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TRANSNATIONAL FORCE OF LAW

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Putting proportionality in proportion

Whistleblowing in transnational law^{*}

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It is now common sense that whistleblowing can be an effective way to bring unlawful actions and social grievances to public attention. This has spurred numerous international efforts, from corporate compliance governance codes to endeavors in the political realm, to create transnational safeguards to protect whistleblowers against repression and enable protest against unlawful practices.¹ Whistleblowing is central to the G 20's anti-corruption plan, measures instituted by the Organization for Economic Cooperation and Development (OECD), the legal policy proposals of Non Governmental Organizations (NGOs), and Transparency International and national initiatives to establish "safe harbors," which, like the Icelandic Modern Media Initiative (IMMI), call for national media regulations to offer the greatest possible protection for whistleblowers.² Provisions designed to shield whistleblowers have been included in the UN Convention against Corruption (Articles 8, 13, and 33), the African Union Convention on Preventing and Combating Corruption (Article 5 Paragraph 6), the Organization of American States' (OAS')

^{*} I am grateful to Isabell Hensel, Johan Horst, Nora Markard, and Gunther Teubner for their constructive criticisms of an earlier version of this chapter.

¹ For an overview, see Buckland and Wills, *Blowing in the Wind?*; Bowers et al., *Whistleblowing: Law and Practice*; Schmolke, "Whistle-blowing-Systeme als Corporate Governance-Instrument transnationaler Unternehmen," pp. 224ff.

² G 20, *Anti Corruption Plan*, Seoul Summit 2010, Annex III (7); Transparency International, *Recommended Draft Principles for Whistleblowing Legislation*; OECD, *Whistleblower Protection*; Ritchie, "Why IMMI matters," pp. 451ff.; and see the survey of the present-day situation in Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (rapporteur: Martin Scheinin), A/HRC/14/46, 17.5.2010, No. 18: "Members of intelligence services who, acting in good faith, report wrongdoing are legally protected from any form of reprisal. These protections extend to disclosures made to the media or the public at large if they are made as a last resort and pertain to matters of significant public concern."

Inter-American Convention against Corruption (Article III Paragraph 8), and the Civil Law Convention on Corruption (Article 9) as well as the Criminal Law Convention on Corruption (Article 22) adopted by the Council of Europe.³

The rise of legal protections for whistleblowing as a major concern in transnational legal policy responds to the increasingly transnational nature of the phenomenon itself: Whereas the classical forms of expression whistleblowers resorted to were chiefly disseminated by national print media and intervened in national debates, the impact of twenty-first century whistleblowing is global. Due to the growing reach of digital media, the emergence of worldwide communication networks, and the work of WikiLeaks, whistleblowers have access to transnational distribution systems that allow them to disseminate information rapidly, effectively, and beyond national jurisdictions.⁴ Especially in spaces of transnational and privatized governance, which are largely impervious to democratic control by the authorities of one or another nation, whistleblowing thus becomes an indispensable source for the generation of attention to breaches of law.

Security policy, where national institutions prize secrecy rather than transparency,⁵ is another domain in which whistleblowing plays an important role, revealing the tendency of transnationally interconnected

³ Even US President-elect Barack Obama issued a full-throated statement in support of whistleblowing in his 2008 transition agenda – at least as long as the whistleblower complies with the logic of the surveillance state rather than turning against it: “Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government.” Barack Obama and Joe Biden, *The Obama-Biden Plan*, available at http://change.gov/agenda/ethics_agenda (last accessed January 13, 2015).

⁴ For a general discussion, see Winter, *Widerstand im Netz*.

⁵ The official statement issued by the German Federal Government on August 13, 2013 in reply to a question of the Social Democratic Party of Germany’s parliamentary group concerning US wiretapping programs and the extent of the collaboration of German intelligence agencies with their US counterparts (BT-Drs. 17/14456) is symptomatic. “For reasons of the welfare of the state” (ibid., 4), large parts of the government’s statement were classified as unsuitable for publication. The sections released for publication contain nothing but truisms such as the assertion that, given the realities of data transmission, it cannot be ruled out that agencies may have access even to purely domestic e-mail communications by tapping “networks or servers abroad” through which such communications are routed (ibid., answer to question 15).

security services to overreach in their surveillance efforts.⁶ Their surveillance-state methods have long slipped the fetters of the rule of law in the nation state. Aided by compliant global players in the information technology business, from Yahoo to Microsoft, which have received monetary compensation for their cooperation,⁷ they have dramatically undermined the democratic and participatory structures charged with their oversight. Yet the field of security policy is also where whistleblowers, despite the widespread appreciation of their function as transmitters bringing social norms to bear on economic, scientific, military, and political decision-making, may suddenly find that they have exhausted the tolerance for their actions. When whistleblowers defy the attempts of surveillance states to benefit from what they do, when they turn their critical attention to security policy itself, they quickly confront severe political, economic, and legal repression: sources of funding are cut off and activists face prosecution and defamation. Legal actions taken to prevent the publication of documents and sanction whistleblowers in response to the critical investigation of issues in security policy have long been a “professional hazard” for journalists,⁸ as the proceedings against *The New York Times* and Daniel Ellsberg in connection with the publication of the Pentagon Papers (1971), the indictment of Carl von Ossietzky for the work of *Die Weltbühne* during the Weimar Republic (1931), and the investigation against Conrad Ahlers and Rudolf Augstein during the *Spiegel* scandal (1962) in postwar Germany attest. Most recently, the cases of the WikiLeaks spokesman Julian Assange, who sets the whistleblowing platform’s strategic direction, the WikiLeaks informant Chelsea Manning, who exposed war crimes in Afghanistan and Iraq, and the American intelligence agency employee Edward Snowden, whose 2013 revelations on Prism, XKeyscore, and the NSA triggered the ongoing surveillance and espionage scandal, demonstrate that the general endorsement of whistleblowing is supposedly limited by putative duties of loyalty and obligations of secrecy, reasons of state, operational interests, and other common good concerns.

In cases of conflict between disclosure and secrecy, the law generally answers the question of which forms of whistleblowing are permissible

⁶ Deiseroth, “Whistle-blowing in der Sicherheitspolitik,” pp. 479ff.

⁷ MacAskill, “NSA paid Millions,” *The Guardian*, August 23, 2013.

⁸ von Ossietzky, “Der Weltbühnen-Prozeß,” pp. 249ff. (p. 250): “I know any journalist who asks critical questions about the Reichswehr must be prepared to face charges of treason; it’s a natural professional hazard.”

and which are unlawful through the “application of statutory provisions or regulations that call for adjudicators either to explicitly balance the two interests or to enforce statutes that incorporate this balance in their structure.”⁹ The judicial method of balancing and its schematic implementation under the principles of proportionality and practical concordance are thus of crucial significance when adjudicators must translate the abstract principle of support for whistleblowing into specific rules and resolutions of collisions, i.e., to answer the question of which forms of whistleblowing are permissible when and where.

The focus of the following observations will be on the example of whistleblowing in the field of security policy. I will argue that balancing, proportionality, and practical concordance as they routinely figure in legal discourse are subtle instruments of repression. To disrupt the repressive operation of this legal method, the principle of proportionality will need to be reassessed. Only a tempered proportionality can facilitate rather than repress the exercise of liberties. I will advance this hypothesis in three steps:

One, balancing, proportionality, and practical concordance have become dominant methods in transnational law. As a consequence of this methodological ascendance, civil liberties are subject to a blanket reservation of ad hoc judicial restriction.

Two, the method of balancing and its objective of establishing proportionality and practical concordance, as currently applied, conceals the nature of the conflicts addressed by legal decisions and result in wrongly framing social conflicts in the law that are divorced from reality. Specifically, the conflict over whistleblowing does not pit subjective liberties against individual and collective opposing rights, the objects of legal protection that are conventionally balanced against each other; instead, it is a conflict between impersonal autonomous spaces.

Three, the development of an adequate legal framework for the collision of these autonomous spaces in cases of whistleblowing requires radical depersonalization of the issue. Instead of basing legal policy considerations on the good or bad intentions of whistleblowers from Edward Snowden to Julian Assange and Chelsea Manning, we will need to develop legal rules that do justice to the significance of whistleblowing as a transmitter of social values, as well as to the interests in confidentiality of the transnational spheres of diplomacy, military affairs, business, etc.

⁹ Fenster, “Disclosure’s Effects: WikiLeaks and Transparency,” pp. 753ff. (p. 783).

Whistleblowing under the balancing reservation

In the *age of balancing*, the methodology of transnational law, like that of other legal fields, is informed by the idea of optimization through balancing.¹⁰ The techniques of balancing and the establishment of proportionality and practical concordance developed in the international legal dialogue¹¹ have long broken the chains of national law. They have also become the dominant method of judicial decision-making on the level of transnational law. Proportionality, it is argued, is a universal constitutional principle,¹² a primary characteristic of global constitutionalism,¹³ or a central proposition of international law.¹⁴ Similarly, the ICANN arbitration courts¹⁵ frequently render decisions on the allocation of Internet addresses that translate the relation between property rights and rights of expression into a matter of balancing:

There is arguably no unlimited guarantee of the right to freedom of expression, since [the ICANN arbitration courts] ultimately already aim to balance interests in the protection of private rights against the public interest in the safeguarding of basic rights. This replicates a balancing of individual against general interests provided in national law by the interplay of basic rights protections and general laws.¹⁶

This balancing process subjects the whistleblower's actions to ad hoc restrictions in light of colliding interests. In employment law, for example, it yields a "balancing between the employee's interest in disclosure and the employer's interest in secrecy."¹⁷ Along the same lines, the European Court of Human Rights (ECtHR) has made the permissibility of whistleblowing dependent on a balancing between employees'

¹⁰ Aleinikoff, "Constitutional Law in the Age of Balancing," pp. 943ff.

¹¹ See Kennedy, "A Transnational Genealogy of Proportionality," pp. 185ff, as well as the comparative legal analysis in Knill and Becker, "Divergenz trotz Diffusion?," pp. 447ff.

¹² Klatt and Meister, „Verhältnismäßigkeit als universelles Verfassungsprinzip," pp. 62ff.

¹³ Stone Sweet and Matthews, "Proportionality Balancing," pp. 72ff.

¹⁴ Franck, "Proportionality in International Law," pp. 231ff.; and see the critique in Petersen, "How to Compare the Length of Lines," pp. 1387ff.

¹⁵ ICANN (the Internet Corporation for Assigned Names and Numbers) is a private organization that manages the assignment of Internet addresses (domain names).

¹⁶ Renner, *Zwingendes transnationales Recht*, p. 196; Simma, "Foreign Investment Arbitration," pp. 573ff. (p. 591) speaks of "competing obligations" under different regimes.

¹⁷ von Busekist and Fahrig, "Whistleblowing und der Schutz von Hinweisgebern," pp. 119ff. (p. 121); on the collision between the employee's duty of loyalty to his or her employer and the civic duty to comply with prosecutorial requests for information, see BVerfG, 1 BvR 2049/00 of 2 July 2001 (disclosure of information to prosecutors does not constitute sufficient grounds for termination).

rights to free expression and the affected opposing rights of employers to the protection of their reputation and economic interests.¹⁸ It has stipulated that the decision to go public with information must be a last resort and made in the honest belief that the specific allegations have been carefully verified and that the public interest in the information outweighs the damage caused by disclosure. In assessing the proportionality of an interference with the whistleblower's rights, authorities must consider in particular the public interest in the information revealed. In this context, the ECtHR has called for a fair balancing between the protection of the employer's reputation and rights on the one hand, and the protection of the employee's freedom of expression on the other hand. But the balancing process itself remains mysterious: The court has remained silent on which specific entities are to be balanced. A balancing *sensu lato* that seeks to reconcile the interests of employers and employees is combined with remarks on the proportionality of the intervention, which is in turn said to be determined by the public interest in the information to be revealed. Yet the ECtHR has not said how this public interest is to be gauged and what distinguishes public from private interests, leaving crucial parameters of the balancing process vague. The court thus retains a free hand in subsequent decisions and the ability to intervene and make inconspicuous adjustments to the judicial practice on a case-by-case basis, but this is detrimental to the establishment of stable legal doctrine and hence to the creation of reliable protections for whistleblowers. The outcome of the balancing process remains unforeseeable and whistleblowing is subject to the general and unqualified reservation that property rights – which are conceived as equal-ranking – must not be infringed.¹⁹

Similarly, in the field of security policy, many attempts to demarcate the boundaries of permissible whistleblowing consider the relative weight of duties to protect, rights to security, and civil liberties.²⁰ For example, with regard to the release of information on the whistleblowing platform WikiLeaks, it has been argued that the freedom of expression must be "reconciled with potential opposing rights in the sense of a practical concordance."²¹ As a consequence, defenders of whistleblowing and the

¹⁸ ECHR, *Heinisch v. BRD*, 21.07.2011, Cs. 28274/08, para. 64ff.

¹⁹ For a general discussion of the prevailing obsession with balancing, which impedes the formation of stable behavioral expectations, see Ladeur, *Kritik der Abwägung*, pp. 9–10.

²⁰ Fenster, "Disclosure's Effects," pp. 753ff.

²¹ Hoeren and Herring, "Urheberrechtsverletzung durch Wikileaks?," pp. 143ff. (p. 146).

exercise of the freedom of expression are frequently called upon to justify the legitimacy of such actions vis-à-vis the public interest in security as an opposing right. In this scenario, however, the practical implementation of the principle of proportionality is often effectively an “assault on human rights.”²² The formula of practical concordance, which demands that in case collisions of constitutional principles by the competing principles must be balanced in a way to realize the maximum effectiveness of each of the principles, also operates in this way. The use of the practical concordance scheme clearly shows that in situations of collision between individual and collective objects of legal protection, community interests may overwhelm civil liberties.²³ The technique of practical concordance, a modified adaptation of Gratian’s twelfth-century *Concordia Discordantium Canonum* introduced to twentieth-century constitutional doctrine by Konrad Hesse and Richard Bäumlín, who had been students of Rudolf Smend,²⁴ is a model of “repressive tolerance,” as Bäumlín candidly acknowledged in 1970.²⁵ Practical concordance allows for a praxis that restricts the exercise of basic and human rights in favor of collective goods even when the constitutional text would demand that these rights be guaranteed without reservation. The fact that concordance knows “no unconditional priority of basic rights over government responsibilities” allows for

optimum practical concordance to be established between the different elements of the constitution, and specifically between the section on basic rights and the constitutionally prescribed or required government responsibilities, such as schools, the military, and the public administration.²⁶

This model quickly defeats mechanisms of constitutional protection for whistleblowers. Considerations of proportionality in constitutional law and the establishment of practical concordances then go hand in hand with anti-espionage provisions and compromise the well-intended transnational

²² Tsakyrakis, “Proportionality: An Assault on Human Rights?,” pp. 463ff.; Rusteberg, “Grundrechtsdogmatik als Schlüssel” pp. 15ff. (p. 19), argues that an imbalance is structurally immanent to case-by-case consideration in such constellations.

²³ For a more extensive discussion, see Fischer-Lescano, “Kritik der praktischen Konkordanz,” 166ff; on the collision of liberties and government objectives in the US, see Mathews and Stone Sweet, “All Things in Proportion?,” pp. 102ff. (p. 116).

²⁴ The *locus classicus* is in Hesse, “Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland,” 20th edn, 1999, para. 72: “The resolution of the problem must correlate objects of constitutional protection in such fashion that each of them gains reality.”

²⁵ Bäumlín, “Das Grundrecht der Gewissensfreiheit,” pp. 3ff. (p. 19).

²⁶ Bäumlín, *ibid.*, pp. 18–9

codes designed to protect whistleblowing.²⁷ To place the freedom of whistleblowing under a sweeping balancing reservation is to gut it. As soon as whistleblowers address the practices of security services, breaking out of their role as private watchdogs in the service of state-surveillance networks, tolerance for their actions is at an end. Tolerance is then another term for repression. Herbert Marcuse put this succinctly in his essay on “Repressive Tolerance,” criticizing that “what is proclaimed and practiced as tolerance today, is in many of its most effective manifestations serving the cause of oppression.”²⁸ Balancing, proportionality, and practical concordance rescind the liberties the transnational law-making process has bestowed by shackling them to colliding individual and community values.

The illusion of proportionality

This repressive substance of the legal method of balancing, which frequently culminates in the establishment of putative proportionality and practical concordance, results from a subjectivist mis-specification that has infected the liberal legal paradigm and its habitual practice of considering the relative weight of subjective rights and opposing rights. Balancing, that is the basis of its methodological ascendance, enables courts and legal workers to administrate justice in individual cases without tying them into an emerging legal doctrine in any further detail – to exert judicial decisionism, as Ernst-Wolfgang Böckenförde put it in a critical essay.²⁹ The adjudicators retain all freedoms in their decision about colliding freedoms by veiling the principles of political order and legal/policy values that underlie their decision so as to render them unrecognizable: “It is not the dialectical *concordantia discordantium* that makes this mixture so distressing, but the complete renunciation of any reference to reality, which is an original sin of the law.”³⁰ The opiates of the balancing method drown social conflicts of interest in a twilight state of harmonization allegedly governed by a rational and inclusive logic that optimally unites all conflicting points of view.³¹ Balancing is a

²⁷ Khemani, *The Protection of National Whistleblowers*, pp. 1ff. (p. 23).

²⁸ Marcuse, “Repressive Tolerance,” pp. 95ff. (p. 95).

²⁹ Böckenförde, “Grundrechtstheorie und Grundrechtsinterpretation,” pp. 1529ff. (p. 1534).

³⁰ Wiethölter, *Rechtswissenschaft*, p. 74.

³¹ Of the many contributions on this point, see only Riehm, *Abwägungsentscheidungen in der praktischen Rechtsanwendung*; Barak, *Proportionality*, pp. 458ff.

dialectical miracle method: It makes the incompatible compatible and the contrarian and fractious pliable.³² It transforms the philosophy of opposites into judicial method.³³ The balancing method owes its appeal to the fact that it provides a schema that can set argument and counterargument, right and opposing right, in relation to each other without having to disclose the principles of political order to which the resulting decisions conform.

It makes intuitive sense that the permissibility of whistleblowing cannot be unlimited. *So my point is not to criticize the use of balancing to demarcate its boundaries. What needs to be criticized is how this balancing is implemented, i.e., what is put on the scales.*³⁴ The judicial method sets individual goods in relation to collective goods without forming an idea of this relation. It translates social conflicts into conflicts between legally protected rights or principles without taking an interest in where the lines of social collision actually run. This transforms the social conflict into a legal one that can putatively be resolved in accordance with criteria of rationality, optimization, and inclusiveness. Balancing as it is conventionally practiced is the subtle technique of judicial hallucination. Entangled in phantom debates over the optimum implementation of subjectivist principles and values, the law remains blind to the fact that the balancing process does not merely decide questions of law and principle; its particular conception of the situation it balances is already the result of the reframing of a social conflict internal to the law. True, it is an inevitable consequence of the autonomy the law has attained that instances of social conflict must first be translated into the language of law before the law can resolve them. The problem is not that such translation takes place, but how it proceeds. The law's vision of the conflicts it resolves is in no way adequate to their complexity. It has not evolved a sense – this is the point Rudolf Wiethölter's trenchant critique homes in on – for the judicial distortion of social conflict, for the realities

³² Cf. Heraclitus, *Fragments*, fragment 56, p. 37: "The cosmos works by harmony of tensions, like the lyre and bow"; see also Taubes, *Ad Carl Schmitt*.

³³ See Adam Müller's treatise on opposites: Müller, "Vom Gegensatz. Erstes Buch," pp. 195ff.; for more on Müller, see Ogorek, "Adam Müllers Gegensatzphilosophie," pp. 96ff.

³⁴ This point is made by Reimer, "... und machet zu Jüngern alle Völker?," pp. 27ff.; Poscher, "Theorie eines Phantoms," pp. 349ff.; see also the critique of balancing in Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship," pp. 179ff., and Kahn, "The Court, the Community and the Judicial Balance," pp. 1ff. (pp. 4–5).

that are lost in the transformation into law, and for how the legal reframing might translate social questions more adequately into the *quaestio iuris*:

The legal premise of proportionality, I have sought to argue, is the most influential transformative instrument for the osmosis, for translations, for instances of covariance between law and society, the highest and most general productive principle of a ... justification of rules of collision guiding the decision in cases of competing rights, interests, needs. Legal relations are indeed (in Germany, they have been since Savigny's days!) neither pure objects of assessment nor pure assessments of objects, but always already pre-mediated general decisions concerning the correlative association of facts with a specific law, as a qualification of the legal answers to social questions ... The covert premises implicit in the application of the theory of qualification itself, i.e., in how the principle of proportionality is applied, contain a complete program of social theory (*sub verbo* proportionality, justice, or the like), because it is the theory of qualification (not the norm) that determines the selection of object domains, and because this theory is determined in turn (not by norms, but) by the selection from alternative highest value assessments. What stands in need of explanation (and justification), then, are the mediating definitions (association) of objects of (e.g., commercial) law and a methodology guided by a substantial theory (social purposes, systemic responsibilities, the circumlocutions are of no concern to us: qualifications of proportionality as a theory of/for/in the practice itself). Yet this critical work remains undone. Whether and how it could be done is a question that cannot be answered with the means of law, jurisprudence, and the legal profession.³⁵

To summarize this critique: the law has only an inadequate and utterly unreflective concept of what it is that the technique of balancing balances, brings into practical concordance, and sets in relation: interests, rights, principles, objects of constitutional protection – there are many candidates for a definition of the colliding entities. What they have in common, however, is that it is always an individual and subjective position (which may be identified as a right, interest, principle, or value) that allegedly needs to be set in relation to individual or collective counter-norms, -interests, -principles, or -values. This situation is even adduced to justify the principle of proportionality as such in the perspective of a theory of norms: as a dynamic relation between norm and counter-norm based on liberties conceived in subjectivist terms.³⁶

³⁵ Wiethölter, "Sozialwissenschaftliche Modelle im Wirtschaftsrecht," pp. 126ff. (p. 139).

³⁶ von Arnould, "Die normtheoretische Begründung des Verhältnismäßigkeitsgrundsatzes," pp. 276ff.

This is exactly the gist of the matter: the law blindly adopts fundamental assumptions of liberalist models in which subjective liberties are set in relation to colliding subjective or collective goods. Especially when it comes to issues relating to whistleblowing, such mis-framing of the conflict engenders absurd results and patterns of argument. For example, the German Federal Ministry of Defense (BMVg) invoked § 97a of the German Copyright Act (UrhG) to argue that intellectual property rights (held, as individual rights, by the BMVg) forbade the publication of leaked papers and that whistleblowers, in publishing them, had violated the author's right to first publication granted by § 12 (1) UrhG.³⁷ Even if one frames the conflict in these terms with the German Federal Constitutional Court's holding, in the "Germania 3" ruling, that the commitment to practical concordance – i.e., to "an equilibrium between the various protected (in some cases, constitutionally protected) interests" – extends to copyright law,³⁸ or rejects the claim that government ministries are creators in the sense of the Copyright Law,³⁹ such arguments do not chart a path out of the underlying judicial mis-framing of the issue. Whistleblowing does not represent a simple collision between an individual liberty (the whistleblower's freedom of expression or freedom of the press) and opposing individual rights (copyright law as an expression of property rights) or collective goods (reasons of state, state security, etc.). Couching the conflict in such subjective terms does not do justice to its complexity:⁴⁰ protecting whistleblowers is not about resolving the collision between subjective rights or principles and opposing rights in a way that safeguards individual liberties, but about the protection and self-delimitation of impersonal autonomous spaces of communication. The subjective right is then in fact what stands in the way of an adequate approach to the problem of whistleblowing.

The reduction of transnational conflicts such as those ignited by cases of whistleblowing to collisions of subjective rights and putative opposing rights is divorced from reality. Corrections to details of the balancing method such as a waiver of the proportionality test in balancing or a narrow application of scope-of-protection analysis, which is designed to avoid situations of collision, do not cut to the heart of the issue: the

³⁷ Cf. Freeman, "Protecting State Secrets as Intellectual Property," pp. 185ff.

³⁸ BVerfG, 1 BvR 825/98 of 29.6.2000 (Germania 3), para 23. The decision concerned the unauthorized use of passages from Brecht's works in Heiner Müller's play *Germania 3*.

³⁹ But see Hoeren and Herring, "Urheberrechtsverletzung durch Wikileaks?," pp. 143ff.

⁴⁰ Springer et al., "Leaky Geopolitics," pp. 681ff. (p. 685).

subjective right as such, the scope of protection of the compact individual basic right, the use of personal liberties as the unit of measure, is the problem. True, the subjective right is itself the result of a process of differentiation. The *ius*, as the integral union of rights and obligations toward the community, and the Roman *actio*, which identified rights with their procedural enforcement, evolved into the subjective right which is independent of procedural considerations and models of community. Its invention made it possible to shift legal relations from their basis in bilateral reciprocity to a foundation of complementary behavioral expectations – to unmix social relations, as it were:

Predetermined and judging symbioses of rights and obligations give way to the social empowerment to act. The social reference is reduced to the license granted to something that has its mainspring in the agent himself, in his *libertas intrinseca*, in his will, in his interests.⁴¹

But the doctrine of subjective rights does not take abstraction far enough. Instead, it has given rise to an empiricism of the law, with grave consequences. This empiricism is not just a naturalistic fallacy: the problem is not that the law refers to what is to draw conclusions concerning what ought to be, as Hans Kelsen criticized in a discussion of Eugen Ehrlich's work.⁴² The situation is more dramatic. The fallacy lies in the very fact that the law treats its social environment as existing and conceives it as composed of actual subjects to whom subjective rights are assigned. As Christoph Menke has rightly criticized,⁴³ this establishes the empiricism of the law as the determining fact in the legal constitution of the bourgeois society it understands to be its natural basis. But rights cannot be grafted onto pre-legal rationally oriented subjects. The subjects do not actually exist in the form the law assigns them. They are merely as-if subjects, projections of the law, an abstracting guise that reduces the human being of flesh and blood to a rational willing entity while also obscuring the social conditioning of the *homo iuridicus*. The critique of empiricism unseats the subject as the alpha and omega of the law. The private autonomous legal subject is not the sun around which the legal planetary system orbits. In a functionally differentiated society, its gravitational pull declines.

⁴¹ Luhmann, "Subjektive Rechte," pp. 45ff. (p. 74), trans. by the author.

⁴² Kelsen, "Eine Grundlegung der Rechtssoziologie," pp. 839ff. (p. 843): "In the field of the law, the rules of is and ought are thus fundamentally different in form."

⁴³ Menke, *Die Selbstreflexion des Rechts*, p. 99.

These observations concur with analyses that have long highlighted the trans-subjective nature of civil rights and liberties and chipped away at the plausibility of the legal form of the subjective right. Niklas Luhmann, who saw this keenly, criticized the judicial distortion of social conflict into a collision of subjective rights, arguing that it had no answer to the contemporary challenges in the system/environment relationships of the global society:

Yet these are exactly the problems a functionally differentiated society with subsystems that operate in relative autonomy increasingly faces, both in the inter-systemic relationships internal to the society and in the relationship between the social system and its natural and personal environment. So the very social order that was built with the assistance of this subject-centered language may find itself in a situation in which this language is no longer persuasive and becomes implausible.⁴⁴

A law that describes society as made up of “subjects” does not operate at an adequate level of complexity. It is divorced from reality, has no idea of sociality, and distorts social conflicts beyond recognition. Because the rational subject is the cornerstone of its thinking, it has no room for ecological and social questions, no language for institutional conflicts and no conception of human freedom.

Safeguarding impersonal liberties

So to conceive the protection of whistleblowers solely as a protection of subjective rights – and even worse, to make the question of whistleblowing hinge on the whistleblower’s good faith – is to misconstrue the trans-subjective dimension of whistleblowing as a specific form of intervention into public spaces. Whistleblowing defends basic forms of democratic participation and control against the encroachments of a transnational security apparatus that resorts to unlawful practices and renders those responsible for them invisible. In WikiLeaks, a global space of communication has emerged that, as envisioned by the “Declaration of the Independence of Cyberspace,”⁴⁵ has attained substantial autonomy vis-à-vis

⁴⁴ Luhmann, “Subjektive Rechte,” pp. 45ff. (p. 80), trans. by the author.

⁴⁵ Barlow, “Declaration of the Independence of Cyberspace,” February 9, 1996, available at <https://projects.eff.org/~barlow/Declaration-Final.html> (last accessed November 13, 2015). The declaration begins as follows: “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.”

national legal orders.⁴⁶ WikiLeaks initially relied on a cloud strategy to safeguard the autonomy of this public space.⁴⁷ During the publication of the Iraq Papers, a network of mirror servers ensured the accessibility of the data. With the recent efforts to install its servers offshore in order to stabilize and preserve the autonomous space of free communication, WikiLeaks seeks to permanently elude the grasp of national authorities. Such spaces of free communication that defy the attempts of political and military institutions and powerful businesses to seize, monitor, and control them are the central requirement if democracy and the spontaneous and eruptive expression of opinions are to remain viable. Keeping them free is the only way to counter the totalizing tendencies of the transnational security apparatuses. Therein lies the democratic function of a whistleblowing platform such as WikiLeaks.

The judicial search pattern, which is designed to identify proportional and balanced forms of the exercise of individual liberties, is not even remotely adequate to this fundamental significance of whistleblowing to democracy: To provide effective protection for whistleblowers through safeguards of impersonal liberties while also preventing injurious acts of whistleblowing, the law needs to map the lines of social conflict in the *quaestio iuris*. The spaces of communication created by WikiLeaks are spaces of the impersonal exercise of liberty. Following Helmut Ridder, Karl-Heinz Ladeur has proposed a definition of “impersonal liberty” as “the protection of the self-definition of a process of opinion-formation that is also held to possess the ability to reflect on its own rule-compliance.”

This capacity for self-organization is quite plausibly protected as a liberty whose impersonal nature is apparent in the fact that it is not about the self-definition of individuals but about the distributed generation of an autonomous rule-compliant process.⁴⁸

By focusing on the protection of spaces of personal autonomy, the traditional theory of basic rights reduces the panorama of complex social relations in which humans act in the context of differentiated social spheres to a diminutive detail it then installs as the only world. But society is more than the interaction of subjects endowed with reason,

⁴⁶ See Teubner, “Globale Zivilverfassungen,” pp. 1ff.

⁴⁷ de Filippi and Belli, “Law of the Cloud v Law of the Land,” pp. 1ff.

⁴⁸ Ladeur, “Helmut Ridders Konzeption der Meinungs- und Pressefreiheit,” pp. 281ff. (p. 290); and see already Ridder, “Die Meinungsfreiheit,” pp. 242ff.

and so issues of basic rights are not exhaustively addressed by rules that govern intersubjective freedoms. Instead, clear distinctions need to be drawn between threats to the integrity of human beings, legal subjects, and impersonal institutions. Conceived in this perspective, basic rights are social and legal counter-institutions against the expansive tendencies of social systems. They protect not simply subjective rights but, depending on their particular form, human beings in their physical integrity, legal subjects in their freedom, or impersonal and institutional autonomous spaces.⁴⁹

Broadening our view to include trans-subjective liberties allows us to reframe the interwovenness of human and social emancipation in the law: The free development of the individual is possible only in concert with the establishment of social spaces of communication. I would like to sketch the consequences of such a shift toward transpersonal liberty safeguards for the legal situation of whistleblowing in three steps:

Step one – Facilitating the evolution of forces: In a first step, it needs to be understood that the protection of whistleblowers not only safeguards individual personal development, but also protects the autonomous space of communication. Ludwig Raiser urged early on that the perspective of subjective rights must be complemented by a perspective of the emancipation of human forces via social institutions. To protect social institutions means to safeguard space for human development, and so his admonition is more relevant now than ever: “The ability to develop one’s own forces and the opportunity to derive economic profit from doing so should not be understood as subjective rights against competitors and customers.”⁵⁰ In the same vein, Gunther Teubner elaborates on the objective of facilitating individual development through the protection of institutions in his argument in favor of protection for whistleblowers, writing that the deliberate promotion of divergent behavior in social institutions can unleash forces of self-correction that stimulate “dissension, protest, opposition, and moral courage amid the debilitating atmosphere of . . . hierarchies and pressures to conform.”⁵¹ The purpose of such a liberation of whistleblowing is then to establish a culture that facilitates divergence. Fritz Bauer, who was the Hessian chief prosecutor at the time of the

⁴⁹ Teubner, “Die anonyme Matrix,” pp. 161ff.

⁵⁰ Raiser, “Der Stand der Lehre vom subjektiven Recht,” pp. 465ff. (p. 472).

⁵¹ Teubner, “Whistleblowing gegen den Herdentrieb?,” pp. 39ff. (p. 39).

Spiegel scandal in 1962, saw this clearly when he criticized that, in the cases of Rudolf Augstein and Conrad Ahlers, “non-conformism was vilified as punishable by jail.”⁵² The urgent need remains to develop effective provisions to protect whistleblowers from sanctions. It is a cynical state of affairs that Edward Snowden, Chelsea Manning, and others are persecuted and prosecuted for security reasons because they have dared to practice whistleblowing not only as watchdogs in the service of the security services, but also as watchdogs over the security services, in a challenge to the security complex. But in addition to shielding individual whistleblowers and their associates and confidants from the grasp of the security complex, we must see the importance of whistleblowing to the democratic process. Whistleblowing is not only about individual emancipation, but also about social emancipation and the unleashing of social forces.⁵³ Put abstractly, the challenge is to make a situation possible in which transnational security apparatuses are once again subject to, rather than in command of, the imperatives of democratically organized social forces. Nothing less is at stake than society’s ability to regain control of security policy and socioeconomic conditions.

Step two – Identifying collisions: The collisions, disputes, conflicts of interest, real contradictions, and antagonisms that arise in this context are not simply collisions between subjective liberties (let alone principles of subjective freedom) and (individual or collective) opposing rights. Instead, they manifest a collision between incompatible social spheres that overwhelm and compromise each other. Karl Marx pioneered the analysis of the destructive potential of economic rationality, whose reach was already global in his day; his observations have been confirmed by many later writers.⁵⁴ Max Weber introduced the concept of modern polytheism to highlight the hazards inherent in the economic sphere as well as other areas of life and analyzed the resulting dangerous conflicts between different rationalities.⁵⁵ Contemporary analyses often follow Jean-François Lyotard in speaking of discourse collisions.⁵⁶ Meanwhile, the larger public has become alive to the

⁵² Bauer, “Schriftliche Stellungnahme von Generalstaatsanwalt Dr. Fritz Bauer,” pp. 135ff. (pp. 139–140).

⁵³ On the concept of force in this context, see Fischer-Lescano, *Rechtskraft*, pp. 115ff.

⁵⁴ Most formidably by Polanyi, *The Great Transformation*, pp. 270ff.

⁵⁵ Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, pp. 605ff.

⁵⁶ Lyotard, *The Differend: Phrases in Dispute*, pp. xi ff.

social, human, and ecological risks posed by other highly specialized global systems such as science and technology. The economic, scientific, military, and technological as well as political spheres have become embroiled in a “clash of rationalities” in the global society, with all the attendant destructive tendencies.⁵⁷ That has consequences also for whistleblowing, which provokes conflicts of one kind in the context of the economic system and another kind in the context of transnational diplomacy and transnational security. Each area has its own criteria to determine what constitutes the core interests of a transnational public information which must be disseminated even when colliding rationalities suggest otherwise. The judicial task is to identify the precise constellation of spheres in each instance and to develop adequate rules for such collisions that do not merely render justice in individual cases, but lend themselves to generalization. That, in turn, is the condition on which the possibility of the emergence of a stable legal doctrine rests.

Step three – Putting proportionality in proportion: The method of the establishment of proportionality must accordingly submit to a proportionality test. The arbitrary approach to the conflict by means of the unspecific consideration of the relative weight of principles of liberty and their social constraints must be supplanted by the development of norms that adequately protect a given social sphere against the encroachments of other domains seeking to maximize the purview of their own distinctive rationality. It goes without saying that the law must safeguard, for example, the core domain of diplomatic exchange and enable diplomatic confidence-building, even in backrooms; complete transparency would be prejudicial to diplomacy.⁵⁸ On the other hand, with regard to security policy whistleblowing, the military-police complex cannot claim unlimited cover from public scrutiny. Yet when secrecy is imperative and when it is impermissible must not depend on the political classification of something as “secret.”⁵⁹ That would subject the public sphere to politics rather than politics to the public. So norms capable of generalization must instead be developed to govern collisions between the logics of the public interest in disclosure and the particular domain’s interest in secrecy. Their goal must be to

⁵⁷ Luhmann, “The World Society as a Social System,” pp. 131ff.

⁵⁸ That is the kernel of truth in the demands expressed in Ischinger, “Das Wikileaks-Paradox,” pp. 155ff.

⁵⁹ Sagar, “Das mißbrauchte Staatsgeheimnis,” pp. 201ff. (p. 217).

enable public debate and discussion of sufficient breadth and depth to tie the spheres in question back to the public discourse of society.⁶⁰ In the tension between the autonomy of spheres and their responsiveness, the law's mission is to develop norms governing incompatibilities that counter the danger that politics, business, science, and other spheres undermine the instruments of democratic control through the ubiquitous invocation of common good interests such as security, the welfare of the state or the need for secrecy.⁶¹ The function of the law in this context is to defend transnational autonomous spaces of public discussion, opinion formation and debate against interventions and encroachments; i.e., in the field of security policy, to allow for democratic oversight and control over transnationally interconnected security policies. As Adolf Arndt rightly pointed out in the early controversies over the concept of the state secret, for defense and security policies to be shaped in a democratic process, the public needs to be "informed about facts that are significant to the formation of the popular will." So in gauging the proportionality of an invasion of the autonomous space of communication, it is vital that military forces and intelligence agencies, too, "must remain subject to public control and criticism; in cases of doubt, the decision must be against the restrictive measure and in favor of the freedom of information."⁶² With regard to the protection of and constraints on whistleblowing, this implies that the whistleblower's motivation is thoroughly irrelevant to the assessment of the permissibility of his or her actions. What

⁶⁰ In a recommendation issued on May 14, 2013, the German Rectors' Conference, an association of public and state-accredited German universities, seeks to forestall public involvement in cases of academic whistleblowing: "For the protection of the sources of information (whistleblowers) and the affected parties, the work of the ombudsperson is subject to strict confidentiality. Such confidentiality is broken when the source shares his suspicion with the public. In so doing, he will frequently be in breach of the rules of good academic practice himself." Yet such a ban on involving the public effectively poses a greater danger to scholarly work, which is based on the free discussion of the formal and substantial qualities of scholarship and its social responsibility, than isolated inquiries into cases of plagiarism; a critical point made by Preuss, "Man darf eine kritische Öffentlichkeit nicht ausschließen," *Süddeutsche Zeitung* of June 6, 2013.

⁶¹ On a norm governing cases of incompatibility in another context, see Teubner, "Ein Fall struktureller Korruption?," pp. 388ff.

⁶² Arndt, "Umwelt und Recht," pp. 24ff. (pp. 25–6); and cf. the exclusion of "facts which constitute violations of the independent, democratic constitutional order or of international arms control agreements by virtue of having been kept secret from the treaty partners of the Federal Republic of Germany" from secrecy, as provided by § 93 Abs. 2 StGB.

is determinative, by contrast, is that no protection can be claimed for secrets whose legitimacy is dubitable and in fact an issue under public debate: War crimes and human rights violations are in no way government responsibilities to be shielded from a critical public, nor do they belong to the legitimately secret core of transnational security policy. Similarly, measures that infringe basic rights and rights to integrity and that lack a sufficient legal basis cannot be legitimately confidential. The actions of a whistleblower who discloses war crimes in Iraq and Afghanistan, then, cannot be unlawful any more than the dissemination of information about secret surveillance programs operated in transnational collaboration by intelligence agencies that manifestly infringe the transnational basic and human rights to the protection of personal data.⁶³

The goal of whistleblowing, then, is not a completely transparent political sphere; it is not trying to counter the total exposure of the private realm by calling for a total exposure of politics. Whistleblowing aims to allow for a public discussion of illegal and undemocratic practices of transnationally interconnected security services that infringe civil liberties, and to create room for the formation of public opinion. Such debate is a necessity if we are to regain democratic control of central issues in transnational security policy. As national forms of democratic oversight and participation prove manifestly insufficient, WikiLeaks, Edward Snowden, Julian Assange, Chelsea Manning, and all those who venture their lives for our freedom give us reason to hope that we will be able to defend the foundations of our democracy against the transnational network of intelligence agencies and security services.

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⁶³ On the challenges of transnational privacy protection, see Hanschmann, "Das Verschwinden des Grundrechts auf Datenschutz," pp. 219ff.; on the nascent efforts to respond to this situation, see e.g., Pitz, "Weltweiter Datenschutz," p. 19.

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