific purposes laid down by law”.¹⁶⁸ The enhanced requirements of protection of personal data and privacy require organizations to tailor their internal reporting systems. The safeguards of legitimacy, proportionality, fairness, and respect for the rights of the incriminated person withstanding, anonymous reporting is nevertheless a reality for EU law in specific situations.

2.2.3.2. The first European framework for whistleblowing protection: The instrumental approach of the Market Abuse Regulation

In December 2015 the European Commission published the Implementing Directive on whistleblowing under the requirements of the Market Abuse Regulation (MAR) of 2014. The Directive 2015/2392 constitutes the first pan-European framework for protection of whistleblowers.¹⁶⁹ Introduced following the Regulation on market abuse, which aimed to update the legislative framework of the EU assuring market integrity, the Directive intends to establish “effective mechanisms to enable reporting of actual or potential infringements of this Regulation”.¹⁷⁰ The Regulation adopted stricter measures of control against market abuse, including, for example, increased obligations on information disclosure, expanded inside trading prohibitions, and increased fines.¹⁷¹ Part of this more restraining approach toward the

¹⁶⁸ ‘Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data’, *OJ L 119/89* (2016), recital 26. The EU has also published guidelines on how EU institutions and bodies should process personal information within a whistleblowing procedure. See, European Data Protection Supervisor, ‘Guidelines on processing personal information within a whistleblowing procedure’ (2016).

¹⁶⁹ See, also the sectorial provision in the ‘Directive 2013/30/EU on safety of offshore oil and gas operations’, *OJ L 178* (2013)

¹⁷⁰ ‘Regulation (EU) No 596/2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance’ (n 154) art 32 para 1

¹⁷¹ *ibid* recital 56, art 16, art 30 para 2(i). See, also Simon Witty, ‘The New EU Market Abuse Regulation’ (2016) <<https://corpgov.law.harvard.edu/2016/06/17/the-new-eu-market-abuse-regulation/>>.

financial markets is the provision of a system of reporting for any infringements of the Regulation. According to the rationale of the Regulation, “measures regarding whistleblowing are necessary to facilitate detection of market abuse and to ensure the protection and the respect of the rights of the whistleblower and the accused person”.¹⁷²

The Directive 2015/2392 implements the Regulation insofar as it concerns the creation of reporting mechanisms and the protection of whistleblowers. Specifying from the very beginning that anonymous reporting should be allowed and that the protection mechanisms should also apply where a whistleblower decides to reveal his or her identity at a later stage, the Directive also does not distinguish between internal and external whistleblowing, stating that whistleblowers should be free to choose their course of action.¹⁷³ This is a remarkable deviation from the variations of the three-tiered system of EU Members States and it indicates the imperative need to prevent or detect and remedy market abuse. In order to facilitate external whistleblowing, the Directive outlines the establishment of procedures for anonymous reporting of infringements of the Regulation to the competent authorities set up by each Member State. These authorities are also obliged to publish on their website an explanatory section regarding the reporting of infringements, in order to facilitate the recourse of the whistleblowers.¹⁷⁴ Furthermore, the competent authorities must establish “independent and autonomous communication channels, which are both secure and ensure confidentiality, for receiving and following-up the reporting of infringements”¹⁷⁵ and to keep records of all reports.¹⁷⁶ Reporting persons must have access to “comprehensive information and advice on the remedies and procedures available under national law to protect them against unfair treatment”¹⁷⁷ and to “effective assistance from competent authorities”¹⁷⁸ which will certify a whistleblower as such in the event of an employment dispute. The protection must extend against retaliation, discrimination, or other types of unfair treatment arising in connection with the reporting of infringements. Personal data of both the reporting and the reported person

¹⁷² ‘Regulation (EU) No 596/2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance’ (n 154) recital 74

¹⁷³ ‘Commission Implementing Directive (EU) 2015/2392 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation’, *OJ L 332/126* (2015), recital 2

¹⁷⁴ *ibid* art 4 para 1

¹⁷⁵ *ibid* art 6 para 1

¹⁷⁶ *ibid* art 7

¹⁷⁷ *ibid* art 8 para 2(a)

¹⁷⁸ *ibid* art 8 para 2(b)

should be protected and treated confidentially.¹⁷⁹ The transposition involved the obligation for regulated financial service providers to put in place internal procedures to facilitate whistleblowing¹⁸⁰ and the provisions for anonymity, which were therefore introduced even in countries that have traditionally been hostile toward whistleblowing anonymity, such as Germany.¹⁸¹ No Member State has so far exercised its discretion to institutionalize financial incentives for whistleblowers.

Whistleblowers assume the function of controllers or potential controllers for a financial system, the complexity of which prevents the regulatory organs of the State from having full overview and enforcing the law in its entirety. As complexity increases, so does the need for experimentation, which involves new forms of participation, coordination of multiple levels of government, transparency, and decentralization. These features of ‘new governance’¹⁸² constitute a new way of regulation that aims to maximize efficiency and to complement the traditional top-down enforcement. The encouragement to blow the whistle, as part of the set of reforms for the reinforcement of market integrity, becomes part of the regulatory puzzle and a way to fortify the penetrability of law enforcement. The pursuit of the Directive is not to orchestrate a labour reform centred on a rights-based approach and the need to protect rights of freedom of expression, but to protect whistleblowing for its benefits for the safeguarding of the integrity of financial markets. In this way, the utilitarian undertone of the reform resembles the U.S. model of whistleblower protection in financial regulation.

Indeed, the EU system against market abuse bears similarities with the U.S. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. They both represent a post-financial crisis approach of regulation that is skeptical of corporate self-regulation (in this case the internal whistleblowing mechanisms) but cannot also return to the “command-and-control” system of the New Deal era. This leads to an approach characterized by the complementarity of different methods and the elevation of whistleblowers as crucial factors of the regulatory process. What is valued the most in this scheme is the information procured by the employee and its potential in controlling and preventing market abuse. Whistleblowing is in this way

¹⁷⁹ *ibid* art 9 para 11

¹⁸⁰ For example, S.I. No. 349/2016 European Union (Market Abuse) Regulations 2016 art 25 in Ireland and the Financial Services and Markets Act 2000 art 131AA (2) in the UK.

¹⁸¹ Guido Strack, ‘Whistleblowing in Germany’ in Marek Arszulowicz and Wojciech Gasparski (eds), *Whistleblowing: In defense of proper action* (vol 18. Transaction Publishers 2010)

¹⁸² See, David M Trubek and Louise G Trubek, ‘New Governance And Legal Regulation: Complementarity, Rivalry Or Transformation’ (2007) 13 *Columbia Journal of European Law* 539, 544

depersonalized: Anonymity is permitted and the motives and the intentions of the whistleblower, such as for example the requirements of good faith or being disinterested are no more important. It is worth noting, that the non-binding Resolution 2016/2224(INI) of the European Parliament, despite addressing whistleblowing at large, beyond the field of market abuse, similarly encourages anonymity and dismisses the importance of motive and good faith.¹⁸³ Good faith was also forgotten at the proposal for a Directive on whistleblower protection of 2018, as I will show in the next section.

The convergence of the nascent European model of whistleblowing protection with that of the U.S. is indicative of what is perceived as a comparative advantage of the U.S. model in regulating the globalized, highly complex economy. The instrumental, U.S.-influenced approach of the market abuse Regulation regarding whistleblowing underlines how the construction of a common European policy is made upon presumptions of efficiency, in abstraction of the legal cultures of the Member States.

2.2.3.3. Whistleblowing contributing to a well-functioning single market: The proposal for a Directive on the protection of whistleblowers

In April 2018, the Commission published a proposal for a Directive strengthening the protection of whistleblowers reporting on breaches of EU law. The proposal aims to strengthen the enforcement of EU law in areas where there is a need to enhance enforcement, where under-reporting is a key factor for the lack of enforcement, and where breaches may result in serious harm to the public interest.¹⁸⁴ These specific areas are: (i) public procurement; (ii) financial services, prevention of money laundering and terrorist financing; (iii) product safety; (iv) transport safety; (v) environmental protection; (vi) nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data and security of network and information systems; as well as breaches of competition law, of corporate tax rules, and breaches that affect the financial interests of the Union.¹⁸⁵ The protection applies to both public and private sector employees, including

¹⁸³ Resolution 2016/2224(INI) (n 41) [47, 49]

¹⁸⁴ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the protections of persons reporting on breaches of Union law: 2018/0106 (COD)' (23 April 2018) 6

¹⁸⁵ *ibid* art 1

contractors and self-employed individuals.¹⁸⁶ The proposal adopts the three-tiered model, whereby Member States are first asked to ensure that public and private entities install internal channels for reporting,¹⁸⁷ second to designate authorities competent to receive confidential reports for external reporting,¹⁸⁸ and lastly whistleblowers may, under conditions, be protected if they disclose publicly.¹⁸⁹ The conditions, similarly to the PIDA, are that the individual reported first internally or externally and no action was taken, or that there was risk for irreversible damage, or that the danger for the public interest was so imminent that reporting could not reasonably be expected. In general, internal reporting is prioritized, despite the number of exceptions that allow for direct external reporting,¹⁹⁰ and public disclosures are envisioned as a case of last instance. Insofar as the information procured falls within the scope of the Directive, whistleblowers are protected if they have reasonable grounds to believe that the information reported was true.¹⁹¹ Therefore, the reasonable belief test displaces the requirement of good faith, facilitating the protection for whistleblowers. Protection is guaranteed through a nexus of sanctions introduced by Member States against retaliation, through the reversal of the burden of proof in favour of the whistleblower in case of judicial proceedings for retaliation, and through legal and financial assistance for whistleblowers.¹⁹² However, contrary to the protection on market abuse, financial incentives are this time not considered, and reports of infringements are confidential, rather than anonymous. This indicates a slight bend to the highly functional logic of the Directive on market abuse, where the need to protect the integrity of the financial markets led to the most accessible protection for whistleblowers. Furthermore, importantly, the proposal for the Directive, applying anyway only for EU law, does not in any way affect national frameworks regarding the protection of classified information and national security.¹⁹³

The fundamental idea behind the suggested reform is that whistleblower protection can be an important instrument for a fair and well-functioning single market, by ensuring a level-playing field, most importantly through the reporting of infractions that threaten the financial

¹⁸⁶ *ibid* art 2

¹⁸⁷ *ibid* art 4

¹⁸⁸ *ibid* art 6 - 12

¹⁸⁹ *ibid* art 13 para 4

¹⁹⁰ *ibid* art 13 para 2

¹⁹¹ *ibid* art 13 para 1

¹⁹² *ibid* art 14 – 17. This, however, does not include financial rewards in line with the bounty system of the US.

¹⁹³ *ibid* recital 21

interests of the Union, for example those that relate to competition law or to public procurement rules:

“The introduction of whistleblower protection rules at EU level would contribute to protecting the financial interests of the Union and to ensuring the level playing field needed for the single market to properly function and for businesses to operate in a fair competitive environment”.¹⁹⁴

Protection for whistleblowers is provided in areas where it would be beneficial for the overall regulatory framework of the EU. This indicates that, not unlike the U.S., whistleblowing is understood as an instrument for the enforcement of the law and for furthering the objective of a well-functioning single market. Whistleblowing provides the level of transparency that is necessary for the functioning of competition, for a ‘level playing field’. The Union considered a different policy direction and legal basis for the expansion of whistleblower protection, that is, through the Article 153 TFEU on improving the working environment to protect workers’ health and safety and on working conditions.¹⁹⁵ However, this option was discarded, first because it would have limited protection only to employees, and second because it was considered far-reaching and costly as regulatory intervention, considering that it would apply where there would be no connection with Union law or with the financial interests of the EU.¹⁹⁶ The more limited reform that was chosen is in line with the functional approach toward transparency and whistleblowing, highlighting the need to protect the efficient functioning of markets in the Union.¹⁹⁷

Yet, the proposal exceeds all current standards of whistleblower protection in the EU and might prove to be a catalyst for a significant regulatory change, affecting corporate behaviour through the threat of reporting from insiders. According to the Commission, “by boosting corporate transparency, social responsibility and financial and non-financial performance,

¹⁹⁴ European Commission, ‘Communication COM(2018) 214 on strengthening whistleblower protection at EU level’ (23 April 2018) 12

¹⁹⁵ The other potential legal basis that was discarded was a legislative initiative based on Article 50(2)(g) TFEU on enhancing the integrity of the private sector by introducing minimum standards for setting up reporting channels, European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the protections of persons reporting on breaches of Union law’ (n 184) 7.

¹⁹⁶ *ibid* 8

¹⁹⁷ *See*, also the reproduction of the market-based rationale in the area of protection of privacy and personal data, where whistleblowing “helps ensuring the continuity of services which are essential for the functioning of the internal market and the wellbeing of society”, *ibid* recital 14.

whistleblower protection can complement measures to increase business transparency on social and environmental matters”.¹⁹⁸ Business transparency, in its turn, is supposed to indirectly achieve policy related-objectives through the reputational pressure it adds to corporations.¹⁹⁹ Transparency and social responsibility are projected as solutions to regulatory gaps and promote a certain level of self-regulation in the quest to limit the rampant expansion of economic rationalities. Whistleblowing protection in the EU follows thus the regulatory idea of responsive regulation, whereby self-regulation in terms of internal reporting constitutes the base of the regulatory pyramid, which then escalates to external reporting to regulatory agencies and eventually to the media, where the reputational costs for the organization will be the most severe.²⁰⁰ Once again, the functional rationale for whistleblowing protections seems to trigger the most expansive protection for whistleblowers.

2.2.3.4. *The Trade Secret Directive and the protection of whistleblowing as means of accountability*

The EU Trade Secrets Directive 2016/943, adopted in April 2016 by the European Parliament and Council, aims to harmonize trade secret protection within the EU, in order to enhance innovation, research and development, and business competitiveness. A trade secret is defined as valuable know-how and business information, that is undisclosed and intended to remain confidential, and which derives its commercial value precisely from being a secret.²⁰¹ In the initial proposed directive little regard was paid to the balancing between whistleblowing in the public interest and the need to protect trade secrets, which led to criticism²⁰² and eventually to a new draft that incorporated an exception and a general protection for

¹⁹⁸ European Commission, ‘Communication COM(2018) 214 on strengthening whistleblower protection at EU level’ (n 194) 5

¹⁹⁹ See, Section 2.1.4.2

²⁰⁰ Orly Lobel, ‘New Governance As Regulatory Governance’ in David Levi-Faur (ed), *The Oxford handbook of governance* (Oxford University Press 2012) 76-77

²⁰¹ ‘Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure’, *OJ L 157/1* (2016) recital 1, art 2(1)

²⁰² See, for example Michèle Rivasi and others, ‘Le «secret des affaires» contre la démocratie en Europe’ (15 June 2015) <http://www.liberation.fr/debats/2015/06/15/le-secret-des-affaires-contre-la-democratie-en-europe_1329928>. According to the authors, “this draft directive makes the right to information an exception, transforming the judiciary into a censor defining the legitimacy of a revelation. Business secrecy is a massive deterrent against information, whistleblowers and journalists”.

whistleblowers.²⁰³ This exception is less narrow than its US counterpart, although not free from ambiguities and sources for concern regarding its implementation.

According to the Directive, “the measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity”.²⁰⁴ Therefore, the acquisition, use or disclosure of the trade secret should not be restricted when carried out “for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest”.²⁰⁵ The terms misconduct and wrongdoing, seeing as they are not defined, leave room for interpretation. Despite the semantic flexibility of these terms, the uncertainty is not as disarming as suggested by Tanya Aplin.²⁰⁶ For instance, answering to the example she evokes of *Tillery Valley Foods v. Channel Four Television*,²⁰⁷ consisting of practices inconsistent with proper food hygiene in a factory producing and distributing frozen meals to the healthcare and public sector, one must answer positively that this must be included under the label of “misconduct, wrongdoing, or illegal activity”. Even if one assumes, despite the different ruling of the Court, that the information in this specific case was indeed confidential, it is difficult to argue that the confidentiality could not be overridden as a result of the mentioned exceptions without rendering the exceptions devoid of content and meaning. To the extent that the production of meals did not adhere to the regulatory standards of food hygiene of the UK Food Standards Agency, it falls under the rubric of illegal activity, which would then permit the disclosure of the trade secret. As illegal activity should be understood any activity, commercial or organizational, that is unlawful with respect to national, European, or international legal statutes. ‘Misconduct’ and ‘wrongdoing’ allow interpretative space for activities that may not be strictly speaking illegal and yet constitute cases where the rule of non-disclosure of the trade secret cannot be upheld for reasons of public interest, such as the Panama Papers example of off-shore companies.

The interpretation is undertaken in the first place by the whistleblower himself or herself, who has to decide whether the witnessed action or omission falls under the respective

²⁰³ European Council Press Release 935/15, Trade secrets protection: Luxembourg presidency seals deal with Parliament (2015)

²⁰⁴ ‘Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure’ (n 201) recital 20

²⁰⁵ *ibid* art 5(b)

²⁰⁶ Tanya Aplin, ‘A critical evaluation of the proposed EU Trade Secrets Directive’ [2014] *Intellectual Property Quarterly* 257, 272

²⁰⁷ *Tillery Valley Foods v. Channel Four Television* [2004] EWHC 1075 (Ch), [2004] (Chancery Division (High Court))

categories. The Directive clarifies that the good faith of the whistleblower in this interpretation should be taken into consideration by the judicial authorities.²⁰⁸ In this case, good faith means the reasonable belief of the whistleblower that the revelations refer to misconduct, wrongdoing, or illegal activity. The Directive, however, proceeds one step further and adds a further requirement that does not appear in the market abuse Directive: That is the purpose of protecting the general public interest. This is meant to rule out cases of industrial espionage but may make protection harder to attain, especially seen as the burden of proof is on the side of the whistleblower, who has to prove that the disclosure was made in the public interest.

The introduction of whistleblowing protection within the directive for trade secret protection is not as contradictory as it might initially appear. In fact, similarly with the provisions of the Directive on market abuse, whistleblowing protection is meant to enhance trust in the market. According to the Commission, whistleblowing protection will “help disciplining companies and protect societal interests, which have the potential to enhance trust in the market and therefore attract potential investors and business partners”.²⁰⁹ Even if in this case the benefit from whistleblowing lies in the protection of social interests, this is seen through the lenses of efficiency, market integrity, and competitiveness. As Vigjilence Abazi highlights regarding the *prima facie* controversy between trade secret protection and whistleblowing protection, it must be examined not only how these protections function, but also how they are utilized.²¹⁰ From this perspective they do not have necessarily conflicting rationales, as they both share at least an aspect of market-related objectives. Trade secret protection aims to encourage innovation, growth, and competitiveness, and whistleblowing, by establishing a mechanism of accountability, aims to enhance trust and encourage investing.

In summary, the introduction of whistleblowing protection within the Trade Secret Directive was a step forward compared to the first draft of the Directive. The vagueness and lack of definition for the terms misconduct, wrongdoing and illegal activity has provoked some critique, which may not be unjustified, but it is excessive to the degree that it magnifies the degree of uncertainty. It is eventually up to the Member States and even more up to the judiciary to interpret these provisions in the light of maximizing the protection for the employees and

²⁰⁸ ‘Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure’ (n 201) recital 20

²⁰⁹ European Commission, ‘Communication COM(2016) 451 on further measures to enhance transparency and the fight against tax evasion and avoidance’ (5 July 2016) 9-10

²¹⁰ Vigjilence Abazi, ‘Trade Secrets and Whistleblower Protection in the European Union’ [2016] European Papers <<http://europeanpapers.eu/en/europeanforum/trade-secrets-and-whistleblower-protection-in-the-eu>>

the public interest. This remains to be seen. What can nevertheless be inferred from the provisions is that they share the instrumental substratum of the Directive on market abuse: They share it because the purpose is once more not to create a rights-based mechanism for employee protection, but instead to create an accountability mechanism that in its turn legitimizes and supports the trust in the internal market, while at the same time the addition of the subjective requirement of the purpose to protect the public interest is in fact meant to also support the major objective of protecting market. This requirement means that this time the disclosure, even it refers to misconduct, wrongdoing, or illegal activity, is not automatically valued more than the trade secret, but it must be motivated by the purpose to protect the public interest. The creation of an accountability mechanism is premised on a balance that is more delicate than the simple reinforcement of law enforcement in the case of market abuse. This time, there are two goods on the scale –the integrity of business in the form of the trade secret and the restoration of legality– and in order for the latter to outweigh the former and thus grant immunity to the whistleblower, his or her motivation must be the public interest. Otherwise, the provision could prove to be a lever for espionage and unethical practices that would only harm the trust and the integrity of the market, defeating the original purpose of the protection; the restoration of legality is not the supreme value and apparently it cannot come at any cost.

These two recent Directives and the proposal for a new Directive exemplify the increasing importance of whistleblowing's role in corporate and financial regulation in the EU. The socio-legal aspects of whistleblowing as a component of contemporary governance will be examined in the next Section.

2.2.4. Whistleblowing and the (Post-) Regulatory State

In this Section I discuss the role of whistleblowing provisions in the contemporary regulatory state. In Subsection 2.2.4.1, I examine the rise of the regulatory state, its relation to the neoliberal paradigm and its imperative impact in restructuring both the state and corporations. However, the concept of the ‘regulatory state’ being inadequate to capture the contemporary decentring of regulation from the state, concepts such as the ‘post-regulatory state’ emerge. Whistleblowing as a regulatory instrument is in line with the developments in regulatory theory and practice, reflecting a way of governing ‘at-a-distance’ over a progressively more expanded market and more privatized ownership of services. Further discussing the significance of ‘regulatory capitalism’, in Subsection 2.2.4.2, I underline the progressive convergence of different approaches to whistleblowing toward an instrumental, functional approach that views whistleblower protection as adjunct to the main regulatory objectives of overseeing the markets and preventing any disturbances in the forms of fraud and corruption. In particular, I question the potential success of the transfer of the US regulatory model in Europe. In Subsection 2.2.4.3, I show that the differences in whistleblowing protection may stem out of structural differences that are related not only to legal cultures, but also to the political economy, following specifically the categorization of Liberal Market Economies (LMEs) or Coordinated Market Economies (CMEs). According to this hypothesis LMEs are more welcoming to whistleblowing legislation. In Subsection 2.2.4.4 I emphasize the connection of whistleblowing legislation as a transparency mechanism with the Foucauldian analysis on governmentality, according to which governing involves the use of the freedom of the governed as a technical means of securing ends of government. The political rationality of transparency is a rationality of liberal government, connected with the rise of the (post-) regulatory state.

2.2.4.1. *Regulation and the political economy: The role of whistleblowing*

Neoliberalism outlines an economic and political doctrine, inspired by the classic liberalism and the *laissez-faire* of private initiative that has come to characterize the political culture and the economic practice of the Global North.²¹¹ It is conventional to think of neoliberalism as a

²¹¹ See, Section 2.1.1

specific form of market fundamentalism that strives for privatization, strong property rights, and deregulation. This conceptualization is based on a dichotomy between the ‘market’ and the ‘state’, whereby the market is the ideal locus for distribution and allocation of resources and any intervention in the market’s processes should be discouraged. This ideological position perceives the market as a pre-political phenomenon, a quasi-natural given, failing to understand it as product of a complex system of relationships that are rendered operational only through law and a legitimized political framework. In fact, it is law that enforces and guarantees market procedures, and, in this way, neoliberalism is mediated through law. According to Grewal and Purdy, “what the neoliberal position advances is not a claim of “market against state” or even simply a push for “more market, less state,” but rather a call for a particular kind of state”.²¹² The state and the market are not two antithetical poles, but rather interconnected in the advancement of an ideologically connoted conception of social welfare.²¹³

The “kind of state” that has resulted from the advancement of the neoliberal position, but not without incorporating some of the reactions against it, is the regulatory state.²¹⁴ The regulatory state indicates the expansion of regulatory modes of governance accompanying a series of changes in the nature and the function of the state. Contrary to the neoliberal ideological quest for deregulation, practice has favoured regulatory expansion in a way that has led scholars to employ the term ‘regulatory capitalism’.²¹⁵ According to this conceptualization, the functioning of the markets has been consistently supported by regulation. For example, in financial regulation, a simple contrast between deregulation and regulation may not be so revealing, as it obscures the fact that the ‘deregulatory’ period of the 1970-80s “consisted not

²¹² David S Grewal and Jedediah Purdy, ‘Law and Neoliberalism’ (2015) 77 *Law and Contemporary Problems* 1, 8

²¹³ According to David Harvey, “We can . . . interpret neoliberalization either as a utopian project to realize a theoretical design for the reorganization of international capitalism or as a *political project* to re-establish the conditions for capital accumulation and to restore the power of economic elites [...] the second of these objectives has in practice dominated”. David Harvey, *A brief history of neoliberalism* (Oxford University Press 2007) 19. According to John Gray, “An increase in state power has always been the inner logic of neoliberalism, because, in order to inject markets into every corner of social life, a government needs to be highly invasive”. John Gray, ‘The Neoliberal State’ *New Statesman* (7 January 2010) <<http://www.newstatesman.com/non-fiction/2010/01/neoliberal-state-market-social>>

²¹⁴ Giandomenico Majone, ‘From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance’ (1997) 17(02) *Journal of Public Policy* 139

²¹⁵ David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598(1) *The ANNALS of the American Academy of Political and Social Science* 12

merely in undoing the regulatory measures of the preceding era, but rather also in its own particular conception of the appropriate occasions and tools *for* regulation”.²¹⁶

The term regulatory state “suggests [that] modern states are placing more emphasis on the use of authority, rules and standard-setting, partially displacing an earlier emphasis on public ownership, public subsidies, and directly provided services. The expanding part of modern government, the argument goes, is *regulation*”.²¹⁷ This comment highlights that the dominance of neoliberalism and an expansion of regulation are not necessarily contradictory and paradoxical developments. The regulatory state means an emphasis on the *steering* part of governance (leading, thinking, directing, guiding), rather than the *rowing* (enterprise, service provision).²¹⁸ The regulatory state, as a compensation for the loss of public ownership, develops in parallel to the proliferation of privatization and the hollowing out of the state.²¹⁹ It also leads to restructuring both the state, through the creation of regulatory agencies and the increased delegation, and the businesses, with an increased emphasis on their accountability and the implementation of systems of internal control and self-regulation under the eventual oversight of the state.

However, Jordana and Levi-Faur are correct to point out that the regulatory state is more than a by-product of neoliberalism.²²⁰ The regulatory state embodies ambivalence: On one hand, it conveys the system of targeted rules and state intervention that aim at reinforcing market integrity, accommodating market expansion and functionality, and on the other hand it also translates the potential for bolder collective control over markets’ imperatives. A similar ambivalence characterises the use of whistleblowing as a regulatory method, which is on one hand fixated at market-related objectives, such as the building of trust in markets’ integrity and an accommodating environment for investors, and on the other hand can be used as a new tool

²¹⁶ Roni Mann, ‘Paradigms of Financial Regulation: The Transformation of Capital Requirements’ [2013] Working paper <https://wzb.eu/sites/default/files/u32/rmann_text_co_paradigms_of_financial_regulation.pdf> 2

²¹⁷ Christopher Hood and others, *Regulation inside government: Waste-watchers, quality police, and sleaze-busters* (Oxford University Press 1999)3

²¹⁸ Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (n 215) 15, citing David Osborne and Ted Gaebler, *Reinventing government: How the entrepreneurial spirit is transforming the public sector* (Addison-Wesley 1992)

²¹⁹ See, also Majone’s argument that the EU represents a regulatory state that has evolved in response to the demands of economic modernisation and that its primary function has been to secure the efficient functioning of markets through regulation. Giandomenico Majone, ‘The rise of the regulatory state in Europe’ (1994) 17(3) *West European Politics* 77

²²⁰ Jacint Jordana and David Levi-Faur, ‘The politics of regulation in the age of governance’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar 2004) 2

for state control over potential business transgressions, supposedly guaranteeing social accountability.

The regulatory state was conceptualized in opposition to its predecessor, the welfare state. However, the focus on state activities and the exclusion of non-state governance institutions, as well as of hybrid forms of regulation, have led to criticisms of inadequacy of the concept and to the emergence of concepts such as the ‘new regulatory state’,²²¹ the ‘post-regulatory state’²²² and ‘new governance’.²²³ In these new paradigms the focus is on the plurality of regulatory forms, including quasi-legal norms and soft regulation, as well as on the plurality of agents and loci of control. Essentially, regulation is understood as decentred from the state.²²⁴

If a broad and decentred definition of regulation is adopted, the institutionalization of whistleblowing as a regulatory instrument is in line with these developments.²²⁵ As a reform it follows the understanding of decentred regulation and it comes to remedy some of the structural causes of regulatory failure, as outlined by Julia Black.²²⁶ In other words, whistleblowing penetrates the complexity of the interactions between systems by providing space for reflexivity and self-remedy in the case of internal whistleblowing and system coordination in the case of external whistleblowing; it addresses information asymmetry between the regulator and the regulatee, because the whistleblower is an insider with direct knowledge of the situation

²²¹ John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222

²²² Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’ in Jacinta Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar 2004)

²²³ See, indicatively, *ibid* 10, citing Peter Grabosky, ‘Beyond the Regulatory State’ (1994) 27 *Australian and New Zealand Journal of Criminology* 192

²²⁴ Julia Black, ‘Decentring regulation: Understanding the role of regulation and self-regulation in a ‘post-regulatory’ world’ (2001) 54 *Current Legal Problems* 103

²²⁵ It should be noted that there is a disagreement as far as it concerns the relationship of law to regulation, and the framework for whistleblowing is predominantly set by law (with the exception of some regulations, for instance those promulgated by the SEC or the FCA). Levi-Faur, adhering to a strict definition of regulation, understands regulation as necessarily excluding law. “Regulation is about bureaucratic and administrative rule making and not about legislative or judicial rule making”, David Levi-Faur, ‘Regulation and regulatory governance’ (*Jerusalem Papers in Regulation and Governance* 2010) 7. On the contrary, Black, supporting her decentred definition, supports the argument that regulation is more than law and law is subsumed under it as one of its techniques, Julia Black, ‘Critical reflections on regulation’ (*Center for Analysis of Risk and Regulation Discussion Papers* 2002) 25. This is the perspective adopted in the present study. For an extended discussion on the relationship of law and regulation and the different opinions, see *ibid* 22-26.

²²⁶ Black, ‘Decentring regulation’ (n 224) 106-110

at hand;²²⁷ it also addresses the fragmentation of power and control by principally being framed in ‘tiers’, including reporting to the organization itself, the monitoring regulatory agency, and finally in some instances the press; and it is a reform based on the idea of interdependencies, where the government ceases to be the solution-provider and where the public/private distinction begins to fade. Indeed, whistleblowing legislation and its functionalist undertone that protects and incentivizes whistleblowers only insofar as the information they provide is useful in the context of financial and corporate regulation manifests the contemporary focus on the *outcome* of the process of regulation, rather than on the actors that participate in it and their formal authority. This form of regulatory pluralism, a ‘smart regulation’, seeks, beyond governmental bodies, to harness the potential of business structures and third parties (here, the employees) in controlling corporate activities.²²⁸

It is necessary to mention that whistleblowing as a regulatory instrument should not be understood in a monolithic way as either ‘new governance’ or state-centred regulation. New governance, as it was already mentioned,²²⁹ entails a process of rule-making from actors other than democratic institutions, bypassing formality requirements to the benefit of problem-solving, flexibility, and cooperation.²³⁰ Internal whistleblowing reflects such an approach. Lobel suggests a pyramid of reporting from chain-of-command dissent, to internal grievance procedures, to agency reporting, to media reporting.²³¹ This idea of steps of reporting, mirrored also on the choice of the three-tiered approach by many European states, is meant not only to protect corporate interests and to speed up problem-solving already within the corporation, but also to address the regulatory paradox that aggressive statutory controls frequently produce too

²²⁷ This is, however, not sufficient if one considers the deeper diagnosis of regulatory failures as problems rising from the social construction of information, meaning that systems can only access information about other systems that they have themselves constructed according to their own criteria, *ibid* 107.

²²⁸ For smart regulation, see Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart regulation: Designing environmental policy* (Oxford socio-legal studies, Clarendon 1998)

²²⁹ See, Section 2.1.4.3

²³⁰ According to Jason Solomon, “new governance seems less a structural or institutional description and more a description of a particular epistemic approach toward the task of governance, drawing from John Dewey’s pragmatist notion of learning by doing”. Jason Solomon, ‘Law and Governance in the 21st Century Regulatory State’ (2008) 83 Faculty Publications <<http://scholarship.law.wm.edu/facpubs/83/>> 826

²³¹ Lobel, ‘New Governance As Regulatory Governance’ (n 200). This pyramid is supposed to parallel to Ayres’s and Braithwaite’s responsive regulation pyramid, which aims to provide for a wide range of powers for regulators. These powers however must be only rarely used, to the advantage of negotiation, guidance, and compliance. Ian Ayres and John. Braithwaite, *Responsive regulation: Transcending the deregulation debate* (Oxford University Press 1992)

little regulation of the private market.²³² This induces the idea of cooperation between the state and private actors, which may eventually lead to official intervention, in the form of soft law, in the area of internal reporting, as is for example the case with the FCA suggestive measures on internal whistleblowing.²³³ Why does the State interfere with internal corporate procedures? The answer lies in restructuring of business, along with the restructuring of the state that the regulatory state entails. Regulatory governance leads to an understanding of different actors—state, market, and civil society—as part of one comprehensive, interlocking system. Corporations assume responsibilities formerly belonging to the State²³⁴ in compensation for their predominant role in the structure of the markets and by extent in the shaping of the contemporary world.

Yet, regulation may assume a more controlling dimension, as I highlighted through the examples of the Dodd-Frank Act or, to a lesser degree, the Implementing Directive on Market Abuse in the EU. This is especially the case with external whistleblowing and the bypassing of the corporation’s internal channels.²³⁵ This less cooperative approach still adheres to the same general principle of ‘governing at a distance’, through new forms of regulation, rather than the unilateral command-and-control style of rule-setting through legislation, of inspections, and sanctions. It also appears as an effort to regulate the market and protect it against its inner forces of friction, namely corruption and fraud, thus reflecting the ambivalence of the regulatory state in general. However, whistleblowing legislation may also (even though not predominantly) refer to non-economic issues, such as the environment or working conditions. Regulation is necessary for the functioning of the markets, but it can also represent a compromise between economic imperatives and political and social values.²³⁶ Whistleblowing legislation, as part of transparency reforms, essentially reflects a way of governing; of governing through regulation

²³² Cass R Sunstein, ‘Paradoxes of the Regulatory State’ (1990) 57(2) University of Chicago Law Review 407, 413

²³³ The rules of “non-binding guidance” suggest that all firms put in place internal whistleblowing arrangements able to handle all types of disclosure from all types of person. Financial Conduct Authority and Prudential Regulation Authority, ‘FCA introduces new rules on whistleblowing’ (2015) <<https://www.fca.org.uk/news/press-releases/fca-introduces-new-rules-whistleblowing>>

²³⁴ Apart from the provision of services, *see* the review of Corporate Social Responsibility and the non-financial disclosures in Section 2.1.4.2.

²³⁵ It should be taken into consideration that this bypassing is progressively discouraged (*see*, for example the SEC on the interpretation of the Dodd-Frank Act mentioned in 2.2.2.2 and the case *Berman v. Neo@Ogilvy* among others) and the focus is on the establishment of internal mechanisms of reporting.

²³⁶ Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (n 215) 19

and compliance over a progressively more expanded market and more privatized ownership of services.

2.2.4.2. *The significance of the convergence of regulatory models*

The examples of the US and the EU indicate that, despite the different legal cultures, the approaches toward whistleblowing tend to progressively converge. The EU, following the US, has made big steps in a direction of establishing strong whistleblower protection, including the abandonment of high subjective requirements on behalf of whistleblowers. The recent adoption of the Implementing Directive on Market Abuse clearly outlines similarities with the US approach of Dodd-Frank not only in its pioneering suggestion for financial incentives, but also in the entirety of its system of reporting. In spite of the remaining differences regarding the channels of disclosure and more specifically the European preference for a three-tiered system that favours internal whistleblowing, the different systems seem to be converging toward an instrumental, functional approach of whistleblowing that views whistleblower protection as adjunct to the main regulatory objectives of overseeing the markets and preventing any disturbances in the forms of fraud and corruption. Furthermore, even the difference of the priority of internal whistleblowing was mitigated in the Market Abuse directive, indicating that the repercussions of the economic climate and the choices of regulatory strategies in the US are reflected across the Atlantic. From Sarbanes-Oxley to Dodd-Frank, the EU and European states have been inspired, to a certain degree, by the American example.

It is beyond the purposes of this project to analyze the reasons behind this convergence. The roles of competition,²³⁷ institutional isomorphism,²³⁸ communication²³⁹, and contagious diffusion²⁴⁰ in the transfer and the convergence of policies have been discussed in the literature and are also relevant with respect to whistleblowing legislation. What is important however to note, is the extent to which this convergence entails the export of a particular order disguised

²³⁷ Mathias Koenig-Archibugi, 'Global Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford handbook of regulation* (Oxford handbooks. Oxford University Press 2010)

²³⁸ Paul J DiMaggio and Walter W Powell, 'The iron cage revisited: Institutional isomorphism and collective rationality in organisational fields' (1983) 48(2) *American Sociological Review* 147

²³⁹ Peter M Haas, 'Introduction: Epistemic communities and international policy coordination' (1992) 46(01) *International Organization* 1; Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Virginia Journal of International Law*

²⁴⁰ Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (n 215)

as “universal rationality”.²⁴¹ First, the introduction of a particular approach on whistleblowing in the EU may not be successful for typical reasons of path dependence. Legal cultures have evolved differently because of different historic events and social phenomena, thus being more susceptible to context-specific institutions and regulatory approaches. For example, it is not a coincidence that France, even though it has also on multiple occasions and especially in financial regulation, approached the example of the US, has not completely adhered to the instrumental approach on whistleblowing protection, opting instead for an approach including a narrower definition for whistleblowers and subjective requirements, indicating that the provision of information is not the sole objective of the legislation, but rather that whistleblower protection should be at least partially seen as individual employee protection weighing against considerations of confidentiality and organizational loyalty. This confirms Haines’s thesis that the success of a regulatory regime is highly context-specific and needs to address not only the technical and actuarial aspects of risk but also the socio-cultural and political dimensions.²⁴²

Second, the transfer of the US approach, especially to the policy choices on an EU level, may entail a democratic challenge. Part of the legitimacy of the increased use of expertise and the technocratic mentality is derived from their common reference ground within the constitutional traditions of the member states of the union. Mirroring the regulatory stance of the US poses a further challenge for the already feeble democratic substratum of the union. Beyond the typical discussion on the legitimacy of the expertise and independent regulatory agencies, both characteristics of the regulatory state,²⁴³ this move may reflect a radical technocratic view according to which politics and regulation can be separated and that finding the optimal solution may settle such debates. At this point, it is important to point out that the differences in whistleblowing protection may stem out of structural differences that are not simply overcome with voluntarism.

²⁴¹ John W Meyer and others, ‘World society and the nation-state’ (1997) 103(1) *American Journal of Sociology* 144

²⁴² Fiona Haines, *The paradox of regulation: What regulation can achieve and what it cannot* (Edward Elgar 2011)

²⁴³ See, Karen Yeung, ‘The regulatory state’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford handbook of regulation* (Oxford handbooks. Oxford University Press 2010)

2.2.4.3. *Liberal market economies and coordinated market economies: A factor of differentiation for whistleblowing protection?*

Following Hall's and Soskice's influential distinction of capitalist economies into the ideal types of liberal market economies (LME) and coordinated market economies (CME) may further elucidate the structural differences that play a role in the introduction of whistleblowing regimes. The 'varieties of capitalism' approach to political economy places the firm in its center as the key actor, the activity of whom has a major influence on the overall economic performance and welfare. According to this account, in LMEs firms coordinate their activities mostly through hierarchies and competitive market arrangements, while in CMEs firms depend on non-market relationships for coordination and the construction of their core competencies.²⁴⁴ The institutions responsible for this coordination provide capacities for information exchange, monitoring of behavior, and sanctioning.²⁴⁵ Where there is lack of institutional support, competitive markets must be robust and extra provisions for transparency may be required to compensate for the absence of "close-knit corporate networks capable of providing investors with inside information"²⁴⁶ that characterize the CMEs. LMEs lack the long-term institutionalized relationships that guarantee the provision of reliable information to investors about the operation of firms. This could support the hypothesis that LMEs are more welcoming to whistleblowing legislation, to the extent that whistleblowing is used as a regulation tool and a guarantor of anti-corruption, transparency, and market integrity.

Hall and Soskice classify six large OECD states as LMEs: the USA, the UK, Australia, Canada, New Zealand, and Ireland. With the exception of Canada, the whistleblowing protection of which is partial and more extended for the public sector rather than the private, the other five states have important and established whistleblowing legislations that have served as sources of inspirations for other jurisdictions. On the contrary, the ten listed CMEs (Germany, Japan, Switzerland, the Netherlands, Belgium, Sweden, Norway, Denmark, Finland, and Austria) have a much more fluctuant level of protection for whistleblowers, ranging from good, to partial, to contingent on case-law.²⁴⁷ This may be attributed to a) the existing institutional framework responsible for information procurement, monitoring, and

²⁴⁴ Peter A Hall and David W Soskice, *Varieties of capitalism: The institutional foundations of comparative advantage* (Oxford University Press 2001) 8

²⁴⁵ *ibid* 10

²⁴⁶ *ibid* 29

²⁴⁷ Simon Wolfe and others, 'Whistleblower Protection Laws in G20 Countries: Priorities for Action' (2014)

sanctioning, and b) to the already robust employment protection mechanisms, as well employee representation, as it was already discussed in Section 2.2.1.4. This may lead to the conclusion that in CMEs, whistleblowing protection has so far been a less imperative need, as the functions of both corporate regulation and employee protection were deemed satisfied through different paths. The progressive introduction of specific whistleblowing laws in CMEs, for example through the Implementing Directive on Market Abuse, may be then indicating more tectonic changes in capitalist economies and a convergence of the two distinct types of political economies.

It is beyond this project's objectives to rigorously test this hypothesis. Instead, it should be understood as an indication of role of different political economies in shaping whistleblowing legislation and as a direction for further research. The diffusion of whistleblowing legislation, prescribed by the structure of globalised political economy, also underlines the governing political rationalities that constitute the governmentality of transparency and of 'governing at a distance'.

2.2.4.4. Whistleblowing as part of the governmentality of transparency and of 'governing at a distance'

The political rationality of transparency is a rationality of liberal government. Liberalism, more than a doctrine on political and economic theory, represents, according to Foucault, a style of thinking quintessentially concerned with the art of governing.²⁴⁸ From this perspective, rights, liberties, and the capacities of the governed should be understood as the mechanisms through which government operates. Their role in the (post-) regulatory state is then dual: Not only to protect individuals from an over-reaching government as in the classic liberal paradigm, but also to facilitate it in fulfilling its functions. According to Dean, following the analysis of Foucault, "liberal ways of governing often conceive the freedom of the governed as a technical means of securing ends of government".²⁴⁹ Whistleblowing legislation is an instrument in the

²⁴⁸ Colin Gordon, 'Governmental rationality: An introduction' in Graham Burchell and others (eds), *The Foucault effect: Studies in governmentality: with two lectures by and an interview with Michael Foucault* (Harvester Wheatsheaf 1991) 14

²⁴⁹ Mitchell Dean, *Governmentality: Power and rule in modern society* (2nd ed. Sage 2010) 23-24

government's effort to maintain the 'framework',²⁵⁰ the conditions of existence of the market, by facilitating the disclosures of facts that could potentially lead to its undoing. The "right" to whistleblowing is simultaneously an individual liberty, rooted in freedom of expression, and a way of governing in the era of the (post-) regulatory state. The "responsibilization" of the individual regarding the detection of corruption creates the basis for a mechanism of discipline that is deemed as efficient. 'Governing at a distance' in this case wipes off the opposition between state and civil society, transforming the exercise of political power in order to achieve the overall aim of market integrity. According to Rose and Miller, "personal autonomy is not the antithesis of political power, but a key term in its exercise, the more so because most individuals are not merely the subjects of power but play a part in its operations".²⁵¹ Individuals are encouraged and occasionally heavily incentivized to play a role in the correction of market irregularities. This is in accordance with a state that prefers to maintain oversight instead of leading service provisions. Whistleblowing is integrated within the move of contemporary bureaucracies and regulatory practice toward transparency, a move that is potentially even more acute in liberal market economies.

Similarly, transparency, as I already showed in Chapter A, is a rationality of government in that it permits to "get things done" in the most efficient way, securing the optimal information flow that will allow the perpetuation of capitalist economy. Far from representing an ideal of complete transparency or of an informed public, the contemporary focus on transparency is part of the liberal governmentality that on one hand secures markets conditions and on the other contains voices of discontent by equating transparency with accountability and therefore with legitimacy.

Government, according to the Foucauldian thinking, is the 'conduct of conduct'. Governing through transparency is accomplished through multiple actors and agencies, whistleblowers being potentially among them. However, this decentralized power paradigm always leaves room for potential 'counter-conducts' in pursuit of 'other objectives'. These movements or personal may not necessarily assume a generalising position in defiance of state sovereignty or economic exploitation but they object to specific aspects of the prescribed conduct.

²⁵⁰ For the notion of framework, see the connections with the 'ordoliberal' and their understanding of state intervention. According to Bilger, "The framework is the specific domain of the state, the public domain, in which it can fully exercise its 'organizing (ordonnatrice) function'", François Bilger, *La Pensée économique libérale dans l'Allemagne contemporaine* (LGDJ 1964) 180-181

²⁵¹ Nikolas Rose and Peter Miller, 'Political power beyond the State: problematics of government' (2010) 61 *The British Journal of Sociology* 271, 272

Whistleblowing acquires a further level of complexity by occasionally fitting this category. When transparency ceases to be an integral part of the regulatory framework, as happens for example within the context of national security, speaking truth to power and demanding transparency on behalf of the citizenry assumes the role of ‘counter-conduct’. In this case, it is a conduct that supports transparency in public affairs and increased accountability of the executive. This will be the topic of Part II.

3. The permanence of government secrecy: Whistleblowing in national security

In this Part, I support my analysis of the functionality of transparency and whistleblowing with an argument *a contrario*, coming from the field of government and national security secrecy. This time, a comparative examination of the legal framework governing unauthorized disclosures of information reveals that whistleblowing is not institutionalized in a manner similar to the field of corporate and financial regulation. Instead, there is an unwillingness to establish efficient internal reporting channels, while simultaneously the government maintains the capacity to criminally prosecute employees who make unauthorized disclosures. Whistleblowing becomes from a decentralized regulatory tool a form of disobedience that threatens the integrity of the State. However, national security, like any other system, is not immune to systemic errors, wrongdoings, and abuses of power. In that sense, whistleblowing reporting mechanisms could function beneficially for the public interest, for public accountability, and democratic control. The absence or inefficiency of such mechanisms inevitably leads to public disclosures. I argue that, under conditions, these disclosures should receive some constitutional protection, as they represent the ultimate safety valve for maintaining the democratic character of state secrecy.

In Chapter 3.1, I conceptualize the role of secrecy in national security and I provide a comparative analysis of the regulation of disclosures within national security. My conclusion is that the current mechanisms in the United States and in the European countries examined do not provide the necessary guarantees that claims about wrongdoing will be addressed and that the whistleblowers will not be subject to retaliation. In return, I argue that an integral element of a democratic understanding of secrecy is its ‘shallowness’, meaning its -at least indirect-connection with the democratic mandate and some form of accountability. This necessarily warns against any autonomization of the national security apparatus through ‘beyond-the-law’ activities and programs operated in secret. The way to ensure the democratic character of secrecy necessarily passes through the prevention of overclassification, the establishment of systems of internal and external reporting of wrongdoing, involving inter-agency and inter-branch coordination, and expanding freedom of speech rights for *lato sensu* whistleblowers who make public disclosures.

In Chapter 3.2, I discuss that final step in the direction of an institutional redesign of democratic secrecy, the expansion of freedom of speech rights for whistleblowers who disclose

wrongdoing to the media. I advocate for an institutional conceptualization of the issue of national security whistleblowing, which means shifting the focus from the subjective rights of the whistleblower to the social value of the disclosure, which depends on the legitimacy of secrecy. I question the current approaches of balancing in the United States and in the ECtHR, which frame the conflict as an issue of subjective rights versus public interest. Subsequently, I outline an institutional model to the resolution of whistleblowing conflicts, which aims to sustain an institutional system of democratic control of the executive power, of separation of powers/checks and balances, of rule of law, and political liberalism.

3.1. The regulation of disclosures within national security: A comparative framework in favour of government secrecy and control of the information flow

Contrary to the solidification of whistleblowing protection in the domains of regulatory compliance and financial regulation, whistleblowing provisions are scattered, ineffective, and occasionally absent where non-market objectives are concerned. This is particularly salient in national security, where secrecy remains a foundational element and a constitutive code of communication for the implicated agencies. Once more it becomes apparent that whistleblowing protection is employed instrumentally, as a way to optimize the control of the information flow for the relevant system. The information flow is controlled through the management of visibilities -what can be seen and by whom-, and according to how loose or tight this control is, the final outcome lies somewhere between the ideal types of transparency and secrecy. In the case of national security, the management of visibilities points strongly to the direction of secrecy as restricting the visibilities (or shaping them through planted information) maintains the authority and assures the reproduction of the national security system. Examining the question of disclosures of classified information, it is concluded that mechanisms for internal reporting of illegalities, fraud and waste, abuse of authority, or danger to public health or safety are generally convoluted and ineffective, while at the same time the executive enjoys a wide margin of discretion for the criminal prosecution of public disclosures. This is the rule in all the countries examined, even if it is an issue that has preoccupied more the U.S. literature. I argue that this degree of control of the information flow by the national security system, first, does not represent the reflexivity systems have to exhibit in conditions of functional differentiation as requirement for system coordination and harmonious coexistence and, second, does not meet the requirements of a procedural form legitimation that would constitute 'democratic secrecy'. I end the chapter by outlining the reforms that would address this situation.

In Section 3.1.1, I provide an overview of the role of secrecy in national security. I start by briefly describing the historical conditions that led to the interlinkage of security and secrecy and I conclude that national security secrecy represents an embedded political practice rather a normative ideal. Drawing from the systems theory of Niklas Luhmann, I proceed to conceptualise national security as a social system that uses the category of the 'non-disclosable' as the set of communications that functionally differentiates it from other systems. Secrecy

represents a way for the system to maximize its autonomy and expand its boundaries, to the point that it might also create the necessary space for a ‘beyond-the-law’ executive action. Yet, the system does not necessarily aim to complete opacity but, like other systems, to the optimization of the information flow, which might include the shaping of public opinion through planted information, ‘plants’ and ‘pleaks’. I briefly expose how, in the context of the ‘war on terror’, this control of the information flow by the national security system has become even more consolidated through for example overclassification, increased invocations of state secrets privilege, and of course, the focus of this study, the restricting and prosecutorial approach to unauthorized disclosures of information.

In Section 3.1.2, I discuss the legal framework for national security whistleblowing in the United States. To begin with, I try to demystify the current definitional issue of ‘whistleblower’ versus ‘leaker’. From a legal perspective, a whistleblower is a person who reports on illegalities, fraud and waste, abuse of authority, or danger to public health or safety to the institutionalized channels of reporting, while a leaker is a person who may expose anything secret to the press. However, as I show in this Section, the channels of reporting and mechanisms of protection for potential whistleblowers are so weak that many opt to step out of the institutional framework (for example by disclosing to the press) to denounce one of the abovementioned situations. To the extent that their disclosure uncovers such phenomena and is done in the public interest, an ethical-political perspective would still understand them as ‘whistleblowers’, as opposed to the pejorative and identified with anonymity characterization of ‘leakers’. This creates a tripartite terminological distinction: *stricto sensu whistleblowers*, who follow the legal procedures to internally report on the abovementioned forms of wrongdoing (disclosing ‘deep secrecy’, as I argue later), *lato sensu whistleblowers*, who also disclose wrongdoing but not to the prescribed channels, and *leakers* who disclose not to the prescribed mechanisms and not necessarily wrongdoing but simply information that is covered by secrecy (‘shallow secrecy’). Leakers and *lato sensu* whistleblowers are retaliated against and prosecuted through the wide reach of the Espionage Act and relevant statutes, while *stricto sensu* whistleblowers might find no way to make their complaints heard and addressed. The efforts to reform this system have so far met the opposition of the executive.

In Section 3.1.3, I examine from a comparative perspective the legal framework in the examined countries of the EU, the United Kingdom, France, and Ireland. In all these states national security secrecy remains an uncontested institutional and pragmatic reality, with only differences of degree as far as it concerns the limits of secrecy. All three states employ a strict framework discouraging unauthorized disclosures of classified information, which consists of

a nexus of criminal and disciplinary sanctions, as well as of few and weak mechanisms for allowing internal reporting on wrongdoing. That is not to say that there are no differences, regarding for instance the existence of damage tests (whether it is necessary that the disclosure was harmful or not) and the severity of the potential sanctions. Regarding the institutionalization of mechanisms for protection of *stricto sensu* whistleblowers who want to report internally, Ireland stands out as a result of its elaborate mechanism of reporting that was introduced by the Protected Disclosures Act of 2014. This relatively recent development might prove to be a forerunner for similar reforms in other states.

In Section 3.1.4, I argue that democratic secrecy necessarily involves a protective framework for national security whistleblowers. In this direction, I employ the concept of reflexive law as both a way of self-restriction of the national security system in its production of secrecy and a way to create the substratum for a procedural legitimation of national security secrecy. At this point, I adopt the distinction of ‘shallow’ and ‘deep’ secrecy and show why only the former meets the requirements of procedural legitimation and can be considered democratic secrecy. My suggestions as to how to materialize this procedural legitimation of shallow secrecy are 1) prevention of overclassification, 2) the establishment of systems of internal and external reporting of wrongdoing, involving inter-branch coordination, and 3) expanding freedom of speech rights for *lato sensu* whistleblowers who make public disclosures. This last point will be the topic of the next Chapter.

3.1.1. National security and the control of the information flow

The control of the information flow is vital for the existence and the activities of the national security system. In Subsection 3.1.1.1, I briefly examine the history of secrecy within national security and I conclude that it represents an embedded political practice, connected with the rise of nation-states and modern bureaucracies, rather a normative ideal. I draw attention to the fact that for the proponents of government secrecy, the ultimate utility of secrecy rests in the fact that it leaves space for a governmental action “beyond-the-law” that cannot be institutionalized as that would undermine the general rule of law and the respect of human rights. In Subsection 3.1.1.2, I analyze national security as a social system. Drawing from functionalism and the systems theory of Niklas Luhmann, I argue that national security can be conceived as a social subsystem that tries to maximize its rationality by reaffirming and potentially expanding its boundaries. This is materialized through the binary classified/unclassified and the control of the information flow, which is not synonymous with opacity, but with a management of visibilities. I proceed to argue that the category of the ‘non-disclosable’ constitutes the set of communications that functionally differentiates the subsystem of national security. In Subsection 3.1.1.3, drawing from the politico-judicial landscape of the United States, I show how the secrecy of national security has been expanded in the context of the ‘war on terror’. This expansion of government secrecy constitutes the setting in which unauthorized disclosures of information take place and in which the debate over their status and their potential protection is conducted.

3.1.1.1. *The fundamentals of national security secrecy*

In liberal political theory, security is a fundamental political principle. According to Kant, the basis of legitimacy does not lie in empirical ends, such as happiness (*Glückseligkeit*) or welfare (*Wohlfahrt*), but in individual freedom.¹ As such, the aim of the political order is to safeguard individual freedom and to protect against arbitrary coercion. Security is protective of that freedom, because even if all humans have different goals, they need to have the security

¹ Immanuel Kant, ‘On the common saying: This may be true in theory but does not apply in practice’ in Hans Reiss (ed), *Kant: Political writings* (2nd ed. Cambridge University Press 1990) 73-74

that guarantees the framework in which they may aspire to fulfil them.² In turn, without individual freedom there can be no inclusive democratic decision-making and participation in the determination of collective goods. Even to theories of a minimal state, security is viewed as an exception from the purity of the free market, necessary in order to protect individuals against arbitrary interference with their person and property.³ National security describes therefore a constitutional value which is meant to be protected.

Security being endorsed as a foundational element of political communities⁴ does not automatically explain the connection between security and secrecy. Yet, it is commonplace in debates and scholarly work about national security (one of the most comprehensive and complex forms of security) to assume that a certain level of secrecy is necessarily entailed. National security is an exception in all access-to-information laws and it is seen as an antithetical value to the public's right to know.⁵ State secrecy traces its roots to the dawn of modern diplomacy⁶ and the antagonism between States. Political prudence and dissimulation were constitutive characteristics of the good society and integral parts of the functioning of government in early modern Europe.⁷ During the 18th century, the philosophy of the Enlightenment exhibited some scepticism over the dark connotations of secrecy and instead shifted its focus on openness and transparency.⁸ This trend is also salient in the works of the utilitarian Jeremy Bentham, where secrecy is seen as an instrument of conspiracy and therefore not appropriate to be part of regular government.⁹ However, the consolidation of nation-states

² Bernard Manin, 'On Legitimacy and Political Deliberation' (1987) 15(3) *Political Theory* 338, 338. However, see Jeremy Waldron, 'Safety and Security' (2011) 85 *Nebraska Law Review* 454, 456 on the idea that the concept of security is vague and ambiguous.

³ Friedrich A v Hayek, *Law, legislation and liberty: A new statement of the liberal principles of justice and political economy* (University of Chicago Press 1979) 46. See, also Robert Nozick, *Anarchy, state, and utopia* (Basic Books 1974).

⁴ This should not marginalize the critiques against security as a way to perpetuate relations of domination, e.g. Louis Althusser, 'Ideology and ideological state apparatus' (1970) 150 *La Pensée* and as a site of reinforcement of homogeneity and of anti-pluralism, e.g. Keith Krause and Michael C Williams, *Critical security studies: Concepts and cases* (UCL Press 1997).

⁵ Right2Info, 'National Security' <<http://www.right2info.org/exceptions-to-access/national-security>>

⁶ Francesco Guicciardini and Alison Brown, *Dialogue on the government of Florence* (Cambridge University Press 1994). In the spirit of the new political realism of the sixteenth century Guicciardini argues that informants are more likely to cooperate with a closed rather than an open regime, 61.

⁷ Jon R Snyder, *Dissimulation and the culture of secrecy in early modern Europe* (University of California Press 2012), cited by Stéphane Lefebvre, 'A brief genealogy of state secrecy' (2013) 31(1) *WYAJ* 95, 99

⁸ Michel Foucault, 'The Eye of Power' in Colin Gordon (ed), *Power/Knowledge: Selected interviews and other writings, 1972-1977* (Pantheon Books 1980) 153

⁹ Jeremy Bentham, 'On publicity' in John Bowring (ed), *The Works of Jeremy Bentham, vol. 2 (Judicial Procedure, Anarchical Fallacies, works on Taxation)* (1843) available at <http://oll.libertyfund.org/titles/1921>.

in the aftermath of the French Revolution reinvigorated the legitimacy of state secrecy, espionage, and secret formation: It was henceforth for the good of the nation that secrecy had to be implemented.¹⁰ At the turn of the twentieth century, state secrecy entered the legal field¹¹ and it saw its use expanded, formalized, and rationalized under the development of large bureaucracies. Secrecy in theory allowed for neutrality and efficacy, as public debate would restrict the margin of manoeuvre for bureaucrats, who would then be forced to take positions reflecting specific interests, forsaking the universality they supposedly represent.¹² Furthermore, according to Max Weber's theorization of bureaucracy, confining the expertise, the knowledge, and the information within the administration, as opposed to sharing or divulging it, reinforces the autonomy of the agency.¹³ This monopolization of knowledge on behalf of the bureaucracy in order to maximize its power is reflected in the concept of 'official secrecy', which, according to Weber, is nothing more than a device to protect the administration from control.¹⁴ Secrecy's importance was heightened during the Cold War and again at the dawn of the twenty-first century, as a result of the 'war on terror'.¹⁵ Therefore, state secrecy, and by extent secrecy in national security, represents a historically embedded political practice, a functional necessity rather than a normative ideal.

The reasons of utility that justify state secrecy are being updated according to the temporal and spatial context. A contemporary example can be drawn from the American Judge of the Court of Appeals Richard Posner, who identified the 'war on terror' as a time of emergency and advocated in favour of an adaptive reading of the Constitution that would allow for utility-maximizing decisions resulting in the reinforcement of national security. In his words, "the pros and cons of coercive interrogation, or rendition, even of torture [...] are more evenly balanced than civil libertarians are willing to acknowledge. But the cons are almost certain to

See, also Kant's arguments against secret treaties as an obstacle to peace in Geoffrey Bennington, 'Kant's Open Secret' (2011) 28(7-8) *Theory, Culture & Society* 26, 28.

¹⁰ Alain Dewerpe, *Espion: Une anthropologie historique du secret d'État contemporain* (Bibliothèque des histoires, Gallimard 1994) 23-34. For a more extended discussion of Dewerpe's work, *see* Lefebvre (n 7) 102-106

¹¹ For example, the Official Secrets Act of 1911 or the Espionage Act of 1917.

¹² Neil Robinson, 'Bureaucracy' in Paul A B Clarke and Joe Foweraker (eds), *Encyclopedia of democratic thought* (Routledge 2001) 43

¹³ Max Weber, Guenther Roth and Claus Wittich, *Economy and society* (II, University of California Press 2013) 992-993

¹⁴ Max Weber, Peter Lassman and Ronald Speirs, *Political writings* (Cambridge University Press 1994) 179. According to Karl Marx, 'The general spirit of the bureaucracy is the secret, the mystery, preserved inwardly by means of the hierarchy and externally as a closed corporation.' Karl Marx, *Critique of Hegel's Philosophy of Right* (1843), available at <https://www.marxists.org/archive/marx/works/1843/critique-hpr/ch03.htm>

¹⁵ *See*, 3.1.1.3

predominate in the international court of public opinion if the methods themselves, or the operations that utilize them, are publicized”¹⁶. It is therefore for pragmatic considerations that secrecy must prevail. Secrecy protects the raw power of the government that is, according to this view, often necessary. According to the judge, “even if torture is not allowed, in extreme circumstances the government will torture –and will be under a moral duty to torture– and that reliance on the executive’s willingness to exercise raw power in extreme circumstances may be preferable to recognizing a legal right to do so”.¹⁷ Secrecy then, even if it covers profound violations of human rights (or precisely because it does) leaves space for a “beyond-the-law” governmental action that, despite being supposedly necessary, cannot be institutionalized as that would undermine the general rule of law. It follows from this syllogism that it is not the function of secrecy to abstractly protect national security without at the same time concealing abuses of power,¹⁸ but instead to create this “beyond-the-law” space, where the rules can be bended to achieve results deemed as optimal by the generative of secrecy system.¹⁹ In this space, questions of abuse of power and legitimacy acquire a content that is not self-standing, based on formal rules and procedures, but dependent on the assessment of contingent factors, such as the risk in question, the scale of the danger, the importance of the ultimate goal etc.

3.1.1.2. *National security as a system*

Drawing from systems theory, national security can be conceived as a social subsystem. Social subsystems, according to Niklas Luhmann, are defined by boundaries between themselves and the environment. Instead of conceptualizing systems as living systems, Luhmann proposes to understand them as consisting of communications, which filter the complexity of information present outside the system in order to produce a ‘temporalized

¹⁶ Richard A Posner, *Not a suicide pact: The constitution in a time of national emergency* (Oxford University Press 2006) 106.

¹⁷ *ibid* 38. For arguments against Posner’s analysis on torture, see Mordechai Kremnitzer and Liat Levannon, ‘Not a Suicide Pact: A Comment on Preventative Means in General and on Torture in Particular’ (2009) 42 *Israel Law Review* 248

¹⁸ Rahul Sagar, *Secrets and leaks: The dilemma of state secrecy* (Princeton University Press 2013) 3

¹⁹ See also Horn’s assessment that secrecy “opens a space of exception from the rule of law, an exception that can breed violence, corruption and oppression.” Eva Horn, ‘Logics of Political Secrecy’ (2011) 28(7-8) *Theory, Culture & Society* 103, 106

complexity'²⁰ that renders the system functional. Communications reproduce themselves in a process of autopoiesis²¹ that perpetuates the operative closure of the (sub-) systems, meaning that they remain distinct from the environment and the other systems. Change, learning and evolution are not excluded, but redefined to be understood as happening within the system.²² In this sense, systems develop in a self-referential manner, being determined by themselves and determining themselves.²³ However, self-referentiality does not contradict the system's openness to the environment.²⁴ Systems remain responsive to the increasing complexity of the environment by translating this complexity into their own functionally differentiated form of communication. As systems are functionally differentiated, no system can 'understand' and take over the role of other systems. Indeed, according to Teubner, the effort to "maximize the rationality of one subsystem is to create insoluble problems in other functional systems".²⁵ Yet, even though for Luhmann systems are supposedly equal to each other, as they specialise in different domains, systems may often try to expand their boundaries and their dominance, creating thus problems in the functioning of other systems.²⁶

The political system's function is to make collectively binding decisions for the entire society.²⁷ Its autonomy and functional differentiation allow for its capacity in producing these decisions and in generating political power.²⁸ National security can be understood as a subsystem of the political system. Like other subsystems of the political system, it is functionally differentiated through its own set of communications and it reproduces itself through an autopoietic process. As a subsystem, it tries to maximize its rationality and to

²⁰ Niklas Luhmann (ed), *Social systems* (Stanford University Press 1995); Eva M. Knodt, 'Foreword' in Niklas Luhmann (ed), *Social systems* (Stanford University Press 1995) xxxiii

²¹ Term borrowed from biology to indicate circular self-production. It is derived from Greek 'auto' (meaning self) and 'poiein' (meaning to make).

²² Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic law: A new approach to law and society* (De Gruyter 1987) 7-8

²³ Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' (2012) 4(2) *Goettingen Journal of International Law* 625, 630

²⁴ Luhmann (ed), *Social systems* (n 20) 62

²⁵ Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law & Society Review* 239, 272

²⁶ In that sense see the work in critical systems theory, indicatively, Bob Jessop, *The Future of the Capitalist State* (Polity Press 2002), where the author develops the concept of the 'ecological dominance' of the economic system, and more recently Marc Amstutz and Andreas Fischer-Lescano (eds), *Kritische Systemtheorie: Zur Evolution einer normativen Theorie* (Transcript 2013)

²⁷ Niklas Luhmann, *Die Politik der Gesellschaft* (Suhrkamp 2008) 84, cited by Mattheis (n 23) 635

²⁸ Niklas Luhmann, *Aufsätze zur Theorie sozialer Systeme* (VS Verl. für Sozialwiss 2005) 201, cited by Mattheis (n 23) 636

reaffirm and expand its boundaries. This happens through the control of the information flow and the binary classified/unclassified. Not only does the national security system operate through this code but recognizing ‘classified’ as its own field of uncontested competence, it tends to expand its use in order to generate its own form of political power. Thus, the political power of the national security subsystem is dependent on the existence of secrecy. It is then the idea of secrecy, of the non-disclosable (rather than abstract notions of the category of ‘*raison d’ État*’) that through practice and time constituted the set of communications that differentiated functionally the subsystem of national security. Yet, secrecy should not be understood as complete opacity, but rather as the management of visibilities and the control of the information flow.

David Pozen’s analysis on the question of leaks illustrates well how the national security subsystem controls the information flow.²⁹ According to the author, the executive branch’s ‘leakiness’ should not be primarily attributed to organizational failures, but rather understood as an adaptive response to external liabilities (such as the mistrust of the media) and internal pathologies (such as overclassification) of the modern administrative system.³⁰ First, leaks should be distinguished from ‘plants’, authorized disclosures designed to advance the interests of the administration.³¹ Planting is not an incidental practice, but programmatic, a mode of governance.³² Second, many of the leaks happen in a grey zone between authorization and no authorization (what Pozen calls the ‘pleaks’) and they highlight that the executive’s tolerant stance towards these leaks is an indication of a “rational, power-enhancing strategy”.³³ The law is not applied against those leaks, even though practically all disclosures of classified information trigger some criminal sanction.³⁴ Furthermore, Pozen makes the point that “plants need to watered with leaks”,³⁵ meaning that some true leaks must remain unpunished if the system wants to retain its credibility and consistency. Otherwise, plants and pleaks alike would

²⁹ David Pozen, ‘The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information’ (2013) 127 *Harvard Law Review* 512

³⁰ *ibid* 513

³¹ *ibid* 534

³² *ibid* 562

³³ *ibid* 515. Pozen mentions the example of a survey conducted by the Harvard Kennedy School’s Institute of Politics in the mid-80’s, where forty-two percent of the senior government officials participating affirmed that they had, at least once, “fe[lt] appropriate to leak information to the press”. The survey designers further suggested that this figure was probably understated. *ibid* 528, citing Martin Linsky, *Impact: How the press affects federal policymaking* (W.W. Norton 1986) 172

³⁴ *See*, Section 3.1.2

³⁵ Pozen, ‘The Leaky Leviathan’ (n 29) 565

be discredited as coming straight from the executive. According to Pozen, "[t]he practice of planting requires some amount of constructive ambiguity as to its prevalence and operation".³⁶

Arthur Schlesinger agrees that secrecy has become an instrument of the presidency to "dissemble its purposes, bury its mistakes, manipulate its citizens and maximize its power".³⁷ He further argues that leaks have never really caused serious damage to the national security.³⁸ The national security subsystem has not sought to eliminate leaking, because it can be manipulated in ways that allows for optimizing the control of the information flow. Naturally, there are some instances where leaking goes beyond the boundaries of what is prescribed by the system as an accepted form of communication to expose systemic abuse or systemic need for accountability. These 'accountability leaks'³⁹ challenge the described configuration and force the system to react. This explains the inconsistency in the criminal prosecutions of leakers.⁴⁰ In this sense, the current crackdown on unauthorized disclosures of information denotes the willingness of the national security subsystem to define its own boundaries.

The theoretical justification of national security secrecy is that insulated decision-makers who are part of the executive are the only ones capable of making sense of the increasingly complex information that relates to security.⁴¹ The arguments that both Congress and the courts lack the expertise to deal with questions on national security are abundant in the relevant literature, while judicial deference on questions of executive privilege is an embedded practice in the United States.⁴² The function of systems, according to Luhmann's functionalism, is precisely to reduce this complexity. As the complexity of the world, meaning 'the totality of

³⁶ *ibid* 562. *See*, however the counterarguments by Rahul Sagar, 'Creaky Leviathan: A Comment on David Pozen's Leaky Leviathan' (2013) 127 Harvard Law Review Forum 75, 81-82 where he attributes the 'permissive enforcement' to the ground realities set by the 'negative publicity' these prosecutions receive in a culture of transparency and mistrust of government and by the 'powerful media and partisan interests' that 'can obstruct the enforcement of the law'. I think this more pragmatic line of reasoning remains simplistic in that it chooses to ignore the overall picture, wherein the national security system remains in control of the information flow and tries to perpetuate the strategic advantages (including its own reproduction as a system) that are derived from it.

³⁷ Arthur M Schlesinger, *The imperial Presidency* (Houghton Mifflin 2004) 329. *See*, also Weber's quote on the notion of official secrecy in Section 3.1.1.1, Weber, Lassman and Speirs (n 14)

³⁸ Schlesinger (n 37) 362

³⁹ Yochai Benkler, 'A Public Accountability Defense For National Security Leakers and Whistleblowers' (2014) 8 Harvard Law and Policy Review 281, 283

⁴⁰ *See*, below, Section 3.1.2.1.

⁴¹ Aziz Rana, 'Who Decides on Security?' (2012) 44(5) Connecticut Law Review 1417, 1417

⁴² Indicatively *see*, Sagar, *Secrets and leaks* (n 18) 65-73; Amos A Jordan and William J Taylor, *American national security: Policy and Process* (The Johns Hopkins University Press 1981) 112-113; Heidi Kitrosser, 'Secrecy and Separated Powers: Executive Privilege Revisited' (2007) 92 Iowa Law Review 489, 504 explaining how the courts "give the executive nearly insurmountable deference in the realm of national security".

possible events and circumstances’,⁴³ is beyond human comprehension, the formation of systems aims to address this impossibility by reducing the scope of what needs to be understood. Through this conceptual framework, national security emerges as a set of communications that other systems are reluctant to decipher. This reinforces national security’s self-referentiality and the deference to its secrecy.

Arguing that national security as a subsystem of the political system is constituted through the existence of secrecy necessarily means that secrecy in national security cannot be eliminated without radically transforming, or even destroying, the subsystem that is national security. Some forms of secrecy will necessarily withstand even the most liberal reforms. The question is what their optimal delimitation in a democratic society is.⁴⁴ As I will show in the following Subsection, the current delimitation has allowed for the secrecy of national security to push its boundaries too far.

3.1.1.3. *The expansion of national security secrecy*

Government secrecy has particularly increased since the breakout of the ‘war on terror’.⁴⁵ This trend has been most prominent in the United States, but it is also present in the rest of the countries examined, especially in the context of counter-terrorist policies.⁴⁶ Occasionally, national security secrecy has concealed serious human rights violations and violations of the

⁴³ Clarissa E B Neves and Fabrício Monteiro Neves, ‘What is complex in the complex world?: Niklas Luhmann and the theory of social systems’ [2006] *Sociologias* 182 <http://socialsciences.scielo.org/scielo.php?script=sci_arttext&pid=S1517-45222006000100004>

⁴⁴ *See*, Section 3.1.4.

⁴⁵ A common premise or conclusion of much scholarly work. Indicatively, Sidney A Shapiro and Rena I Steinzor, ‘The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism’ (2006) 69(3) *Law and Contemporary Problems* 9999, Sudha Setty, ‘The Rise of National Security Secrets’ (2012) 44 *Connecticut Law Review* 1563,1572.

⁴⁶ *See*, for example, the passing of the Loi n° 2015-912 du 24 juillet relative au renseignement, in France, which increased the power of surveillance on the disposition of intelligence agencies. Surveillance of internet data is carried out based on a secret algorithm, *see* Martin Untersinger, ‘Loi renseignement: On a vérifié le « vrai/faux » du gouvernement’ *Le Monde* (15 April 2015) <http://www.lemonde.fr/les-decodeurs/article/2015/04/14/loi-renseignement-on-a-verifie-le-vrai-faux-du-gouvernement_4615597_4355770.html>

Also, the passing in the United Kingdom of the Investigatory Powers Act 2016, which reinforced UK intelligence agencies’ surveillance powers, combined with the efforts of the Law Commission to review the Official Secrets Act in order to, among other things, increase the sanctions for unauthorized disclosures of information. *See*, Law Commission, ‘Protection of Official Data: A Consultation Paper’ (Consultation Paper N. 230, 2017) <http://www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230_protection_of_official_data.pdf>

democratic mandate, as exemplified in the cases of the NSA warrantless wiretapping, the CIA renditions and water torture, and the cases of prisoner abuse in Abu Ghraib.⁴⁷

Beyond these highly publicized cases (often made public due to unauthorized disclosures), one of the more mundane aspects of the movement toward increased government secrecy is the issue of over-classification. As ‘classified’ is understood the government information, the unauthorized disclosure of which could result in damage to national security.⁴⁸ In the United States, it has been claimed that the classification system has been used in an abusive way.⁴⁹ Elizabeth Goitein and David Shapiro outline the factors that contribute to this development. According to them classification abused is to be attributed to a) a culture of secrecy originating from the Cold War, b) the competition among agencies, whereby secrets become organizational assets,⁵⁰ c) the eagerness to conceal administrative failures or violations of the law, seeing as there is no mechanism to ensure compliance with the prohibition of classification for such purposes, d) the demand for efficiency and facilitation of policy implementation, unencumbered by the workings of the democratic processes, e) the fear of repercussions for failing to protect sensitive information, f) the fact that deciding whether information is classifiable or not is a time consuming exercise, and, very importantly, g) the lack of incentives to refrain from, or challenge over-classification.⁵¹

Another aspect of secrecy’s dominance is the increase of the invocation of a non-disclosure privilege for national security reasons in court proceedings and the subsequent deferential posture of the courts.⁵² Originally, the state secrets privilege was designed to protect particular pieces of evidence that were deemed to be potentially dangerous to national security were they

⁴⁷ Richard Moberly, ‘Whistleblowers and the Obama Presidency: The National Security Dilemma’ (2012) 16 Employee Rights and Employment Policy Journal 51, 90

⁴⁸ Executive Order 13526, 3 C.E.R. 298, [1.1]

⁴⁹ David McCraw and Stephen Gikow, ‘The End to an Unspoken Bargain?: National Security and Leaks in a Post-Pentagon Papers World’ (2013) 48 Harvard Civil Rights-Civil Liberties Law Review 473, 474

National Commission on Terrorist Attacks Upon the United States (9/11 Commission), *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (W. W. Norton & Co 2004), 417. The report concludes that the current security requirements nurture overclassification and excessive compartmentalization of information discourages information sharing. According to the report, a better balance between security and shared knowledge should be restored.

Elizabeth Goitein and David M Shapiro, ‘Reducing overclassification through accountability’ (2011) 5-6 provide a list of examples of overclassification.

⁵⁰ This illustrates how the national security subsystem is in fact permeated by further subsystems.

⁵¹ *ibid* 21-33

⁵² William G Weaver and Robert M Pallitto, ‘State Secrets and Executive Power’ (2005) 120(1) Political Science Quarterly 85, 89

to come to light.⁵³ This narrow category has been, according to the President of the American Civil Liberties Union, Nadine Strossen, “expanded, distorted, and exaggerated, so the privilege is now being used systematically to completely dismiss cases before the introduction of any evidence, even cases claiming enormous abuses of the most fundamental human rights”.⁵⁴ Following the foundational case *United States v. Reynolds* (1953)⁵⁵, courts have consistently deferred to executive’s claims on questions of secrecy.⁵⁶ Furthermore, narrow judicial interpretation of the Freedom of Information Act (FOIA) has also led to an increase in government secrecy.⁵⁷

The move toward increased secrecy is further illustrated by the use of new surveillance practices, among which the use of national security letters (NSL), which demand that private entities turn over information about their customers.⁵⁸ Not only may these letters be issued without judicial warrant, but they also “normally come with a gag order. The recipient may not

⁵³ Nadine Strossen, ‘Constitutional Overview of Post-9/11 Barriers to Free Speech and a Free Press’ (2007) 57 *American University Law Review* 1204, 1211

⁵⁴ *ibid.* Also, note the documented tendency of the government to exaggerate national security harms caused by the disclosure of information, Christina E Wells, ‘“National Security” Information and the Freedom of Information Act’ (2004) 56 *Administrative Law Review* 1195, 1198-1205.

⁵⁵ *United States v. Reynolds* 345 U.S. 1, [1953] (US Supreme Court). The Supreme Court famously held that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake” [11]. Furthermore, it held that “the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers” [10]. The decision of the Supreme Court has been criticized for examining whether the report in question contained secret information, instead of examining whether the disclosure of the information would harm national security. Sagar, *Secrets and leaks* (n 18) 60, citing Robert Chesney, ‘State Secrets and the Limits of National Security Litigation’ (2007) 75 *George Washington Law Review* 1249, 1287-88 and Louis Fisher, ‘The State Secrets Privilege: Relying on Reynolds’ (2007) 122(3) *Political Science Quarterly* 385, 397

⁵⁶ See the cases *Mohamed v. Jeppesen Dataplan, Inc.* 579 F.3d 943, [2009] (US Court of Appeals, Ninth Circuit) [Jeppesen I] and *Mohamed v. Jeppesen Dataplan Inc.* 614 F.3d 1070, [2010] (US Court of Appeals, Ninth Circuit) [Jeppesen II] on the question of extraordinary rendition. For further examples, see William G Weaver and Robert M Pallitto, ‘State Secrets and Executive Power’ (2005) 120(1) *Political Science Quarterly* 85 90. See, also Sudha Setty, ‘Litigating Secrets: Comparative Perspectives on the State Secrets Privilege’ (2009) 75 *Brooklyn Law Review* 201.

⁵⁷ Sidney A Shapiro and Rena I Steinzor, ‘The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism’ (2006) 69(3) *Law and Contemporary Problems* 99 102. See, also *Halperin v. Central Intelligence Agency* 629 F.2d 144, [1980] (US Court of Appeals, Columbia Circuit) and the emergence of the ‘mosaic theory’ as a justification for government secrecy and as an obstacle to declassifying documents. According to the Court, “we must take into account that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself” [150].

⁵⁸ Jack M Balkin, ‘Old-School/New-School Speech Regulation’ (2014) 127 *Harvard Law Review* 2296, 2332

reveal the contents of the NSL or the fact that it exists, and recipients are subject to the gag order until the government releases them, which it may never do”.⁵⁹

Finally, there has been a prosecutorial approach toward whistleblowers and leakers of classified information.⁶⁰ The aggressive stance of the government towards unauthorized disclosures of information is one more instance of the move toward a reinforcement of government secrecy in the domain of national security. In the next Section I will explain in depth the modalities through which this ‘war on whistleblowers’⁶¹ has taken place in the United States, in the same country where whistleblowing was first conceptualized and where whistleblowers in the fields of financial regulation and regulatory compliance have been (to a certain extent) protected and incentivized through Acts such as the SOX or the Dodd-Frank Act.⁶²

⁵⁹ *ibid* 2330-2331

⁶⁰ Benkler, ‘A Public Accountability Defense For National Security Leakers and Whistleblowers’ (n 39) 283 argues that “the present prosecutorial deviation from a long tradition of using informal rather than criminal sanctions represents a substantial threat to democracy”.

⁶¹ Rashed Mian, ‘Obama’s Legacy: A Historic War on Whistleblowers’ *Long Island Press* (14 January 2017) <<https://www.longislandpress.com/2017/01/14/obamas-legacy-historic-war-on-whistleblowers/>>

⁶² *See*, above Section 2.2.2.

3.1.2. Are disclosures of classified information legally possible? The restrictive framework for national security whistleblowing in the United States

National security whistleblowers in the United States face a legal framework that is restrictive and hostile toward their disclosures. The United States government has apprehended disclosers of national security information as leakers, even if the disclosed information revealed serious illegalities, such as in the cases of Snowden and Manning. In Subsection 3.1.2.1, I will show how the weak and ineffective institutional framework for whistleblowers leads to confusion between a restrictive legal perspective and a broader ethical-political perspective on what constitutes whistleblowing and what leaking. Attempting to provide some clarity over the issue, I propose a tripartite classification, including *lato* and *stricto sensu* whistleblowers, as well as leakers. In Subsection 3.1.2.2, I show how the Espionage Act has developed into a major tool in combatting leaking of national security information by prosecuting the disclosers, regardless of whether they are *lato sensu* whistleblowers or leakers. In Subsection 3.1.2.3, I discuss the weaknesses of the legal protections for national security whistleblowers, which are as a general rule ineffective in providing substantial protection against disciplinary and criminal sanctions or avenues for correcting the reported wrongdoing, especially when the disclosure reveals systemic abuse and lack of accountability. In Subsection 3.1.2.4, I briefly mention some of the suggested reforms and highlight that it is consistently the opposition of the executive branch that has led them to failure. It should be noted that when I employ the term ‘national security whistleblowers’ I understand it as including both *lato sensu* and *stricto sensu* whistleblowers.

3.1.2.1. Leaker or whistleblower? A fallible distinction and the increase in prosecutions of unauthorized disclosures of national security information

The exemplar cases of Chelsea Manning and Edward Snowden gave rise to contestation over the definition of their actions. Were they leakers or whistleblowers?⁶³ Taking it a step further into the territory of ethics, were they heroes or traitors? Leaving the ethics aside, it seems that for the executive branch of the United States, this ‘name game’ is insignificant:

⁶³ Katy Steinmetz, ‘The Edward Snowden Name Game: Whistle-Blower, Traitor, Leaker’ *Time Magazine* (10 July 2013) <<http://newsfeed.time.com/2013/07/10/the-edward-snowden-name-game-whistle-blower-traitor-leaker/>>

Unauthorized disclosures of national security information should be regarded as undue exposure of governmental secrecy and as a way to undermine the executive's privilege of controlling the dissemination of information to the public.⁶⁴ Indeed the United States government has intensified the prosecutions of unauthorized leaking of classified information, operating in a legal landscape where "the government is assumed to have a wide leeway to prosecute leaks of classified information with only a very minimal burden to show possible national security harm and no obligation to assess the value of the information at stake".⁶⁵

The argument that the distinction between leakers and whistleblowers is virtually unimportant in the legal sphere is supported by the current state of federal law. Although at first it could be argued that leakers and whistleblowers are differentiated by the procedure of their disclosures (whether they report to the designated channels or not) and by the content of their revelations (whether they reveal wrongdoing or not) and therefore by the level of their legal protection, this argument becomes less convincing when examined in conjunction with the weak whistleblowing protection statutes. Theoretically the difference is a) that of institutionalization and b) that of the content of the disclosure. Whistleblowers are the "systemic players", following the rules to make disclosures that reveal violation of law, gross mismanagement, an abuse of authority, or a substantial and specific danger to the public health or safety.⁶⁶ Leakers, on the other hand, are the ones who stepped out of the institutional framework to make in principle anonymous disclosures that are not any more content-specific (they do not necessarily reveal illegalities etc.).

Yet, the institutionalization of reporting mechanisms being too restrictive, certain categories of disclosures that content-wise would fit to the characterization of whistleblowing are forced to bypass the designated framework. Thus, confusion is created as to the difference between leakers and whistleblowers.⁶⁷ As most of the prominent leaks that arguably revealed wrongdoing, such as these of Manning, Snowden, and earlier that of Ellsberg did not follow the designated procedures, the term whistleblower, in its broad sense as the disclosure of wrongdoing to protect the public interest, became disconnected with its legal status in the

⁶⁴ Mary-Rose Papandrea, 'Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment' (2014) 94 Boston University Law Review 449, 450

⁶⁵ Heidi Kitrosser, 'Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers' (2015) 56 William & Mary Law Review 1221

⁶⁶ 5 U.S.C. § 2302(b)(8).

⁶⁷ For news agencies characterizing Edward Snowden differently *see*, Erik Wemple, 'Edward Snowden: 'Leaker,' 'source' or 'whistleblower'?' *The Washington Post* <https://www.washingtonpost.com/blogs/erik-wemple/wp/2013/06/10/edward-snowden-leaker-source-or-whistleblower/?utm_term=.a1b39d192cee>

Whistleblower Protection Act or the related statutes.⁶⁸ The distinction maintained its relevance in terms of content, but not in terms of the institutionalized procedure of disclosure, precisely because of the inefficiency of the latter. In the public debate the distinction highlights ethical and political, rather than legal, issues, with ‘leaker’ having a derogatory implication of which ‘whistleblower’ is largely dispensed.⁶⁹ Whistleblower then denotes the individual who believes he or she is revealing illegal, unethical, or improper misconduct in the public interest.⁷⁰ This might be *necessary* to trigger the protection guaranteed to a whistleblower by the law, but it is not *sufficient*. Therefore, individuals (such as Edward Snowden) who could qualify as whistleblowers under the auspices of such a broad definition are prosecuted as leakers under the current legislative framework. Here, for the sake of clarity, I propose a tripartite terminological distinction: *stricto sensu whistleblowers*, who follow the legal procedures to report on wrongdoing, *lato sensu whistleblowers*, who also disclose wrongdoing but not to the prescribed channels, but for instance to the press, and *leakers*, who disclose classified information not to the prescribed mechanisms and not involving wrongdoing.

Current practice undermines the assumption⁷¹ that national security whistleblowers who honestly care about correcting wrongdoing and protecting their agencies must follow the internal procedures.⁷² *Lato sensu* whistleblowers may step out of an organization too corrupt to deal with its own wrongdoings or systemic failures. According to Yochai Benkler, it is precisely this type of leaks, the ‘accountability leaks’ that purport to expose systemic abuse or a systemic need for accountability that have become more abundant in the past decade.⁷³ The reason behind this increase is a legitimacy crisis of the national security system.⁷⁴ This crisis can be addressed with an increase of transparency and accountability that internal procedures cannot deliver. If indeed the increase of accountability leaks is connected with a legitimacy

⁶⁸ “The whistleblower statutes tend to be ignored in the debate over classified information leaking, apart from occasional calls to revise them.” Pozen, ‘The Leaky Leviathan’ (n 29), 527

⁶⁹ Although *see* Orly Lobel, ‘Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems’ (2013) 54 South Texas Law Review 37, 40 (explaining that in the United States whistleblowers have an “uneasy” image, ranging “from hero to snitch; from saint to traitor”)

⁷⁰ Janet P Near and Marcia P Miceli, ‘Organizational dissidence: The case of whistle-blowing’ (1985) 4(1) Journal of Business Ethics 1

⁷¹ Terry M Dworkin and Elletta S Callahan, ‘Employee Disclosures to the Media: When Is a “Source” a “Sourcerer”?’ (1992) 15 Hastings Comm & Ent LJ 357, 369

⁷² Jack L Goldsmith, *Power and constraint: The accountable presidency after 9/11* (W. W. Norton & Co 2012), 239

⁷³ Benkler, ‘A Public Accountability Defense For National Security Leakers and Whistleblowers’ (n 39), 283

⁷⁴ *ibid*

deficit, then the importance of the current approach of aggressive prosecution extends beyond the question of the rights of the individuals, to questions of democratic governance.

Indeed, national security whistleblowers were prosecuted intensely from an administration that claimed to be “the most transparent administration in history”.⁷⁵ The Obama administration prosecuted more leakers of classified information than all the previous administrations combined,⁷⁶ producing a chilling effect on potential whistleblowers, journalists, and the larger public. This approach is, to a large extent, a novelty, as in the past the leaking of classified information faced only civil sanctions, like termination from employment.⁷⁷ According to Macy-Rose Papandrea, the reasons for this increase in prosecutions lie a) in the changes in technology and the media, meaning the digital access to classified information and the easiness in its dissemination, as well as the emergence of non-traditional media entities like Wikileaks, and b) in the sensitivity of contemporary government secrets, especially in relation to the war on terror.⁷⁸

As it was previously noted, Pozen's analysis underestimates the extent of the prosecutorial approach by comparing the number of prosecutions to the sheer volume of leaks of classified information.⁷⁹ Even if, as Pozen claims, this general regulatory regime of permissive enforcement has its merits,⁸⁰ it still provides the executive with the tools of controlling the information flow to the expense of whistleblowers or leakers that want to report wrongdoing of the higher scale. The selectivity in the prosecutions entails the possibility of content-targeted prosecutions and of a hardening of the government stance toward ‘accountability leaks’. The most powerful instrument of the existing legal framework for this prosecutorial approach is the Espionage Act.

⁷⁵ Jason R Arnold, ‘Has Obama delivered the ‘most transparent’ administration in history?’ *The Washington Post* (16 March 2015) <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/16/has-obama-delivered-the-most-transparent-administration-in-history/?utm_term=.fe17ab0d086b>

⁷⁶ Mian (n 61)

⁷⁷ Gabriel Schoenfeld, *Necessary secrets: National security, the media, and the rule of law* (W. W. Norton & Co 2011) 81

⁷⁸ Papandrea (n 64) 455-459

⁷⁹ “A suite of eight prosecutions looks more like a special operation than a war”, Pozen, ‘The Leaky Leviathan’ (n 29) 536

⁸⁰ For instance, plants and pleaks may have “educative and deliberative value for members of the public,” *ibid* 624.

3.1.2.2. *Facilitating prosecution: The broad scope of the Espionage Act*

The United States never adopted an Official Secrets Act, unlike countries like the United Kingdom. There is therefore no law that automatically criminalizes all disclosures of classified information.⁸¹ The legal instrument employed to prosecute unauthorized disclosures of classified information has been the Espionage Act of 1917. Although historical research has indicated that the Act was not meant to be applied generally to the publication of defence information but only against those who intended to assist a foreign government,⁸² later institutional practice turned the provisions of the Espionage Act into an effective instrument in prosecuting leakers. Indeed, in 1988, during the first successful prosecution of a leaker, the Fourth Circuit rejected the contention that the legislative history of the Act demonstrated that the statute was meant to be applied only in cases of classic spying.⁸³ On the contrary, the statute could be applied to the “disclosure of the secret defense material to anyone ‘not entitled to receive it’”.⁸⁴ The court also ruled against the statute being unconstitutionally vague and overboard. It found neither the term “relating to the national defense” to be vague in the constitutional sense,⁸⁵ nor the term “wilfully” to necessitate “a specific intent or evil purpose” but merely to indicate “that the prohibited act be done deliberately and with a specific purpose to do that which was proscribed”.⁸⁶

The Espionage Act prohibits whoever has either lawful or unauthorized access, or control over:

“any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the

⁸¹ There are administrative sanctions for violating regulations regarding classified information. See, National Security Information, Executive Order No. 13,526 § 4, 3 C.F.R. 298 (2009). The government has also civil remedies at its disposal, including enforcing nondisclosure agreements signed by government employees.

⁸² Laura Barandes, ‘A Helping Hand: Addressing New Implications of the Espionage Act on Freedom of the Press’ (2007) 29 *Cardozo Law Review* 371. Also, according to Geoffrey R. Stone, “Congress did not intend the Espionage Act to have the severely repressive effect attributed to it by the federal courts during World War I”. Geoffrey Stone, ‘Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled’ (2003) 70 *University of Chicago Law Review* 335, 335

⁸³ *United States v. Morison* 844 F.2d 1057, [1988] (US Court of Appeals, Fourth Circuit). The court found “no basis in the legislative record for finding that Congress intended to limit the applicability of sections 793(d) and (e) to classic spying”. [1070]

⁸⁴ *ibid* [1065]

⁸⁵ *ibid* “National defense, includes all matters that directly or may reasonably be connected with the defense of the United States against any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness”. [1071]

⁸⁶ *ibid*

national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation” from willfully transmitting it or communicating it “to any person not entitled to receive it”.⁸⁷

The trespasser shall be fined under this title or imprisoned not more than ten years, or both. Some important issues that emerge from this section of the Espionage Act are:

- i) Courts have read the "not entitled to receive it" language in light of the classification system.⁸⁸ This means that “not entitled to receive it” is whoever is not authorized according to the classification system (Executive Order 13526) to receive the information. This naturally includes the press.
- ii) There has been some debate regarding whether the requirement of the belief of the possessor in the potential injury of the United States is necessary also for the transmission of documents and not only for information. The court in *U.S. vs Drake* decided negatively, stating that in cases “involving documents, the defendant need only have acted wilfully, as a defendant will more readily recognize a document relating to the national defense based on its content, markings or design than it would intangible or oral 'information' that may not share such attributes”.⁸⁹
- iii) “Relating to the national defense” signals information “dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities”.⁹⁰ Despite relevant contestations, this requirement has not been found to be constitutionally vague.⁹¹ Yet, in order for this criterion to be fulfilled, the government must “prove that the disclosure of the photographs would be potentially damaging to the United States or useful to an enemy” and that “the documents or the photographs are closely held in that [they] . . . have not been made public and are not available to the general public”.⁹² Yet, proving the potentially damaging nature of the information or its non-public nature becomes almost automatic when classified information is concerned.⁹³ This represents a

⁸⁷ 18 U.S.C. § 793(d), (e)

⁸⁸ Kitrosser, ‘Leak Prosecutions and the First Amendment’ (n 65) 1232. See, *United States v. Kim* 808 F.Supp.2d 44, [2011] (US District Court Columbia) [54-55]

⁸⁹ See, *United States v. Drake* 818 F. Supp. 2d 909, [2011] (US District Court Maryland) [917]

⁹⁰ *United States v. Rosen* 445 F. Supp.2d 602, [2006] (US District Court Virginia) [619-20]

⁹¹ *Gorin v. United States* 312 U.S. 19, [1941] (US Supreme Court), *United States v. Morison* (n 83)

⁹² *ibid* See, also *United States v. Rosen* (n 90). However, these requirements were not repeated at the case *United States v. Kim* (n 88).

⁹³ *ibid* [53]

minimum threshold for the government, which still leaves those who had no intent in harming the United States exposed to criminal liability. According to the House Committee during the revision of the Act in 1950, “the absence of a requirement for intent is justified, it is believed, in view of the fact that subsection 1(d) deals with persons presumably in closer relationship to the Government which they seek to betray”.⁹⁴

- iv) The scienter requirement, the ‘willful intent’ is seen as meaning that the leaker acted deliberately, knowing that his or her actions were unlawful. This was also clarified in the *Morison* case.⁹⁵ As it was argued above in c), no further intent is necessary.
- v) A more ambiguous requirement is that the discloser of the information had “reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation”. This can be interpreted as a requirement that the leaker is of bad faith.⁹⁶ However, this requirement has not posed an obstacle in successful prosecutions of leakers thus far. Furthermore, in the digital age of information it can be argued that this requirement is fulfilled because of the worldwide diffusion of information. According to Robert Litt, General Counsel for the Office of the Director of National Intelligence, “what the Washington Post reports, al Qaeda knows”.⁹⁷ This idea of indirect injury was stressed during the prosecution of Manning even for the charge of military treason, with the highlighting of Civil War cases, where individuals would aid the enemy through widely distributed publications. According to Benkler, under this theory, “the prosecution must show only that he communicated the potentially harmful information, knowing that the enemy could read the publications to which he leaked the materials”.⁹⁸ In order to counter this approach, it is perhaps best not to focus on “to whom” the disclosures are made, but on the question of the audience the leaker intended to have.⁹⁹ In sum, even if

⁹⁴ House of Representatives, ‘H.R.Rep. No. 647, 81st Cong, 1st Sess.’ (1949), [3-4]

⁹⁵ *United States v. Morison* (n 83). Because “the defendant . . . knew that he was dealing with national defense materials” potentially advantageous to foreign governments, the scienter requirement of willfulness was met. [1073-1074]

⁹⁶ *Gorin v. United States* (n 91) “The obvious delimiting words in the statute are those requiring ‘intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation’. This requires those prosecuted to have acted in bad faith”. [27-28]

⁹⁷ Robert S Litt, ‘Executive Updates on Developments in National Security Law’ (General Counsel for the Office of the Director of National Intelligence, 31 October 2013) <<https://perma.cc/6P8V-39XQ>>

⁹⁸ Yochai Benkler, ‘The Dangerous Logic of the Bradley Manning Case’ *The New Republic* (1 March 2013) <<https://newrepublic.com/article/112554/112554>>. Manning was eventually acquitted of the charge of military treason.

⁹⁹ Papandrea (n 64) 490

this requirement is not strong enough to support a defence of public disclosures, it still leaves room for doubt.¹⁰⁰

Further provisions of the Espionage Act prohibit the disclosure of specific categories of information. Section 798 restricts the dissemination of “classified information...concerning the communication intelligence activities of the United States”.¹⁰¹ This time there is no requirement of “reason to believe” in the injury of the United States, lowering the bar even more for prosecution. Similarly, 18 U.S.C § 641 criminalizes theft, conveyance, or sale of government property or ‘things of value’, without the need to show harm to United States. This could be seen as including government information.¹⁰² Indeed, Daniel Ellsberg was prosecuted under § 641, and so was Edward Snowden and Bradley Manning.¹⁰³ The provisions of the Computer Fraud and Abuse Act have also been used in the prosecution of leakers.¹⁰⁴ This law in particular offers a broad provision of liability for “whoever...intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains...information from any protected computer”.¹⁰⁵ In addition, statutes such as the Atomic Energy Act, the Intelligence Identities Protection Act contain provisions prohibiting the disclosure of classified information and can be used in the prosecution of leakers. It should also be mentioned that national security employees must sign Non-Disclosure Agreements that impose civil and administrative sanctions in case of violation.¹⁰⁶

The result of this nexus of provisions and interpretations of the Espionage Act is that any government insider who leaks classified information to the press and other third parties is

¹⁰⁰ Posner (n 16)108

¹⁰¹ 18 U.S.C. § 798(a)

¹⁰² There is no consensus of the Circuits over this issue. For an extended discussion of the provision, *see* Jessica Lutkenhaus, ‘Prosecuting Leakers the Easy Way: 18 U.S.C. § 641’ (2014) 114 *Columbia Law Review* 1167

¹⁰³ Melville B Nimmer, ‘National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case’ (1974) 26 *Stanford Law Review* 311, 314; Snowden’s indictment available at ‘U.S. vs. Edward J. Snowden criminal complaint’ <<http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/>>; Manning’s indictment available at ‘Charge Sheet of Bradley E. Manning’ <<http://graphics8.nytimes.com/packages/pdf/politics/20110302-manning.pdf>>;

¹⁰⁴ *See*, in particular, Manning’s charge under 18 U.S.C. § 1030(a)(1) and (2).

¹⁰⁵ 18 U.S.C. § 1030(a)(2)(C).

¹⁰⁶ The Classified Information Non-Disclosure Agreements (SF 312) are based on the Executive Order 12958 and on the National Security Decision Directive No. 84. SF 312 Agreements are not meant to conflict with whistleblower statutes, because the latter do not protect employees who make unauthorized disclosures and because the Executive Order 12958 prohibits classification that conceals violations of law [Sec. 1.8(a)], ‘Classified Information Nondisclosure Agreement (Standard Form 312): Briefing Booklet’ (2013) <<https://fas.org/sgp/isoo/sf312.html>>. *See* below, Section 3.1.2.3.

criminally liable, mostly under the Espionage Act, but also under relevant statutes. Charging leakers with espionage goes against the idea that the individuals involved must have some relationship with another government or foreign actor. In addition, it disregards the “greatest damage” to national security caused by espionage, i.e. the mistaken belief of the government that its secrets remain secret.¹⁰⁷ Leakers, by making the disclosures public, completely shatter any such illusion. According to Stephen Vladeck, “because of the broad language of the Espionage Act and the narrow language of certain whistleblower laws, a government employee would enjoy no statutory whistleblower protection whatsoever from either an adverse employment action or a criminal prosecution for disclosing classified national security information”.¹⁰⁸ Agreeing with this observation, I will now discuss the limited scope of the current whistleblowing laws in the context of national security, especially when examined in juxtaposition with the broad language of the Espionage Act.

3.1.2.3. The ineffective legal framework for the protection of national security whistleblowers

Central in the legislative protection of national security whistleblowers is the Whistleblower Protection Act of 1998 (WPA). The WPA, in continuation of the foundational Civil Service Reform Act of 1978, aimed at enhancing democratic accountability of public institutions by ensuring that wrongdoing can be reported and government conduct can be redressed even outside the hierarchical chain of command. For instance, it is characteristic that the WPA included a right to disobey illegal orders.¹⁰⁹ Vaughn rightly points out that the right to disobey illegal orders embodies the same broad concept of loyalty as the protections of whistleblowers: A loyalty that goes beyond the supervisor and the hierarchy to encompass the organization as a whole, the government as a whole, or even the society at large.¹¹⁰

¹⁰⁷ Harold Edgar and Benno C Schmidt, JR. ‘Curtiss-Wright Comes Home: Executive Power and National Security Secrecy’ (1986) 21 Harv CR-CLL Rev 349, 400-401

¹⁰⁸ Stephen I Vladeck, ‘The Espionage Act and National Security Whistleblowing After Garcetti’ (2008) 57 American University Law Review 1531, 1533

¹⁰⁹ 5 U.S.C § 2302(b)(9)

¹¹⁰ Robert G Vaughn, ‘Whistleblower Protection and the Challenge to Public Employment Law’ in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (ANU E Press 2011), 163

However, the protection WPA concretely offers to national security whistleblowers is very limited. With respect to public disclosures, the Act protects the disclosure of any information a government employee reasonably believes constitutes “violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety”, but only insofar as it “is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs”.¹¹¹ Therefore, due to the Espionage Act, which precludes the dissemination of national security information to “anyone not entitled to receive it”, and due to the classification system established by executive order, classified information may not be publicly disclosed under any circumstances. Furthermore, the WPA excludes from its protection most government employees that might reasonably be expected to have possession of classified information, such as those of the FBI and the CIA.¹¹² The Act also offers no protections to contractors, who nowadays make up a significant part of the national security apparatus.¹¹³ Moreover, the Act does not secure against the revocation of one’s security clearance,¹¹⁴ which in the field of national security practically means losing one’s job. Finally, insofar as it concerns the WPA in general, it is perhaps indicative that although whistleblowers who have been subjected to personnel actions may address whistleblowing as a defence before the Merit System Protection Board, in 79% of the cases this process has resulted in a defeat for the employees.¹¹⁵

Federal employees covered by the statute may disclose wrongdoing that involves classified information to the Inspector General or the Special Counsel, as no such prohibition is listed.¹¹⁶ This information in turn has to be transmitted to the National Security Advisor and the House and Senate Permanent Select Committees on Intelligence.¹¹⁷ This minimum oversight may be

¹¹¹ 5 U.S.C § 1213(a)

¹¹² 5 U.S.C § 2302(a) (2) (C)(ii)

¹¹³ 5 U.S.C § 2302(b)(8)(A)

¹¹⁴ The courts have upheld the executive near-total discretion to revoke security clearances. *See, Department of the Navy v. Egan* 484 U.S. 518, [1988] (US Supreme Court) [527–33] establishing the non-reviewability of security clearance determinations in the absence of specific statutory warrant.

¹¹⁵ Shelley L Peffer and others, ‘Whistle Where You Work?: The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012’ (2015) 35(1) *Review of Public Personnel Administration* 70. *See, also* Robert J McCarthy, ‘Blowing in the Wind: Answers for Federal Whistleblowers’ (2012) 3 *William & Mary Law Review* 184, 184 according to whom “MSPB’s self-styled ‘administrative judges’ are a deceptive and inadequate substitute for “administrative law judges,” with none of the Congressionally-mandated qualifications and independence of the latter”.

¹¹⁶ 5 U.S.C § 2302(b)(8)(B), no exception for classified information is listed

¹¹⁷ 5 U.S.C § 1213(j)

effective in some cases, but as Vladeck correctly highlights, it will most likely be the *least* effective when whistleblowing is *most* important, namely in accountability leaks, where the unlawful secret was known and perpetrated by the organizational hierarchy.¹¹⁸

In an effort to ameliorate the status of protection for the intelligence community, Congress passed the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA). The ICWPA expanded the protection to federal employees of intelligence agencies and to contractors.¹¹⁹ The aim of the Act was to empower the legislative branch and its oversight over the executive and indeed, even though it prioritizes disclosures to the Inspector General it allows, under conditions, disclosures to Congress.¹²⁰ However, due to the protection being limited to subjects of ‘urgent concern’, the discouragement of direct disclosures to Congress,¹²¹ the repeated issue of revocation of security clearances, and, perhaps most importantly, the absence of judicial review for retaliation against a covered employee,¹²² the statute has been largely inefficient in sufficiently protecting national security whistleblowers. In the wake of Edward Snowden’s disclosures, Congress included a provision within the Intelligence Authorization Act of 2014 for the protection of intelligence community whistleblowers, without however bringing about significant changes. Even though it eliminates the need for an ‘urgent concern’ for disclosures and it permits disclosure to a number of instances beyond the Inspector General, including the Director of National and a congressional intelligence committee,¹²³ it still does not allow for judicial review and it does not include specific procedures whistleblowers may use to utilize their rights.¹²⁴

The Whistleblower Enhancement Act of 2012 (WPEA) did little to change this overall restrictive approach toward national security whistleblowers. Aimed mostly at addressing the restrictive interpretations of the courts as to what constitutes the scope of protected conduct of

¹¹⁸ Vladeck (n 108) 1544. It should also be noted that the Inspector General does not “offer an independent check on executive power because they are under the command and authority of their respective agency heads and subject to removal by the President”, Papandrea (n 64) 492.

¹¹⁹ 50 U.S.C § 3033k(5)(A). The employee may however address Congress directly in case the Inspector General dismisses the concern or fails to take the respective actions. 50 U.S.C § 3033k(5)(D)

¹²⁰ *ibid* k(5)(D). The conditions may be summed up to the inaction of the Inspector General or the consent of the Director of National Intelligence.

¹²¹ *Ibid*

¹²² Unlike the WPA, no explicit mechanism for remedy in the cases of retaliation resulting from disclosures is provided. On the contrary, the actions of the Inspector General regarding the evaluation of a disclosure is not subject to judicial review, 50 U.S.C § 3033k(5)(F)

¹²³ 50 U.S.C § 3234(b)

¹²⁴ *ibid* (d), “The President shall provide for the enforcement of this section”.

the WPA,¹²⁵ the WPEA clarified that protection against retaliation is not lost because a) the disclosure was made to a person who participated in the wrongdoing, b) the information had already been disclosed, c) of the motive of the whistleblower, d) the disclosure was made when the employee was off duty, e) the amount of time that has passed since the occurrence of the described events.¹²⁶ It also established that Non-Disclosure Agreements must specify that they do not alter employee rights stemming from whistleblower protection statutes.¹²⁷ However, after the insistence of the Obama Administration, the Act excluded national security employees and contractors.¹²⁸

In spite of aiming to address this obvious legislative gap, the Presidential Policy Directive 19 (PPD-19) released by the Obama administration lacked the appropriate force to convey significant legal remedies for national security whistleblowers. PPD-19 prohibits retaliation against employees working in the Intelligence Community or having access to classified information when reporting on waste, fraud, and abuse within their service.¹²⁹ The Directive, by making clear that it “does not create any right or benefit, substantive or procedural, enforceable in law or equity by any party against the United States”¹³⁰, restricts itself to an internal review process implemented by the agencies themselves. Even though an employee may request external review of the complaint, the findings of the Inspector Generals, even if they are favourable to the whistleblower, will have to be approved by the agency head.¹³¹ This convoluted internal mechanism highlights that agencies have the final word in resisting a disclosure and providing no remedy to the retaliated against employee. According to Linda Lewis, “what the new directive does is give intelligence community whistleblowers lots of

¹²⁵ *Horton v. Department of the Navy* 66 F.3d 279, [1995] (US Court of Appeals, Federal Circuit), the Court held that disclosures to the alleged wrongdoer are not covered; *Willis II v. Department of Agriculture* 141 F.3d 1139, [1998] (US Court of Appeals, Federal Circuit), court excluded from WPA protection disclosures related to the employee's normal job duties; *Meuwissen v. Department of Interior* 234 F.3d 9, [2000] (US Court of Appeals, Federal Circuit), the court held that disclosure of information that is publicly known is not a “disclosure” upon which a Whistleblower Protection Act (WPA) claim may be based.

¹²⁶ Whistleblower Protection Enhancement Act 2012, Sections 101 and 102. See, Jason Zuckerman, ‘Congress Strengthens Whistleblower Protections for Federal Employees’ (2012) <https://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html>

¹²⁷ Whistleblower Protection Enhancement Act (n 126), Section 104

¹²⁸ See, Executive Office of the President, *Statement of Administration Policy: H.R. 985 - Whistleblower Protection Enhancement Act of 2007* (2007)

¹²⁹ Presidential Policy Directive/PPD-19 2012, 1-2

¹³⁰ *ibid* 8 5 U.S.C § 2302 (n 116)

¹³¹ Presidential Policy Directive/PPD-19 (n 129) 4

process without substantially changing the result”.¹³² The absence of an avenue to the courts, or of an external disclosure, for instance to Congress, highlights the insubstantial protection guaranteed by PPD-19.

3.1.2.4. Separation of powers and suggestions for reform

This restrictive framework for national security whistleblowing has not remained unquestioned. In 2007 the House of Representatives passed the Whistleblower Enhancement Act of 2007, which provided new and important rights and protections to national security whistleblowers: It allowed for disclosures to a broad range of congressional and executive branch officials, it prohibited revoking an employee's security clearance as a measure of retaliation and, most importantly, it allowed employees to bring claims of retaliation before federal court.¹³³ However, the Obama administration opposed these proposed changes and in the end, the final outcome of the WPEA did not involve these protective for the whistleblowers changes.¹³⁴ The administration tried and achieved to have whistleblowing procedures for national security issues restricted to administrative procedures. This highlights the inter-branch struggle over the flow of information that whistleblowers could potentially influence. Allowing for direct disclosures to Congress and for bringing retaliation claims in front of courts could be seen as tilting the balance against the executive's predominance in the domain of national security. As I mentioned before however, the national security system (and the executive's dominance in it) have to be understood as a system that is operationally closed and wants to maximize its rationality. Legislation that would empower other branches in the management of national security issues would disrupt its current rationality and eventually undermine the system itself. Yet, it is precisely this disruption that might be necessary against the current dysfunctional system of disclosures of wrongdoing. For example, it has been commented that the "reputation [of the Inspector General] within the Agency is so low that people risk prosecution [by leaking to the press] rather than merely report their concerns to the authorized

¹³²Linda Lewis, 'President Obama signs directive on national security whistleblowing' <<http://whistleblowing.us/2012/10/president-obama-signs-directive-on-national-security-whistleblowing/>>

¹³³ See 'H.R.985 — 110th Congress' (2007) §10. For a more extended discussion on the topic, see Moberly (n 47) 81.

¹³⁴ *ibid* 83

internal guard".¹³⁵ Changing the balance in favour of the legislative branch by allowing direct disclosures to Congress might be a first step in increasing the transparency of the national security system.¹³⁶

Scholars have also highlighted the problematic nature of the current legislative framework and called for reform. Suggestions in the literature have ranged from amending the Espionage Act in order to preclude prosecution for those who leak information to the media to timid efforts to introduce a 'three-tiered system' whereby protection is granted if the whistleblower tried to comply to the ICWPA and only leaked information to the press as a last resort;¹³⁷ or from the call for an equivalent treatment of national security whistleblowers to other types of federal whistleblowers regarding the procedural and substantive remedies for retaliation¹³⁸ to mentioning the examples of countries that have introduced a public interest balancing test;¹³⁹ and from addressing the overclassification problem, potentially by allowing employees to object to information being classified simply to hide embarrassing or illegal activities,¹⁴⁰ to institutionalising a new whistleblower court.¹⁴¹ These theoretical suggestions have not been fruitful so far.

In general, there is a diffused sense of pessimism regarding the potential for legislative reform. This has pushed scholars to comment on the existing constitutional framework and on the possibility of granting whistleblowers and leakers the rights entailed by freedom of expression. According to Papandrea, "given that statutory reform is not likely to occur in the near future, it is essential for courts to rethink the First Amendment implications of leak

¹³⁵ Afsheen J Radsan, 'One Lantern in the Darkest Night: The CIA's Inspector General' (2010) 4 *Journal of National Security Law & Policy* 247, 288

¹³⁶ In that sense, see Bruce A Ackerman, *Before the next attack: Preserving civil liberties in an age of terrorism* (Yale University Press 2006) 103-105, who argues for an 'emergency constitution' which "places the legislative oversight committees in the hands of the minority party," with the courts playing "a more important role... on more-procedural matters"). For a counter-argument on the potential entailed by legislative involvement in the domain of national security, see Aziz Rana, 'Who Decides on Security?' (2012) 44(5) *Connecticut Law Review* 1417-1422, claiming that "the current reform debate ignores the broader ideological context that shapes how the balance between liberty and security is struck".

¹³⁷ Josh Zeman, "A slender upon which to rely": Amending the Espionage Act to protect Whistleblowers' (2015) 61 *Wayne Law Review* 149, 166. See, also Michael P Scharf and Colin T McLaughlin, 'On Terrorism and Whistleblowing' (2007) 38 *CWRU Journal of International Law* 567, 579-580.

¹³⁸ Moberly (n 47) 130

¹³⁹ *ibid* 140

¹⁴⁰ *ibid* 141

¹⁴¹ Stephen C Tily, 'National Security Whistleblowing vs. Dodd-Frank Whistleblowing: Finding a Balance and a Mechanism to Encourage National Security Whistleblowers' (2015) 80(3) *Brooklyn Law Review* 1191, 1208

prosecutions”.¹⁴² I will discuss the possibilities for constitutional defence of national security whistleblowing through freedom of expression in the last Chapter. Before that, it is essential to analyse and compare the institutional framework in Europe, where the legislative protections granted to whistleblowers are equally ineffective.

¹⁴² Papandrea (n 64) 539

3.1.3. National security secrecy in the European Union: An almost non-existent framework for whistleblowing

Like in the United States, in EU members states national security is also fundamentally a domain of secrecy. This affects the framework for whistleblowing, which ranges between very restricting to practically inexistent. In Subsection 3.1.3.1, I discuss state secrecy with regards to disclosures of information in the United Kingdom, France, and Ireland. The difference between common and civil law does not have a direct implication on the essence of the provisions protecting government secrecy and discouraging disclosures. The differences that exist between those countries are a matter of degree of protection, rather than variances referring to the essence of the law. In Subsection 3.1.3.2, I examine the legal framework for the prosecution of unauthorized disclosures. All three states employ a strict framework discouraging disclosures of classified information, even though there are significant differences regarding the existence of damage tests and the severity of the potential sanctions. In Subsection 3.1.3.3, I describe the current mechanisms for whistleblower protection and I find that in sum, they are almost non-existent. One exception is Ireland which, due to its cutting-edge legislation protecting whistleblowers, has implemented a mechanism of internal reporting that gives whistleblowers some space to report wrongdoing. Yet, even this mechanism might prove insufficient when the wrongdoing is perpetrated by the hierarchical authority.

3.1.3.1. State secrecy and disclosures of government information: Comparative perspectives

The United Kingdom has a long tradition of government secrecy and an established system that deters potential whistleblowers. For instance, the institution of state secrets privilege in the United States, briefly discussed above, finds its origin in the British “public interest immunity” and the precedent from the World War II era.¹⁴³ As a general rule, the Courts in the UK afford

¹⁴³ Sudha Setty, ‘Judicial Formalism and the State Secrets Privilege’ (2012) 38(5) William Mitchell Law Review 1629, 1639

deference to claims of public interest immunity by government officials, although this precedence has not remained unchallenged.¹⁴⁴

As far as it concerns disclosures of information by individuals, the Official Secrets Act, first enacted in 1889, regulates both primary disclosure of information by public employees and secondary disclosure by other individuals. In comparison to the United States, the UK has embraced a system of secrecy that is at the same time theoretically broader in scope and more precise in language and categories of application. It is broader in scope insofar as its prohibitions extend to members of the press.¹⁴⁵ While in the US such a prohibition would likely be seen as incompatible with the First Amendment,¹⁴⁶ in the UK a more lenient approach toward freedom of expression allows for such a provision.¹⁴⁷ One further instance of a generally more restrictive attitude towards the press is the Defence Advisory Notice, through which the government issues standing orders to the media not to publish stories on certain sensitive issues, to which the media generally comply, even if it is only optional.¹⁴⁸

The system of secrecy of the Official Secrets Act is based on formal rules that are less open to interpretation than the Espionage Act. Prior to the latest amendment of 1989 all disclosure of classified information was essentially criminalized,¹⁴⁹ creating a system that was seen as draconian.¹⁵⁰ After the latest amendment, the information the disclosure of which triggers criminal penalties is limited to the following categories: Security and intelligence, defence, international relations, information likely to result in the commission of an offense, to facilitate

¹⁴⁴ See, for example *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs (Rev 1)* [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653 [105], “a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the involvement of the British security services in wrongdoing be placed in the public domain in the United Kingdom.”

¹⁴⁵ Official Secrets Act 1989 s 5-6, 8

¹⁴⁶ Elie Abel, *Leaking: Who Does It? who Benefits? at what Cost?* (Unwin Hyman 1987) 8. In general, it should be noted that even though the language of the Espionage Act does not specifically eliminate this possibility, the case law and the legal history of the US would make such an application seem unlikely. However, see Schoenfeld (n 77) 249, supporting the application of the Espionage Act against *The New York Times* regarding the disclosure of the Bush administration's domestic electronic surveillance program.

¹⁴⁷ The UK incorporated in 1998 the European Convention on Human Rights into domestic law (Human Rights Act 1998), which makes freedom of expression potentially subject to numerous exceptions, among which national security. The limitation has to be prescribed by law, necessary and proportional, and pursue a legitimate aim. See, Art 10(2). I will come back to this in Chapter 3.2.

¹⁴⁸ The DA-Notice System is a means of providing advice and guidance to the media about defence and counter-terrorist information the publication of which would be damaging to national security, ‘The DA-Notice System’ (2013) <<http://www.dnotice.org.uk/danotices/index.htm>>

¹⁴⁹ Official Secrets Act 1911, s 2

¹⁵⁰ Pozen, ‘The Leaky Leviathan’ (n 29), 626

escape or to impede detection, information obtained in confidence, and special investigations under statutory warrant. This restriction was explicitly designed so that “the criminal law should protect, and protect effectively, information whose disclosure is likely to cause serious harm to the public interest, and no other”.¹⁵¹

It has been supported that the British system of secrecy is an exceptional case of overwhelming government secrecy in the Global North.¹⁵² However, contemporary comparisons with its US counterpart indicate a progressive convergence of the two.¹⁵³ As the system in the UK becomes more lenient by narrowing the information the disclosure of which leads to criminal sanctions, prosecuting fewer individuals,¹⁵⁴ and showcasing lenient enforcement regarding members of the press,¹⁵⁵ its US counterpart becomes more stringent as a result of the reading of the Espionage Act by the courts.

In France government secrecy is protected equally strongly through the Penal Code. The recent reforms in the direction of governmental and administrative transparency¹⁵⁶ have not been equally influential in the domain of ‘secret défense’. *Secret défense* covers any process, object, document, information, computer network, computerized data or files relating to national defence which has been the object of classification measures.¹⁵⁷ Classification is implemented for information etc., the disclosure of which, or the access to which is likely to harm national security. The assessment of what may harm national security rests with the issuer

¹⁵¹ According to the Home Secretary during the reading of the Act, ‘HC Deb 21, col 460’ (December 1988), cited by Public Administration Select Committee (House of Commons), ‘Leaks and Whistleblowing in Whitehall’ (Tenth Report of Session 2008–09, 2009), 15

¹⁵² Alexa van Sickle, ‘Secrets and Allies: UK and U.S. Government Reaction to the Snowden Leaks | Carnegie Council for Ethics in International Affairs’ <https://www.carnegiecouncil.org/publications/ethics_online/0089> It is also telling that the UK has been criticized by the UN Human Rights Committee for its policy of secrecy: “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”, Human Rights Committee, ‘CCPR/C/GBR/CO/6’ (21 July 2008) [24]

¹⁵³ Katherine Feuer, ‘Protecting Government Secrets: A Comparison of the Espionage Act and the Official Secrets Act’ (2015) 38 Boston College International & Comparative Law Review 91, Pozen, ‘The Leaky Leviathan’ (n 29)

¹⁵⁴ *ibid* 627-628

¹⁵⁵ Only one of the twelve individuals was a freelance journalist and the case was eventually dropped prior to trial. For the case of Tony Geraghty, *see* Sandra Coliver, ‘The United Kingdom’s Official Secrets Act 1989’ (2013) <<http://www.right2info.org/resources/publications/national-security-page/uk-official-secrets-act-1989>> accessed 28 September 2017, 9

¹⁵⁶ André Roux, ‘La transparence administrative en France’ in Charles Debbasch (ed), *La transparence administrative en Europe* (Éd. du Centre National de la recherche scientifique 1990) 57

¹⁵⁷ Code Pénal, art. 413-9

of the document.¹⁵⁸ Yet, one effort to limit the autonomy of the executive regarding questions of classification has been the creation of the *Commission consultative du secret de la défense nationale* (CCSDN).¹⁵⁹ According to the Conseil d'État, the creation of an autonomous administrative agency "would constitute a decisive step towards the elimination of a "dead angle" of institutional regulation, and towards the suppression of one of the last bastions of the self-control of the administration by itself".¹⁶⁰ The Commission advises the Government on the possibility of declassifying documents, following the request of a court to access the relevant information. Without this act of declassification, state secrets represent an insurmountable obstacle for the judiciary.

The limits of state secrecy were examined by the Conseil Constitutionnel in the form of a *Question Prioritaire de Constitutionnalité* (*a posteriori* control of a law's adherence to the Constitution). The questions raised through the mechanism of the QPC were that of the compatibility of certain provisions protecting the secrecy of national security (among these were included the article 413-9 of the Penal Code on classification and the articles 413-10 and 413-11 on the disclosures of state secrets) with the principles of the right to a fair trial, the separation of powers, and crime investigation and the pursuit of justice.¹⁶¹ The core of the conflict was the inability of the judiciary to access classified files, even when it estimates that knowledge of their content would be necessary to the pursuit of the truth.¹⁶² According to the Conseil d'État and following an historically embedded scepticism in French jurisprudence over the role of the judiciary, it is the responsibility of the legislator to balance the constitutional objective of crime investigation and of the protection of the fundamental interests of the Nation.¹⁶³ Indeed, the Conseil Constitutionnel found most of the abovementioned provisions to be constitutional (including the notion of national security secrecy, the classification levels and the penalties for any breach of secrecy), abrogating only the provisions that made the

¹⁵⁸ Patrice Sartre and Philippe Ferlet, 'Le secret de défense en France' (2010) Tome 412(2) Études 165 <http://www.cairn.info/load_pdf.php?ID_ARTICLE=ETU_4122_0165>, 169

¹⁵⁹ Loi n° 98-567 du 8 juillet 1998 instituant une Commission consultative du secret de la défense nationale, the articles of which were codified in the Code de la Défense, art. L. 2312-1- L. 2312-8

¹⁶⁰ Conseil d'État, 'Rapport public: La transparence et le secret' (La Documentation Française 1995), 157

¹⁶¹ Cass. crim. 31 août 2011, n° 11-90.065 (QPC incidente)

¹⁶² See however the recent Loi relative au renseignement (n 46) that set up, within the Conseil d'État, a specialized formation, the members of which are entitled to access classified information with regards to appeals concerning the implementation of intelligence techniques. This reform remains partial only to the mentioned circumstances and only at the level of the Conseil d'État.

¹⁶³ CE avis, 5 avr. 2007, n° 374120

judge's access to classified sites (*lieux classifiés*)¹⁶⁴ conditional on a temporary declassification of the relevant place by the administrative authority. In this instance, the balance of the opposing values was breaching on the separation of powers by subtracting a defined geographical area from the powers of investigation of the judicial authority. Despite this limited reform, the Conseil Constitutionnel did not call into question the overall balance of the rules protecting national security secrecy.¹⁶⁵

Ireland, according to Michael Foley, prior to the introduction of the Freedom of Information Act in 1997, “was easily the most secretive state in Western Europe, even more so than the UK”.¹⁶⁶ Ireland inherited the Official Secrets Act from the British Empire and did not amend it until 1963 and then amended it only to strengthen its application.¹⁶⁷ The Act applies to a wide range of disclosures as it has not been amended to distinguish between categories of disclosure, like its British counterpart. Instead, it applies to “any official information” and it is not restricted to government employees but to any individual that could communicate it.¹⁶⁸ Official information means any secret or classified information which had been in the possession of a holder of public office.¹⁶⁹ As I will analyse in the next section, the Act opts for a broad criminalization of any unauthorised disclosure of classified information. Furthermore, the Freedom of Information Act of 2014, similarly to the FOI of 2000 in the UK, classifies national security as an exemption from the obligation of disclosure. The combination of the two Acts leads to the conclusion that national security information is robustly protected against any disclosure, leaving a tiny, if not non-existent margin for disclosures in the public interest, as I will show in Subection 3.1.3.3.

¹⁶⁴ The article that provided for the classified sites read: “only those sites may be the object of classification that cannot be accessed [...] without this access providing by itself knowledge of a secret of national security”. Code Pénal, art. 413-9-1

¹⁶⁵ Agathe Lepage, ‘Le secret de la défense nationale devant le Conseil constitutionnel: Une décision mesurée’ (2012) 7 *Semaine Juridique* 309

¹⁶⁶ Michael Foley, ‘Keeping the State’s secrets: Ireland’s road from ‘official’ secrets to freedom of information’ (2015) *Book Chapters* 30 Dublin Institute of Technology 186, 186

¹⁶⁷ Tom Garvin attributes the tendency to ‘authoritarian law enforcement’ and ‘censorship’ to the urge to further state policy in the context of a highly centralised state following a civil war. Tom Garvin, ‘Democratic Politics in Independent Ireland’ in John Coakley and Michael Gallagher (eds), *Politics in the Republic of Ireland* (Political Studies Association of Ireland 2005) 226, cited by Foley (n 166) 189

¹⁶⁸ Official Secrets Act 1963, s 4(1)

¹⁶⁹ *ibid* s 2(1)

3.1.3.2. *A strict framework for prosecution of unauthorized disclosures of classified information*

As it was mentioned, the Official Secrets Act in the UK is aimed both at government employees and anyone else who might possess classified information. The Act differentiates the penalties the respective groups face. Members of the security and intelligence agencies who make an unauthorized disclosure are liable to criminal sanctions regardless of whether their disclosure was harmful to national security.¹⁷⁰ This indicates that the core of the criminalized behaviour is the betrayal of trust, rather than the risk to national security.¹⁷¹ The only possible defence is the lack of knowledge, or reason to believe, on behalf of the employee that the information pertained to security and intelligence.¹⁷² Contrary to this blanket ban on disclosures, government employees other than the categories mentioned may be penalized only when they make a “damaging disclosure”.¹⁷³ The disclosure is damaging when it causes, or it is likely to cause, damage to the work of the security and intelligence services.¹⁷⁴ For the disclosures that do not relate to security and intelligence but to defence and international relations, the disclosure has to be damaging. Yet, the breadth of what constitutes a damaging disclosure in the field of international relations has been criticized as too broad.¹⁷⁵ For all employees, the penalty may include up to two years imprisonment and an unlimited fine.¹⁷⁶ Moreover, similarly to the United States, members of security and intelligence agencies have to sign Non-Disclosure agreements that enable the state to bring civil actions for unauthorized disclosure.¹⁷⁷

¹⁷⁰ Official Secrets Act (n 145), s 1(1)

¹⁷¹ *R v. Shayler* [2002] UKHL 11, [2002] 2 WLR 754 [11, citing white paper *cm 408*, 41]

¹⁷² Official Secrets Act (n 145), s 1(5)

¹⁷³ *ibid* s 1(3)

¹⁷⁴ *ibid* s 1(4). The concept of harm has been criticized for not requiring damage to the national interest, which is more serious than a –perhaps trivial or temporary– prejudice to the work of security and intelligence services. See, Lucinda Maer and Oonagh Gay, ‘Official Secrecy’ (2008) 7, citing Roy Hattersley, Shadow Home Secretary.

¹⁷⁵ Official Secrets Act (n 145), s 3(2), A disclosure is damaging if it endangers, or it is likely to endanger, the interests of the United Kingdom abroad and if it seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad. For a more detailed analysis, see Sandra Coliver, ‘The United Kingdom’s Official Secrets Act 1989’ (2013) <<http://www.right2info.org/resources/publications/national-security-page/uk-official-secrets-act-1989>> 4

¹⁷⁶ Official Secrets Act (n 145), s 10(1)(a)

¹⁷⁷ *Ministry of Defense v. Benjamin Simon Glairé Griffin* [2008] EWHC 1542 (QB), [2008] All ER (D) 38[16], noting that the obligations of the contractual provisions are intended to achieve “the same public policy objectives [with the OSA], in the interests of national security although to be enforced through the remedies available in civil litigation rather than by way of criminal sanctions.”

The secondary disclosures, which may target the press, are penalized if they are, or are likely to be, damaging. Apart from the disclosure not being damaging, another possible defence is the lack of knowledge, or reason to believe, that the information was protected by the Act, or that the information would be damaging.¹⁷⁸

In France, the unauthorized disclosure of classified information is a crime falling under the category of “violations of a fundamental interest of the Nation”. These fundamental interests include “the integrity of its territory, its security, the republican form of its institutions, the means of its defence and diplomacy, the safeguarding of its population in France and abroad, the balance of its natural environment, and the essential elements of its scientific and economic potential and its cultural heritage”.¹⁷⁹ The disclosure of a *secret défense* is punishable, according to the Penal Code, by 7 years imprisonment and a fine of 100 000 euros for a legal possessor of a secret and by 5 years and 75 000 euros for any other individual.¹⁸⁰ There is also no damage test for triggering these sanctions, it suffices that the information is classified. The combination of harsh penalties with the lack of damage test makes the French legal framework exceptionally hostile to any wide disclosures of any classified information.

Furthermore, public employees are bound by the obligation of discretion, which can only be lifted by the explicit permission of the hierarchical authority¹⁸¹ and the violation of which leads to disciplinary sanctions,¹⁸² while the unauthorized disclosure of a professional secret is considered a crime punished by the Penal Code.¹⁸³ However, professional secrecy can be lifted in a number of cases, including “in cases where the law imposes or authorizes the disclosure of secrecy”.¹⁸⁴ Among these cases figures the article 40 paragraph 2 of the Code of Penal Procedure (CPP), which states that “any authority, public officer or official who, in the performance of his duties, acquires knowledge of a crime or offense, shall without delay give notice thereof to the public prosecutor”.¹⁸⁵ However, this obligation of disclosure of crimes (which is also not accompanied by sanctions in case of non-adherence) does not trump the *secret défense* category, which protects the fundamental interests of the Nation, leaving national security whistleblowers unable to make use of it. Indeed, if both provisions have

¹⁷⁸ Official Secrets Act (n 145), s 5(2), (3)

¹⁷⁹ Code Pénal, art. 410-1

¹⁸⁰ Code Pénal, art. 413-10, 413-11

¹⁸¹ Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires, dite loi Le Pors, art. 26

¹⁸² *See*, notably the affaire ‘Pichon’, Conseil d’État, 31 mars 2017, n° 392316

¹⁸³ Code Pénal, art. 226-13

¹⁸⁴ *Ibid* art. 226-14

¹⁸⁵ Code de Procédure Pénale, art. 40 al 2

constitutional grounding (fundamental interests of the nation and investigation of crimes/pursuit of justice), it was already mentioned that it rests upon the legislator to perform the balancing, which has been done through the provisions relating to unauthorized disclosures of classified information, which contain no exceptions for reporting to the Prosecutor. In this sense, *secret défense* could be considered *lex specialis* in relation to the obligation of reporting crimes included in the CPP and its protection, contrary to the article of the CPP, is accompanied by sanctions in case of unauthorized disclosure.¹⁸⁶ Hence, it should not be surprising that secret *défense* presents an obstacle in the disclosure of wrongdoing within national security.

Despite having an ‘Official Secrets Act’ as well, Ireland follows a distinct pattern of prosecution of unauthorized disclosures of classified information, with a more encompassing legal statute but lighter penalties. As it was already explained, all disclosures of official information are criminalized, regardless of whether the discloser is a public employee or any other individual. Only authorization from State authority may render such a disclosure lawful. As an aggravating factor, and apart from the general prohibition described, the Act explicitly prohibits the communication or publication of information that is “prejudicial to the safety or preservation of the state”.¹⁸⁷ This has been interpreted to mean that the crime was committed “in such a way as to endanger specifically the safety or preservation of the State i.e. the fundamental institution which comprises Irish society”.¹⁸⁸ It is not the harm to an interest of the State that is prosecuted, but it is the harm to the State itself, to one of its fundamental organs. Those found guilty for contravening the Act may be sentenced to a fine, six months imprisonment, or both. In the aggravating case of a prejudice to the “safety or preservation of the state” the penalties can be imprisonment for a term not exceeding two years or penal servitude for a term not exceeding seven years.¹⁸⁹ The distinction between the general, broad offence that does not require a damage test and the narrow, aggravating case that requires damage not just to the interests of the state, but to the state itself differentiates the prosecution of unauthorized disclosures in Ireland. The penalties are also less severe when compared to the UK or France.

¹⁸⁶ As is also the professional secret, which trumps the article 40 al 2 of the Code de Procédure Pénale

¹⁸⁷ Official Secrets Act (n 168), s 9(1)(v)

¹⁸⁸ *D.P.P. v. Finn* [1999] IEHC 154 [4]

¹⁸⁹ Official Secrets Act (n 168), s 13(3)

3.1.3.3. *Mechanisms of protection for national security whistleblowers?*

National security whistleblowers in the United Kingdom are not protected through the Public Interest Disclosure Act (PIDA), as the Act explicitly excludes the security, intelligence, and government communication employees from the provisions regarding protected disclosures.¹⁹⁰ Furthermore, the Official Secrets Act did not provide for a public interest defence, as such a provision, according to the government, would make it impossible to achieve maximum clarity in the law and its application.¹⁹¹ The only possible route for disclosure from within the security and intelligence agencies is through previous authorization of the disclosure by the heads of the agency, who decide on the matter after a damage assessment.¹⁹² The refusal of authorization can be challenged by judicial review and by reference to the requirements of the Article of the European Convention on Human Rights,¹⁹³ which is for the courts sufficient for enabling non damaging disclosures.¹⁹⁴ Similarly with the WPA in the United States, this internal process of authorization runs the risk of being the least effective when the abuse disclosed is most crucial.¹⁹⁵ The restricted legal leeway for national security whistleblowing is either reporting to the respective Crown servant or to acquire an official authorization.¹⁹⁶

French law, according to Laurent Pech, “does not recognize the right to disclose classified information for the purpose of denouncing criminal offenses and does not in any way protect against disciplinary and/or criminal prosecution in such a case hypothesis”.¹⁹⁷ Indeed, despite two more recent opportunities to initiate some protection for national security whistleblowers, France has still not institutionalized any channels for disclosures of classified information or

¹⁹⁰ Employment rights act 1996, s 193

¹⁹¹ *R v. Shayler* (n 171) [11, citing white paper *cm 408*, 60]

¹⁹² Official Secrets Act (n 145), s7

¹⁹³ *R v. Shayler* (n 171) [31]

¹⁹⁴ *ibid* [36] “The crux of this case is whether the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to publish is not abused and that proper disclosures are not stifled. In my opinion the procedures discussed above [autorisation and judicial review in case of refusal], properly applied, provide sufficient and effective safeguards [...] I am satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the convention”.

¹⁹⁵ *See*, also the appellant’s contestation in *ibid* [34] that judicial review “was in practice an unavailable means since private lawyers were not among those to whom disclosure could lawfully be made under section 7(3)(a), and a former member of the service could not be expected to initiate proceedings for judicial review without the benefit of legal advice and assistance”.

¹⁹⁶ Official Secrets Act (n 145), s 7(3)

¹⁹⁷ Laurent Pech, ‘Secret de la Défense Nationale’ (2014) 3421 LexisNexis JurisClasseur Communication 1,

any framework of protection for individuals who disclose classified information pertaining to illegal activities, lack of accountability, or grave emergencies.

The first opportunity to install some moderate protection for whistleblowers within national security came with the draft of the *Loi relative au renseignement* (Intelligence Act), which included inserted an article L.855-3 in the Code of Internal Security creating a status for whistleblowers working within intelligence agencies. Introducing a “right to alert”, the provisions would apply to public employees (but not contractors) reporting violations of privacy. This was an important check in a law often criticized for extending the powers of surveillance of the intelligence apparatus. The process of reporting was framed restrictively, allowing reports to the Commission de Contrôle des Activités de Renseignement (CNCTR), which was nevertheless not obligated to transmit the report to the prosecutor. Moreover, no remedy was provided enabling whistleblowers to appeal against a decision of the Commission not to act.¹⁹⁸ However, the provision was amended and excluded from the final version of the law.¹⁹⁹ In spite of its partiality and the strict framework in which it had to operate, the protection for national security whistleblowers would be an important step in keeping the opaqueness of the executive power in check for potential abuses.

The second opportunity was the *Loi relative à la transparence*, which, as it was discussed before, is the highest and most unified standard of protection for whistleblowers in France and is supposed to be instrumental in the increase of transparency and the fight against fraud and corruption. However, according to the law, “facts, information or documents, irrespective of their form or medium, covered by the secrecy of national defence, medical confidentiality or the secrecy of relations between a lawyer and his client are excluded from the alert system defined by this chapter”.²⁰⁰ Therefore, the criminal immunity introduced for whistleblowers in article seven does not apply to national security whistleblowers disclosing classified information. It should be noted that regarding information that is not covered by the category of ‘secret défense’, military personnel is protected following the established procedures.²⁰¹

¹⁹⁸ ‘N° 117 Sénat: Projet de loi relatif au renseignement’ (23 June 2015) <<http://www.senat.fr/leg/tas14-117.html>>

¹⁹⁹ This decision led to an intense argument in the national assembly, with criticisms against the government’s decision, among other things because it was presented as an ‘amendment of precision’ (n.7), Assemblée nationale, ‘Session ordinaire de 2014-2015: Compte rendu intégral’ (24 June 2015) <<http://www.assemblee-nationale.fr/14/cri/2014-2015/20150267.asp>>

²⁰⁰ Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, , art 6

²⁰¹ *ibid* art 15

The Protected Disclosures Act of 2014 in Ireland adheres to the general rule that a disclosure pertaining to the security, the defence, or the international relations of the State is not a protected disclosure, unless it is undertaken in the specified by the Act ways.²⁰² That is, the disclosure is protected if it is made to the employer, to the Minister, or in the course of obtaining legal advice from a barrister, solicitor etc. It is also protected if the whistleblower reasonably holds the information to be true, he or she is not motivated by personal gain, he or she has already made the disclosure in vain, or believes that he or she will be sanctioned by the employer as a result of the disclosure or that the evidence will be shortly thereafter destroyed, and the case is of exceptionally serious nature. In this case, a disclosure to the Disclosure Recipient, who is a judge appointed by the Prime Minister, is permitted and the judge may refer the information for consideration to the relevant public office.²⁰³ These mechanisms of internal reporting may prove to be useful in case of wrongdoing not perpetrated by those at the top of the hierarchy but once more it will most likely prove too restrictive in case of serious accountability leaks. Following the general structure of the very encompassing Protected Disclosures Act, the system of reporting in the public interest within national security, even if it imposes some strict conditions, creates the space for the necessary investigations and corrections that amount to some degree of system reflexivity. The Act confirms that it is at the vanguard of whistleblowing protection, even if there is space for improvement. I will return to these points in Section 3.1.4.3.

²⁰² Protected Disclosures Act 2014, s 18(3)

²⁰³ *ibid* Schedule 3

3.1.4. The quest for democratic secrecy and a protective framework for national security whistleblowers

In this Section I argue that creating a protective framework for national security whistleblowers is a proof of self-reflexion of the national security system, a way to favour system coordination in conditions of functional differentiation, and an integral element of democratic secrecy. In Subsection 3.1.4.1, I challenge some of the main arguments as to why national security disclosures should be treated differently than other disclosures and not enjoy an equivalent protection. Returning to the conceptualization of national security as a system, I support a regulation of national security whistleblowing not unlike its counterpart in regulatory compliance of corporations, in order to prevent wrongdoing and systemic failures or at least create the necessary accountability. In Subsection 3.1.4.2, I discuss how this reform fits into a general concept of democratic secrecy and I invoke the concept of ‘reflexive law’ as both a way of self-restriction of the national security system and a way to create the substratum for a procedural legitimation of national security secrecy. Legitimate democratic secrecy takes then the form of ‘shallow’, as opposed to ‘deep’ secrecy. In Subsection 3.1.4.3, I propose three steps for concretizing the principles of democratic secrecy: Prevention of overclassification, the establishment of systems of internal and external reporting of wrongdoing, involving inter-branch coordination (giving examples of the countries discussed), and expanding freedom of speech rights for *lato sensu* whistleblowers who make public disclosures. This last point will be the topic of the next Chapter.

3.1.4.1. Why treat national security whistleblowing differently?

The rationale for the criminalization and strict punishment of national security disclosures derives from the idea that they produce harm to national security, which means harm to the interests of the state and the nation.²⁰⁴ Moreover, the discussion about their status in criminal and constitutional law is contextualized by a debate between high values, namely security and democracy. According to Benkler, this high-level abstraction obscures the fact “that ‘national security’ is, first and foremost, a system of organizations and institutions, subject to all the

²⁰⁴ For example, according to *R v. Shayler* (n 171) Shayler, [11, citing white paper Cm 408, 41] unauthorized disclosures are harmful because “they reduce public confidence in the services’ ability and willingness to carry out their essentially secret duties effectively and loyally”.

imperfections and failures of all other organizations”.²⁰⁵ This preposition makes the automatic connection between national security disclosures and harm questionable. Indeed, if agencies as important as security and intelligence agencies are also prone to systemic error and wrongdoing doesn’t this potential error or wrongdoing entail a potential harm for the interests of the state? And if so, how can it be empirically tested if the harm inflicted by systemic failure or wrongdoing, covered by the secrecy of national security, is of smaller significance than the potential disclosure of this failure? In other words, the maintenance of legitimacy in the actions of the executive branch, the democratic dialogue about the extent of the government's mandate, the existence of accountability mechanisms that obstruct undue seizures of power are as important interests of the State as its international reputation or its military advantages. This does not of course rule out the possibility of serious harm to state interests caused by unauthorized disclosures, but it warns against an unmeasured, unequivocal criminalization of all disclosures that pertain to national security, simply because they pertain to national security. Besides, calculating the harm inflicted on national interests is understandably difficult and to a certain extent speculative.²⁰⁶ For example, according to Rahul Sagar, "Snowden’s disclosures may have inadvertently served to intimidate Al Qaeda, but they may have also allowed the Chinese to better firewall their plans for the South China Sea".²⁰⁷ At the same time, Snowden's disclosures had an arguably positive impact to at least some of the interests mentioned above relating to the government's reach and to democratic governance.²⁰⁸ The concept of harm is therefore elusive and open to interpretation, rather than an absolute guide to treating national security whistleblowing differently.²⁰⁹

Another reason that is presented for treating national security disclosures differently than disclosures in other domains is that whistleblowers might be wrong in assessing the illegality of the situation they witness due to the nuanced and complicated nature of national security

²⁰⁵ Benkler, ‘A Public Accountability Defense For National Security Leakers and Whistleblowers’ (n 39) 284

²⁰⁶ *Halperin v. Central Intelligence Agency* 629 F.2d 144, [1980] (US Court of Appeals, Columbia Circuit) [149]

²⁰⁷ Sagar, ‘Creaky Leviathan’ (n 36), 83

²⁰⁸ In this I oppose Sagar’s view *ibid* 83, that the decline in trust in government “has been abetted in no small measure by unauthorized disclosures, such as those relating to Vietnam, Iran-Contra, and Iraq, which have eroded the executive branch’s legitimacy”, because the cause of the decline associated with those cases was not the disclosures, but the actions of the executive and the illegitimate secrecy.

²⁰⁹ In that sense, see Geoffrey Stone, ‘On Secrecy and Transparency: Thoughts for Congress and a New Administration’ (2008) 3, according to whom “it is exceedingly difficult to measure in any objective, consistent, predictable, or coherent manner either the ‘value’ of the disclosure to public discourse or the ‘danger’ to national security. And it is even more difficult to balance such incommensurables against one another”.

issues.²¹⁰ I concede that this argument is potent but there are two blind spots: First it does not explain why national security disclosures are treated differently than, say, disclosures pertaining to corruption or regulatory compliance, where the whistleblower might also be wrong in assessing the illegality of the situation. The counterargument here stems from the same understanding of national security as a system of organizations that might fail or foster misconduct. Whistleblowers in domains other than national security are generally protected, as I have shown, when they ‘reasonably believe’ the witnessed behaviour constitutes an illegality, for example fraud. This is a reasonable threshold as one could not expect the whistleblower to be absolutely sure of the legal qualification of the disclosed actions. Second, the argument that whistleblowers might be wrong is more relevant when it applies to public disclosures, where there is no intermediate to potentially act and correct the wrongdoing without causing further damage, and not when the disclosure is directed to a regulatory agency, which, as I have shown, remains the general rule for whistleblowing in the domains where it is actually protected. Moreover, ‘the nuanced and complicated’ nature of national security is an unconvincing argument, to the extent that other domains where whistleblowing protection is robust, such as financial regulation, are not exempt from complications.

Furthermore, it is suggested that the whistleblower, even if he or she is right about the illegality of the reported conduct, does not understand the wider context of the disclosure.²¹¹ This is an example of the application of the ‘mosaic theory’. According to this theory, information that may at first appear insignificant becomes significant when combined with other information, similarly to the pieces of a mosaic. The theory has been supported by US case-law²¹² and it is most often used as a justification for the government's withholding of information from the public.²¹³ Whistleblowers may therefore consider their disclosures to be non-detrimental but if they are seen in the larger context they might be causing serious harm. The problem is that if there is a damage test to decide whether the unauthorized disclosure

²¹⁰ Moberly (n 47) 116

²¹¹ *ibid* 117

²¹² Adherence to the mosaic theory by the courts results in deference to state privilege. *See, Halkin v. Helms* 598 F.2d 1, [1978] (US District Court Columbia), 8 “Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate” and, *Snepp v. United States* 444 U.S. 507, [1980] (US Supreme Court) 512, “When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA - with its broader understanding of what may expose classified information and confidential sources – could have identified as harmful”.

²¹³ Jameel Jaffer, ‘The Mosaic Theory’ (2010) 77(3) *Social Research* 873, 873. *See, also* David Pozen, ‘The Mosaic Theory, National Security, and the Freedom of Information Act’ (2005) 115 *Yale Law Journal* 628

should be criminally prosecuted (as is for example the case in the UK Official Secrets Act for government employees other than the ones employees in intelligence and security agencies) the mosaic theory will almost always give a positive answer. This is because it does not require a necessary connection between the cause (the disclosure) and the effect (the harm) but it deems as sufficient a general connection of events that does not have to be proved and that can be claimed at the discretion of the executive branch. Only the supposition of someone ('a' terrorist) who has a broader overview and who can put things in context to the expense of national security interests is enough to prevent the disclosure.²¹⁴ The problem with the mosaic theory is not that it is not true; on the contrary, precisely because it is true all the time (there always might be a distant connection between seemingly unconnected events) it ceases to be a convincing reason for which to prevent a disclosure. Otherwise, all disclosures, even authorized, would have to be forbidden as only total opacity would prevent the mosaic effect.

By these counterarguments I do not mean to underestimate the importance of national security interests and the legitimate interest in maintaining a level of secrecy. However, I support that national security whistleblowing could be regulated in a way that would resemble its counterpart in the functioning of the markets so as to prevent the perpetuation of wrongdoing and systemic failure within organizations that are indeed important for state interests. This reform should be understood as part of a broader conceptualization of democratic secrecy, whereby national security secrecy, far from remaining unquestioned, is would be harmonized with democratic governance.

3.1.4.2. *Conceptualizing democratic secrecy in the context of public interest disclosures*

In order to conceptualise the conflict between national security secrecy and democracy in a way that it could have a meaningful resolution, it is preferable to refrain from creating a

²¹⁴ Jameel Jaffer, 'The Mosaic Theory' (2010) 77(3) Social Research 873, 874, citing *Center for National Security Studies v. Department of Justice* 217 F.Supp.2d 58, [2002] (US District Court Columbia), where the government refused to release information, contending that disclosure would jeopardize an ongoing investigation, while acknowledging that it could not explain precisely how the investigation would be compromised by the release of the detainees' names. Similarly, in *American Civil Liberties Union v. U.S. Dept. of Justice* 265 F.Supp.2d 20, [2003] (US District Court Columbia) the government refused to release statistics concerning the implementation of the USA PATRIOT Act, contending that their disclosure could allow terrorist organizations to identify "safe harbor[s]" from government surveillance.

dipole of abstract and conflicting values that require the –at least partial– sacrifice of the one for the benefit of the other. Instead, following my analysis of national security as a social subsystem, the question is what institutional design will enable a self-referential system such as national security, which achieves its own reproduction and maximizes its rationality through the code of secrecy, to communicate with other social subsystems according to the requirements of democratic governance.

Following Gunther Teubner’s concept of ‘reflexive law’,²¹⁵ a synthesis of the functionalism of Luhmann’s systems theory and of Habermas’ critical approach, I suggest that the creation of reflexive structures within the social subsystem of national security can facilitate integration and coordination with other subsystems. Furthermore, it can create the substratum for a procedural legitimation of national security secrecy through the materialization of a ‘shallow secrecy’.

In a functionally differentiated society there is no omnipotent agency that can steer society as a whole. This entails a displacement of the mechanisms of social integration and coordination from the level of society to the level of the subsystems themselves.²¹⁶ The social subsystems, apart from completing their function towards the entirety of the social system (in the case of national security formulating and executing decisions that pertain to security, defence, and intelligence) and their performance toward other subsystems (in the case of national security securing the material conditions for the reproduction of state mechanisms), they must also be reflexive toward themselves.²¹⁷ This reflexivity is supposed to function as a type of control mechanism of the subsystem, so that it restricts itself from maximizing its rationality to the point that it ceases to be a suitable component of the environment of bigger systems or other subsystems, which could for instance happen in the example of national security if the system hinders or blocks the processes of legitimation carried out by the political system. Such a development threatens the conditions of reproduction of the subsystem itself. One way the national security system can implement this self-restriction is by institutionalizing limits to its own imposition and production of secrecy. Some examples of how this could be done would be real and efficient processes of internal reporting of wrongdoing, a system of checks that extends to the legislative or the judiciary branches and allows a legal leeway for

²¹⁵ Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239

²¹⁶ Niklas Luhmann, *The Differentiation of Society* (Columbia University Press 1982), 229

²¹⁷ *ibid*

external disclosures, and an internal review and evaluation of the classification system. Reflexive law is envisioned as learning law, aimed at creating semi-autonomous, self-regulating systems that are also observing systems, meaning that they have the capacity to communicate with other systems and develop ways to maximize their efficiency while minimizing their friction.²¹⁸

To the extent that it reflects critical theoretical underpinnings, reflexive law is also envisioned as a contextualized and responsive legal intervention, in line with Habermas' project of 'democratization of social subsystems'. According to Habermas,²¹⁹ post-metaphysical thinking requires legitimation to arise through a discursive rationality of the implicated parts, rather than through universal legitimation structures.²²⁰ This leads to procedural legitimation, whereby the formal justificatory procedures and structures through which the decision-making process is concluded acquire legitimating force themselves. The institutionalization of procedural legitimacy includes the notion of 'organizational democracy', meaning the installation of participatory mechanisms within the various social subsystems.²²¹ Similarly, according to Teubner, "reflexion within social subsystems is possible only insofar as processes of democratization create discursive structures within these subsystems".²²² What form can these discursive structures take within national security? At this point it is important to recall Habermas' insistence on transparency as a quintessential element of the democratic procedure and of discursive structures.²²³ Indeed, how could the implicated parts, which in the case of national security include the public at large, whose safety is at stake, be part of a sufficiently inclusive deliberative process and thusly legitimise the structures of the national security subsystem if they are prevented from accessing the information that is necessary for a rational agreement? At the same time, it is reasonable that some policies remain secret lest they could not be carried out at all.

²¹⁸ Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239 270. *See, also* Niklas Luhmann, 'The world society as a social system' (1982) 8(3) *International Journal of General Systems* 131

²¹⁹ *See, also* Section 2.1.2

²²⁰ Jürgen Habermas, *Between Facts and Norms* (Polity Press, Blackwell Publishers 1996)

²²¹ Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 218) 269

²²² Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 215) 273

²²³ Jürgen Habermas, *Between Facts and Norms* (Polity Press, Blackwell Publishers 1996) 296, "democratic procedure [...] grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed"

The answer to this conundrum and the materialization of the procedural legitimation of national security secrecy is the concept of ‘shallow secrecy’.²²⁴ Shallow secrecy means that citizens are aware of the existence of a secret, even if the precise information is not known to them (it is thus a known-unknown), as opposed to deep secrecy (an unknown-unknown), where even the existence of the secret is hidden.²²⁵ According to Pozen’s more elaborate definition,

“a government secret is deep if a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders’ ignorance precludes them from learning about, checking, or influencing the keepers’ use of the information. A state secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content”.²²⁶

According to Dennis Thompson, “secrecy is justifiable only if it is actually justified in a process that itself is not secret. First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret)”.²²⁷ Along the same line, Heidi Kitrosser highlights that “the Constitution demands that secrets generated by the political branches be shallow and, to make the shallowness meaningful, politically checkable”.²²⁸ That means first, second-order publicity, meaning that the access requirements to the secrets are formulated through a transparent policy, and second a system of checks by the Congress, agencies, and the public.²²⁹ Opinions on what the extent of these checks should be and what precisely constitutes legitimate secrecy may differ, depending on the deference one is willing to show to the executive branch; yet, the idea that deep secrecy cannot be a political and legal principle of a democratic form of government seems to be fundamentally inscribed in constitutional theory.²³⁰ Shallow secrecy is based on the idea that for reasons of efficiency the citizenry may mandate the pursuit of policies and actions of which it is aware

²²⁴ Concept first appeared in Kim L. Scheppelle, *Legal secrets: Equality and efficiency in the common law* (University of Chicago Press 1988), 76

²²⁵ Amy Gutmann and Dennis F. Thompson, *Democracy and disagreement* (Belknap Press of Harvard University Press 1996), 121

²²⁶ David Pozen, ‘Deep Secrecy’ (2010) 62(2) *Stanford Law Review* 257, 274. According to Pozen the level of secrecy must be evaluated according to the following indices: (1) how many people know of the secret, (2) what sorts of people know, (3) how much they know, and (4) when they know, 268-275

²²⁷ Dennis Thompson, ‘Democratic Secrecy’ (1999) 114 *Political Science Quarterly* 181, 185

²²⁸ Heidi Kitrosser, ‘Secrecy and Separated Powers: Executive Privilege Revisited’ (2007) 92 *Iowa Law Review* 489, 494

²²⁹ Kitrosser, ‘Secrecy and Separated Powers’ (n 42)

²³⁰ David Pozen, ‘Deep Secrecy’ (2010) 62(2) *Stanford Law Review* 257 305

only of the outer limits. For example the citizenry may know the existence of intelligence networks and espionage without needing to know the identities of the agents.²³¹ Deep secrecy, on the other hand, “prevents democracy from playing precisely the role for which it was designed: managing hard choices about what to do and how much of it, to protect what, at what cost, to which other values”.²³² Deep secrecy signifies an extreme degree of autonomy of the national security system and the lack of reflexive structures that purport to restrict its expansion. Although there might be cases where it is hard to label the secrecy as shallow or deep, there will also be plenty of cases where indices such as the number and the position of people that know the secret, as well as the extent to which the citizenry can estimate the content of the secret, will clearly point to the one or the other direction. For example, the existence of a counterterrorism program might be a shallow secret, if it refers to targeted operations, and a deep secret, if it involves massive violations of constitutionally protected privacy of ordinary citizens.

National security whistleblowers reporting on wrongdoing and lack of accountability intervene at this juncture between shallow and deep secrecy.²³³ There can be no shallow secrecy that conceals abuses of human rights, illegality, corruption, or other forms of wrongdoing. These are secrets that are autonomously perpetuated by the national security system and that have no legitimacy basis on some form of inclusive deliberation. In the example of a famous national security whistleblower *lato sensu*, Edward Snowden, at least some of his disclosures, such as those of bulk collection programs and of the limitations of the oversight system led by the United States Foreign Intelligence Surveillance Court (FISC) can easily be identifiable as

²³¹ This is a simple and probably consensual example of what constitutes shallow secrecy. Pozen discusses Gutmann’s and Thompson’s invocation of the United States government’s radiation experiments on human subjects during World War II and claims that contrary to their evaluation, this could be considered a shallow secret, because everyone knew that military action meant “devising military tactics to prosecute the war and that the precise content of some tactics would be kept secret to prevent the enemy from gaining an advantage”. Another example that highlights the subjectivity in determining the depth of secrecy is the development of the atomic bomb. Was it a deep or a shallow secret? *See*, Pozen, ‘Deep Secrecy’ (n 226) 272-273.

²³² Benkler, ‘A Public Accountability Defense For National Security Leakers and Whistleblowers’ (n 39) 293, citing Gene Spafford, ‘Security through Obscurity’ <https://www.cerias.purdue.edu/site/blog/post/security_through_obscurity/>. Benkler is referring here to secrecy in general, without making the shallow/deep distinction but, as I explained above, I think not making the distinction at all ignores the fact that national security secrecy may, in its shallow form, be democratically mandated and a necessary code of communication for the system of national security without being detrimental to other functional systems.

²³³ This does not apply to leakers, who by definition (following the ethical-political definition), might disclose shallow secrets (for instance with disclosures that do not necessarily pertain to wrongdoing and misconduct but simply embarrassing information or information that is legitimately secret).

deep secrets, as they exposed illegalities, possible unconstitutionality, and significant flaws in judicial review.²³⁴

Following then the paradigm of reflexive law, five points resurface as far as it concerns national security secrecy and public interest disclosures: 1) The national security system needs to be reflexive in order to secure its own reproduction and coordinate with other functional systems, 2) reflexivity becomes possible only insofar as the subsystem is democratized through the creation of discursive structures, 3) secrecy is democratic insofar as it is shallow, 4) the national security system must develop the discursive structures that restrict the degeneration of shallow secrecy to deep secrecy, 5) these structures include mechanisms through which national security whistleblowers may report on wrongdoing. It is important to note that at this point I do not refer to public disclosures to the wider public (this will be discussed in the next Chapter) and that by whistleblowers I mean, according to the ethical-political definition, persons who report on wrongdoing in the public interest, which by definition includes reporting on deep secrecy. I will now address the more pragmatic ways of achieving this ‘reflexive’ outcome of democratic secrecy, always with the focus on the question of public interest disclosures.

3.1.4.3. Regulating national security disclosures in the public interest

The first way of concretizing democratic secrecy, at least as far as it concerns the disclosures of wrongdoing and illegalities, is through the prevention of deep secrecy, prevention that could take the form of restriction of classification. The issue of overclassification in the US was already mentioned, as was Goitein’s and Shapiro’s point that classification may conceal administrative failures or violations of the law, despite the relevant prohibition of classification for such purposes.²³⁵ There is in fact an absence of mechanisms to ensure compliance with this prohibition, with FOIA litigation and leaks being the only checks

²³⁴ See, the extended discussion by Benkler, ‘A Public Accountability Defense For National Security Leakers and Whistleblowers’ (n 39), 321- 324, who, among other things, supports that the telephony bulk collection program violates the Fourth Amendment.

²³⁵ Elizabeth Goitein and David M Shapiro, ‘Reducing overclassification through accountability’ (2011) 23. The Executive Order 13526 (n 48) bans classification intended to “conceal violations of law, inefficiency, or administrative error,” or to “prevent embarrassment to a person, organization, or agency” [Sec. 1.7(a)].

for overclassification.²³⁶ In addition, even if there was a mechanism that could impose sanctions for improper classification it would be difficult to prove the violation of the prohibition of the executive order, as its focus is on the intent of the classifier. This means that if the classifier “could posit some national security implication to releasing the information—however tenuous, implausible, or secondary—he or she could maintain that hiding wrongdoing was not the intent”.²³⁷ Furthermore, the courts, convinced by the ‘determination’ of the executive to classify the information²³⁸ or by the argument that they lack the expertise to judge if the information was rightly withheld from the public, show deference to the executive and do not challenge classification decisions.²³⁹ The lack of a formal legal procedure to challenge undue secrecy results in an augmentation of *lato sensu* whistleblowing instances. As I will show in the next Chapter, improper classification could be used as a defence for these whistleblowing instances.²⁴⁰

In case prevention fails, there must be in place an efficient system of reporting that involves checks beyond the particular agency, or even the executive power. In that regard, solutions are naturally context-specific. As a general rule, in all the countries examined, neither the Constitutions nor the principles of statute and common law in the UK point to unilateral executive action in the domain of national security absent some form of emergency. The absence of absolute power of the executive branch should suggest a blunting of its regime of secrecy and the possibility for other branches to constitute the ‘second tiers’ for public interest disclosures, following the ‘three-tiered model’ described in Chapter 2.2. In the US, reforms should for example include a reporting instance other than the office of Inspector General, who

²³⁶ David McCraw and Stephen Gikow, ‘The End to an Unspoken Bargain?: National Security and Leaks in a Post-Pentagon Papers World’ (2013) 48 *Harvard Civil Rights-Civil Liberties Law Review* 473, 500. The institution that oversees classification, the Information Security Oversight Office (ISOO), has only limited capacity to oversee all classified products and in any case has no power to impose sanctions for improper classification but may only issue a report to the senior agency official. The agencies’ self-inspection programs also fail to hold employees accountable. Efforts to appoint an overclassification ombudsman have fallen short. Goitein and Shapiro, ‘Reducing overclassification through accountability’ (n 235) 19, 29-30.

²³⁷ Goitein and Shapiro, ‘Reducing overclassification through accountability’ (n 49) 23, citing *ACLU v. Department of Defense* 628 F.3d 612, [2011] (US Court of Appeals, DC Circuit)

²³⁸ *United States v. Aref* 2007 WL 603510, [2007] (US District Court New York), 1

²³⁹ McCraw and Gikow, ‘The End to an Unspoken Bargain?’ (n 236) 499-500, Even though “[T]he courts’ duty to review a classification decision flows directly from FOIA’s general requirement of *de novo* review, and more specifically from the text of Exemption 1 of FOIA, which allows an agency to withhold only such information that is ‘in fact properly classified pursuant to such Executive order’”.

²⁴⁰ Following the claim of the defence in the Drake case. For an overview of the relevant documents, see Federation of American Scientists, ‘USA v. Thomas A. Drake: Selected Case Files’ (2013) <<https://fas.org/sgp/jud/drake/index.html>>.

is appointed by the President, is part of the executive branch, and has been criticized by whistleblowers as little help to their cause and even as a way to identify and punish whistleblowers.²⁴¹ One way to keep the national security system in check would be through Congress,²⁴² which could be a recipient of disclosures, as was for example suggested in the Federal Employee Protection of Disclosures Act of 2005 or in the original Whistleblower Enhancement Act of 2007. At the same time, unlike the recent provisions of the Intelligence Authorization Act of 2014, reforms in favour of whistleblower protection should be accompanied with procedural rights regarding their utilization and especially with the possibility of judicial review. In the UK, a recipient of disclosures could be the Intelligence and Security Committee (ISC) that oversees the work of intelligence agencies. Instead of being limited to a *post facto* review of events, the ISC could develop into a whistleblowing mechanism.²⁴³ Building on the provision of the Justice and Security Act of 2013 that evidence presented in front of the ISC may not be used in civil or disciplinary proceedings unless given in bad faith, the Committee could receive whistleblowing concerns and undertake relevant investigations without significant amendments to the current legislative framework.²⁴⁴ In France, the initial provision within the *Loi relative au renseignement* regarding the reporting to the Commission de Contrôle des Activités de Renseignement (CNCTR) of violations of privacy was a step in a good direction. The ample use of independent administrative authorities in regulation in France (for example the CNCTR and the Commission consultative du secret de la Défense nationale – CCSDN) indicates that this structure could also function as a recipient of disclosures in the public interest. In Ireland, the Protected Disclosures Act of 2014, as I already argued, exhibits the traits of an efficient reporting system that allows for system self-reflexion and correction. The possibility to disclose to the employer, the Minister, in the course of obtaining legal advice, or as a last resort to the Disclosure Recipient meets, to a certain

²⁴¹ See, the Drake case, where allegations were made that the confidentiality of the report was not kept, Jane Mayer, ‘The Secret Sharer: Is Thomas Drake an enemy of the state?’ *The New Yorker* (23 May 2011) <<https://www.newyorker.com/magazine/2011/05/23/the-secret-sharer>>. In another context, it has been claimed by an anonymous whistleblower that reporting to the Inspector General of SEC is “well-known to be a career-killer, Matt Taibbi, ‘Is the SEC Covering Up Wall Street Crimes?’ *Rolling Stone* (17 August 2011) <<https://www.rollingstone.com/politics/news/is-the-sec-covering-up-wall-street-crimes-20110817?page=4>>

²⁴² See, in that sense Lawrence Friedman and Victor Hansen, ‘Secrecy, Transparency, and National Security’ (2012) 38(5) *William Mitchell Law Review* 1610, 1625-1627

²⁴³ Ashley Savage, *Leaks, whistleblowing and the public interest: The law of unauthorised disclosures* (Edward Elgar Publishing 2016) 216

²⁴⁴ Justice and Security Act 2013 Schedule 1, 7(1). For an extended discussion of this proposal, see Savage (n 243) 216-217

extent, the requirement of inter-branch coordination. However, it should be pointed out that the Disclosure Recipient is a judge, or a former judge, who is appointed by the Taoiseach (Prime Minister) for a renewable term of five years. To the extent that this configuration does not create extra-legal bonds of over-dependency between the office of the Disclosure Recipient and the executive branch, it has the capacity to constitute a suitable ‘second tier’.²⁴⁵

At this point, I have to stress that these –feasible– recommendations serve as indications of the possibilities that currently exist within domestic legislation to supplement the current institutional design with reflexive and discursive structures that maintain the democratic character of secrecy and prevent shallow secrecy from becoming deep secrecy through the reporting and handling of misconduct, waste, fraud, or abuse of authority. They are definitely not exhaustive and it is incumbent on national legislators and policy makers to articulate the best proposals for the concretization of a reflexive, learning law that aims at democratic secrecy.

All this concerns the possibility of developing a system of reporting (internal to the agency or external, but not public, meaning the press) that is beneficial both for the whistleblowers themselves and the public interest, democratic governance, and system integration. It does not concern the question of criminal prosecution of unauthorized disclosures to the press. In this case, it has been suggested that the ‘disorderly situation’,²⁴⁶ formed by the strong authority of the government to punish leaks and by the expansive rights of the press to anyway publish them is an advantageous way of system coordination, even if it comes to the expense of doctrinal and theoretical consistency.²⁴⁷ The ‘permissive enforcement’ or ‘permissive neglect’ of leak prosecutions suggested by Pozen as an advantageous and flexible response of the institutional system is informed by a similar tone of pragmatism.²⁴⁸ Indeed, there seems to be in general deep ambivalence within judicial and statutory doctrine about the role of individuals in resisting illegality within their group settings,²⁴⁹ an ambivalence that is expressed and legitimised

²⁴⁵ In this direction, Protected Disclosures Act (n 202) Schedule (3) states that “the Taoiseach may remove the Disclosures Recipient from office, but only for stated misbehaviour or for incapacity”.

²⁴⁶ Alexander M Bickel, *The Morality of Consent* (Yale University Press 1975) 80

²⁴⁷ The idea of ‘disorderly situation’ is expressed clearly in the Pentagon case by Justice Potter Stewart’s distinction between the right of the media to publish and the right of the whistleblower to disclose, which should be restricted by government secrecy laws. *New York Times Co. v. U.S.* 403 U.S. 713, [1971] (US Supreme Court) [730]

²⁴⁸ Pozen, ‘The Leaky Leviathan’ (n 29) 627

²⁴⁹ Orly Lobel, ‘Citizenship, organizational citizenship, and the laws of overlapping obligations’ (2009) 97 *California Law Review* 433, 434

through this kind of conceptualizations that do not break with the current practice. The pragmatism of the ‘disorderly situation’ or the ‘permissive enforcement’ has as a prerequisite in both cases the sacrifice of the individuals who defy immediate authorities. These compromising conceptualizations that are in the final analysis dependent on extra-legal facts, such as the willingness of the whistleblower to disclose despite the lack of legislative protection, should not be confused with reflexive law: They are political solutions and not institutional redesigns. They do not assure democratic secrecy, they merely assure a temporal compromise of conflicting political interests (in the case of the ‘disorderly situation’) and a consolidation of the governmental control of the information flow through the selectivity of prosecutions and the democratic deliberation that this configuration yields (through ‘permissive enforcement’).

The final step then in the direction of an institutional redesign of democratic secrecy, apart from addressing undue secrecy (deep secrecy) and creating a sustainable and efficient system of inter-branch or inter-agency reporting, is to expand freedom of speech rights for whistleblowers who disclosed to the press after all internal means failed them. In some cases, the right of the people to know might signify the threshold for what constitutes the ‘democratic’ in the democratic secrecy. These might be hard cases, where both the first and the second tier of disclosures failed and where the disclosure might entail some harm for national security interests. At the same time, they might be the most crucial cases and the reason why the internal valves did not work was precisely that they exposed systemic abuse and lack of accountability to the highest degree, perpetuated from those highest in hierarchy. The constitutional, under conditions, protection of public disclosures against criminal sanctions could then constitute the ultimate safety valve for maintaining the democratic character of secrecy. In the next Chapter I will discuss the question of public disclosures, the significance of the ‘right to know’, and the notion of a ‘right to leak’.²⁵⁰

²⁵⁰ McCraw and Gikow, ‘The End to an Unspoken Bargain?’ (n 236) 496

3.2. Balancing the right to know, freedom of expression, and national security: Whistleblowing as a counter-institution against undue secrecy

Recognizing that secrecy within national security is not only a constitutive code of communication for the implicated agencies, but that it also serves the legitimate purpose of safeguarding a protected public interest, seems to be framing whistleblowing as a conflict of values and interests. This conflict must then be resolved by resorting to proportionality and balancing, where the civil and human rights of the whistleblower must be weighed against the potential harm to national security. A comparative examination of the jurisprudence and the case law in the United States and in the ECtHR indicates that whistleblowing is indeed conceptualized within the question of subjective rights and their conflicts with public interest. Throughout this Chapter I advocate for an institutional conceptualization of the issue of national security whistleblowing. This means shifting the focus from the subjective perspective of the whistleblower to the social value of the disclosure. Understanding human rights as social and legal counter-institutions that limit the expansive tendencies of social systems indicates that the ultimate value to be protected in cases of unauthorized disclosures of classified information is the democratic control over security politics, as well as an institutional system of rule of law, separation of powers/checks and balances, and political liberalism. The repercussions of this conceptualization lie in the shift from the extent or the meaning of freedom of speech, or the motivation and the good faith of the whistleblower/leaker, to the question of the legitimacy of the secrecy, which in its turn determines the social value of the disclosure. As it emerges from a comparative constitutional analysis, there is a presumption in favour of the right of the people to know about government activities, which dictates that state secrecy must be limited and strictly defined. In general, throughout the Chapter I argue against the idea that national security, because of its sensitive nature, should be conceived as a space potentially ‘beyond-the-law’, where the executive can make evaluations and decisions based on self-developed criteria that do not have at least indirect democratic validation. *Lato sensu* whistleblowing should be protected as an institutional safety valve against such a direction of autonomization of the national security apparatus. However, as I will show, this initial conclusion applies to criminal sanctions in the case of disclosures of illegitimate -deep-secrecy, but in other cases it needs to be further nuanced.

In Section 3.2.1, I discuss the current framing of the legal debate over the protection of whistleblowers and leakers who disclose publicly, presenting the major arguments against and in favour of granting them some form of constitutional protection. I introduce the institutional reframing of the problematics of whistleblowing and I describe how it touches upon the right to know, a foundational democratic principle that requires secrecy to be explicitly defined and restricted to the required minimum for state operations.

In Section 3.2.2, I show how the principle that the limitations to the people's right to know about government's activities must be strictly defined and necessary 'in a democratic society' resonates in international law, US constitutional law, and the case law of the ECtHR. The case law of international jurisdictions may not be systematic enough to allow for general conclusions, but one thing it does indicate is that the right to information may be interpreted as stemming from freedom of expression and restricted only for considerations that are necessary in a democratic society. The right to know also has a place in the American constitutional tradition, through the case law on the right to information and the broader principle of separation of powers. The case law of the ECtHR is important in that it adopts a functionalist perspective of the right to information, underlining that what is essentially protected by the scope of the right is the necessary for democracy public debate. Even if the receiver of the information cannot be the entire public, as is the case in public disclosures of whistleblowers, this interpretation bridges the case law on the right to information with the case law on whistleblowing, as the rationale is always the value of the disclosure for public debate. State secrecy must itself be legitimate in order to constitute a legitimate interference with the right to receive information.

In Section 3.2.3, I discuss the approach adopted by the United States Supreme Court and the ECtHR with regards to the limits of free speech for public employees. In the US, a series of constitutional cases, including *Pickering*, *Connick*, *Garcetti*, and *Lane*, have concretized a balancing test consisting of three requirements for the protection of such speech: a) The obligation of the individual to be speaking as a citizen, rather than as an employee, b) the issue being of public concern, and c) a *stricto sensu* balancing affirming that the interest of the employee to comment upon the topic outweighs the interest of the state in preventing the disclosure. This balancing applies to civil sanctions and not in the case of national security employees, where First Amendment implications have so far been dismissed. The ECtHR, on the other hand, has established a set of criteria for determining the proportionality of governmental interference with employee speech, which have been applied in cases of national security as well. I argue that the Court has progressively been placing increasing emphasis on the criterion of

‘public interest’, proving at the same time unwilling to deny protection to the employee in cases where the subjective requirement of good faith could reasonably be doubted. The focus on the social value of the disclosure makes the ECtHR case law more protective of *lato sensu* whistleblowers than the US case law and leads to the final normative Section.

Building on the ECtHR approach, in Section 3.2.4 I propose a jurisprudential model around four axes: 1) The protection of unauthorized disclosures when they reveal deep secrecy, in order to restore accountability of the executive and to safeguard the rule of rule, the separation of powers, and the right to know, an integral element of democratic governance. 2) The protection of legitimate secrecy through sanctions to leakers, which should nevertheless remain on the level of employment-related sanctions and only in exceptional circumstances, after heavy justification from the government, should they allow for criminal punishment. 3) The minimization of the discretion of the judiciary through a categorization that allows for limited balancing through established criteria, which I analyze further. 4) A disregard for questions of motivation and good faith, focusing instead on the social value of whistleblowing and its function as a counter-institution against undue secrecy.

3.2.1. Framing the legal debate on the expansion of freedom of speech rights for national security whistleblowers

Expanding constitutional protection for national security whistleblowers through freedom of expression is a contested issue both in doctrinal and theoretical studies and in judicial practice. In this Section I discuss the current framing of the legal debate and I suggest a new way of conceptualizing the conflict over whistleblowing. In Subsection 3.2.1.1, I present the major arguments raised within the literature against expanding freedom of speech rights to national security whistleblowers. In Subsection 3.2.1.2, I present the counter-arguments of a strain of scholarship invested in civil rights. In Subsection 3.2.1.3, I attempt to relocate the focus from the question of subjective liberties of national security whistleblowers to the question of their function for democratic governance. Therefore, I propose an institutional – rather than a subjective- reading of the conflict over whistleblowing as corresponding better to the role and the social contribution of whistleblowing, as well as to the requirements of proportionality. In Subsection 3.2.1.4, I suggest that the balance in the evaluation of a criminal statute forbidding the disclosure of classified information should not be between the personal self-fulfilment of the whistleblower and national security interests, but between the illegitimacy of secrecy, triggering the right of the public to know on the hand, and national security interests on the other. This is a necessary first step in constructing the normative proposal for the limits of protection for whistleblowers and leakers that I will develop in the last Section of this Chapter.

3.2.1.1. Arguments against expanding freedom of speech to national security whistleblowers

The first and most straightforward argument against any form of rights-based protection for national security whistleblowers is that their disclosures do not constitute speech. On the contrary, unauthorized disclosures involve classified information, which is government property and therefore they amount to theft.¹ Adopting such a view, the U.S. Court of Appeals, in the already discussed case *United States v. Morison*, found “no First Amendment

¹ This was the position of the US administration in *United States v. Rosen* 445 F. Supp.2d 602, [2006] (US District Court Virginia), referring to the Morison case. See, ‘Government’s Supplemental Response to Defendant’s Motion to Dismiss the Superseding Indictment’ (2006) 22, 29-30

rights...implicated” by his prosecution.² The jurisprudential uncertainty³ in what constitutes ‘speech’ allows for this argument to unfold.

Another argument is that officials of the national security apparatus have waived their freedom of speech rights and that they are bound by professional obligation not to disclose information they acquire while performing their duties.⁴ In other words, the employee engages in a relationship of trust with the government based on the premise of nondisclosure, an obligation he or she wilfully accepts when signing a nondisclosure agreement. In the famous case *Snepp v. United States* the Supreme Court upheld a Non-Disclosure Agreement prohibiting Snepp, a former CIA agent, from publishing anything related to the CIA without prepublication clearance.⁵ The signing of a contract is important, because constitutional rights may be voluntarily waived.⁶

The ‘executive discretion approach’⁷ toward freedom of speech is also structured on the premise of the exclusive legitimacy of the executive branch in steering public policy and determining the public interest. Sagar supports that “officials, reporters, and publishers do not have the knowledge or the legitimacy to decide whether unauthorized disclosures are in the public interest”.⁸ He concedes that these individuals might, in the case of serious wrongdoing, be justified to disobey laws prohibiting unauthorized disclosures and yet, this ‘justified’ action should not be legally condoned. The justification must remain at the level of morality because

² *United States v. Morison* 844 F.2d 1057, [1988] (US Court of Appeals, Fourth Circuit) [1068-1070]

³ Indeed, for example the US Supreme Court has not consistently favoured one legal theory over another. *See*, Frederick Schauer, ‘The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience’ (2004) 117 Harvard Law Review 1765, who argues that the location of the boundaries of the First Amendment is less a doctrinal matter than a political, economic, social, and cultural one.

⁴ *United States v. Aguilar* 515 U.S. 593, [1995] (US Court of Appeals, Ninth Circuit) [606]. A concise summary of this position was pronounced in the case *Boehner v. McDermott* 484 F.3d 573, [2007] (US Court of Appeals, District of Columbia Circuit) [579] “those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information”. In France, see CE, 5 février 2014, n° 371396, the case called ‘Pichon’, where the Conseil supported the view that only the hierarchical authority can relieve a public employee from the obligation of professional discretion. The employee may still report a crime to the Prosecutor and claim in front of a court an abuse of disciplinary sanctions resulting from the obligation of professional discretion.

⁵ *Snepp v. United States* 444 U.S. 507, [1980] (US Supreme Court)

⁶ *See, Johnson v. Zerbst* 304 U.S. 458, [1938] (US Supreme Court), on the waiver of a right to counsel

⁷ Heidi Kitrosser, ‘Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers’ (2015) 56 William & Mary Law Review 1221, 1238

⁸ Rahul Sagar, *Secrets and leaks: The dilemma of state secrecy* (Princeton University Press 2013) 126. Similarly, *see* Harry Kalven, JR, ‘The Supreme Court, 1970 Term’ (1971) 85(1) Harvard Law Review 3-36, 38-353, 211 (arguing that it is not the role of a federal employee -here Ellsberg- to balance the public’s right to know against the harm disclosure would cause).

whistleblowers cannot know the extent to which their disclosures will harm national security and they cannot claim to act on behalf of the citizenry as they are not elected.⁹ This nexus of lack of knowledge and lack of legitimacy makes a powerful argument as it posits unauthorized disclosures in opposition to the principles and institutions of an organised polity, the rule of law, and democratic self-governance.¹⁰ Former US President Barack Obama summed up this position by stating that “if any individual who objects to government policy can take it into their own hands to publicly disclose classified information, then we will not be able to keep our people safe, or conduct foreign policy.”¹¹ Simply acknowledging a right to blow the whistle outside the institutionalized procedures would undermine democratic process and would give individuals the inconceivable –in a democracy– privilege to disrupt government policy.¹²

The argument referring to the lack of knowledge of whistleblowers reflects the contemporary trust in expertise as a response to the complexity of the world.¹³ Whistleblowers cannot properly estimate the harm their disclosures might cause to national security.¹⁴ More interesting is the argument about legitimacy. Whistleblowers, not being elected, cannot determine and decide the content of the public interest. By definition, the public interest is decided by the elected representatives. In this sense, this position resembles the classic positivist view, according to which the ‘exact’ meaning of a norm is a fiction, such that no method of interpretation can be decisive from a scientific point view.¹⁵ It is then the interpretation by the institutional instance of application that has an authentic character and makes law.¹⁶ Similarly, whistleblowers cannot ‘interpret’ the public interest and cannot assess a program’s legality.

⁹ Sagar, *Secrets and leaks* (n 8) 13

¹⁰ According to Gabriel Schoenfeld, *Necessary secrets: National security, the media, and the rule of law* (W.W. Norton 2011) 187, Ellsberg’s revelations constituted an ‘assault on democratic self-governance itself’.

¹¹ Jane Meyer, ‘Snowden Calls Russian-Spy Story “Absurd” in Exclusive Interview’ *The New Yorker* (21 January 2014) <<https://www.newyorker.com/news/news-desk/snowden-calls-russian-spy-story-absurd-in-exclusive-interview>>

¹² Patricia L Bellia, ‘WikiLeaks and the Institutional Framework for National Security Disclosures’ (2012) 121 *Yale Law Journal* 1448, 1505

¹³ See, Aziz Rana, ‘Who Decides on Security?’ (2012) 44(5) *Connecticut Law Review* 1417

¹⁴ According to Stone, public employees have no “First Amendment right to second-guess the classification system”. Geoffrey R Stone, ‘Government Secrecy vs. Freedom of the Press’ (2007) 1 *Harvard Law and Policy Review* 185, 194

¹⁵ Paul Amselek, ‘L’interprétation dans la Théorie pure du droit de Hans Kelsen’ in Stéphane Beaulac and Mathieu Devinat (eds), *Interpretatio non cessat: Mélanges en l’honneur de Pierre-André Côté* (Éditions Yvon Blais 2011) 43

¹⁶ Hans Kelsen, *Théorie pure du droit* (Dalloz 1962) 460. In that sense, see the neo-Kelsenian theory of ‘realist’ interpretation supported by Michel Troper. For example, Michel Troper, ‘Le problème de l’interprétation

3.2.1.2. *Arguments in favour of expanding freedom of speech to national security whistleblowers*

The ‘speaker protective approach’¹⁷ tries to debunk these arguments. Papandrea shows in some length why national security disclosures constitute speech.¹⁸ In particular, according to Post, freedom of speech analysis becomes relevant when the values served by its constitutional protection are implicated.¹⁹ These values do not correspond to abstract acts of communication, but to social contexts that render them meaningful. It is then difficult to argue that national security whistleblowing does not constitute speech, when it relates directly to the operations of government and its possible abuses of power, fitting into what Sunstein names ‘the Jeffersonian conception of freedom of speech’.²⁰

The arguments against the waiver justification focus on the structural consequences of the governmental imposition of curtailed speech rights. Free speech does not exist solely to protect individual autonomy, but also to guarantee a type of liberal government that allows for deliberative processes of the wider public.²¹ Besides, whistleblowing is meant to uncover wrongdoing and illegality. If the utmost aim of the secrecy agreement is to immunize the government against such phenomena, then the purpose of the agreements itself is unconstitutional. In any case, confidentiality agreements, according to the law of contracts, cannot be enforced if they violate public policy.²² As far as it concerns their relationship of trust to the government, employees have overlapping obligations, not only toward their organization, but also to society at large.²³

et la théorie de la supralégalité constitutionnelle’ in Marcel Waline (ed), *Recueil d'études en hommage à Charles Eisenmann* (Cujas 1975) 138

¹⁷ Kitrosser, ‘Leak Prosecutions and the First Amendment’ (n 7) 1243

¹⁸ Mary-Rose Papandrea, ‘Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment’ (2014) 94 *Boston University Law Review* 449, 514-517

¹⁹ Robert C Post, ‘Recuperating First Amendment Doctrine’ (1995) 47 *Stanford Law Review* 1249, 1255

²⁰ Cass R Sunstein, ‘Government Control of Information’ (1986) 74 *California Law Review* 889, 914. According to Kitrosser, there is virtual unanimity over the point that freedom of speech includes a right to convey information and opinion about government. Heidi Kitrosser, ‘Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protection for Leakers of Classified Information’ (2012) 6 *Journal of National Security Law & Policy* 409, 422

²¹ Sunstein (n 20) 915

²² Papandrea, ‘Leaker Traitor Whistleblower Spy’ (n 18) 20

²³ Orly Lobel, ‘Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations’ (2009) 97 *California Law Review* 433, Kitrosser, ‘Leak Prosecutions and the First Amendment’ (n 7) 1246

A similar position on the structural value of freedom of speech is employed in the counter-arguments against the lack of legitimacy of the whistleblowers. According to Kitrosser, “First Amendment rights are grounded not only in their individual interests, but also in their societal value as sources of information”.²⁴ In any case, there should not be a total restriction of public disclosures as, at least occasionally, the public interest might be too important and the disclosures of a particularly serious nature.²⁵ The ‘speaker protective approach’ may concede that the domain of national security belongs to the executive power, but it stills underlines that according to the executive unchecked power over the information flow and unfettered discretion on what is classified would counter the very idea of the Constitution as a limitation to political power.²⁶ Classification by itself is not a sufficient reason for weaker freedom of speech rights. Kitrosser also points to the ‘twin realities’ of overclassification and selective ‘leaking’ from the top of the hierarchy to highlight the discretion of the executive in shaping the information flow and the need to develop the necessary checks that would ensure executive accountability.²⁷ At least, the argument goes, there must be some balancing between the protected interest of national security and the value of the disclosure for democracy and public deliberation.

3.2.1.3. Reframing the debate: Toward an institutional conceptualization of the conflict

Although the social value of whistleblowing is recognized by the ‘speaker protective approach’, both the arguments in favour and against expanding freedom of speech rights to *lato sensu* whistleblowers (and leakers) are framed within the conceptualization of the conflict of a subjective right, the freedom of speech of the whistleblower, with a legitimate state interest, national security. In this section I will show how this framing of the debate is misleading and how the focus should be on institutional designs relative to the functioning of the political system and the subsystem of national security. More specifically, as I already underlined in

²⁴ *ibid* 1244

²⁵ Richard Moberly, ‘Whistleblowers and the Obama Presidency: The National Security Dilemma’ (2012) 16 *Employee Rights and Employment Policy Journal* 51, 137; Michael P Scharf and Colin T McLaughlin, ‘On Terrorism and Whistleblowing’ (2007) 38 *Case W Res J Int'l L* 567, 579-580

²⁶ Kitrosser, ‘Leak Prosecutions and the First Amendment’ (n 7) 1243-1244

²⁷ Kitrosser, ‘Free Speech Aboard the Leaky Ship of State’ (n 20), 428-429

Chapter A, expanding freedom of speech rights for national security whistleblowers should be understood as the ultimate safety valve for maintaining the democratic character of state secrecy.

It has already been established that in the normative approach of Habermas there is a co-originality of public and private autonomy and an ‘equiprimordiality’ of democracy and the system of rights.²⁸ The resulting democratic principle necessitates a discursive process of legitimation, which in its turn depends on the unobstructed flow of information. Hence the societal value of whistleblowing about government wrongdoing and abuse of power. The success of deliberative politics depends on the institutionalization of the deliberative procedures and conditions of communication. The institutionalization of protection against sanctions for whistleblowers would fit this category, because the citizenry needs to know the content of governmental action in order to meaningfully participate in the deliberative processes that produce legitimacy.

From the perspective of systems theory, as adopted in previous chapters, human rights play the role of mechanisms protecting and stabilizing the functionally differentiated society.²⁹ Human rights should then be understood as social and legal counter-institutions against the expansive tendencies of social systems.³⁰ Fischer-Lescano correctly points out that the conflict over whistleblowing should not be conceived as concerning mostly subjective liberties –that would be an oversimplification– but instead it is a conflict over impersonal autonomous spaces.³¹ It is essentially an institutional conflict the resolution of which has profound impact on the functional logic of democratic governance. Teubner hints that institutionalizing whistleblower protection would amount to some form of reflexive law, as the promotion of divergent behaviour in social institutions has the potential of triggering forces of self-correction.³² There is some similarity between this approach and Arendt’s proposal to create some space for forms of civil disobedience within the functioning of public institutions.³³

²⁸ See, Section 2.1.2.2

²⁹ Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (2. Aufl. Duncker & Humblot 1974)

³⁰ Andreas Fischer-Lescano, ‘Putting proportionality in proportion: Whistleblowing in transnational law’ in Kerstin Blome and others (eds), *Contested regime collisions: Norm fragmentation in world society* (Cambridge University Press 2016) 338

³¹ *ibid* 327. See, also the idea of a ‘justification defense’, Eric R Boot, ‘No Right to Classified Public Whistleblowing’ (2018) 31(1) *Ratio Juris* 70.

³² Gunther Teubner, ‘Whistle-blowing gegen den Herdentrieb?’ in Dirk Baecker, Birger P Priddat and Michael Hutter (eds), *Ökonomie der Werte* (Metropolis-Verlag 2013) 39

³³ Hannah Arendt, *Du mensonge à la violence* (Calmann-Lévy 1972) 101

Protection of whistleblowers should then be understood as a legal counter-institution against the expansive tendencies of the national security subsystem. Fischer-Lescano insists that “nothing less is at stake than society’s ability to regain control of security policy”.³⁴

Furthermore, phrasing the conflict as an issue of subjective liberties makes the question of proportionality and balancing much more difficult. Assuming the balance is between the subjective right of the employee to exercise freedom of expression and the legitimate and protected public interest of national security would risk resolving the conflict in an over-deferential way for the executive. According to the proportionality doctrine developed by jurisprudence and case-law, a law that restricts freedom of speech, such as the laws that punish unauthorized disclosures of information for national security employees, can only be constitutional insofar as it is proportional. It is proportional if a) it is meant to achieve a proper purpose, b) if the measures taken to achieve this purpose are both rational and necessary, and c) if the limiting of the constitutional right is *stricto sensu* proportional.³⁵ Assuming for the moment that a law meets indeed the first two requirements (I will come back to the specifics of the proportionality analysis in Sections 3.2.3 and 3.2.4), then what remains to be balanced in the final test of proportionality *stricto sensu* is whether the benefits gained by the implementation of the law outweigh the harm caused to the constitutional right.³⁶ According to Aharon Barak, the normative rule that allows for this balancing between benefits and harms should be determined by the social importance of the benefits of the law in question and the social importance of the particular, *in concreto* harm inflicted upon a constitutional right.³⁷ The weight of the limitation being determined in context, it could be speculated that the harm to freedom of expression will more than likely be presumed to weigh less than the benefit for the public interest of national security. That is because when the subjective, personal interest of the employee to speak up and comment on public policy is taken into consideration, then the harm to limiting this right is restricted to one particular individual and his or her ‘views’ and ‘opinions’.³⁸ Such an approach undermines the true value of whistleblowing, which to be a

³⁴ Fischer-Lescano (n 30) 339

³⁵ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2011) 223

³⁶ *ibid* 340

³⁷ *ibid* 349

³⁸ That was for example the balance the Supreme Court opted for in the case *Pickering v. Board of Education of Twp. High Sch. Dist. 205 Will Cty. Illinois* 391 U.S. 563, [1968] (US Supreme Court) [568]: “The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon

trigger of accountability, sparking and informing public debate and allowing citizens to exercise their communicative power and freedom in a meaningful way. Public disclosures are less about the subjective right of the employee to speak up and more about the collective right of the citizenry to know about abuses of power and to control security policy.

How can this suggested institutional –rather than subjective– framing of the conflict over whistleblowing be legally articulated in a way that would also allow for a better application of the principle of proportionality? I propose that this can be achieved through a connection of whistleblowing with the ‘right to know’ as an essential limitation on state secrecy, which is also a product of the constitutional and internationally recognized right to freedom of expression and information.

3.2.1.4. The right to know as a pillar of democracy and its relation to whistleblowing

The Global Principles on National Security and the Right to Information (“Tshwane Principles”) describe the tension between national security and the right to know as the tension between “a government’s desire to keep information secret on national security grounds and the public’s right to information held by public authorities”.³⁹ Access to information is not only a safeguard against abuse of authority, but it is also a necessary component of democratic governance and of the democratic design of national security policies. According to US Sixth Circuit Judge Damon Keith, referring to secret deportations carried out by the executive branch, “democracies die behind closed doors. [...] When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”⁴⁰

Indeed, the right to know about government conduct and policies is considered by many theoretical accounts a pillar of democracy. Following Alexander Meiklejohn, the right of citizens to obtain and receive information is derived from their status as the sovereign master over the public servants who compose the government.⁴¹ According to this view, the right to

matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees”.

³⁹ ‘The Global Principles on National Security and the Right to Information’ (2013) <<https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>>

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⁴⁰ *Detroit Free Press v. Ashcroft* 303 F.3d 681, [2002] (US Court of Appeals, Sixth Circuit) [683]

⁴¹ See, Alexander Meiklejohn, *Political Freedom* (Harper 1960).

know has a primordial function in a democracy, in comparison with freedom of speech as personal self-fulfillment which is only secondary, because it is through the right to receive information that the citizenry becomes knowledgeable and collective self-government becomes possible. Therefore, insofar as a communication contributes to the public's right to know, it is entitled absolute protection under the first amendment.⁴² Thomas Emerson, another strong advocate of the right to know, approaches the issue slightly differently. Rejecting Meiklejohn's absolute emphasis on the listener (arguing that the First Amendment also protects individual self-fulfillment), he still prescribes a high normative value on the right to know as part of freedom of expression and he still considers democracy to be the decisive theoretical base for this conclusion. In his words, "if democracy is to work, there can be no holding back of information".⁴³ National security, in its vagueness as a concept, should not inhibit the right to know through "criminal or other penalties beyond the area of traditional espionage".⁴⁴ As a general rule, "secrecy in government operations, though sometimes justified, must be held to a bare minimum, and that minimum must be carefully and explicitly defined".⁴⁵

These arguments have gained traction and developed into a contemporary defence of a right to know.⁴⁶ Rana develops in some length the argument that the rise of expertise and institutional specialization has insulated national security from public judgement and deliberation, contrary to democratic exigencies.⁴⁷ Nobel laureate Joseph Stiglitz argues that in democratic societies there is a basic right to know, to be informed about what the government is doing and why.⁴⁸ Based on classic liberal arguments, such as the ones of John Stuart Mill and Jeremy Bentham in favour of transparency and public scrutiny, he presents a series of arguments leading to the duality of transparency's value: transparency justified on instrumental grounds and

⁴² Thomas I Emerson, 'Legal Foundations of the Right to Know' (1976) 1 Washington University Law Quarterly 1, 14

⁴³ *ibid*

⁴⁴ Thomas I Emerson, 'National Security and Civil Liberties' (1982) 9 Yale International Law Journal 78, 93

⁴⁵ *ibid* 87. *See*, also the earlier work of Kent Cooper, according to whom "Congress shall make no law [...] abridging the Right to Know through the oral or printed word or any other means of communicating ideas or intelligence." Kent Cooper, *The Right to Know* (Farrar, Straus & Cudahy 1956), 16

⁴⁶ For a list of academic contributions arguing in favour of the right to know, *see* Meredith Fuchs, 'Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy' (2006) 58(1) Administrative Law Review 131,140

⁴⁷ Security, according to Rana, has transformed from "a matter of ordinary judgement into one of elite skill", Rana (n 13) 1485.

⁴⁸ Joseph E Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life' (Oxford Amnesty Lecture, 27 January 1999) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.594.93&rep=rep1&type=pdf>> 2

transparency as an intrinsic value, resulting from the idea that the public is the true owner of the information and therefore has quasi-property claims on it, which are expressed through the right to know. The connection between right to know and democracy is commonplace among the proponents of the right. “The essence of representative democracy is informed consent”⁴⁹, according to Ann Florini and “FOI [Freedom of Information] is a right of citizenship”, according to Patrick Birkinshaw.⁵⁰ Similarly, Alasdair Roberts argues that information rights, in addition to freedom of expression, are rooted in political participation rights: “the logic suggests that the access right is better understood as a corollary of basic political participation rights, rather than of the right to free expression alone.”⁵¹

Pozen, however, warns against a holistic approach to a right to know. He underlines that the right to know cannot be a right for everyone to know everything at all times and that some limitations, such as the legitimate national security interests, are to be considered.⁵² The content of the ‘right to know’ can then be phrased as the principle that government activity must be transparent, accessible to the citizenry and only in exceptional circumstances, and under conditions that themselves meet the requirement of transparency, can it be secret. Following a similar line of thought, Pozen suggests that if there is one principle that is beyond doubt, at least in American constitutional theory, it is that deep secrecy is illegitimate and therefore there is a corresponding right to know against the operations it has concealed. I will show in the next Section that this -more moderate- conclusion can be extrapolated to the jurisprudence of the ECtHR. It is one thing when members of the public can identify a secret but are denied access to it, as can be the case with FOIA exceptions, including legitimate classification; but it is totally different when they cannot even estimate the content of policies that are decided outside any institutionalized formats and of which only a small bureaucratic elite is aware. In this case, the right to know can often not be materialized by access to information legislation, because the citizenry and civil organizations would not know what information to request, they are totally in the dark. In other cases, the executive might reject information requests simply to avoid accountability. For instance, in 2004, leaks of photographs and other material from Abu

⁴⁹ Ann Florini, ‘The battle over transparency’ in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 3

⁵⁰ Patrick Birkinshaw, ‘Transparency as a human right’ in Christopher Hood and David Heald (eds), *Transparency: The key to better governance?* (Oxford University Press 2006) 56

⁵¹ Alasdair Roberts, ‘Structural Pluralism And The Right To Information’ (2001) 51 *The University of Toronto Law Journal* 243, 262

⁵² David Pozen, ‘Deep Secrecy’ (2010) 62(2) *Stanford Law Review* 257, 305

Ghraib brought the conditions of prisoners to light and revealed serious abuse and violations of human rights.⁵³ Civil organizations had requested these records months before the leak, but their demand was rejected.⁵⁴

Whistleblowing may concretize the right to know of the citizenry in conditions of deep secrecy. In these cases, it cannot be claimed that the balance in the evaluation of a criminal statute forbidding the disclosure of classified information is between the personal self-fulfillment of the whistleblower and national security interests. Instead, it is between the illegitimacy of secrecy, triggering the right of the public to know, and national security interests. In the final Section of this Chapter I will show how this plays an important role in the formalization of a normative proposal on the constitutional protection of whistleblowers. First, I will show that the right to know has a solid basis in international law and in the constitutional traditions of the USA and of European states through their membership to the ECHR.

⁵³ Suzanne Goldenberg, 'Abu Ghraib leaked report reveals full extent of abuse' *The Guardian* (17 February 2006) <<https://www.theguardian.com/world/2006/feb/17/iraq.suzannegoldenberg>>

⁵⁴ Fuchs (n 46), 153-154

3.2.2. The social value of whistleblowing: The right to know against undue secrecy

The principle that the limitations to the right of the people to know about government's activities must be strictly defined and necessary 'in a democratic society' resonates in international law, US constitutional law, and the case law of the European Court of Human Rights. In Subsection 3.2.2.1, I examine some influential cases in international case law regarding the right to know. In particular, I highlight the interpretation of the right to information by the IACtHR, which provides the theoretical basis for an international recognition of a right to know resulting from freedom of expression and restricted only by considerations that are necessary in a democratic society. In Subsection 3.2.2.2, I discuss the place of the right to know in the American constitutional tradition. Despite the courts' deference to national security claims, the First Amendment and its interpretation in the *Richmond Newspapers, Inc. v. Virginia*, the legislation limiting state secrecy, and the broader principle of separation of powers, lead to the conclusion that government secrecy is legitimate under restrictions and that whenever these restrictions are not respected there is a corresponding right to know the government's actions. In Subsection 3.2.2.3, I focus on the case law of the ECtHR, which reads the right to information from a functionalist perspective, underlining that what is essentially protected by the scope of the right is the necessity of informed public debate to a functioning democracy. I proceed to show how this functional approach leads to an institutional conceptualization of the conflict over whistleblowing.

3.2.2.1. A brief examination of the right to know in international case law: The broad understanding of the Inter-American Court of Human Rights

The idea that the right to know represents intrinsic values of liberal democracies is not new in international law. In 1946, the General Assembly of the United Nations emphatically stated that "freedom of information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated".⁵⁵ The Universal Declaration of Human Rights, by stating 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

⁵⁵ UN General Assembly, 'Calling of an international conference on freedom of information' (Resolution 59(I), 14 December 1946)

information and ideas through any media and regardless of frontiers”⁵⁶, seems to be making access to information an integral part of freedom of expression. This formula became later the core of the Article 19 of the International Covenant on Civil and Political Rights. This article seems to reinforce the conclusion that, beyond the mentioned exceptions (respect of the rights or reputations of others and protection of national security, public order, health or morals), access to information, as part of the freedom to *seek* information, should not be obstructed by the State. The question that arises is whether access to information is indeed a subset of freedom of expression and if it is a necessary prerequisite of democratic consent.

The fundamental status of access to information in international law was highlighted in 2006 by the seminal decision of the Inter-American Court of Human Rights *Claude Reyes et al. v. Chile*. According to the Court deciding on the rejected request of an environmental organization for information on the deforestation project of a foreign company, “the “freedom to seek, receive and impart information and ideas” guaranteed by Article 13 of the Convention [the American Convention on Human Rights], includes a right of general access to state-held information”.⁵⁷ The Court put beyond doubt that the right of access to state-held information is an essential part of freedom of expression and it encompasses not only the right of individuals to receive information, but also the state’s positive obligation to provide it. Regarding the objection of the significant harm potentially caused to legitimate state interests (for instance national security), the Court affirmed that the likelihood of disclosure resulting in significant harm should be examined on a case-by-case basis.⁵⁸ Regarding the balancing test, it suggests: “First, information can be withheld only if its disclosure is likely to cause significant harm to one of the legitimate aims specified by law. Secondly, the anticipated harm must be greater than the public interest in disclosing the information—in other words, if a careful balancing of the conflicting interests indicates that there is a prevailing public interest in disclosure, the information should be made public, despite any lesser harms it may cause”.⁵⁹ This balancing exercise, by adopting the standards set by the human rights organization “ARTICLE 19”,⁶⁰ provides a general framework orientated toward maximum disclosure and which can, on a second level, be inclusive of revelations of whistleblowers when the public interest in them

⁵⁶ Universal Declaration of Human Rights 10 December 1948, 217 A (III) (UN General Assembly), art 19

⁵⁷ *Claude Reyes et al v Chile* Series C no 151, [2006] (IACtHR) [93]

⁵⁸ *ibid* [77]

⁵⁹ *ibid* [74]

⁶⁰ The decision cites ARTICLE 19, ‘The Public’s Right to Know: Principles of Freedom of Information Legislation’ (1999)

exceeds the public interest in maintaining governmental secrecy. It is also important to note that the Court does not seem to derive the right to access to information solely from a strictly constructionist interpretation of Article 13 of the American Convention on Human Rights (as in the freedom to “receive” information), but from a more contextualized, structuralist understanding of right to know as an integral part of the democratic societies. The following quotes are striking in that regard: “Whether as part of traditional free expression guarantees or as a basic entitlement in its own right, it [right of access to information] is perceived as an integral and imperative component of the broader right to democratic governance. Indeed, any arguments to the effect that the public should not have a right to know what their government knows and does, subject only to compelling exceptions, smack of authoritarianism”⁶¹ and “if the information is the oxygen of democracy, the right of democratic participation in decisions that affect the welfare of entire communities would be asphyxiated without proper access to information”.⁶² By contextualizing thusly the right of access to information, the Court approaches the idea of an emergence of a right to know, a right to information for reasons of democracy and public participation. Its considerations lead to a conceptualization of the conflict over whistleblowing that is not adequately captured by an invocation of subjective rights. Instead, it is a balancing between the public interest in the disclosure and the anticipated harm to national security.

In *Gomes Lund et. al. v. Brazil* (2010) the Inter-American Court of Human Rights confirmed that a right to access information stems from freedom of expression. Judging on the refusal of Brazilian authorities to disclose information on military operations conducted by the Brazilian army between 1972 and 1975, on the grounds of amnesty laws describing these operations as “political offenses”, the Court held that neither “official secrets,” nor “confidentiality of information,” nor “public interest”, or “national security” may serve as legitimate grounds for the non-disclosure of information about human rights violations required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.⁶³ Moreover, by affirming that “all persons...have the right to know the truth [about human right violations]”,⁶⁴ the Court confirms that the recipient of the right to know is the general public and that, when it concerns human rights violations (which rest in

⁶¹ *Claude Reyes et al v Chile* (n 57) [40]

⁶² *ibid* [52]

⁶³ *Gomes Lund et al v Brazil* Series C No 219, [2010] (IACtHR) [202]

⁶⁴ *ibid* [200]

the sphere of deep secrecy), it is placed on a higher normative ranking in the balancing between different aspects of the public interest. Despite adopting a more cautious argumentation, it still links the right to information with democracy⁶⁵ and with the principle of maximum disclosure, stating that “the limitations imposed must be necessary in a democratic society and oriented to satisfy an imperative public interest”.⁶⁶

A more prudent recognition of the right of access to information held by public bodies as part of freedom of expression came from the UN Human Rights Committee in *Toktakunov v. Kyrgyzstan* (2011), regarding the rejected request by Mr. Toktanukov by the Ministry of Justice for information on prison population, which was classified as top secret. Adopting a more moderate position, the Committee considers that “the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output.”⁶⁷ Reflecting the text of the ICCPR itself, the restrictions on the right must be (a) according to law, and (b) necessary (c) to protect a legitimate interest. This recognition of the right of access to information refrains from broadening the scope and potential implications of the right by connecting it with democratic deliberation and public debate.⁶⁸ The result is a less flexible and evolutive right, with roots only in the textual dimension of the Covenant. This is what Committee member, Mr. Gerald L. Neuman, insightfully highlights:

“I believe that the right of access to information held by government arises from an interpretation of Article 19 in the light of the right to political participation guaranteed by Article 25 and other rights recognized in the Covenant. It is not derived from a simple application of the words “right . . . to receive information” in Article 19(2), as if that language referred to an affirmative right to receive all the information that exists. [...] Too often this essential right has been violated by government efforts to suppress unwelcome truths and unorthodox ideas. Sometimes governments accomplish this suppression directly by blocking communications transmitted through old or new technologies. Sometimes they punish citizens who possess forbidden texts or who receive forbidden transmissions [...] The traditional right to receive information and ideas from a willing

⁶⁵ The Court cites General Assembly OAS, ‘Access to Public Information: Strengthening of Democracy’ (AG/RES. 2514 (XXXIX-O/09), 4 June 2009)

⁶⁶ *Gomes Lund et al v Brazil* (n 63) [229]

⁶⁷ *Toktakunov v Kyrgyzstan* Communication No 1470/2006, [2011] (UN Human Rights Committee) [7.4]

⁶⁸ See, however, UN Human Rights Committee, ‘General Comment No. 34’ (2011) <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, released a few months later, which highlights the importance of public debate, especially regarding public figures and institutions [34,38]

speaker should not be diluted by subsuming it in the newer right of access to information held by government”.⁶⁹

A minimum right of access to governmental information, as it seems to be advocated in this case by the UN Committee, offers limited potential for possible connections with the public’s right to know in the event of whistleblowers’ revelations of public interest. The lack of the ‘necessary-in-a-democracy’ factor in the balancing will result in the legitimate exceptions, like national security, prevailing consistently. In such a schema, there is essentially no limit set by proportionality as to how much the law can restrict the right to information, as long as it also protects a legitimate interest.

The right of access to information is thus not necessarily synonymous with a more general right to know. It depends upon the interpretation undertaken by the Courts to outline the sources and limits of this right. The stark contrast of the reasoning of the Inter-American Court of Human Rights is revealing. Its audacious interpretation of the right to information provides the basis for an international recognition of a right to know resulting from freedom of expression and restricted only for considerations necessary in a democratic society. This line of thought, occasionally advanced by national and international jurisdictions,⁷⁰ including –although not without nuances– the ECtHR, constitutes the basis for a jurisprudence protective of whistleblowing at least in cases of deep secrecy.

3.2.2.2. *The more minimalistic understanding of the right to know in the United States*

It has been argued that the right to know is a constitutional right enshrined in the US tradition, including the right to acquire information from willing, or unwilling government

⁶⁹ *Toktakunov v Kyrgyzstan* (n 67), Individual opinion by Committee member, Mr. Gerald L. Neuman, (concurring).

⁷⁰ Other prominent examples include: In an often-cited judgement of 1982, the Indian Supreme Court held that “the concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression Disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands”. *S.P. Gupta v President of India and Ors* AIR 1982 SC 149, [1982], [234]

Adopting a similar perspective, the Constitutional Chamber of the Supreme Court of Costa Rica held that “the right to information ... implicates the citizens’ participation in collective decision-making, which, to the extent that freedom of information is protected, guarantees the formation and existence of a free public opinion, which is the very pillar of a free and democratic society”. *Navarro Gutiérrez v Lizano Fait* 2002-03074, [2002], as translated in the 2003 Report of the Special Rapporteur for Freedom of Expression, 161.

sources.⁷¹ Apart from the arguments that the right to know has direct affinity with the constitutional right to freedom of speech presented in the previous section, the legislative tradition of the US indicates that state secrecy must be limited and that there is at least a minimal right to know which opposes undue secrecy.

The United States pioneered in the movement toward freedom of information with the FOI Act of 1966 (FOIA). FOIA, being introduced in an era of civil rights activism, expresses the structural elements of the main approaches regarding transparency: The need to control state secrecy, illustrated by the power of scrutiny delegated to the Congress, and the liberal, individualistic approach of *ad hoc* solutions to particular problems. In the 1970s the cultural shift in favour of government openness was institutionalized in the passage of FOIA amendments and the Foreign Intelligence Surveillance Act (FISA). These reforms allowed for greater access to government information and restricted the discretion of the executive to function in secrecy. The basic purpose of the FOIA Act reflected a “philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language”.⁷² FISA established *ex ante* mechanisms of independent control in order to regulate surveillance practices. Most importantly, intelligence officials needed henceforth to acquire a warrant from the special FISA court before initiating any form of surveillance on American citizens.⁷³ The OPEN Government Act of 2007, amending the FOIA, gives some theoretical insight on the recognition of the importance of access to information. According to the Act, “Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the fundamental ‘right to know’”.⁷⁴ This refers to the right of access to information without being obliged to demonstrate a legal interest, but it also reinforces the idea that the relevant provisions are based on the fundamental principle of a right to know, which prevails unless rightfully and legitimately limited.

⁷¹ David M Ivester, ‘The Constitutional Right to Know’ (1977) 4 Hastings Constitutional Law Quarterly 109, 109

⁷² *Dep’t of the Air Force v. Rose* 425 U.S. 352, [1976] (US Supreme Court) [360] (quoting S. REP. NO. 89-813)

⁷³ 50 U.S.C § 1802(b)

⁷⁴ OPEN Government Act of 2007 2007, Section 2(6)

These Acts may have aimed to open agency action to public scrutiny and to impose a system of control for surveillance practices, but they neither restricted secrecy to a minimum, nor did they establish a general right to know which could always be invoked. First, the right to access to information is not absolute but depended on the existence of an exemption, the first of which is properly classified information.⁷⁵ In spite of the 1974 amendments designed to empower *de novo* judicial review of classification decisions, in most cases involving national security courts grant the government summary judgement without inspecting the requested records in camera.⁷⁶ Second, FOIA's nature as a request-driven, procedural form of transparency, which invites corporate capture,⁷⁷ combined with the fact that its content becomes irrelevant where government is traditionally more opaque, leads to the conclusion that it "ultimately serves to legitimate the lion's share of government secrecy while delegitimizing and debilitating government itself".⁷⁸ FISA's functioning has also been far from perfect, with judges deferring to executive policies and with the executive systematically violating the limits placed on these policies.⁷⁹

Yet, despite the formal and practical shortcomings of these state secrecy related Acts, their mere existence highlights that the normative orientation of the US constitutional framework is towards government openness, a restrained executive, and an informed and deliberating public. According to Pozen, "FISA and FOIA are the closest thing we have to a constitutional

⁷⁵ 5 U.S.C § 552(b)(1)(9). The exemptions are: (1) properly classified information pertaining to national defense or foreign policy, (2) internal agency personnel information, (3) information exempted by other statutes, (4) trade secrets and other privileged or confidential financial or commercial information, (5) agency memoranda, (6) personnel, medical, and other files the disclosure of which would interfere with personal privacy, (7) certain categories of law enforcement investigation records or information, (8) reports from agencies responsible for the regulation of financial institutions, and (9) geological and geophysical information.

⁷⁶ As an indicative example, *see* the syllogism of the court in *Hayden v. NSA*, according to which evaluating the agency's argument that the requested revelation would threaten the agency's mission, "is precisely the sort of situation where Congress intended reviewing courts to respect the expertise of an agency; for us to insist that the Agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review." *Hayden v. NSA* 608 F.2d 1381, [1979] (US DC Circuit) [1388]

⁷⁷ *See*, Margaret B Kwoka, 'FOIA, Inc.' (2016) 66 Duke Law Journal 1361, 1380 "commercial requests represent the overwhelming majority of all requests received".

⁷⁸ David Pozen, 'Freedom of Information Beyond the Freedom of Information Act' (2017) 165 University of Pennsylvania Law Review 1097 1100. An alternative design is affirmative disclosure requirements enforced by ombudsmen or inspectors, 1107.

⁷⁹ *See*, Snowden's revelations regarding the malfunctioning of the FISA oversight, Spencer Ackerman, 'Fisa court order that allowed NSA surveillance is revealed for first time' *The Guardian* (19 November 2013) <<https://www.theguardian.com/world/2013/nov/19/court-order-that-allowed-nsa-surveillance-is-revealed-for-first-time>>

amendment on state secrecy”.⁸⁰ They indicate a minimalistic, but still relevant understanding of the right to information by reiterating that government transparency must be the guiding norm and state secrecy must be limited to a well-defined exception.

Contrary to the rise of access to information legislation in the 1970s, the Supreme Court made repeatedly clear that the government had no positive duty to provide the press with information that was not available to the public.⁸¹ The lack of constitutional status of the right of access to information was highlighted by the Court in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). Despite the strong protection of freedom of expression under the US Constitution, the Court denied that this extends to the right of access to information. According to the Court, “there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information” and “the public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”⁸² Therefore, “neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control”.⁸³

In complete opposition to these developments, *Richmond Newspapers, Inc. v. Virginia* (1980), a case involving the challenge from two reporters of a judge's action to close a trial to the public and the media, provided a different interpretation of the First Amendment. In this case, the Supreme Court recognized that freedom of speech plays a structural role in requiring an open government. By claiming that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing”⁸⁴, the Court underlined the importance of informed consent. The purpose of the First Amendment is to assure “freedom of communication on matters relating to the functioning of government”.⁸⁵ More importantly even, the “First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock

⁸⁰ Pozen, ‘Deep Secrecy’ (n 52) 314

⁸¹ *Pell v. Procunier* 417 U.S. 817, [1974] (US Supreme Court), *Saxbe v. Washington Post Co.* 417 U.S. 843, [1974] (US Supreme Court)

⁸² *Houchins v KQED, Inc.* 438 U.S. 1, [1978] (US Supreme Court) [14]

⁸³ *ibid* [15]. *See*, however the dissenting opinion, according to which “[t]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution”. [30]

⁸⁴ *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555, [1980] (US Supreme Court) [572]

⁸⁵ *ibid* [575]

of information from which members of the public may draw”.⁸⁶ The right to receive information and ideas is guaranteed through freedom of speech.⁸⁷

However, the Court has declined to decide a right of access case since 1986.⁸⁸ The courts have exhibited a reliance on the capacity of political processes to force government disclosure and have generally proven unwelcoming to the recognition of the constitutionality of a right to know.⁸⁹ The seminal case *Richmond Newspapers* that seemed to underscore the constitutional nature of the right to access by interpreting freedom of speech as including freedom to receive information did not find its historical continuation. Furthermore, its unreconciled break with the previous case law has left lower courts in confusion about whether they should apply the *Richmond Newspapers* judgement in cases beyond judicial proceedings, where the case originally applied.⁹⁰ Therefore, there is an ambiguity regarding the existence and the potential extent of the right to know.

Yet, the problem seems to be less in the formal rule-setting and more in the reluctance of the courts to challenge the executive’s discretion in determining the outer limits of national security. The First Amendment, along with the interpretation of *Richmond Newspapers*, together with the legislation limiting state secrecy and the broader principle of separation of powers,⁹¹ lead to the conclusion that government secrecy is legitimate under restrictions and that whenever these restrictions are not respected there is a corresponding right to know of government’s actions. Papandrea rightly highlights that “[h]istory has demonstrated that without an enforceable right to know about government activities, the executive branch is likely to reveal only the information that serves its purposes, whatever they may be”.⁹² The more moderate (in relation to the rulings of the IACtHR for example) status of the right to know in

⁸⁶ *ibid* [575-576]

⁸⁷ *ibid*

⁸⁸ Mary-Rose Papandrea, ‘Under Attack: The Public’s Right to Know and the War on Terror’ (2005) 25(1) *Boston College Third World Law Journal* 35, 47

⁸⁹ *See*, Antonin Scalia, ‘The Freedom of Information Act Has No Clothes’ (1982) 6 *Regulation* 14, 19 “This is not to say that public access to government information has no useful role-only that it is not the ultimate guarantee of responsible government, justifying the sweeping aside of all other public and private interests at the mere invocation of the magical words “freedom of information””.

⁹⁰ Papandrea, ‘Under Attack’ (n 88) 69

⁹¹ *See*, in particular the power of Congress to investigate other branches, *McGrain v. Daugherty* 273 U.S. 135, [1927] (US Supreme Court). According to Pozen, “[i]f Congress has a constitutional right and ‘duty’ to inquire into virtually every last thing the executive does, it cannot also be the case that the executive has a right to prevent Congress from learning where to look” Pozen, ‘Deep Secrecy’ (n 52) 321

⁹² Papandrea, ‘Under Attack’ (n 88) 36

the United States retains, despite the reluctance of the courts to enforce it, the normative function of a counter-institution to undue secrecy.

3.2.2.3. *The right to know and the limits of state secrecy derived from freedom of expression in the ECtHR case law*

In the European context, the question of the status of a right to know remains performe, to a certain extent, a comparative question. Although the Charter of Fundamental Rights of the European Union,⁹³ entered into force in 2009 with the Treaty of Lisbon, attempts to partially harmonize questions of rights, it is only applicable when EU law is implemented. In any other context, the protection of fundamental rights is guaranteed under the constitutions of the respective states or under the European Convention of Human Rights (ECHR).

The ECHR is important not only due to its transnational application and its eventual superiority to national ordinary legislation,⁹⁴ but also because its interpretation by the European Court of Human Rights (ECtHR) profoundly influences the interpretations of national courts regarding the fundamental rights guaranteed by their constitutions. Freedom of expression, a fundamental first generation civil right, is protected under all the constitutions or the constitutional traditions of EU member states and its interpretations are necessarily different. Yet, since all Member States are also contracting parties to the ECHR, the different interpretations of freedom of expression are not detached from the interpretation of the ECtHR. According to the German Federal Constitutional Court, deciding on the *Görgülü* case, the Convention can, indeed, “influence the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual’s fundamental rights under the Basic Law”.⁹⁵ In other words, to the

⁹³ See, EU Charter of Fundamental Rights, Article 11 on freedom of expression and information.

⁹⁴ For an overview of the classification of national constitutional provisions regarding the ECHR, see Giuseppe Martinico, ‘Is the European Convention Going to Be ‘Supreme’?: A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ (2012) 23(2) European Journal of International Law 401

⁹⁵ BVerfG, *Görgülü*, 2 BvR 1481/04, Order of 14 October 2004 [32]

extent that the interpretation undertaken by the Strasbourg Court is not more restrictive than the one guaranteed under the Basic Law, it constitutes a powerful, yet not binding, indication of the way the particular right should be interpreted. Based on the principle of *Völkerrechtsfreundlichkeit*—openness to international law—the relationship between the jurisprudence of the Federal Constitutional Court on the fundamental rights guaranteed by the German Basic Law and the ECHR is one of dialogue.⁹⁶ The ECHR has thus “a quasi-constitutional influence for the purpose of the application of most of the Basic Law’s fundamental rights”.⁹⁷ This reflects the prevalent idea in legal and political theory that “transnational human rights and constitutional rights do not stand in contradiction to one another – even in the case of significant divergences – but rather should be seen as engaged in a *reflexive and iterative hermeneutic*”.⁹⁸

The ECHR consecrates freedom of expression in Article 10.⁹⁹ The ECtHR was initially reluctant to acknowledge the right to know as part of freedom of expression. Although it would often concede to individual demands for access to information for considerations of protection of private or family life, it would deny that freedom of expression entails a right to access to governmental information on behalf of individuals. In *Leander v. Sweden* (1987), the Court interpreted narrowly the freedom to receive information, as only prohibiting a government from restricting a person from receiving information that others wish or may be willing to impart to him.¹⁰⁰

⁹⁶ Eirik Bjorge, ‘National supreme courts and the development of ECHR rights’ (2011) 9(1) *International Journal of Constitutional Law* 5, 26

⁹⁷ Philipp Cede, ‘Report on Austria and Germany’ in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of the ECHR and EU laws: A comparative constitutional perspective* (Europa Law Pub 2010) 6

⁹⁸ Seyla Benhabib, ‘The new sovereigntism and transnational law: Legal utopianism, democratic scepticism and statist realism’ (2016) 5(1) *Global Constitutionalism* 109, 112

⁹⁹ ARTICLE 10 – Freedom of Expression

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

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

¹⁰⁰ *Leander v. Sweden* 9 EHRR 433, [1987] (ECtHR) [74]. The Court reiterated this position in *Gaskin v United Kingdom* 12 EHRR 36, [1989] (ECtHR) and in *Guerra and Ors v. Italy* 26 EHRR 357, [1998] (ECtHR).

A shift in the position and the reasoning of the Court took place in 2009 in the case *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*.¹⁰¹ Deciding on a complaint of the Hungarian Civil Liberties Union against the decisions of the Hungarian courts denying it access to the details of a parliamentarian's complaint pending before the Constitutional Court, the ECtHR ruled that social watchdogs have an Article 10 right to access state-held information, in order to allow for democratic debate over a matter of legitimate public concern. The Court states that “the public has a right to receive information of public interest”.¹⁰² After restating the conclusions of the Leander case, the Court highlighted that it “has recently advanced towards a broader interpretation of the notion of ‘freedom to receive information’¹⁰³ and thereby towards the recognition of a right of access to information”.¹⁰⁴ Regarding the identity of the applicant, the Court is satisfied that the purpose of the applicant's activities was to inform public debate.¹⁰⁵ The functional reading of the right to information, meaning its connection with and protection depending on its effect on public deliberation, underlines that what is essentially protected is the essential value of public debate to the democratic processes. Not the request of an organization *per se*, but the function it fulfils in democratic societies. Although the ECtHR did not recognize a general right to know, it highlighted that in certain situations, for considerations of democracy, public authorities should not impede the flow of information, as denying access to information of public interest could be tantamount to a form of censorship.¹⁰⁶ This decision was welcomed by the European Commission For Democracy through Law (‘the Venice Commission’) as a “landmark decision on the relation between freedom to information and the...Convention”.¹⁰⁷

The Court revisited the question of the right to receive information in the context of *Magyar Helsinki Bizottság v. Hungary* (2016) concerning the rejection by the Hungarian police of an access to information request. In examining the scope of access to information under Article

¹⁰¹ See, also the cases *Kenedi v. Hungary* App no 31475/05, [2009] (ECtHR), *Österreichische vereinigung zur erhaltung, stärkung und schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen grundbesitzes v. Austria* App no 39534/07, [2013] (ECtHR), *Youth Initiative for Human Rights v. Serbia* App no 48135/06, [2016] (ECtHR)

¹⁰² *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary* 53 EHRR 3, [2009] (ECtHR) [26]

¹⁰³ See, *Sdruženi Jihočeské Matky v la République tchèque* App no 19101/03, [2006] (ECtHR)

¹⁰⁴ *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary* (n 102) [35]

¹⁰⁵ *ibid* [27]

¹⁰⁶ *ibid* [36]

¹⁰⁷ European Commission For Democracy through Law, ‘Opinion No 458/2009 on the Draft Law Obtaining Information of the Courts of Azerbaijan’ (14 December 2009)

10, the Court linked the right to receive information with the nature of the information as of public interest. More specifically, the need for disclosure exists where “disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large”.¹⁰⁸ The Court proceeded in outlining a ‘public interest’ test:

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public’s thirst for information about the private life of others, or to an audience’s wish for sensationalism or even voyeurism. [...]

163. In this connection, the privileged position accorded by the Court in its case-law to political speech and debate on questions of public interest is relevant. The rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such expressions [...], likewise militates in favour of affording a right of access under Article 10 § 1 to such information held by public authorities.

The elements of the ‘public interest’ test are: a) Information that relates to topics that affect the well-being of the community, b) information capable of generating controversy over social issues, c) exclusion of sensationalism and information of a personal nature, regardless of the ‘interest’ it may spark. The Court connects the right to receive information with freedom of expression in order to safeguard public deliberation on topics of public interest. Even though the Court refers only to the role of the press and social ‘watchdogs’ in “imparting information on matters of public concern”¹⁰⁹, it is because of their function in a democracy that their actions receive protection. This functional reading of the right to information and its connection with public interest can potentially be used to encompass the disclosures of whistleblowers on topics of public interest.

Any interference with freedom of expression, as I will show more extensively in Section 3.2.3.2 must be ‘necessary in a democratic society’, meaning proportionate. As far as it concerns the right to know versus state secrecy, that means that state secrecy must be shallow

¹⁰⁸ *Magyar Helsinki Bizottság v. Hungary* App no 18030/11, [2016] (ECtHR) [161]

¹⁰⁹ *ibid* [167]

and legitimate, in order to justify the obstruction of public debate. The Court made this clear in the case *Stoll v. Switzerland* (2007), on the publication of confidential documents regarding the way Swiss government would conduct negotiations with the World Jewish Congress over wartime assets of Holocaust victims held in Swiss banks. Even though the criminal sanctions over the publication were imposed on the journalist and not on the leaker, this is an important case regarding the limits of state secrecy according to the ECtHR. The Court acknowledged that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest”.¹¹⁰ The Court also affirmed the recognition of a right to know as an integral part of the democratic process in cases of deep secrecy: “Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature”.¹¹¹ Interestingly, the Court made reference to the IACtHR case *Claude Reyes et al. v. Chile* discussed above in order to stress the importance of disclosure of State-held information for public deliberation.¹¹² In this case, the public’s interest in being informed had to be weighed against another public interest, which was the search for a satisfactory solution to the issue of unclaimed funds. The documents were indeed of public interest and able to contribute to public debate. Yet, it is also vital for the smooth functioning of diplomatic services to be able to exchange confidential or secret information.¹¹³ While confidentiality cannot be protected at any price, in this case the interest in maintaining it outweighed the public interest in the documents and, especially taking into consideration the lenient penalties, the interference with freedom of expression was judged compatible with article 10.¹¹⁴ In other words, in cases where secrecy is legitimate, freedom of expression is rightfully limited, without a corresponding right to know.

From the combination of the case law on right to information and on state secrecy, one common principle can be discerned: Public deliberation is of foundational importance for democratic societies and therefore, as far as it concerns matters of public interest, the rule should be disclosure and the right to be informed, while state secrecy may constitute a legitimate interference only when itself is legitimate. Even if the right to information is restricted in the current interpretations to specific applicants and not the wider public, the goal is clear – and that is to protect democracy and reinforce public deliberation. This functional

¹¹⁰ *Stoll v. Switzerland* App no 69698/01, [2007] (ECtHR) [106]

¹¹¹ *ibid* [110]

¹¹² *ibid* [111]

¹¹³ *ibid* [126]

¹¹⁴ *ibid* [129], [162]

approach leads to an institutional conceptualization of the conflict over whistleblowing. Only where secrecy is shallow and legitimate, like in *Stoll v. Switzerland*, can the right to information be curtailed and subsequently whistleblowing potentially sanctioned and even criminalized. Suppose for instance that in the case *Magyar Helsinki Bizottság v. Hungary*, where the Court ruled that the authorities violated Article 10 by not providing the requested information, that a police officer, recognizing the public-interest character of the information sought, exposed the information. In this case, I suggest, the whistleblower materializes the right to know of the citizenry against undue secrecy, which means he or she *functions* as the press or an NGO would by imparting the relevant public-interest information. This paves the way for my normative suggestion regarding the resolution of whistleblowing conflicts that I will elaborate in Section 3.2.4. Before this normative section, I will discuss the current balancing exercises featuring freedom of expression in the protection of government whistleblowers in US and in the ECtHR.

3.2.3. The current balancing test for government and national security whistleblowers in the subjective liberties paradigm

In this Section I investigate the current balancing tests in the U.S. and in the ECtHR. In Subsection 3.2.3.1, I discuss the U.S. case law, which focuses on the balancing between the freedom of speech of employees and the interest of the government in promoting the efficiency of public services, occasionally through secrecy. In the aftermath of a series of important constitutional cases, including *Pickering*, *Connick*, *Garcetti*, and *Lane*, the balancing test, in order to be favourable to employees, involves a) the obligation to be speaking as a citizen, rather than as an employee, b) the issue being of public concern, and c) a *stricto sensu* balancing affirming that the interest of the employee to comment upon the topic outweighs the interest of the state in preventing the disclosure. I explain that this test leaves many points open to contestation and does not prove sufficiently protective of whistleblowers, even less so when they disclose wrongdoing internally. National security matters render the invocation of freedom of speech even more difficult, ruling out the possibility for balancing. This may be attributed to freedom of speech being confined in a subjectivist reading that foregoes the social value of the information disclosed by the whistleblowers. In Subsection 3.2.3.2, I examine the ECtHR case law on freedom of speech of civil servants. In *Guja v. Moldova* the Court established a set of criteria for determining the proportionality of governmental interference. Since then, by accentuating the importance of the criterion of public interest and by undermining the most clearly subjective criterion, good faith, the Court seems to be moving toward an objectivist-institutionalist reading of whistleblowing, taking into consideration its social value. In several of its decisions on whistleblowing, similarly to its case law on the right to information, the Court has adopted a functionalist reading of freedom of expression, basing its decisions on the importance of the disclosed information for public debate. Therefore, the ECtHR case law in its quest to protect democratic deliberation presents itself as more favourable for whistleblowers than the U.S. case law, which focuses still on the subjective liberty of the employee speaking as citizen.

3.2.3.1. Balancing in the United States

3.2.3.1.1. Balancing for government employees in general

The seminal case establishing the basis upon which the modern American constitutional doctrine of public employee speech was constructed is *Pickering v. Board of Education of*

1968. The case concerned a letter of Mr. Pickering, a school teacher, to the press, complaining about the board's policies on allocation of funds, which triggered the termination of employment of Mr. Pickering. In assessing whether the letter was constitutionally protected free speech, the Supreme Court introduced a balancing test in order to achieve "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees".¹¹⁵ This balancing test was conceived as flexible, depending on the particulars of each case, but it was dependent on the speech addressing questions of public interest. According to the Court, "teachers may not constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work".¹¹⁶ The ruling of the Court seemed to suggest that the protection granted to the teacher was connected to the speech not being a product of the employment relationship and that, in fact, any citizen could have engaged in this form of criticism.¹¹⁷

The Pickering standard was further refined in the following years. The case *Connick v. Myers* in 1983, regarding the termination of employment of Ms. Myers for preparing a questionnaire for her colleagues' views on the transfer policy, which was seen as insubordination, established that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record".¹¹⁸ This emphasis on the context and the role of the employee, adding one more threshold in the quest for constitutional protection, has been described in the literature as a step backwards for civil liberties, when compared to *Pickering*.¹¹⁹ Further interrogations into

¹¹⁵ *Pickering v. Board of Education of Twp. High Sch. Dist. 205 Will Cty. Illinois* (n 38) [568]

¹¹⁶ *ibid* [563]

¹¹⁷ "However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be", *ibid* [574]. The argument that the employee was actually speaking as a citizen and not within the duties of employment was put forward by Justice Kennedy in *Garcetti v. Ceballos* 547 U.S. 410, [2006] (US Supreme Court) [423-424], suggesting that Ceballos did not represent such a remarkable shift from past case law. For a contrary interpretation of the Pickering ruling, see Beth A Roesler, 'Garcetti v. Ceballos: judicially muzzling the voices of public sector employees' (2008) 53 South Dakota Law Review 397, 408-409

¹¹⁸ *Connick v. Myers* 461 U.S. 138, [1983] (US Supreme Court) [147-48]

¹¹⁹ Jessica Reed, 'From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine' (2007) 11 New York City Law Review 95, 103; Jeffrey A Shooman, 'The Speech of Public Employees Outside the Workplace: Towards a New Framework' (2006) 36 Seton Hall Law Review 1341, 1363 (2006) calling it a 'doctrinal failure'.

the question of the freedom of speech of public employees led either to reiterations¹²⁰ of the *Pickering-Connick* balancing doctrine or to clarifications.¹²¹ The resulting balancing test consists of a) the speech of the employee as a citizen¹²² addressing a matter of public concern, specified as such by its content, form etc., b) a *stricto sensu* balancing on whether the interest of the employee to comment upon the topic outweighs the interest of the state in guaranteeing the efficiency of its services, and c) a requirement that the protected expression was a substantial or motivating factor in the adverse employment decision.¹²³ This balancing test suggests that revelations of whistleblowers should be covered by the First Amendment. Yet, the courts have not consistently ruled in favour of whistleblowing constituting ‘public concern’. This is usually the case when the employee seems to have an ulterior personal motive for the revelation of the wrongdoing. The motive, contrary to whistleblowing legislation in financial regulation and corporate compliance, may in this case be a controlling factor.¹²⁴

The case *Garcetti v. Ceballos* (2006), concerning the retaliation against a deputy district attorney –Ceballos– for exposing government misconduct in a memorandum and decried as ‘the worst whistleblower decision in five decades’¹²⁵, marked a major point in the development of the doctrine, by specifying when the employee does *not* speak as a citizen and therefore the *stricto sensu* balancing exercise is not necessary. The Court held that “when public employees

¹²⁰ “First Amendment limitations on public employers, as the plurality explains, must reflect a balance of the public employer's interest in accomplishing its mission and the public employee's interest in speaking on matters of public concern”. *Waters v. Churchill* 511 U.S. 661, [1994] (US Supreme Court) [683]

¹²¹ In 1993 the Eighth Circuit elaborated six factors to be calculated for the specification of the balancing test: “(1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties”. *Shands v. City of Kennett* 993 F.2d 1337, [1993] (US Court of Appeals, Eighth Circuit) [1344]

¹²² According to some commentators, whether the employee had to be speaking “as a citizen” was in doubt at least until *Garcetti*. See, for instance Roesler (n 117) 417 and relevant citations. In my opinion, this already emerges from the interpretation of *Pickering*, *Connick*, and *San Diego*. In *Garcetti* the Court specified when the employee does not speak as a citizen.

¹²³ *Mt Healthy City School Dist. Bd. of Education v. Doyle* 429 US 274, [1977] (US Supreme Court) [283-284]

¹²⁴ See, for example, *Barkoo v. Melby* 901 F2d 613, [1990] (US Court of Appeals, Seventh Circuit). For a contrary example, where the personal interest was not deemed enough to disqualify an employee from freedom of speech protection, *Breuer v. Hart* 909 F2d 1035, [1990] (US Court of Appeals, Seventh Circuit). Examples taken from Hon D D Mckee, ‘Termination or Demotion of a Public Employee In Retaliation For Speaking Out As a Violation of Right of Free Speech’ (2017 (updated)) 22 American Jurisprudence Proof of Facts 3d 203

¹²⁵ David G Savage, ‘Supreme Court Limits Free Speech in Workplace for Public Employees’ *Seattle Times* (31 May 2006), A1.

make statements *pursuant to their official duties*, they are not speaking as citizens for First Amendment purposes”¹²⁶, thus significantly narrowing the scope of First Amendment protection for employees, especially for whistleblowers, who might often expose wrongdoing pursuant to their official duties. The majority, in its effort to safeguard the government’s control over employees’ speech and to prevent a ‘constitutionalization’ of employee grievances,¹²⁷ contented itself in the whistleblowing protection laws and labour codes as the means to encourage the exposure of wrongdoing and the protection of the employees.¹²⁸ According to the majority, restricting the speech which “owes its existence to a public employee’s professional responsibilities”¹²⁹ does not violate the First Amendment, because the employee was not acting as a citizen. According to Roesler, this indicates a shift of the emphasis on the content of the speech to the speaker.¹³⁰ The Court’s subjectivist approach can lead to a chilling effect against potential exposures of wrongdoing within the working place, incentivizing instead external reporting.¹³¹ The remaining external leeway has been brought up as an argument in favour of *Garcetti*, arguing that the decision does not discourage whistleblowing.¹³² This position undermines the value of freedom of speech as an internal controlling mechanism, important for the entirety of the constitutional structure. Kitrosser correctly points out that *Garcetti*’s rule is at odds “with the notion that public employee speech has special value because of the distinctive insights and expertise it offers”.¹³³ The ‘special value’ rationale for the protection of employees’ freedom of speech corresponds to my suggestion of an objective, institutional reading of the conflict over whistleblowing. In that sense, *Garcetti* failed to consider that a facet of employees’ freedom of speech is its connection to a constitutional design of checks, limitations of executive action, and rule of law.¹³⁴

A question that had arisen after *Garcetti*, particularly relevant to whistleblowers, was whether all speech that “owes its existence” to public employment is unprotected by the First

¹²⁶ *Garcetti v. Ceballos* (n 117) [421]

¹²⁷ *ibid* [418-419]

¹²⁸ *ibid* [425]. On the contrary, according to Judge Souter dissenting, “statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief”. [440]

¹²⁹ *ibid* [421]

¹³⁰ *ibid* [417-418]

¹³¹ *See, ibid* [427] (Stevens, J., dissenting).

¹³² Kermit [I] Roosevelt, ‘Not as Bad as You Think: Why *Garcetti v. Ceballos* Makes Sense’ (2012) 14 *University of Pennsylvania Journal of Constitutional Law* 631, 659

¹³³ Heidi Kitrosser, ‘The Special Value of Public Employee Speech’ (2015) 2015 *The Supreme Court Review* 301, 302

¹³⁴ *See, Kitrosser, ‘Leak Prosecutions and the First Amendment’* (n 7), 1244–46; Lobel (n 23) 451–456

Amendment, meaning also speech that simply conveys information acquired by virtue of one's employment.¹³⁵ In 2014 the Court rejected this claim by evoking the 'special value' of employees' speech for societal interests:

"Garcetti said nothing about speech that relates to public employment or concerns information learned in the course of that employment. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Indeed, speech by public employees on subject matter related to their employment holds *special value* precisely because those employees gain knowledge of matters of public concern through their employment".¹³⁶

The Court in *Lane v. Franks* (2014) supported that the speech necessary to prosecute corruption by public officials must be protected by the First Amendment,¹³⁷ stressing that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee –rather than citizen– speech".¹³⁸ However, even if Mr. Lane's subpoenaed testimony –the reason for his termination of employment– was not considered part of his employment responsibilities, the fact that the case concerned specifically a subpoenaed testimony led to *Lane* being subject to a narrow reading.¹³⁹ Even if the post-*Lane* case law of lower courts is often contradictory as to whether

¹³⁵ This was the part of the argumentation in lower courts. Indicatively, see *Lane v. Central Alabama Community College* 523 Fed Appx 709, [2013] (US Court of Appeals, Eleventh Circuit) [712], *Abdur-Rahman v Walker* 567 F3d 1278, [2009] (US Court of Appeals, Eleventh Circuit) [1279, 1283]. Whether the knowledge conveyed was gained through the employment factors in the argumentation, even if the outcome of the examination was positive for employee. For example, *McGunigle v. City of Quincy* 944 F. Supp. 2d 113, [2013] (US District Court Massachusetts) [122], even though the claim was dismissed at appellate because of stage c) of the balancing, i.e. causal connection between his speech and the adverse employment actions.

¹³⁶ *Lane v. Franks* 134 S. Ct. 2369, [2014] (US Supreme Court) [2373]. The Court had already touched upon the social value of employee speech in previous cases, e.g. *City of San Diego, Cal. v. Roe* 543 U.S. 77, [2004] (US Supreme Court), "[u]nderlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public" [82]. See, also Justice Souter dissenting, *Garcetti v. Ceballos* (n 117) [431].

¹³⁷ *Lane v. Franks* (n 136) [2380]

¹³⁸ *ibid* [2379]

¹³⁹ The Fifth Circuit, in its determination of whether a police officer's report of wrongdoing was made as from a citizen, argued that speech is not necessarily made 'as a citizen' whenever corruption is involved and cautioned against an expansive reading of *Lane*, *Gibson v. Kilpatrick* 773 F.3d 661, [2014] (US Court of Appeals, Fifth Circuit) [669]; See also, *Amirault v. City of Malden*, where the Court ruled that the relevant disclosure of the police officer occurred in the context of carrying out his duties, *Amirault v. City of Malden* 241 F. Supp. 3d 288, [2017] (US District Court Massachusetts).

speech that conveys information learned during the employment constitutes protected speech or not, the exposure of government misconduct seems to be a factor in favour of a broad reading of *Lane*, protective of employees-whistleblowers beyond the narrow scope of testimony.¹⁴⁰

Despite the advancement of the cause of whistleblowers by *Lane*, there are still main obstacles that have to be overcome in order for their speech to be protected under the First Amendment:

- i) Employees have to be speaking as citizens, which as I showed remains a point of contestation. The major post-*Lane* argumentation is that they do speak as citizens when they uncover wrongdoing, unless the speech at issue is itself ordinarily within the scope of their duties (for example if they are Detectives, etc.).
- ii) The issue has to be of public concern, which may in general be the rule for whistleblowing cases, but it is also not irrefutable, especially if the motive of the whistleblower is taken to be personal grievance.¹⁴¹
- iii) Their disclosure must satisfy the *Pickering* balance, meaning whether the interest of the employee to comment upon the topic outweighs the interest of the state in guaranteeing the efficiency of its services. The Supreme Court has noted that “the interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it”,¹⁴² partially (but not consistently) endorsing the objectivist reading of the conflict and the social value of the disclosed information that corresponds to the right to know.

3.2.3.1.2. *The absence of balancing for national security employees*

It is important to point out that this balancing test, formed by *Pickering*, *Garcetti*, *Lane*, and other decisions, applies in case of civil sanctions. However, this has not been the case for national security employees. Deciding on the case *Snepp v. United States* (1980), concerning the publication -without prior approval- by an agent of a book critical to CIA's activities, which nevertheless did not contain classified information, the Supreme Court held that freedom of speech could not invalidate the non-disclosure agreement, which required prior governmental

¹⁴⁰ For example, in *Hunter v. Mocksville, North Carolina* 789 F.3d 389, [2015] (US Court of Appeals, Fourth Circuit)

¹⁴¹ See above (n 123)

¹⁴² *City of San Diego, Cal. v. Roe* (n 136) [82]

approval for publication.¹⁴³ The *Snepp* case may not be a *lato sensu* whistleblowing case, where wrongdoing or misconduct is brought to the public, but it showcased the limits of the First Amendment as a constitutional defence against national security. The Court accepted that “the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment”.¹⁴⁴ Even if it can be conceded that the Court probed the reasonableness of the restriction, it did not examine the potentially opposing interests, as it would if it followed *Pickering*.¹⁴⁵ *Snepp* has been heavily criticized by scholars.¹⁴⁶

As far as it concerns criminal sanctions, the government has dismissed or obtained guilty pleas in all but one of the leaker cases. The single appellate case on the constitutional protections from prosecution owed to *lato sensu* whistleblowers or leakers is *United States v. Morison*, where Morison’s actions were characterized as pure theft, not falling within the scope of the First Amendment.¹⁴⁷ According to the Court, the First Amendment cannot be considered as ‘asylum’ simply because the information is transmitted to the press.¹⁴⁸ It is worth nevertheless mentioning that the two concurring opinions in *Morison* did not rule out First Amendment implications, even if they did not explore the topic in depth.¹⁴⁹

Lower courts have also refused to enter into *Pickering* balancing or any other consideration of First Amendment implications in cases of *lato sensu* whistleblowing or leaking. The U.S. Court of Appeals for the D.C. Circuit, deciding on *Boehner v. McDermott* (2007), stated that “those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that

¹⁴³ *Snepp v. United States* (n 5) [510]

¹⁴⁴ *ibid* [510]

¹⁴⁵ James A Goldston, ‘A Nation Less Secure: Diminished Public Access to Information’ (1986) 21 *Harvard Civil Rights-Civil Liberties Law Review* 409, 442. *See*, also the Court’s examination in *McGehee v. Casey* 718 F.2d 1137, [1983] (US Court of Appeals, District of Columbia Circuit) [1142–43], “First, restrictions on the speech of government employees must “protect a substantial government interest unrelated to the suppression of free speech. [...] Second, the restriction must be narrowly drawn to “restrict speech no more than is necessary to protect the substantial government interest.”

¹⁴⁶ Goldston (n 145), 441-442; Emerson, ‘National Security and Civil Liberties’ (n 44) 100; Ronald Dworkin, *A matter of principle* (Harvard University Press 1985) 393

¹⁴⁷ *United States v. Morison* (n 2) [1077], “To use the first amendment for such a purpose [handing confidential information to the press] would be to convert the first amendment into a warrant for thievery”.

¹⁴⁸ *ibid* [1068]

¹⁴⁹ Judge Wilkinson, “I do not think the First Amendment interests here are insignificant”, *ibid* [1081]. Judge Philips “I agree with Judge Wilkinson’s differing view that the first amendment issues raised by *Morison* are real and substantial”, *ibid* [1085]

information”.¹⁵⁰ This statement was repeated in *United States v. Kim*.¹⁵¹ Kitrosser insightfully points out that this jurisprudence, which traces its roots in *Snepp*, focuses excessively on the ‘voluntary’ aspect of the assumption of duty in order to arrive at the conclusion that this precludes the invocation of freedom of speech. Yet, as it was shown in the previous section, public employees do not renounce their citizenship or relinquish their constitutional rights by taking up public employment.¹⁵²

It becomes apparent that national security matters render the invocation of freedom of speech even more difficult than in other sectors of public employment. This development may be attributed to freedom of speech being confined in a subjectivist reading that foregoes the social value of the information disclosed by the whistleblowers. Before going into my normative suggestion in Section 3.2.4, it suffices here to say that compromising the occasionally opposing interests of government functioning and national security with freedom of speech or the ‘interest of the people’ to receive the information is predicated upon the legitimate character of these interests, which cannot be taken for granted when the disclosures relate to government wrongdoing and misconduct. It is for this reason that balancing may not always be appropriate, but this is a reason the subjectivist paradigm focusing on the individual and his or her interest ‘to comment upon matters of public concern’ may overlook.

3.2.3.2. *Balancing in the ECtHR*

3.2.3.2.1. *The proportionality criteria for freedom of speech of employees as established by Guja v. Moldova*

This case involved the dismissal of a public employee from the Prosecutor’s Office for the disclosure to the press of two letters that allegedly revealed political interference in pending criminal proceedings against police officers who arrested ten persons suspected of offences related to parliamentary elections, and who were then charged with ill-treatment and illegal detention. The application was dismissed on the basis that these letters were internal secret documents, to which the applicant gained access only by virtue of his employment, effectively

¹⁵⁰ *Boehner v. McDermott* 484 F.3d 573, [2007] (US Court of Appeals, District of Columbia Circuit) [579]

¹⁵¹ *United States v. Kim* 808 F. Supp. 2d 44, [2011] (US District Court, District of Columbia) [56-57]

¹⁵² Kitrosser, ‘Leak Prosecutions and the First Amendment’ (n 7) 1236-1237. *See, Lane v. Franks* (n 136) [2377]

‘stealing’ them, according to the Government.¹⁵³ Contrary to this narrative, the applicant claimed the status of a whistleblower acting in good faith and exposing corruption and the lack of independence of the Prosecutor’s office.¹⁵⁴

The Court first stated that the applicant’s dismissal amounted to an “interference by public authority” with the right to freedom of expression, as provided under Article 10 of the Convention, since it has been established by the Court that Article 10 applies to the workplace and to public employees in particular.¹⁵⁵ The Court then followed the tripartite scrutiny of whether the interference was legitimate or whether it violated the Convention by examining a) whether it was prescribed by law, b) whether it pursued a legitimate aim, and c) whether the interference was necessary in a democratic society. The Court was convinced that the interference was prescribed by law (the Labour Code) and that it pursued a legitimate aim, i.e. the prevention of disclosure of information received in confidence.¹⁵⁶

As far as it concerns the condition of the interference being “necessary in a democratic society”, the Court referred first to its established case law.¹⁵⁷ It clarified that ‘necessary’ implies a ‘pressing social need’, for which the Contracting States enjoy a margin of appreciation but only under European supervision. This supervision consists in not only ascertaining whether the discretion of the state was reasonably exercised, but whether the interference was indeed proportionate and sufficiently justified by national authorities.

Civil servants may invoke Article 10, but they are still bound by a duty of loyalty and discretion. How to balance the occasionally conflicting interests of the duty of loyalty and freedom of expression? Acknowledging that there may be times that such disclosures should be protected in cases of wrongdoing and illegal conduct, the Court articulated a list of criteria that should determine whether public disclosures should be protected under freedom of speech:¹⁵⁸

- i) *Reporting to the appropriate channels.* The Court prioritizes disclosures to the hierarchical authority or the competent authority, when such a body exists. It should be taken into

¹⁵³ *Guja v. Moldova* App no 14277/04, [2008] (ECtHR) [65]

¹⁵⁴ *ibid* [60, 61]

¹⁵⁵ *ibid* [52, 55], citing *Vogt v. Germany* 21 EHRR 205, [1996] (ECtHR)

¹⁵⁶ *Guja v. Moldova* (n 153) [58, 59]

¹⁵⁷ *ibid* [69], *Jersild v. Denmark* App no 15890/89, [1994] (ECtHR) [31]; *Hertel v. Switzerland* 59/1997/843/1049, [1998] (ECtHR) [46]; *Steel & Morris v. United Kingdom* App no 68416/01, [2005] (ECtHR) [87]

¹⁵⁸ *Guja v. Moldova* (n 153) [73-78]

account whether means other than those involving public disclosures were available, thus avoiding the breach of the obligation of discretion. Disclosures to the press should be the last resort.

- ii) *Public interest*. There is little scope for restrictions on debate on questions of public interest. “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. 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”.¹⁵⁹
- iii) *Authenticity of the disclosed information*. Freedom of expression carries duties and responsibilities and any person willing to make a public disclosure should review the information as carefully as possible. The lack of elaboration of this criterion makes it difficult to determine whether it similar to the ‘reasonable belief test’ or whether it requires the information to be actually true. The case *Bucur v. Romania* (2013) seems to advocate in favour of the former, rather than the latter, meaning.¹⁶⁰
- iv) *Balancing the damage*. The Court must weigh the damage suffered by the public authority as a result of the disclosure and determined whether this damage outweighs the public interest in having the information revealed. This represents a *stricto sensu* test of proportionality.
- v) *Good faith*. The Court correlates the protection of a public employee engaging in public disclosures of government malfeasance or wrongdoing with his or her motivations. Had the individual been motivated by personal interests or private antagonisms, then a strong level of protection is not justified. Instead, the individual must be motivated by the public interest in the disclosure. The individual must have acted in good faith (good faith test) and in the belief that the information was true (reasonable belief test).
- vi) *Proportionality of the penalty*. In case sanctions are imposed, they must be proportional to the offence committed.

In this particular case, the Court determined that these criteria were met, including the *stricto sensu* proportionality test that “the public interest in having information about undue pressure and wrongdoing within the Prosecutor’s Office revealed is so important in a democratic society that it outweighed the interest in maintaining public confidence in the

¹⁵⁹ *ibid* [74]

¹⁶⁰ *Bucur and Toma v. Romania* App no 40238/02, [2013] (ECtHR) [107], see also below, subsection b)

Prosecutor General's Office"¹⁶¹ and the proportionality test of the penalty, with the most severe penalty being imposed. Therefore, the interference with the applicant's freedom of expression did not meet the requirement of being "necessary in a democratic society".

It is important to note that the Court has referred to these criteria also in cases involving private employees. In particular, in the case *Heinisch v. Germany* (2011), regarding the dismissal of a geriatric nurse for bringing a criminal complaint against the employer alleging deficiencies in the institutional care provided, the Court reiterated the *Guja* criteria in determining whether the interference on freedom of speech of the employee was proportional, or 'necessary in a democratic society'.¹⁶²

3.2.3.2.2.A latent shift towards an institutional interpretation of whistleblowing cases: Accentuating the importance of public interest and setting aside good faith

Returning to the question of public employees, including those working in the even more restricted domain of national security, it is questionable whether the balancing criteria adopted by the Court represent an ideal resolution of the conflict. More specifically, the subjectivist reading of the conflict by the Court leads to take into consideration factors, of doubtful relevance from the perspective of the legitimate interests truly at stake. In fact, it seems that the Court has shifted its interpretations and advanced a more objective-institutional understanding of the conflict of public disclosures of wrongdoing. This has happened by accentuating the importance of the criterion of public interest and by undermining the most clearly subjective criterion, good faith. In several of its decisions on questions of whistleblowing, the Court has advanced a functionalist reading of freedom of expression, balancing the importance of the information for public debate. Like the case law on the right to information, this highlights the preoccupation of the Court to protect the facets of Article 10 that function as safeguards for democratic deliberation. At the same time, this reading of the conflict makes the requirement of good faith contradictory.

The importance the Court attributes to the information being of public interest bridges the case law on whistleblowing with the case law on right to information. The Court establishes a functional reading of the Article 10 in these cases, underlining that what is really being examined is the extent to which the information is important for a deliberating public. The case

¹⁶¹ *Guja v. Moldova* (n 153) [91]

¹⁶² *Heinisch v. Germany* 58 EHRR 31, [2011] (ECtHR) [63-70]

Bucur v. Romania (2013) addressed the question of national security whistleblowers. This time, the applicant, an employee of the Romanian Intelligence Service, brought concerns regarding illegal surveillance practices to the public, resulting in him facing criminal sanctions for theft and transmission of state secrets. The Court repeated the criteria set in *Guja* and applied them to the specific case. In the process of making its evaluation, the Court confirmed that the information brought forward by the applicant referred to “very important questions relevant to political debate in a democratic society, of which the public opinion has a legitimate interest in being informed”.¹⁶³ After accepting that the requirement of authenticity was met by the reasonable belief of the whistleblower that the information was indeed true,¹⁶⁴ the Court underscored that national courts failed to verify whether the classification of the information as ‘top secret’ was justified and whether the interest in maintaining the confidentiality of the information trumped the public interest in being informed about the alleged illegal surveillance practices.¹⁶⁵ In its *stricto sensu* balancing, the Court came to the important conclusion that “the public interest in the disclosure of reports of illegal activities within the [secret service] is so important in a democratic society that it outweighs the desirability to maintain public confidence in this institution (...). A free discussion of public issues is essential in a democratic state and it is important not to discourage citizens to decide on such issues”.¹⁶⁶

In the case *Kudeshkina v. Russia* (2009) concerning the dismissal of a judge as a result of her public disclosures revealing undue pressure exercised against her, the Court considered such revelations to fall in the domain of political speech¹⁶⁷ and to trigger, once more, the public interest.¹⁶⁸ It underlined that even though no disclosure of classified information was involved on this occasion the allegations of the judge had a factual basis and were more than value judgements. The Court reaffirmed that within public institutions, the duty of loyalty and discretion requires that “the dissemination of even accurate information is carried out with moderation and propriety”.¹⁶⁹ It is the combination of factual statements with their significance

¹⁶³ *Bucur and Toma v. Romania* (n 160) [103]

¹⁶⁴ *ibid* [107] making here explicit reference to CE Parliamentary Assembly, ‘Resolution 1729 (2010): Protection of “whistle-blowers”’ (2010)

¹⁶⁵ *Bucur and Toma v. Romania* (n 160) [111]

¹⁶⁶ *ibid* [115]

¹⁶⁷ *Kudeshkina v. Russia* App no 29492/05, [2009] (ECtHR) [95]. Adopting the core-periphery distinction, political speech lies close to the core of freedom of expression, Stijn Smet, ‘Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test’ in Smet, Stijn, Brems Eva (ed), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) 47

¹⁶⁸ *Kudeshkina v. Russia* (n 167) [94]

¹⁶⁹ *ibid* [93]

for the public interest that guaranteed the protection of the applicant and the disproportionality of the interference.^{170, 171}

As far as it concerns good faith, even though it figures on a number of international instruments involving the protection of whistleblowing, such as the UNCAC and the Recommendation CM/Rec(2014)7 of April 2014 of the Committee of Ministers, it seems hardly relevant in this particular context. It suffices to wonder, what if the whistleblower is indeed motivated by antagonistic concerns or personal interest but nevertheless discloses serious government wrongdoing and lack of accountability? Why should he or she be deprived of protection in such a case, where the importance of the disclosure for the public interest is acknowledged? Interestingly, the criterion of good faith has been inconsistently and loosely interpreted in the case law of the ECtHR.¹⁷² In *Guja v. Moldova*, bad faith is inferred to be the motivation “by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain”.¹⁷³ Yet, in the case *Soares v. Portugal* (2016), a different approach was adopted. The Court, balancing this time freedom of expression in the workplace and the protection of reputation, distinguished between statements of fact and value judgements and placed the allegations of the applicant about the supposed engagement of a Commander of the Portuguese National Guard in corruption in the category of factual claims.¹⁷⁴ The allegation of misuse of public money being a very serious category, the Court underlined the need for a factual basis, which the applicant did not provide, basing his accusations entirely on rumours. Thus, the claim that he did not act in ‘good faith’ is justified.¹⁷⁵ Indeed, “the applicant, knowing that his allegations were based on a rumour, made no attempt to verify their authenticity before reporting them to the General Inspectorate of Internal Administration”.¹⁷⁶ This interpretation

¹⁷⁰ The Court noted in particular the ‘chilling effect’ sanctions may have on freedom of expression, which “work to the detriment of society as a whole”, *ibid* [99].

¹⁷¹ *A contrario*, when the revelations are deemed to be ‘defamatory accusation’, rather than ‘criticism in the interest of the public’, then they cannot be protected. This can be subsumed under the requirement of ‘authenticity of the disclosed information’, showcasing the interconnectedness of factual basis with public interest and the protection of freedom of expression. *See, Langner v. Germany* App no 14464/11, [2015] (ECtHR), where Mr. Langner did not verify his allegations of ‘perversion of justice’ against the Deputy Mayor, even though he was in a position to do so.

¹⁷² The flexibility of taking into consideration –or not– ‘good faith’ as defined by *Guja* could be interpreted as a component of the ‘open-ended’ nature of balancing tests in the ECtHR, whereby the Court can freely decide which criteria it will resort to in any given case. *See, Smet* (n 167) 40

¹⁷³ *Guja v. Moldova* (n 153) [77]

¹⁷⁴ *Soares v. Portugal* App no 79972/12, [2016] (ECtHR) [45, 46]

¹⁷⁵ *ibid* [46]

¹⁷⁶ *ibid* [47]

of good faith approaches the ‘reasonable belief’ test. What is claimed by the Court for justifying the lack of good faith is not the ulterior personal interest or antagonistic motivation, but the fact that the applicant did not attempt to verify the authenticity of the information, failing thus the reasonable belief test.

The unsuitability of the ‘good faith’ criterion is even more striking in *Aurelian Oprea v. Romania* (2016). This time the applicant, himself an associate professor who had been denied multiple times full professorship, exposed corruption at university level by informing the press. The Court found that “the applicant’s statements concerned important issues in a democratic society, about which the public had a legitimate interest in being informed”.¹⁷⁷ This is a key phrase, indicating that in the final analysis the protected interest is public deliberation and the right to know of the citizenry. Therefore, the good faith of the individual immediately becomes less significant. The Court opted to place it in the background, minimizing the requirements of good faith to a sheer minimum: “[E]ven assuming that the applicant’s frustration as a result of not being promoted to a position of professor might have been an additional motive for his actions, the Court has no reason to doubt that the applicant acted in good faith and in the belief that it was in the public interest to disclose the alleged shortcomings in his University to the public”.¹⁷⁸ The Court continues to evaluate good faith as one of its criteria but seems unwilling to block its protective approach for this reason alone, as long as the information provided is deemed to be of public interest and important for democratic societies.¹⁷⁹

The Court has in general adopted a very protective perspective on freedom of information on matters of general interest, important for the public debate.¹⁸⁰ Its emblematic statement that

¹⁷⁷ *Aurelian Oprea v. Romania* App no 12138/08, [2016] (ECtHR) [65]

¹⁷⁸ *ibid* [71]

¹⁷⁹ *See, also Rubins v. Latvia* App no 79040/12, [2015] (ECtHR), where the Court decided in favour of an academic who, previously to his disclosure of corruptions within the university, had sent a letter to the Rector of the University threatening to make his allegations public, if he were to not see his demands regarding the revocation of an order merging his departments met. The reasons for this decision were the public interest in the information [85] and not finding the applicant to be of bad faith [88].

Jeremy Lewis and others, *Whistleblowing: Law and practice* (Third edition, Oxford University Press 2017) 18.35, commenting on *Kharlamov v. Russia* App no 27447/07, [2015] (ECtHR), note that the importance of protecting expression on matters of public interest may outweigh duties of good faith in the work environment.

¹⁸⁰ *See, also Matúz v. Hungary* App no 73571/10, [2014] (ECtHR) on the protection of an employee of the State television company regarding his dismissal as a result of him publishing a book about alleged censorship within the company; *Bargão and Domingos Correia v. Portugal* App no 53579/09 and 53582/09, [2013] (ECtHR), where the Court assimilated private citizens to employees-whistleblowers, if in their capacity as users of public services get to know and are able to disclose wrongdoing within public administration [35, 40]; *Sosinowska v. Poland* App no 10247/09, [2012] (ECtHR), where the applicant’s assessment of her superior in the hierarchy of the hospital concerned a socially justified interest and therefore the interference was not necessary in a democratic

“in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed”¹⁸¹ indicates the high value of the right to know against undue secrecy. The balancing exercise for freedom of speech in the workplace as defined by *Guja v. Moldova* seems ill-suited to address issues where the ‘speech’ under question constitutes well-founded allegations of government wrongdoing. In that case, not only good faith, but in fact even the *stricto sensu* balancing test becomes problematic. Because, if the disclosures of the whistleblower reveal illegalities and illegitimate secrecy, it becomes questionable whether the potential harm to the reputation of the institution should be taken into consideration. The reputation of the institution is valuable to the extent that it fulfils a certain legitimate function in a democratic society. Admitting some form of legitimate interest that should counter-balance the public interest in the disclosure, such as for example the potential harm to national security, implies a blank check to the executive to even break the law, insofar as it purports to protect national security. It implies that illegitimate secrecy may at times be condoned, which is a contradictory statement from the perspective of democracy. In the next Chapter I will propose a set of distinctions as to when a balancing test is indeed necessary and based on which criteria and when it should be avoided.

society [83, 87]; even the case *Rubins v. Latvia* (n 179), as above. See, on the contrary, *Bédat v. Switzerland* App no 56925/08, [2016] (ECtHR), where the interference to the freedom of expression of a journalist (not employee) publishing confidential information about criminal proceedings was deemed proportional, partly because the information provided did not contribute to any public debate [66].

Furthermore, the Court has many on many occasions protected freedom of expression of journalists against alleged violations of privacy or supposed defamatory statements, especially when the information published reveals illegal activities of public interest. Most importantly, see *Axel Springer AG v. Germany* (no. 1) App no 39954/08, [2012] (ECtHR), where the Court set criteria for the balancing the right to freedom of expression against the right to privacy, the first and foremost of which being “the contribution to a debate of general interest”, see Dirk Voorhoof, ‘Freedom of Expression versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism’ in Smet, Stijn, Brems Eva (ed), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) 154

¹⁸¹ *Voskuil v. The Netherlands* App no 64752/01, [2007] (ECtHR) [70] on the protection of journalists’ sources

3.2.4. Restructuring the balancing test according to the institutional paradigm

Having examined the prominent approaches to balancing between freedom of expression and governmental interests, I turn to my normative section, where I outline the principles that should guide the resolution of the abovementioned conflict, in the more precise and demanding context of national security. The adoption of an institutional perspective that aims to safeguard the democratic control of security politics, the rule of law, the separation of powers, and the institutional limits to executive action, inevitably shifts the jurisprudential focus to the legitimacy or the illegitimacy of the secret activity or program that was disclosed. In Subsection 3.2.4.1, I suggest that in case of deep – illegitimate secrecy, balancing should be minimized. In the absence of a legitimate purpose, criminal sanctions should be ruled out, while employment-related sanctions will depend on whether internal channels of reporting were exhausted or whether it would have been futile to pursue disclosure through them. In Subsection 3.2.4.2, I propose that in cases of leaking of legitimate secrecy, the imposition of criminal sanctions will depend on whether the government can prove that the disclosures could be harmful to national security, while the presumption should be in favour of freedom of expression. Employment-related sanctions, which the government has the liberty to pursue in this case, should be the main deterrent. In Subsection 3.2.4.3, I ponder on the reach of the institutional model, hard cases that may arise, and potential shortcomings. I emphasize that deep secrecy is broader than illegality, thus covering cases where the legality of an activity insulated from public accountability can be disputed, but I warn of ‘hard cases’, where determining the legitimacy or illegitimacy of secrecy might be difficult. Considering that every model will have its weak points, I argue that the merits of the institutional paradigm vastly outweigh the difficulties that might arise in very few hard cases.

3.2.4.1. The balancing test in the case of deep secrecy – Lato sensu whistleblowing

For the purposes of outlining my normative suggestion regarding the balance between freedom of speech and national security considerations, I would like to briefly return to some main points mentioned earlier: A) It is a principle arising from both European and American constitutional traditions and institutions that the limitations to the right of the people to know about government’s activities must be strictly defined by law (e.g. classification law), necessary to achieve their purpose of protecting national security, and proportional to the

detriment inflicted on open, public deliberation. In liberal democracies, state secrecy must be the exception, not the rule. B) Legitimate secrecy is ‘shallow secrecy’, meaning that the citizenry must be aware of the existence of a secret, even if the precise information is not known to them. Secrecy -through for example classification- cannot and should not function as a cover-up for illegality, wrongdoing, and government misconduct. C) Undue secrecy should be first addressed in a preemptive way through the regulation of overclassification and then through the establishment of an efficient inter-agency and inter-branch system of reporting of wrongdoing. This echoes Moberly’s normative claim that “the law should be clear that exposing governmental waste, abuse, and illegality takes precedence over any contractual obligation to keep information secret”.¹⁸² Constitutional protection, through freedom of speech, against prosecution and potentially against civil and administrative sanctions imposed on *lato sensu* whistleblowers constitutes the ultimate safety valve for maintaining the democratic character of secrecy. D) *Lato sensu* whistleblowing, meaning public disclosures about government wrongdoing, does not entail so much a conflict over subjective liberties (e.g., the freedom of speech of the whistleblower), but an institutional conflict over the content of democratic governance and the ultimate control over security policies. It is the social value of whistleblowing that has to be protected, functioning as a legal counter-institution against the expansive tendencies of the national security subsystem.

It is in this frame that my normative proposal on the conditions of constitutional protection for whistleblowers and leakers will unfold. Without a doubt, this is a delicate and complicated issue, where developing general rules proves to be challenging. In this first Subsection, I will deal with the case of whistleblower protection in case of public disclosures involving government wrongdoing, that is, in conditions of deep secrecy (*lato sensu* whistleblowing).

In the effort to find an elegant solution for the competing interests, scholars have been tempted to outline an all-encompassing balancing test. In that sense, the *Pickering* test has been suggested as appropriate for national security whistleblowers¹⁸³, while a more generic test of “whether the potential harm to the national security outweighs the value of the disclosure to

¹⁸² Moberly (n 25) 135. This expresses the idea that it is through legislative reform that the balance of competing interests will be achieved. Similarly, in the European context, *see* Dimitrios Kagiros, ‘Protecting ‘national security’ whistleblowers in the Council of Europe: an evaluation of three approaches on how to balance national security with freedom of expression’ (2015) 19(4) *The International Journal of Human Rights* 408, 419, arguing for the inclusion of broad categories of wrongdoing in the law to ensure protection of whistleblowers.

¹⁸³ Goldston (n 145) 438-439

public discourse”¹⁸⁴ has been proposed as an ideal constitutional standard, despite its admittedly difficult implementation.¹⁸⁵ I argue that the potential normative suggestions regarding the balancing of the social value of whistleblowing and national security need to take into consideration the different context and nuances of whistleblowing in practice. The distinctions of a) *lato sensu whistleblowing versus leaking* (corresponding to the distinction of deep and shallow secrecy) and b) *criminal versus employment-related sanctions* will be instrumental in outlining the normative suggestion.

3.2.4.1.1. Criminal sanctions

Balancing, in the case of whistleblowers exposing deep secrecy, is, for a number of reasons, not an appropriate solution when criminal sanctions are considered. First and foremost, balancing requires competing legitimate interests, which is not the case in this particular situation. The proportionality test is made up of the prongs of suitability, necessity, legitimate purpose, and *stricto sensu* proportionality. The criminal sanctions imposed on the whistleblower, following the various criminal laws, must be able to meet these requirements against the constitutional defence of freedom of speech. In fact, before even getting into the question of the *stricto sensu* proportionality test where as it has been pointed out it is the social value of whistleblowing that should be weighed, the absence of a legitimate purpose of the sanction renders the balancing an inappropriate solution to the conflict. Sanctions like those included in the Espionage Act, or in Official Secrets act, or in the French Penal Code serve the legitimate aim of preventing harm to national security, safeguarding state secrets, and maintaining trust in government operations that require secrecy in order to operate efficiently. However, to the extent that it is not the constitutionality of the law in abstract that is being judged, but rather its application in the particular context, it is the legitimate aim of the law’s application that should be evaluated.¹⁸⁶ If the application of the law, meaning the enforcement of the sanction for a public disclosure, is carried out despite the illegality of the particular form of secrecy the whistleblower is unveiling, then where does the legitimate aim lie? In other words, if it can be established that the secrecy under consideration was deep, meaning that it covered illegal activities or at least activities of contested legality that were insulated from

¹⁸⁴ Geoffrey R Stone, ‘Free Speech and National Security’ (2009) 84 Indiana Law Journal 939, 961

¹⁸⁵ Geoffrey R Stone, ‘Secrecy and Self-Governance’ (2011) 56 New York Law School Review 81, 84

¹⁸⁶ Barak (n 35) 350-351 on the marginal effects caused by the law.

public accountability,¹⁸⁷ then there is no legitimate interest that this instance of secrecy could protect.¹⁸⁸ This covers the defence of ‘improper classification’,¹⁸⁹ to the extent that the classification of violations of law is prohibited. The major counter-argument, namely harm to the national security,¹⁹⁰ which can be claimed even if the secrecy was itself illegal,¹⁹¹ is an unacceptable argument because it essentially places the executive’s determination of national security interests beyond the reach of law. It implies that national security is such an important value that it could justify violations of the law, a claim that is unacceptable in liberal democracies functioning under the rule of law. Safeguarding state secrets to the benefit of national security interests is legitimate, only to the extent that it respects the restrictions placed by democratic governance, separation of powers, and the rule of law. State secrecy cannot be a ticket to unaccountability. The disclosure of deep secrecy is therefore not interfering with the general (and in abstract legitimate) purpose of restricting the flow of information to the general public, but rather with the particular (and illegitimate) purpose of engaging into unchecked and unaccountable activity by the executive. The only argument that could be made in favour of proceeding to balancing in such a scenario of a public disclosure pertains to the legitimate aim of maintaining trust in government operations that legitimately require secrecy for their operations. Indeed, this seems to be the case in the UK Official Secrets Act, where members of security and intelligence agencies making unauthorized disclosures are liable to criminal sanctions regardless of whether their disclosure was harmful to national security. This extreme focus on internal loyalty and trust overlooks the loyalty public servants owe to society as a

¹⁸⁷ Deep secrecy, meaning undue and illegitimate secrecy, has a broader spectrum than illegality, in that it covers activities and programs insulated from any form of scrutiny and accountability, the legality of which could at least be contested. An example would be the disclosure of bulk data collection program of the NSA by Snowden, *see* below Section 3.2.4.3.

¹⁸⁸ Tsakyrakis is right when suggesting that “some types of justification are not just less weighty than the right with which they conflict [...] Rather, their invocation is incompatible with the recognition of that right”, Stavros Tsakyrakis, ‘Proportionality: An assault on human rights’ (2009) 7 *International Journal of Constitutional Law* 468, 488

¹⁸⁹ *Bellia* (n 12) 1523, suggesting that the improper classification defence could be an amendment to the Espionage Act. According to Kitrosser, ‘Leak Prosecutions and the First Amendment’ (n 7) 1265, the reasonable belief that the material was improperly classified should be sufficient.

¹⁹⁰ *See*, also Section 3.1.4.1.

¹⁹¹ For example, according to Sagar, *Secrets and leaks* (n 8) 128, “a secret surveillance program may violate the privacy of citizens but also uphold public safety”. Yet, the authority of the executive to make this kind of evaluation goes against democratic principles, not least because decisions about safety are decisions in which the citizens must partake. National security cannot function as a mechanism to by-pass the Constitution. In fact, Sagar goes further to argue that clearly unlawful conduct, such as ‘enhanced interrogation techniques’ should not always count as wrongdoing, as for the evaluation of a violation of law, the “broader context within which the violation has occurred” has to be taken into consideration, 129.

whole and to the Constitution.¹⁹² It is reasonable that the government may restrict the freedom of speech of employees in order to maintain trust and loyalty in its institutions, but that can be expressed through administrative sanctions, as I will show in the next subsection. Thus, even if it can be conceded that the maintenance of trust is a legitimate purpose of sanctions against disclosures, which is not trumped by the illegality of the secrecy (because they are questions of different order), then the sanctions would still not be necessary. Deterrence in that sense can be achieved through lesser sanctions, while the restoration of the rule of law and of public accountability is of paramount importance.

Second, a broad balancing test which balances the contribution of the whistleblower to democratic deliberation against the harmfulness of the disclosure is unworkable¹⁹³ and risks politicising the decision through ‘judicial decisionism’.¹⁹⁴ This touches upon the established criticism of the incommensurability of the opposing values and of the ‘irrationality’ of balancing.¹⁹⁵ The objections run in my opinion in parallel¹⁹⁶ and can only be stronger when the elements on scale are increasingly abstract. Irrationality essentially means the lack of standards that permit a rational reconstruction of the argumentation leading to a particular decision. According to Grégoire Webber, “without an identified common measure, the principle of proportionality cannot direct reason to an answer. It can merely assist reason in identifying the

¹⁹² It has also been supported that there is a constitutional duty, at least in the U.S., to affirmatively support the Constitution, which could entail an obligation of leaking, Alexander J Kasner, ‘National Security Leaks and Constitutional Duty’ (2015) 67 *Stanford Law Review* 241

¹⁹³ Papanrea, ‘Leaker Traitor Whistleblower Spy’ (n 18) 537. For an example of that test, see *Claude Reyes et al v Chile* (n 57) [93]

¹⁹⁴ Ernst-Wolfgang Böckenförde, ‘Grundrechtstheorie und Grundrechtsinterpretation’ (1974) 27 *Neue juristische Wochenschrift* 1529, 1534. See, also Poscher’s argument of ‘intuitionism’ Ralf Poscher, ‘The Principles Theory: How Many Theories and What is Their Merit?’ in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012)

¹⁹⁵ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press in association with Blackwell Publishing Ltd. 1996) 259, arguing that balancing lacks ‘rational standards’.

¹⁹⁶ A slightly different strain of objections starts from incommensurability to express a profound scepticism regarding proportionality’s ‘utilitarianism’ and its aptitude to protect rights, which should enjoy priority over competing interests. These would be approaches internal to the subjective liberties paradigm. For example, according to Dworkin rights are ‘trumps’, prevailing over policy decisions relating to public interest. Ronald Dworkin, *Taking rights seriously* (Harvard University Press 1978) 184-205. Tsakyrakis considers balancing a potential ‘assault’ on human rights, as it tends to neglect moral reasoning, which is necessary in the prioritization of values Tsakyrakis (n 188), 474-475. In a not so different vein, Aleinikoff suggests that balancing risks replicating the legislative process, when what is sought is the maximization of social welfare through an examination of similar variables in similar ways. Alexander T Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 991-992. This renders the constitutional protection of rights futile, as protection is always conditional on various circumstances and on the outcome of the balancing.

incommensurable choice that one must make.”¹⁹⁷ How can the judge make a decision that is not arbitrary amidst such wide discretion? Robert Alexy’s ‘Law of Balancing’, according to which “the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”,¹⁹⁸ cannot be applied if the detriment to one principle (say, national security) or the satisfaction of the competing principle (democratic deliberation) cannot be established using set criteria.¹⁹⁹ The very broad spectrum of discretion of the judge in the evaluation of the two parameters leads to the conclusion that the balancing test in such a scenario will necessarily rely on a personal decision not sufficiently informed by verifiable and reproducible standards.²⁰⁰ Furthermore, the outcome risks being too often deferential, if it assumed that the judiciary reproduces its strategy of not questioning the executive’s expertise and claims on matters of national security. In any case, the unpredictability of the outcome of the balancing has the further adverse institutional impact of functioning as a deterrent against public disclosures in the first place.

These arguments are not meant to oppose balancing altogether, a topic of extensive scholarly and jurisprudential analysis. The much more modest goal is to highlight the unsuitability of proportionality balancing between the contribution of the disclosure to democratic deliberation and potential harm to national security. Considering the established

¹⁹⁷ Grégoire C N Webber, *The negotiable constitution: On the limitation of rights* (Cambridge University Press 2009) 97

¹⁹⁸ Robert Alexy, *A theory of constitutional rights* (Oxford University Press 2002). Similarly, Barak (n 35) puts forward the ‘relative social importance’ of the public purpose or the right as the common denominator. Jeremy Waldron suggests a distinction between ‘strong’ and ‘weak’ incommensurability, Jeremy Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’ (1994) 45 *Hastings Law Journal* 813

¹⁹⁹ See, Rahul Sagar, ‘Creaky Leviathan: A Comment on David Pozen’s *Leaky Leviathan*’ (2013) 127 *Harvard Law Review Forum* 75, 83, for the impossibility of calculating national security harm.

²⁰⁰ See, also Lorenzo Zucca, *Constitutional dilemmas: Conflicts of fundamental legal rights in Europe and the USA* (Oxford University Press 2007), 88

The answer to this critique will be along the following lines: According to Alexy, the fact that values play a role in balancing exercises does not represent an objection to the rational justification of balancing decisions, unless the arena of non-authoritatively binding predetermined evaluations is in its entirety irrational. Defending the rationality of proportionality balancing (an integral element of his theory of principles as optimization requirements), Alexy suggests that “propositions about intensity of interference and degrees of importance lend themselves to rational justification”. Robert Alexy, ‘Proportionality and Rationality’ in Vicki C Jackson and Mark V Tushnet (eds), *Proportionality: New frontiers, new challenges* (Cambridge University Press 2017) 23. In any case, even if the role values might at times be problematic, it is often less so compared to interpretation. At best, the irrationality argument functions in comparative logic to interpretation’s rationality, Alexy, *A theory of constitutional rights* (n 198) 106. Similarly, Barak argues that discretion does not necessary mean irrationality. Judicial discretion must reflect the fundamental values of the legal system through transparent legal reasoning, Barak (n 35) 485-486.

tendency of the judiciary to trust the expertise of the executive in matters of national security,²⁰¹ as well as the potential media interest in such cases, it is in my opinion to the benefit not only of human rights protection, but also to the benefit of separation of powers and of the system of checks and balances if judicial discretion is kept to a minimum.²⁰² Therefore, the judge should first determine whether the *ad hoc* problem belongs to the category of *lato sensu* whistleblowing, meaning the disclosure of undue secrecy,²⁰³ or to the categories of espionage or treason.²⁰⁴ If the former is the case, then my suggestion is that no balancing should take place and criminal sanctions, a direct and extremely serious restriction of speech and personal freedom, should be ruled out as a possibility. *Lato sensu* whistleblowers should not be subject to criminal sanctions.

3.2.4.1.2. *Employment-related sanctions*

The answer for administrative, employment-related sanctions is not equally clear-cut. In cases of whistleblowing disclosing illegal secret practices, the government is still the employer. According to the ECtHR the employee has a duty of loyalty, reserve, and discretion to the employer and according to *Pickering* and its progeny, the government has a legitimate interest in guaranteeing the efficient functioning of its operations. Therefore, the legitimate purpose of the sanctions exists irrespectively of the (il)legitimacy of the secrecy involved. This is the major differentiation with the case of criminal sanctions, where as I argued, there is no legitimate purpose pursued by the sanctions. This does not mean that freedom of speech cannot invalidate a Non-Disclosure Agreement, as the US Supreme Court decided on the *Snepp* case, but it does mean that the duty of loyalty that Non-Disclosure Agreements prescribe is not automatically moot because of the existence of wrongdoing within the institution that is covered by secrecy.

Assuming therefore that employment-related sanctions are also suitable and necessary, they must also satisfy the question of proportionality between the satisfaction of democratic deliberation and the detriment to the duty of loyalty. The abovementioned scepticism to the rationality of the balancing test notwithstanding, this time the test appears much more defined and workable, under a standard that may guide the judge and frame his or her evaluation. The

²⁰¹ See, Sections 3.1.1.2, 3.1.4.3

²⁰² This answers to Barak's point regarding proportionality critics that "[a] more adequate argument would show that the use of this seemingly too wide a discretion leads to negative effects", *ibid* 487

²⁰³ For the 'hard' cases, where whistleblowers might disclose both deep and shallow secrecy, or where the nature of the secret information disclosed is not easily determinable, *see* Section B.4.3

²⁰⁴ For the distinction, *see* Papandrea, 'Leaker Traitor Whistleblower Spy' (n 18) 534-543

criterion for the particular balancing exercise is whether the whistleblower exhausted the internal means of reporting the wrongdoing, or whether such means did not exist, *or whether it would have been futile to pursue reporting through internal procedures*. This criterion is the first step of evaluation in the *Guja* case and it also figures, in different variations, in the relevant scholarship.²⁰⁵ If official channels of reporting exist, then it is reasonable to expect the employee to make use of them, as disclosure directly to the media may carry additional reputational costs for the public institution. In case reporting first to the organization would not be necessary, the organization would lack the incentives to develop internal mechanisms of reporting. In turn, the lack of internal reporting mechanisms might lead to underreporting, especially for relatively minor cases of wrongdoing, where the employee might lack the motivation to face the difficulties entailed by external reporting and where the organization could have indeed resolved the situation. If the employee deliberately ignores this possibility, then the detriment to the duty of loyalty outweighs the social value of the disclosure, because democratic deliberation does not rule institutional mediation and it could have been achieved by means less costly for the institutions. However, the whistleblower, carrying the burden of proof, should be able to argue that despite the existence of channels of reporting, pursuing them would have been to no avail, for instance in cases where the channels of reporting are controlled by the perpetrators of the wrongdoing. In such a case, the futility of following the internal reporting amounts to a defence of the whistleblower against employment-related sanctions. This is because the purpose of a constitutional protection of whistleblowers is to function as the last safety valve of the rule of law, accountability, and democratic legitimacy through the right of the public to know. If Pozen is right in that interbranch and interagency disclosures should be the first priority in avoiding deep secrecy,²⁰⁶ public disclosures still have to be protected as a means of last resort, first, because internal channels are bound to occasionally fail and second, because this protection acts as a deterrent against any efforts to prevent the disclosure of deep secrecy by controlling the internal reporting channels.

²⁰⁵ *Guja v. Moldova* (n 153) [73] and indicatively, Scharf and McLaughlin (n 25) 579-580, Kitrosser, 'Leak Prosecutions and the First Amendment' (n 7) 1273-1275,

²⁰⁶ Pozen, 'Deep Secrecy' (n 52) 324

3.2.4.2. *The balancing test in the case of shallow secrecy – Leaking*

3.2.4.2.1. *Criminal sanctions*

This case involves disclosures of shallow secrecy, in other words legitimate secrecy. Therefore, the persons who disclose the information are by definition ‘leakers’, not *lato sensu* whistleblowers, as they do not disclose any wrongdoing. In this case, under the institutional paradigm for which I have been advocating, there is little, if any, social value in the disclosure of the leaker. State secrecy in these cases is legitimate and the leaker decided to publicly disclose regardless. Does this mean that criminal sanctions are in order? Here I second Papandrea’s point that the government should not be allowed to punish its employees criminally unless it makes the same showing that it must make for government outsiders.²⁰⁷ This follows my previous point that disjoints criminal sanctions from the duty of loyalty and from the special status of public employees. However, the standards the government must meet for the criminal punishment of outsiders when it comes to speech are also not clear. Papandrea in this case refers to the American standards for prior restraints as confirmed by the seminal *Pentagon Papers* case,²⁰⁸ meaning grave and irreparable danger to national security that, if proved, may constitute an exception to the heavy presumption in favour of freedom of speech.²⁰⁹ In liberal democracies the power of the government to prosecute the publication or dissemination of information under the broader public purpose of national security must be met with the highest scrutiny in order to protect the unobstructed exercise of political rights that is necessary for the functioning of democracy. However, if the information is legitimately classified and the leaker has an objectively reasonable basis to believe that the information may inflict grave damage to national security, then the application of statutes such as the Espionage Act or the Official Secrets Act is justified.²¹⁰ A relatively straightforward example would be the disclosure (by an employee or even a journalist, as the same standards should apply) of the

²⁰⁷ Papandrea, ‘Leaker Traitor Whistleblower Spy’ (n 18) 543

²⁰⁸ See, *New York Times Co. v. United States* 403 U.S. 713, [1971] (US Supreme Court)

²⁰⁹ Papandrea, ‘Leaker Traitor Whistleblower Spy’ (n 18) 544, also suggests that after the government sufficiently proves this first point, it must also prove that the public interest in the information did not outweigh the harm. This cannot be the case for disclosures of shallow secrecy, as the public interest in the information, by definition, will never outweigh the serious harm to national security.

²¹⁰ Nevertheless, the “objectively reasonable basis to believe” the information was harmful does not necessarily mean ‘bad faith’, which focuses on the ‘selfish’ motivations of the leaker. This moralistic approach does not feature in my analysis. For a contrary analysis, see Patrick M Rahill, ‘Top-secret - the defense of national security whistleblowers: Introducing a multi-factor balancing test’ (2014) 63 *Cleveland State Law Review* 237, 251-253

names of intelligence agents working undercover. On the contrary, if the information disclosed by the leaker is already available to the public, then this is a strong indication²¹¹ that it is not harmful to national security and therefore should not be criminally punished.²¹²

3.2.4.2.2. Employment-related sanctions

I suggest that this is an easier case, as there is no convincing argument as to why the unauthorized disclosure of legitimate state secrecy should not entail employment-related sanctions for leakers. The government as an employer, rather than as a sovereign, may use sanctions to regulate the flow of information and to protect sensitive information. Employment-related sanctions are a sufficient deterrent, not only for its economic and social impact (e.g. in the case of dismissal), but also because it could have a permanent impact on one's career paths and life, for example through the revocation of one's security clearance and the subsequent record, which would prevent future employment opportunities in the national security sector or even more broadly in the federal government sector.²¹³

3.2.4.3. The reach of the institutional model of whistleblowing protection and the challenge of 'hard cases'

A legal maxim, sometimes attributed to Justice Oliver W. Holmes, is that 'hard cases make bad law'. Following this maxim, I would like to defend the general structure of my normative suggestion, which might be exceedingly difficult to implement in a few hard cases, but it will offer balanced solutions for the great majority of whistleblowing and leaking cases. The axes of my institutional model are the following: 1) Construct a jurisprudential model that focuses on the protection of unauthorized disclosures of information when they reveal illegitimate

²¹¹ Even though not conclusive, as the repetition of information already available may act as confirmation, for example in cases where the later disclosure comes from someone from a high position of the hierarchy of the institution.

²¹² Although the protection of journalistic sources is not discussed in this project, it should be noted that disclosures of shallow secrecy should be covered under its auspices, to the extent that they are not damaging to national security. The syllogism should be the same like the one presented in this Subsection. Therefore, even if the existence of a system for classifying publishing companies and journalists according to whether they were "favourable" or "hostile" to the armed forces is considered an instance of shallow secrecy, the government may not interfere with the freedom of the press to publish the story, or violate the protection of sources in order to locate and punish the source, *see* the analysis in *Görmüş a.o. v. Turkey App no 49085/07, [2016] (ECtHR)*

²¹³ *See*, 'Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information' (1982), A-5

secrecy, in order to restore accountability of the executive and to safeguard the rule of rule, the separation of powers, and in the final analysis the right to know, an integral element of democratic governance. 2) Protect legitimate secrecy through sanctions to leakers, which should nevertheless remain on the level of employment-related sanctions and only in exceptional circumstances, after heavy justification from the government, allow for criminal punishment. 3) Minimize the discretion of the judiciary through a categorization that allows for limited balancing through established criteria. 4) Place less emphasis on questions of good faith, focusing instead on the social value of whistleblowing and its function as a counter-institution against undue secrecy.²¹⁴

This model will work well in cases where the nature of secrecy is clear. For example, in cases where the *lato sensu* whistleblower came to the objectively reasonable conclusion that wrongdoing, abuse of authority, waste, or threat for public health and safety were concealed by state secrecy, then the described model is functional. Being based on the distinction between deep and shallow secrecy, rather than on the distinction between the legality or the illegality of the disclosed programs and actions, it has the advantage of maintaining the model's functionality in cases where the legality might be in a grey zone, but the secrecy did not permit for any substantial accountability. Deep secrecy and illegality do not always overlap, as deep secrecy describes a field larger than mere illegality and disclosures that pertain to this wider spectrum that have to be protected according to my analysis of Section 3.2.4.1.²¹⁵ For example, in the U.S., warrantless wiretapping programs, as well as interrogations that included violations of human rights, had been justified by "internal executive branch memoranda produced by the Office of Legal Counsel (OLC) under exceedingly insular conditions".²¹⁶ According to Jack Goldsmith, the relevant legal opinions were written by a tiny, like-minded group, which

²¹⁴ By this I do not mean that whistleblowers should not be treated as end in themselves - a fundamental principle of constitutional and criminal law, *see* Mordechai Kremnitzer, 'Constitutional Principles and Criminal Law' (1993) 27(1-2) Israel Law Review 84. Instead, I suggest that good faith, meaning the motivation of the whistleblower being the public good, should not constitute a requirement the lack of which would entail an absence of protection and sanctioning of the whistleblower. Indeed, if the information the whistleblower has social value thanks to the revelation of illegitimate secrecy, why should he or she not receive protection if he or she was motivated not by the public good but by, say, a personal antagonism with his or her supervisor? Such a development would not be favourable to whistleblowers and would be inconsistent with the notion that conflict over national security whistleblowing is not only about the rights of whistleblowers but about the democratic control of security politics.

²¹⁵ This dovetails with Kitrosser's argument that the balance should be tilted to the side of leakers and whistleblowers if the disclosure reveals a program or an activity, "the legality of which is subject to reasonable debate", Kitrosser, 'Leak Prosecutions and the First Amendment' (n 7) 1272

²¹⁶ *ibid*

disregarded statutes of which they did not approve.²¹⁷ Similarly, with regards to Snowden's disclosures, even though the existence of the bulk data collection program operated by the National Security Agency was approved by the FISC, its legality remains contested, with strong arguments supporting its illegality.²¹⁸ However, as Benkler has supported, even if the bulk data collection program is legal, "it is the kind of decision, affecting Americans and innocent civilians in other nations, that merits public debate and a democratic decision".²¹⁹ Therefore, in cases of illegal government activity or activity of contested legality that had been insulated from public accountability, the suggested institutional model can apply without shortcomings.

On the contrary, for the few cases that it is difficult to determine whether the secrecy was shallow or deep, then the model might encounter some difficulties. To return to the example of the development of the nuclear bomb during World War II, it is a difficult assessment whether this constitutes a deep or a shallow secret, because it depends on the unit of analysis. If that is the development of a weapons program, then it is a shallow secret, while if the unit of analysis is the development of weapons of nuclear technology, then it is a deep secret as it entails consequences citizens could not have fathomed.²²⁰ In such hard cases, the judge inevitably will have to determine the nature of the secrecy disclosed and resolve the conflict accordingly. Yet, there will only be a few cases that will not fall clearly within the spectrum of deep or shallow secrecy. In general, the standards set in this Chapter cannot preclude judicial discretion in its entirety, as it falls upon the judge to decide the legitimacy of the secrecy.

What will be more often the case is that disclosures include elements of both deep and shallow secrecy. A characteristic example are the disclosures of Chelsea Manning, who leaked thousands of reports to Wikileaks, ranging from footage of airstrikes that indiscriminately

²¹⁷ Jack Goldsmith, *The terror presidency: Law and judgment inside the Bush administration* (W. W. Norton 2009) 181

²¹⁸ According to Judge Leon the bulk program could constitute a violation of the Fourth Amendment: "[t]he Court concludes that plaintiffs have standing to challenge the constitutionality of the Government's bulk collection and querying of phone record metadata, that they have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim, and that they will suffer irreparable harm absent preliminary injunctive relief". *Klayman v. Obama* 957 F.Supp.2d 1, [2013] (US District Court, District of Columbia) [9]. According to Laura Donohue, the bulk collection program ignored the public purpose of FISA, it violated statutory language, and it gives rise to serious constitutional concerns, Laura K Donohue, 'Bulk Metadata Collection: Statutory and Constitutional Considerations' (2014) 37 *Harvard Journal of Law & Public Policy* 757, 763-766. For an opposite legal opinion, see John Yoo, 'The Legality of the National Security Agency's Bulk Data Surveillance Programs' (2014) 37 *Harvard Journal of Law & Public Policy* 901

²¹⁹ Yochai Benkler, 'A Public Accountability Defense For National Security Leakers and Whistleblowers' (2014) 8 *Harvard Law and Policy Review* 281, 322

²²⁰ Pozen, 'Deep Secrecy' (n 52) 272-273

targeted civilians and journalists, to war logs revealing violations of human rights, to thousands of diplomatic cables, the vast majority of which did not contain any violations and which were legitimately secret under the prerogatives of foreign affairs and international diplomacy.²²¹ What matters in this case is how the information is disclosed, meaning whether it has gone through a rigorous process of selection or whether it is a data dump, as well as to whom the information is disclosed.²²² In such a scenario of ‘mixed’ disclosures, the whistleblower/leaker should be sanctioned proportionately to his or her disclosures of legitimate secrecy.²²³ This would necessarily entail the possibility of employment-related sanctions, as well as the possibility of criminal punishment under the condition of proven harm to national security, as analysed in Section 3.2.4.2. Nevertheless, the disclosure of deep secrecy and the subsequent contribution to democratic deliberation should function as a mitigating factor.

In conclusion, the merits of the institutional model for which I have been advocating outweigh the difficulties posed by hard cases, where the role of the judge will necessarily be more determinant. The shift from the extent of the freedom of speech or the motivation and the good faith of the whistleblower/leaker to the legitimacy of the secrecy is consistent with the jurisprudence on the right to receive information and on separation of powers, as well as with the premises of deliberative democracy and political liberalism. The protection of unauthorised disclosures of deep secrecy functions as a safeguard of the democratic control of security

²²¹ For footage of the Baghdad airstrikes of 2007 targeting unarmed civilians and journalists, *see* (with caution) ‘Collateral Murder’ (2010) <<https://collateralmurder.wikileaks.org/>>. For the Iraqi war logs, indicating among other things that US soldiers handed over detainees to a notorious Iraqi torture squad, *see* David Leigh and Maggie O’Kane, ‘Iraq war logs: US turned over captives to Iraqi torture squads’ *The Guardian* <<https://www.theguardian.com/world/2010/oct/24/iraq-war-logs-us-iraqi-torture>>. For a summary of released diplomatic cables *See*, Scott Shane and Andrew W Lehren, ‘Leaked Cables Offer Raw Look at U.S. Diplomacy’ *New York Times* (28 November 2010) <<http://www.nytimes.com/2010/11/29/world/29cables.html?pagewanted=all>>

²²² The contrast of Manning’s and Snowden’s methods are indicative of the difference, with the prosecution stating in the former case that “there is no way he even knew what he was giving WikiLeaks”, Charlie Savage, ‘In Closing Argument, Prosecutor Casts Manning as “Anarchist” for Leaking Archives’ *New York Times* (25 July 2013) <<http://www.nytimes.com/2013/07/26/us/politics/closing-arguments-due-in-manning-leaks-case.html>>

²²³ For example, Benkler (n 219) 321-324 points out that while the disclosures of the bulk collection program, the ‘Bullrun’ program, and the limitations of the oversight process should be protected disclosures, the disclosure of the ‘Tailored Access Operations’ (TAO) program, aimed at targeting specific computers, cannot be protected “unless one completely abandons espionage as a tool”. This is because such a targeted counterterrorism program that does not extend its reach beyond specific targets cannot be said to be a deep secret. Yet, according to Benkler, “given the significance” of the other disclosures, Snowden should not be denied the protection of the ‘public accountability defense’ – here of the institutional model suggested.

politics, the rule of law, the separation of powers, and the institutional limits to executive action.

4. Conclusions

4.1. Lessons from the comparative perspective

The benefit of the comparative method consists, among other things, in the assessment of commonalities or differences in the way different legal systems approach one particular issue or conflict.¹ This assessment may in turn be used to outline general trends or to highlight fundamental and unbridgeable differences between legal systems that may be explained through recourse to history, sociology, etc. My approach takes the former path, in that it showcases the increasing similarity in how different legal cultures approach the issue of whistleblowing. In an age of globalization, inter-dependence, and multiplying structures of supranational unity, concepts such as ‘European public law’,² ‘global law’,³ and ‘global constitutionalism’⁴ entail bold claims or normative directions regarding the standards governing the exercise of public authority. In a similar spirit, the literature on comparative political economy has been intensely debating the issue of institutional convergence, with arguments suggesting that convergence happens within the clusters of Coordinated Market Economies (CMEs) and Liberal Market Economies (LMEs), but not across them,⁵ to more radical views suggesting that there is a tendency of capitalist economies to move toward liberalization.⁶

My project on the comparative institutionalization of whistleblowing is too partial to allow for generalizations of that kind. However, it does underscore that whistleblowing, a relatively recently conceptualized phenomenon, tends to be addressed in similar ways from countries

¹ John C Reitz, ‘How to Do Comparative Law’ (1998) 46(4) *The American Journal of Comparative Law* 617, 624

² Armin v Bogdandy, ‘The idea of European Public Law today’ (2017) 4 MPIL Research Paper Series 1

³ Rafael Domingo, *The New Global Law* (Cambridge University Press 2010)

⁴ For example, Anthony F Lang and Antje Wiener (eds), *Handbook on global constitutionalism* (Edward Elgar Publishing 2017)

⁵ This is fundamentally the view of the ‘varieties of capitalism approach’, see Peter A Hall and David W Soskice, *Varieties of capitalism: The institutional foundations of comparative advantage* (Oxford University Press 2001). See also, Wolfgang Streeck, *Re-forming capitalism: Institutional change in the German political economy* (Oxford University Press 2009) 162 suggesting that convergence and divergence may be operating simultaneously in different dimensions of institutional structure.

⁶ Chris Howell, ‘Review: Varieties of Capitalism: And Then There Was One?’ (2003) 36(1) *Comparative Politics* 103, 109

with different institutional cultures. Furthermore, it shows that the supposed ‘continental divide’ is progressively been bridged. It has been argued that European cultures may have been more suspicious of whistleblowers due to the memories of totalitarian regimes and of the role of informants. At the same time employment protection is in general more robust in Europe, while the existence of employee councils and unions, as well as the employee representation on boards (such as for example in Germany), activates non-institutionalized yet accessible channels of communication for whistleblowers. However, the globalization of economic practices, the interconnectedness of markets and the threat that corruption and fraud pose to market integrity, the exportation of the U.S. model, the need for uniform regulation especially for multinational corporations, as well as the prevalence of an individualistic perspective regarding relations of employment, have turned whistleblowing into a progressively important tool for financial and corporate regulation and, secondarily, for employee protection. It is the political economy that plays the decisive role in bridging the continental divide. As I argued through the examples of the Directive on Market Abuse of 2014, the Trade Secret Directive of 2016, and the proposal for a general Directive on the protection of whistleblowers of 2018, the construction of a common European policy on the matter of whistleblowing is made upon presumptions of efficiency, often in abstraction from the legal cultures of the Member States.⁷ This entails a risk of transforming the American model into a ‘universal rationality’ regardless of path dependence and democratic challenges.

The establishment of this convergence highlights the advantages of the comparative approach: First, it allows the development of a frame of reference that enables broader abstraction and transnationally valid conclusions on the principles, the functionality, and the normative directions for public interest disclosures. It is through this abstraction that I conceptualize and address the dualism of whistleblowing, meaning how whistleblowing has been adopted as a regulatory instrument in the effort to combat corruption and to secure market conditions, while at the same time its protection has been restricted when the disclosures refer to government secrecy. In its turn, this broad conceptualization allows for more general conclusions on the dialectics of transparency and secrecy as methods to regulate the information flow within or from a social system, in order to optimize its operative closure and cognitive openness. Second, it can also enable the delineation of principles that may indicate a deeper and more significant trend. An example of the latter would be if my conclusions on

⁷ See Sections 2.2.3.2 and 2.2.3.3.

whistleblowing in the regulatory governance of the markets and in national security served as an argument of a general trend toward institutional liberalization of capitalist economies, or toward insulation of the national security apparatus from mechanisms of accountability. Nevertheless, the meta-level, fascinating though it may be, requires caution and consideration of the partiality of the undertaken study. Therefore, for these final conclusions I will mostly focus on the results that can be asserted with certainty, leaving nevertheless some space for speculation as to the impact of the suggested theoretical conceptualizations and normative suggestions.

The domains compared were those of regulatory governance, focusing on the role of whistleblowing in financial and corporate regulation, and of national security, discussing the legal framework governing unauthorized disclosures of classified information. Legal evolution has been most striking and wide-reaching in the field of corporate regulation, where whistleblowing is perceived as an efficient instrument of decentred regulation, following the model of the United States. On the contrary, the seemingly opaque character of government secrecy, discouraging the establishment of reporting mechanisms while allowing for the criminal prosecution of public interest disclosures, is not a novelty, but rooted in the history and the functionality of the national security apparatus.

4.2. Protecting the market, not the whistleblower: The function of whistleblowing in the regulatory governance of the markets

Whistleblowing, as I showed, was first introduced into the workplace of the United States in the late 1970s, in the aftermath of the era of civil rights movement, transcribing a shift in the understanding of employee loyalty and hierarchical control. The institutionalization of whistleblower protection was based on the nexus of the prevalent individualism of the time and the pursuit of efficiency, a major goal of the Civil Service Reform Act of 1978. In the private sector, at the dawn of an era of deregulation, whistleblowing came to be regarded as a ‘last line of defence’⁸ against malpractices of powerful organizations.⁹ As it has insightfully been pointed out, the establishment of legal protection for whistleblowing employees was

⁸ Ralph Nader, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Grossman Publishers 1972) 7

⁹ See, for example the 1986 amendments to the False Claims Act.

“consistent with the trend of deregulation, which is based on scepticism that the government is in the best position to remedy some social ills”.¹⁰ At the same time, corporations started establishing internal channels of reporting of wrongdoing.¹¹ The assumed efficiency and the flexibility of whistleblowing as a regulatory instrument has led in the recent years to a progressive expansion and diffusion of whistleblowing legislation beyond the U.S., also to the European Union and its Member States, such as the United Kingdom, France, and Ireland, but also to Australia, New Zealand, Canada, South Africa, the Republic of Korea, and other countries. At the same time, whistleblowing protection has been enshrined in a plethora of international law instruments in the form of soft law recommendations.¹² These soft law initiatives seem to have an effect, as more and more countries have been adopting whistleblowing protection provisions in their national legislations.

The roots of whistleblowing legislation in the American legal tradition have shaped the trajectory of whistleblowing reforms in the European context. I have argued that the fundamental and most defining characteristic of whistleblowing legislation in the U.S., at least in the private sector, is that protection against retaliation is provided as an *adjunct* to the statute’s principal objectives, namely the maintenance of trust in the integrity of the markets through the fight against corruption and fraud. Whistleblowing is institutionalized as a regulatory instrument, rather than as an employee or human rights protection mechanism. This was mostly evident in the Sarbanes-Oxley Act (SOX) of 2002,¹³ which was passed in the aftermath of the major scandals of Enron and WorldCom. Aiming at solidifying corporate integrity and restoring the confidence in the markets, SOX sought to enhance transparency through new forms of regulatory oversight, among which were the increased protections for whistleblowers. More specifically, the Act, rather than granting rights to employees, purports

¹⁰ Daniel P Westman and Nancy M Modesitt, *Whistleblowing: The law of retaliatory discharge* (2nd ed. Bureau of National Affairs 2004) 1-12

¹¹ Already in 1995, David Lewis points out that “employers have increasingly been introducing codes of conduct or ethics which encourage the internal reporting of malpractices”, David Lewis, ‘Whistleblowers and Job Security’ (1995) 58(2) *The Modern Law Review* 208, 210

¹² See, for example, the United Nations Convention Against Corruption (UNCAC) of 2005, the Recommendation CM/Rec(2014)7 30 April 2014 (Committee of Ministers of the Council of Europe), OECD, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016), or The Global Principles on National Security and Freedom of Information of 2013.

¹³ Although the False Claims Act, allowing for *qui tam* actions of whistleblowers in cases of fraud against the government, already embodied a similar spirit of utilitarianism, which saw the concession of benefits/protection to individuals as an instrument for the resolution of broader problems. For the similarities between the False Claims Act and the Dodd-Frank Act, see Evan J Ballan, ‘Protecting Whistleblowing (and Not Just Whistleblowers)’ (2017) 116 *Michigan Law Review* 475.

to protect whistleblower behaviour, and as such the chief goal is the procurement of information regarding conduct that the employee reasonably believes constitutes securities fraud or corporate fraud against shareholders. Considering that the protection for whistleblowers in the private sector before the enactment of the Act was relatively weak and often depended on personal action (such as the requirement of personal ‘opposition’ to an unlawful action), SOX set a new paradigm, where the whistleblowers’ protection from retaliation is subsumed under the broader goal of detecting and remedying systemic threats to market integrity. This also meant an absolute emphasis on the information and the lack of subjective requirements, such as good faith. The whistleblower is only required to have ‘reasonably believed’ the information he or she procured was true. In addition, SOX placed the emphasis on the establishment of internal whistleblowing mechanisms and on internal reporting, showcasing the priority of problem-solving and preservation of corporate self-governance.

This approach was reversed in 2010, following the financial crisis, by the Dodd-Frank Wall Street Reform and Consumer Protection Act. This Act not only perpetuated and enhanced SOX’s anti-retaliation protection, but, most importantly, it also established a system of potentially hefty monetary awards for the reporting of securities law violations. However, the stronger protection and the financial incentives of the Dodd-Frank Act only apply to those who by-pass internal corporate reporting channels and instead report directly to the Securities and Exchange Commission (SEC).¹⁴ Employers cannot impede disclosures to the SEC by means of Non-Disclosure or Confidentiality Agreements.¹⁵ Conveying the contemporary distrust of financial self-regulation, whistleblowing provisions become a part of the larger regulatory framework aiming to guarantee the integrity, transparency, and accountability of financial institutions and private entities in general. The oscillation between less or more interfering policies highlights the dependence of whistleblowing protection mechanisms on the political economy and the level of trust placed on financial self-regulation. This dependence further adds to the argument that whistleblowing protection is conceived in a utilitarian fashion, as an instrument in the effort to secure market conditions.

¹⁴ *Digital Realty Tr. Inc. v. Somers* No. 16-1276, 2018 WL 987345, [2018] (US Supreme Court)

¹⁵ Securities Whistleblower Incentives and Protections 13 June 2011, 17 CFR 240, Rule 21F-17(a)(SEC). Considering, however, that Rule 21F-17 does not provide employees with a private right of action, courts also rely on existing contract law to balance the public and private interests of these confidentiality agreements. *See*, Section 2.2.2.3

In the European Union, whistleblowing legislation, significantly inspired by the American model, has been expanding. The countries examined for the purposes of this project, the United Kingdom, France, and Ireland, all indicate a progressive convergence with each other and with their transatlantic counterpart. The most important point of convergence among them is the establishment of a “three-tiered model”¹⁶ of protection. The UK Public Interest Disclosure Act (PIDA) of 1998, the French law n° 2016-1691 on transparency, fight against corruption, and modernization of economic life, and the Irish Protected Disclosures Act of 2014, all designate a system of disclosure that prioritizes first the employer, then the regulatory agency, and lastly, if the other channels fail, the media for disclosures that concern corruption, financial delinquency, and danger to environment, public health, or safety. That is not to say there are no differences between these countries. Importantly, the requirement of good faith is a necessary condition of protection in France, it plays a role in the determination of the compensation in UK, while it is insignificant in Ireland.

The convergence with the U.S. becomes more apparent on the level of the European Union. The Resolution 2016/2224(INI) of the European Parliament adopts the functional approach of the American framework, in that it bases protection on the information exposed, rather than on the motive or the good faith of the whistleblower.¹⁷ The Directive 2015/2392 aims to establish effective mechanisms to enable reporting of actual or potential infringements of the Market Abuse Regulation of 2014 and draws significantly from the Dodd-Frank Act. In its effort to secure market integrity, the Directive outlines the establishment of procedures for anonymous reporting of infringements of the Regulation to the competent authorities set up by each Member State, encouraging thus external whistleblowing. This constitutes a noteworthy deviation from the variations of the three-tiered system of EU Members States and it indicates the imperative need to prevent or detect and remedy market abuse. Protection extends against all forms of retaliation or unfair treatment arising as a result of the disclosure and it is not dependent on the motive of the whistleblower, while the implementation of financial incentives for reporting of wrongdoing is also recommended. The goal of enhancing enforcement is also the centripetal force of the newly published proposal for a Directive strengthening the protection of whistleblowers reporting on breaches of EU law (April 2018). In particular, the

¹⁶ Wim Vandekerckhove, ‘European whistleblower protection: tiers or tears?’ in David B Lewis (ed), *A global approach to public interest disclosure: What can we learn from existing whistleblowing legislation and research* (Edward Elgar Pub 2010) 15

¹⁷ Resolution 2016/2224(INI) 24 October 2017 (European Parliament) [47]

areas where increased enforcement would be the most valuable, such as public procurement, are the areas targeted by the reform proposal. Whistleblowing protection may, according to the proposal, contribute to a well-functioning single market, by securing the financial interests of the Union, and by ensuring the respect of competition rules, and of a level-playing field.¹⁸ This proposal exceeds all current standards of whistleblower protection in the EU and indicates that a functional understanding of whistleblowing as an instrument for the regulatory governance of the markets necessitates strong protections for reporting individuals in order to be meaningful. Nevertheless, these protections remain confined in the fields where reporting is deemed necessary for the success of the regulatory framework and most importantly, for the preservation of financial interests and integrity of the single market.

In both the U.S. and the EU whistleblowing protection is symbiotic with trade secrecy. In the U.S., according to the Defend Trade Secrets Act of 2016 (DTSA), whistleblowers are immunized from criminal and civil liability under any federal or state trade secret law for disclosure, in confidence, of trade secrets to government officials and attorneys for the purpose of reporting a suspected violation of law. Nevertheless, according to the existing case-law, the burden of proof regarding the intent to reveal a violation of the law lies with the whistleblower. In the EU, the Trade Secrets Directive 2016/943 established that the acquisition, use or disclosure of the trade secret should not be restricted when carried out “for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest”.¹⁹ I argue that despite some semantic flexibility, this is an important level of protection for whistleblowers, who must however this time be motivated by the purpose of protecting the public interest. This sudden reappearance of subjective standards, upon which the protection is dependent, can be attributed to the need to minimize the risk of the whistleblowing provision becoming the lever for industrial espionage. This highlights how whistleblowing protection is compatible with trade secrecy. The restoration of legality is this time balanced against trade secrecy. The purpose being to protect the trust in the market, the restoration of legality through the revelation of wrongdoing cannot come at the cost of opening the door to unethical market practices that would threaten the trust the Directive is supposed to be building. Whistleblowing must reflect the broader market-

¹⁸ European Commission, ‘Communication COM(2018) 214 on strengthening whistleblower protection at EU level’ (23 April 2018) 12

¹⁹ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure 8 June 2016 (European Parliament and Council) OJ L 119/89 recital 1, art 5(b)

related objective of creating accountability and ensuring a level-playing fields for private actors.

Whistleblowing is thus protected based on the value of the exposed information. It is progressively depersonalized through the encouragement of anonymity and the decline of requirement for good faith. It functions as a regulatory instrument, operating therefore also ‘in its absence’: If whistleblowing protection and incentivization is solid, the lack of whistleblowing instances may function as a further guarantee for market trust.²⁰ Whistleblowing institutionalization constitutes a form of regulatory pluralism, reflecting a way of governing ‘at-a-distance’ over a privatized network of services. This fits well with the description of the regulatory state, according to which the functioning of the markets is supported by rule- and standard-setting. This is more evident in the case of external whistleblowing to a regulatory agency, where the State harnesses the knowledge and proximity of employees to achieve regulatory aims. This is very much a functionalist, outcome-oriented understanding of regulation. In the case of internal whistleblowing, whistleblowing can best be conceptualized as part of the move to ‘new governance’, which entails a process of rule-making from actors other than democratic institutions, bypassing formality requirements to the benefit of problem-solving, flexibility, and cooperation. The oscillation between state-centred regulatory governance and new governance should not obscure the fact that whistleblowing is employed as a means to solve problems. The dovetailing of employee protection with market protection is an example of how liberal ways of governing employ the freedom of the governed as a technical means of securing ends of government.

4.3. Balancing whistleblowing and national security

The functional approach to whistleblowing protection is mirrored in the domain of national security *a contrario*, this time through the absence of protection. Where the disclosure of wrongdoing, systemic failures, and abuse of authority, -that is, the function of whistleblowing- threatens the stability of the social system, then protection and incentivization of the

²⁰ See, for example Hee M Lee, ‘Does the Threat of Whistleblowing Reduce Accounting Fraud?’ (University of Chicago 2017), suggesting that firms’ exposure to whistleblowing laws can create *ex ante* incentives for managers to deter fraud.

whistleblower are limited. Instead, whistleblowers may face employment-related sanctions and even criminal prosecution.

In the U.S., the issue of government whistleblowing and leaking has received much media and scholarly attention, especially in the aftermath of highly publicized cases, such as those of Chelsea Manning and Edward Snowden. Unauthorized disclosures of classified information, and especially those revealing accountability deficits and serious wrongdoing, have prompted a prosecutorial response by the government, which does not distinguish between whistleblowers and leakers. However, the definitional issue retains some importance, in the sense that ‘whistleblowers’ remains a legal category that may claim anti-retaliatory protection. For the purposes of clarity, I proposed a tripartite terminological distinction: *stricto sensu whistleblowers*, indicating individuals who follow the legal procedures to report on wrongdoing, *lato sensu whistleblowers*, who also disclose wrongdoing but not to the prescribed channels, but for instance to the press, and *leakers*, who disclose classified information not involving wrongdoing to the press.

The reporting mechanisms for *stricto sensu* whistleblowers being too restrictive and convoluted, individuals who want to report serious wrongdoing often resort to public disclosures, assuming thus the title of *lato sensu* whistleblowers. Indeed, the Whistleblower Protection Act of 1998 (WPA) excludes from its protection most government employees that might reasonably be expected to have possession of classified information, such as those of the FBI and the CIA, and does not secure against the revocation of one’s security clearance. The Intelligence Community Whistleblower Protection Act of 1998 (ICWPA) expanded protection to employees of intelligence agencies and to contractors reporting to the Inspector General, but it limited the subjects to those of ‘urgent concern’, it did not sufficiently encourage disclosures to Congress, it once again did not protect against the revocation of security clearance, and, most importantly, it did not provide for judicial review for retaliation resulting from the disclosure. The drawbacks of the Intelligence Authorization Act of 2014 are similar. Finally, the Whistleblower Enhancement Act of 2012 (WPEA) eventually excluded national security employees and contractors, while the Presidential Policy Directive 19 (PPD-19) created a convoluted internal mechanism, which grants agencies the final word in resisting a disclosure and which provided no remedy to the retaliated against employee. These mechanisms, as Vladeck correctly points out, will be the *least* effective when whistleblowing is *most* important, namely in accountability leaks, where the unlawful secret was known and perpetrated by the

top of the organizational hierarchy.²¹ At the same time, the government enjoys a wide discretion for the criminal prosecution of *lato sensu* whistleblowers through the Espionage Act. The statute applies in the case of disclosure of information relating to national defence “to anyone not entitled to receive it”.²² This makes disclosures to the press punishable in the category of espionage, considering that “anyone not entitled to receive it” applies to whoever is not authorized according to the classification system.

In Member States of the European Union, the situation is not much different. In the UK, the Official Secrets Act has a broad scope, as it is aimed both at government employees and anyone else who might possess classified information. Members of the security and intelligence agencies who make an unauthorized disclosure are liable to criminal sanctions regardless of whether their disclosure was harmful to national security, while other government employees or even journalists may be penalized only when they make a “damaging disclosure”. National security whistleblowers are also excluded from the PIDA and the only route to a protected disclosure is through previous authorization. In France, the unauthorized disclosure of classified information, regardless of its damaging nature, is a crime with severe sanctions under the Penal Code, while public employees are also bound by the obligation of discretion, a violation of which leads to disciplinary sanctions. Once more, no institutionalized channels of disclosure or framework for protection exists for whistleblowers, who are not immunized against criminal or disciplinary sanctions. Ireland’s regulation of national security secrecy is also governed by an Official Secrets Act, a legacy of the British Empire. All disclosures of official information are criminalized, regardless of whether the discloser is a public employee or any other individual, but penalties are lighter than in France or the UK. There is also a distinction between a general offence that does not require a damaging test and an aggravating case that requires damage to the State itself. However, Ireland has innovated in that the Protected Disclosures Act of 2014 provides for some channels of disclosures for *stricto sensu* whistleblowers. In particular, under specific conditions, a disclosure to the Disclosure Recipient, who is a judge appointed by the Prime Minister, is permitted.

But why does national security whistleblowing receive a response diametrically opposed to that of other types of whistleblowing? Starting from Benkler’s proposal that “national security is, first and foremost, a system of organizations and institutions, subject to all the

²¹ Stephen I Vladeck, ‘The Espionage Act and National Security Whistleblowing After Garcetti’ (2008) 57 American University Law Review 1531, 1544

²² 18 U.S.C. § 793(d), (e)

imperfections and failures of all other organizations”,²³ I suggest that whistleblowing’s important role as an accountability mechanism deserves a place within national security as well. I argue against the idea that national security, because of its sensitive nature, may be conceived as a space potentially ‘beyond-the-law’, where the executive can make evaluations and decisions based on self-developed criteria that do not have at least indirect democratic validation. Considering that the maintenance of legitimacy in the actions of the executive branch, the democratic dialogue about the extent of the government’s mandate, the respect of a system of separation of powers or checks and balances, and the existence of accountability mechanisms are important interests of the State, the potential for harm to ‘interests of national security’ by unauthorized disclosures should not lead to unequivocal and indiscriminate criminalization of all national security whistleblowing. Assuming, therefore, that legitimate interests might lie on both sides of the scale, the question that arises is how to balance them and how to conceptualize a *democratic secrecy*.

Whistleblowing reporting mechanisms have a role to play in this effort, not least because they represent the reflexive structures that allow for the coordination and integration of the national security subsystem within the broader political system. Following Habermas’ post-metaphysical thinking that sees legitimation arising from a discursive rationality of the implicated parts leads to the necessity of deliberation and agreement on the conditions of secrecy. These requirements are met in what has been framed as ‘shallow secrecy’,²⁴ meaning that citizens are aware of the existence of a secret and can estimate its content, even if the precise information is not known to them (it is thus a known-unknown), as opposed to deep secrecy (an unknown-unknown), where even the existence of the secret is hidden. My normative suggestions for the materialization of this legitimate, shallow secrecy are:

- i) Prevention of overclassification, through a sanction-imposing mechanism for improper classification, including classification of violations of law. Similarly, the courts should review classification decisions when necessary, instead of unquestionably deferring to the expertise of the executive.

²³ Yochai Benkler, ‘A Public Accountability Defense For National Security Leakers and Whistleblowers’ (2014) 8 Harvard Law and Policy Review 281, 284

²⁴ Indicatively, see Kim L Scheppele, *Legal secrets: Equality and efficiency in the common law* (University of Chicago Press 1988), 76, Amy Gutmann and Dennis F Thompson, *Democracy and disagreement* (Belknap Press of Harvard University Press 1996), 121, Dennis Thompson, ‘Democratic Secrecy’ (1999) 114 Political Science Quarterly 181, 185, David Pozen, ‘Deep Secrecy’ (2010) 62(2) Stanford Law Review 257, 274

- ii) The establishment of systems of internal and external reporting of wrongdoing, involving inter-agency and inter-branch coordination. For example, in the U.S., reforms should include a reporting instance other than the office of Inspector General, such as a congressional committee, while in the UK a recipient of disclosures could be the Intelligence and Security Committee (ISC) that oversees the work of intelligence agencies.²⁵ At the same time, reforms in favour of whistleblower protection should be accompanied with procedural rights regarding its utilization and especially with the possibility of judicial review for retaliation arising from the disclosure.
- iii) Expanding freedom of speech rights for *lato sensu* whistleblowers who make public disclosures. In cases where internal reporting mechanisms have failed, for example because the wrongdoing was perpetrated by those highest in the institutional hierarchy, then public disclosures might, under certain conditions, present the ultimate safety valve for the democratic character of secrecy.

But what are these conditions and how can the constitutional protection of whistleblowers be balanced with national security interests? A comparative examination of the jurisprudence and the case law in the United States and in the ECtHR indicates that whistleblowing in government is conceptualized as a conflict between subjective rights and public interest. As I showed, in the U.S., a series of constitutional cases, including *Pickering*, *Connick*, *Garcetti*, and *Lane*, concretized a balancing test consisting of three requirements for the protection of government employee speech: a) The obligation of the individual to be speaking as a citizen, rather than as an employee, b) the issue being of public concern, and c) a *stricto sensu* balancing affirming that the interest of the employee to comment upon the topic outweighs the interest of the state in preventing the disclosure. For national security employees, this balancing test has not been applied. Focus on the subjective liberty - freedom of speech, rather than on the social value of whistleblowing, informs this restrictive idea of balancing that has been prevalent in the U.S. On the other hand, the ECtHR, after establishing a set of criteria for the resolution of the conflict between the duty of loyalty and freedom of expression in *Guja v. Moldova*, has progressively been placing increasing emphasis on the social value of this form of speech. This is indicated by the shift of focus to the criterion of 'public interest' of the disclosed information

²⁵ In that direction, Ashley Savage, *Leaks, whistleblowing and the public interest: The law of unauthorised disclosures* (Edward Elgar Publishing 2016) 216

and its importance for public debate and deliberation, as well as by the slight subsiding of the most clearly subjective criterion, the good faith of the whistleblower.

The developments of the case law of the ECtHR, even if not conclusive of a general distancing from the subjective liberties paradigm, fuel my suggestion for an institutional framing of the conflict arising from national security whistleblowing. Understanding human rights as social and legal counter-institutions against the expansive tendencies of social systems underscores that the ultimate value to be protected in cases of unauthorized disclosures of classified information is not the self-fulfilment of the employee, but rather the democratic control over security politics, as well as an institutional system of rule of law, separation of powers/checks and balances, and political liberalism. The social value of whistleblowing in this case consists in the fulfilment of the citizens' right to know about government misconduct and undue secrecy. It is through the right to receive information that the citizenry becomes knowledgeable and self-government becomes possible. Besides, the requirement of transparency also stems from the theory of deliberative democracy.²⁶ Of course, the 'right to know' cannot be a right of everyone to know everything at all times, but it does transcribe the principle that government activity must be transparent, accessible to the citizenry and only in exceptional circumstances, and under conditions that themselves meet the requirement of transparency, can it be secret. The principle of the restricted nature of government secrecy resonates in international law, U.S. constitutional law, and the case law of the ECtHR on the right to information.

The institutional paradigm for which I advocate is based on the idea that only legitimate state secrecy must be protected. Where state secrecy covers violations of rights, misconduct, or by-passing of the law, then whistleblowers should be entitled to some protection based on the social value of their disclosures. More specifically, the institutional model warns against criminal sanctions to whistleblowers who publicly disclose instances of deep secrecy, considering that there is no legitimate secrecy (and hence legitimate public purpose) against which the freedom of expression of the whistleblower should be balanced. The counter-argument of potential harm to national security should be dismissed, because it would essentially place the executive's determination of national security interests beyond the reach of law, implying that national security is such an important value that it could justify deliberate violations of the law. This is a claim that defies not only the idea of a *democratic* secrecy, but

²⁶ See, Section 2.1.2.3

also the rule of law and the separation of powers, that is, the fundamentals of liberal democracies. However, in cases of disclosures of illegitimate secrecy, employment-related sanctions may still be in order if the whistleblower did not exhaust the internal means of reporting the wrongdoing, provided that they indeed existed and that it would not have been futile to pursue reporting through internal procedures. On the other hand, the disclosures of shallow, legitimate secrecy by leakers may be criminally sanctionable, depending on whether the disclosure seriously endangered national security. If the government can prove such danger, then the presumption in favour of freedom of speech may be overridden. Disclosures of shallow secrecy will necessarily entail the possibility for employment-related sanctions.

In sum, the axes of my institutional model are the following: 1) Construct a jurisprudential model that focuses on the protection of unauthorized disclosures of information when they reveal deep secrecy, in order to restore accountability of the executive and to safeguard the rule of law, the separation of powers, and democratic control of security politics. 2) Protect legitimate secrecy through sanctions to leakers, which should nevertheless remain on the level of employment-related sanctions and only in exceptional circumstances, after heavy justification from the government, allow for criminal punishment. 3) Minimize the discretion of the judiciary through a categorization that allows for limited balancing through established criteria, recognizing that balancing tests might be unworkable when two very abstract interests are placed on the scale.²⁷ 4) Place less emphasis on the subjective requirement of good faith, focusing instead on the social value of whistleblowing and its function as a counter-institution against undue secrecy.

The distinction between deep and shallow secrecy, rather than between the legality or the illegality of the disclosed programs and actions, has the advantage of maintaining the model's function in cases where legality might be contested, but the secrecy did not permit for any substantial accountability.²⁸ Even though there might be cases where distinguishing between shallow and deep secrecy might be difficult, I argue that these few 'hard cases', where the judge will necessarily have a more determinant role, should not warn against the implementation of the institutional model. In conclusion, the shift from the extent of the freedom of speech or the motivation and the good faith of the whistleblower/leaker to the

²⁷ See, Section 3.2.4.1.1

²⁸ Examples that would then be covered in the category of deep secrecy include the warrantless wiretapping programs and the interrogations that included violations of human rights in the U.S, which had been justified by internal executive branch memoranda, as well as the disclosure of the bulk data collection program, the legality of which was disputed. See, Section 3.2.4.3

legitimacy of the secrecy is consistent with the jurisprudence on the right to receive information, as well as with the premises of deliberative democracy and political liberalism, including the separation of powers, the limited nature of the executive's reach, and, ultimately, the democratic control over security politics.

4.4. Whistleblowing and human rights

The project set out to understand the relationship between whistleblowing and human rights. The conclusive answer is that the institutionalization of whistleblowing in the examined countries is distanced from a rights-based approach. The dualism of whistleblowing –in respect to markets and to national security– indicates the ‘*à la carte*’ approach of states in the establishment of whistleblower protection mechanisms against criminal or employment-related sanctions.

A typical rights-based approach would see whistleblowing protection integrated within the broader system of rights, as a subset of freedom of expression. Indeed, according to the European Parliament, the legal basis of whistleblowing protection is derived from its nature as “a fundamental aspect of the freedom of expression and information, as enshrined in the Charter of Fundamental Rights of the European Union”.²⁹ This would necessarily entail some limitations, stemming for instance from Article 10 of the ECHR, according to which the exercise of freedom of expression carries with it ‘duties and responsibilities’. The limitations could include the reputation or rights of others, meaning the right to a fair trial or privacy, as well as the public interest, e.g. in the case of national security whistleblowing. At the same time, a holistic, rights-based approach would also imply one general level of protection that may be limited in some circumstances under the principle of proportionality, but which benefits from the presumption of constitutional status. Nonetheless, this type of coherence would risk legitimizing and empowering a practice that disturbs the control of the information flow, with possible adverse consequences for the respective social subsystem. On the contrary, the approach that has been adopted links whistleblowing protection with its function. Whistleblowers are protected as carriers of information that is deemed useful for some specific

²⁹ Resolution 2016/2224(INI) (n 18) [A]

purposes; when the information does not pertain to the designated purposes, protection ceases as well.

As I argued, the U.S. model of whistleblower protection in the fields of financial and corporate regulation, even though it definitely empowers whistleblowers, does not create a general right to disclose public interest information as a component of freedom of speech. The same applies to the European Directive 2015/2392 on the reporting of infringements of the Market Abuse Regulation and to the proposed Directive of 2018.³⁰ First, the confinement of whistleblowing to certain areas where the enhancement of enforcement would be beneficial for market-related objectives and financial interests is incompatible with the universality of an individual right. Second, the development of a ‘three-tiered’ system or the prioritization of internal whistleblowing limit whistleblowing’s reach and do not correspond to the nature of freedom of expression. Third, and seemingly in contradiction, as it is to the advantage of whistleblowers, the potential dissonance of anonymous reporting with the rights of others was readily disregarded in view of whistleblowing’s benefits in the fight against fraud, corruption, and market abuse.³¹ Fourth, monetary rewards also seem hardly in line with the exercise of a right. Instead, this type of incentivization denotes the importance of the acquisition of the information. In France, where whistleblowing has often been seen as a right (*droit d’alerte*) and where monetary rewards do not apply, the Conseil d’État has underlined that “the right to whistleblowing” is inherently subsumed under the pursuit of the public interest.³² This is where the requirement of good faith comes to the foreground, as a way to preclude the pursuit of individual interests.³³ When whistleblowing is conceptualized as a ‘right’, then good faith is employed to restrict it to the pursuit of public interest, rendering it thus functional and shifting the focus from the self-fulfilment of speaker to the ‘noble cause’ of his or her disclosure. In general, and despite the ambivalence that may exist in the EU Member States regarding its

³⁰ Regarding the recent proposal for a Directive, it should be noted that the Commission explicitly discarded the option of making Article 153 TFEU on improving the working environment to protect workers’ health and safety and on working conditions the legal basis for the proposed reform, as it would be too far-reaching and costly, considering that it would apply beyond the Union’s law and financial interests, *see* European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the protections of persons reporting on breaches of Union law: 2018/0106 (COD)’ (23 April 2018) 7, discussed in more detail in Section 2.2.3.3.

³¹ Despite the early resistance to anonymity in the EU, as for example, in 2005, when the French Data Protection Authority (CNIL) prohibited McDonalds and Exide Technologies, two SOX-regulated multinational companies, to operate whistleblowing anonymous hotlines because of the subsequent violation of the privacy of the data subject. *See*, *Délibération relative à une demande d’autorisation de MacDonal’d’s France pour la mise en œuvre d’un dispositif d’intégrité professionnelle* n° 2005-110, [2005] (CNIL)

³² Conseil d’État, ‘Le droit d’alerte: signaler, traiter, protéger’ (2016). Les études du Conseil d’État 73

³³ *ibid*

legal basis, whistleblowing has been tailored as a transparency reform to fulfil the function of ‘governing-at-a-distance’, aiming to secure market conditions.

Conversely, the absence of a protective framework in the field of classified government secrecy indicates the unwillingness of the executive to see its own instances of wrongdoing exposed, while it makes the protection of whistleblowers dependent on the interpretation of freedom of expression. As I mentioned above, the limitation of whistleblowing in the context of government secrecy would not *per se* rule out its integration in the system of rights, under the auspices of freedom of expression. However, it is only by judicial initiative that whistleblowing may come to be seen as part of freedom of expression, as the criminal laws protecting state secrecy invariably target unauthorized disclosures of information, regardless of whether they involve wrongdoing. Even then, the primordially of national security interests—as the example of the non-applicability of the balancing test for government employees in the field of national security in the U.S. shows—, as well as the restricting criteria for establishing protection—for example under the ECtHR jurisprudence—, indicate the difficulties in according rights-based protection to whistleblowers. It is, in fact, precisely the lack of a more defined legal basis that leads to the pursuit of protection through the constitutional and human right of freedom of expression as a last resort and a possibility of relief, only in the aftermath of retaliation. Had whistleblowing received a stronger protection overall, in the private and public sector, and not just in the field of corporate and financial regulation, then efficient reporting mechanisms might have made prevention of retaliation possible and in any case resorting to the highest and most abstract scales of the normative order would rarely be necessary. Yet, this contradictory approach to whistleblowing protection is what constitutes the dualism of whistleblowing and it consists of: a) specialized laws establishing specialized procedures of prevention and remedy in case of securities law violations, market abuse, and fraud, and b) uncertain, difficult to achieve, and in any case limited and *a posteriori* right-based protection against a protected public interest in the case of government secrecy.

The functional approach to whistleblowing protection results from its perceived advantages as a method of regulation. In that sense, it serves as an indication of the interpenetration of law and economics, a recognition shared by the, in many respects oppositional, theoretical traditions of Law and Economics and Critical Legal Studies. Establishing that the current state of legislation on whistleblowing is based on a certain notion of economic efficiency does not necessarily entail that the infusion of the factor of ‘justice’, as an alternative to functionality, should take the form of a general right to blow the whistle, applicable in all fields and under all circumstances, but burdened with the general limitations of rights. Answering the ultimate

normative question in the context of whistleblowing, meaning, what the purpose of the law should be, I suggest that the response needs not be given in terms of subjective rights and their positivistic foundation or their naturalistic inalienability.

Instead, the normative substratum could be the institutionalization of a form of democratic control for and within social systems. That means that whistleblowing should function as a counter-institution against the expansive tendencies of social systems –whether that be the economy or national security. Bringing together different intellectual traditions, such as Arendt’s republicanism and Teubner’s system theory, the suggestion to create spaces for dissent within institutions resonates in contemporary questions of democratic governance.³⁴ Defying the rigidity of hierarchical command, while simultaneously recognizing the multiple layers of loyalty an employee might have (e.g. toward the organization and the society at large), institutionalizing the possibility for dissent constitutes a constant democratic test for the relevant organization. In a functionally differentiated society, where no central agency can claim to have the control, or even the overview, of the entirety of society, social regulation and coordination necessarily depends upon the existence of some level of self-regulatory capacities within each social subsystem. In fulfilling this kind of decentralization, whistleblowing becomes an instance of societal constitutionalism, guaranteeing bottom-up control of hierarchies, accountability, and the transparency necessary for political deliberation. By making possible communicative reflexive processes within social systems, whistleblowing brings to the foreground societal responsibility and it functions as a protective shield against human right violations. Whistleblowing law is then an imaginary concretization of Foucault’s *parrhesia*, that is, speaking truth to power, while it nonetheless remains confined within the framework that is imposed by definition through the processes of institutionalization. Whistleblowing law cannot encompass civil disobedience, but, contrary to those that support that whistleblowing needs to remain a moral –but punishable act,³⁵ I argue that in cases where the proclaimed institutional mechanisms fail, constitutional protection of freedom of speech, in relation to the content of the disclosure, should function as the ultimate safeguard of democratic control, public accountability, and public debate.

Keeping in mind that each social system and subsystem requires its own, specific, and adapted mechanisms for reporting wrongdoing, protecting the individual from retaliation, and

³⁴ Hannah Arendt, *Du mensonge à la violence* (Calmann-Lévy 1972) 101, Gunther Teubner, *Constitutional fragments: Societal constitutionalism and globalization* (Oxford University Press 2012) 88-89

³⁵ Rahul Sagar, *Secrets and leaks: The dilemma of state secrecy* (Princeton University Press 2013) 13

addressing the wrongdoing, my suggestions in the field of national security –at the level of the law and at the level of standards for a rights-based protection in balancing exercises—are context-specific. Yet, they are consistent with the described normative basis of whistleblowing as an instrument of democratic control and they may serve as a guide for developing a framework for whistleblowing protection in other fields, such as tax evasion, environmental protection, etc.

4.5. The dialectics of transparency and secrecy

The current institutionalization of whistleblowing serves to support the argument that the apparently contradictory forces of transparency and secrecy may in fact not be as antithetical as initially thought. Instead, I suggest conceptualizing them as the two ends of a common spectrum, ‘the control of the information flow’. They transcribe values much less than they transcribe specific functionalities and ways of governing. For example, transparency can then be a tool to regulate the administrative state or corporate behaviour, while secrecy the method to maintain executive predominance over specific state functions, such as those that are related to national security operations. Yet, transparency and secrecy remain ideal-types, describing different levels of restriction of the flow of information. Social systems in their quest to achieve their purpose, which at its most basic level is survival and reproduction, need to regulate the amount of information that goes in and out of the system in order to suppress deviations from the goal. It has already been pointed out that social systems and subsystems, such as for example national security, consist of communications. The communication being understood as the transmission of one message, selected from a set of possible messages,³⁶ it is the role of the system to define these sets of possibilities. The set of possibilities is not pre-given in a system, but instead it is produced by the very selections being feasible, “which recursively constitute (by being remembered, forgotten and re-invented) that set of possibilities”.³⁷ This points to a conclusion of first-order cybernetics, meaning that control has to do with communications.³⁸ It necessarily means that the definition of the set of possibilities for

³⁶ Claude E Shannon and Warren Weaver, *The Mathematical Theory of Communication* (Illinois University Press 1963) 31

³⁷ Dirk Baecker, ‘Why Systems?’ (2001) 18 *Theory, Culture & Society* 59, 66

³⁸ For the breakthrough study in the notions of communication and control, see Norbert Wiener, *Cybernetics or control and communication in the animal and the machine* (2nd ed. 14. print, MIT Press 2007), according to

selection of messages and the creation of meaning is integral for the goal-directedness of an autonomous system.³⁹ Control may require more or less information, depending on the function and the goal of the system. Systems seek to optimize the control of the information flow, which means managing the visibilities of communications in a way that allows them to optimize function performance. The two areas studied in this work, corporate and financial regulation and national security serve as examples.

The market -including the capital market- is, according to Luhmann, an economic system considered not in its wholeness but in its “turning-itself-into-environment”.⁴⁰ That means that participating subsystems in the economic system (such as corporations) regard the market as their environment. The market does not necessitate absolute transparency for its optimal functioning. For example, trade secrecy, a level of secrecy of the corporations-subsystems, is considered an integral part of optimal market functioning. On the other hand, if the secrecy of corporations-subsystems conceals phenomena that constitute deviations from the goal-directedness of the system, then secrecy is a perturbation that must be suppressed. If the goal of the market is to reproduce itself by allowing a continuous system of payments that allow a profit margin for its participating subsystems, then instances of fraud and corruption that threaten the trust in the processes of the market and risk its integrity must be suppressed. Therefore, the level of transparency required is the one that will permit the maximum freedom for economic actors (meaning therefore the minimum state coercion), while at the same time guaranteeing the maximum level of trust in the integrity of the market. This golden ratio may be materialized through reflexive structures that act as a safety valve for the entirety of the system, enhancing its self-regulatory capacities. In that sense, internal reporting whistleblowing mechanisms are meant to improve corporate compliance without resulting in reputational costs, while aligning with the broader trend of Corporate Social Responsibility, which conveys the idea that corporations become accountable to society at large and therefore should assume an active role in the resolution of cases of wrongdoing. Similarly, corporations are supposed to disclose non-financial information on environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. The development of this ‘new governance’ approach stresses that the best way to trigger changes

whom “one of the lessons of the present book is that any organism held together is held together in this action by the possession of means for acquisition, use, retention, and transmission of information” 161.

³⁹ Even if the goal-directedness is simply the process of autopoiesis, as in Luhmann’s work.

⁴⁰ Ivan A Boldyrev, ‘Economy as a Social System: Niklas Luhmann’s Contribution and its Significance for Economics’ (2013) 72(2) *American Journal of Economics and Sociology* 265, 277

to the economic system is through creating the mechanisms and the structures that will enable efficient self-regulation. Transparency requirements that may lead to reputational costs and force corporations to shape their behaviour based on societal pressures fall under this category and they concretize the idea of regulation through disclosure. Another way to achieve the transparency equilibrium is external whistleblowing, where protection and incentives to whistleblowers who step out of the firms are provided as part of the effort to improve enforcement and to guarantee the level of transparency that is necessary to avoid market abuse and to ensure a level-playing field for private actors.

Transparency, meaning then an information flow with few limitations, rather than absolute openness, also fulfils a function in government and public administration. In the U.S., the EU, as well in the context of global governance, transparency has been hailed as a solution to government malfunctions and a guarantee of accountability and sound decision-making. In this model, accountability becomes synonymous to legitimacy. The authority of a political system to produce and enforce norms is progressively distanced from its input legitimacy, meaning its participatory and representative potential and whether citizens can see themselves as the creators of their own laws, and more tied to its functionality, that is, to its role in the provision or coordination of services. Therefore, if the legitimacy of a political system depends more and more on its efficiency, then transparency becomes an important principle in the functioning of public governance. First, it constitutes a form of oversight over public functions via the constitutive role of the press; second, in the context of New Public Management and the introduction of economic rationalities into public administration, it is supposed to improve performance through its connection to professional management, contracts and out-sourcing, explicit standards of performance, and increased control on output of services; and third, it is integral for democratic decision-making. Possible critiques are that the increase of transparency is just nominal, that it is inefficient, that it leads to adverse results of information overload, that it functions only as a supposed antidote to democratic deficits, as well as that the change in governmental rationalities that stress the importance of transparency are aligned with market-based approaches and the neoliberal *modus operandi*, rather than with democratic and egalitarian values. This last critique correctly underscores transparency's character as a form of governmentality: Transparency indicates an approach to governance and to regulation, rather than an uncontested implementation of a liberal value. Apart from its function in the regulatory governance of the markets already described, it denotes that in government (especially in the context of public-private collaboration) the information flow needs to be so unhindered that it allows for an efficient carrying out of services –on which the legitimacy of the system, meaning

its capacity to reproduce itself, depends—, but not so free that it prohibits the kind of communications that can only thrive in secrecy.

This is the case of national security, where the information flow must be much more restricted for the system to remain autopoietic. National security is established as a self-referential system through the binary classified/unclassified, where classified describes its field of uncontested competence. According to Luhmann, “[w]hatever functions as a unit becomes a unit by the unity of the self-referential system.”⁴¹ The classification system, that is, the institutional foundation of governmental secrecy, constitutes the centripetal force in the creation and the continuity of the national security system. Yet, secrecy should not be understood as complete opacity, but rather as the management of visibilities and the control of the information flow. As it was argued,⁴² the executive controls the information flow also through a certain level of ‘leakiness’ and ‘planting’, designed to advance the interests of the administration. As a result of this management of visibilities, some true leaks have to remain unpunished if the system wants to maintain its credibility. According to Pozen, “[t]he practice of planting requires some amount of constructive ambiguity as to its prevalence and operation”.⁴³ Such a conceptualization of secrecy, which differs from opacity, brings to the foreground the similarities with transparency in that they both describe *ways of governing*. The national security apparatus achieves its legitimacy through its functional differentiation, as the only system capable of handling sensitive information that pertains to national interests. This insulates the information from the control of other systems or the wider public and enables the system to reproduce itself. Considering, therefore, that some level of secrecy is integral for the system of national security, I outlined what its optimal delimitation in a democratic society would be.

The functional approach to transparency and secrecy dictates the regulatory approach towards the phenomenon of whistleblowing. As I suggested already, whistleblowers are protected as carriers of information, rather than as individuals in the process of exercising their rights. The legal protection of whistleblowers is dependent on the value of the disclosed information for the particular system. If whistleblowing is beneficial to the optimization of the information flow in financial regulation, then it becomes an integral part of the regulatory

⁴¹ Niklas Luhmann, *Social Systems* (Stanford University Press 1995) 175

⁴² See, Section 3.1.1.2

⁴³ David Pozen, ‘The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information’ (2013) 127 *Harvard Law Review* 562

framework. If, on the other hand, it is detrimental to national security's centralized control of the information flow, then it cannot be condoned. This functional approach should nevertheless not come at the expense of democratic control of security politics, which is the axis upon which my normative suggestion for balancing whistleblowing and national security interests has been constructed.

4.6. Speculations and directions for further research

Some of the speculative questions and directions for further research relate to the empirical outcomes of the recent –or forthcoming, in the case of the proposed Directive– legislation, especially in the EU. Considering that I have made the case that whistleblower protections or incentive follow a functional logic of achieving specific outcomes, especially in the context of ensuring market trust and integrity, one topic that would be worthwhile studying is to what extent they achieve these goals.⁴⁴ In that sense, a socio-legal study on the efficiency of EU Directive 2015/2392, as well as on similar future initiatives of the EU would be significant. Similarly, will the proposed EU Directive on strengthening whistleblower protection for individuals reporting breaches of EU law, provided that it is actually adopted, achieve its proclaimed goal of enhancing enforcement? Could such a Directive, especially considering that national legislation of Member States is often sceptical toward whistleblowing protection, signify a change in organizational culture? Insights from empirical legal studies will be useful for the better understanding of the concrete outcomes of this policy shift, especially in the context of the EU. At the same time, doctrinal and EU law perspectives on the reception and the interaction of the proposed EU directive with national legislations will most certainly preoccupy legal scholarship in the coming years.

In addition, the diffusion of the described functional legislative framework for whistleblowing could be incorporated in broader studies of law and political economy as a part of a broader argument on the convergence of the varieties of capitalism in the direction of a liberalization of capitalist economies. I already suggested that strong whistleblowing protection

⁴⁴ In the U.S. the recovered sums from wrongdoers have been an argument in favour of the success of SEC programs. *See*, for example, Jason Zuckerman and Matt Stock, 'One Billion Reasons Why The SEC Whistleblower-Reward Program Is Effective' *Forbes* (18 July 2017) <<https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/#65d535713009>>

appears to be more coherently a part of LMEs and that this might be a direct result of the specific construction of labour relations and market regulation. Building on that hypothesis, it could be argued that the introduction of whistleblowing laws in CMEs might be indicating tectonic changes in the institutional shaping of capitalist economies, perhaps reinforcing the globalization hypothesis.⁴⁵

The diffusion of whistleblowing as a regulatory instrument in the globalized economy might be understood as part of a larger project of societal constitutionalism. The idea is that, as I have explained in the introduction and in the context of the idea of ‘reflexive law’, considering that a unitary conception of regulation of social fields appears less and less possible, democratic governance must take the form of ‘sub-constitutions’. According to Teubner, the public/private divide should be replaced by polycontextuality, meaning a pluralism of partial rationalities. Regarding the economic system, this means that it should be forbidden to express exclusively economic rationalities but should instead be infused with elements of ‘public’, where ‘public’ means the system’s relation to the entirety of society.⁴⁶ The goal is then to democratize the economy. However, the effort to democratize social subsystems should not mimic the political system; every social system must find its own way to democratization.⁴⁷ Societal constitutionalism places increasing emphasis on the development of self-reflective processes within the economic system, which would translate societal pressures into self-limitation and inclusion of a plurality of rationalities that extend beyond profits. This is why Teubner sees Corporate Social Responsibility Codes as civil constitutions.⁴⁸ The encouragement to corporations to design internal whistleblowing reporting mechanisms is part of the same logic of corporate self-limitation. The bigger question, therefore, is whether, in today’s transnational regimes, different concretizations of societal constitutionalism, including whistleblowing mechanisms, will be sufficient in restricting the economic system from having a harmful, or even catastrophic, impact upon other systems. This question necessarily includes more partial questions on the feasibility of societal constitutionalism, such as whether Corporate Codes could potentially be judicially enforceable,

⁴⁵ See, Paul Q Hirst and Grahame Thompson, *Globalization in Question* (3rd ed. Polity 2009) and the idea that national economic strategies become insignificant in the face of the global market.

⁴⁶ Teubner, *Constitutional fragments* (n 35) 34

⁴⁷ Gunther Teubner, ‘Societal Constitutionalism and the Politics of the Common’ (2010) 21 *Finnish Yearbook of International Law* 2, 13

⁴⁸ Gunther Teubner, ‘The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination’ in Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia 2010) 204

and on the safeguards that would guarantee that societal constitutionalism and democratizing the economy is not reduced to private ordering. In that sense, the research on whistleblowing as a regulatory instrument could be contextualized within the broader field of global public law and legal pluralism.

These are some indicative directions for future research that relate to the institutionalization of whistleblowing and which connect with the analysis undertaken in this study. Of course, further courses of study are possible. These could include different comparative approaches, which could include countries of the Global South not studied in this project, doctrinal approaches regarding whistleblowing protection in specific sectors, different theoretical approaches within human rights theory, potentially linking whistleblowing to collective rights, and others. The broad goal of this project was to outline a conceptualization of whistleblowing based on its current institutionalization in the U.S. and the EU. Building on the classic goal of social theory of law and legal sociology to theorize the role of law in modern society, the project aimed to theorize the role of whistleblowing and the juxtaposition of transparency and secrecy. I can only hope that legal practitioners and future researchers will find the insights presented here of use for their endeavours.

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5.10. Legislation

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United States

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Statement of Independence

“I hereby declare that I have written the present thesis independently, without assistance from external parties and without use of other resources than those indicated. The ideas taken directly or indirectly from external sources (including electronic sources) are duly acknowledged in the text. The material, either in full or in part, has not been previously submitted for grading at this or any other academic institution”.

Berlin, August 2019
Ioannis Kampourakis