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Freedom of expression as the “broken promise” of whistleblower protection

Wim Vandekerckhove

- 1 If you would go out on the street and ask people to name a whistleblower most would probably say “Edward Snowden”. His whistleblowing on governments’ mass surveillance of internet and phone communication continues to be covered in the media and on political fora. Apart from numerous press articles, a documentary was made, and he made live appearances through video-link at conferences in Canada, the World Technology Summit 2014 in New York, and a hearing at the Parliamentary Assembly of the Council of Europe (PACE).
- 2 In contrast to what many might believe, the media does not always pick-up a whistleblower story. Whistleblowers often have a hard time getting journalists to be interested in the wrongdoing they disclose¹. Findings from the World Online Whistleblowing Survey conducted by Professor AJ Brown showed those who had been whistleblowers were the least likely group to believe whistleblowing to the media is a good idea. Of the whistleblower who took part in the study, 13 per cent (more than double that of the other groups and the general populations) considered that the whistle should *never* be blown to the media, suggesting that many whistleblowers have had bad experiences when going to the media, or found the route to be ineffective².
- 3 Whistleblower support organizations are increasingly networked with hand-picked journalists, ranked according to topics-likely-to-cover and integrity of dealing with the whistleblower, i.e. protection of sources and refraining from picturing the whistleblower as a lunatic. Snowden initially worked through three such trusted journalists - Glenn Greenwald, Laura Poitras, and Even MacAskill - but the wider press quickly picked up on his disclosures. An obvious reason for this is that what Snowden disclosed affects us all. Most of us were shocked to learn our emails and what we read on the internet was being monitored by a government agency. Not just in the US, but also in the UK and Germany and possibly elsewhere too. Then it daunted on us that

what we put on Facebook is not just visible to our ‘friends’. Our tweets are not just read by our ‘followers’ only. Moreover, some of the apps on our smartphone store positioning data without us knowing and without having any use whatsoever with why we downloaded the app for - flashlight for example. We then learned that social media companies transfer information to governments. We did not know why we had to be scared of this, but we were. Stories that get all of us scared make headlines. Snowden’s disclosure ticked that box.

- 4 In this paper, I argue that whilst the possibility of whistleblowing in the media is fundamental to all notions of whistleblowing, it largely remains a ‘broken promise’ of whistleblowing activism. I show how in the short 45 year history of whistleblowing activism, whistleblowing in the media has brought moments of hope for whistleblowers, but that these moments were short-lived. I also suggest that we currently live another such moment of hope.
- 5 The most important politician in recent years pushing the whistleblowing agenda is perhaps Pieter Omtzigt. A Dutch pensions expert, he has been a member of the Dutch Parliament since 2003, and a member of the Parliamentary Assembly of the Council of Europe (PACE) since 2004. In 2010, as the rapporteur of the Committee for Legal Affairs and Human Rights, he managed to get PACE to pass a resolution on the protection of whistleblowers (PACE Resolution 1729 (2010)). In July 2013, he tabled a motion for a recommendation on an “Additional protocol to the European Convention on Human Rights on the protection of whistle-blowers who disclose governmental action violating international law and fundamental rights” (PACE Doc. 13278 of 5 July 2013). Note the combination of human rights, whistleblowing, and governmental wrongdoing. A month earlier, June 2013, Edward Snowden had started his disclosures on NSA mass surveillance.
- 6 Omtzigt’s motion was trying to ride that momentum. However, the motion was never discussed in the Assembly. He did however get something out of the attempt. He was appointed in November 2013 as the rapporteur for two projects, mass surveillance on the one hand and whistleblower protection on the other. The two streams were not allowed to merge. There was already a resolution on whistleblower protection ; a draft recommendation was being developed after an expert meeting in Strasbourg in May 2013, about one month before Snowden’s initial disclosures. Soon after this, the other track also started to bear fruit : in April 2014, the European Parliament adopted Resolution on the ‘US NSA surveillance programme, surveillance bodies in various Member States and impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs’ (2013/2188 INI). It is not clear whether Omtzigt played a role in this. The European Parliament comprises of elected politicians from the members states of the European Union ; the Parliamentary Assembly of the Council of Europe, where Omtzigt has a seat, comprises of delegations of national parliamentarians from its 47 member states (including EU countries but also Russia, Turkey, Ukraine, etc.).
- 7 In his report of January 2014, Omtzigt makes the case that Snowden combines the two tracks ; that these are inherently intertwined³. He does so again in his report from March 2015 from the Committee on Legal Affairs and Human Rights⁴. The report is titled “improving the protection of whistleblowers” rather than “additional protocol to the ECHR on the protection of whistleblowers”. Whatever the intent behind the change in title, Omtzigt draws in his report on Snowden’s case to argue for whistleblower

protection when public interest overrides national security mechanisms. Between these two reports, in April 2014, the Council of Europe’s Committee of Ministers adopted Recommendation (CM/Rec (2014)7) on the protection of whistleblowers. The 29 principles of the recommendation provide an excellent framework to evaluate any national whistleblowing regime around the world, and especially serves as a benchmark for the Council of Europe’s 47 member states. Does it say anything about mass surveillance and Snowden-like whistleblowing? Not directly, but principle 5 makes allusions to national security related whistleblowing: “A special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order or international relations of the State” (CM/Rec(2014)7). The explanatory memorandum (CM(2014)34 add final), confirms that “there are legitimate reasons why member States may wish to apply a restricted set of rules in some or all of the cases mentioned”, but it stresses that “they may not leave the whistleblower completely without protection or a potential defence”.

- 8 Omtzigt’s “mass surveillance” track is taking a bit longer to materialize. In April 2015, PACE adopted Resolution 2045(2015) on Mass Surveillance, urging the Council of Europe member and observer States to adopt some restrictions on mass surveillance practices, and inter alia to “provide credible, effective protection, including asylum, for whistleblowers who expose unlawful surveillance activities”. During the same session, PACE also adopted Recommendation 2067(2015) on privacy. This does not mention whistleblowing at all. The difference between a PACE Recommendation and Resolution is that the former is addressed to the Committee of Ministers and for which the implementation is within the competence of governments. A Resolution however, is an expression of view by the Assembly for which it alone is responsible. It is telling that the document linking human rights and whistleblowing is a resolution and thus has of yet very little potential to impact national law.
- 9 My point in this paper is that the recent unfolding of whistleblower protection led by Pieter Omtzigt is history repeating itself. At the end of the 20th century debates in many countries on whistleblower protection were initially framed in terms of protecting freedom of expression; whistleblowing was a human right that had to be protected. None of these discourses was maintained. Just like Omtzigt had to separately pursue the whistleblowing and the mass surveillance projects. Whistleblower protection laws came about through an anti-corruption agenda, not a human rights one. A paradox of whistleblower protection is that free speech drove it but was irrelevant in bringing it home. I elaborate on this in the next section.
- 10 However, something has gone missing along the way. The whistleblower protections in many countries are able to deal with some issues of fraud, corruption, and other wrongdoing, but not with the cases that would trigger everyone’s fears. They do not recognize the fundamental human right of freedom of expression when the public needs to be warned in cases where those who rule us breach human rights. I also elaborate on this in a section in this paper.
- 11 The point and the paradox is this: because the freedom of expression element is missing, there remains whistleblowing that causes scandal; there remains whistleblowing for which there are no adequate institutional arrangements. Snowden’s whistleblowing is an example of that. But so are Wikileaks, Globaleaks, Indoleaks, Scienceleaks, Magyarleaks, Ruleaks, Unileaks, and many other ‘leak’-sites that have sprung up since 2007. Hence free speech initially drove whistleblowing protection, and

whilst it has been irrelevant for establishing whistleblowing protection, free speech is still driving whistleblower protection. This paper closes with a section explaining this continued yet altered drive. History repeats itself, but each time in a slightly different way.

I- Whistleblowing as a Human Right

- 12 Article 19 of the United Nations Universal Declaration of Human Rights states :
- 13 “Everyone has the right to freedom of opinion and expression ; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- 14 A whistleblower speaks out - although he or she sometimes writes - an evaluation of a situation. In doing so, they pass on information. That information may be warnings of risky practices, accusations of illegalities or inappropriate diligence, or expression of concern. Hence, whistleblowing *prima facie* falls under this right to freedom of opinion and expression. However, not everything is said with that. What kinds of qualifications need to be considered, e.g. whistleblowing happens in the context of work relationships, not simply in a citizenship context. If Article 19 holds, in spite of the specifics of work relationships, then that necessitates whistleblower protection, since Article 28 of that same Declaration states :
- 15 “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”
- 16 The UN Declaration of 1948 was a response to the atrocities of and prior to the Second World War, and was addressed to national governments. In this sense, its aim was to identify inalienable rights to individuals which they can claim on their governments. Indeed, nation states have written the Declaration into their constitution, thereby accepting it as their duty to respect, protect and even realize human rights. Hence, responsibilities concerning human rights have historically been located within national governments. However, more recent history has shown that 1) national governments are not the sole perpetrators of human rights, thus private organizations also have the duty to respect ; 2) national governments are not alone in having an ability to ensure individuals can claim their human rights, thus private organizations also have duties to protect ; and 3) not only national governments have the means to realize societal conditions allowing individuals to enjoy their human rights, thus private organization too have duties to realize human rights. The most obvious examples of this are in the area of supply chain responsibilities, and Professor John Ruggie has made considerable way in writing policy and regulation on this. Between 2005 and 2011, Ruggie was the UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. He developed the UN ‘Protect, Respect and Remedy’ Framework, which the UN Human Rights Council endorsed in 2011 (A/HRC/RES/17/4). This framework has been implemented into the OECD Guidelines for MNCs and ISO standards. There is nothing on whistleblowing in there, but the development shows an acknowledgment that private legal entities also have human rights responsibilities.
- 17 Crucial to the Declaration of Human Rights is that these rights cannot be interpreted separately. A right cannot be claimed by a person, group, or state if exercising that

right would imply the violation of the rights of others (Article 30). Moreover, the UN Declaration also stipulates in Article 29 that one has “duties to the community in which alone the free and full development of his personality is possible”, and that the exercise of the rights and freedoms is subject to limitations necessary for the public order and the general welfare in a democratic society. The UN Declaration has been reiterated a number of times, and each time also its qualifications (or limitations). The European Convention on Human Rights (1950) has Article 10 :

18 “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

19 It also has the limitations that ‘This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises’, and more importantly :

20 “The exercise of these freedoms, since it carries with its duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.”

21 The American Convention on Human Rights (1969) has Article 13 :

22 “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”

23 And with the limitations :

24 “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure : a) respect for the rights or reputations of others ; or b) the protection of national security, public order, or public health or morals. [...] The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls of newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”

25 The Universal Islamic Declaration of Human Right (1981) has Article 12 :

26 “Every person has the right to express his thoughts and belief so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons. [...] Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim. It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state. There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.”

- 27 All of these acknowledge freedom to receive and impart information, but this freedom is restricted by notions of national security and public order. This qualification makes the absoluteness and universality of human rights quite arbitrary, as blowing the whistle on those who rule, or those to whom work is subcontracted is quite likely to have effects that destabilize the public (perception of) order, and might very well involve disclosure of information that is qualified as national secret.
- 28 However, Tom Campbell⁵ argues that these claims are ‘a way of getting at a more substantive matter, namely the claimed universal value of human existence, or what may be called the idea of equal human worth’. Hence, the point of reference for interpreting the adequate scope and applicability of human rights is the equal worth of human beings, a value that is closely tied to the notion of human dignity and the Kantian concept of people being ends in themselves. Thus the human rights discourse emphasizes the high moral status of any human being, and ‘a human right is held to be a right that protects or furthers human dignity in very important ways’⁶. The implication is that a right can be a human right even if it is subject to many qualifications. Moreover, Campbell argues that a human right can be either intrinsic or instrumental. An intrinsic right is a right to do or have things that are worthwhile in themselves, like the right to life. An instrumental right is a right of which the value lies in the causal relationship to intrinsic rights. The value of an instrumental right varies with its effectiveness in protecting or furthering intrinsic rights. Campbell mentions three ‘free speech rationales’, or three ways to argue for workplace free speech as a human right : 1) the argument for truth, 2) the argument for self-expression, and 3) the argument for democracy. The argument for truth posits workplace free speech as an instrumental human right. The existence and spread of true belief in society or community is the intrinsic good to which free speech rights are the instrument. That would also go for organizations, where the spread of ‘true belief’ - besides its intrinsic value - is itself instrumental for efficiency. The argument for self-expression sees workplace free speech as an intrinsic right, necessary in order to respect human dignity and moral worth. As Campbell⁷ puts it :
- 29 “If self-expression is an important human need and is essential to the flourishing of the individuals as moral, rational and creative beings, then we have something that is clearly universal, intrinsic and important. Further, to prevent such self-expressive activity may be deemed a violation of a person’s humanity, [...] which denies them dignity and suppresses their individuality.”
- 30 The third argument is again instrumental, based on the role of political free speech in democracy. How does this apply to organizations ? Political free speech rights are a way of protecting the individual interests against officialdom : the role of free speech and information sharing in making demands and influencing decisions. Such role is instrumental to democracy, but could also be applied to private organizations even though no elections are held⁸. Democracy can also be understood as a process - one of dialogue as a way to reach consensus on matters of common concern. That too is applicable to organizations.
- 31 The point is that whistleblowing as a human right is always an affirmation of individual human dignity (self-expression), either directly and explicitly, or indirectly as an instrument to such affirmation (truth and democracy). The implication for whistleblower protection policy is that there would be no restrictions on the kind of relationships within which free speech whistleblowing is protected, and no restrictions

on the type of concern that would qualify as protected. In terms of who the whistle is blown to, this may be qualified for the sake of public order and mistaken concerns but must allow for public speech at some point, i.e. a 3-tiered whistleblowing regime⁹. By the end of the 20th century, discussions in a number of countries had been using the human rights argument. I will give three examples : the USA, South Africa, and the Netherlands. In each of these, whistleblowing as a human right, closely tied to the notion of freedom of expression and its implications which I have just argued, goes out the window when whistleblower protection eventually gets enacted.

- 32 In a 1975 comment in Harvard Business Review entitled ‘Your employees’ right to blow the whistle’, Walters¹⁰ (1975) expects that matters traditionally considered an organization’s ‘own business’ might become the public’s as well. More precisely, Walters spotted legal trends that whistleblowers ‘in private organizations are steadily gaining legal support and may someday enjoy essentially the same rights as employees in government organizations’¹¹ (Walters 1975 : 27). He mentions a number of court rulings that made reference to free speech protection and the USA First Amendment.¹² Arguments used in those rulings use rationales of truth and democracy¹³, and include : 1) that free and open debate is vital to informed decision making, 2) that it is essential that members of a community most likely to have informed opinions about how to spend funds, are able to speak freely on such issues without fear of retaliatory dismissal, and 3) that some critics are engaging in precisely the sort of free and vigorous expression that the First Amendment was designed to protect. Walters quotes Emerson, a First Amendment scholar, to argue that free speech based arguments are driving the USA towards whistleblowing policies :
- 33 “A system of freedom of expression that allowed private bureaucracies to throttle all internal discussion of their affairs would be seriously deficient. There seems to be general agreement that at some point the government must step in. In any event the law is moving steadily in that direction (Emerson 1970, cited in Walters 1975 : 34)¹⁴.”
- 34 In 1977 GAP (Government Accountability Project) was founded in Washington, DC. It became one of the world leading whistleblower organizations, advocating free speech, litigating whistleblower cases, publicizing whistleblower concerns, developing policy and advising on legal reforms. To this day, Tom Devine and Bea Edwards still use arguments emphasizing occupational free speech, human rights and the First Amendment. That same year, the US Senate established a *Special Committee on Governmental Affairs*. Jimi Carter had become President of the USA, and the Watergate scandal had put civil service reform high on the agenda. A year later, in 1978 the Committee issued its report¹⁵. This led to the passing of the *Civil Service Reform Act* which included protection against reprisal for civil servants. One of the agencies the Act created for this was the Office of Special Counsel (OSC). However, between 1979 and 1988 the OSC turned down more than 90 % of cases referred to it¹⁶. It just did not function. In 1989, the *Whistleblower Protection Act* (WPA) was passed to improve the effectiveness of the OSC and to increase protection for federal whistleblowers, allowing them to appeal to the Merit Systems Protection Board if the OSC did not seek corrective action on their behalf. The WPA was amended in 1994. The onus of proof for reprisals remained on the whistleblower. However, federal employees no longer had to show that their whistleblowing was a significant factor causing the reprisal, but merely a contributing one.

- 35 Whereas in 1978 Congress had answered the desire for open decision making and the recognition that civil servants had a potential for public responsibility as individuals¹⁷, these normative appeals of the 1970s had shifted during the 1980s and 1990s. Groeneweg¹⁸ argues that the structure of the internal mechanisms for reporting under the WPA shows whistleblowing as an efficiency tool rather than provide a mechanism for the protection of government employees who disclose on corrupt practices. By 1993 this turn in discourse seems completed. Groeneweg¹⁹ cites the opening letter of the 1993 MSPB report, in which the chairman and the vice-chairman state their position on whistleblowing :
- 36 “Obviously, if meeting the current goals to improve Government operations is going to depend significantly on employee reporting of information about fraud, waste and abuse, employees will need to be more willing to do this now than they were in 1983.”
- 37 The ideal of whistleblowing has now become efficiency. The focus of designing or revising whistleblowing policies then, is not to make protection better, but to get information from employees. Dworkin and Near²⁰ note the same shift. They write that whereas the ‘old’ model valued motivation over information and viewed whistleblowing as an act of conscience and responsibility, the ‘new’ model values information over motivation.
- 38 In South Africa, whistleblower protection legislation was developed and enacted as part of a democratization process in an attempt to deal with the historical weight of the Apartheid regime. Only in 1994 did the country hold its first democratic elections. These were the beginnings of transformations of government with an aspiration for a participative democracy. In 1995, provisions to protect whistleblowers was part of the first draft of the Open Democracy Bill. A second draft from 1997 published as ‘general notice 1514’ also protected whistleblowing to ‘one or more news media and on clear and convincing grounds’ - a qualified but open ended recipient. It would also protect ‘any person’. So far so good. But the new Constitution had been called in on 4 February 1997 and specified a constitutional deadline of three years (Section 21-4) to enact legislation prescribing a framework for the government procurement policy for the allocation of contracts and the protection or advancement of persons. Thus the Open Democracy Bill had to be voted before 4 February 2000.
- 39 The Institute for Security Studies, and more precisely Lala Camerer succeeded in 1999 - there was little time left - in convincing the Justice Committee to split up the Open Democracy Bill into the Promotion of Access to Information Bill, on the one hand, and the Protected Disclosure Bill, on the other²¹ (Camerer 2001, Dimba et al 2004). The Protected Disclosures Act (PDA) was eventually passed mid 2000 (Protected Disclosures Act, No 26 (2000), published in the Government Gazette on 7 August 2000). Although the PDA makes reference in its preamble to ‘the democratic values of human dignity, equality and freedom’, a peculiarity in the PDA suggests this reference is only rhetorical. It covers both public and private sector, but only whistleblowers in an employer-employee relationship. Contractors or volunteers are not covered. In an era of outsourcing and subcontracting, this is a strange twist and an acknowledged flaw in the South African PDA²² (Dimba et al 2004, ODAC 2003). Of the two Acts into which the Open Democracy Bill was split, it is the Access to Information Act that represents the human rights focus. Access to information is a human right and hence the Act allows people to exercise their human rights. Whistleblowing on the other hand, is a tool to tackle fraud. Since 2002, the King Committee on Corporate Governance rationalized

whistleblowing further into an instrument improving efficiency²³ (Vandekerckhove 2006).

- 40 In the Netherlands, Mark Bovens influenced the conceptual tinkering around whistleblowing in the early 1990s. Bovens wrote in Dutch and introduced the translation of ‘whistleblower’ as ‘bell-ringer’ (*klokkenluider*) - a person sounding the church-bells - which is still the standard term. Now, a person sounding the church-bells is someone calling for the attention of his/her community. A church is a refuge, a safe place. Bovens’ term points at the need to protect those who sound the alarm or raise concern to their community. Bovens continued to be an influential scholar in the field of public accountability, democracy and citizenship, and political trust. The rationale for a whistleblowing policy he sketched was based on the notion of institutional citizenship (*institutioneel burgerschap*). Bovens emphasized that an official or employee is, even within the context of the organization, always a citizen. In 1993, the then Minister of Home Affairs Ien Dales started a discussion about renewing public sector governance, emphasizing integrity.
- 41 Five years later, Paul Van Buitenen, a Dutch auditor working for the European Commission, blew the whistle on corruption by a Commissioner, which led a year later, in 1999 to the resignation of the whole European Commission²⁴. The same year, the Dutch Ministry of Home Affairs published a report making recommendations on how to strengthen integrity in government²⁵. The first chapter in that report is about whistleblowing. The report states that external whistleblowing has undesirable effects. It undermines trust in the department and internal relationships are damaged. Hence, the meaning of whistleblower or *klokkenluider* as Bovens introduced it in the Netherlands was completely hollowed out. In a classic example of double speak, Bovens’ ‘institutional citizenship’ is turned upside down with references to ‘fulfilling the duties of the office’ and secrecy provisions. The whistleblowing policy the report proposes²⁶ is a mere expansion of the old civil servants’ duty to report criminal matters to the Public Prosecutor. It foresaw an independent commission, ideally comprised of a president, a trustee of employees, and a trustee of employers, all retired politicians, judges, or academics. This commission could only publish anonymized advice on cases. Public whistleblowing was cut short. In 2000, the FNV (*Federatie Nederlandse Vakbewegingen* - Federation of Dutch Unions) made an attempt to correct this. The FNV proposal emphasized freedom of expression as an intrinsic right to be respected in the workplace, as workplace free speech furthers both the self-realization of the individual as well as democracy. Public interest overrides secrecy provisions. Alas, in 2002 the city of Amsterdam ran its own whistleblowing policy, using the 1999 report as its blue print. Reporting was a duty and all recipients were mandated and reported to the executive city council. There was no external channel. In 2003, I participated in a meeting of ethicists in Utrecht. Mark Bovens criticized this policy arguing that there was no accountability in such a scheme. When asked if he wasn’t pleased to finally see what he had called for being realized, Bovens replied that this was not at all what he had called for.

II- Media Whistleblowing and National Security

- 42 At the start of the 21st century, William De Maria from the Centre for Public Administration, University of Queensland, was shocked to see governments of

countries with no history or tradition of democracy prepare to legislate whistleblowing schemes. His core argument was that ‘core infrastructural prerequisites needed to be in place before the enactment of disclosure statutes’²⁷. Countries with whistleblower protection legislation (and a history of democracy) would be advising other countries without a tradition of such ‘core infrastructures’, and De Maria feared ‘the worst’ for what would happen. His fears were based on his analysis of whistleblower protections precisely in countries with a tradition of democracy. For even in those countries, De Maria claims, ‘whistleblowing laws have been born in the house of secrecy’²⁸. He points at a dialectic relation between whistleblowing and secrecy. Secrecy ‘needs’ - in the sense of being maintained by - whistleblowing to moderate public anger about official concealment, control perceptions of organizations, and maintain preferred hierarchies of power. On the other hand, whistleblowing ‘needs’ secrecy because :

43 “[...]destroying it is its single “raison d’être”. Curiously every “win” for a whistleblower is a triple-win for secrecy. A whistleblower win (typically a powerful disclosure that is received well in the media and pushes officialdom to at least a promise of reform) is thrice reaped by the state as a public relations exercise. The State reframes the whistleblowing as evidence of openness. A whistleblower win captures the imagination. It is a story of David winning over Goliath. The next day David is inducted into the whistleblower hall of fame, we feel good, and Goliath quietly shambles on”²⁹.

44 One of the core features of an effective whistleblower scheme for De Maria is protection for media whistleblowers. In the last decade, whistleblower legislation has moved in the direction of De Maria’s worst fears. The Malaysian Whistleblower Protection Act 2010 (Act 711) has many good features, e.g. reversal of burden of proof, possibility of interim relief, etc. It also includes a solid provision for keeping the whistleblower’s identity confidential, even during court proceedings. In fact, the provisions are so strong not even the whistleblower can disclose the information beyond their disclosure to an enforcement agency :

45 “Any person who makes or receives a disclosure of improper conduct [...] shall not disclose the confidential information or any part thereof (Art 8(1)) (emphasis added).”

46 This effectively makes whistleblowing to third parties punishable by a fine of up to RM50,000 and imprisonment of up to 10 years. What further complicates whistleblowing is the scope of what is deemed as confidential - or official secret - namely any information gained from government sources, the disclosure of which is punishable under the Official Secrets Act 1972 by one to seven years of imprisonment. Lim Guan Eng, the Chief Minister of Penang, said that ‘the WPA unfortunately appears to be the product of the old mindset in this country that values secrecy above everything else’³⁰.

47 The Netherlands has seen a number of regulations and initiatives to protect and support whistleblowers, like the integrity office (*Bureau Integriteit*) for Amsterdam in 2001, the Bureau for Improving Integrity in Public Sector (*BIOS - Bureau Integriteitsbevordering Openbare Sector*) in 2006, the Advice Centre for Whistleblowers (*Adviespunt Klokkeluiders*) in 2012. There has also been a concurrent reiteration over an all-encompassing whistleblower law. It took almost 15 years with draft bills going in all kinds of directions, but in 2015 the law was finally passed through parliament. The legislation creates an agency - House of the Whistleblower - that focuses more on investigating wrongdoing than on protecting whistleblowers - e.g. there is no reversal of burden of proof - but it covers both public and private sector wrongdoing. Because

previous bills had been criticized for being unconstitutional, the Council of State was asked to give advice on later versions of the bill, in an attempt to pre-empt further filibustering. In the advice from the Council of State (30 January 2015, No.W04.14.0469/I) just before the bill was enacted, there is a striking peculiarity. The Council of State writes :

- 48 “The Explanatory Memorandum discusses the question in which cases and under what conditions the employee externally discloses wrongdoing. Reference is made to a document from the Labour Foundation. The Council of State points out that the question of external disclosures poses itself differently once the House of the Whistleblower is established through this law. A whistleblower who has the right to make an external disclosure can do this with the House of the Whistleblower, and thus no longer has any ground to approach the media. The Council advises to make this explicit in the Explanatory Memorandum.³¹”
- 49 What this ‘advice’ suggests is that in the name of the constitution, whistleblower protection and arrangements are ways of keeping whistleblowers out of public sight. Or in William De Maria’s words ‘whistleblowing laws have been born in the house of secrecy’³². Of course, these provisions can be read in a way that is more favourable for whistleblowers. But without some pattern of favourable interpretations in tricky cases, we can only note, question and - with De Maria - worry about the absence of a route to protected media whistleblowing.
- 50 In the USA, the last decade has seen increasing criminalization of whistleblowing under the Espionage Act³³ (Radack and McClellan 2011). In 2005, the New York Times published a story disclosing NSA’s domestic spying programme - this was eight years before Snowden. Bush called this ‘a shameful act for someone to disclose this very important program in a time of war’³⁴. The DOJ prosecuted - and continued to do so under Obama - both the New York Times and the leakers, with large-scale investigations into the sources of the article, issuing subpoenas for over 50 individuals. Among those whose houses were raided were whistleblowers who had previously raised their concern through the prescribed internal channels.
- 51 Before Obama became President of the USA he had been siding with whistleblowers on a number of occasions³⁵. Strengthening protections for whistleblowers was even part of his plan to reinvigorate ethics in government. Moberly writes that Obama has lived up to that promise in many respects. However, Moberly also notes
- 52 “President Obama’s seemingly contradictory approach to whistleblowers and the distinction he appears to draw between whistleblowing about governmental misconduct generally, which he supports, and whistleblowing in the national security context, which he appears to disdain³⁶”.
- 53 The Omnibus Appropriations Act 2009 included a provision preventing any federal officer to prohibit or prevent communications between other federal employees and Congress (Section 714 Division D). In a signing statement to this bill, Obama wrote that he did ‘not interpret this provision to detract from [his] authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential’ (Signing Statement for H.R. 1105, P.L. 111-8). In other words, whistleblowing to Congress about the executive branch is protected unless the executive branch does not want it. Moberly³⁷ also gives a detailed account of how whistleblowing protection was weakened

for national security whistleblowers, in the turning around of H.R. 985 and H.R. 1507 into S. 372).

- 54 When it comes to allowing journalists to protect the confidentiality of their sources, Obama not only demands that exceptions exist to require a journalist to reveal their source’s identity, but also insists that ‘judges defer to the executive branch’s judgment on whether national security would be affected’³⁸. Indeed, making national security exceptions to free speech becomes really dangerous when those protecting secrecy also have a mandate to decide what is to be kept secret. Or, as Moberly³⁹ writes : ‘To put it bluntly, when it comes to national security, Obama would rather protect secrecy than protect whistleblowing’.
- 55 At the outset of this paper, I argued that whistleblowing as a human right would allow policies to have a qualified recipient, i.e. a specification of preferred channels, but must also include an option to go public at one point or another. We can see that, in the Council of Europe Recommendation, where a 3-tiered recipient is put forward : internal to the organization, external to a regulator or enforcement agency, and public through media or third parties. However, this is not what seems to be happening. The examples I gave are of policies that indeed strengthen whistleblowers’ position at the first two tiers - internal and to an enforcement agency - but effectively cut off access to public or media whistleblowing. Increased whistleblowing modalities come with an increase in imposed secrecy. Sometimes, this hides in the conditions for protection, other times national security serves as an explicit exception to freedom of expression. Both are instances of double-speak.

III- Whistleblowing as a Human Right Revisited

- 56 The aspiration to make freedom of expression an acknowledged right drove the movement for whistleblower protection. Yet the protection we have seen come about puts a lid on that freedom. As I have shown with examples from the end of the 1990s, this is not something that happened in the last decade alone. In my book from 2006, I argue that this trend away from whistleblowing as a human right is a subjectivating one⁴⁰. My conclusion was that :
- 57 “[...] even though whistleblowing policies are necessary, they are ethical only to the extent that they succeed in protecting individuality rather than institutionalizing the individual”⁴¹.
- 58 The individual is reduced to an employee, which becomes the institution for integrating organization and society, economic and social concerns. There is acknowledgment of wrongdoing, but only at the level of workers. That - organizations as structures might be dysfunctional or harmful for society - is neglected. The assumption is that when organizations know of wrongdoing - by employees blowing the whistle internally or to a regulator - they can and must correct it. Thus the individual becomes enclosed - or trapped - inside the organization.
- 59 I contrasted this subjectivation (Foucault) with subject affirmation (Touraine). For Touraine - one of the first French intellectuals to support the campaign in 2014 to give Edward Snowden asylum in France -, the subject is an individual who wants to be an actor, who wants to reshape the social. Subject affirmation is a political notion. It denotes an individual who does not succumb blindly to authority and imposed goals or

rationalities but rather engages with these to make a structural change. For Touraine, the extreme form of the subject is the dissident. He might as well have written ‘the whistleblower’, in particular whistleblowers who make several attempts and finally disclose to the media. Snowden has made it undeniable that the whistleblower protections we have seen emerging since 1978 fall short of what was hoped for. In a sense, he represents a renewed hope for whistleblowing as a human right. Yet he is not alone. There are other instances of such a renewed hope.

- 60 One of these is the growing jurisprudence from the European Court of Human Rights on whistleblowing cases brought under Article 10 (freedom of expression) of the European Convention on Human Rights. Its first case in that respect dates from 2008 (*Guja vs Moldova*, Application No. 14277/04). A public official had sent two letters from politicians exerting pressure on courts to the press and was sacked for doing so. The ECtHR sided with the whistleblower. Another important case is *Bucur and Toma vs Romania* in 2013 (Application No. 40238/02), where a worker of the Romanian Intelligence Service (RIS) blew the whistle by holding a press conference that the RIS had unlawfully tapped the phones of journalists, politicians, and businessmen. Romanian courts had convicted the whistleblower for breach of official secrecy. The ECtHR, however, found that this conviction breached the whistleblower’s right to freedom of expression as the prosecution was not ‘necessary in a democratic society’.
- 61 Another instance of renewed hope - and human rights drive - for whistleblowing can be found in the Tshwane Principles (2013), a set of 50 principles which the Open Society Justice Initiative currently promotes as the ‘Global Principles on National Security and the Right to Information’. Principles 37-42 and 46 are explicit calls for the protection of whistleblowers disclosing information about wrongdoing even if that information is classified or otherwise confidential. Principle 40 in particular calls for protection for public whistleblowing. The other principles are relevant as well for the current trend in whistleblowing policies. The Tshwane Principles are an attempt to establish a benchmark on what can legitimately be a national security issue. They embody a call to do away with the recent trend of over classification and provisions that allow ad hoc tagging of anything sensitive as national security.
- 62 Pieter Omtzigt mentions the Tshwane principles in his report from January 2015 as rapporteur of Committee on Legal Affairs and Human Rights⁴². In that report, he calls for the Council of Europe to 1) enact whistleblower protection laws also covering employees of national security or intelligence services and of private firms working in this field, 2) grant asylum to whistleblowers threatened by retaliation in their home countries, 3) establish a binding legal instrument on whistleblower protection on the bases of the Council of Europe Recommendation (2014(7)), and 4) for the USA (which has observer status membership of the Council of Europe) to allow Snowden to return without fear of criminal prosecution and allowing him to raise the public interest defence.
- 63 However, the route to the European Court of Human Rights is a very long one ; the Tshwane Principles are sound but it is an uphill battle to get policy makers to recognize them as a benchmark ; Omtzigt’s endeavours are promising but might not get implemented before he needs to vacate his political seat. All of this is promising, but we have seen promising things before that did not turn out how we hoped they would. Is there anything concrete and happening right now on the ground ? After all, it was the

‘on the ground’ campaigning of Ralph Nader in the early 1970s that started the whistleblowing movement.

- 64 Two things happening now are unprecedented for whistleblowing, and have been hugely important. Although, I will not provide a full analysis of these in this paper, I do want to mention them as vehicles of that renewed hope for whistleblowing as a human right. One phenomenon is the emergence of whistleblower support groups. During the 1980s, there was GAP (Government Accountability Project) in the USA. That was it - worldwide. In the 1990s there were a handful, including PCaW (Public Concern at Work) in the UK, ODAC (Open Democracy Advice Centre) in South Africa, and PISA (Public Interest Speak-Up Advisors) in Japan. Today, there are such groups in more than 15 countries, and, in many countries, there is more than one. These groups vary widely in how they are organized and what they specialize in: whistleblower led self-help groups, organizations offering advice to whistleblowers, lobbying and campaigning groups, psychological support groups, and organizations offering legal support for whistleblowers. These groups keep whistleblowing on the public agenda, continue to stress the importance for society of freedom of expression as speaking ‘truth to power’, educate mass media journalists on whistleblowing, point at loopholes in legislation, and stand together with whistleblowers. They are now also networked through WIN (Whistleblowing International Network), which gives them credibility and voice no matter how small they are in their respective countries.
- 65 The second ‘on the ground’ phenomenon are the leaks sites. Wikileaks was the first to start around 2007. In 2010 Wikileaks started publishing classified US military and diplomatic documents leaked by Chelsea Manning, which triggered a witch hunt. The Obama administration added Wikileaks to the list of enemies that threatened US Security. When Assange got into trouble in 2012, the excitement and know-how for this activism had already spread. There was a mushrooming of leaks sites: Globaleaks, Indoleaks, Scienceleaks, Magyarleaks, Ruleaks, Unileaks, etc. It hardly makes a difference if one gets closed down. New ones pop up all the time. The importance of leaks sites is that it makes disclosure easy. It does not necessarily mean that people will want to disclose information quicker or earlier in their whistleblowing process but once they come to the stage that they want to, they can.
- 66 It is precisely the technological and practical ease of doing so that is taking the secrecy lid off of whistleblowing again. It scares the hell out of everyone in control of an organization - public and private. Simply because it puts a limit on their control over secrecy. Managers and officials now cannot but understand that if they fail to listen, the whistle will be blown elsewhere. Of course, blowing the whistle through a leaks site might not be the most effective way to do it, but then again, effectiveness was never a criterion for hope, including hope for free speech.

NOTES

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31. My translation of ‘In de toelichting wordt aandacht besteed aan de vraag in welke gevallen en onder welke voorwaarden de werknemer het vermoeden van een misstand extern bekendmaakt. Daarbij wordt verwezen naar de Verklaring inzake het omgaan met vermoedens van misstanden in ondernemingen van de Stichting van de Arbeid. De Afdeling merkt op dat hetgeen in die verklaring wordt gesteld over externe meldingen in een ander licht zal komen te staan als het Huis voor klokkenluiders daadwerkelijk tot stand is gekomen. Een klokkenluider die het recht heeft een externe melding te doen, kan zich dan immers wenden tot het Huis, zodat hij geen grond meer heeft om de media te benaderen. In de toelichting wordt deze verandering niet onderkend. De Afdeling adviseert de toelichting aan te vullen.’
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39. Idem, p. 89.
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41. Vandekerckhove, op.cit., 2006 p. 306.

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ABSTRACTS

The recent unfolding of whistleblower protection is history repeating itself. At the end of the 20th century, debates in many countries on whistleblower protection were initially framed in terms of protecting freedom of expression ; whistleblowing was a human right that had to be protected. None of these discourses was maintained. Hence, Whistleblower protection laws came about through an anti-corruption agenda, not a human rights one. A paradox of whistleblower protection is that free speech drove it but was irrelevant in bringing it home. Because of that, the whistleblower protections in many countries are able to deal with some issues of fraud, corruption, and other wrongdoing, but do not recognise the fundamental human right of freedom of expression when the public needs to be warned in cases where those who rule us breach human rights. And, because the freedom of expression element is missing, there remains whistleblowing that causes scandal ; there remains whistleblowing for which there are no adequate institutional arrangements.

Le développement d'une nouvelle préoccupation pour la protection des lanceurs d'alerte démontre que l'histoire se répète. A la fin du vingtième siècle, les débats autour de la protection des lanceurs d'alerte dans de nombreux états étaient envisagés sous l'angle de la protection du droit de l'homme à la liberté d'expression ; le lancement d'alerte était un droit de l'homme qui devait, à ce titre, bénéficier d'une protection. Aucun de ces discours n'a réellement prospéré. Par conséquent, les lois de protection des lanceurs d'alerte ont été adoptées dans le cadre de politiques de lutte contre la corruption, et non pas dans un élan visant à protéger les droits humains. Le paradoxe de la protection des lanceurs d'alerte est le suivant : la liberté d'expression a constitué le point de départ de la préoccupation de protéger les lanceurs d'alerte, mais n'a pas réussi à ériger le lancement d'alerte en composante à part entière d'un droit de l'Homme. Par conséquent, les lois de protection des lanceurs d'alerte reconnaissent la légitimité du lancement d'alerte dans les hypothèses de fraude, de corruption et d'autres mauvaises pratiques, mais ne reconnaissent que trop peu le droit à la liberté d'expression dans les hypothèses où le public doit être alerté des violations des droits humains commises par les gouvernants. Et c'est précisément parce que la liberté d'expression apparaît comme le chaînon manquant de l'alerte que certaines affaires de lancement d'alerte (Wikileaks, Luxleaks, révélations Snowden...) continuent de faire scandale car il s'agit de variantes de lancement d'alerte pour lesquelles aucun encadrement juridique n'a été mis en place.

INDEX

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