

PhD Programme in Political Theory

XXVI Cycle

For whom the Whistle blows?

Secrecy, Civil Disobedience, and Democratic Accountability

PhD Candidate:

Manohar Kumar

Supervisor:

Dr. Daniele Santoro

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Abstract

This work deals with the question of governmental practices of secrecy. The fundamental question guiding the dissertation is the following: does whistleblowing, represent a legitimate case of civil disobedience in democracy? The dissertation answers this question in the affirmative. Against the backdrop of the main question lies the revelation that Wikileaks and Edward Snowden have made public in recent years. These revelations bring to light, among other things, the wrong-doings by the state under the veil of secrecy, and the extent to which the secret services have attained power to obtain secret data through surveillance.

In this context, it is imperative to ask whether the revelation by the whistleblowers was indeed right. To answer this question, we first need to study the democratic need for secrecy, its practice in day to day affairs, and the institutional measures designed to control the abuses that might result from it. The inquiry pursues the following stages: first, the democratic need for secrecy is explained. Second, limitations of secrecy for democratic functioning are examined. Third, the justification for secrecy, on grounds of security, is critically examined by analyzing the mainstream discourse of security. Fourth, institutional designs to curb excessive practices of secrecy are perused. Five, innovative institutional proposals to curb secrecy are scrutinized for their practicability. And finally, a case for civil disobedience is made, when all proposals to curb secrecy fail.

The main argument of the dissertation is as follows: secrecy is a prerequisite for democracy for reasons of security. The current conception of security, and the concomitant practices of secrecy, create democratic deficits, and have deleterious consequences for fundamental civil liberties. These deficits cannot be filled through the existing democratic instruments and institutions. In the absence of institutional

solutions to curb excessive secrecy, whistleblowing is a legitimate act of dissent. When whistleblowing is done with the intention to uncover illegitimate limitation of rights, or exposes democratic deficits, it is an act of civil disobedience.

The revelations by Wikileaks and Edward Snowden are not an aberration to the normal functioning of democracy. Reasons of state have often been used to hide institutional practices from the glare of publicity. Security is another reason to keep information secret. Often, revelations in the media illuminate about the consequences of classified state information. Yet, even if we assume, for the sake of discussion, that the revelations indeed are an aberration, we still need to inquire into the institutional systems that allow such an aberration to creep in. I argue that these revelations show an important point which has been relatively understudied in political philosophy. The problem is this: if secrecy is justified on democratic grounds, then do democracies have the necessary institutions and instruments to curb the excesses that might result from it?

While political philosophers have hitherto tried to justify the requirements of publicity in a democracy, the focus on secrecy has been miniscule. Publicity has been justified either on grounds of protecting substantive autonomy of citizens, or to ensure accountability on the part of public officials. Publicity also allows citizens to take part in deliberative sphere of policy making. Yet, the practice of secrecy and its fallouts for democracy are relatively understudied. The temptation to make a principled standpoint often ignores the empirical fact of secrecy. This is a gap in political philosophy which this thesis aims to partially fill.

Secrecy has been justified on the grounds of security. In trying to accommodate the fact of secrecy to the normative demands of publicity, following possibilities obtain. We accept the balance model interpretation (according to the model the proper position of a security policy is one that balances the need for security with that of liberty) that completely undermines the need for publicity in times of emergency. Accepting this model requires deference to the executive due to their superior expertise and efficiency

in dealing with security matters. Yet, this deference can only be based on trust which does not have a rational epistemic ground. Additionally, the balance model interpretation leaves great scope for undermining civil liberties that only gets exacerbated through deference. Civil liberties are far too important to be treated under a model of balance. They are not open to revisions as the model suggests. Any limitation to liberties has to be justified to those whose liberties are being limited. Such limitations should be based on the requirement of liberty itself, as John Rawls suggests. The limitation of liberty is only justified on the grounds that it protects the overall system of liberties. The diminution of liberties ought to be justified to those whose liberties are being limited. The balance model completely does away with the need of justification. Moreover, its consequentialist reasoning allows for the diminution of liberties of minorities, thus creating problems of distributive justice. Therefore, we ought to discard the balance model for such failings.

Alternative accounts (to accommodate secrecy with publicity) either advocate in favor of deliberative policy making, or in favor of the creation of institutional oversight mechanisms for ensuring transparency. The first approach is that of Gutmann & Thomson. They propose that only those public policies are legitimate that go through a test of publicity under deliberative circumstances. Secrecy is justified only when the general policy, under which it has to be maintained, has been accepted by the citizens. This line of reasoning follows the hypothetical Kantian test, but requires further testing at the deliberative level. Thus, if the citizens had known the specific details of the policy they would have agreed for it to be kept secret. The specific details cannot be made public, without letting the enemies know, meaning that the citizens ought to agree to a specific policy to be kept secret at the level of generality. This approach does not take into account the practices of deep secrecy where even the general details of the policy might be kept secret. Even by allowing the specific details to be kept secret, this theory allows the executive the freedom of unrestrained arbitrary actions. Thus, even if the general policy is public at the level of details the policy can conceal harmful actions.

The other three approaches are more institutional and argue in favor of an enhanced oversight role of the legislative, the judiciary or the media. Yet, they all face similar problems. They too do not take into account the problem of deep secrecy that allows information to be equally hidden from all other institutions, and not only from the citizens. The media can only rely on leakers for its sources of information, or careful leaking can be done through it for the purpose of manipulating public opinion. It is also not clear from the above approaches why the judiciary and the legislative would not show collusive behavior. The threats and the fears that security situations evoke might even allow them to defer to the judgment of the executive. It is in this context that we can understand the revelations by Wikileaks and Edward Snowden. If democracies cannot rely on the existing institutions to control unrestrained executive power, whistleblowing becomes justifiable if it reveals gross wrong-doings by the state.

Civil disobedience is an act of last resort when normal institutional procedures to correct wrong-doing do not function. I argue that secrecy operations, sometimes, subvert the democratic systems of checks and balances. Democratic oversight mechanisms fail since they require information from the very same gate keepers who are potentially bound to abuse their power. The only possible form of regulation is self-regulation, which implies no regulation at all. This requires a basic trust in the executive. Yet, such trust is not based on rational epistemic grounds. The threats to liberty are as real from the state as from outside forces. Thus, the chequered history of rights violations from executive bodies belies any rational trust in them. When normal oversight procedures fail, solutions to democratic deficits have to be found outside existing democratic institutions. An act of political or moral dissent is a necessary correction in this regard, if it does not threaten to undermine the basic democratic structures, but aims to strengthen them. Whistleblowing fulfills the requirements of genuine dissent if it uncovers illegitimate practice within institutions.

I argue that whistleblowing is an act of civil disobedience, if and only if, it reveals information that pertains to : a) a harm protected by a secret; b) uncovering an act of manipulation of public opinion by government institutions; c) an illegitimate law or policy; d) unveiling a policy that overextends its constitutional mandate. If any, or a combination, of these conditions hold then the act of whistleblowing is not only right, but it is the moral duty of the whistleblower to disobey. In the act of disobedience the whistleblower transcends the narrow confines of legal duty that binds her to the oath of secrecy, and affirms her status as a moral agent.

The morality of the act is grounded in the refusal to participate in the wrong-doings that are a product of secret operations. The institutional practice of secrecy, in these conditions, not only causes harm to individuals, but also undermines the basic structure of democracy. It shows that the institution has deviated from the constitutional functions assigned to it, creating a deficit in democracy. Any access to secret information that protects harm from being uncovered makes the knower a party to the harm, by the virtue of their silence. In fact by not revealing the harm, the knower participates in protecting the wrong-doers. The whistleblower, on the contrary, refuses to participate in this act of maintaining secrecy and reveals the wrong done. It is for this reason that it is an act of disobedience. Disobedience, in circumstances of secrecy, is both an epistemic and a moral act. Epistemically, the act informs the citizens about the deficits and harms that ensue from the informational asymmetry created by secrecy. Such harms not only compromise fundamental civil liberties and limit the political obligations of citizens, but the information protecting the harm compromises their autonomy. Classified information allows for arbitrary forms of power to the party controlling the information. Even if no actual interference happens, the potential for arbitrary interference is always present. This compromises the citizens' right to know the circumstances that surround the limitation of their rights, thus negating any possibility of having proper justification for those limitations. Absence of information

also limits the possibility to challenge such limitations in the court of law. Disobedience, in these conditions, aims at a necessary correction of the democratic flaws that result from arbitrary actions protected under secrecy.