

**PhD Programme in Political Theory**

**XXVI Cycle**

# **For whom the Whistle blows?**

**Secrecy, Civil Disobedience, and Democratic Accountability**

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## Introduction

### 1. Two events

On June 6, 2013 The Guardian and The Washington Post published the extent of United States surveillance operation under the secret programme PRISM. The United States government since then is pursuing the arrest of Edward Snowden, who is responsible for the revelations. On August 21, 2013, a military court convicted Chelsea Manning for 35 years on 20 charges, including espionage, for leaking secret documents to Wikileaks. Julian Assange, the founder of Wikileaks, remains in the confines of Ecuadorian embassy, fearing arrest if he walks out. The Wikileaks and the PRISM revelations brought to the public light the capacity USA has developed, not only in gathering private data, but also in its ability to eaves drop on diplomatic conversations of other nations. At the same time Wikileaks also highlighted the state's ability to maintain secrecy on its own affairs; some of them extra-legal.

The revelations point out three directions that secrecy policies of the state have taken, in years following the terrorist attacks of 9/11: the state has developed an enhanced capacity to gather private, personal and diplomatic data, while keeping its own data secret. At the same time, the state is becoming increasingly intolerant against acts of whistleblowing that reveals its secrets. It is argued that such revelations put the state at risk by aiding the enemy, shows disbelief in the democratic structures, and in its ability to correct any aberrations that might result from an extension of secretive policies.<sup>1</sup> The whistleblowers,<sup>2</sup> on the other hand, argue that although the state is right in keeping

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<sup>1</sup> <https://www.techdirt.com/articles/20130620/18182823551/obama-administration-has-declared-war-leakers-claims-any-leak-is-aiding-enemy.shtml> [Accessed Oct. 26, 2013]

<sup>2</sup> I take for granted in the introduction that these acts qualify the requirements of Whistleblowing. This is not an assumption for the thesis, but something I prove later on in chapter 4. Till then for the sake of the

some secrets, the revelations relates to that part of classified information that impinges on some of the fundamental interests of the citizens; i.e. the information is of a sort that citizens ought to know.<sup>3</sup> Additionally, it is the citizens who should decide what kind of information ought to be kept secret.<sup>4</sup> Thus, rather than aiding the enemy these revelations seek to uphold the rights of the citizens,<sup>5</sup> and creates a vibrant, transparent and strong democracy, devoid of corruption.<sup>6</sup>

## 2. The context

These two events have generated contrary responses from people either side of the political platform. Some have argued that these events threaten the security of the country, aid the terrorists, and thus ought to be termed as anti-national.<sup>7</sup> The incarceration of Chelsea Manning has been celebrated in these quarters. On the contrary civil liberty groups have challenged the response of the state to the leaks. They suggest that the revelations are in national interest since they uphold the constitutional values; the revelations expose the threats to civil liberties from the state. Such revelations ought to be protected under freedom of speech. Some of them characterize the act akin to the

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argument I will assume that these acts are Whistleblowing, thus rebutting the claim of those critiques who argue that these revelations aim to aid the enemy, and thus are anti-national.

<sup>3</sup> <http://www.policymic.com/articles/47355/edward-snowden-interview-transcript-full-text-read-the-guardian-s-entire-interview-with-the-man-who-leaked-prism> [Accessed Aug. 10, 2013]

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> <http://wikileaks.org/About.html>. [Accessed Oct 25, 2013]

<sup>7</sup> <http://www.theguardian.com/world/2013/jun/23/nsa-director-snowden-hong-kong> [Accessed Oct. 31, 2013]

Pentagon Paper revelations by Daniel Ellsberg, and suggest that these leaks ought to be seen as an act of civil disobedience.<sup>8</sup>

The contrary responses can be only understood by situating them in the context from where they emerge. The event hanging in memory behind the responses is that of 9/11. The event not only affected the victims of the attacks, but also the way the debate on civil liberties has been conducted since. It has been asserted that the nature of civil liberties cannot be the same as it was before 9/11, since there is a danger of an existential threat, from an invisible enemy, capable of striking at any time. This enemy, the terrorist, cannot be identified in a particular form, does not follow the normal rules of the game, or allude to the principles of the war. It does not discriminate between civilians or the security forces. They do not have a necessary political agenda for change, but they wage war because they hate 'our' way of life, i.e. 'our' liberties, modern values etc. Since terrorists undertaking the 9/11 attacks were muslims, it was also alleged that this is a form of religious jihad against the west and its values. Thus, in order to counter this threat, which lies as much 'within' us, in form of aliens, as much as 'without', requires alertness. The need to vigilant arises out of a basic prospect of fear, grounded in the need to safeguard ourselves against existential threats.

In the wake of 9/11, the popular mainstream discourse argued for a need to balance liberty against security. This discourse not only populated the debates in the media, and the parliaments<sup>9</sup> of various countries, it also found credence in the work of some legal

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<sup>8</sup> <http://www.theguardian.com/world/2013/aug/07/john-lewis-civil-rights-edward-snowden> [accessed Oct. 31, 2013]. For Brownlee, while the act of Snowden fulfills all the requirements of civil disobedience, except that Snowden did not submit to the law and so if he does so the act will comply with the conception of civil disobedience. For more see <http://blog.oup.com/2013/08/is-edward-snowden-a-civil-disobedient/> [Accessed Oct. 31, 2013] Also see Danah Boyd: Whistleblowing is the new Civil Disobedience <https://medium.com/surveillance-state/9a53415933a9> [Accessed Oct. 31, 2013]

<sup>9</sup> Michaelsen (2006)

theorists.<sup>10</sup> It was contended that times of emergency (and the period post 9/11 represents one) requires prompt, effective and efficient response. To cater to the demands of efficiency and effectiveness civil liberties should not be seen as inalienable, but should be calibrated against the existential requirements of security.<sup>11</sup> Such calibration can be done on a scale, where the requirements of civil liberties can be balanced against the needs of security. Treating rights as ‘trumps’ imposes heavy burdens in responding to security threats, which gets slowed down in the cumbersome requirements of realization of rights. Thus, rights should be stripped of their deontological status and treated on an equal footing with the concerns of safety. In the absence of such revisions, in the words of Richard Posner, the constitution becomes a suicide pact that allows trumping of rights at its own peril.<sup>12</sup> Under this reading, rights limitations of a minority are allowed to the extent that it makes the majority feel safer. This is based on a consequentialist account of rights. Such reading allows the theorists to argue for torture in extreme cases, extra-ordinary renditions, data mining and wire-tapping in order to serve the requirements of security.<sup>13</sup> This largely mirrors the popular discourse<sup>14</sup> that followed 9/11 which suggested that terrorists should not have human rights, because in threatening the rights of others they do not respect rights in general. And, people who do not respect rights cannot claim for their own legal rights.

The response from the state has largely mirrored such theorization. It is not my contention here to prove whether the theory justified the practice or *vice-versa*, or

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<sup>10</sup> Posner (2006), Posner & Veremeule (2007)

<sup>11</sup> Posner (2006)

<sup>12</sup> Ibid

<sup>13</sup> ibid

<sup>14</sup> In suggesting this point I do not want to say that Posner necessarily agrees with this mainstream view point, but the consequences of the view point are the same. But there is a marked distinction, while for Posner no one’s rights are trumps, but in the mainstream discourse, the rights of those who respect rights are considered as trumps, while those of the terrorists are not.

whether there is indeed a linkage between the two. It is sufficient to argue that, even if the two events are disconnected, security policies have not deviated from this line of reasoning. The wars in Afghanistan, in Iraq were argued as a response to thwart the dangers that emerged from terrorism and external threat. A spate of new anti-terror laws followed in countries around the world. Some of these laws allowed for wide scale surveillance with minimum controls. The executive power has seen a manifold increase, and the amount of information that has been classified as secrets has gone up considerably since 9/11.<sup>15</sup> Additionally, revelations showed the presence of detention sites like Guantanamo and Abu Gharib where alleged suspects were tortured and detained without trials.

The wide scale violations of civil liberties due to extra-legal methods have been critiqued by civil libertarian groups and some political and legal theorists.<sup>16</sup> It has been argued that the quest for security has led to a severe compromise of the human rights of individuals. The state has been given an unrestrained hand that has led to severe violations; such violations go against the very values of human rights and democracy much cherished in the west. The protection of these values cannot be done by undermining the very same values that one seeks to protect. It is only in this context that we can make sense of the revelations done by Wikileaks and Edward Snowden.

### 3. Publicity and Secrecy

The whistleblowers narrative, if right, provides a troubling account of the practice of governmental secrecy and its impact on the lives of the citizens. This rendition does not criticize governmental secrecy per se; secrecy practices are only illegitimate in so far as they impinge on the rights and obligations of the people. Under this interpretation,

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<sup>15</sup> <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/> [Accessed Oct. 31, 2013]

<sup>16</sup> Dworkin (2002), Waldron (2003), Luban(2005), Cole (2003)

secrecy is a necessary fact which democracies ought to take into account. In other words, the fundamental concern is not with secrecy, but what follows from the practice of it. Secrecy allows for information to be withdrawn from the public sphere that should ideally belong to it. It provides the necessary maneuver for agencies to work, sometimes extra-legally, outside their constitutional mandates. Because secret agencies have outstripped their own constitutional mandate, without any correlative controls,<sup>17</sup> they need to be submitted to citizens' assessment. Transparency, under this account, opens up the state institutions for a public review. Citizens' appraisal entails a critical scrutiny of security services and lays down constraints between legitimate and illegitimate action.

### *3.1 Is secrecy compatible with the publicity requirements of democracy?*

Political philosophers have not adequately studied the practice of governmental secrecy, barring a few exceptions.<sup>18</sup> Largely the study of secrecy has come from legal scholars who have tried to delineate the practices of secrecy which results from the institutional design of democracies.<sup>19</sup> Others have tried to study secrecy from the perspective of enhanced power of the executive,<sup>20</sup> or from the incentives that hidden information provides them with.<sup>21</sup> Curiously, the revelations by Wikileaks and Edward Snowden have not evoked much response on the practice of secrecy within state

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<sup>17</sup> Edward Snowden in an interview suggests that the internal system of checks and balances does not work. For more details see <http://www.theguardian.com/world/2013/oct/18/edward-snowden-us-would-have-buried-nsa-warnings-forever> [accessed Oct. 27, 2013]

<sup>18</sup> Sagar(2007, 2009), Bok (1983), Bobbio (1987)

<sup>19</sup> Pozen(2010), Fuchs(2006),

<sup>20</sup> Mohinyan (1999)

<sup>21</sup> Stiglitz (1999)

institutions.<sup>22</sup> There have been concerns raised, by a few scholars, on threats to liberty that arises out of the state discourses of security,<sup>23</sup> but the linkages, barring a few exceptions,<sup>24</sup> do not allude to the fact of secrecy. The reason for the lack of theoretical analysis can be cited in the way political philosophy has approached the issue of secrecy. Principally, political philosophy rejects the argument of ‘reasons of state’ argument for secrecy in favour of publicity.<sup>25</sup> Having argued for the ideal<sup>26</sup> requirements of publicity, secrecy, in my reading, is seen as an aberration that arises in non-ideal conditions with imperfect institutions that do not conform to the norms of publicity. The problem thus is not with the theory but with the deviation of the practice from the theory. Thus, it seems that political theory has nothing much to offer in regard to actual practices of democracy. At best some theorists have argued for an enhanced role for citizens’ participation in deliberations on policy making,<sup>27</sup> or institutional designs that will counter excessive secrecy.<sup>28</sup> Yet, secrecy per se, in the words of Norberto Bobbio, represents a deviance between ‘democracy as it is’ and ‘democracy as it should be’.<sup>29</sup> Thus, neglecting to study secrecy in its own regard, with respect to its

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<sup>22</sup> Some responses to Wikileaks revelations do not study the practices of secrecy in itself, but argue that Wikileaks kind of organizations create new form of accountability structures (Moore, 2011) or radicalize the right to know ( Zizek (2011) Giri (2010a, 2010 b)

<sup>23</sup> Dworkin (2002), Waldron (2003, 2006, 2011)

<sup>24</sup> Sagar (2007, 2009)

<sup>25</sup> Kant(1795), Bentham (1843), Rawls(1993,1999)

<sup>26</sup> The ideal and non-ideal distinction made throughout the thesis does not ascribe to the one made in Rawls (1999). For the purpose of the thesis, the ideal concerns of full transparency is what political institutions ought to establish in order to count as democratic, while non-ideal requirement allows for the fact of secrecy i.e. the day to day functioning of democracy requires that some practices need to be kept secret. The ideal works as a principled stand point from where the workings of democracy can be judged and critiqued. Under this reading secrecy is a problem only at the non-ideal level.

<sup>27</sup> Gutmann & Thomson (1996)

<sup>28</sup> Ackerman ( 2004)

<sup>29</sup> Bobbio (1987)



nature, its space in democracy and how it impacts democratic institutions represents a huge void in political philosophy that needs to be corrected. This thesis does not claim to have addressed this question in totality. Secrecy is a complex concept, and its space within democracy needs much more study than the current dissertation can undertake. In this context, the dissertation aims to stimulate further research in this direction. Its goal is to study the problem of governmental secrecy, the discourse in which it is situated, the way democratic institutions aim to counter its excesses, and argues that in absence of countervailing institutional design Whistleblowing cases ought to be treated as a form of moral disobedience. The questions in this thesis have been mainly influenced by the debates that have surrounded the events which followed the Wikileaks revelations by Chelsea Manning.

In order to understand the main concerns of this dissertation we need to understand the question that the revelations open up for political philosophy: should democratic states keep secrets? The moment we ask this question we assume that there are no prima facie reasons to accept secrecy. On the contrary secrecy practices ought to be treated with suspicion. Principally, this suspicion is grounded on the very fundamental premise that imparts legitimacy to democracy as a form of government viz. the will of the people. The question can thus be reiterated in the following manner: if democracies govern on behalf of its citizens, why should it keep secrets from them? Consent can only be grounded in a state when public offices are open to scrutiny by the citizens. Secrecy, under this reading, violates the possibility of such scrutiny and hence is illegitimate. In the face of secrecy, citizens can neither play an active role in the affairs of the state, nor keep track of activities. Such an argument, based on a delegated role of representation, assumes either direct or deliberative forms of participation.<sup>30</sup> But, even if we allow that

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<sup>30</sup> Pateman (1976), Habermas (1989), Gutmann & Thomson (1996). On the concept of representation see Pitkin (1967), Urbinati & Warren (2008). For debates on forms of representation also see Rehfeld (2005) & (2006), Mansbridge (2003), Saward (2010), Runciman (2007)

public offices should be based on a trusteeship model of representation,<sup>31</sup> the only way judgement can be entrusted to the representatives is by holding them accountable for their actions.<sup>32</sup> Transparency in public affairs ensures that public offices are not usurped to serve individual or narrow sectarian interests.

Publicity is required to check the unrestrained powers of the state. This premise is based on the fundamental interest in the protection of civil liberties and rights. It is argued that the threats to civil liberties come not only from external sources but from states too. Since the state is the only entity endowed with legitimate violence, it can turn its violence upon citizens or dissidents when it deems them as a threat to its own existence. In order to curb the potential abuses of this power, laws and government actions emanating from them ought to be public. In fact, such laws should be only those that rational people deliberating with each other have publicly agreed, know and accepted, and know that others accept it too.<sup>33</sup> Thus, any coercion on the governed ought to be a product of laws that emerge from the same consent. Thus, this requires that any curb on fundamental civil liberties ought to be justified to those whose liberties are being restricted. The publicity of the law and the need for a rational justification curbs the arbitrary interference by the state.

Thus, publicity is required not only for fulfillment of political obligations of the citizens, but also to ensure that their rights have not been illegitimately limited. But, does the principled point of publicity preclude any form of secrecy in a democracy? What, if any, are the justifying grounds of secrecy? If secrecy is justified how should it be

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<sup>31</sup> Burke (1790), Schumpeter (1976), Sartori (1987), Manin (1997) argue in varied ways for either complete independence or of relatively independence of the representatives from their electorates' view points.

<sup>32</sup> Pitkin (1967)

<sup>33</sup> This is the fundamental idea behind the publicity principle of Rawls. For more see Rawls (1999) esp. pp. 115, and see Political Liberalism, especially the part on three levels of publicity. Rawls (1993: 66-71)

accommodated with the normative requirement of publicity? This is the first question the thesis explores.

This way of asking the question already lays down possibilities and the manner through which it can be answered. The need to accommodate secrecy with publicity already assumes that the concepts under analysis are rival in nature; the presence of one excludes the possibility of another. But, is there an irresolvable tension between secrecy and publicity in a democracy? So, if we address the question regarding democracies' need to keep secrets in the affirmative, then we need to address the concern of the rivalrous nature of secrecy, if we are not to discard publicity altogether. Thus, we need to prove that the publicity requirement indeed accommodates the need for secrecy. Publicity, in this version, is treated as a default position for democracy and secrecy is an aberration; though a necessary aberration. If we are able to prove that publicity can indeed accommodate secrecy, it takes care of the requirement of the fact of secrecy, elucidated by the whistleblowers. To demonstrate this point, we need to show that secrecy is not only a fact in a democracy, that it should be accommodated just because of its empirical necessity, but the justification of secrecy comes from the very premises that democracy is built upon. We also need to prove that in conditions where there is an actual conflict, democracy does have the necessary institutions and values to resolve such conflicts.

### *3.2 The need for secrecy*

The justification of secrecy in a democracy stems from two sources: (a) security, and (b) the need for better quality deliberation. Secrecy is justified on grounds of security.<sup>34</sup> The line of reasoning is as follows: One of the basic functions of a democratic state is the protection of its citizens against internal as well as external threats. States in order to fulfill this function need to keep some of its operations secret. The operations are of a

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<sup>34</sup> Thomson (1999), Sagar(2007), European Convention of Human rights (1950)

nature that revealing them will defeat their very end. The information cannot be shared with the citizens without the enemies accessing it at the same time. Cases like troop movements along the border, surveillance represent some examples of this kind of secrecy. Secrecy, in this argument, preserves the fundamental interest of security of the citizens by ensuring normal functioning of the democratic institutions. This argument can also be represented in the following manner: the very reason for which citizens have consented to form a state is to preserve their security and liberty. The state can only fulfill this duty in some cases by maintaining secrecy.

Yet, this argument does not allude to a fundamental suspicion in the powers of the state to threaten citizens' interests. Some theorists thus argue that secrecy is justified only when the policy, under which information has to be concealed, itself has gone through a process of public deliberation between free and equal citizens.<sup>35</sup> Thus, under this reading, publicity requirement itself accommodates the need for secrecy; publicity does not require that all the information of the state ought to be public, but only the general policy that covers secrecy. The complete compliance with the ideal of publicity, under this model, goes against certain other democratic requirements which people have reason to uphold. Thus, publicity accommodates the need of secrecy, at the non-ideal level of daily practices of the state.

The other justification for secrecy comes from the fact that it allows for better quality deliberation. Secrecy allows for policy makers to not play to the gallery of individual or sectarian interests. They can invoke better reasons, revise their positions, deliberate without undue pressures and come out with better quality decisions.<sup>36</sup>

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<sup>35</sup> Gutmann & Thomson (1996)

<sup>36</sup> Gutmann & Thomson (1996), Thomson (1999), Chambers(2004)

#### 4. The problems with secrecy

Theoretically, thus, publicity and secrecy are not incompatible at the level of democratic institutions. Yet, at the level of practice the problem of secrecy still remains. This is the contention of the whistleblowers. The contention even goes further to claim that the existing institutions cannot control the abuses that result from secrecy. It is this lack of checks, both prospectively and retrospectively, that justifies the act of whistleblowing. This charge of the whistleblowers though requires further examination. It is this contention that defines my next set of inquiries. Thus, we need to ask: what are the problems that can emerge from the state practices of secrecy? Why do these problems occur in the first place? Does it have to do with the nature of secrecy or with the freedom that secrecy allows individuals with?

To answer these questions the thesis proceeds in the following manner: first I explicate a theoretical understanding of secrecy and its particular characteristics. Secrecy allows for an action or information to be hidden without being known to others, thus, allowing for freedom to act, without any correlative constraints. It allows for spaces of maneuver and deception. The particular problems of secrecy arise from this very nature. I then go on to demonstrate this analysis with empirical examples of how secrecy impinges on the rights of individuals, and in some instances subtracts important information that might be required to fulfill political obligations of citizens. Such a conception of secrecy emerges from the dominant conception of security that sees the relationship between security and liberty as a form of balance. The balance model argues for deference to the judgement of the executive at times of emergency, since it is they who due to their secrecy and expertise can provide a quick, efficient and effective response to the threats. Under this reading, the lack of expertise, and the lack of information regarding the nature of security threats makes courts and the legislative ineffective in handling security situations.

## 5. Can democratic institutions control excessive secrecy?

Even if we have demonstrated that secrecy constrains the realization of rights and obligations, the analysis would be incomplete in the absence of demonstrable reasons that show that state institutions do not have the necessary means to overcome them. Representative democracy is based on the fundamental idea of checks and balances, whereby any extension in the power of one branch is kept in check by other branches. So it needs to be demonstrated that these mechanisms might not work in some instances. This leads to the third question: whether the existing institutions of judiciary, legislative and a vibrant press<sup>37</sup> can control the excesses that result from executive practices of secrecy? According to the balance model these institutions do not have sufficient role to play during emergency. Yet, liberal scholars argue for an enhanced responsibility of judiciary and the legislative through oversights, and vigilance on the part of media to counter the excesses. But, in the face of secrecy, can these institutions provide the correlative checks that these theorists think they can?

Edward Snowden in his interview contends that they cannot. There are three conclusions one can draw from his contention with differing impacts for future analysis. Firstly, his contention can be taken as that of an insider. Even an insider account can raise suspicions regarding his motives. Secondly, his contentions, if true, might just represent the way secret agencies function, but not how they ought to function. Thirdly, it can be argued that while in this case the constitutional bodies could not control the excesses, which if they had functioned properly they would have been able to. And finally, we can conclude that the hidden nature of secrecy allows the executive to even subvert democratic controls over their actions. To explicate what

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<sup>37</sup> Press is not an institution of state but can work towards ensuring accountability of the state by revealing its wrong doings.

indeed is the case, we need to peruse the various proposals that seek to control executive excesses, and evaluate them against the specific hidden nature of secrecy. Secrecy allows information to be known by those who possess it, by virtue of it the executive can act as a gatekeeper over who has access to information. If this is true then other branches can only have information when the executive provides them with it.

## 6. Is Whistleblowing an act of civil disobedience?

The gatekeeper role of the executive regarding information control opens up a paradox for democracy. For democracy to function it needs secrecy, yet it ought to be able to maintain control over excessive practices, through its institutions. But if the information is only accessible to those who are prone to abuse it creates a conundrum which cannot be solved through existing mechanisms of democratic control. This contention needs to be examined and the thesis will examine it further. But, if the contention is found true, then we need to find how democracy can be salvaged from such conundrum. The revelations by the whistleblowers seem to show a way. By dissenting against wrong practices of secrecy, they aim to communicate to the citizens about such wrongdoings. This contention leads me to ask the final question of the thesis: is whistleblowing an act of last resort to salvage democracy against excessive practices of secrecy? In fact we need to ask whether acts like Wikileaks ought to be termed as whistleblowing or should fall under the category of civil disobedience. To show what the case is, the thesis will analyse the existing theories of whistleblowing and civil disobedience and see the categories under which Wikileaks and PRISM revelations fall.

## 7. Chapter Plan

The thesis has 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. Four, existing democratic institutions and

instruments are perused for their efforts to limit the practices of secrecy. Five, innovative institutional proposals to curb secrecy are examined for their practicability. And finally, a case for civil disobedience is made, when all proposals to curb secrecy fail.

In short the thesis can be summarized in the following sentences: Secrecy is a prerequisite for democracy due to the requirement of security. The current conception of security and the concomitant practices of secrecy create democratic deficits: deficits which cannot be filled through the existing democratic instruments and institutions. Absent any prior instrument to curb secrecy, democracies ought to allow for civil disobedience, when classified information protects unjust practices.

The first chapter looks at the democratic implications of secrecy. State secrecy is often justified on the grounds of security. It is often argued that states in order to keep its citizens secure need to withdraw some information from the public domain, lest it spills over to the enemy. This justification though causes a few problems for democratic theory at the level of principle and practice. Principally democracy ought to conform to the norms of publicity. Democratic procedures and institutions ought to be open for public scrutiny.

Secrecy deviates from the ideal requirement of publicity in democracy. Yet it does not pose a problem of justification in non-ideal settings. It would only be problematic if we do not weigh the demands of publicity with the requirement of security. State is entrusted with the function of protecting the life, liberty and property of individuals. In doing so, it has to keep a check on any possible infringements on security. In non-ideal settings, the state would be justified to use secrecy if it helps in fulfilling its functions of security. The thesis acknowledges the claims of security and argues that any democratic theory should accommodate the demands of secrecy to the ideal of publicity. Yet, it argues that publicity should be the norm against which requirements of secrecy should



be judged. Secrecy should not be the default principle in a democracy. To this end, the thesis casts a window of suspicion on the governmental practices of security and secrecy.

Secrecy claims have to be put to scrutiny for their democratic implications. To this end, first the thesis conceptually defines secrecy in general and its practices by the executive in particular. Then it charts out its implications. Secrecy, by its nature, limits the information only to the one who possesses it. This ensures not only a control over ways to use the information, but also over those who do not possess it. It thus has particular implications for the enjoyment of rights of the citizens, the democratic checks and balances and fulfillment of the political obligations on the part of the citizenry. It can also work as a smokescreen behind which the unjust practices of the executive can be hidden. These aspects are discussed in detail in the thesis.

The second chapter details out the mainstream conception of security. The mainstream conception of security is represented by the balance model. The tradeoff thesis is a particular way to implement the principles of the balance model. For the balance model, the aim of public policy should always be to achieve an optimum balance between the claims of liberty and security. This chapter argues that the particular way of framing the model gives more credence to security at the expense of liberty, thus violating the requirement of neutrality which the model assumes. Allowing rights to be open to calibrations with the demands of security has particular consequences for civil liberties without any correlative epistemic warrant that such curbs will make people secure. The chapter also argues that the balance model has important distributive implications for it does not account for the rights of the minority.

The responsibility of achieving the balance, in the model, lies with the executive, especially in times of emergency. It is argued that in times of emergency, legislative and judiciary ought to defer their decisions to the executive, given its efficiency and

effectiveness in handling emergency and its access to information. This is called the deference thesis. The deference thesis allows for a relative autonomous functioning of the executive, free from the constraints of the judiciary and legislative. It thus provides legitimacy for the practice of secrecy in the functioning of the executive.

The model is based on the prospects which people fear. Security is conceptualized on the basis of such a fear in the minds of the people. Public policy then ought to limit such prospects of fear, but in doing so the model is willing to limit rights, without proper guarantees to those whose rights are being limited. This has particular problems regarding responses to such a policy. Security reasons often evoke uncritical response because they appeal to people's deep held anxieties. Even courts and legislative are not averse to such fear. If the object of fear is hidden from public and only accessible to the executive, it could be used to generate favourable responses to policies which the executive deem fit. Secrecy can then easily be justified under such a conception of security.

The third chapter seeks to analyse institutional responses and innovative solutions proposed by legal and political theorists in order to curb secrecy. First the normative requirement of publicity is laid out through a reading of the classics. This normative requirement serves as limitation on which any institutional responses can be evaluated. It is argued that democratic theory ought to weigh the need for secrecy to the normative requirement of publicity. Any institutional solution ought to take the normative criteria as its benchmark in order to succeed. Institutional responses, if they have to be successful, have to accommodate the legitimate need for secrecy along with a practicable way to limit the unjust practices which ensue due to it. In this regard the chapter evaluates the proposal for legislative oversight by Bruce Ackerman in 'The Emergency Constitution', the various proposals for Judicial oversight, and the role the media can play (especially under the equilibrium model interpretation of it) in curbing executive secrecy. I argue that most of the institutional responses seem to fail in this

regard. Either they leave too much scope for secrecy without providing practical pathways to confront it, or they lean heavily in direction of publicity without leaving any scope for legitimate secrecy.

The fourth chapter analyses whistleblowing as a case of civil disobedience. Ideally public policies ought to comply fully with the demands of publicity. In non-ideal circumstances full compliance is often not possible. Partial compliance would entail that the practice of secrecy is justified. Absent proper justification the practice cannot be legitimate and ought to be curbed. Democratic institutions ought to be able to curb the excessive practices of secrecy, especially when those practices are linked to unjust acts and limit the balance of powers among institutions. Yet often citizen groups and institutions are not able to limit secrecy owing to the absence of information. Existing designs of institutions often fail to curb these excessive practices. It thus opens up a democratic dilemma. The dilemma can be specified as follows: 'democracies need secrecy, but do not have instruments to challenge the malpractices due to excessive secrecy'.

The dilemma cannot be resolved by the instruments of democratic self-correction. If democracies have to correct the deficit caused by secrecy, it ought to create other instruments. In the absence of such instruments we need to look beyond an institutionalist understanding of democracy. Current understandings have to look at the practices of dissent as a way to correct the necessary deficits in the democratic process. Dissent, if done not with the purpose to subvert existing institutions, but to expose their wrong-doings ends up in strengthening democracy. It is in this context we need to study acts of Whistleblowing as genuine cases of dissent. Whistleblowing, in conditions of secrecy, normally exposes the wrong-doings of an institution, or reveals practices that deviate from the constitutional requirements. I argue that it is to Whistleblowing cases that we ought to bring our attention if any attempt to salvage democracy from excessive secrecy has to be successful. The chapter presents an

alternative reading of Whistleblowing than has been usually the case. It argues that whistleblowing ought to be read as an act of civil disobedience when the revelations highlight gross wrong-doings, reveal the exorbitant powers of the executive that compromises democratic checks, and show instances of manipulation under the veil of secrecy.

Civil disobedience ought to be a right when normal instruments of democracy fail to curb the injustices which results from excessive secrecy. In conditions of excessive secrecy, public disclosures by citizens or state officials of classified documents which reveal the unjust practices of the state ought to be categorized as an act of civil disobedience. Civil disobedience is justified when the act is done publicly, on behalf of the citizens and seeks to reveal unjust practices of the state. It ought to be an instrument of the last instance when all the normal modes of engagement and redress of injustice have been exhausted.

It can be argued that secrecy, when used as a cover for unjust acts, breaks the social terms of cooperation, whose rules are codified and enacted through an institution. The institution, here the executive, breaks the social compact which binds it. An act of civil disobedience, enacted as a last resort, is aimed at correcting such a deficit. Rather than betraying the trust of democratic institutions, civil disobedience instates vitality in them. Similarly, if secrecy hides the unjust practices of the state which compromises the rights and obligations of the citizens, civil disobedience exposes the lack of guarantee of rights or provides information to fulfill political obligation.

Secrecy creates an epistemic asymmetry between the citizens and the executive. It allows for forms of control and exercise of unchecked power. This has particular problems for democracy in general. An act of disobedience, in these circumstances, reveals this deficit, the deviation of the democratic institution away from the constitutional norm. I call this form of disobedience as epistemic disobedience. The

disobedient fulfills his moral duty by exposing the informational asymmetry that protects the wrong-doers, and the democratic deficit within the institution. In doing so the disobedient moves beyond narrow constraints of legal duty, which binds her to the oath of secrecy, to fulfill their obligation to the citizens. In doing so, she refuses to be complicit in the harms done. It can be argued that by having access to the information the whistleblower is made complicit in the harm, if she maintains silence. In this case the moral duty to disobey (a refusal to take part in the harms) overrides the narrow constraints of legal duty. The second argument in favour of disobedience arises out of autonomy. Secrecy severely compromises the autonomy of citizens, exposing them to interferences in their liberty (sometimes even without their notice). The revelation of secrecy practices provides the ground for citizens and civil society groups to assess the losses in their autonomy, and is a basic precondition if the lost autonomy has to be indeed restored. It does not directly follow from the argument that civil disobedience indeed to be successful ought to reach out to those whose autonomy has been curtailed. While that necessarily should happen, but in this instance, disobedience is used as a communication about a deficit, about a wrong practice. The communication is not necessarily aimed at a specific individual, but to the various actors in society viz. civil society, legislative, judiciary etc. who are in a position to pick up the information and act upon it. Such change can only happen at the level of politics at the level of institutions and public sphere. Civil disobedience is just the beginning of this politics, and provides with the most important resource to carry on the activity for the desired political change. It is in this regard the chapter claims the Wikileaks and PRISM revelations by Edward Snowden be seen as an act of epistemic disobedience.

## Chapter one

### Democratic implications of secrecy

The problem of secrecy has been widely studied in the recent years. It is generally accepted that secrecy in the affairs of the state is not a good thing, but necessary for the good of security. It is argued that for democracy to function properly, it needs to protect itself from external and internal threats. Security requires that sensitive information be not open to public, lest it spill over to the enemy. Stationing of troops, sites of military nuclear power, or intelligence gathering by the secret services are examples of this kind. For this reason, the functioning of the secret services is constitutionally mandated, and their informational resources are exempted from sunshine laws that require functioning of the executive to be open for public scrutiny. Thus, state secrecy privileges, especially executive privilege, are enshrined in the constitutions<sup>38</sup>. Yet, in the period post 9/11- with the discourse of security taking a precedent-<sup>39</sup> the exemptions sought by the

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<sup>38</sup> It is a mistake to assume that the executive privilege and the secrecy privilege which comes with it are a product of the constitution. As Mark J Rozell suggests “Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power – Congress and the courts (and therefore, ultimately, the public). This right is not absolute, as executive privilege is often subject to the compulsory powers of the other branches.” (2002:404)

<sup>39</sup> One of the markers of the enhanced requirements of security is the enhanced defence budget expenditures of the countries around the world. Taking the example of US Zedner says : “It is estimated that the US security market generated \$29.1 billion in revenue in 2006 from ‘the threat of terror’, of which about 70 per cent came from federal, state, and local government contracts, and current estimates suggest that this will double by 2010.” (Zedner 2009: 102). See also <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/> [accessed Oct. 15, 2013].

executive has grown exponentially.<sup>40</sup> It is argued that the risk of threats have gone up due to an invisible enemy with the potential of striking at any time. This enemy, cannot be defined in terms of a territory, or does not have particular features, and does not follow the old rules of combat thus combating the threat presupposes a different response.

The response to the threat has resulted in a spate of new laws in the US and other countries.<sup>41</sup> Surveillance operations, data mining etc. have been on the rise on an unprecedented scale. It thus becomes imperative to look at the implications of the discourse of security on the functioning of democracy. In order to understand it, I will highlight two key concepts: security and secrecy. Security is one of the fundamental grounds used by secret agencies for classifying state documents. With the number of such classification on the rise, it becomes imminent to understand what this conception of security entails and how it structures the functioning of the state. It is equally necessary to understand the implications of secrecy for the democratic functioning of institutions, and its impacts on the liberties of citizens. In this chapter, I will demonstrate the democratic implications of secrecy.

Before embarking on my argument some qualifications need to be made. The concept of secrecy will be understood in relation to the democratic functioning of the state. I leave out cases of secrecy that concern individuals (for whom secrecy might be a way to

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<sup>40</sup> A study done by Washington Post shows that there has been an exponential rise in exemptions under state secrecy privileges. See <http://www.aofs.org/wp-content/uploads/2010/08/100820-TWP-america-top-secret1.pdf> [Accessed Oct. 15, 2013]

<sup>41</sup> The attacks of 9/11 followed a spate of anti-terrorism legislation all across the world. Homeland Security Act, 2002, Patriot Act and amendment in National Defence Authorisation Act in USA, Anti-terrorism, Crime and Security Act of 2001, Terrorism Act 2008 in UK, Australian Anti-terrorism act, 2005, Unlawful Activities (Prevention) Act in India are some of the examples of such kind of acts.

preserve their privacy), secret societies and groups.<sup>42</sup> The minimum interest in individual secrecy, if any, would have to do with cases of surveillance, data mining and data gathering. For this matter privacy is a more helpful concept than secrecy, and I would allude to it if required. Thus, in this chapter I do not draw on a whole sale analysis of the concept, but limit it to the cases of executive secrecy. By executive I mean that branch of the state which deals with the day to day functioning of the state apparatus. This branch is responsible for the execution and enforcement of the constitutional laws, as mandated by the legislature or as interpreted through the judiciary. It is thus responsible for maintaining public order. This could be the branch of defence, the secret services, police, education, health etc. Executive secrecy deals with the secrecy imminent in the functioning of this branch of the state.

## **1. Secrecy: A conceptual analysis**

X is a secret if and only if an agent A having information I intentionally<sup>43</sup> withholds it from being revealed to others. Holding a secret requires four definite characteristics:

- a) agent A knows I,
- b) I is not known to anyone else other than A,
- c) I is intentionally hidden from others, and
- d) the veridic claims of I can only be ascertained by A.

The claims of veracity have to be treated with a bit of caution and a qualification is in order before we proceed. I can be kept secret even if A is uncertain about the truth value

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<sup>42</sup> For a wholesale analysis of individual and group secrecy look at Simmel(1906). For the need for individual secrecy see Bok(1983)

<sup>43</sup> The intentional aspect of secrecy has also been highlighted by Bok (1983)



of I. For I to be kept secret, it need not be true. It might be completely false or uncertain. I need not be a piece of knowledge and need not stand up to the epistemological scrutiny of truth. I can be kept away from others just because the truth content is not known by A or she is uncertain about it. It is instructive to see that while the veridic claims of information I cannot be tested, but the veridic claims of the statement, that particular information, albeit uncertain or false in its content, has been kept secret can be verified. Possession of truth value by A with respect to I does not always have to do with the truth content of I but with the truth content of the possession of I. From the ensuing observations, one can also claim that it is only A who is potentially able to ascertain the veracity of I. A is thus in a position to use I as they deem fit, and given favourable circumstances to ascertain the veracity of I.

### *1.1) Intentionality aspect of secrecy*

The type of secrecy under consideration here is intentional.<sup>44</sup> A knows that she knows and that others don't know<sup>45</sup> and makes sure that they don't know, till the point A wants to reveal it. Thus intentionality protects a range of actions. Secrecy, in this sense, can allow for a range of actions to be undertaken which would not have been possible without the active subtraction of information from the public domain. Troop movements or surveillance operations, if known, can defeat the very purpose of the action. On the other hand, secrecy can also be used to thwart the capacity of rational decisions of others. Intentional secrecy creates a control over informational resources. Such control opens up a wide range of action for A. It empowers A to utilize information for her own end or the end of the others. This creates an asymmetry in

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<sup>44</sup> A might not know something but might not be aware of the knowledge of it. It belongs to the category of unknown knowns. But this is not part of the analysis here.

<sup>45</sup> A might be mistaken in the belief that others are not aware of the secret, but in his knowledge it is just her who knows about the secret. Sometimes A herself can be the origin of the secret and would be the only one knowing about it.

power relations between A and others. Such power asymmetry, if used for the ends of others who have access to the knowledge of the existence of such asymmetry, as happens in constitutionally mandated executive secrecy privileges can be beneficial to others, but it can also lead to manipulation or control. It does not necessarily follow, that holding I directly empowers A to act; an act to be actualized requires other set of conditions to be in place. Manipulation, is not directly a product of secrecy, but is enabled due to the presence of the secret information. For manipulation to take place, secrecy might be a necessary condition but not a sufficient one. Secrecy, being the enabling condition, can allow A to reorder other circumstances for manipulation to be successful. Others can thus be made to believe things which are contrary to the fact. By actively subtracting information from others or providing them with insufficient or wrong information A hampers the capacity of an autonomous agent to make rational decisions and have control over one's own choices. Under secrecy, what the agent believes to be a product of rational choice might have been tampered with, due to the active interference of A.

Let us try and make sense of the above theoretical considerations with an empirical example. One of the main reasons for the war with Iraq, as cited by the USA and its allies was the possession of weapons of mass destruction by the Iraqi regime. After the occupation of the country by the allied forces, the information turned out to be completely false.<sup>46</sup> There could be multiple scenarios which will highlight the theoretical point under discussion. It might have been the case, that there was no information received by the US agencies about their being any presence of Weapons of Mass Destruction (WMD) and they deliberately chose to mislead the public about it being the case by creating such information.<sup>47</sup> The second scenario would be that they

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<sup>46</sup> See <http://www.nbcnews.com/id/7634313/> [accessed Oct. 25, 2013]

<sup>47</sup> Fresh evidence claims that MI 6 and CIA were told by the Iraqi foreign ministry before the war about the absence of active weapons of mass destruction. See

received false information which they took to be true and tried to work on it. In fact, the information carried out by the media houses about the presence of WMD always suggested reliable sources, but never went on to specify who those sources were in the first place. So even if, the second scenario does hold it specifies our case that holding information does not necessarily mean that it is true. Even if the state was misled into believing, it still was in complete possession of the instruments in order to verify its claim, which it did not do so for reasons outside to do with the nature of information itself. This enhances my claim, that it is the agent who possesses the information, and the only one in perfect position to assign a truth value to it. This was not done in the case mentioned above and false information was taken to be true. Or it might be the case that the information was always known to be false but action was initiated due to reasons other than those to do with the possession of information itself. Since the sources and the proofs for making the case of WMD was kept secret, the state could act as it deemed fit without any recourse to the truth of their being such a case. In fact, there are enough reasons to believe that truth was sidestepped to undertake other ends. This is a particular case, where the aspect of secrecy allows for a realm of action which has nothing to do with the truth content of the information. In fact information can very well be manufactured or non-existent but the opacity of secrecy allows even the non-existent information to be hidden.

### 1.2) *Secrecy in institutions*

The analysis till now has been at the level of individuals but secrecy in the case of government is institutional and cannot be understood by generalizing individual practices of secrecy. Institutions have to do with certain set of rules and practices comprising of multiple set of people working on different designated tasks. In democracies, such an institution is the executive. Secrecy at the institutional level does

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<http://www.theguardian.com/world/2013/mar/18/panorama-iraq-fresh-wmd-claims> [accessed Oct. 25, 2013]

not mean that the existence of I is a common knowledge among all the employees of the secret services. The information I being kept secret is institutional and is maintained by the agents who are responsible for maintaining or gathering the information. The condition of common knowledge does not hold though all the individuals in the institutions might potentially have it. In fact, it might be the case that different secret agencies hold separate information, which might not be accessible to the other.<sup>48</sup>

Secrecy at the level of institutions thus protects the range of actions and information within that institution. It grants freedom to individuals working within those institutions, to execute certain actions without being known. Any abuses which result from such protected actions are due to the way the institution itself functions. In democracies, it is assumed that the institution ought to have certain internal and external checks on their actions. While the external checks are absent as we will see later, internal checks means that we can attribute intentionality to the action to an individual or groups within an institution particularly mandated for such tasks. Having said that, the sphere of actions of an individual within the institution is not limited by the assigned task to them, in fact, the possession of I opens up other incentives and possibilities of action that might run contrary to their duty within the institution. Individuals might want to trade information for their personal benefits with enemies or might be discontent with the content being kept secret. Spying is an example of the first kind, while cases of conscientious objection, moral disobedience exhibit the second kind. Individuals can dissent believing that the actions protected under the secret run contrary to the stated objectives of the institution and do harm to those it seeks to protect. They can specify reasons for their dissent; reasons which have nothing to do with personal incentives or rewards, reasons which are public in nature, work towards

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<sup>48</sup> This was evident in the 9/11 case whereby the CIA had information which could have been used by FBI to thwart the terrorist attacks. See 9/11 commission report for more on this <http://www.9-11commission.gov/report/911Report.pdf> [Accessed Oct. 15, 2013]

fulfilling their obligation to fellow citizens, and seek to preserve the democratic institutions of the country. These cases will be considered in chapter 4 of the current dissertation.

## **2. The democratic need for secrecy<sup>49</sup>**

Is secrecy justified in democracy which is a system based on transparency, on the consent of the governed? Should not the decisions of the state and its actions be open for public review and criticisms? If decisions in democracy are legitimated in the name of the governed, is it then, not a paradox that some of the decisions need to be kept away from them? The paradox is because, in the words of Bobbio, there is a perceived difference between 'democracy as it should be' and 'democracy as it is'.<sup>50</sup> It is the gap between the ideal of democracy- as a system which promises openness, transparency- and the actual practices of it. Yet it is not so paradoxical if we take into consideration that the justification for secrecy comes from within the democratic process itself which mandates the requirement of certain secrets through the constitutional process.<sup>51</sup> Secrecy thus becomes internal to the functioning of the democratic process itself; and to some extent a prerequisite for undertaking some activities which might not be undertaken, if they are publicly declared. The problem of secrecy and its contrast to publicity works within democracy itself, and not external to it. 'The conflict' as Thomson argues 'is not primarily between secrecy and democracy but arises within the

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<sup>49</sup> The analysis just reasons that justify the legitimate practice of secrecy in a democracy. It does not take into account Max Weber's (1978) account of state secrecy that sees it as an instrument of state power, or the account of Mark Neocleous (2002) who suggests that there are no independent basis for state secrecy other than the reasons of state. He has criticized this aspect of secrecy. The analysis in this chapter though suggests that some secrecy is justified for the legitimate purpose of security. See also Neocleous (2008)

<sup>50</sup> (Bobbio, 1987)

<sup>51</sup> (Sagar 2007)

idea of the democratic process itself. Some of the best reasons for secrecy rest on the very same democratic values that argue against secrecy.<sup>52</sup> The argument thus runs that ideal of publicity can co-exist with secrecy in a democratic system; some levels of secrecy is seen as compatible with the ideal of democratic government.<sup>53</sup>

What are those levels of secrecy which would be compatible with democracy? When would we say that a secret is justified? The answer lies in policies which might not be carried out effectively without the need for secrecy; policies for the effective fulfillment of which secrecy is a must. Yet these policies are public which, according to Thomson,

.. citizens would consent to if they had an opportunity. The most familiar examples are in foreign policy and law enforcement. If the Dayton negotiations on Bosnia had been open to the press and all the terms of the final agreement fully disclosed, the leaders would almost certainly not have been able to reach an agreement. Or if the plans for a sting operation to catch drug dealers were revealed even after it took place, the safety of informers and future operations of a similar kind would be jeopardized.<sup>54</sup>

We clearly see here in the above statement, three strands of justifications emerging for secrecy. I will call them the arguments for: a) security, b) deliberation enhancing reasons, and c) effectiveness. These arguments do not stand alone, but might require each other to justify themselves. So a security policy might need to be secretive for it to be effective at all. Similarly, a closed chamber discussion might be required on certain policy matters for policy makers to approach the best possible solution. The argument of effectiveness runs throughout the other two justifications. In fact, it might be apt to

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<sup>52</sup> Thomson (1999:182)

<sup>53</sup> (Sagar 2007)

<sup>54</sup> Thomson(1999:182). Similar kinds of reasons were invoked in the Reagan memorandum when it was arguing for the case of executive privilege regarding secrecy in some of its affairs. It allowed for secrecy in the cases where information might impair the national security, the deliberations of the executive branch or might impair some of the functions of the executive as mandated in the constitution. (Rozell, 2002)

suggest here, that it is because there was a warranty that the act would be secret, that made these acts possible in the first place. Let us run through these arguments in detail.

## 2.1) *Secrecy for security*

The first justification for secrecy stems from necessity and effectiveness. If the democratic institutions are to be protected they should be secure.<sup>55</sup> Paraphrasing what he calls a moderate version of Machiavelli, Bernard Williams provides a reason generally cited in favour of maintaining governmental secrecy:

The responsibilities of government are sufficiently different from those of private individuals to make governmental virtue a rather different matter from that of individuals--or rather (and this is very much the point) from that of individuals who are being protected by a government. In particular, any government is charged with the security of its citizens, a responsibility which cannot be discharged without secrecy, and which it will be lucky if it can discharge without force and fraud.<sup>56</sup>

This is precisely the kind of argument that lays ground to what Williams calls the 'anti-tyranny' argument famously advocated by liberals; this argument casts suspicion on the acts of state endowed with enormous power. This excessive power needs to be controlled lest it violates the very rights and liberties for which the state has been created. Yet, in order to enjoy life and liberties, citizens have to be assured that the basic institutions of democracy are protected, that their life is secured from both external and internal threats. This existential requirement entails the need for vigilant institutions of defence and internal security that guards against potential threats, and thwarts them. When the state has to take action against criminals, mafias, drug cartels etc. or track the movements of the terrorists; these actions require a certain level of secrecy, for publicity will endanger the effectiveness of such policy. It is thus argued that institutions like the

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<sup>55</sup> Bok (1983)

<sup>56</sup>Bernard Williams

<http://omero.humnet.unipi.it/matdid/637/Williams%20Truth%20politics%20selfdeception.pdf>

[Accessed Aug. 30, 2012]

secret services are not an exception, but are necessary for the very functioning of democracies.<sup>57</sup>

Executive secrecy is derived from the prerogative or the function designated constitutionally to the executive. This prerogative, according to Locke, allows the executive “to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it”.<sup>58</sup> The prerogative is required

..for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.<sup>59</sup>

Executive prerogative thus is a logical outcome of the expertise and the assigned function of the executive. Their expertise allows them to assess situations of emergency better and respond to them, sometimes in extra-legal ways. Though, it is not clear where Locke would stand on governmental secrecy, but the need for it can be derived from his support for executive prerogative. The prerogative allows for discretions on the part of the executive, if they are done for the public good. The logical need for secrecy can be laid down as follows: i) Security is a necessary good. ii) State is bound by the contract to ensure the self-preservation of its citizens, iii) The executive is the arm of the state designated for the purpose of security, iv) Self-preservation in times of necessity requires secrets to be maintained on certain acts of the executive.

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<sup>57</sup> Sunstein 1986, Solove 2008, Sagar 2009, Moore 2011, and Article 8 of the European Convention on Human Rights

<sup>58</sup> Locke (1980: 84)

<sup>59</sup> idem



National security matters require public judgements to be deferred to the executive. Not all acts of the executive are thus open to public scrutiny. The need for secrets from the citizens is twofold: effectiveness and expertise. Effective fulfillment of a security policy sometimes requires secrecy for a secret operation that cannot be made public without letting the enemy know about it at the same time. On the other hand, the expertise argument requires that judgements on matters of national security be taken by people who have the requisite knowledge on the matter. The citizens neither have sufficient information nor the expertise to provide for meaningful inputs. Only the executives are in such a position to decide upon the actual existing nature of the threat.<sup>60</sup> The effectiveness argument justifies the requirement for secrecy, while the expertise argument justifies the need to defer judgement to the executive. Thus, since the citizens are not aware of every security policy, they ought to surrender their judgement to the executive.

## 2.2) *Deliberation enhancing reasons for secrecy*

Secrecy enhances the quality of deliberation for the following two reasons: i) it enhances the quality of decisions,<sup>61</sup> and ii) protects the privacy of the participants. Public deliberations might bring representatives to subscribe to particular interests, rather than invoke public reasons. 'Publicity' suggests Bok,

'tempts participants to rigidity and to posturing, increasing the chances either of a stalemate in which no compromise is possible, or alternatively, of a short-circuited and hasty agreement. To pull back from an opening offer, often made for bargaining purposes only, might be interpreted, if done in full public view, as giving in.'<sup>62</sup>

'The public nature of the debate', contends Chambers, 'forces speakers to make general appeals, but there is little or no critical accountability to ensure that those appeals are

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<sup>60</sup> (Posner and Vermeule 2007).

<sup>61</sup> (Elster 1995, Gutmann and Thomson 1996, Chambers 2004, Sunstein 1986, Dryzek, 2000)

<sup>62</sup> Bok (1983: 184)

well reasoned.<sup>63</sup>The reasons presented in public would be shallow or pertain to narrow interests of the representatives' own constituencies thus resorting to demagoguery. Interest groups would be able to influence the way decisions are being taken. The decision makers might not be interested in upholding the virtue of truth but will strive to gain support for their cause; manipulation and pandering being their means.<sup>64</sup> The quality of deliberation would generally improve when the officials deliberate in secret; they can fearlessly play out their reasons, revise their positions and better appreciate others' reasons.<sup>65</sup> Widely different and contrasting positions can thus be resolved and reconciled. Similarly, if the representatives have to carry on deliberations in private they have to be assured that their tentative proposals are not made public.<sup>66</sup> Doing otherwise will compromise their basic freedoms and also restrict their participation.

### **3. Problems with secrecy**

The particular problem with secrecy appears due to its very nature; an apparent conflict ensues with the values of publicity in democracy. Secrecy by its very nature resists publicity; it can only do so by denying itself. The moment the secret is told, it no longer remains one. The content of the secret and its existence can only be known to the agent who keeps the secret. This highlights peculiar epistemological properties. The truth is then only accessible to the agent, who keeps secrets. This also means that it is not accessible to others apart from the agent; thus the truth about existence or non-existence of secret information or an act cannot be verified by the non-knower. As highlighted before, the access to a secret puts the knower in a privileged position with respect to the non-knower, especially when the informational good in question is rivalrous in nature

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<sup>63</sup> Chambers (2004:398)

<sup>64</sup> Ibid

<sup>65</sup> Gutmann and Thomson (1996)

<sup>66</sup> Bok (1983)

or the information might impact the non-knowers' life in adverse ways. For example, a trade secret can put the knower in an advantageous position vis –a –vis their rivals. Or take the example of an individual, who suffers from a communicable disease, intentionally hides the information from all those who might potentially get infected. If a person suffering from HIV keeps the information secret, she might be harming the health of their sexual partners, especially when they engage in unprotected sexual intercourse. Thus, secrecy might advantage its knower not only in a profitable sense, but it also enables the person to inflict harm on others<sup>67</sup>. Lacking adequate checks, the secret keeper can continue harming the interests of others and exercising power over them. This power is enhanced when the secret keeper have access to information of others. It creates asymmetry in the power relations. Cases like data mining, surveillance etc. exemplify the problems with such asymmetry. Corporations and security agencies are able to access secret details of the population while being able to hide knowledge about themselves under veils of secrecy.<sup>68</sup>

Secrecy also provides a fertile ground for deception as mentioned before. The knower can selectively decide to leak, or withdraw certain sets of information from others. Partial sets of information can be disclosed or withheld in order to tell a coherent story that the deceiver wants the hearer to follow. The non-knower does not have full set of information to make considered judgements in such circumstances.

Secrecy can debilitate judgement, not only on the part of the non-knower, but also for its keeper. As Sisella Bok points out:

Secrecy can harm those who make use of it in several ways. It can debilitate judgement, first of all, whenever it shuts out criticism and feedback, leading people to become mired down in their own stereotyped, unexamined, often erroneous beliefs and ways of thinking. Neither their perception of a problem nor their reasoning about it then receives the benefit of challenge and exposure. Scientists

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<sup>67</sup> Simmel (1906)

<sup>68</sup> Moore (2011)

working under conditions of intense secrecy have testified to its stifling effect on their judgement as journalists, police agents, and spies, or about living incognito for political reasons, have described similar effects of prolonged concealment on their capacity to plan and to choose, at times on their own sense of identity.<sup>69</sup>

This is an important epistemic point which needs to be highlighted. Secrecy means that one cannot put one's own beliefs and knowledge to the test of others. It excludes the possibility of alternative view-points to come in contradiction with one's own held beliefs. Secrecy thus resists one of the basic preconditions of knowledge formation; the test with alternative facts and ideas. The knower thus has to depend on one's own epistemic resources and judgement; which might be limited or constrained. It might create a certainty in one's own knowledge. But such knowledge might not necessarily be grounded in reason and could lead to self-deception, thus being inimical to the interests of the secret keeper.

#### **4. Implications for democracy**

The general pitfalls of secrecy, highlighted above, have important implications for a democracy governed by the rule of law. These problems generally emerge due to the deference to the judgement of the executive.

##### *4.1) Balance of Powers is compromised:*

Democracy is based on the principle of balance of power, whereby, any branch of the state should not have so much power as to override other branches. Any potential or real misuse of power needs to be controlled by other branches of the state. Under conditions of secrecy, the executive branch, is the one who holds excessive power by the virtue of being in the position to not only access secret information, but also by

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<sup>69</sup> Bok (1983:25)

precluding control over the use of that information. “An indication of power”, suggests Moore “is the ability to forcibly demand access to information about others while keeping one’s own information secret.”<sup>70</sup> This executive privilege compromises the balance of power between the different branches of the state, and tilts it in the favour of the executive. The Iran-contra affair is a case in point: where not only the legislative was not informed but its decisions were also overlooked.<sup>71</sup> Access to information puts the executive in the position to decide on the potential harms of disclosing the content of the information. The internal checks are generally missing or reinforce the existing trends in maintaining secrecy.<sup>72</sup>

#### 4.2) *Excessive Power of executives can lead to manipulation*

Being the sole arbiter, over deciding to disclose or suffocate the disclosure of information, gives the executive enormous amounts of power over the informational resources. Secrecy often denies the legislature and the policy makers of important bits of information. Executive can and does utilize the information to influence the legislative in matters of public policy. The Iran- Contra affairs showed that secrecy was used to subvert the legislative policy, hide an act which was not authorized by the congress and then pressurize the congress into affirming support for the Contras. One of the major motives in the Iran-contra affair was to influence the legislative towards supporting the Contras, a move which was initially thwarted by the legislative. It was hoped that by keeping the support of the Contras in secret, the congress will be left with no other option than to support them in the later stage. The idea was to manipulate the public opinion and the opinion of the congress towards the support.<sup>73</sup>

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<sup>70</sup> Moore (2011:2)

<sup>71</sup> Thomson (1999)

<sup>72</sup> Fuchs (2006)

<sup>73</sup> Parry et.al (1988)

The executive can also resort to selective leaks from time to time, in order to orient public support in their desired policy direction.<sup>74</sup> An example from the 2011 ACLU report corroborates this point of view:

“In September 2009, Bob Woodward of the Washington Post obtained a leaked copy of a confidential military assessment of the war in Afghanistan that included General Stanley McChrystal’s opinion that more troops were necessary to avoid mission failure. The purpose of this leak was undoubtedly to manipulate the policy debate by putting public pressure on President Obama to comply with the commanding general’s preferred strategy.”<sup>75</sup>

The obfuscation due to secrecy allows the executive to watch and control the behaviour of the public (through the existence of surveillance technologies), and wield power over them.<sup>76</sup> Secrecy thus works as a blind and a tool for social control, manipulation and indoctrination.<sup>77</sup> The informational resources required to control the excesses of the executive are unavailable to the citizens. In fact, they might be quite unaware that such an excess is occurring in the first place. It is not only the act of wielding power that is hidden but also the knowledge that such an act exists in the first place. The citizens in such circumstances are doubly disadvantaged. Firstly, as a citizen who are unaware of what the state does in their name, which is the political obligation of citizens qua citizens, and secondly, they are unaware of the fact of how secrecy meddles with their own rights. This creates uncertainty in the level of action while fulfilling their political

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<sup>74</sup> Fuchs (2006), Berman (2009).

<sup>75</sup> Stanley and German (2011: 13).

<sup>76</sup> “If we take the pair command/obedience as the epitome of the asymmetrical power relationship, the more hidden from sight the person who commands, the more terrible he is (the subject knows that there is someone looking at him but does not know exactly where he is).” (Bobbio 1987: 90)

<sup>77</sup> “Privileged access to the sources of relevant knowledge makes possible an inconspicuous domination over the colonized public of citizens cut off from these sources and placated with symbolic politics.” Habermas cited in note 28 (Chinen 2008 : 106 )

obligation and while ascertaining the guarantees of their own rights. Thus the question arises a la Bobbio 'who controls the controllers' under such conditions?

#### 4.3) *Usurpation of public office by private interests*

Secrecy might allow public officials to go scot free when they use their office to further personal or sectarian interests that conflict with the public good.<sup>78</sup> Public officials or legislatures might be influenced by powerful private factions and sectarian groups thus allowing some groups to usurp government functioning.<sup>79</sup> This is often the case with corruption where a certain group or an individual is favored over another, due to conferral of some private benefits to the public employee. Lacking any review or checks, information might be withdrawn or not revealed to shield public officials from any forms of critical scrutiny or prosecutions.<sup>80</sup>

#### 4.4) *Political Sovereignty is compromised*

Secrecy compromises one of the basic tenets of democracy- sovereignty based in the will of the people. Sovereignty requires autonomy for individuals to make choices. Information is a basic prerequisite to exercise autonomy; especially on matters which have implications for the lives of the individuals. Secrecy, with regards to security or otherwise, denies the individual a basic right to know and act on their own. It denies them the epistemic warrant to take decisions. Rather, the judgement is deferred to

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<sup>78</sup> Sunstein (1986)

<sup>79</sup> Interestingly, Sunstein shows that at times the justification for secrecy in deliberations might be required to so that a particular group having 'intense preferences' might want to orient the policy in their preferred direction. (ibid)

<sup>80</sup> Stiglitz (1999), Moynihan (1999), Fuchs (2006). In the Reynolds case the judiciary was refused any insight into the case citing crucial national security information, but in the end it was about shielding some neglect on the part of some officials. For more analysis see Fisher (2007)

experts, who by the virtue of being in an epistemic superior position to judge the circumstances of action, can render certain actions of secrecy necessary. Deference opens up an ethical, political and epistemic conundrum, since the consent of the citizens is never sought for, but implicitly assumed. The recent case of the usage of drones as a weapon of war is a case in point. The use of drones was completely kept secret from the American public, while their impact on the civilian population and enemy combatants was widely reported in the news media; drones as an official policy was not assented till recently. This led to secret assassinations and huge damages to civilian life and property. It can be asked whether the American public would have assented to this policy, if the policy was made public. The citizens of the state are being implicated in a policy where their consent has been assumed. Citizens thus become part of the harms done by their state in their names. Ignorance of the affairs of the state does not reduce the culpability of the citizens in any manner, but it only enhances it, for it shows the double failure of political obligation on the part of the citizens. Not only they should refuse to be part of the harms done by the state in their name<sup>81</sup>, but they should be aware when such harms are being committed and seek to redress those wrongs, if possible. In order for this to be possible, information and knowledge of the affairs of the state is a must; which any condition of secrecy does not fulfill, instead judgement on important matters of national security is handed over to the experts.

Deference to the judgement of experts<sup>82</sup>, owing to their superior epistemic position opens up a 'democratic deficit'. The judgement of the expert does not betray democracy

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<sup>81</sup> According to Mill 'A person may cause harm to others not only by his actions but by his inaction, and either way he is justly accountable to them for the harm.'(1991:15).In case of secrecy, though it can be assumed that this inaction is due to the lack of information. See also Pogge (2008) for why it is a duty of the citizens to refrain from harms being done in their name.

<sup>82</sup> This deference to the experts stems not from "the traditional contempt for the common people as an irrational crowd, incapable of making rational decisions even in its own interest, unable to raise its eyes so that instead of staring at the ground of its own daily necessities it might contemplate the blazing sun of



by belittling citizens' rational abilities; on the contrary it celebrates it.<sup>83</sup> The argument in favor of expertise is not that the citizens do not have the critical faculties in order to judge the circumstances for themselves. The justification is that the experts have better epistemic grounds to assess facts, as they are given. They possess the required skill, technical know-how, resources and the crafts of the trade in order to make better judgement, especially during the time of emergencies. The courts have continuously shown this tendency to defer to the judgement of executive when it comes to matter of national security. One of the reasons cited by courts is the lack of expertise of the court to correctly assess the matter in hand.

This argument has several problems from the perspective of democratic theory: i) It assumes, and the assumption is correct, that decision making in democracy can be at times messy,<sup>84</sup> and sometimes democratic processes have to be subverted if we ought to take efficient and quick decisions. Secrecy is thus sought to speed up the decision making process. The messiness of the democratic decisions arise out of various stakeholders who have to be integrated in the process of decision making, and their consent to be sought in the decision. This might require time as well as reaching out to those various stakeholders. But here, it is argued that at the times of the emergency the executives might not have enough time to deliberate and reach out to wider audiences.

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the common good. Rather it stems from an objective recognition of its ignorance, or rather its lack of scientific know-how, of the unbridgeable gulf which separates the expert from the lay-man, the competent from the incompetent, the technician's or scientist's laboratory from the high street." (Bobbio 1987: 92).

<sup>83</sup> *ibid*

<sup>84</sup> Citing the case of the affidavits filed by the FBI officials and the Department of Justice on disclosures of the information on the detainees held post 9/11, Festner suggests that executive agencies working on national security matters often think the sunshine laws and the openness required under them to be 'at best a burden and, at worst, a threat to their work'. (2006, 892)

Thus, they would have to be trusted while making decisions. While it is true that during emergencies decisions cannot be made in a deliberative manner and not all concerns can be taken into account, but those emergency decisions ought to be open for retrospective deliberations. The problem with executive deference is that deference becomes a norm even in non-emergency circumstances. They are not open to debate and checks in normal circumstances and also not to retrospective evaluation post emergencies. This is problematic because, it transpires of a fundamental anti-democratic behaviour, if not outright paternalism and calls for good faith<sup>85</sup>. The problem in essence is not whether the experts can be trusted, to make fair laws and take just decisions, but whether the procedures entailed above are fair and just.

Epistemic resources in democracy are widely scattered among different agents and actors.<sup>86</sup> There is a wide diversity in these resources across the population which is brought together when democracies need to take decisions. Democracy rests on the assumption of rational epistemic beings coming together and making decisions, not necessarily the true ones. Decisions are an outcome of a collective process- competing judgements are put to scrutiny and accepted after long deliberations. Democratic decisions are considered epistemically fallible.<sup>87</sup> Arriving at truth is not necessarily the criterion which binds them, though truth can be the normative benchmark on which decisions can be judged. Secrecy does not fulfill the condition of fallibility- decisions are not put up for public scrutiny; rather the judgement of a group of experts is adhered to. This violates one of the basic tenets of democracy, and can create inefficient decision making.<sup>88</sup> Citizens and other arms of the state do not have enough epistemic warrant to

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<sup>85</sup> Sagar (2007)

<sup>86</sup> Anderson (2006)

<sup>87</sup> *ibid*

<sup>88</sup> Sunstein shows that those decisions are generally efficient where people from different stand points and dissenting voices are allowed to contest and put forward their claims. The possibility is not allowed, especially in closed groups where like minded people generally echo each others' ideas. (2002) Secrecy

trust the judgement of the executive, and to know whether the decisions are: (a) not faulty, and (b) not meant to justify narrow sectarian or group interests. Writing on the pentagon papers case, Hannah Arendt argued that it was a closed group of individuals, who were supposed to be the ones deciding on the security policy. These individuals had enough confidence on their own built technocratic models and rationalities to allow any fact to interfere or to correct their judgements. So even when the facts necessarily pointed to the opposite direction, they were unwilling to use them. This was one of the potential reasons for disasters in the campaigns in Vietnam, where the war was carried on just to live up to an image of the superpower, without any ascription to the basic facts on the ground.<sup>89</sup> She argues that belief in their own technocratic models and rational beliefs might lead experts to discard any facts that state to the contrary.<sup>90</sup> The example suggests two things about the aspect of secrecy which are deeply troubling: Secrecy can distort the judgement of the individuals or even group, and executives are not averse to this kind of failures, in fact are quite prone to them. b) Judgment formation in important policy matters might be impaired in the process. It is not that judgments of executives cannot be error prone; though it ought to be so, given its consequences for others. The disturbing aspect is that errors creep in because contrary opinions are not allowed while making decisions. Dissenting opinions, even when they are wrong, present alternative facts and might lead one to deliberate upon their own firmly held convictions.<sup>91</sup> Contrarily, decisions taken in closed minded groups are often less efficient or erroneous.<sup>92</sup> The justification for secrecy, on the grounds of efficiency and expertise, runs thin when epistemic properties of secrecy are analysed. There are

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allows for such a like minded group to be formed who generally disregard any sense of dissenting opinion.

<sup>89</sup> Arendt (1972)

<sup>90</sup> *ibid*

<sup>91</sup> Mill (1991)

<sup>92</sup> Sunstein (2002)

enough epistemic reasons to doubt these claims, for secrecy precludes any forms of fallibility of judgement. Even if fallibility is taken into consideration and corrective steps are taken in the future, the citizens do not have the warrant that it indeed is the case. Citizens do not have any epistemic basis to ground their trust in the executive. On the contrary, the abuses due to secrecy when revealed in the long run might betray even the minimal trust of the people in democratic institutions.<sup>93</sup>

#### 4.5) *Might not lead to better quality deliberation:*

Secrecy might not often lead to better quality deliberations for several reasons: (i) There is no warrant that all the given positions and interest groups have been represented<sup>94</sup>, (ii) It is not possible to ascertain whether the participants in the discussions were not swayed by sectarian interests,<sup>95</sup> (iii) Citizens might be denied important information in order to conduct deliberations for public policy goods, (iv) Secret deliberations might prove counter-productive, and might betray their own ends.<sup>96</sup>

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<sup>93</sup> Pozen (2009)

<sup>94</sup> A recent study by New York based NGO, Open Justice Society Initiative, has alleged that around twenty five countries in Europe and others across Asia and Africa were involved in the practice of extraordinary rendition run by the CIA. This might not be possible without the assent of the existing state governments of those countries. It can be reasonably assumed that these practices were an outcome of secretive agreements and deliberations among those countries. For more <http://www.guardian.co.uk/world/2013/feb/05/cia-rendition-report-uk-court>. [Accessed March 15, 2013] This example clearly states that the people have not been taken as a stakeholder in this practice. This practice has largely operated in secret. It needs to be debated and argued whether such a practice would have been allowed if done in the full glare of publicity by taking in to account all the stakeholders.

<sup>95</sup> Sunstein (1986)

<sup>96</sup> One of the examples of fallouts of secret deliberations was the Bay of Pigs fiasco. 'The Bay of Pigs debacle was caused, in part, by the fact that the government of the United States had entered into negotiations with exiles from Cuba in secret, and had planned the invasion without allowing the American Public to participate in the decisions regarding such a venture. The temptation is strong to negotiate in secret with a faction within a foreign country: perhaps a junta that is about to take over or to

## 5. Limitations to civil liberties of citizens and groups

Security policies, under a veil of secrecy, might severely limit the enjoyment of basic liberties of individuals, and in some cases, of whole groups. These limitations might be known to the individuals, or they might be completely ignorant of there being such a case. Let us illustrate this with some examples. Abu Gharib and Guantanamo<sup>97</sup>, till recently, are two secret prisons run by the CIA. Enemy combatants and militants captured from different parts of the world were kept in confinement in these prisons. They were not produced before a court of law and torture and extra-legal means were used to extract confessions and information.<sup>98</sup> In this case the liberties of the individuals had been compromised; their basic right to due process and fair trial was denied. The limitation of their liberties was not secret to them, but it was kept secret from the citizens at large. That such a policy was being run by the secret agencies of the United States was kept secret. Such secret policies have impact not only on the liberties of those interned but also for the citizens. Illiberal policies of the state might endanger liberties of citizens at home. Citizens might be under threat from future terrorist attacks

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be toppled, or a political party one hopes will be more friendly than others to one's position. Yet the indignation that follows upon the discovery of such secret talks, both at home and abroad, bespeaks the sense of unfairness that they arouse.' Bok (1983:186)

<sup>97</sup>An Amnesty International report cited in Pogge (2008) suggests that the secret detention sites are spread across different parts of the world like Eastern Europe, Qatar, Pakistan, Jordan, Thailand, Uzbekistan and the British Island of Diego Garcia. (pp. 18-19).

<sup>98</sup> Citing various sources Pogge describes the ordeal of these prison inmates. "Labelled "unprivileged combatants," "unlawful enemy combatants" or "security detainees," these people have been routinely humiliated and degraded at will by coalition personnel: stripped naked, forced to masturbate and to simulate sex acts, abused with dogs, shackled in stressful positions, kicked and beaten with electric cables, and tortured with electric shocks, drugs, sleep deprivation, induced hypothermia and "waterboarding" (simulated drowning)." (2008: 16)

which might be a response of the imperialist policies of their own states.<sup>99</sup> It can be asked, that can a state which tramples liberties abroad be trusted to maintain liberties at home, since the fact of limitations of one person's liberty in a particular instance threatens the equal enjoyment of that liberty, and is a future threat to total system of liberties.

The detention of prisoners in secret sites does represent a fundamental limitation of liberty which at the same time is illegitimate. Even if the state has noble objectives,<sup>100</sup> acts of secrecy arouse legitimate suspicion.. As Pogge suggests about the detention sites

At these "black sites" our governments are imprisoning so-called ghost detainees – unknown numbers of unknown persons for unknown reasons under unknown conditions. Our governments are telling us that nothing untoward is going on at such sites. But it would be irrational and irresponsible to trust that basic human rights are being respected in locations no one else has access to when such rights are not being respected in locations from which a fair amount of information is leaking out. Common sense suggests that, once persons have been caught in the secret prison system, their captors are reluctant to release them even when they become convinced of their innocence: Wholly unaccountable for their actions, these captors prefer innocent persons to remain missing indefinitely over their resurfacing with information about conditions in the secret facilities and possibly with knowledge that might be used to identify particular torturers, interrogators, or collaborating doctors.<sup>101</sup>

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<sup>99</sup> One of the prominent justifications provided by the terrorists is that of the injustice of the policies of the US government against them. They generally resort to providing evidence of the death of civilians and innocent persons in the war against terror launched by the US and its allies. In fact the death of innocent civilians allows the terrorists in some cases to find recruits who are willing to avenge the death of their near and dear ones.

<sup>100</sup> Citizens should beware of their threat to liberty even when the objectives of the state are well meaning. As Louis Brandeis points out in *Olmstead Vs. United States* (1928) "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

<sup>101</sup> Pogge (2008:19)

It is the complete lack of transparency on the part of the state in dealing with the liberty of others which is worrying. The citizens cannot be sure whether innocents have not been incarcerated; whether the state is operating in secrecy just to hide their own wrong doings. In fact, policies of the state towards others might also translate into similar policies towards its own citizens. The killing of three US citizens, in secret, through drone strikes in Yemen, is a case in point. Due process was denied in the above mentioned case and the guilt was assumed to be proven by the state executive bodies themselves.<sup>102</sup> The National Defence Authorisation Act (NDAA) of USA, 2012, allows for indefinite detention without trial of supposed enemy combatants. The Patriot Act of United States provides for powerful tools to the executive to collect information, which might mean the use of data mining and surveillance devices.<sup>103</sup> Similarly, The Armed Forces Special Powers Act (AFSPA), 1958 of India provides immunity to army working in conflict zones from civilian trial. Several abuses of the act have come to light where army in conflict areas of Kashmir and Manipur have enforced disappearances of innocent people, raped women and illegally detained citizens and tortured them.<sup>104</sup>

The fallouts of AFSPA in India and the continual usage of the Espionage act in USA,<sup>105</sup> suggest that the state can use brute force not only against individuals who are security threats but also against dissident voices, both at home and abroad.<sup>106</sup> Curbing of dissent is justified on grounds of security. Especially vulnerable are those dissidents who reveal

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<sup>102</sup> For more on this case see <http://www.guardian.co.uk/world/2012/jul/18/us-citizens-drone-strike-deaths>. [Accessed Aug. 30, 2012]

<sup>103</sup> for more see <http://www.aclu.org/reform-patriot-act> [Accessed Jan. 21, 2013]

<sup>104</sup> See <http://www.humanrights.asia/resources/journals-magazines/article2/1003/the-armed-forces-special-powers-act-1958-in-manipur-and-other-states-of-the-northeast-of-india-sanctioning-repression-in-violation-of-india2019s-human-rights-obligations> [accessed January 17, 2013]

<sup>105</sup>[http://www.salon.com/2012/02/09/obamas\\_unprecedented\\_war\\_on\\_whistleblowers/](http://www.salon.com/2012/02/09/obamas_unprecedented_war_on_whistleblowers/)[accessed December 12, 2012]

<sup>106</sup> Wladron (2003)

the wrong-doings of the state. Former CIA officer John Kirikaou is alleged to have disclosed to the media about the waterboarding and torturing of Al- Qaida suspects. Similarly, Chelsea Manning has been charged with handing over the information which led to revelations by Wikileaks. Both the individuals have been charged under the Espionage Act. Dissent, when it confronts the boundaries of security and secrecy might be termed dangerous by the secret keepers. Threats of being exposed might lead to curbing or silencing the whistleblowers, thus curbing their liberty to dissent.

The treatment of dissenters is symptomatic of the way states handle dissent in general. When dissent tries to challenge the official line of reasoning, it is termed dangerous. Thus, the last resort to salvage liberty through dissent is severely restrained. Individuals with access to information might resort to playing safe if revealing information comes at a high cost to their personal interests. Public officials might just resort to play safe rather than be in the wrong books of higher authorities. Dissent might then be limited on its own volition making its future possibility seem improbable. This has severed implications for the enjoyment of basic liberties in the future. Liberties cannot be enjoyed in certainty, if possibilities to challenge its limitations are restricted, or worse criminalized.

### *5.1 Unknown threats to liberty*

The last part highlighted those instances of liberty limitations where the individuals whose rights are being limited are aware of such being the case. This part will deal with those limitations, the existence of which is not known to those whose liberties are being limited. To elucidate this point, three examples would be highlighted: i) Surveillance and data mining, ii) no-fly list case, and iii) Secret nuclear power plant or military installations.



i) *Surveillance and data mining:*

Surveillance and data mining compromises the privacy of individuals without them being aware of it. While making the policy public will defeat its original purpose, its implications for individual rights are serious. It is claimed that surveillance and data mining is required, in the interest of public good of security, to track a person suspected of engaging in a wrong act. The individual waives of their claim of privacy right by virtue of their engagement in illegal activities. Denying her this right is a prerequisite for the enjoyment of rights by others. It is done in the interest of liberty itself.<sup>107</sup> Yet, the secretive nature of the operations does not give a warrant to the citizens as to whether the policy is being run on reasonable grounds, or if it is justifiable. Citizens are also not aware of the accountability structures that govern the usage of the individual data gathered by the state.<sup>108</sup> The threat to liberty is equal from both external agent and the state; especially when the accountability structures are blurry or non-existent. Under conditions of secrecy, the individual is not aware epistemically: a) whether they have surrendered their privacy rights, and b) whether by surrendering their privacy rights they are actually more secure,<sup>109</sup>c) The ends to which the data will be utilized, and d) whether they can trust the state with the handling of the data. Secrecy creates a situation of epistemic uncertainty for the citizens; uncertainty regarding their own position vis-à-vis a security policy. Uncertainty exists when individuals know that surveillance and data mining constitute part of security policy, but are unaware of its

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<sup>107</sup> Rawls suggests that liberty can be restricted for the sake of liberty itself, and when such a limitation strengthens the overall system of liberty, and such a limitation is acceptable to those with a lesser liberty. (1999: 222) In this case while the wrong-doer might not agree to lesser liberty, but her action since it is a threat to others' liberty might require a check.

<sup>108</sup> Moore (2011)

<sup>109</sup> The recent ACLU report shows that the greater level of secrecy meant that some of the dangers which could have been avoided could not be because of the high level of secrecy, since there was no coordination between the security agencies themselves. (Stanley and German 2011)

potential targets. Everyone is potentially a suspect, and in absence of proper control, everyone's rights are threatened. Thus, individual might have surrendered their basic rights, without having knowledge of it and with no proper resource to challenge those limitations. This violates the self-ownership, autonomy and the individuality of the person, and creates an uncertainty in making rational decisions and charting out future life plans.<sup>110</sup> Secrecy thus denies the individuals of any kind of epistemic warrant- a basic precondition for enjoying any kind of privacy rights.<sup>111</sup>

Surveillance and data mining also have important distributive consequences, when security policies mark out certain groups and communities as their targets. The surveillance of mosques in USA is a case in point: members of a certain religious community were marked out as a potential source of threat.<sup>112</sup> Singling out certain groups or communities for surveillance violates the distributive character of security. It cannot be the goal of public policy to single out specific groups and communities based on their ethnic, religious, racial belonging, but secrecy violates this purpose. Secrecy obfuscates the distributive dimension of security. Thus, the community does not have the warrant of equal enjoyment of their liberty.<sup>113</sup>

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<sup>110</sup> Gowder (2005) and Pozen (2009).

<sup>111</sup> Rights act as 'trumps' (Dworkin 1977) and cannot be forfeited under any condition, even through the consent of the individual. If some rights are being compromised then the individual needs to be aware of such a condition.

<sup>112</sup> A law suit filed by the American Civil Liberties Union and the Council of American-Islamic Relations alleges that the FBI was monitoring and using surveillance mechanisms against several mosques in south California. For more on this read <http://www.huffingtonpost.com/2011/02/23/muslims-and-aclu-sue-fbi- n 827339.html>. [Accessed Jan. 15, 2013]

<sup>113</sup> Waldron (2006)

ii) No fly list case: John Graham, an ex-member of the state department on security, was put on a no fly list of the US Transportation Security Administration (TSA).<sup>114</sup> Due process was denied to him, and no reasons were assigned for the limitation of his freedom of movement. The curious thing about the no-fly list is that once put on the list, you remain on it, even when proven as not a threat to security.<sup>115</sup> Such a listing not only curtailed Graham's liberty to move, but also his livelihood, which is essentially linked to travel.<sup>116</sup> No fly list suggests one of the basic limitations of the freedom of movement; such a limitation is not even known to the individual until and unless they want to fly. Secrecy in this case, denies the epistemic warrant of the limitations of rights, and to contest those limitations, if and when they exist.

iii) Secrecy might affect the health of its citizens: One of the essential features of secrecy is that it impacts individuals in incalculable ways. Secrecy can render life decisions uncertain and future projects at the mercy of unknown risks. Three illustrations will suffice to demonstrate the dangers linked with 'risk-secrecy':

a) the secret nuclear power plants of Rocky Mountains, Denver:

From the year 1952-89 a secret nuclear power plant in the Rocky flats was producing over 70,000 plutonium triggers. This plant was maintained under the direction of the Atomic energy commission (later the department of Energy) by Dow Chemicals till 1975 and Rockwell International till 1989. This facility had serious impacts on the environment and the health of the citizens exposed to the threats of radiation. These

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<sup>114</sup> Graham (2005), See [http://www.alternet.org/story/23362/who's\\_watching\\_the\\_watch\\_list](http://www.alternet.org/story/23362/who's_watching_the_watch_list) [Accessed July 21, 2012]

<sup>115</sup> ibid

<sup>116</sup> ibid

factors were hidden from the residents. Even the workers working in those factories were not aware of the nature of the risks they were indulging in.<sup>117</sup>

b) Military firing squad of Salta di Quirra<sup>118</sup>:

Evidence based on the health statistics of the individuals living around the firing squad shows a high rate of leukemia and different other sorts of pathologies. The danger to the health from the operations of the firing squad was kept hidden till some adverse complications started developing among the citizens living around the area.

c) Adverse health effects from wind-turbines in Ontario:

Information availed through the freedom of information act revealed in 2009 that the state was aware of the risks to health and environment which the turbines posed. The ministry of environment was encouraged to take a 'consistent position' along that of the company which was advocating for clean energy.<sup>119</sup>

The first example shows a case of complete secrecy, while in the second and the third case the effects of operations on the health of the individuals was kept secret. The third case also represents the existence of private interests in denying the information to the public. The effects on the public health are quite clear in the demonstrated cases, but the above illustrations also highlight other forms of restrictions of liberty. The liberty to choose an occupation, knowing the dangers they were exposed to, was compromised in the first case. Similarly, freedom of movement, to reside and settle, wherever they want, is severely restricted in all the cases mentioned above. Secrecy limits the citizens'

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<sup>117</sup> For more on this read [http://www.alternet.org/story/156223/we had a secret nuclear weapons plant near a major american city yeah, one of the most contaminated sites in america](http://www.alternet.org/story/156223/we_had_a_secret_nuclear_weapons_plant_near_a_major_american_city_yeah_one_of_the_most_contaminated_sites_in_america) [accessed January 21, 2013]

<sup>118</sup> See Zucchetti (2005) for more details.

<sup>119</sup> See <http://www.windaction.org/news/36973> [Accessed Feb. 1, 2013]

rights to be aware of the limitations of their liberty. It just creates an unsafe environment, from the perspective of their health and enjoyment of other liberties which might be an outcome of such a limitation. Governmental secrecy also limits the exercise of free choice; for what seems to be a free choice to live and reside in an area is severely limited by the non-availability of information, on the full implications of the range of fallouts from exercise of choice.

In conclusion, this chapter sought to demonstrate that while secrecy is required for the purposes of safety of the citizens it might compromise the very good it seeks to protect. Secrecy, in the absence of proper accountability structure, impacts not only compromises democracy by granting unmitigated power to the executive, but also limits the enjoyment of rights and liberties of citizens; limitations whose existence citizens might not even be aware of. In the absence of such awareness, citizens cannot contest those very limitations. The insights developed in this chapter show the problems with state secrecy. The next chapter looks at a particular way this problem has been sought to be solved in the prevalent discourse on security, as drawn out in the balance model.

## Chapter two

### Safety and security: a critique of the balance model

The last chapter opened up the problem of secrecy for critical scrutiny. It argued that while secrecy can be defended on grounds of security, it has implications for the democratic process. Actions protected under secrecy sometimes endanger fundamental civil liberties. This chapter critically examines the mainstream view that accommodates the conflicting demands of security and liberty, thus attempting to provide a way to accommodate secrecy. The mainstream conception is represented by the balance model. The model suggests that security policy should be guided by pragmatic considerations of efficiency; it ought to lie at the point of balance between liberty and security. At the outset the model puts fear at the heart of its conceptualization, and seeks to design policies to overcome such fears in the minds of people. In doing so, they are willing to limit rights, without proper guarantees to those whose rights are being limited.

In brief, this chapter tries to do two things: (a) To analyse the way secrecy is accommodated in the mainstream model, and (b) a critical scrutiny of the mainstream discourse for its implications on democratic practices.

#### **1. Liberty, security and trade-offs**

*'There seems to be something singularly captivating in the word balance as if, because anything is called a balance, it must, for that reason, be necessarily good, '-- John Stuart Mill<sup>120</sup>*

There seems to be a certain truism in the metaphor of balance post 9/11. It has been argued that the only way security can be ensured in a world threatened by terrorism is

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<sup>120</sup> Mill (1988 :263)

to balance it against liberty.<sup>121</sup> The events of 9/11 made analysts as well as theorists think whether the new menace of terrorism could be indeed countered through old and time tested instruments. Politicians framed the questions in terms of the value of human rights for the general citizens and those of the terrorists: should terrorists have same protection of rights as the citizens? It was argued that the rights of the alleged terrorists need to be balanced against the rights of the citizens who are at the receiving end of terrorist attacks.<sup>122</sup> This perspective is part of the political rhetoric which has tried to frame the debate of 'us' versus 'them', 'our' rights versus 'their' rights.<sup>123</sup> Terrorists are seen as a threat to 'our way of life' and as someone who neither believes in rights nor respects the rights of others. In this context we are asked whether we should indeed be protecting their rights; rights of those who do not believe in rights. Examples of Guantanamo, Abu-Gharib, extra-ordinary renditions, drone strikes etc. suggest that the discourse is not only in rhetoric but exists in reality.

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<sup>121</sup> Dershowitz (2001), Posner (2001, 2006). The harrowing images constructed in the wake of the terrorist attacks construe the possibilities of a future threat and exhort us to imagine the dilemmas in the public policy in the face of those threats. It is generally suggested that the terrorists are capable of much more than what we saw in the 9/11. They can have access to Nuclear Weapons or weapons of mass destruction (Posner, 2006) and thus capable of inflicting large scale harms than imagined till date. The anxiety is peculiarly reflected in these words of columnist Kristoff '[T]errorist incidents in the 1970s (such as at the Munich Olympics) had maximum death tolls of about a dozen; attacks in the 1980s and 1990s raised the scale (as in the Air India and Pan Am 103 bombings) to the hundreds; 9/11 lifted the toll into the thousands; and terrorists are now nosing around weapons of mass destruction that could kill hundreds of thousands. As risks change, we who care about civil liberties need to realign balances between security and freedom. It is a wrenching, odious task, but we liberals need to learn from 9/11 just as much as the FBI does.' (cited in Waldron 2003: 192).

<sup>122</sup> Dworkin (2006) See <http://www.guardian.co.uk/commentisfree/2006/may/24/comment.politics> [accessed Feb 14, 2013]

<sup>123</sup> Loader (2007)

The balance model is a way in which the relationship between liberty and security has been framed. It is argued that security agencies always resort to balancing, even under normal circumstances.<sup>124</sup> The metaphor of the balance has stayed even when the event of 9/11 has receded a bit in the memory. The vocabulary of balance has widely entered public discussions and debates in parliaments like the US, Canada, Australia and the European Union.<sup>125</sup> New York Times reporter Scott Shane initiated a running dialogue with readers, government officials and experts about their views on the balance between security and liberty.<sup>126</sup> The way the questions were framed suggests the purported belief in the metaphor of balance:

What is the proper balance between liberty and security? Would you like to see the government alter the trade-offs of post-9/11 America? Do you fear the scrutiny of the [Department of Homeland Security](#) more than that of Walmart? Do you think much about the electronic trail you leave as you go about your day? Have you taken any steps to protect yourself from the prying gaze of the government? Or do you feel better when you read about the formidable security bureaucracy built up since 9/11?<sup>127</sup>

The question necessarily frames the relationship between liberty and security in a form of balance, without questioning it. People who vouch for a balance between liberty and security consider it necessarily as a good thing, as something which is the right thing to do. The suggestion of balance is assumed as a mere fact of life, something which the policy makers and the citizens encounter and act upon in their day to day life.<sup>128</sup> It is assumed, in the words of Jeremy Waldron, that the balance is '*always* necessary – even in normal circumstances – to balance liberty against security.'<sup>129</sup>

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<sup>124</sup> Posner & Vermeule (2007)

<sup>125</sup> Michaelsen (2006)

<sup>126</sup> <http://thecaucus.blogs.nytimes.com/2012/07/24/assessing-the-trade-offs-between-security-and-civil-liberties/?ref=scottshane> [accessed on March 12, 2013]

<sup>127</sup> *ibid*

<sup>128</sup> Philips (2010)

<sup>129</sup> Waldron(2003: 91-92)



Framing the discourse of balance as a necessity or as mere fact obscures the critical interrogation of the metaphor of balance itself. The choices which the citizens or the policy makers are made to believe is between having more security and less liberty or the vice-versa. Necessity implies an 'ought' and by this very virtue escapes critical scrutiny. Pragmatically, one can critique necessity at one's own peril by inviting suggestions of self-inflicted harms. Normatively it can be critiqued by stripping it of the 'ought'; by removing it from its high point of necessity; by showing that what we consider as necessary might not necessarily be so. This is the same problem with the discourse of balance. One cannot question the model of balance, though there can be reasonable disagreements about: the point of balance, who decides about this point, and how weights should be assigned to the competing goods. In this background the next part will analyse the balance model.

## 2. The Balance Model

Image of a balance is a term coined by Richard Posner in order to understand the relationship between liberty and security. The image invites us to look at civil liberties 'as a point of balance between concerns for personal liberty and concerns for public safety'.<sup>130</sup> In times of emergency when the concerns of safety are higher the balance shifts in direction of security and civil liberties are narrowed, while in safer times the opposite happens.<sup>131</sup> Rights are not supposed to be inalienable in this discourse, but their scope 'must be calibrated by reference to the interests that support and oppose it.' This could be done by locating the point 'at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty' and vice-versa.<sup>132</sup>

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<sup>130</sup> Posner (2006:9)

<sup>131</sup> *idem*

<sup>132</sup> *ibid*: 32-3

Posner assigns no priority to liberty or security. For him one should not ask ‘whether liberty is more or less important than safety. One is to ask whether a particular security measure harms liberty more or less than it promotes safety.’<sup>133</sup> The values and weights assigned to goods are a matter of personal preference, rather than governed by a principled priority rule. In case of states the decisions are to be made by the executive and the judges, given the demands of the situation at hand. If individuals feel that sacrificing of liberty is a strong demand, they will try to mitigate its loss by compromising on security or vice-versa. Any assessment of threat to security is based on a probabilistic assessment of risks involved in the future. It cannot be a complete act in certainty, and Posner concedes the point, yet he suggests that any threats to liberty from the counter-terrorists measures are also speculative at most.<sup>134</sup>

The assignment of proper weights to security and liberty are problematic, but for Posner, these problems are similar to the one we encounter daily when we base our judgement on a utilitarian calculus. These judgements are not based on a real assignment of weights or quantification but based on a pragmatic utilitarian calculus. Lastly, the balance model suggests that security judgements must be deferred to the executive, since courts and the legislative do not have the necessary expertise, and the ability to make quick and efficient judgements during times of security crisis. Threats to national security and concomitant fears associated with it would make judges subject themselves to the judgement of the very executive.

### 2.1) *The trade-off thesis*

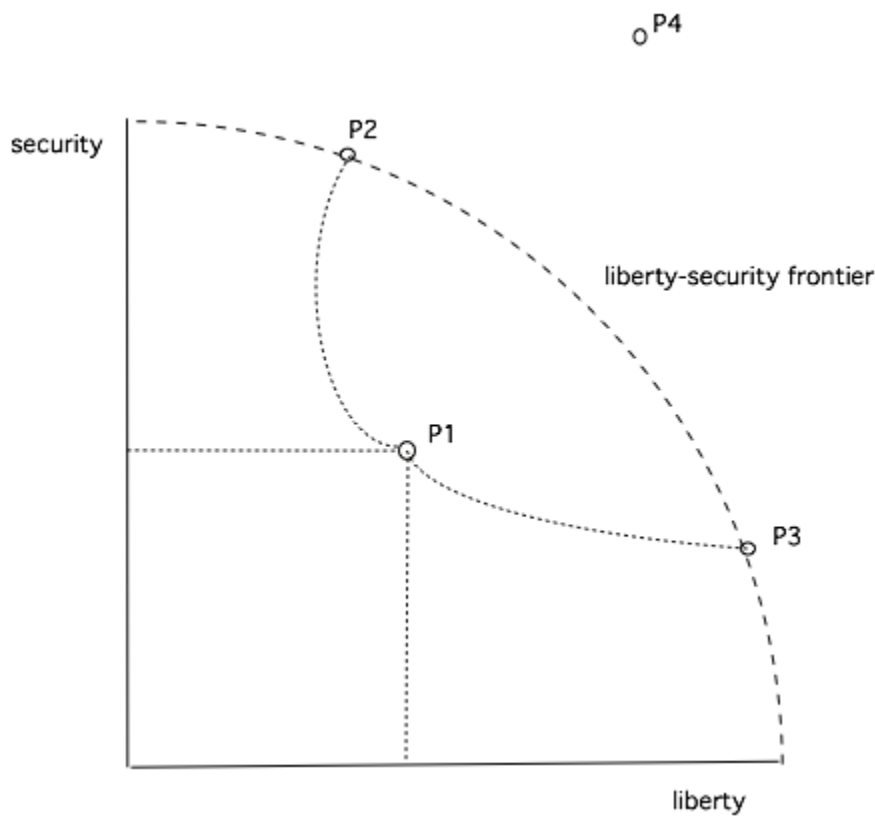
Eric Posner and Adrian Vermeule have articulated a particular interpretation of the balance model as a form of tradeoff between liberty and security. The tradeoff is akin to

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<sup>133</sup> *idem*

<sup>134</sup> *ibid*

a pareto- frontier. Liberty and security form the two axes of the frontier which represents the various points of tradeoff between the two goods. Along the frontier any increase in allocation of security can only happen at the expense of decrease in the level of liberty, and vice-versa. The frontier represents points with the most efficient allocation of the competing goods, given the constraints. In order to achieve efficient outcomes governments ought to align their security policies along the frontier, and keep adjusting them as threats arise or wane, till they find the point of optimization that maximizes the joint benefits of liberty and security.<sup>135</sup> The point of optimization is where a gain in security is more than the corresponding losses in liberty or vice-versa.



Liberty- Security Frontier<sup>136</sup>

<sup>135</sup> Posner and Vermeule(2007:27)

<sup>136</sup> Santoro & Kumar, unpublished manuscript.

The diagram above represents a typical liberty-security frontier. In the figure above points P2 and P3 are points on the frontier that represent the most efficient allocation of resources. Along the frontier a movement from the point P2 to P3 represents a policy choice which prefers an increase in liberty to a decrease in security, and vice-versa. Only P2 and P3 represent the admissible points of trade-off. P1 is a point below the frontier and is thus an inefficient utilization of resources. Hence the state needs to rethink its policies to move closer to the frontier. From P1 both security and liberty can be increased without sacrificing either. P4 is a policy that cannot be reached.<sup>137</sup> The frontier represents optimal and efficient level of social welfare, a policy can achieve at a given time and with the resources at hand. Over a period of time, as emergencies come and go, the shape of the frontier will change.<sup>138</sup>

Tradeoff thesis is based on the assumption of that people are aware of the relative worth of their liberty and security. They can make interpersonal comparisons between their gains in security to the loss of liberty of others or vice-versa.<sup>139</sup> This means that 'a loss in liberty (security) for Jack can be compared to a greater gain in security (liberty) for Jill, allowing us to make meaningful claims about whether overall social welfare has increased or decreased as a result of government policies.'<sup>140</sup> Posner and Vermeule are aware of the fact that sometimes 'interpersonal comparisons are either unscientific or conceptually meaningless', but for them 'security policy is not a scientific subject, and meaningful interpersonal comparisons are made in many policy domains.'<sup>141</sup> It is not important, for the authors, whether actual weights can be assigned to liberty and security, but rather that a security policy should use practical reasoning, similar to those

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<sup>137</sup> Vermeule(2011:2)

<sup>138</sup> Posner and Vermeule (2007)

<sup>139</sup> *ibid*, 28

<sup>140</sup> *idem*

<sup>141</sup> *idem*

used by people while making choices between competing goods; goods which cannot be quantified. Thus, a pragmatic security policy, in order to be efficient, should make similar comparisons in terms of the welfare gains and losses to the citizens.<sup>142</sup>

## 2.2) *The deference thesis*

At the level of policy, judgement on the optimal point of tradeoff has to be made by the executive, especially during times of emergency. This is the deference thesis advocated by Posner and Vermeule. According to them, emergencies distort the normal functioning of the state apparatus. Responses considered ideal in times of normalcy are not adequate; the urgency of the situation requires quick and efficient response so that the state of affairs reverts back to normal as soon as possible. Such response requires expertise in the matters of national security. Only the executive, given their expertise, is in the best position to judge and react to the enormity of the situation. This is the argument in favour of the deference thesis. The thesis holds

‘that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty. During emergencies, the institutional advantages of the executive are enhanced. Because of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times. The deference thesis does not hold that courts and legislators have no role at all. The view is that courts and legislators should be more deferential than they are during normal times; how much more deferential is always a hard question and depends on the scale and type of the emergency.’<sup>143</sup>

The thesis is based on the idea that courts and legislatures often do defer their decisions to the executive. The judiciary and the legislative subscribe to the decisions of the executive due to their superior skills in handling matters of national security. ‘In emergencies’, say Posner & Vermeule,

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<sup>142</sup> *ibid*

<sup>143</sup> *ibid*: 5-6

'judges are at sea, even more so than are executive officials. The novelty of the threats and of the necessary responses makes judicial routines and evolved legal rules seem inapposite, even obstructive. There is a premium on the executive's capacities for swift, vigorous, and secretive action. Of course, the judges know that executive action may rest on irrational assumptions, or bad motivations, or may otherwise be misguided. But this knowledge is largely useless to the judges, because they cannot sort good executive action from bad, and they know that the delay produced by judicial review is costly in itself. In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this.'<sup>144</sup>

Thus the judiciaries do not have the expertise to judge executive actions; whether they arise out of good motivation or bad, whether they are rational or irrational, or misguided. This inability to pass judgement over executive affairs makes deference inevitable and rational, and a reason judges have historically deferred to the executive. For Posner & Vermeule 'the historical baseline of great deference during emergencies is also the right level of deference.'<sup>145</sup> Deference is the most efficient and practical way to thwart emergency threats. It is not an article of faith in the executive. Their past misdeeds do provide enough grounds for suspicion, yet such actions would not be less rational, and less well motivated than is the case during normal times.

The inability of the other branches of the state to judge executive action during emergency entails a lack of choice other than deference. The capacity to access secret information, conduct their actions in secret, to be more flexible regarding rules and method of conduct, and the ability to turn around decisions in quick time allows the executive to trump over courts in responding to emergency situations. Emergency situations allow for a departure from the normal modes of engagement, sometimes at the cost of the rights of a few citizens or the democratic functioning of the state. Executive have over-extended powers, and their operations are more secretive than

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<sup>144</sup> *ibid*: 18

<sup>145</sup> *ibid*: 6

normal times. Their counter-terror operations might also cause a few rights violation of innocent citizens. Contrary to the civil libertarian criticisms, Posner & Vermeule argue that such violations are 'tolerable when the stakes are higher'.<sup>146</sup> In fact for them, the state would not be less rational, or their decision making worse than normal times during emergency. The states will commit some mistakes during emergency. This is inevitable, but similar to mistakes during normal times,<sup>147</sup> the mistakes are 'not systematic errors of cognition'<sup>148</sup>, i.e. they are not systematically biased in one direction.<sup>149</sup> The errors 'are essentially random and wash out over many decisions or over time'.<sup>150</sup> Even when violations of rights happen, during time of emergency, the actions of the state cannot be judged on the normal templates of accountability.<sup>151</sup> Those actions ought to be judged given the background conditions of the nature of threat and the quick and efficient response required to thwart them.

### 3. Criticisms of the balance model

The criticisms of the balance model can be classified into three kinds: (a) methodological, (b) Epistemic, and (c) Distributive concerns. I will discuss them in three different sections.

#### 3.1) *Privileging security over liberty*

Economic models of tradeoff are based on methodological neutrality between the competing goods. The neutrality is at the point of origin. The goods are treated as

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<sup>146</sup> *ibid*: 17.

<sup>147</sup> *ibid*: 4

<sup>148</sup> *ibid*: 12

<sup>149</sup> *ibid*: 4

<sup>150</sup> *idem*

<sup>151</sup> *ibid*: 18

principally equal in essence, and the agent is indifferent to the specific character of the goods. Due to their neutrality, the frontier maps the stated preference of the consumer or a producer, given the budget and technical constraints. Contrary to this, the balance model is not indifferent among the goods. The terms of discourse are set by the requirements of security; liberty needs to be balanced against the assessed needs of security. In doing so the model does not accrue to an actual balance, since it violates the condition of indifference and neutrality among the goods. But, the balance model is not neutral between the two goods; it privileges security over liberty.

According to the model human rights are not inalienable. Acceptance of 'rights as trumps' will impose constraints on the actions of the state, thus running counter to the stated goal of efficiency, to claims of quick and effective response to emergency situations. Thus it needs to be rejected for the model to be successful. Their claims are open to revisions, and need to be accommodated against the demands of security.<sup>152</sup> In doing so, the model inadvertently accords a primacy to security; policy making is essentially geared towards avoiding emergency which requires an efficient and effective response to a given security situation. The model, unknowingly, assigns a weight to security which already outweighs the requirements of liberty. It is from this standpoint that losses or gains in liberties can be evaluated. Thus, faced with situations where normative judgements need to be made the model largely weighs in favour of security. Assessment on the particular weights of liberty and security are defined by the context of an existential threat, and not with concerns of enhancing liberty. Thus, the model, cannot not be guided by the concerns of security, and will always end up privileging it.

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<sup>152</sup> It is this unarticulated standpoint that allows, Richard Posner, to justify torture and suspension of habeas corpus in extreme circumstances. (2006)



### *3.2) Problems in assigning weights*

Pareto frontier is based on the assumption of comparability; comparison is possible due to quantification and the rival nature of the goods. Increase in production of one good at the frontier is only possible at the expense of the other good, if we are not to compromise on efficiency. Can liberty and security be quantified? If so how? Are liberty and security rival in nature? Reiterating Posner and Vermeule; comparisons can be based on practical reasoning akin to comparisons we make daily among competing choices. Such comparisons do not require quantification to be successful. Yet, the translation of a practice at individual level to that of a policy has severe implications. The choices of rational individuals are based on their own preferences, and can often be vague without any set criteria or principled judgement. Individuals making choices in isolation are responsible for the consequences that result from such choices, if those choices have not been interfered with. Similarly, states are responsible for the choices it makes, yet the choices made by the state impacts citizens and other population groups in adverse ways. In the case of the individual, the agent making the choice and bearing the responsibility are the same person, and they have to be ready to face consequences that result from such a choice. In case of states, population groups are affected due to the choices made by their representatives. In essence, even though they represent the choice of the citizens, there is a separation between citizens and policy makers. Thus policy proposals cannot be made on the line of reasoning that governs individual choices. It ought to take into account the preference of the citizens it impacts through its policy choices. Thus, the criteria used to assign weights cannot be based on those principles that govern individual choices. These criteria ought not to be vague, and should be made public.

If, according to Posner & Vermeule, liberty and security cannot be quantified similar to a toy model, then the pareto frontier representation is unhelpful as a real analytical tool

in guiding public policy.<sup>153</sup> The goods of liberty and security cannot be similarly placed to represent a pareto-frontier. But, if the opposite is true, the balance model still does not specify the criteria used by the executive in assigning weights to liberty and security. It defers such decisions to the prerogative of the executive. The factual assertion, by Posner & Vermeule, that policy makers often engage in a balancing exercise is unhelpful, because it needs to be demonstrated that: (a) such indeed is the case, (b) the executive is right in doing so, (c) they can assess and assign weights to preferences of different groups,<sup>154</sup> (d) they get the weights approximately right, and (e) that they are aware when the balance has been struck. Point (b) Requires normative justification, while (a), (c), (d) and (e) require demonstrable empirical proof. Even if (a) is factually true it does not make it normatively right. Due justification needs to be provided for such an exercise. Deviations, if any, have to be explained. Contrary to this, in the balance model, such calculations are carried out by the executive in secret. The methods and rationale for it are not shared with the citizens, thus leaving space for arbitrary decision making by the executive. The space for arbitrariness is only enhanced by secrecy of decision making and actions.

The model assumes that citizens are indifferent between the goods of security and liberty; but this is far from reality. Citizens do attribute values to these goods and are far from indifferent. In addition, important policy matters assigning weights to liberties are unconstitutional at large, for liberties are inalienable, and for this reason such deviations need to be justified to those whose liberties are limited. Due to the secrecy, such an operation can neither be evaluated by citizens, nor by the legislative and the judiciary. It might end up assigning weights which might run contrary to the same interests which it seeks to protect in the first place.

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<sup>153</sup> Macdonald, 2008

<sup>154</sup> Gross (2009) [http://www.tulsalawreview.com/wp-content/uploads/2011/05/Gross.Final\\_.pdf](http://www.tulsalawreview.com/wp-content/uploads/2011/05/Gross.Final_.pdf)  
[Accessed March 15, 2013]

It can be argued though, by proponents of the model, that not all preferences can or should be accommodated, and the necessity of quick response requires that not all information can be shared. In a situation of emergency citizens themselves are governed by fear and would allow for limited incursions in their liberty. Though true, it still does not override the concern, specified above, that liberty reductions need to be justified. People's perception of fear is not a legitimate justification for incursions of liberty, especially when they have no grounds to judge either the enormity of the prospects they fear, and the response of the executive to allay these fears.<sup>155</sup> This point will be discussed in detail in the section on epistemic concerns.

#### **4) Epistemic and definitional concerns**

The goods of security and liberty are hardly defined in the model. Liberty and security are not like other comparable economic goods. Historically, these concepts have been contested and entail different interpretations. Binary opposition of security and liberty obscures the complexity of the concepts and their relationships.<sup>156</sup> Obscurity in

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<sup>155</sup> Waldron (2003)

<sup>156</sup>ibid. In the classical political thought three relationships emerge. For Hobbes, Security is the primary aim of society and liberty is subservient to it (1996). Contrary to Hobbes, for Locke and Rawls, the primary aim of society is the preservation of liberty, and any reduction in liberty for the purpose of security, can be justified only on the grounds of liberty. (Rawls, 1999) (Locke, 1980). In fact for Rawls, liberty reducing policies are only justifiable, if they protect the overall system of liberties. Thus liberty can be reduced for the sake of liberty itself and ought to be justified to those whose liberties are restricted. (ibid: 222) For Mill too, limitation of liberty can only be justified for prevention of harm to others, i.e. protection of their liberty. (1991: 14) Mill and Bentham justify security on prudential grounds. (Santoro & Kumar, unpublished manuscript) For Bentham, liberty is a branch of security, that protects against injuries from the state, (1843: ch.2). For both Mill and Bentham, security protects the expectations of future from arbitrary interference in our liberty. (Bentham, 1843: Part I, ch.7) (Mill, 1991, p. 190). Physical

definitions precludes any possibility of a correct translation of the concept in the domains of public policy. Security, being an open ended and a contested concept, that leaving it undefined allows the policy makers enough maneuver to define it as they deem fit.

Any vague characterization of the nature of threat works to the advantage of the security agencies and has deleterious consequences for civil liberties.<sup>157</sup> . Conor Gearty, exhorting the dangers of vagueness, suggests

“Danger lies not so much in the confusion as such (inelegant though it is), but in the freedom of action for power that vagueness permits. If words mean all things to all, then what matters is who has the power to turn their words into action, into people being locked up or put under house arrest, into police action or state forbearance in the name of freedom.”<sup>158</sup>

Vague characterization by itself does not preclude action. On the contrary it enhances the power of those agents who are in a position to respond to the particular situation. In the case of security threats, the agent is the executive. Security agencies have an epistemic advantage, given their position in accessing and gathering sensitive information. Their assigned constitutional function allows them to translate such information into action as they deem fit. Thus, faced with vague definitions the executive has enhanced freedoms to promptly define it.

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security, Henry Shue argues, is one of the preconditions of enjoyment of any form of rights. It is for this reason it should be treated as a Basic right. (1996: 21)

<sup>157</sup> Even if it is considered to be acceptable that the threats posed by terrorism are something new which require large scale policy changes, yet the threat of terrorism has itself been very widely defined. The USA Patriot Act and the United Kingdom Terrorism Act are examples of policies which define the threat in quite elaborate terms, thus prone to abuses of liberty. (Zedner, 2005) (Dworkin, 2002).

<sup>158</sup> (2010: 3)

#### *4.1) The problem of heuristics*

A vague understanding of security results in either a generalization of the threat, or a certain narrow understanding of it. Empirically, the tendency is towards former. Security policies tend to be preventive in such situations; they try to pre-empt or play out the nature of future threats. They mirror possible responses to the events of past, and design appropriate responses. Yet, pre-emptive responses have an epistemic fallacy; they work on half-baked information. This creates an epistemic uncertainty regarding possible responses to the situation. But, such uncertainty does not preclude action on the part of the state. Policies deal with uncertainty by either a total curbing of liberties, or have a limited response through available heuristic devices.

Periods of turmoil present people with heuristic devices through which they try to understand their future. Aftermaths of emergency might be marked by a large scale fear about the prospects of future. Thus responses are ordered taking into consideration the available heuristic.<sup>159</sup> Future prospects suddenly start looking bleak, and uncertainty creeps in the life plans of individuals. The possibility of future likelihood of such risks or emergencies is then overestimated. Attempts are made to secure oneself from the recurrence of such threats in the future. Competing interests or preferences are then sidelined or sacrificed for the sake of the presumed threat. In this atmosphere of fear the respect for civil rights or human rights is fragile in conditions of fear.<sup>160</sup> Citizens and civil rights groups might support tradeoff with their liberty.<sup>161</sup> States might not be immune from such fears too. Judges, in times of an emergency, often defer to the judgement of the executive i.e. they are prone to accept the decisions of the executive

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<sup>159</sup> Sunstein (2004)

<sup>160</sup> Dworkin (2002)

<sup>161</sup> Ibid, Silver & Davis (2004)

much more than they would in a peace time. <sup>162</sup>Thus, conditions of crises often lead to a systemic overvaluation of the nature of threat due to the prevalence of the 'availability heuristic'. As Oren Gross points out:

'..the pressure exerted by acute exigencies on decision makers (and the public at large), coupled with certain unique features of the crisis mentality and thinking, are likely to result in a systemic undervaluation of one interest (liberty) and overvaluation of another (security) so that the ensuing balance will be tilted in favour of security concerns at the expense of individual rights and liberties.'<sup>163</sup>

The 'availability heuristic' presents a serious epistemological limitation of public security policy at times of emergencies. Punitive measures are supported and in fact deemed to be required at those times. These extraordinary measures are not a product of a real assessment of the situation, but a mere projection based on the present situation. Justifications abound for measures which do not hold currency in normal times. Cases of surveillance, data mining, illegal detentions are examples of such cases. It can be argued that the power of the state increases during emergencies due to the demands of protection placed upon it. Models like the image of balance need to be seen in such a background.

#### *4.2) The silencing of dissent*

Can fear or a perception of threat can be an actual model guiding state action in emergency situations? Even if states' actions are guided by such a perception but the epistemic base of such actions is flimsy at best, not supported by enough evidence. Does the modification of civil liberties 'will make a difference to the prospects we fear'?<sup>164</sup> There is a complete uncertainty with regards to our security; whether by making a tradeoff we are genuinely more secure against those threats. The balance model does

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<sup>162</sup> Brennan (1987), Sagar (2009)

<sup>163</sup> Gross (2011: 3)

<sup>164</sup> (Waldron, 2003: 198)

not account for these measures of uncertainty. On the other hand the effect on civil liberties of individuals and groups is quite certain. As Waldron argues:

The balance model is imperfect not just for how it quantifies the values of liberty and security, but for it lacks justification: even on the (common-sense) assumption that liberty is associated to risk, it is not clear that a diminution of liberty will increase the net-sum of security. Therefore, if we cannot know whether it is worth giving up some liberties, “we cannot talk with any confidence about an adjustment in the balance”. On the contrary, what we know for certain is that “the immediate effects on suspects and dissidents are quite clear”.<sup>165</sup>

Rhetoric of security can as well be used against the internal enemies of the state; individuals who question the state and its illiberal policies. The example of whistleblowers mentioned in chapter 1 is an instance of this case. In contexts of large scale curbs on liberty, dissent is the last preserve of liberty. Dissent allows for challenging the illiberal policies of the state. Dissent in epistemic uncertain situations might attempt to unravel the secrecy which surrounds security policies at times of emergency. It might fill the epistemic lack of the citizens’ vis-à-vis the practice of the state, thus curtailing the total power of the state owing to the uncertain situations.<sup>166</sup>

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<sup>165</sup> (Waldron 2003: 209)

<sup>166</sup> It is important to highlight two different kinds of epistemic uncertainties which might ensue in times of emergency. One is a general phenomenon shared both by the state and the citizens, the other is what pertains to citizens in particular. The first instance is about the possible outcomes of security policies which might or might not ensure the safety of the citizens yet compromising on some of their liberties. The second is more to do with the specific aspects which link to the governmental responses to the security situation; about the examples and the cases where the state response leads to curtailment of liberties which might not be justified. The citizens might be unaware or uncertain of this situation largely, so dissenters might want to challenge either this uncertainty or largely the policies of the state. The state repression on dissent then can be on both levels; at the level of those directly challenging the repressive policy of the state and at the level of those challenging the information asymmetry which arises out of the

Yet dissent can be seen as limiting the actions of the state; the state might term it dangerous since its scale of activities is often up for challenge. Thus, the attempt is to silence dissent, either by alleging dissenters as being in support of the enemy, or arguing that dissent normally curtails the effective tackling of an emergency situation. Largely the public can also be made to believe in the same. Civil libertarian groups arguing for the rights of suspects might be termed as helping the cause of the suspects. This is clearly present in the prevalent discourse of “our” rights versus “theirs”.

#### *4.3) The problems with deference*

The balance model argues for a need of deference to the judgement of the executive. Deference, in normal affairs, is based on the acknowledgement of authority of the individual or institution to which deference is made to. Deference is grounded on trust. The person making the deference does not know the epistemic validity of the utterance made by the institution or individual, yet takes it to be truthful because of the reliability of the source of the statement. Past instances of reliability, or the character of the individuals can be grounds for basing this trust. Deference can also be a result of the lack of expertise by the individual. People often defer to doctors, lawyers; not because they completely trust them, but because they lack the expertise, and have no choice other than deference.

Deference to the executive, during emergency, is about absolving or withdrawing the judgement on part of the citizens, not because they trust them but because they do not have the wherewithal to act in such circumstances. The prompt nature of required response, the constraints of information, and the need for efficiency empowers the executive to take decisions. The relationship between the citizens and the executive is

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secretive carrying out of the state policy. Thus, it would be worthwhile to make an analytical distinction between the modes of dissent which are available.



thus constrained by requirements of time, information, and efficiency. Even when the epistemic basis of trust is missing, the executive have to be trusted as a reliable source of information for reasons of efficiency. The imminent danger of the present creates a form of uncertainty regarding future choices and states of being. This can lead to an 'unconditional identification with a strong, sovereign authority, which is posited and looked to as the source of protection'.<sup>167</sup> The urgency of the situation, the fear it generates, coupled with the immanent desire to return back to normalcy, leaves citizens with no other choice than to support executive prerogatives.<sup>168</sup> Yet, this trust is not based on reliable information, and does not have an epistemic basis. On the contrary the grounds of trust are flimsy given the state's own record of historical excesses against its own people and dissidents.<sup>169</sup> But the necessity of the situation, the fear and uncertainties it generates leaves citizens with no other alternative.

The balance model argues for deference not only by citizens, but by the legislative and the judiciary too. The grounds of deference are the same requirements of speed, secrecy and efficiency. Deference means an absence of prior constraints on the actions of the

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<sup>167</sup> Loader (2007:37)

<sup>168</sup> Ibid

<sup>169</sup> Periods of security threats might see support rallying around the need for a strong response and a strong entity which can protect the citizens.(Loader, 2007). In fact it might be the case that the citizens often do trust the state in the conditions of crises. (Silver & Davis, 2004). The condition of trust might be due to the fear which results from the conditions of insecurity. It might not necessarily have to do with an increased confidence in the state with respect to protection of civil liberties. Trust might not be a good category of analysis here given the fact if generally the trust was not high before the event, any increase in belief in the state might just be a product of fear and granting of legitimacy to an authority which is capable and responsible for protection. In fact there are heightened chances of state oppression during an increased power of the state, so any trust might have to be just seen due to the prevalence of fear. It is quite the case that minority groups who have not been properly assimilated are quite wary of the incursions of the state during emergency and for the same reason lease likely to agree for a tradeoff between their liberty for a greater security.(Ibid)

executive. This creates problems for the system of checks and balances which can undermine democracy. Unchecked executive actions can undermine liberty without enhancing security in any form,<sup>170</sup> since not only the executive is invested with higher powers, but the fears that external threats evoke might also lead a general lowering of guard against the state. Fear might lead to concession in liberties much more than those democratically required to counter the threats. In addition, executive secrecy in dealing with emergency means that citizens can never be sure whether the prospects they fear are for real, and whether the actions taken by the executive will allay them.<sup>171</sup> Thus, deference creates an informational asymmetry between the citizens and the state. Due to such asymmetry citizens can never be certain when the threat is genuinely over. The roll back of the security apparatus to its original state, before the emergency began, is not certain. The laws made during the emergency might still impinge upon the rights of the individuals, even under normal circumstances.<sup>172</sup> The states might have enough incentives to not roll back the laws, in order to check internal dissidents even during times of normalcy.<sup>173</sup> The continuity of anti-terror laws suggests that what was initially considered as a temporary measure, to thwart an imminent threat, has been codified permanently in the law.

Information asymmetry can also lead to deception or manipulation of the citizens. Sometimes the curb on basic liberties might also not be known to those whose liberties are being curbed. The no-fly list case exhibited in chapter 1 and the recent PRISM

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<sup>170</sup> Waldron (2003)

<sup>171</sup> *ibid*

<sup>172</sup> Zedner (2005)

<sup>173</sup> Interestingly in India anti-terror laws have been used against civil rights activists. Civil rights activists fighting for the case of the tribals or against caste oppression have been termed as a security threat and have been booked under the Unlawful Activities (Prevention) Act. This is a particular instance whereby a law made to fight terrorist can be evoked against genuine dissidents.

revelations by Edward Snowden show the problems with unrestrained secrecy. Unmitigated secrecy by the executive takes away the need for proper justification for restraints on liberty. The balance model does not account for such a need of due process requirement or burdens of justification for liberty constraints.

## 5) Distributive concerns

Security policies generally should have universal applicability i.e. they should be non-discriminatory and egalitarian in character. Similarly, rights are inalienable. The balance model treats security and liberty, not as having an egalitarian character, but as goods which can be balanced on a consequentialist reasoning. Any policy which maximizes the security or liberty for the greater amount of the population would pass the test for these models. The requirements of the model can be satisfied by trading the rights of the minority with the security of the majority.<sup>174</sup> Concern for equality is thus not inbuilt in the model. Such concerns are sought to be sorted by policy makers, this lies outside the purview of the model.<sup>175</sup> The model, thus, does not ask the normative question of the distribution of the goods, i.e. who are the losers and gainers of such a policy. This violates the distributive and non-discriminatory structure of the rights.<sup>176</sup>

Public support for liberty reducing policies, post 9/11, resulted from the fact that majority of citizens did not encounter major changes in their sphere of liberties, except for increased security checks at airports.<sup>177</sup> Tradeoff at a national level does not directly

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<sup>174</sup> Waldron (2003), Zedner (2005), Dworkin (2002)

<sup>175</sup> Vermeule (2011: 8)

<sup>176</sup> Waldron (2006)

<sup>177</sup> Dworkin(2002). The general silence of the majority on the incursion of minority rights can also be explained due to the ascriptive and associational identities that threats generates. Identities might be coalesced around certain notions of the collective. It is in this context that one can understand the

translate in to a tradeoff at an individual level.<sup>178</sup> Thus, for many citizens, in their privileged dominant position as the majority, there is hardly a tradeoff or a potential of there being one in the near future. Thus, there is no direct association in the citizens' mind with effects of such overall policies, because it is always guided towards the 'other'; the other who can be a minority, an 'alien.' It is only when citizens feel a direct threat to their systems of liberties that a large outcry ensues.<sup>179</sup>

Contestations to the security policies of the state have largely come from minority groups or civil liberty unions advocating for minority rights.<sup>180</sup> It is the ethnically or religious minorities, or aliens, who are at a receiving end of such policies which result from the balance model.<sup>181</sup> Particularly vulnerable in such a situation are the aliens or the foreigners whose liberty might be sacrificed for the citizens to be made to feel safer. David Cole puts the point quite succinctly stating:

All too often, we have sought to avoid the difficult trade-offs between liberty and security by striking an illegitimate balance, sacrificing the liberties of noncitizens in furtherance of the citizenry's purported security. Because noncitizens have no vote, and thus no direct voice in the democratic process, they are an

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branding and creation of such "affective and intimate" identities as "us" whose "way of life" or cultural ways of belonging are threatened by "them". The 'them' could be enemies from without, or from within. Loader (2007: 37)

<sup>178</sup> Luban suggests that the suggestion of a tradeoff is a fallacy; there is no real tradeoff. The question is not asked in the manner in which it should really be asked to the majority: 'how many of *your own* rights are you willing to sacrifice for added security?' (2005: 243)

<sup>179</sup> Gross (2011)

<sup>180</sup> A survey conducted by Darren Davis and Brian Silver found that in a case of higher prospects of fear citizens are willing to tradeoff more liberties for increased security. Yet this finding was separate for separate groups. Liberals were only willing to trade liberties for only increased level of threats and not for lower ones, while minorities like African Americans and the Hispanic population were the most reluctant to trade off liberties, African Americans more than the Hispanics.(2004)

<sup>181</sup> Cole (2003)

especially vulnerable minority. And in the heat of the nationalistic and nativist fervor engendered by war, noncitizens' interests are even less likely to weigh in the balance.<sup>182</sup>

The wide scale targeting of the muslim groups in USA, the proposals for military tribunals to convict terrorists, cases of extra-ordinary renditions would exemplify cases where equality has been violated. They compromise the basic right of fair trial and due process requirement of law of non-citizens. Dworkin challenging the metaphor of balance argues:

Fairness requires, as a matter of equal concern for anyone who might be innocent, that we extend those rights to everyone brought into that system. Whenever we deny to one class of suspects rights that we treat as essential for others, we act unfairly, particularly when that class is politically vulnerable, as of course aliens are, or is identifiable racially or by religious or ethnic distinction. It makes no sense to say that people accused of more serious crimes are entitled to less protection for that reason. If they are innocent, the injustice of convicting and punishing them is at least as great as the injustice in convicting some other innocent person for a less serious crime. So we must reject the balancing argument—it is confused and false. If we believe that in our present circumstances we must subject some people to special risks of grave injustice, then we must have the candor to admit that what we do to them is unjust.<sup>183</sup>

Fairness requirements are not met by the model. It requires that a certain individual, a group of people or a community should be willing to sacrifice their liberties in order to achieve the overall good of security. Such an argument sacrifices the individual or group welfare for the sake of the prospective fears of the majority.<sup>184</sup> Such a

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<sup>182</sup> Ibid: 292

<sup>183</sup> Dworkin (2002: part 2, para 20)

<sup>184</sup> As I have argued before that the fear of a recurrence of a terrorist attack is not based on a genuine epistemological proof, and it cannot be testified whether taking drastic measures of security might indeed reduce cases of terrorist attack. The state to allay the genuine fears of the populace might need to take some steps, but when those fears are related or assigned to a particular identity group or a community group who are deemed a source of threat, then policies such as these do open up important distributive concerns. The state can indeed lock up or intern all the members of the minority community as happened

classification is based on an understanding that specific groups of people do not deserve the same kind of constitutional protections as others. This calculus is not only flawed for distributive reasons, but might in the long run be substantially harmful to the majority as well. David Cole citing various examples<sup>185</sup> from American experience suggests that measures which were initially supposed to be used only against aliens were later extended to the citizens as well.<sup>186</sup> Reflecting on this practice he suggests:

History reveals that the distinction between citizen and alien has often been resorted to as a justification for liberty-infringing measures in times of crisis. In the short term, the fact that measures are limited to noncitizens appears to make them easier for the majority to accept-citizens are not asked to sacrifice their own liberty. But the same history suggests that citizens should be wary about relying on this distinction because it has often been breached before. What we are willing to do to noncitizens ultimately affects what we are willing to do to citizens. In the long run, all of our rights are at stake in the war against terrorism.<sup>187</sup>

Reflections from criminal justice suggests that security policies meant to counter emergency threats, if sustained over a period of time, spill over in the daily practices of the criminal justice system.<sup>188</sup> This is especially significant due to the shift in the crime

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in the case of the Japanese living in US during the Second World War, while these might allay some of the fears which the majority might have but morally it would raise serious questions about the acts of the state.

<sup>185</sup> the World War II internment of the ethnic Japanese American citizens, the Macarthy period, the US Patriot Act, The anti-terrorism and the death penalty act, 1996

<sup>186</sup> Cole (2003: 305-09)

<sup>187</sup> Ibid: 309-10

<sup>188</sup> Zedner (2005). The distinction between normalcy and the emergency is much contingent than it seems at the outset, in fact they can and do feed into each other. For more see Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge U. Press 2006). Once the crises ensues and lasts for a long time it becomes the new normal condition and liberties are adjusted to this new state of affairs.(ibid)

policing discourse towards a preventive 'pre-crime' model.<sup>189</sup> As Zedner says

The conclusion that 'people like us' have nothing to fear from security measures may thus be born of a naive failure of imagination. To posit our loved ones or ourselves as possible subjects of security measures is no abstract act of jurisprudential conjecture. Rather, it is the stark, self-interested recognition that where measures are defined so as to capture every instance of political protest, we too might find ourselves subject to the very provisions whose introduction we approved.<sup>190</sup>

Thus, popular acceptance of a public policy that treads on minority rights might in the long run have disastrous consequences for the enjoyment of the rights of the majority too. Thus, not heeding to the distributive concerns might spell disaster for the general enjoyment of the rights.

A security policy targeting a minority affects their beliefs in the state, resulting in disenchantment with the state policies.<sup>191</sup> The targeting of innocent members of the

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<sup>189</sup> Zedner discussing the shift suggests "We are moving from a 'post-crime' society in which crime is thought about primarily as harm or wrong done and in which dominant ordering practices arise *post-hoc*, to a 'pre-crime' society in which the perspective is shifting to anticipate and forestall that which has yet to occur. Under the post-crime model, the dominant mechanisms of crime control are the police, the criminal process, trial and punishment. Dedicated to detecting offences, ascribing responsibility, determining guilt, they impose penal burdens either proportionate to the wrong done or consistent with consequentialist aims of punishment. The precrime model has a different, prospective orientation, concerned rather with the calculation of risk and the prevention of future harms in the name of security." (2007: 259)

<sup>190</sup> Zedner (2005: 515)

<sup>191</sup> State policies might have a performative character whereby through assigning a certain kind of labeling on a certain group or community it might end up creating such a kind of community, for e.g. some of the rhetoric of the terrorists accrue to the fact of the ill treatment of their acknowledged brethren in those societies. When a particular group is singled out for a specific treatment, and if there is systemic targeting and exclusion, they might lose faith in the systems of the state. Certain individuals within the community might turn away from the instruments of the state to create their own instruments to fight against policies which they consider discriminatory. One of the usual rhetoric used by terrorist organization in their attempt to hire in new recruits to their cause is to show the systemic deprivation of

community might make the whole community uncooperative in the security ventures of the state.<sup>192</sup> This results in destroying the communal enjoyment of the good of security<sup>193</sup>.

In conclusion, this chapter demonstrated that the balance model has particular consequences not only for civil liberties but for the functioning of democratic institutions in general. The deference requirement means that citizens not only should surrender their judgements to the executive, but the veil of secrecy that it ensures makes the executive less transparent, thus ensuring less accountability. Thus, the balance model cannot accommodate the requirements of publicity with secrecy, but leans on the side of the latter. But this has deleterious consequences for rights and distributive justice, thus it should be discarded in favour of other models. The next chapter looks at alternative democratic responses to counter excessive practices of secrecy from the principled stand-point of publicity.

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the community which they belong to. In an environment where the rhetoric of 'us' versus 'them' prevails, the concomitant turning away of a few individuals away from the state might threaten the security of the majority too. In highlighting of the performative aspect of the policy, I do not in any way want to suggest that this is the single reason why terrorism might flourish, in fact there might be individuals apart from those being hurt or injured who might take up arms for other reasons. My suggestion only reflects on the impacts of exclusionary policies of the state against the minority.

<sup>192</sup> Cole (2003)

<sup>193</sup> The good of security can only be enjoyed in the company of others, only when the other is deemed to be safe that one can really feel safe oneself. (Loader and Walker, 2007).



## Chapter three

### Democratic responses to counter excessive secrecy

Democracy is based on procedures which are largely assumed to be self-correcting, due to its procedures and functioning of its institutions ought to be corrected by this mechanism. Secrecy is one of the democratic deficits, yet it is required for reasons of security. This opens up a dilemma for democracy: it ought to abide by the principles of publicity by accommodating the fact of secrecy. My goal in this chapter is to see whether secrecy can indeed accommodate, within democratic institutions, the need for publicity. While the need for publicity and openness in state affairs has been acknowledged and widely accepted in theory, democracies have only partially succeeded in limiting the abuses due to state secrecy. The demands of security and requirements of secretive deliberations have often trumped over the general claims of publicity. These limitations have been duly acknowledged in theory and attempts have been made to accommodate them in theories of publicity.<sup>194</sup> In this context, this chapter seeks to analyze and understand particular institutional safeguards in democracy that try to limit excessive secrecy. In doing so, the chapter will highlight some of the limitations, if any, of such approaches.

The first part of the chapter deals with the classical and the contemporary accounts of publicity and critically engages with them, highlighting some limitations, if any, of such accounts for their applicability in non-ideal settings. In doing so, this chapter does not aim to develop a theory of publicity but analyses the limitations of current theories vis-a-vis the requirement of secrecy. The second part deals with some practical political

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<sup>194</sup> Thomson (1999), Gutmann & Thomson (1996)

solutions developed by contemporary political and legal theorists in order to counter state secrecy.

### **1. The need for publicity: a historical view point**

Publicity is a corner stone of democratic polity. Democracy is supposed to be an open system where policies are open to public scrutiny. A check on excessive power can be maintained when policies and actions of the state are open to the glare of the public. Publicity in public political affairs affirms the sovereignty of the people and is an affirmation of their status as autonomous beings. Secrecy is allowed when it concerns matters of security or for the reasons of deliberation, yet publicity is considered to be the ideal state of affairs. Any need for secrecy has to be justified and the justifications ought to be open for public scrutiny. In the absence of proper justification public policy ought to lean in the direction of publicity and openness. In order to fulfill the requirement of publicity most states have passed sunshine laws or right to information laws, requiring that public expenditure and details of public policy are often easily available at the behest of the citizens. Institutions are designed in order to conform to the publicity requirements. Such being the case, the demands of publicity are not absolute and the exceptions are codified in the law. The exceptions define the limit to the exercise of the right. The limit might be overextended when the practice of secrecy is quite well spread.

The need for security works as a justification for secrecy. This justification is often not challenged, given the fact that security as a good is coveted by all and any threat to self-preservation considered a matter of grave importance. The fear that security evokes, works as a smokescreen behind which secrecy can function effectively. High proliferation of government data in the US which has been codified as 'top- secret' can be partially attributed to this fact. Contemporary theories on security also justify an

enhanced role for the executive in decisions regarding national security in times of emergency.<sup>195</sup> This enhanced role gives a free hand to the executive; norms of publicity are considered a burden to the efficient and effective decision making, in this law and economics approach to security. It is argued that publicity might threaten national security by divulging information to the enemies of the state. The demands of security and the need for publicity then conflict with each other. As I pointed out in chapter 1 that secrecy creates a democratic dilemma. The dilemma is at two levels: theoretical and practical. At the theoretical level the dilemma is between conflicting demands of secrecy and publicity. At the practical level, the dilemma is to accommodate the fact of secrecy to the principled requirement of publicity, and to curb the excesses that might result from actions protected under secrecy. The normative standpoint of publicity should work as a criterion to judge the needs of secrecy. This is not often the case in the current practices, and publicity as a virtue of public institutions has failed or subsided considerably.

If publicity is a value which needs to be upheld then what kind of exceptions can be allowed? An analysis of the moral and normative justification of publicity will go a long way in explicating the limits of the norm itself. A brief survey of a few notable views<sup>196</sup>

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<sup>195</sup> Posner (2006), Posner & Vermeule (2007)

<sup>196</sup> The discussion in this part accounts for only those theories of publicity that argue for the need for transparency in state affairs. In doing so the discussion in this section does not account for Mill's criterion of publicity which favours open ballot in order to promote public interests, (Mill, 1861), or Sidgwick's covert utilitarianism which defends the need for secrecy at two levels (a) that some actions to be morally acceptable deems it necessary that not only those actions are kept secret but the maxims under which those actions are allowed should also be kept secret, (b) secrecy also needs to be maintained about the fact that not only certain acts have been kept secret, but their maxims are also secret. This requires a meta level secrecy. (Gosseries, 2010: the part on Sidgwick's covert utilitarianism). See also Sidgwick (1874). Another conception of publicity is that of John Rawls. For him, the principles of justice should be publicly known; the parties should know that the principles were an outcome of an agreement. The need for publicity is 'to have the parties evaluate conceptions of justice as publicly acknowledged and fully

in history of political philosophy might be in order to provide a principled answer to this question. The normative account laid by the classical and contemporary theorists of publicity can be judged for their applicability in practical situations.

### *1.1) Bentham: Utilitarian reasons for publicity*

Bentham situates the requirement of publicity in the need for the legislators and the state to be publicly accountable for their deeds and words. Publicity ensures a check on the actions of the public officials and the legislative, constrains the political power from overreaching itself and falling into tyranny, and provides the instruments to challenge undemocratic behavior. Publicity is required due to the systematic distrust of the citizens in the public officials. Bentham expresses disagreement with the notion that citizens ought to trust the legislative and the polity. Trust is not a default position for him in a democratic polity since ‘Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it?’<sup>197</sup> The distrust is not based on the moral character of the officials thus elected, but due to the fact that they might pursue policies to serve their own ends or interests, or neglect their duties due to indolence since it does not concern their own affairs. Public officials ‘possess all the means of serving themselves at the expense of the public, without the possibility of being convicted of it.’<sup>198</sup> Bentham interrogates whether such ‘dangerous motives’ can be thwarted by creating an interest of a higher magnitude. If at all such an interest of ‘superior force’ exists it can only be ‘respect for public opinion—dread of its judgments—desire of glory?—in one word, everything which results from publicity?’

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effective moral constitutions of social life.’ (1999: 115) In Rawls, publicity assures of mutual knowledge, and allows people to know between what is acceptable and what is not. See also Political Liberalism (1993) for Rawls’ discussion of three levels of publicity.

<sup>197</sup> Bentham (1843: ch. 2, sec. 2, para 21)

<sup>198</sup> Idem

<sup>199</sup>Publicity thus ensures trust and the confidence of the people in the legislative and through its openness provides a feedback on the policies of the state. It can know whether its policies have the consent of the governed. Knowledge, for Bentham, is not limited to the legislative. Legislative can benefit from the knowledge which exists among the citizens; it can use the public knowledge to overcome its own epistemic limitations and revise policies accordingly. The citizens who use their own opinions to judge the elected representatives will be beneficial for the overall goodness of society.

This contention of allows Bentham to challenge the assumption of the critics who doubt the competency of the citizens' judgement in matters of public policy. This criticism stands only 'when the means of judging correctly' and 'the inclination to judge' were taken away from the public.<sup>200</sup> On the contrary, for Bentham, people always do judge and if they judge wrongly, it is not because of the lack of a capacity of judgement but because they are devoid of the particular facts and information which are 'necessary particulars for forming a good judgment'.<sup>201</sup> If the citizens are not able to judge it is because particular information is concealed by the public officials. The advocates of secrecy thus base their argument on a faulty circular reasoning which justifies secrecy for its own end: 'you are incapable of judging, because you are ignorant; and you shall remain ignorant, that you may be incapable of judging.'<sup>202</sup>

While admitting the fact that secrecy 'is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government', Bentham does not admit publicity as an absolute value governing the norms of the state.<sup>203</sup> Bentham considers publicity as a rule during 'a state of calm and security'. The same rule does not apply to the states in

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<sup>199</sup> Idem

<sup>200</sup> Ibid (ch. 2, Sec. 2, para 4)

<sup>201</sup> Ibid (ch.2, sec. 2, para. 10)

<sup>202</sup> Idem

<sup>203</sup> Ibid (ch.2, sec.4, para.2)

times of peril and emergencies, because the assembly cannot 'foresee all the circumstances' in which it will be placed during such times. One of the exceptions allowed by Bentham is in cases where publicity tends to 'favour the projects of an enemy'.<sup>204</sup>

### *Problems in the Benthamite conception*

The Benthamite conception of publicity does not necessarily solve the dilemma we began with i.e. the dilemma of maintaining public accountability in times of emergency. Bentham allows security as a basic justification for secrecy, while not providing necessary instruments to counter the 'democratic deficit' which owe to the practice of secrecy. Since the demands of publicity are not morally binding on the public officials; they need not adhere to it until and unless they strictly adhere to a utilitarian principle.<sup>205</sup> Even if such is a case, the utilitarian calculus might not strictly weigh on the side of publicity, and rather admit exceptions to the rule. Security is such an exception. This exception itself might find favour in the popular calculus of benefits over costs. Thus security might trump over the demands of publicity in times of emergency.

While Bentham's conception justifies a need for openness, yet it is not clear why public officials will necessarily follow such a principle. The vested interests of the officials might block any move towards publicity. Security as an exception can also provide perfect rationale for secrecy practices even in normal times. Since the normal and exceptional times are not detailed out it has been left at the mercy of the executive to define such moments. It is thus unclear as to why they would not use it to their own advantage. It can be argued in Bentham's defence that his analysis is an attempt to provide a principled answer to the requirement of publicity. While this might be true, and it does provide a strong theoretical justification for publicity in a democratic polity,

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<sup>204</sup> Ibid (ch.2, sec.4, para.1)

<sup>205</sup> Gutmann & Thomson (1996: 98)

the utilitarian principle leaves the exception to publicity due to security unanswered. Similarly it is unclear how such principles can be applied to resolve some of the dilemmas which secrecy poses to enjoyment of rights etc. which I discussed in chapter 1. In order to understand a principled view of publicity we now move on to Kant.

### 1.2) *Kant: moral reasons for publicity*

Kant presents a hypothetical test which any public policy ought to pass if it has to be legitimate. The test is the following: "All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity."<sup>206</sup> For Kant, "there is something wrong in a maxim of conduct which I cannot divulge without at once defeating my purpose, a maxim which must therefore be kept secret, if it is to succeed, and which I could not publicly acknowledge without infallibly stirring up the opposition of everyone."<sup>207</sup> The requirement of publicity acts as a means to know 'when an action is unjust to others'.<sup>208</sup> In Kant's own words, the test is a negative one; it acts as a principle to test the justness of the act. It does not necessarily follow that 'all successful maxims are right',<sup>209</sup> but a maxim which does not follow the test is necessarily wrong.

Kantian publicity test though is hypothetical; it is an act of 'pure reason' and can be carried out in the private. In David Luban's interpretation, the test does not require all policies or the maxims governing them to be public. It requires that any maxim should have the 'capacity' and the 'possibility' of withstanding the publicity test.<sup>210</sup> Any maxim

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<sup>206</sup> Kant (1795: 185)

<sup>207</sup> Idem

<sup>208</sup> Ibid:186

<sup>209</sup> Gosseries (2010)

<sup>210</sup> Luban (1996:156)

or policy thus has to pass the hypothetical publicity test either to be right or just. For Luban, if it does not do so then it has to be re-evaluated till it confirms to the norms of publicity. Kantian publicity principle, for Luban, 'is not only a proposition of morality,' but 'a principle of institutional design as well'.<sup>211</sup> Following Kant, institutions ought to be designed in a manner that they confirm to the norm of publicity. Institutions and public officials are thus morally bound to limit the practices of secrecy and encourage openness, public scrutiny and accountability. The best way to ensure that institutions 'could withstand publicity is by increasing the likelihood that policies will withstand publicity.'<sup>212</sup>

### *Problems in the Kantian conception*

The Kantian publicity test is hypothetical; an act of pure reason. The maxim that governs publicity is universal in character. In the context of the state, this maxim tests the legitimacy of public policies. The justification for secrecy can be inferred from the maxim, when citizens, using pure reason, looking at a particular policy, argue from the stand point of a legislator, and infer that the very nature of the information requires the policy to be kept secret.<sup>213</sup> Secrecy, citizens would agree, is required in conditions where revealing the content of the information will defeat the very purpose for which it was kept secret, on the condition that the hidden information does not violate the principle of right. A necessary qualification would require making the information public when the immediacy requirement of secrecy diminishes. Thus, in the long run it might be possible to make that information public. Thus while the hypothetical test is to

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<sup>211</sup> Idem

<sup>212</sup> Ibid: 157

<sup>213</sup> Chambers (2004) argues that while the Kantian hypothetical publicity test does not require actual deliberation for it to be successful, but a close reading of his other writings might suggest that he would favour more deliberation in public sphere than the test itself suggests. (esp. pp. 406-08)



be undertaken by the public officials, secrecy is justified under the condition that if citizens would consent to the secrecy of the policy, if they were in a position to decide.

The problem is that the onus of application of the principle lies on the public officials themselves, who as Bentham rightly pointed out, are the ones who are more likely to abuse power. The Kantian conception does not allow for a check on the abuse of power which might most likely follow. In non-ideal circumstances, public officials cannot be assumed to be following the moral law. Public officials might also deceive themselves in believing that they are actually following the moral requirements of publicity. They might 'persuade themselves that their subjective motivations are unimpeachable, even if it appears to others that they had acted on disreputable reasons'.<sup>214</sup> It might well be argued that the Kantian conception does not allow for such a reading.<sup>215</sup> In conducting the hypothetical publicity test, if the public officials work with self-serving reasons, are careless or are mistaken in their motivations, their acts cannot be justified.<sup>216</sup> Even if such is the case, the fact that the Kantian conception does not require public justification for political action,<sup>217</sup> and the motivations governing them, causes grave problems for the viability of the principle in non-ideal settings.

It can be argued in defence of the Kantian conception that it does not deal with specific instance of policies, but engages with them at a high level of generality.<sup>218</sup> For Kant, publicity defines the legitimacy of a policy, not an epistemic trust in public officials. For Kant publicity of a policy makes it legitimate, and if a particular law is publicly justified then by the same measure secrecy can also be justified. It does not follow from this that

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<sup>214</sup> Ibid: 169

<sup>215</sup> Gutmann & Thomson (1996)

<sup>216</sup> Ibid: 100

<sup>217</sup> *ibid*

<sup>218</sup> Luban (1996)

public officials ought to be trusted in their acts of secrecy. Epistemic trust is required for the Kantian conception to be realised in non-ideal circumstances. It is this applicability of the maxim in practical circumstances that creates problems.

## 2) Gutmann & Thomson's publicity requirement

Gutmann and Thomson agree that while a policy itself ought to be public, the particular details of the policy can be secretive provided proper public justification is provided for them.<sup>219</sup> For them public knowledge of the policy is not sufficient ground for accepting it. The policy ought to be publicly justified and deliberated for it to pass the publicity test. According to them, necessity cannot be the grounding reason for secrecy. The need for secrecy ought to be properly deliberated and publicly justified if it has to pass the publicity test. The need for necessity itself ought to go through the publicity test to decide its actual need and the form of the necessity. Matters of necessity ought not to be left to be defined by the public officials but should be open for public deliberation and debate.<sup>220</sup> Thus, if the general principles of a policy have been publicly justified and accepted then the specificities of a particular policy can be kept secret.

For the purpose of this chapter let us scheme out the publicity condition: There is a general policy G (for example, troop movements along the border). X is a specific detail of the policy (the troop movement on a specific date). X is known to R (security agencies) and hidden from C (citizens). Thus, under the publicity condition, X can be kept secret, if and only if G has been publicly deliberated, justified and the justification is acceptable to C, and C recognizes that as a consequence of such acceptance R is right in keeping X as a secret. In this picture, the legal nature of the secret and the prerogative of the agencies in maintaining it are an outcome of a deliberative process of democracy.

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<sup>219</sup> Gutmann & Thomson (1996)

<sup>220</sup> *ibid*: 104

This view, though, has four problems: (a) The premises of publicity are ideal, (b) the premises require trust in public officials, (c) this creates problems of inapplicability in non-ideal settings, and (d) Finally the publicity principle lacks breadth: it does not cover all accounts of secrecy. (b) and (c) are independent problems but they follow from (a), while (d) is a separate problem which is not inherent to the publicity principle but it shows its lack of breadth with dealing with problems of secrecy in general. (a), (b) and (c) will be covered in this section, while the next section will cover (d).

### *2.1) Problems with the premises of publicity*

The premises on which the discussion on publicity is based are shaky, for they either assume a moral agent who ought to divulge the requisite information for any deliberation to be possible, or they assume that citizen groups have alternative sources of information to make informed judgements, both of which are not available in non-ideal settings. It can be argued in defence of the theory that the theory starts with ideal conditions, assuming rational citizens, deliberating on general policy matters and establishing guidelines which ought to govern any policy. If that indeed is the case, the problems related to secrecy will still remain. This will still impact judgements on actual policy matters, not only at the level of specificity but also at the level of generality. How ought the state to behave in times of emergency or when facing the security threat? Such policy directions can only be decided if the nature of the threat is known. Thus in matters of security, it might be argued that it is the secret information itself that guides the direction of the policy. The holder of the secret information has informational resources to manoeuvre the outcome of the direction which the general policy ought to take.

Since the citizens in general lack such information, they might not have anything to contribute, or they would have to be dependent on the information which emerges from within the secrecy apparatus itself. It is only under such a reading that cases like deep

secrecy are possible; for the information required to deliberate on a general policy itself is absent. If this is true then at least for the specific instance of security, the order in which a judgement on a public policy is based on adds another crucial component which might be missing on general policy deliberations on other matters, largely which are the concerns of the publicity condition of Gutmann and Thomson. Let us show it with an example. Let us assume that citizens need to deliberate on allocation of funds on education. First they might agree on the budgetary requirement for a good educational system, follow it with an assessment of the resources at hand, finally agreeing upon how the available resources ought to be allocated, or find alternate ways to pump in more resources if required. In the example mentioned above the given circumstances are known, while in the case of security often the circumstances are not known to the public, so the desired security policy might vary from the desired outcome of deliberative politics. The publicity condition does not take into account the specific requirements which limit the possibility of deliberation while dealing with security issues where the level of secrecy is much higher than other affairs of the state.

## 2.2) *Problems of inapplicability*

The publicity condition is a normative account which requires the condition of publicity as a precondition and as an outcome of deliberative democracy. Thus the principle of publicity established develops a normative account of the need for publicity in democracy. The nature of secrecy is not analysed in detail. This poses a problem in the way publicity criteria can be put into practice. In the absence of such an analysis the publicity criteria just becomes a principled stand point from which the existing practices of secrecy can be judged. Publicity thus becomes a norm in the ideal circumstances, and a boundary condition for non-ideal ones.

A specific analysis of the nature of secrecy ought to tell us when the publicity condition will or will not work. Secrecy by its very nature resists independent evaluation, because

it will defeat the very purpose of keeping a secret. In such an instance it is not certain that the secret held by a security agency is the same which has been mandated by the citizens under the policy. Thus it can be the case that while the policy G allows only X to be kept secret, there is no way for citizens to know whether the assigned mandate has not been violated. The general policy G only lays down the general guidelines; it does not take into account the specificities of the application of G. Thus, a general agreement on G does give a scope to maintain secrets (say Z) which are other than X, even though maintaining secret Z is not legally allowed. For example, let's say that G allows for data mining of a particular individual B. Here X represents the information about B. But citizens have no way to ascertain that R is also not obtaining information B\*. The recent revelations of PRISM point out exactly in this direction.

The particular nature of secrecy allows R to hold Z without necessarily requiring her to make it public. In the absence of countervailing conditions, it just depends on the good faith of R whether she wants to make it public or not. The publicity condition does give us demanding reasons for publicity, but does not ensure that those reasons will be followed by those who ought to follow them. In fact if Z hides a particular interest or wrong doing of R, they might have sufficient reasons to hide it. The success of the publicity condition, in its application, thus requires trust in public officials. There are no independent reasons to assign trust to them. In fact, due to threats to liberty that emerge from the state, there might be enough grounds to doubt them. The publicity criteria fails because it requires, in the end, trust in the same officials who might have sufficient reasons to maintain secrecy.

It can be though argued in defence of the publicity condition that it only specifies institutional solutions and does not pertain to specificities. It can be said that institutions ought to be designed so that they adhere to the requirement of publicity and other institutions and citizen groups ought to act as a watchdog to ensure that they do. This argument though sounds convincing, but it does not still answer the question as to why would institutions not have incentives enough to maintain secrecy? Why

would not institutions follow the same paths as individuals and flout the requirements of publicity if it is in their interests to do so? Secrecy provides the ideal ground for such maneuvers to be possible, as we have argued in detail in the first chapter. Security agencies can also deny information to legislative and courts alike, who might defer to their judgement owing to fears that security threats evoke in the minds of judges and citizens alike. Publicity requires deliberation among rational individuals but reasons of security almost always work as a conversational stopper. In such circumstances publicity can only be possible through the acts of agents from within R. The publicity condition does not generally deal with individual acts of leaking by agents within R, though such acts might remotely find justification within the condition. It still needs to be specified, otherwise the criteria, does not respond to the demands of publicity in non-ideal circumstances. For publicity to succeed in such circumstances we have to look beyond the normal institutions, and morally argue for the right of individual agents to leak information which I will do in detail in the next chapter.

### 2.3) *Problem of trust in public officials*

The publicity condition makes it mandatory for public offices to be open for the scrutiny of the citizens in general. It provides a normative framework for why citizens in a deliberative democracy ought to have access to information regarding the policies and the actions of the state. Such condition of publicity deals in the last instance with the moral character of the agent R who has access to the secrets. Morally R ought to reveal the information, but in non-ideal cases they are governed by other motives, interests etc. which we highlighted in the previous section. If R has access to X, R can: i) completely hide it, ii) completely reveal it, iii) reveal part of it, iv) reveal information which is false. The model of publicity works on the assumption that the information available in the public, about G and X, is transparent. But, in reality this may not be true. Citizens have no way of differentiating between information which is partially true, completely true, and false or is misleading. They are left to trust the judgement of

the executive in this matter. The publicity condition fails to specify the reasons why the executive ought to be trusted in such matters. The executive need not be a moral agent to follow dictates of publicity, and has complete freedom about the way to use the information. "The structural position of the executive" argues Sagar

makes it pivotal not only to the formation and distribution of informed first-order judgments by virtue of its monopoly over second-order judgments, but the same monopoly also allows it to preempt public scrutiny of the decision making process. Thus the monopoly exercised by the executive creates an environment in which it can selectively publicize bits of information in order to generate public support in favor of policies it prefers."<sup>221</sup>

The first order judgements relate to taking policy decisions, in this case pertaining to national security matters. But the first order judgements are based on another level of second order judgements which is related to the assessment of the threat or the situation at hand. This second order judgement depends on the availability of the information pertaining to the threat in real situations. This information is solely available to the executive, in this case R. Given that this information itself is of a secretive nature R can decide to what extent the information ought to be divulged or shared with the public and in what form.<sup>222</sup> It thus puts R in an epistemic privileged position even in terms of the formation of even first order judgements. They can use such a position to maneuver public opinion. The publicity condition can thus only be successful if it ascribes a moral authority to public officials, but then the success of the condition does not depend on any independent criteria which can be controlled by the citizens, but on the need of trust in public officials, to control whose excesses publicity is required in the first place.

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<sup>221</sup> Sagar (2009: 174)

<sup>222</sup> Ibid

### 3) Breadth of secrecy

Gutmann and Thomson acknowledge the fact that there are different aspects of secrecy viz. deep and shallow.<sup>223</sup> Shallow secrets are the ones the presence of which is known to the general public, but the details are hidden. In the above example X represents a case of shallow secrecy. Deep secrecy represents those cases of secrecy the presence of which is completely hidden from the public.<sup>224</sup> In practices of deep secrecy the general policy as well as its specific details is hidden from the public. The Gutmann and Thomson account of publicity only works for complete publicity cases, and in some instances for policies which are relatively public. To understand the problem better let us understand it with the table given below. It lays down a general taxonomy with examples of different kinds of publicity and secrecy.

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<sup>223</sup> I use the taxonomy of deep and shallow secrecy as developed Gutmann and Thomson (1996) . David Pozen (2010) uses the term shallow secrecy refers to cases whereby the audience from whom the content is being kept secret is aware of such being the case, but is not aware of the content of the secret. On the other hand the audience, from whom the secret is being kept, is not aware of the existence of a secret and the content of it. (262). Deep and shallow do not exist as binary discontinuous categories but are seen by Pozen as lying on a continuum. He argues that there is no bright line separating these categories. (265-66). For him ‘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.’ (274)

<sup>224</sup> Pozen (2010)



Degrees of publicity	General Policy	Content of the policy	Public Control	Example
Completely public	Public	Publicly available	Possible	Public expenditure in education
Relatively public (shallow secrecy)	Public	Not public	Depends on the case	Surveillance, no fly list & data mining
Not public (deep secrecy)	Not public	Not public	Not possible	Extra ordinary rendition & drone strikes

### 3.1) Complete Publicity

Complete publicity cases are perfectly compatible with the publicity criteria of Gutmann and Thomson. In this case the policy can be considered to be an outcome of public deliberation. The general details of the policy are public, the specific details, in this case the expenditure on education, are accessible on demand to the citizens. The citizens can use this detail to further question the state and pressurize it, if required, to change the policy in their desired direction.

### 3.2) Relatively Public (shallow secrecy)

Cases of shallow secrecy may or may not be compatible with the publicity criteria. It depends on the specific instance of the secrecy. Cases like data mining, surveillance and no-fly list are constitutionally justified, under this version of secrecy. Incursions in the privacy rights of citizens are justified with some limitations, if those citizens pose security threats or have been involved in cases of fraud or wrong doing. Constitutionally though such cases have to follow the due process of the law and require legitimation from the courts. Enhanced cases of surveillance for groups of

citizens have to be deliberated in the legislative and legitimated through the judiciary. That the specific content of the policy, if the general policy is public, ought to be kept secret in such cases has been publicly justified, deliberated upon and has been accepted. The general policy thus passes the requirement of publicity.

Epistemically, such a policy is based on the limitations on the actions of the executives by the legislative and the judiciary. It is considered that any policy that seeks to maintain shallow secrets ought to be validated through the actions of the latter two branches of the state. It is assumed that the particular details of the policy will pass the scrutiny of these two branches. Yet, in practice it is quite possible that the secret keeper has sufficient freedom, allowed by the very nature of secrecy, to keep away information which the keeper deems fit, from whosoever is concerned. It is possible since the only form of regulation which secrecy allows is self-regulation. Revelations of the contents of the secret is completely based on the discretion of the secret keeper. So, if the secret keeper, in this case the executive does not wish to reveal certain contents, they are perfectly capable of doing so. The judiciary in this case has no way to know the possible violation of the law by the executive. This is a case of a violation of law, but in this case the violation goes unnoticed.

Thus, the problems with this shallow secrecy emerge at the level of the details. Shallow secrets are problematic since they might allow particular violations of the stated policy to remain unchecked. The citizens, judiciary and the legislative might be unaware of the circumstances when the limits laid down by the law have been breached. They do not have any epistemic warrant against possible violations of the law. It might be difficult to rein in the over extension of secret policies when the details of the programme are not available for public scrutiny. Recent revelations of the PRISM by Edward Snowden point towards such violations. Data mining and surveillance by the NSA was not only used against potential wrong-doers but against general citizens as well. In doing so, the

policy extended itself beyond the limits set by the law.<sup>225</sup> Similarly, the discussions of the no-fly list case and the Salto di Quirra in the first chapter also point towards instances where the particular details of the policy were hidden.

Instances of shallow secrecy compromise the rights of the citizens without any access to the due process of the law. Denied any epistemic warrant or information regarding the possible violations of the law, citizens can often be rendered helpless in challenging such policies. Yet, on the other hand it can be argued that since the general policy itself is public, a rational response would require that citizens and other branches of the state ought to be responsive towards the dangers which such secrecy entails.<sup>226</sup> It would require an active seeking of the contents of the secrets. Courts and the legislative have a special role to play, i.e. to scrutinize and separate legitimate and non-legitimate cases of secrecy. The role though will be limited given the nature of secrecy, yet a proactive step can seek to limit the abuses to a minimum level.

### 3.3) *Deep Secrecy*

Deep secret policies are an outcome of the executive using its prerogative in matters of national security. In this case both the policy and the details of the policy are hidden from the public, as well as the judiciary and the legislative. These policies have neither been publicly deliberated with the citizens nor with the legislative. Thus, any form of oversight is impossible into the workings of this policy. As discussed in chapter 1, the Iran-Contra affair, drone strikes and extraordinary rendition are some examples of such kinds of secrecy.

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<sup>225</sup> See <http://www.policymic.com/articles/47355/edward-snowden-interview-transcript-full-text-read-the-guardian-s-entire-interview-with-the-man-who-leaked-prism> [Accessed Aug. 10, 2013]

<sup>226</sup> Ibid

Deep Secrets, argues Pozen, “renders their targets especially vulnerable by depriving them of information needed to make rational decisions. No amount of vigilance or cleverness would allow the target of a perfectly deep secret to defend herself against the keeper, prospectively, or to avenge herself, retrospectively.”<sup>227</sup> The point Pozen seems to be mentioning here relates to the uncertainty which deep secrets are capable of generating. Deep secrets are not products of policies which have been publicly justified or articulated. Thus citizens are in no position to determine their rational expectations regarding such a policy. Rational expectations about future are built around a trust that certain life choices and decisions will not be arbitrarily interfered with. If policies are not public, arbitrary interferences with freedoms of individuals is possible. It creates an uncertainty regarding the position of the individual with regards to a policy. In the absence of proper proofs no challenge to the policy is possible, it might be guided by intuitions which lack any substance, and can be easily stuck down in a court of law. Such uncertainties can only creep in when an individual has some inkling of a particular violation or has observed the violation with regards to other individuals. It is not possible in conditions of complete secrecy. It creates a doubt about one’s own situation. Imagine the situation of cases of extra-ordinary rendition where individuals were picked up for being placed in a certain location and belonging to a certain minority group. Certain knowledge of such an act on others might make one’s own future uncertain.

This is not particularly a problem with deep secret policies per se, but might also be with shallow secrets as well. In justification of the leaks of the PRISM, Edward Snowden mentioned that how surveillance mechanisms collect data which might be used against an individual. Individual data, in itself harmless, can be pooled together over a life time, and even minor hints can be used against them, making them guilty in the eyes of

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<sup>227</sup> Pozen (2010: 263)

the secret services.<sup>228</sup> Such revelations makes uncertain lives of those billions whose data has been collected by the agency i.e. they know they are being watched, but do not know what act of theirs, or what words they have uttered, or what searches or footprints they have left on the internet that can be used against them. Publicity principle though theoretically does critique policies which might be hidden or which are a result of arbitrary policies, but does not take into account deep secret policies which might aid such arbitrary actions.

#### **4. Democratic alternatives against excessive secrecy**

If the above analysis is correct, secrecy is not only perfectly compatible with the demands of publicity, but also excessive forms of secrecy can exist in a regime of publicity. This point is often missed by the scholars of publicity since they have not taken sufficient care to understand and analyse the nature of secrecy. An analysis of its nature evokes problems with the dominant understanding of publicity in combating excessive secrecy. This particular limitation has been quite understood by democratic theorists who propose alternative institutional solutions to check the abuse of power. These institutional solutions have often take recourse to empowering the judiciary or the legislative in such matters to work as an oversight over the affairs of the executive in times of emergency. In the following sections, I will critically analyse some of the institutional proposals offered to combat excessive secrecy. While this section will deal with the legislative oversight, section 5 and 6 will deal with the judicial oversight and the role of the media respectively.

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<sup>228</sup> See infra ft.32

#### 4.1) *Legislative oversight: Ackerman's Emergency Constitution*

Informational control and access by the executive during emergencies can severely compromise the democratic checks and balances. It can particularly limit the functioning of other branches of the state apparatus. This problem has been well acknowledged by Bruce Ackerman in "The Emergency Constitution". In order to limit the abuse of power by the executive and by the president Ackerman designs what he calls the emergency constitution. He argues that an emergency to be sustained over a period of time should need the consent of supermajorities. This would allow for the minority to have a stake in the decision making process and would severely curb the extended powers of the state during the emergency. Yet, the presence of supermajorities, and the need to get their consent for the emergency might work as a 'perverse incentive' for the executive to hide information, especially when it concerns their wrong doings.<sup>229</sup> The executive might mislead the legislature in believing the need to continue with the emergency regime through their careful control of information. Thus, for Ackerman, 'the legislature cannot act effectively if it is at the mercy of the Executive for information'.<sup>230</sup> The minority can only be 'well- informed' if they are granted 'a majority of seats on the oversight committees', and the chairperson of such a committee come from the opposition.<sup>231</sup> The executive is required under the emergency constitution to provide 'complete and immediate access to all the documents'.<sup>232</sup> Oversight committees would be structured to 'make the tradeoff between publicity and secrecy in a politically responsible fashion' and would not have any strong incentives to suppress information as might be the norm with the party in the government.<sup>233</sup> Such

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<sup>229</sup> Ackerman (2004: 1050)

<sup>230</sup> Ibid: 1051

<sup>231</sup> idem

<sup>232</sup> Ibid: 1052

<sup>233</sup> idem

an arrangement in the oversight committees might go a long way, according to Ackerman, to counter the threats which might arise from executive secrecy. Such being the case, Ackerman is aware of the upper hand which the executive might still have with regards to the control of information which might lead it to abuse its privilege. Thus, if such circumstances do indeed hold, 'judicial intervention may sometimes be desirable to enforce legislative demands'.<sup>234</sup>

The proposal for a legislative oversight seeks to work out checks and balances between different branches of the state. The control over informational resources tilts the balance in favour of the executive. Ackerman's proposal largely tries to aim at a balance, understanding the limitations imposed by the informational control. Yet, the transparency that he seeks to build in the model through legislative oversight runs through different problems. The objections to the proposals are of two kinds: (a) Legislatives lack expertise in dealing with security, (b) the emergency constitution does not account for the capacity of potential arbitrariness that secrecy grants to the executive. Let us call these two problems: (a) the problem of expertise, and (b) the problem of potential arbitrariness.

*a) The problem of expertise*

Let us assume for a moment that classified information is indeed presented on demand to the committee. It can still be asked whether they would have the necessary expertise to judge the matter at hand. Ackerman assumes that the oversight committee will have the necessary expertise and know how in matters of national security to engage with the executive.<sup>235</sup> But this not true, since, empirically, during times of emergency the

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<sup>234</sup> Ibid :1068

<sup>235</sup> Sagar (2009:176)

deference to the judgement of the executive is often higher than during normal times.<sup>236</sup> Such deference is based on the fear that security threats arise in the minds of the people and the legislatures arise, and the lack of expertise in providing a quick and effective response to the situation.

*b) The problem of potential arbitrariness*

The proposal by Ackerman does not take into account the nature of secrecy. The hidden character of secrecy does allow for potential arbitrariness to the agent who has the access to information. The agent can decide how to utilize the information, the parts of information to be shared, and the parts that can be hidden. In fact until and unless information is handed over to the oversight committees, they might not be aware of its existence. Ackerman assumes that such will be the case, that the oversight committees will have access to all the information, if and when they demand it. He fails to mention the fact that the executive might not have any incentive to share the information.<sup>237</sup> In fact, especially in the case of deep secrets the incentives work in the opposite direction. Ackerman acknowledges the problem of perverse incentives yet has not found a way to get around it. The assumption of executives handing over information on demand seems untenable. Until and unless all files of the executive are open to scrutiny, the oversight committees might be unaware of presence of different kinds of secrets.

The judgements of the committee can only be based on the informational resources available to them. Executive is thus in a position not only to decide the amount and the nature of information which could be handed over, but the information which is presented can itself limit the range of judgements and policy choices available to the

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<sup>236</sup> Ibid, Posner & Vermeule (2007: 18)

<sup>237</sup> Sagar (2009: 176)



committee. Oversight committees can only shoot an arrow in the dark about information which is hidden or can rationally analyse the inconsistencies in the evidence presented to them. Apart from these the range of actions are severely limited. It can thus be a guess as to whether a proper judgement can indeed be formed in such circumstances. It seems that the only possible alternative left would be to either defer to the judgement of the executive, or to base judgement on half baked information, or on the political platform and the ideas which the members on the committee subscribe to.

The general practice though points in a different direction. Empirically it has been found that the presidents and the executives often use their discretionary power to classify information<sup>238</sup>, they often circumvent laws passed by the legislative, or mislead them in affairs of national security and policy.<sup>239</sup> At times even when the information is produced, it is with a delay or after long negotiations which thwarts any possibility of making judgements.<sup>240</sup> Thus, it is contended that even a presence of oversight committees might not ensure accountability on the part of the executive.<sup>241</sup>

## 5. Judicial Oversight

Legislative are often limited in their attempt to curtail executive secrecy. In this section I try to consider if the courts can work as an effective watchdog in cases of executive secrecy. Judicial review and oversight has been suggested as an effective way to counter

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<sup>238</sup> Stanley & German (2011)

<sup>239</sup> Schulofer (2010: 5) Historically the misuse of the executive privilege has been exemplified by the cases of misuse of domestic surveillance by the Church Committee in the 1970s, then famously in the Iran-contra affair, recently in CIA's outsourcing of torture to countries with histories of employing torture and the surveillance programme of the National Security Agency. (Berman, 2009)

<sup>240</sup> Ibid

<sup>241</sup> Bok (1983)

practices of secrecy.<sup>242</sup> The courts have an important role to play, as they have to maintain a vigil over the wrongdoings that emerges from such a practice, check cases where the secrecy compromises constitutional rights of the individuals, and lastly the courts ought to ensure that due process is granted to the supposed guilty. Can the courts curb the excesses of secrecy? It is often argued that courts might be in a better position to do so since some of the practices of the secrecy require jurisdictional control, especially the ones related to surveillance operations. Surveillance operations have to be justified under a special court and show a probable cause if they have to pass the test of law, since they constitute a particular violation of the rights of privacy. The necessity to explain the actions or the reasons behind them often can have a 'salutary effect' on the powers of the executive.<sup>243</sup> By insisting on better explanations and the rationale for classification of information the courts can limit cases of over-classification.<sup>244</sup>

Empirically, though courts have been increasingly deferential to the executive in matters of national security.<sup>245</sup> Two reasons have been cited for the need for deference: (a) the lack of expertise of the court, and (b) revealing of secret information to an open court will divulge information to the enemies. The rationale for such deference has been the lack of expertise of the judiciary in matters of security.<sup>246</sup> Meredith Fuchs, on the other hand, finds the rationale of expertise 'quite odd'. Undertaking a historical survey of judicial deference to the executive, she suggests that "if the government were an ordinary litigant, its past practices might cause a court to consider secrecy claims with some level of skepticism."<sup>247</sup> She argues that courts do have experience in examining

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<sup>242</sup> Fuchs (2006)

<sup>243</sup> Fuchs (2006: 169)

<sup>244</sup> Ibid :170

<sup>245</sup> Ibid, Sagar (2009)

<sup>246</sup> Posner & Vermeule (2007:18)

<sup>247</sup> Fuchs (2006:156)

‘facts for the sorts of warning signs that are sometimes present in secrecy cases and that should trigger increased pressure on the government’, especially when such cases relate to infringement of minority rights and violate constitutional guarantees to rights.<sup>248</sup>

Despite the fact, the deference of the judiciary has in fact increased post 9/11. Part of the reason is to do with the fact that the courts are not immune to the popular panics that follow cases of emergency.<sup>249</sup> Secondly, the courts often take it for granted that the executive are in the best position to judge the material at hand. The litigants who challenge cases of secrecy are often required, by the state, to present ‘compelling need’ or ‘breaking news story’ in order to access the content of the information.<sup>250</sup> Lack of intervention by the court in such cases also reveals how the executive is let off scot free. Interestingly such cases reveal how secrecy curbs the right to assess a situation of potential abuse of power. It is only the executive who has the access to the information. It thus can assess whether certain information does or does not relate to a potential abuse or is indeed sensitive. The executive thus acts as a gatekeeper and does sort out the information which ought to be kept secret from the one to be revealed. The only way other agencies can have access to such information is through the cooperation of the gatekeepers themselves which leaves the entire discretion in the hands of those who are bound to potentially misuse it.<sup>251</sup>

If the courts accept the argument of the executive at a face value, which they most often do, it defies a rational recourse as they have not looked at the background evidence or

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<sup>248</sup> Ibid: 170

<sup>249</sup> Waldron (2003)

<sup>250</sup> When the Abu Gharib revelations were leaked out the media, civil liberty groups asked for the information to look into potential abuses. The Department of Defense refused the information arguing that they could not show ‘compelling need’ or ‘breaking news story’ for the material. (Fuchs 2006: 153-4)

<sup>251</sup> Sagar (2009: 179)

the information which might show the executive guilty. The rationale of a revelation of information to the court being revealed over to the enemies is often used to keep the information secret. Even pieces of not sensitive information have been withdrawn from the scrutiny of the judiciary. The mosaic theory of information generation has been cited as a reason behind such secrecy.<sup>252</sup> It is argued that while individual pieces of information, in themselves harmless, might be joined together with similar other pieces to create a mosaic of information. Such a mosaic will hence divulge important information to the enemies of the state. As Pozen succinctly puts it “for courts and agencies alike, since 9/11 the mosaic theory has at the same time manifested, justified, and exacerbated a new reticence to publicize government-controlled information.”<sup>253</sup> After 9/11, with the number of detentions of suspects linked with terrorism on the rise, the refusal of the courts to review information, claimed to be secret, has denied the possibility of a fair trial to the victims, thus compromising their civil right to fair trial.<sup>254</sup> The recent PRISM revelations show how the FISA court went along with the executive rationale of “reasonable suspicion”, rather than look into the details of the surveillance programme, to allow for collection of individual private data of millions of individuals.<sup>255</sup> The court has surrendered important judicial functions to the privileges

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<sup>252</sup> Pozen (2005)

<sup>253</sup> Pozen (2005: 631)

<sup>254</sup> Stanley & German (2011). See also <http://www.latimes.com/news/local/la-me-mosque-spying-20120815,0,7626350.story> [Accessed on Aug. 23, 2012]

<sup>255</sup> It has been argued that the FISA court itself has been weakened with the amendment of the FISA act, 2008 and the executive itself does not need to show “probable cause” but just a “reasonable suspicion” to get a court order to conduct the surveillance. For more look at <http://www.theatlantic.com/national/archive/2013/06/prisms-legal-basis-how-we-got-here-and-what-we-can-do-to-get-back/276667/> [Accessed July 18, 2013]. Yet such being the case the court generally allows for cases of surveillance against individuals who are supposed to be suspects, but they are not supposed to pass a blanket general authorization for surveillance which they did in the case of PRISM. It thus challenges the efficacy of such control over the executive for the court showed a collusive behavior.

of the executive. Thus, even gross violation of the secrecy privilege has not led to a change in decision of the courts to treat such cases with greater suspicion, which it generally ought to do.

The alternative suggested by Pozen is to narrow down deep secrecy cases to a shallow level and to develop inter-agency regulations so that the access to secrecy is spread out across different actors. Courts can play an important role at the beginning of a policy process and reduce cases of secrecy to specified content.<sup>256</sup> Citing the Vaughn court, Fuchs presents alternatives which are available to the judiciary. According to the judgement the court ought to lay down certain rules for secrecy: “(a) that the agency submit a “relatively detailed analysis” of the material withheld, (b) that the analysis be presented in “manageable segments”, and (c) the analysis include an “indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government’s justification.”<sup>257</sup> The courts also ought to demand an in-camera inspection of the documents procured.

It is not clear though whether the processes specified here have actually managed to overcome the gatekeeper objection as raised by Rahul Sagar.<sup>258</sup> The specific nature of secrecy might still allow the executive to hide information. Such institutional safeguards might only help in cases of shallow secrecy, or when particular violations of certain rights are visible and known. These safeguards might not work in circumstances of deep secrecy.<sup>259</sup> It is important to remember that potential cases of abuse or limitation of

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Such collusive behavior, if it was one, was possible because the decisions of the court itself are secretive and not open for public scrutiny.

<sup>256</sup> Pozen (2010: 326)

<sup>257</sup> Fuchs (2006: 171)

<sup>258</sup> Sagar (2009)

<sup>259</sup> Pozen (2010: 326)

rights might not be known till quite late or maybe never, if the policy itself is hidden from the public view.

It is clear from the above cases that the epistemic asymmetry of information does work in the favour of the executive. The epistemic asymmetry works at two levels: (a) the lack of information, (b) the lack of knowledge that one lacks information. If the court is aware that it lacks information it can demand it, though it can be misled or provided with limited information. In the case of (b) the agency of the court is completely limited. (b) is typically the case of the knowledge of the asymmetry which determines the agency or the freedom of an agent. If the condition under which (b) exists is arbitrary then the executive seeks to control the directions of the judiciary. But in conditions of (b) the court cannot distinguish between arbitrary and constitutional control of information, which is part of the conundrum with secrecy. The epistemic base to distinguish between legitimate and illegitimate cases of secrecy is missing. Consequently, courts are limited in their judgement to decide between arbitrary and constitutional interference with freedom of individuals and groups by the executive.

The only epistemic relevant agent in these cases is the executive. The court in order to pass a judgement will have to depend on the epistemic agent in order to garner information. Thus action by the court is only possible if it has access to the information which the epistemic agent has every incentive to block or deny. For the court to even demand information requires a hint or an idea of the existence of such information. From an epistemic point of view, the courts are in no position to assess the information without the collaboration of the gatekeeper or dependence on leaks from one of the epistemic agents. Thus the courts' response can be critically determined by the information provided by the agent. The correctness of the response depends totally on the moral attitude of the agent. The political system of checks and balances will

ultimately be dependent on the moral and ethical approach of the agent in question, rather than on an external control on their powers.

Critiques of such an approach argue for the courts to use their constitutional authority to demand information from the executive. Judicial authority to be effective requires reasonable doubts or possible knowledge of violations. If the actions or the violations are public, judiciary can demand information which pertains to such violation, but when the act and the violation are hidden then courts might be equally powerless. The evidence to ground suspicion is absent in deep secrecy cases. In surveillance cases even the primary experience of the violation of a right is absent. In the absence of such information suspicions might not be well founded which might tilt the scales towards deference to the executive. Such deference is not a product of trust but might be well grounded in the constitutional separation of power. The judiciary can only intervene if it has sufficient grounds to do so. The advocates for judicial oversight in secrecy cases miss the primary point of the epistemic preconditions required to use constitutional authority.

## **6. The role of the media**

The media plays an important role in democracies in keeping the citizens informed about the affairs of the state. In the face of rampant secrecy, manipulation and deception the media acts as a watchdog by providing information which separates truth from deception. States and especially the executive branch have enough incentives to keep certain embarrassing details away from the public lest it causes uproar. Citizens can access some relevant details about the acts of the executive through the Right to Information laws, but the Right allows for constitutional limitations on the exercise of it. Executive acts of secrecy related to security are some exceptions to the sunshine laws. Thus, the citizens in order to deliberate on the affairs of the state might sometimes

require information which is limited under the right, especially when the information is related to the abuse of power. Through their networks the media can and indeed do access to secret information which is not available to the general public. Press disclosures have played an important role in checking the power of the executive. Some of the notable examples of media revelations of the executive wrong doing relate to the CIA role in overthrowing the Allende government in Chile, the role of the US in secret paramilitary operations in Cambodia, the Iran-Contra affair and revealing the extent of surveillance on anti-war dissidents.<sup>260</sup>

The above examples clearly state a case of media playing a vigilant role in controlling state excesses. Defendants of media freedom suggest that the press ought to be free to publish any secret documents they have access to. It is argued that it is only through a free press, having no fear of prosecution from the state that accountability can be ensured on the acts of the executive. One of the particular defenses of the freedom of press comes from the equilibrium model interpretation, presented by Alexander Bickel<sup>261</sup>, which represents a free market like model of information. According to the model, the state prerogative of secrecy and control over informational resources comes in conflict with the requirements of transparency.<sup>262</sup> This conflict represents a competition over the same informational resources between the executive and the media. According to this interpretation, the state is legitimate in asserting its control

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<sup>260</sup> J. R. Ferguson suggests that "Press disclosures of executive misdeeds thus played an important role in fostering congressional oversight of both the President's warmaking powers and his use of the intelligence agencies. With these precedents firmly established, Congress continued throughout the post-Vietnam era to impose constraints on the President's conduct of foreign affairs. For example, Congress narrowed the peacetime use of the President's national emergency economic powers;" created new procedures for the domestic surveillance of foreign intelligence activities; and prohibited the expenditure of funds for military operations in Cambodia, Vietnam, Angola and Nicaragua." (1993: 473)

<sup>261</sup> Bickel (1975)

<sup>262</sup> Sunstein (1986:898)



over the informational resources till it falls in the hands of the media or any other individual, in which case the state has no right to stop them from publishing the available information. Does this model help us in curbing secrecy? The model provides a justificatory ground for press freedom but it is not sufficient in curbing secrecy. Such a model provides the states with enough incentives to withhold information rather than legitimately provide it even when the information is owed to the public. The state will use all the resources and power in its hands in order to stop the leakage of information.<sup>263</sup> Under such an argument the state would make it very difficult for the outflow of information to the media.

Media cannot be an equal power to the state in the competition over informational resources. Classification of secrets, under the model, will be left over to the arbitrary decisions of the executive and no constitutional checks can be exercised over the control of informational resources. Self-regulation by the executive would be the only form of regulation possible in such circumstances. The equilibrium model interpretation should be dispensed with since it does not provide an effective solution to the problem of secrecy, on the contrary provides enough rationale and incentives for hiding even those bits of information which ought to be accessible to the public under normal democratic procedures.

Even though the media ought to be free under a democratic system it is not always necessarily the case. It might resort to publish leaks which support the state agenda.<sup>264</sup>

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<sup>263</sup> Ibid: 903

<sup>264</sup> An example of such a kind is the revelations on the presence of weapons of mass destruction in Iraq which was aimed at swinging the public support in favour of the war. The leaks cited anonymous sources and were later found to have been without any credible evidence of there being such a thing. See also Sunstein (1986: 902) on the possible alliance between media and the state.

The press can be misled or deceived into believing into a story which might be an act of selective leaking from the state. Secrecy precludes any possibility of checking the background sources of the story. Often it is difficult to tell between evidence that is true and reliable, and the one that is planted by the state to support its own agenda. Possibility of assessing the veracity of the informer or the story is very bleak. The access to a credible story might be very difficult in circumstances where the state punishes any whistleblower.<sup>265</sup> Any whistleblower would then resist making the content public or take recourse to the media. If the content of the media is being monitored by the state for possible leakages of secret documents, the media under scrutiny might often take recourse to safe options than face the wrath of the state which it ought to do in such instances.<sup>266</sup>

In conclusion, the quandary of secrecy that we began creates epistemic limitation in democratic procedures which seek to overcome or control it. The epistemic nature of the secret allows it to go unnoticed without any correlative check on the freedom of action it allows for the agent who controls the secret information. Judges, the legislative and even the media appear to provide a semblance of control over the abuse from secrecy but they can only go so far, not completely breach the fort of secrecy. Even though limited they create accountability structures which are not so easy to overcome and provide for prospective grounds of redress when the abuses finally see the light of the day. If secrecy does limit the possibility of democratic self-correction, and manipulate democratic procedures to the benefit of the executive, is there no way out of the quandary that we present? Is the situation so dismal as to not provide any

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<sup>265</sup> See [http://www.salon.com/2012/02/09/obamas\\_unprecedented\\_war\\_on\\_whistleblowers](http://www.salon.com/2012/02/09/obamas_unprecedented_war_on_whistleblowers) [Accessed July 21, 2013]

<sup>266</sup> The defense secretary of USA ordered the Pentagon to keep an eye on leak of classified documents. For more on this see <http://rt.com/usa/news/pentagon-monitor-media-leaks-classified-645/> [Accessed on July 23, 2013]

alternative? I would argue that, within the given democratic structures the possibility of redress is always prospective. It can always be an ex-post phenomenon. Any checks and controls induced in the procedures to limit the abuse ex-ante will always have to overcome the hiddenness inherent in the epistemic nature of the secret which makes it impossible for it to be known beyond the individual or the group which holds the secret. Does it really mean that limitations cannot be imposed on the practice of secrecy? Procedurally it might be difficult. Any limitation can only come from the self-induced regulation of the executive apart from the constant vigilance of the other branches of the state and the media. This leaves us with the group of individuals who constitute the executive. I have so far refrained from analyzing the group of individuals who constitute the executive and analyzing one of the most important ways through which executive abuses come to be known, that of whistleblowing or leaks, except in the context of the media. It is assumed that the information within the executive is spread over different individuals and one of them can and often do leak information due to several reasons, one of which could be the wrong doing which is hidden within the act. In the next chapter I will analyse whether such cases of leaking can indeed be treated within the moral framework of disobedience, especially when the leaks reveal gross acts of wrongdoing on the part of the state.

## Chapter 4

### Whistleblowing: A case for Civil disobedience

The previous chapter demonstrated that the normal institutional mechanisms to curb excessive secrecy often do not work. In the absence of such structures does it mean that the gaps left by secrecy would remain? Do democracies not have other instruments through which this gap can be filled? This chapter aims to look at one of the alternate systems through which the deficits caused by secrecy can be filled. This is the instrument of whistleblowing. In the absence of normal institutional democratic procedures of self-correction, dissent is the last resort to salvage democracy. It is in this context that whistleblowing needs to be studied. Thus, the goal of this chapter is to study the activity of whistleblowing, the reasons for it, and its role in a democracy. Further the chapter aims to analyse and understand whether whistleblowing can be understood as an act of civil disobedience, under some instances. The chapter concludes with an analysis of Wikileaks and PRISM revelations as a legitimate act of civil disobedience.

Ideally public policies ought to comply with the demands of publicity. Yet, in non-ideal circumstances full compliance is often not possible, for it would require an entitlement to complete information on every activity of a modern state. But security reasons offer countervailing considerations to full publicity. Full publicity implies the risk of the information being spilled out to the enemies of the state. The need for secrecy must then

be weighed against the countervailing considerations of publicity. Secrecy, on the other hand, in virtue of its peculiar role in the functioning of a modern state, can easily outstrip the purpose for which it is ordained, and become – in particular circumstances – an end to itself or a way of protecting the wrong-doers. In other words, secrecy, in non-ideal settings, is a necessity, and – at the same time – a constant risk.

In ideal circumstances, secrecy threatens the ex-ante ‘epistemic entitlement’ which underlies any conception of rights. Yet, secrecy can be justified in non-ideal settings, only on the condition that the action protected under its rule does not unjustifiably limit rights. I argued that the rights of individuals ought not to be limited unless such limitations can be justified to those whose rights are being curbed. Thus, in non-ideal cases a ‘right of assessment’ guarantees the legitimate limitation of a right.<sup>267</sup> It follows that real world democratic institutions have a political duty to curb the excessive practices of secrecy, when those practices hide unjust acts and limit the balance between constitutional powers. In fact, any act of secrecy, to be legitimate, ought to pass the test of the ‘right of assessment’.

Yet, as the previous chapter demonstrated, the epistemic nature of secrecy means that neither the constitutional controls, nor media vigilantism can work towards checking the abuse of power. It is inherent in the epistemic nature of secrecy that the informational asymmetry favours the individuals or members of the group who have

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<sup>267</sup> See also Santoto & Kumar (unpublished manuscript)

access to that information. Hiding under this feature of secrecy, executive abuses of power and rights violation can go unnoticed. We face then the following dilemma: either democracy needs secrecy, but lack instruments to challenge the malpractices due to excessive secrecy, or they do not need secrecy, but lack instruments to protect the fundamental interests of safety, security, and – more in general – the fundamental interest protected under democratic institutions, from the threats of potential enemies.

The dilemma cannot be resolved from within the democratic institutions. In the absence of institutional controls it might seem that democracy cannot correct the deficit that results from secrecy. Yet such an institutionalist reading of democracy is at best narrow. It does not account for channels outside institutions that work towards strengthening democracy. Thus, in order to find the missing link to resolve this dilemma, we need to look outside the normal institutional frameworks. The missing link, I argue, is the role that individuals can play in checking the abuse of power. In the context of the discussion of secrecy, this role is that of a whistleblower. A whistleblower, while working within an institution, deviates from the legal oath of secrecy to expose the wrong-doings within the institution. The act of exposing wrongs is aimed at correcting the necessary deficit that occurs due to secrecy. In absence of institutional checks, it is only by recognizing the role played by a whistleblower that we can argue in favour of democracy being a self-correcting form of government. Thus, whistleblowing is a necessary modality of democratic self-correction.

In the sections that follow I will defend the view that whistleblowing constitutes a core aspect of democracy. In some crucial instances, whistleblowing constitutes more than an act of leaking secret information. When a gross violation of rights and systematic abuse of power is concerned, whistleblowing is an act of civil disobedience. This is the line of the argument I would be taking in the rest of the chapter. To this purpose, I will first show why whistleblowing arises in the first place. An examination of this sort requires discussing the role of the agents involved in secret practices, and their motivations for leaking information. However, some distinctions need to be made between different cases of whistleblowing (since not all of them can be categorized as an act of disobedience) and confronted against the existing dominant conceptions of civil disobedience. The purpose of this analysis is to evaluate whether the dominant framework of civil disobedience is suitable to capture all relevant cases of whistleblowing or, rather, a more robust account needs to be designed to argue in favour of them. I will finally argue in conclusion for Wikileaks and the recent PRISM revelations as instances of civil disobedience.

## **1. Secrecy and Whistleblowing**

In order to understand whistleblowing one needs to answer the following questions: what is whistleblowing? Who can blow the whistle? Why does it take place? What are the background conditions for Whistleblowing? Is it an act of last resort? Is whistleblowing legitimate? We also need to show that whistleblowing, under

conditions of executive secrecy, ought to be an act of last resort, if it does not have to undermine the democratic systems of checks and balances. Thus, the leaks ought to strengthen democracy, rather than undermine its basic structures. Any deviation from the previous requirement (whistleblowing being an act of last resort) needs to be justified through an overriding reason that explains the necessity of side-stepping the democratic procedures. Such reasons should be either political or moral, but should not concern individual interests of the whistleblower.

### *1.1 Whistleblowing: definition*

According to Sissela Bok, Whistleblowing is an act “meant to call attention to negligence, abuses, or dangers that threaten the public interest.” Whistleblowers sound an alarm based on their expertise or inside knowledge, often from within the organization in which they work. With as much resonance as they can muster, they strive to breach secrecy, or else arouse an apathetic public to dangers everyone knows about but does not fully acknowledge.<sup>268</sup>

On the other hand, Elliston suggests four different definitions of whistleblowing:

- (a) going public with information about the safety of a product;
- (b) sounding an alarm from within the very organization in which they work, aiming to spotlight neglect or abuses that threaten the public interest;
- (c) (when) the employee, "without support or authority from his superiors... independently

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<sup>268</sup> Bok (1983: 211)



makes known concerns to individuals outside the organization";

(d) a whistle blower is an employee or officer of any institution, profit or non-profit, private or public, who believes either that he/she has been ordered to perform some act or he/she has obtained knowledge that the institution engaged in activities which (a) are believed to cause unnecessary harm to third parties, (b) are in violation of human rights or (c) run counter to the defined purpose of the institution and who inform the public of this fact.<sup>269</sup>

The definitions underlined here, except for Bok, are a result of practices of whistleblowing in a business setting. Except for definition (a), all other accounts mentioned above can qualify as a general definition of whistleblowing. Definition in (a) generally concerns with a product; unless security is considered as a product, our discussion in this chapter is not concerned with these cases.<sup>270</sup>

A perusal of the definitions given above suggests that Whistleblowing has six inherent elements: i) it is a deliberate act, ii) often done by an insider having access to information and an expertise in assessing the information; iii) the information is directly related to threats to citizens' rights, their obligations or harm the public interest; iv) it is

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<sup>269</sup> Elliston (1982: 167)

<sup>270</sup> The act of providing security by the executive is not a case of a provider-customer relationship, as in the case of a business enterprise. Provision of security is one of the function for which executive branch is formed in a democratic state. According to the social contract tradition, one of the reasons hypothetically individuals bind themselves in a contract is that for the purpose of obtaining security and the protection of fundamental rights. Security, according to this understanding, is not a product offered by the state to the citizens, which the citizens can accept or reject or bargain at competing prices. Citizens do not conceive of security as a product, but as a right the state is bound to provide.

assumed by the whistleblower that withdrawing such an information from the public is a grave wrong done to the citizens; v) the information is such that the public ought to know, and vi) it is in form of appeal to the higher authorities, through publicity, with an intention to generate public pressure to correct the wrongs done.

### *1.2 Whistleblowing: intentionality and responsibility*

Whistleblowing is an intentional act done with the purpose of revealing secret information to the public. If the information is leaked through gross negligence, it would not be termed as whistleblowing, even if the information concerns wrongs done to the citizens at large. Whistleblowing is a form of action a rational autonomous person undertakes, by going through a process of self-deliberation and reasoning- where such reasoning is often the consequence of a moral commitment. Yet, it is only often moral, since the intention behind leaking a set of information might not always be guided by the public interest. Leaking might be also done to achieve personal ends. Yet, sometimes even when leaking is done for narrow ends, it might inadvertently end up promoting the public good by virtue of the information revealed.

Whistleblowing acts as a communicative tool to elicit change in the existing state of affairs. When guided by concerns of public good, the intention behind the leaks is to generate debate among citizens about practices that the whistleblower thinks is essentially wrong. The intention to alter the malpractices cannot happen if institutions are not held accountable for their practices. Thus, the act of leaking is insufficient if the

institutions responsible for the wrong-doing are not pin-pointed. Thus, the intentional act of whistleblowing is about attributing responsibility, to the individuals who are complicit in the wrong-doing and to those who can bring about the desired change.

Elliston describes two kinds of responsibilities:

a descriptive one referring to those who cause something to happen; and a normative one identifying those who should do something about it. The first sense looks to the past, as part of an explanation. The second looks to the future as a coping strategy. Whistleblowers must to some degree locate responsibility in at least one of these senses if their statements are to be more than mere warnings.<sup>271</sup>

Responsibility might be ascribed either to individuals or to institutions; the revelation might also pin-point a structural flaw in the institution. In pin-pointing responsibility, the whistleblower aims to change the existing state of affairs. It is an effort to “enlist the support of others to achieve social objective”.<sup>272</sup> The whistleblower understands that under the given condition, change can only be brought about through leaking; she might neither have the power, nor the legal authority to push for change from within. In the act of leaking she fulfills her role as a conscious citizen, providing information so that those public officials, civil society groups, who are in position to press for more transparency or enforce culpability for the wrongs, assume responsibility. Leaking itself does not guarantee the change; it has to be brought about by a conscious deliberate

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<sup>271</sup> Elliston (1982: 169)

<sup>272</sup> Ibid: 170

political action on the part of those to whom the information is communicated to. When the citizens fail to act on the information often the state of affairs remain the same.

### *1.2 The who of whistleblowing*

The definition provided above describes whistleblowers that are part of the institution they blow the whistle on. Yet, does a whistleblower necessarily have to be an insider? It need not always be so. Whistleblower is someone who has access to the information, has necessary expertise in handling the secret content, and can evaluate the gravity of wrongs being committed under the veil of secrecy. Internal accounts of whistleblowing exclude instances of information leaking from sources outside those of the culpable institutions. However, the outsider, in order to be categorized as a whistleblower, needs to intentionally act on the information, test the veracity of the leak, and then make it public through channels they deem fit. Instances in which an insider transmits information to an outsider, the title of whistleblower ought to be accorded to both.

It might be argued that the anonymity of the insider takes away the credibility out of the leaks; i.e. the leaks might not be judged as authentic. In the same vein it is argued that the whistleblower stands public scrutiny and submits to the law. Two points can be made in opposition: the leak ought to be treated in its own right, disregarding references to the motivation or the identity of the person concerned.<sup>273</sup> Secondly,

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<sup>273</sup> *ibid*

impetus ought to be on testing the veracity of the information rather than the moral character of the individual.

### *1.3. The why of whistleblowing*

Why do individuals having access to secret information have a duty to leak the information? The two conditions under which the whistleblower can decide to leak the information depends on the following: (i) the moral demandingness of the situation. The moral requirement of the situation overrides or outweighs the fear of reprisals that might follow from the act, thus suggesting that the act is sincere and not guided by personal motives. (ii) the personal benefits that might accrue to the whistleblower. Whistleblowing, even if done with a motive of personal gain, might end up benefiting others as well.

To understand the motivations behind whistleblowing, let us take the following two similar looking examples delineated below.

Example 1: A decides to leak, out of personal malice, secret information about B to C. The information concerns a wrong done by B to C. The leak thus helps C to know of the wrong done, at the same time allowing A of her revenge.

Example 2: Suppose a public employee decides to blow whistle on the mismanagement of funds within her institution. She might be motivated due to ill-treatment by her superiors. Her leak exposes the public to the wrong-doings of her institution.

In both the examples we see that as a consequence of the leak a good occurs, but the motivation behind the act is particularly sinister. Thus, while for a consequentialist the act is moral, for a Kantian it is not, because in both the instances the primary intention of the whistleblower was not to help C (in example 1) or to act towards a common good (example 2). These examples raise a fundamental concern regarding whistleblowing: how can we ensure that the motivation guiding the action is not governed by personal interests? I argue that moral motivations are difficult to know, until and unless the actions of the whistleblowers are publicly scrutinized and held accountable for their actions. Allowing anonymous whistleblowing precludes the possibility of discerning the motivations governing the act. Yet, sometimes the threats of personal harm might lead the whistleblower to be anonymous. Should such acts then not be considered as legitimate? In my contention the act still fulfills a political purpose of strengthening democratic institutions. It initiates necessary corrections in the fissures in the institutions. Thus, even if we disregard the act as moral, depending on our own moral commitment, its political significance ought not to be lost to us. While questions of moral motivations should be raised, but they should not override the political actions required to fill the exposed democratic deficit.<sup>274</sup>

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<sup>274</sup> The majority of responses to Snowden's revelations tried to discredit the act by showing bad motivations or a chequered personal history. For more see <http://www.nytimes.com/2013/06/11/opinion/brooks-the-solitary-leaker.html? r=2&> [accessed on Aug. 30, 2013]

In ideal conditions the whistleblower should publicize the reasons behind the revelations, and be able to face public scrutiny for her actions. In non-ideal circumstances though, the prevailing power relations might force her to undertake the action in anonymity; the reasons, if any, have to be discerned from the revelations themselves. In absence of public justification the content of the leaks should itself count as sufficient reason, for political purposes, if not for moral ones. The question more important for me is: what are the reasons that justify an act of whistleblowing? In other words, under what conditions whistleblowing ought to be undertaken? It is to this inquiry that I move next.

#### *1.4 Reasons for whistleblowing*

The background conditions for whistleblowing has to do with the following: a) the particular nature of secrets; b) the act protected under the secret; c) the epistemic agents having knowledge of such acts; d) the reasons for whistleblowing. The first three conditions fulfill the requirement of the “why” of the whistleblowing. Secret information by its very nature limits the information to a particular individual(s) or a group of people working within an institution. Not necessarily all members within an institution might know the information. Secrecy grants autonomy to the agents having the information, they can either share it with others or keep it to themselves. It is only when an individual from within the institution decides to reveal the information that others acquire the knowledge of it. The whistleblower is such an agent who decides to

hand over classified information to the citizens. Thus, she makes the knowledge available, hitherto limited to a subgroup of people, to the citizens. Let us understand the reasons for whistleblowing.

### *The argument from rights*

The first reason has to do with the burden of justification that secrecy creates within a democratic set-up. If publicity is the ideal norm in democracy, then any need for secrecy has to be justified. The possibility of abuse, under a veil of secrecy, means that the burden of justification is on the institution hiding the information. The need for justification is higher if the secret information hides from a person or groups the information of harms done to them, or the sources of such harm. In conditions where the source of the harm is the state itself, the burden of justification is higher. The need for a special justification arises due to the public good nature of state information. Any deviation from its public nature requires due justification. Reasons of security mark exceptions to the publicity requirement, but do not take away the justification owed to the citizen. Security in general cannot be a justification, especially when secrecy measures are used to hide wrong-doing.

The need for justification arises out of the entitlement, right holders have, to know the conditions under which their rights are being limited.<sup>275</sup> Secrecy limits the knowledge of right limitations, thus affecting the capacity of the agents to act autonomously.

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<sup>275</sup> Santoro & Kumar (unpublished manuscript)



Autonomous action requires 'that a person should possess all the relevant information concerning the options available to her in pursuing the conduct protected under a specific right; for if a person had such knowledge, she might have chosen to act differently or could have possibly contested those limitations.'<sup>276</sup> Thus, to exercise the capacity of free action, protected under a right, the individual has an entitlement to 'full knowledge of the circumstances that may impede the enjoyment of a right.'<sup>277</sup> This is the epistemic entitlement of rights. Secrecy violates the epistemic entitlement by limiting the knowledge of the conditions under which a right is limited. Yet, under certain circumstances the nature of secrecy operation requires that providing the information to the right holder might betray the very purpose of the secret action. This is the case of surveillance operations. In such cases citizens ought to be granted an ex-post assessment of the conditions under which their right was limited.<sup>278</sup> This is the right of assessment which fulfills ex-post, the ex-ante requirement of the epistemic entitlement.

Right of assessment creates correlative obligations on those who aim to limit these rights. The obligation, in general, lies with the institution aiming to limit individual rights; they might be unwilling to enact it due to threats to their interests. On the contrary, a whistleblower refuses to take part in the harm protected under the secret.

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<sup>276</sup> Ibid: 18

<sup>277</sup> Ibid:19

<sup>278</sup> Ibid: 20

Even if she is not the direct source of the harm, the access to information creates a complicity in the harm, which though less than the actual harm, is nonetheless important. This is a direct derivation from Mill, where he suggests: 'A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable for the injury.'<sup>279</sup>

The knower can either withdraw their services from the institution responsible for the harm (such is the case with a conscientious refusal) or blow the whistle, but she cannot escape from being complicit in the harm, even through her silence. Whistleblowing is thus a positive duty towards the individual whose rights are being limited. This duty derives from the contention of Mill. It is a moral duty that admits no exceptions. It overrides the constraints of the positive legal duty to maintain secrets. The demands of the moral duty to act and reveal information overrides the duty that legally binds the whistleblower. The whistleblower, by acting on behalf of the right holder, fulfills her obligation by providing them the information to assess their limitations of rights. Through the active leaking of information she not only exculpates herself from the guilt, but fulfills the active duty to uphold the rights of the individual. Yet such duty does not require that leak be aimed at the individual who is harmed. Ideally, the leak should reach those individuals and groups harmed, but in some cases it is not possible. In such cases, it would suffice to say that whistleblowing reveals a systemic democratic deficit, a deviation in the function of the institution from its stated constitutional mandate.

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<sup>279</sup> Mill (1991: 15)

Limitation of a particular right by the state, in the absence of justification, suggests that the state has deviated from the constitutional requirements it ought to uphold.

If secrecy hides violation of rights of groups or minorities, it undermines the distributive structure of rights. In such circumstances the threat to a particular right of an individual or a group is a violation of the equal enjoyment of that right in general, thus undermining the very system of rights. The whistleblower upholds the spirit of the constitution by exposing the deficits within the institution. In fact the act of leaking reveals that the state has turned away from its role as a protector of constitutional rights. On the contrary, the state fails the minority population who are the most vulnerable in such cases. Thus, the authority vested by the citizens in the state is undermined. It creates a deficit of democratic legitimacy. Such deficits, if gone unnoticed, might not only undermine the basic democratic structure, but might lead to a potential future violation of rights in general. The act of leaking is thus not a communication about a particular harm, but about a threat to system of rights and the basic structure in itself. Thus, for a leak to be successful it is not binding that it reaches to the individuals harmed, but that the information of the harm be made public. It can then be picked up by civil liberty groups, media, the legislative, and the judiciary who are agents who champion the cause of rights, and restrain the state from turning away from its democratic duty. Yet even if undemocratic policies of the state are not contested, it does not undermine the democratic nature of the leaks, which provide a necessary tool for a change in the existing practices. Such change can only happen at the

level of politics, the whistleblower is a necessary cog for this politics to begin in the first place. Whether the politics begins or not depends on factors outside the control of the whistleblower, though she can initiate a dialogue for it to begin. Thus, the validity of whistleblowing does not depend on the fact that the intended change was brought about or not, or whether the individuals who have been harmed are the audience being communicated to, but it lies in the revelation of the moral wrongs being committed within democratic institutions, that creates a deficit in democracy which needs to be pin-pointed in its own right.

### *The argument from political obligation*

Consider the case where the information relates to democratic flaws, wrong doings on part of the institutions, i.e. the institution diverting from their stated objectives. Such a wrong, if publicly known, would have invited punishment or checks from democratic institutions. Secrecy presents democracy with a serious flaw. Wrong doings cannot be checked by other institutions, it can only be checked through self-regulation of the institution maintaining the secret. But, self-regulation requires trust in the same individuals who have incentive enough to misuse it. In the absence of stronger inner moral constraints on the part of the individuals, secrecy gives rise to abuse of power as has been explicated in chapter 1. In the last instance, whistleblowing is an attempt to correct the flaw.

In a democratic institution the information is meant for the public. Even if in the short run the information is kept away from the citizens, retrospectively they ought to have access to it. Secondly, the information that ought to be kept secret, constitutionally should not concern grave wrong doing on the part of the executive. Secrecy is permissible constitutionally only to the extent that it extends the interests of the citizens. When it becomes inimical to the very interests it seeks to protect or undermines the very structures it seeks to uphold, secrecy loses its democratic and constitutional justification.

Citizens ought to know whether a particular institution is fulfilling the function for which it is designed and democratically legitimated. Deviation from constitutional norms breaks the terms of social cooperation which binds the institution with the citizens who impart authority to it. General harms to others- by a state working on behalf of the citizens- implicates the citizens in the harm caused, since the citizens being ultimate authority ought to assume responsibility for the actions of the state. Information in such cases provides the citizens with the necessary tools to potentially check the abuse of the power of the state. It thus becomes the prerogative of the individual who has access to such information to revert back to the citizens about the breach of trust.

### *1.5 Is whistleblowing an act of last resort?*

It is often argued that the whistleblower ought to exhaust all possible options of deliberations, within the group, before leaking the information. Reflecting on the recent Prism revelations by Edward Snowden, David Brooks insists that such cases of whistleblowing often erode the basic trust in institutions, the terms of social cooperation which has been agreed to, and deference to common procedures which are required to keep these institutions functioning.<sup>280</sup> It betrays the honesty and trust which are the grounding stone of any cooperative enterprise.<sup>281</sup> While he does not rule out the need for whistleblowing when the information being hidden is “grave”, he finds this typical case of Edward Snowden to be an obsessive act not guided by democratic values.

This is the standard critique against acts of whistleblowing. The argument suggests that whistleblowing, if at all required, should be an act of last resort. The typical whistleblower should exhaust all possible institutional channels before making the information public. Another strand of criticism suggests the whistleblower betrays the duty towards the institution she is working in. It is also argued that the whistleblower has access to the information only by the virtue of being part of the institution, so leaking is an act of stealth.

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<sup>280</sup> See [http://www.nytimes.com/2013/06/11/opinion/brooks-the-solitary-leaker.html?\\_r=2&](http://www.nytimes.com/2013/06/11/opinion/brooks-the-solitary-leaker.html?_r=2&) [Accessed Aug. 30, 2013]

<sup>281</sup> Ibid

Such arguments miss the point for the following reasons: even though the terms of contract bind an employee to an institution, the terms do not apply if the original condition under which the contract was made has changed. If the employee is implicated in a certain wrong doing, which was not part of the original function within the organization; she has every right to blow the whistle. As argued before the moral duty to expose the harms overrides the legal duty to obey the institutional rules. Similarly, the information within a democratic institution is public in nature, and ought to be known to the public, so it not an act of stealth.<sup>282</sup> Any information which concerns harms is stripped off its necessity of secrecy by its very virtue of the harm that it protects.

Dissent within the institution also might not work; the institution might have enough incentive to keep the secret.<sup>283</sup> Institutions might not respond to moral reasons due to

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<sup>282</sup> For more see O'Neill <http://mises.org/daily/6474/> and <http://mises.org/daily/6475/The-Ethics-of-State-Secrecy> [accessed on Nov. 04, 2013]

<sup>283</sup> As Edward Snowden asserts why dissent within the organization does not work. “[W]hen you talk to people about [abuses] in a place like this where this is the normal state of business people tend not to take them very seriously and move on from them. But over time that awareness of wrongdoing sort of builds up and you feel compelled to talk about [them]. And the more you talk about [them] the more you’re ignored. The more you’re told it’s not a problem until eventually you realize that these things need to be determined by the public and not by somebody who was simply hired by the government.” <http://opinionator.blogs.nytimes.com/2013/09/15/the-banality-of-systemic-evil/> [Accessed on Sept. 30, 2013] Similar was the case of Chelsea Manning who first tried all possible internal ways to bring the wrong-doing to the light of the administration. Only when the attempt was frustrated that she made it public. (ibid)

the special privilege that secrecy grants. On the contrary, if the potential whistleblower is a subordinate it might harm her career chances, as blowing the whistle might come at a high cost she might be unwilling to take.<sup>284</sup>

Whistleblowing does not amount to a lack in trust in the institution, it represents a lack of trust in that particular instance where the whistleblower has compelling reasons to believe that the desired changes will not be brought about through internal dissent. In fact, a typical whistleblower imposes faith in the democratic procedure to correct itself, and to that end appeals to the sense of justice shared by the citizens. The social terms of cooperation that binds her to the citizens provides a compelling ground for her to revert back to the citizens when normal channels to correct wrongs are missing. Rather than encourage blind obedience to the law and terms of duty, the whistleblower often fulfills her obligation as a citizen. Such an act shows faith in the democratic institutions, but challenges their way of functioning. The harm to social cooperation, in the long run, comes not from the whistleblower but the grave wrongs that are preserved under a veil of secrecy.

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<sup>284</sup> See *infra* note 17 for the case of mathematician William Binney and NSA analyst J.Kirk Weibe who tried institutional mechanisms to reveal the wrongs protected under the secret. They were frustrated in their attempts and only in the last instance they decided to blow the whistle. They have faced deleterious consequences for their actions through law suits brought against them and their security clearance being revoked. In fact the article shows empirical cases where the NSA was spying on the legislators and FISA court judges (the ones who are supposed to have an oversight over surveillance operations)



## 2. Civil Disobedience: Three accounts

When does an act of whistleblowing become civil disobedience? In order to answer this question, let us first begin with the existing theories of civil disobedience and try and see if cases of whistleblowing indeed fit within the existing conception of civil disobedience. If such is not the case, then we would have to see whether the conception of civil disobedience needs to be elaborated to apply to cases of whistleblowing.

### 2.1 *The liberal account*

According to John Rawls, Civil Disobedience is defined as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”<sup>285</sup> The Rawlsian conception of civil disobedience only applies to a nearly just society governed by a liberal democratic polity.<sup>286</sup> For him, conditions of Civil Disobedience obtain only when current arrangements “depart in varying degrees from publicly accepted standards that are more or less just; or these arrangements may conform to a society’s conception of justice, or to the view of the dominant class, but this conception itself may be unreasonable, and in many cases clearly unjust.”<sup>287</sup> Civil Disobedience acts as an appeal

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<sup>285</sup> Rawls (1999: 320)

<sup>286</sup> Ibid: 319

<sup>287</sup> Ibid : 309. On the other hand, for Joseph Raz in a liberal democratic state there is no general right of civil disobedience. The argument goes that the liberal states protect the right of political participation of its citizens and any critique of the laws will be protected by the state. It does not mean that, when faced with iniquitous laws in a liberal state, citizens cannot disobey. (2009:273)

to the society's 'sense of justice' when the current arrangements deviate from 'publicly recognized standards'<sup>288</sup> and threaten the "principle of equal liberty" and "violates the principle of fair equality of opportunity".<sup>289</sup> It is an appeal, based on the 'shared conception of justice' and justified through political reasoning, by a minority or an individual, to the majority to bring to their notice the existing unjust arrangements.<sup>290</sup> It is hoped that the act of defiance or resistance would bring to notice the injustice and proper measures would be taken to correct it. Civil Disobedience, according to Rawls, should be undertaken in the public and the disobedient should be willing to submit to the laws of the polity and be willing to bear any punishment ordained for the law's violation. The act of submission suggests a general fidelity to the law on the part of the disobedient; it suggests that the disobedient is against a particular law or policy but not against laws in general.<sup>291</sup> Fidelity to law ascribes a necessary faith in the democratic process and in its ability to redress the wrongs done, for civil disobedience when undertaken with "due restraint and sound judgement helps to maintain and strengthen just institutions"<sup>292</sup> The civil disobedient necessarily acts in good faith and ascribes to uphold the cause of justice and build just institutions. In doing so, she seeks to actively engage with the existing institutions in order to change it.

For Rawls, civil disobedience has five general characteristics: a) it should be public, b) non-violent, c) conscientious political act, d) contrary to the law, and e) should be done with an intention to change the law. Fidelity to law is a requirement of civil disobedience but does not define the act itself. It is a requirement which stems from the near justness of the constitution and the society in general i.e. when the society does not

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<sup>288</sup> Rawls (1999: 310)

<sup>289</sup> Ibid:366

<sup>290</sup> Ibid: 321

<sup>291</sup> Ibid: 322

<sup>292</sup> Ibid:336

deviate largely from the 'shared conception of justice' or when the laws are not in general 'unreasonable'.

The general literature on civil disobedience tends to agree on the fact that for an act to be termed as civil disobedience it should necessarily be public, and contrary to the law i.e. illegal.<sup>293</sup> Civil disobedience ought to be public since both the "public and the government should know" what the disobedient "intends to do".<sup>294</sup> The public nature of the act and the willingness to pay the penalty not only shows the fidelity to the law, and a basic support of the constitutional democratic process but is also required to "enlist support, sympathy and admiration" in favour of the cause that the civil disobedient espouses.<sup>295</sup> Fidelity to law, for Habermas, shows that the "civil disobedient recognizes the democratic legality of the existing order."<sup>296</sup> It is only through a participation in the existing political order that the civil disobedient can expose a law which is illegitimate, and seek to correct it.<sup>297</sup> It ascribes a necessary faith, through an appeal to the majority's sense of justice and reason, in the possibility of democratic institutions to revise and correct themselves, and works as a "morally justified experiment", an innovation in the current existing constitutional doctrines.<sup>298</sup> The reasons for civil disobedience, for Habermas, derive from the fact that "even in the democratic constitutional state, legal regulations can be illegitimate".<sup>299</sup>

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<sup>293</sup> Cohen (1972: 284), Habermas (1985:99), Bedau (1991: 655)

<sup>294</sup> Bedau (1991:655)

<sup>295</sup> Cohen (1972: 285). For Raz, publicity and submission to punishment is not what necessarily defines Civil Disobedience, but submission to punishment "...proves the purity of one's motives; a trial or a term in gaol may serve as a focal point for the mobilization of more opposition to the law or policy protested against." (2009: 265)

<sup>296</sup> Habermas (1985: 103)

<sup>297</sup> *ibid*

<sup>298</sup> *Ibid*:104

<sup>299</sup> *Ibid*:103

## 2.2 *The Republican account*

The liberal account of civil disobedience is based on the idea that citizens are generally right in disobeying authority when certain laws and policies are unjust. Citizens have every right to disobey existing laws, and appeal to the majority conception of justice to the extent that the act does not undermine the overall basic structure of the society and seeks to bring about the desired change through democratic means of persuasion and appeals to reason. Contrary to the liberal model of disobedience, which Daniel Markovits calls as “democracy limiting”, he proposes an alternate model of “democratic disobedience”, based on a republican conception of government, which seeks to correct “democratic deficits in law and policy that inevitably threaten every democracy”.<sup>300</sup> For him, the need for democratic disobedience stems from the fact that in democracies often public policies depart from the “sovereign will” and the “individual authorship of collective decisions sometimes fail.”<sup>301</sup> This creates democratic deficits due to the chasm between individual authorship of sovereign will and the public policy which does not confirm to it. Thus, for democratic authority to be legitimate, it ought to build in the possibility of disobedience which is a necessary step in correcting this deficit.<sup>302</sup> Sometimes democracies deviate from the collective will due to “manipulation and abuse by special interests.”<sup>303</sup> Secondly, democratic deficits might owe to the fact that citizens tend to believe that their preferences have not been accounted in the process of the sovereign will formation. Democracies ought to be deliberative at all levels in order to include all voices, but often in the process of engagement, which is a long and arduous one, the old sovereign will does not include the new engagement required due to the presence of new citizens or changed preferences or the new sovereign will does

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<sup>300</sup> Markovits (2005: 1902)

<sup>301</sup> Ibid: 1903

<sup>302</sup> Ibid:1904

<sup>303</sup> Ibid:1922

not represent the preferences of the old. Thus democratic deficits might accrue due to the “distance from any past sovereign engagement” or “resistance to a new sovereign engagement” or a combination of the two.<sup>304</sup> A citizen who comes across such deficits might “wish to reintroduce into the political agenda preferences and ideals that have been excluded by the collective decision”.<sup>305</sup> But they might be frustrated by the normal democratic procedures (i.e. legal protests), or such procedures might not be adequate to account or anticipate all forms of democratic deficits and correct them.<sup>306</sup> In absence of proper procedural safeguards citizens might not have other options rather than to disobey.<sup>307</sup> Thus, “political disobedience might, in appropriate circumstances, be justified as a counterweight to the inertial institutions and practices that correct and cure democratic authority but that inevitably misfire on occasion and produce democratic deficits”, but perhaps such disobedience, “if appropriately employed serve to correct these deficits and in this way enhance democracy.”<sup>308</sup>

### *2.3 Deliberative disobedience*

Contrary to the liberal and republican accounts of disobedience, Will Smith defends civil disobedience within the framework of deliberative democracy. Deliberative democracy requires participation of citizens to deliberate on public policies which have significant impact on their lives. Civil Disobedience, for him, becomes justifiable when “processes of public deliberation fail to respect the principles of a deliberative democracy in the following three ways: when deliberation is insufficiently inclusive; when it is manipulated by powerful participants; and when it is insufficiently

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<sup>304</sup> Ibid:1927

<sup>305</sup> Ibid:1934

<sup>306</sup> Ibid:1934-5

<sup>307</sup> Ibid:1936

<sup>308</sup> Ibid: 1928

informed.”<sup>309</sup> Disobedience is not only needed for citizens group to challenge policies which are insufficiently participatory, but also to challenge at the level of civil society when such groups do not include different interests groups. Thus, civil disobedience operates at two axes: vertical and horizontal. The vertical plane represents the engagement of civil society groups with the state. At this plane, civil disobedience is about persuading the state “to enter into a dialogue about law and policy in the light of perceived failings in existing deliberative procedures”.<sup>310</sup> The civil disobedient hopes “to persuade the state to engage in deliberative uptake, by encouraging a response on the part of political actors to concerns expressed within civil society.”

The horizontal plane relates to the engagement within the civil society to make it inclusive. Thus, the horizontal dimension represents the intention of the civil disobedient “to stimulate processes of communication and argumentation within civil society itself. A citizen engages in civil disobedience to communicate concerns to other citizens in civil society, to raise awareness of issues and to secure support for his or her viewpoint.”<sup>311</sup>

The republican and the deliberative account append on the liberal account of disobedience by extending the theory to cases that might not be cases of injustice but represent certain procedural flaws in the democratic process itself. An overarching understanding of civil disobedience indicates four criteria: a) it has to be illegal; b) its purpose should be to change the law or correct democratic flaws (either in the procedures of policy making or deliberation); c) it has to be public; d) it ought to be communicative in order to gather support in their favour.

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<sup>309</sup> Smith (2004: 363-4)

<sup>310</sup> Ibid: 363

<sup>311</sup> idem

### 3. Secrecy and disobedience

Does a pervasive presence of state secrecy create valid conditions for civil disobedience? To answer this question, let us recall some of the epistemic pitfalls of secrecy. Secrecy creates an epistemic gap, an informational asymmetry between the citizens and the executive. Such an epistemic gap has the following consequences:<sup>312</sup> limitations of citizens' rights often go unnoticed, and hence they are denied the information required to know between legitimate and illegitimate limitation of their rights, and hence unable to challenge those limitations. Secrecy violates the equal enjoyment of civil liberties and equal access to opportunities. It thus precludes participation by those who are most affected by the actions protected under it. Citizens do not have full information to deliberate and contest important policy decisions. A basic condition of deliberative democracy (the publicity requirement of the law) is unmet, thus limiting the political obligations and political judgement of citizens thus limiting their participation. Under the cover of secrecy powerful interest groups can usurp government functioning in their favour. Secrecy precludes the knowledge of policies which are hidden from the public and its impact on the citizens. Recall the examples from chapter 3 regarding surveillance and extra-ordinary rendition. The first represents a case where the actions protected under secrecy overreaches the extent protected under a policy. Thus, surveillance measures can be used to target innocent people without any correlative checks on them. Similarly, secrecy becomes a veil under which policies can be undertaken which might not be justifiable under the glare of publicity. Extra-ordinary

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<sup>312</sup> The preceding outline of limitations due to secrecy is based on the following line of reasoning: a) Individuals are autonomous beings who should not be subjected to arbitrary power, b) any exercise of power or control has to be justified to the person on whom it is exercised, c) the public nature of informational resources owned by the state, d) access to information as a requirement for citizens to fulfill their political obligations. e) access to the knowledge of any possible impediments in the enjoyment of rights.

renditions, drone strikes, Guantanamo, the surveillance by NSA are examples of such kind. Secrecy precludes in such circumstances the citizens' duty to dissent on behalf of the others (non-citizens, aliens) who are the most affected by their state, but who have no recourse to challenge such policies at a deliberative level.

Secrecy does represent a test case for the outlined accounts of civil disobedience. The primary requirements which justify the need for civil disobedience are met by the deficits caused by the pervasive presence of state secrecy. Secrecy represents a 'democratic deficit' under which the democratic procedures can deviate from the collective will of the citizens. Particular interest groups can usurp the functioning of the state to favour their own interests. This particular characteristic of secrecy creates a gap between the collective will and the state policy. Citizens' particular wills might not find representation in important security policies which might have significant impact on their lives. If the following observation is well-grounded, then secrecy passes the test for 'democratic disobedience' since it impacts the autonomy of the citizens and exposes them to arbitrary laws which are not a product of their collective wills. Thus, the policies are not a product of self-authorship by collective citizens, and this limits not only sovereignty based in the will of the people, but also exposes them to harm from arbitrary policies. It thus in essence compromises their freedoms.

Similarly, meaningful deliberation is absent under conditions of secrecy. Particular interest groups tend to influence the policy in their favour. Citizens can be manipulated, deceived or insufficiently informed regarding particular details of a policy. Thus, secrecy also fulfills the test for 'deliberative disobedience'. On the other hand as stated before, secrecy can also act as a veil to protect injustices. Additionally, if the secret services deviate from the democratically accepted norms and violate the rights of those whom it claims to protect it becomes unjust. Thus, it can be said that the liberal account of disobedience can also account for cases of secrecy.



#### **4. A different argument for disobedience**

Existing arguments for disobedience account for secrecy due to the consequences that result from it. Disobedience is justified only if the consequence of hidden information is a violation of right, a democratic deficit or failure to accommodate requirements of deliberation. Yet, the above mentioned three accounts are far from consequentialist. They approach the issue of disobedience from the perspective of justice, rights, will of the citizens or the fundamental right of participation at deliberative levels. In fact it can be argued that they might argue against secrecy if it goes against these above stated perspectives. So secrecy creates democratic deficits, compromises the rights or precludes democratic participation. Until this point secrecy can be accommodated within the existing accounts. The problem arises because they do not look at secrecy per se. So if no wrong occurs, secrecy might not provide for a justifying ground for disobedience, even if the practice of secrecy might be inimical from a principled standpoint. Thus, the existing accounts, at best, rely on a particular consequence or wrong that results from secrecy, but not deal with the nature of secrecy and the impact it has on the autonomy of the citizens and for functioning of the democratic structures. It is my contention that these problems need to be spelt out if existing accounts have to accommodate secrecy. Yet they cannot do so because their fundamental premises do not allow for accommodation of the specific aspect of secrecy. Thus, either the existing accounts need to be discarded or enlarged to account for this fact. In the arguments that follow I tend to append the existing accounts with a version of disobedience which is epistemic, that can accommodate the fact of secrecy. The epistemic account does not aim to discard existing accounts but should be read as a necessary addition in them. Thus, under conditions of secrecy, only an account of epistemic disobedience can accommodate the peculiar problems that arise from hidden information. But before I

move on to the epistemic account I need to show what are the particular premises in the existing discussions of civil disobedience that do not accommodate for secrecy.

All the three theories outlined above are based on two premises. It requires that the citizens who engage in disobedience are aware of the background conditions (i.e. injustice, democratic deficits etc.) and that such deficits are potentially accessible to the citizen groups at large. The second premise is that of autonomy. Existing conditions of civil disobedience assume that the citizen groups largely act with autonomy and they make their choices in complete freedom. Even when complete conditions of autonomy might not obtain, citizens are free to the extent that they are aware of the limitations on their autonomy, know under what conditions the autonomy has been limited, can pass judgements whether such limitations are justified, and if they are not legitimate then can engage in dissent or disobedience to reclaim their lost autonomy.

Autonomy, under the existing theories, does not depend on epistemic considerations. This epistemic precondition is the knowledge about the limitation of their rights, or knowledge about existence of democratic deficits. This knowledge is largely available to the citizens. Thus, under normal accounts of civil disobedience, epistemic preconditions to engage in disobedience are met. The disobedient, under such circumstance, only highlights a particular law or policy that she considers unjust with an intention of changing them. These states of affairs are publicly known, and potentially anyone can engage in an act of disobedience if they believe that the policy deviates from the shared conception of justice. Thus, potentially everyone is in a position to disobey.

## 5. Disobedience and the epistemic relevance of secrecy

Under conditions of secrecy, citizens do not have the knowledge of the extent of the limitations of their rights, or whether they completely enjoy the range of actions protected under that right. Thus, limitations of rights or knowledge about democratic deficits are not publicly known. Any deviance from the publicly shared conception of justice is only available to the insiders of the information. Citizens cannot know about such limitations until an insider to the secret informs them about it. It is thus only the insider to the information who can be a potential disobedient. In short, thus disobedience under secrecy does not begin with a shared knowledge of: limitations of rights; or democratic deficits, thus making the epistemic preconditions to disobey different from the existing accounts of disobedience.

The need of disobedience arises because of the informational asymmetry that secrecy causes between the executive and the citizens. Such asymmetry hides the wrong done from the citizens. Thus, disobedience, under conditions of secrecy, is about revealing this secret information in public. In doing so the disobedient intentionally disobeys the law protecting the secret information. The legal duty to protect the secret is overridden by the moral duty to reveal the harms. The disobedient thus also refuses to take part in the harms, even just by the virtue of being a silent spectator to the secret information. Disobedience becomes a communicative act in order to elicit support against the unjust policy that protects the harm. The disobedient might not necessarily be against the particular law. On the contrary, she might believe that secrecy privileges are justified, but she might just be against the particular information regarding a harm that is protected by state secrecy privileges. Additionally, the civil disobedient might argue that, while the particular policy is democratically justified, in this particular instance, it has overextended its democratic mandate.

Thus, under conditions of secrecy, any theory of disobedience has to take account of the particular characteristics of the act. Disobedience under such circumstances relates to revealing of information about: a) a general wrong doing or harms done protected under a secret; b) information is kept secret to manipulate or mislead public opinion in a desired policy direction; c) secrecy protects an illegitimate law or policy; d) when a policy under secrecy overextends its constitutional mandate and no checks are in place to control its abuse.

Under these conditions, if a person is exposed to sets of information that reveal a series of injustices, disobedience not only is a right, but a duty of justice. The person, by the virtue of being in an epistemic privileged position, be it as a government employee or as a journalist, is able to assess the circumstances and the weight of the information in question. She then needs to assess her role as an active political subject, moving beyond subjective considerations,<sup>313</sup> and reason out the urgency of making the information accessible to the public. The disclosure of unlawful conduct should be made even if it threatens national security.<sup>314</sup> In doing so, the disobedient rises above the narrow constraints set upon her by the calls of professional duty and restraints of the positive law.<sup>315</sup> Thus she, as a citizen, not only affirms her status as a moral and epistemic agent,<sup>316</sup> but as a political being she uses the right granted to her by the constitution.<sup>317</sup>

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<sup>313</sup> Brownlee (2007)

<sup>314</sup> Stone (2011) makes the case based on the first amendment right of the citizens for freedom of speech. This argument generally stems from a fundamental liberal suspicion of threats to civil liberties both from the state as well as outside entities. See especially *Liberalism of fear* by Judith Shklar (1989). The citizens need to be especially skeptical of the claims of the state, especially when they are done in their name.

<sup>315</sup> Constitutionally, the state cannot force individuals to surrender their rights. A voluntary agreement on the part of the individual does not undermine her position as a citizen guaranteed certain rights by the state. The rights of free speech in this case are inalienable. For more see (Stone, 2011) and (Sunstein 1986)

<sup>316</sup> Parekh (1993)

<sup>317</sup> Stone (2011)

She in the process reinstates the epistemic agency of the other citizens and takes a step towards correcting the democratic deficit which occurs due to this epistemic lack.<sup>318</sup>

Civil disobedience, under secrecy, has an epistemic character. Its need arises out of the informational asymmetry between the executive and the citizens. We can call it *epistemic disobedience*. We can define epistemic disobedience as an illegal act, done on behalf of others, to expose the wrong done under conditions of secrecy, with an intention to bring about change. Thus, it is an act performed by a whistleblower, on behalf of others, whose rights or political obligations might have been compromised due to the absence of information. Epistemic disobedience is illegal, in so far as such revelations are not protected under the right to information laws. The disobedient, on the contrary, believes that she has sufficient reasons to reveal such information.

The revealed information fulfills the right of assessment of the citizens; it provides them with the epistemic resources to be in the best position to judge the limitation of their rights. Epistemic disobedience is premised on the reasoning that information is a vital good for enjoyment of rights, and fulfillment of political obligations. The disobedient highlights that part of democratic deficits and injustices that owe their presence to informational asymmetry. The assumption is that such information would potentially

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<sup>318</sup> I do not claim that citizens do not have autonomy and agency, on the contrary they do. In the specific instance of secrecy citizens lack the knowledge about the limitation of their rights, and this is a severe limitation on their autonomy to act as they deem fit. In the absence of the given information citizens cannot act to reinstate the lost autonomy. Only when the information is made available that they can act regarding this limitation on their rights. It might also be the case that citizens might not agree with the disobedience in question and might want to withdraw their assumed consent in this matter - since the author of the disobedience, especially in conditions of secrecy, can only assume the consent, as seeking active consent might actually undermine the cause of the disobedience itself. She can only assume what rational citizens would agree in such circumstances. Contrarily, Pitkin suggests that deliberation to disobey is never based on the consent of the governed but by the nature and the quality of the government and the justness of its policies. For more see Pitkin(1966)

provoke corrections in the existing unjust state of affairs. I say potentially, because not often the issues raised by the disobedient would be taken up by citizen groups or civil society organizations in their attempt to correct wrongs. In fact, epistemic disobedience can potentially provide a pathway for disobedience of the other three kinds. Revealing information about the deficits caused in democracy by secrecy could potentially lead to democratic disobedience,<sup>319</sup> or calls for more deliberation in some kind of policy making. Individuals who have been harmed might also engage in disobedience against unjust policies.<sup>320</sup>

## 6. Justification from autonomy

Epistemic disobedience is an attempt to provide knowledge of the illegitimate limitations on the autonomy of the citizens; it ensures that they are in the best position to judge the import of public policies not only on their rights but also on their political obligations. In order to prove that the disobedience in an epistemic sense ensures autonomy of the agent, I would have to prove that secrecy has epistemic fallouts. That these epistemic fallouts have implications on the rights and obligations of the citizens, that the disobedience provides them the ground to reassess these fallouts and finally, that this disobedience is not paternalistic. The last charge comes because epistemic

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<sup>319</sup> Post PRISM revelations by Edward Snowden, has seen that there has been considerable gap created in the democratic process by secrecy. Such fact was even acknowledged by the President Obama who came under considerable pressure from civil society groups, civil libertarian groups and the public who held considerable disregard for such high scale surveillance. Though, not clearly an act of democratic disobedience, but the information did reveal a democratic deficit which generated lot of debate and discussion and considerable pressure from civil society groups

<sup>320</sup> The occupy Wall Street movement and the Arab spring used a lot of information revealed by Wikileaks in order to challenge the unjust policies of their state. The Pentagon Paper revelations provided a lot of impetus to the already ongoing civil disobedience movements against the war in Vietnam.

disobedience, as I claim, can only be done on behalf of someone but not by the agent who herself is wronged.

That secrecy has epistemic fallouts has already been shown before. The informational asymmetry caused by secrecy has grave implications on the choices that an individual makes. In making the implications of the informational asymmetry clear I closely follow the line of reasoning developed by Santoro and Kumar in their recent, yet unpublished paper. A decision or choice which an agent considers to be an outcome of a deliberate rational plan might be interfered with due to secrecy. The consequences of an action that the agent perceives to be an outcome of their own reasoning and conduct, might have been a result of a deliberate interference on the part of an agent, working in secrecy, trying to manipulate or govern those choices. Even in the absence of manipulation, the agent might not have complete information regarding the consequences which might result from a set of actions. The background conditions of information required to undertake a decision is thus be hidden from the agent. This lack of knowledge is not due to the normal epistemic neglect or faulty reasoning on the part of the agent, but due to information which has been actively subtracted from the rational calculation of the agent. Even if no interference is made, or no background information is actively subtracted from the agent, the veil of secrecy allows the executive to exercise potential interference in the choices of the individual. Such potential interference not only goes against the basic rights of privacy, but also compromises the range of actions protected under a right, which an agent in normal circumstances believes she should have access to. The only way an agent can know that the range of actions have not been interfered with, is by an access to the knowledge of the prior conditions under which the action is taken, and that those prior conditions have not been interfered with.

To enjoy a right fully an agent ought to have access to the full background epistemic conditions of the extent of rights and the possible limitations on them. This is the

epistemic entitlement mentioned before.<sup>321</sup> Such an entitlement though might be counterproductive in cases where active information is subtracted from the agent, like the cases of surveillance. In such conditions, the agent ought to be allowed an ex-post right to assessment of the reasons and the conditions under which her rights have been limited. Thus secrecy, in non-ideal settings, does not directly constrain the autonomy or the rights of the individuals but constrains their right to be in a best position to judge when rights can be legitimately limited.<sup>322</sup>

If the following argument is right, then we see that a consequence of secrecy is that it compromises the autonomy and the enjoyment of the rights of the citizens even when no willful interference is made by the executive, but when the potential of interference exists. Secrecy, in fact does worse: it takes away the citizens' ability to be in the best position to judge whether a rights limitation is legitimate or not. Secrecy thus affects the capacity of judgement of citizens both at the level of enjoyment of rights and in fulfillment of obligations. In such a scenario they cannot judge between just and unjust policies. Epistemic disobedience in a way works towards providing conditions to judge between legitimate and illegitimate limitations on autonomy. In cases where the normal demands of right of assessment are not fulfilled, disobedience might be the last resort to restore the right.

The argument for disobedience from autonomy is mostly negative. Epistemic disobedience is justified because secrecy can illegitimately curb the autonomy and rights of the agents. Such a curb can be exposed through disobedience. Disobedience in epistemic conditions only provides the agent with resources to challenge such limitations on autonomy; it does not directly reinstate the lost autonomy. The lost autonomy can only be reinstated if the citizens use such information to challenge the

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<sup>321</sup> Santoro & Kumar (unpublished manuscript)

<sup>322</sup> *ibid*



policies limiting their rights. Thus, epistemic disobedience, even when done on behalf of others is not paternalistic,<sup>323</sup> because it only provides the agent with information which they are unaware of, and which they will remain unaware of if not for the revelations. The disobedient in no ways tries to influence the choices or preferences of the citizens or the agents as some autonomy based arguments for civil disobedience do.<sup>324</sup> On the contrary, it just shows that what the citizens consider to be a well formed belief or political judgement based on an autonomous choice might not be the case, because their rights or obligations might have been tampered with or manipulated. Since the citizens lack the essential information to judge on the actual enjoyment of a right, epistemic disobedience is meant to provide them with those resources to judge those instances when such choices have been maneuvered. Thus, the disobedience itself does not restore autonomy or prescribes a path of action or coerces individuals to undertake an action, but it only provides a basic precondition required to challenge limitations of rights and obligations.

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<sup>323</sup> When disobedience is done on behalf of others, the consent can never be obtained. It is epistemically impossible, as well as practically falls into varied problems. It will defeat the very purpose. As Pitkin suggests, that deliberation to disobey is never based on the consent of the governed but by the nature and the quality of the government and the justness of its policies. For more see (Pitkin 1966)

<sup>324</sup> See Moraro (2013) for civil disobedience as using force to enhance the autonomy of citizens by forcing them to notice their second order desires, which they would not do so if not compelled to do so by the act of disobedience.

## 7. Whistleblowing as epistemic disobedience

Whistleblowing cases are generally not considered as instances of civil disobedience except when some of the revelations relate to ‘unlawful and dangerous practices’ and in doing so the whistleblower openly violates ‘the oath of secrecy they have sworn’.<sup>325</sup> Contrary to this position I maintain that many instances of whistleblowing can be seen as cases of epistemic disobedience. Whistleblowing is epistemic disobedience if it represents one of the following cases: a) about a general wrong doing or harms done protected under a secret; b) information is kept secret to manipulate or mislead public opinion in a desired policy direction; c) secrecy protects an illegitimate law or policy; d) when a policy under secrecy overextends its constitutional mandate and no checks are in place to control its abuse. Under this reading Whistleblowing cases like Pentagon Papers, Wikileaks and the recent PRISM revelations would be categorized as epistemic disobedience.

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<sup>325</sup> Sisella Bok makes the following distinction between Whistleblowing and Civil disobedience: First, whistleblowing resembles civil disobedience in its openness and its intent to act in the public est. But the dissent in whistleblowing, unlike that in civil disobedience, usually does not represent a breach of law, it is, on the contrary, protected by the right of free speech and often encouraged in codes of ethics and other statements of principle.

- second, whistleblowing violates loyalty, since it dissents from within and breaches secrecy, whereas civil disobedience need not and can as easily challenge from without.

-Whistleblowing, finally, accuses specific individuals, whereas civil disobedience need not. A combination of the two occurs, for instance, when former CIA agents publish books to alert the public about what they regard as unlawful and dangerous practices, and in doing so openly violate, and thereby test, the oath of secrecy they have sworn. See notes (1983: 214)

Wikileaks revealed extended torture and abuse in Iraq, the killing of innocent civilians<sup>326</sup>, and civilian deaths on an unprecedented scale,<sup>327</sup> extra-ordinary renditions among other things.<sup>328</sup> In a similar vein the Pentagon papers revealed the unprecedented levels of lying and manipulation that the US government was engaged in order to keep the war in Vietnam going. The recent PRISM scandal revealed the unprecedented level the National Security Agency of the United States has reached in gathering private data.<sup>329</sup> The above three represents instances where the basic autonomy of the citizens either in enjoying their rights or fulfillment of their obligations is compromised. Some of the revelations relating to extra-ordinary rendition, Guantanamo, drone strikes also suggest limitations of rights of others. In the case of PRISM revelations the basic rights of assessment of the citizens has been denied.

These kinds of revelations create new form of accountability structures towards transparency from the state and multi- national corporations.<sup>330</sup> They challenge the boundary line between legitimate and illegitimate forms of secrecy and the imbalance in power relations that results from it. These kind of revelations also open up a radical space for rethinking over the control of epistemic resources and their distributive consequences. The disproportionate control over epistemic resources by the state and

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<sup>326</sup> <http://www.youtube.com/watch?v=25EWUUBjPMo> [ accessed on August 8, 2013] .

<sup>327</sup> <http://www.bbc.co.uk/news/world-middle-east-1161273> [accessed Oct. 9, 2013]

<sup>328</sup> for more see here

[http://www.slate.com/blogs/future\\_tense/2013/06/04/bradley\\_manning\\_trial\\_10\\_revelations\\_from\\_wikileaks\\_documents\\_on\\_iraq\\_afghanistan.html](http://www.slate.com/blogs/future_tense/2013/06/04/bradley_manning_trial_10_revelations_from_wikileaks_documents_on_iraq_afghanistan.html) [Accessed on Oct. 11, 2013]

[http://www.salon.com/2010/11/29/wikileaks\\_roundup/](http://www.salon.com/2010/11/29/wikileaks_roundup/) [Accessed on Oct. 11, 2013]

<sup>329</sup>See Edward Snowden's interview with the Guardian here <http://www.policymic.com/articles/47355/edward-snowden-interview-transcript-full-text-read-the-guardian-s-entire-interview-with-the-man-who-leaked-prism> [Accessed Aug. 5, 2013]

<sup>330</sup> Moore (2011)

multinational corporations has led to greater amounts of social control of the masses. Such revelations, as epistemic disobedience, are a plea for struggle against these forms of control.

Whistleblowing cases like the Pentagon papers, Wikileaks, PRISM scandal do not find a justification under the current readings of civil disobedience. They merely remain as a case of whistleblowing. Civil disobedience theories have not been able to accommodate whistleblowing cases in their ambit of disobedience.<sup>331</sup> Part of the reason is that most of the whistleblowing does not ascribe to the norms of publicity,<sup>332</sup> or the whistleblowers often do not submit to the law.<sup>333</sup> But, the need for publicity or submission to the law is not a necessary condition for an act to be civil disobedience. For Brian Smart, publicity can be counterproductive if it thwarts the very possibility of the act happening in the first place.<sup>334</sup> In some instances the very prospect of whistleblowing itself can be thwarted if it tries to fulfill the publicity condition. Howard Zinn and David Lyons argue that there is no blanket moral obligation to obey an unjust law; the disobedient need not submit to a law which deviates from the norms of justice.<sup>335</sup> Sometimes the

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<sup>331</sup> The exception is Bok (1983)

<sup>332</sup> The case of Edward Snowden was public, so was the Pentagon papers while the case of Wikileaks revelations was done in anonymity. See Morozov(2010) for this criticism of Wikileaks.

<sup>333</sup> Exception is Daniel Ellsberg. Chelsea Manning never came out openly, only later confessed about his involvement when he was already under prosecution .

<sup>334</sup> Smart (1991)

<sup>335</sup> Zinn disagrees that a civil disobedient need to submit to the law: "Why agree to be punished when you think you have acted rightly and the law, punishing you for that, has acted wrongly? Why is it all right to disobey the law in the first instance, but then, when you are sentenced to prison, start obeying" (1990: 914). David Lyons (1998) on the contrary shows that there is no blanket moral obligation to obey the law, especially when the policy being objected to is unjust. It can be a strategic choice on the part of the disobedient but it does not bind him morally to submit to the law.

best way to inform citizens is through anonymous whistleblowing. The underlying reasons of the act can be fathomed from the revelations themselves. The public nature of the revelations can act as fulfillment of the publicity criteria. Publicity and fidelity to law, though desirable, do not constitute as essential conditions for an act to be civil disobedience but just are an attempt to garner support in their favour by showing that they respect the democratic procedures. They obtain in conditions of near perfect conditions of justice where full compliance is possible. In conditions of partial compliance civil disobedience can deviate from the requirements of publicity and fidelity to the law. If the criminal justice system is bent over criminalizing acts of dissent, as has been the case in recent times with Chelsea Manning and Edward Snowden among other whistleblowers, anonymity might be a way of informing public about the ensuing unjust practices. Criminalization of whistleblowers happens due to the same reasons of maintaining security and it is the fear which the discourse of security produces in the minds of the citizens that can hamper the public support which such revelations ought to get. In such instances the only way whistleblowers can be encouraged or protected is through being anonymous. Only when democracies start appreciating whistleblowing as genuine moral acts of democratic dissent, and champion such causes that revelations can be done in open.

## Conclusion

The questions posed by the Wikileaks and PRISM revelations are far too important for a democracy that can be ignored at our own peril. Ideally it can be argued that democracies do not need whistleblowers. The argument in favour of this claim follows this line of reasoning: democracies are embedded with institutions which are largely self-correcting. The fallacies that appear in one institution are restrained by the countervailing powers of others. Thus, no institution has absolute control over power. Any excessive control is brought under check through mechanisms which are embedded in the democratic procedures themselves. Thus, any external source is not required to provide these checks. The critiques of Wikileaks and Edward Snowden have followed the same line of thought. But I have argued that this reasoning is flawed precisely because the democratic controls have not worked in regard to executive secrecy. I also argue that if we take into account the hidden nature of secrecy, normal democratic procedures hit a roadblock in its efforts to subvert the abuses that result from the actions protected under classified information. The hidden nature of the information allows access to only those individuals or institutions with whom the agent controlling the secret shares with. This nature of secrecy allows the executive to play a gatekeeper role in maintaining its control over classified information.

It is precisely because of the gatekeeper role that classified information permits abuses, without any countervailing controls. This enhanced power imbalances democratic checks even under normal circumstances. Thus, reading the abuses as an aberration misleading. Even if misuses do not result, lack of an oversight over executive power has disastrous consequences for democracy in general. Trust cannot be the ground to vest such powers, since it does not have an epistemic rational given the past tendency of the executive to misuse it. Secrecy thus allows the executive to circumvent normal channels

of accountability. Thus, the revelations open up a conundrum which does not emerge out of a specific practice in a given space or time, or which is contextual, but it is a symptom of a democratic flaw, a flaw which cannot be accommodated within the existing set of procedures. In other words, democracy does not have self-correcting mechanisms for a secrecy practices that are justified on democratic grounds. If secrecy is indeed required, and justified on the grounds of democracy, then institutions ought to be in place to control its excesses. Yet, secrecy allows for outmaneuvering such controls. Can we argue then that such a flaw cannot be tackled within democracy itself? I argue against this notion, because, in my reading, we are only looking for institutional solutions. This account of democracy is based on its procedures. It is precisely the design which cannot accommodate secrecy with publicity. Does it mean that we ought to change the institutional design? No, alternate institutional designs would also face similar problems. If a design leans towards publicity, it will do so only at the cost of genuine requirements of secrecy. The moment we admit certain secrecy as legitimate, we allow for the fissure to creep in the institutional design. But, we can argue against secrecy only at our own peril.

If secrecy is a fact of democratic institutions, how ought it to be accommodated against the democratic requirements of publicity? It can be argued that we need to make the design flawless and democratic theorists and policy makers ought to work towards it. But, in my contention, any such attempt will still face the roadblock of secrecy. I, thus argue that the current reading of democracy ought to be broadened to take into account another important factor, that of dissent. Dissent strengthens democratic institutions through its critique. It is only by including dissent in our analysis that we can have hopes to salvage democracy from being undermined by executive power. It is only under this reading that whistleblowing cases like Wikileaks and PRISM revelations make sense. I argue that these instances should be read as epistemic disobedience. In the absence of democratic controls dissent is the last resort to salvage democracy. Yet,

dissent can only be justified, if used as a last resort, in absence of other correcting mechanisms, which indeed is the case sometimes with secrecy practices. Yet, dissent to be legitimate should work towards strengthening democracy, and should come from individuals having faith in democracy. They ought not to work towards undermining the basic structures of society, if those structures are largely just. Dissent is thus based on the premise that democratic institutions might not function properly in some instances, and citizens or individuals who are in position to point out the flaws or correct them, ought to intervene. Thus, only under an enhanced understanding of democracy, outside that of institutions, that sometimes efforts can be made to limit abuses due to secrecy.

Under this reasoning, public officials working within the secrecy apparatus have a moral duty to disobey, when classified information hides actions relating to harms to individuals or when such actions threaten to undermine the democratic controls. In conditions of abuse of power, the narrow requirements of a legal duty to obey the law, to uphold the pledge of secrecy, does not hold. It is overridden by the moral requirement of not only upholding the rights of the others, and inform the citizens at large when the system of rights is being curtailed, but also by the demanding condition that one ought not to participate, even unknowingly, in harms done to others. Maintaining silence, by alluding to the fact of legal duty, only makes the individual complicit in the harms. Public officials working in secret services, by the virtue of being part of the secrecy apparatus, should reveal such information when it comes to their light.

The revelations by Wikileaks and Snowden unveil the practices of secrecy within the state apparatus and the deleterious consequences it has for the rights and obligations of the citizens. It is in this context that the thesis makes a contribution in the debates in political philosophy. 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 to the citizenry. Publicity also allows citizens to take part in deliberative sphere of policy making. Yet, the practice of secrecy and its fallouts for democracy have been 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. If we try to accommodate the fact of secrecy to the normative demands of publicity, the following conclusions follow. Either we accept the balance model interpretation that completely undermines the need for publicity in times of emergency. Accepting this model requires deference to the executive in matters of security, 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 a lot of 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 limitations 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 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 justified. The balance model completely does away with the need of justification, and its consequentialist reasoning allows for diminution of liberties of minorities in order to make the majorities safe, thus having distributive implications. Thus, we ought to discard the balance model for such failings.

Alternative accounts, that attempt to accommodate secrecy with publicity, either advocate for deliberative policy making or create institutional 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 it to be tested at the deliberative level. Thus, if the citizens had known the specific details of the policy then they would have agreed for it to be kept secret. The specific details cannot be made public, without letting the enemies know, thus the citizens ought to agree for 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. By allowing the specific details to be kept secret, this theory allows freedom of action to the executive at that level, which might result in the concealment of harms, even against citizens. Cases of surveillance under PRISM are examples of such a kind.

The other three approaches are more institutional and argue for an enhanced role of legislative, the judiciary or the media in terms of keeping a check on the secrecy practices of the executive. Yet, they all fall into a similar problem. 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 it can be used to manipulate the citizens through careful leaking. 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 judgement of the executive. Recent revelations have also shown that the NSA has been spying on the legislatures and the FISA court judges who themselves are responsible for maintaining a check on the surveillance operations.

It is in this context that we can understand the revelations by Wikileaks and Edward Snowden. If democracies cannot rely often (and it indeed will remain the case sometimes) on the existing institutions to provide for checks on executive power, then

Whistleblowing becomes justifiable if the revelations illuminate upon the gross wrongdoings of the state. The thesis argues that cases of this sort ought to be treated as that of disobedience. Under this reading breaking the legal oath of secrecy is not only justified on political grounds but is a moral duty. To understand Whistleblowing as an act of disobedience we need to move beyond existing accounts. They do not account for the epistemic aspect of secrecy which is quite relevant for our purpose. They assume a measure of autonomy for the citizen that is not present in this specific instance. In fact secrecy creates an asymmetry between those possessing information and those without it. This creates particular problems of autonomy for the citizens in general. Thus, disobedience under conditions of secrecy has to take into account this following feature which is absent in other theories. Disobedience is justified, under conditions of secrecy, when revealing of information: a) is about a general wrong doing or harms done protected under a secret; b) is about information that is used to manipulate or mislead public opinion in a desired policy direction; c) unravels an illegitimate law or policy; d) unveils a policy that overextends its constitutional mandate and no checks are in place to control its abuse.

This act of disobedience I call epistemic disobedience. Epistemic disobedience is contrary to the law, done on behalf of others, with the purpose that such revelations will lead to change in the policy. Epistemic disobedience is an attempt to provide information, about the systemic wrong doings of the secret apparatus, to relevant actors who can thus challenge the illiberal policies of the executive. It does not directly follow though that the message itself will reach to those directly affected, but it will taken up groups or individuals who are concerned about threats of civil liberties in general. Since it is assumed that a threat to liberty of a few individuals is a threat to the equal enjoyment of that liberty in general. The revelations only show that democratic institutions have deviated from their constitutionally assigned duties. This deviation creates a deficit in democracy. It does not affect only those who are at the receiving end

of such illiberal policies, but can affect potentially everyone in the future too. Any deficit in the democratic institutions ought to be corrected, if democracies do not have to mimic tyranny in the long run. The information thus revealed is a step towards a necessary correction in the democratic deficit. It is assumed, as well as intended, by the whistleblower that the relevant actors in the civil society, judiciary, the legislative, and media will pick up the information and challenge the state in order to change the existing state of affairs. Having said that, the relevance of the leaks cannot be judged by the outcome they have achieved, for information might not itself transform into action in the first place. It requires politics at the level of institutions, as well as deliberative public sphere to bring about the desired change. The disobedient is a necessary cog in this process, who provides the resources for this politics to begin in the first place.

Thus, in summary, Wikileaks and PRISM revelations present a hard case for existing institutional design and procedures. They even represent a test case for existing theories of civil disobedience. Moving beyond legal and moral claims, the thesis makes a case for disobedience on political and epistemic grounds. The argument, in a nutshell, proceeds in the following way: since secrecy precludes democratic virtues of participation and can lead to arbitrary forms of control over citizens, it does not account for any substantive notion of autonomy in democracy, which would require, beyond mere non-interference, a constitutional guarantee from potential interference. Under this light, civil disobedience becomes justifiable in circumstances which make it impossible for citizens to fairly know the procedures through which the state governs them, that is not only when actual breach of justice are committed, but also when potential threats to justice are at stake.

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