

DYNAMICS OF DISSENT AND WHISTLEBLOWING: CONCEPTUALIZATION AND THE WAY AHEAD¹

DINÂMICAS DO DISSENSO E WHISTLEBLOWING: CONCEITUAÇÃO E O CAMINHO ADIANTE

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ABSTRACT

This article's overall aim is to reflect on dissent and its dynamics and to highlight connections between dissent and whistleblowing. The article does not contain a strictly legal approach based on existing criminal statutes. It expresses a socio-legal and conceptual perspective useful for further tracing important parallels between dissent and whistleblowing. It is built around four core sections in which whistleblowing is seen under the light of dissent. "Dissent: a foundational rather than a disputed concept"; "Establishing the concept of dissent"; "Dissenters as potential catalysts of changes"; "The way ahead for dissent and whistleblowing". These sections advance three arguments. Dissent and whistleblowing are much used but very ambivalent terms. Their lack of clarity does not contribute to discussions about their importance and regulation. Dissent, dissenters, and whistleblowers can be important catalysts of societal changes. A whistleblower is, by definition, a dissenter who, for whatever reasons, brings to the daylight what was not known by most. It is useful, thus, to study whistleblowers in relation to dissenters.

KEYWORDS:

Dissent; Whistleblower; Sociolegal theory; Theory of law.

RESUMO

O objetivo geral deste artigo é refletir sobre o dissenso e sua dinâmica e destacar as conexões entre dissenso e "whistleblowing". O artigo não contém uma abordagem estritamente legal com base nas leis penais existentes. Expressa uma perspectiva sociojurídica e conceitual útil para rastrear paralelos importantes entre dissenso e "whistleblowing". É construído em torno de quatro seções centrais nas quais a denúncia de irregularidades é vista sob a luz do dissenso. Entre elas: "Dissenso como um conceito fundacional"; "Estabelecendo o conceito de dissenso";

¹ This article is based on the author's oral presentation at the International Seminar "*Whistleblowers e Justiça Negociada*" hosted by EMERJ, Rio de Janeiro, in October 2019 and contains relevant lines of his "theory of dissent" that are published in Brazil for the first time. The author acknowledges and thanks UNESA - Rio de Janeiro - Brazil and its Post-Graduation Program in Law (PPGD) for the partial funding of his investigations, and thanks for the continuous support of Prof. Rafael Mario Iorio Filho, UNESA's Vice-Rector of Graduate Studies, Research and Community Affairs, and Prof. Carlos Eduardo Adriano Japiassú, Coordinator of UNESA's PPGD program. Further, the author wishes to register a special thankful note to Professor Hanne Petersen, Director of CECS (Centre for European and Comparative Legal Studies) of the Faculty of Law of the University of Copenhagen (KU) for her continuous support, rare insightfulness, and collaboration, without which the development of the current work could not be possible. He also thanks Johanne Keiding, from the same Faculty, for her dedication and close collaboration, and KU for supporting his research on dissent and sponsoring his work trips and stays in Copenhagen, Denmark.

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“Dissenso como potenciais catalisadores de mudanças”; “O caminho adiante para dissenso e whistleblowing”. Essas seções apresentam três argumentos. Os termos dissenso e whistleblowing são frequentemente usados, mas de maneira ambivalente. Sua falta de clareza não contribui para as discussões sobre sua importância e regulamentação. Agentes de dissenso e whistleblowers podem ser catalisadores importantes de mudanças sociais. Um whistleblower é, por definição, um agente de dissenso que, por quaisquer motivos, traz à luz o que não era conhecido pela maioria. É útil, portanto, estudar “whistleblowing” em relação a dissenso.

PALAVRAS-CHAVE:

Dissenso; Whistleblower; Teoria sociojurídica; Teoria do Direito.

INTRODUCTION

The dynamics of dissent (e.g. how dissent is formed, channeled, promoted, or stifled) are not sufficiently studied despite their importance in times of profound societal crises. During the 2020 pandemic, for instance, many have dissented to the restriction of their freedoms and rights carried out on behalf of public health directives, health authorities’ recommendations, and supporting legal norms. Those dissenters have received strong criticism. Notwithstanding, they also provoked reflections and heated debates on the contours of fundamental rights and freedoms and their suspension or relativization during crises. Their situation is not new, however, and dissenters have often had to pay high prices for behaving in disaccord with conformist crowds, for contesting official policies and rules, or for going against majoritarian narratives. Dissenters are often seen as troublemakers, selfish, irrational, or even unpatriotic.

This article’s overall aim is to offer reflections on dissent and its dynamics, based on the author’s continuous and still ongoing empirical and theoretical investigations, and to highlight connections between dissent and whistleblowing. The article does not contain a strictly legal approach based on existing criminal statutes. It expresses a socio-legal and conceptual perspective useful for further tracing important parallels between dissent and whistleblowing. It is built around four core sections in which whistleblowing is seen under the light of dissent. “Dissent: a foundational rather than a disputed concept”; “Establishing the concept of dissent”; “Dissenters as potential catalysts of changes”; “Final remarks and the way ahead for dissent and whistleblowing”. These sections advance the following three arguments.

The first, dissent is a much used but very ambivalent term. Its lack of clarity does not contribute to discussions about its importance and legal regulation. Such legal regulation concerns both the protection as well as the eventual restriction of certain manifestations of dissent. The same can also be argued about the term whistleblowing: its lack of clarity and diverse usage creates difficulties for its legal regulation. The second, dissent and dissenters can be important catalysts of societal changes. The same is valid for whistleblowers. The third, a whistleblower is, by definition, a dissenter who, for whatever reasons, brings to the daylight what was not known by most. It is useful, thus, to study whistleblowers in relation to dissenters.

I. DISSENT: A FOUNDATIONAL RATHER THAN A DISPUTED CONCEPT

Given the variety of ways and contexts in which the term dissent is commonly used in daily life as well as in academic works, most of them without a specification of its exact meaning, one could well argue that it is a disputed concept. After all, one hears a multitude of types and forms of “dissent”, which are not always compatible with each other. For one, the term is often used to refer to disagreement or to criticism. Further, there is a vast literature that uses the term as a synonym of concepts that are only occasionally coincidental. Illustrations of those concepts are disobedience, transgression, protest, deviance, conflict, resistance, non-compliance, subversion, social movement, and a range of political rights and freedoms including the freedoms of speech, association, press, and demonstration.

Indeed, the various types (e.g. political, judicial), forms (e.g. by omission or action, lawful or unlawful means), and manifestations (i.e. individual or collective, peaceful or violent) of dissent are only coincidentally equivalent to those mentioned concepts. For one, a separate and dissenting opinion of a judge in a paneled court (i.e. a judicial dissent) in a jurisdiction that allows that to be expressed represents neither an act of disobedience, nor of transgression.

I do not consider dissent as a disputed concept though, because rather than the controversy over its meaning, there is a lack of effort to define it by the many who use the word. The word dissent is vaguely used, and this is the reason why confusion and ambivalence may rise. I prefer to see dissent as a foundational idea: at the foundation or that is the foundation of

many other ideas. To define dissent means to define a term that is *the core* (rather than merely at the core) of several fundamental ideas constantly examined in scholarly works that cross different fields of inquiry. In the field of law, for instance, dissent is *the core* of fundamental political rights and freedoms including those of speech, press, demonstration, and association. These rights and freedoms are especially relevant to safeguard dissenting views and behavior.

Indeed, in the context of authoritarian regimes which, nonetheless, formally recognize those rights and freedoms, regime loyalists or conformist people whose conducts favor the regime and its officials are likely to enjoy those fundamental rights without serious challenges. This means if people wish to voice their praise to the regime or form an association to support it, those initiatives are likely to be supported rather than repressed. On the other hand, those daring to diverge are likely to encounter a repressive response when trying to voice or demonstrate their dissent or to form an association aimed at challenging the regimes' malpractices.

The concept of dissent appears and intersects several aspects of social life and human interaction. It can be categorized in types according to its predominant nature. In theory, dissent's types include religious, political, judicial, economic, epistemological, philosophical, academic, gender-related, and ecological. These types usually appear combined, though, when manifested in reality. Different fields of study and scholarship focus on the events representing the different types of dissent above. Table 1 offers a list of those broad types of dissent able to categorize individual events and situations.

TABLE 1

TYPES	
(Usually Combined In Reality)	
Predominant Nature/Substance of the Dissent	
1. LEGAL	8. PHILOSOPHICAL
2. JUDICIAL	9. ACADEMIC
3. ECONOMIC	10. EPISTEMOLOGICAL
4. POLITICAL	11. GENDER RELATED
5. CULTURAL	12. ETHICAL
6. SCIENTIFIC	13. TECHNOLOGICAL
7. RELIGIOUS	14. ECOLOGICAL

Dissent's foundational character justifies the term's usage in a variety of contexts and the importance of its close analysis. In the book "Dissent: the history of an American idea", Young offers a journey through the history of dissent in the U.S. by linking dissent with protest, civil disobedience, and social movements:

Dissent is one of this nation's defining characteristics. Every decade since the earliest days of colonization Americans have protested for just about every cause imaginable, and every time they did, defenders of the status quo denounced the protestors as unpatriotic and in more recent times as un-American. But protest is one of the consummate expressions of "Americanness." It *is* patriotic in the deepest sense. (Young, 2015, p. 2-3)

Young's characterization of dissent as a form of patriotism, rather than the contrary, becomes particularly relevant in those times of crises or in those authoritarian contexts in which the holders of political power are not willing to tolerate criticism or, even, views that diverge with the official political "mantras" or policies. Illustration of that was the official motto commonly used in Brazil during its 20-year military dictatorship, which was: "Brazil; love it, or leave it". Such a motto had a clear target: the discontent people who could eventually articulate their dissent and dare to challenge the government's policies and practices.

Dissenting voices remain being silenced around the world though. From rich to poor societies, from lay to religious, from Western to Eastern, and from "democratic" to "non-democratic", there are recent examples from across the world (Sammut, 2014; Lal, 2014; Berlet & Planansky, 2015; Beswick, 2010) on how undue restriction of those rights and freedoms have been taking place or how they have been severely threatened on numerous occasions. Police violence, falsification of evidence against activists, the adoption or implementation of harsh criminal laws, strict surveillance schemes and social control, the efforts to legally label social movements as "gangs" and criminal associations, and just a few examples of resources used to criminalize individual and collective manifestations of dissent that are in large part peaceful and aimed at bringing to light discontent, social problems, and alternative worldviews (Lovell, 2009). The repressive power of governments restricts, thus, the political discussion and neutralizes its manifestations in the public space often seeking to characterize dissenters as harmful, troublemakers, or as dangerous elements.

The possibility of dissenting, which is closely connected to the freedom of expression and that of demonstration, is not only threatened in times of crises or in authoritarian settings, though. That same country of Brazil, decades after its military dictatorship period between 1964 and 1985, which currently have an arguable democratic institutional architecture and practices, may illustrate the argument. In 2013 and 2014, excessive police violence was seen against a wave of massive protests, mostly peaceful. The protesters were particularly showing their grievances against government corruption and the allocation of resources related to the 2014 Football World Cup, hosted by Brazil. It was not a time of crisis, but rather of optimism. During that period of protests and accompanying police repression, the preventive arrest of activists, including a philosophy professor, produced great controversy. The activists were allegedly planning violent street protests to take place on the day of the final game of the World Cup (Amorim; Werneck, 2015). For that, all were criminally prosecuted, and some remained free under the condition of not taking part in any public demonstration, which means not allowing their further dissent.

II. ESTABLISHING THE CONCEPT OF DISSENT

A new definition of a concept requires establishing relations between that concept under investigation and other existing and well-defined concepts. This section is relevant because the discussion and clarification of the term dissent illuminates that of whistleblowing. The previous section underscored the term's ambivalence and its broad types, which justify its usage in various fields and contexts. It stated that many terms such as disobedience and transgression are only occasionally coincident to that of dissent. Hence, there are similarities but also important distinctions between those three terms.

Dissent is also not identical to the freedoms of expression and demonstration, which can be exercised to express conformist views that are convergent to those of many others. To dissent implies not only to have a possibility but also to make a choice to divergently speak out or behave when facing the opinions or conducts of others. Very importantly, those divergent voices or behavior need to be manifested (externally expressed or articulated). A person who

“dissents” in silence without anyone knowing about it is not to be considered a dissenter. The manifestation of dissent, either by action or by omission (i.e. when an action is the expected behavior) brings it to life and generates consequences. The feelings and beliefs of the so-called “silent majorities” or groups of conformists are only relevant once and if mobilized. Such mobilization can be triggered upon the articulated behavior of a first dissenter capable of catalyzing whatever silent divergence they may have. The well-known fable “The Emperor’s New Clothes” by Hans Christian Andersen illustrates the process of collective realization of a reality that was being masked and denied. Such realization only took place because of the dissent of a child who externalized the obvious: the king was naked!

Christian Andersen’s story is relevant to highlight, for one, the relevance of political dissent. A single articulated political dissent can produce doubts in people’s minds concerning government’s acts and force increasing accountability from officials. Dissent or its possibility, as well as the attempt to reduce its formation, can encourage innovative and soundly-motivated political decisions in touch with people’s needs and aspirations – including those of the silent conformist majority (many of whom would take no action even in face of unjust situations).

An important misconception concerning dissent is its supposed connection with criticism. Dissent does not necessarily imply criticism, but rather, a view from elsewhere (Daube, 1971, p. 784ff). Dissent offers another sense, another view, another feeling, another reason: an alternative to something that exists. An alternative view, for instance, regarding a common or majoritarian belief. Often, however, the mere manifestation of that alternative may result in some sort of loss or self-sacrifice of the dissenter. Many dissenters are conscious of such risks and still move ahead.

There is a need to further conceptualize dissent, though. The study of events, manifestations of dissent and its dynamics, and dissenters can contribute to fulfilling that need. A categorization of those manifestations of dissent and a typology of dissenters shall offer a portrait of the many facets of the concept of dissent. This is a much-needed effort for proper normative regulation of rights and freedoms related to dissent. Further, that effort is arguably more relevant than contemporary debates concerning what “right” or “wrong”, “positive” or “negative” kinds of dissent are. An example of this debate in academia was that between Mark Tushnet and Cass Sunstein. With the article “Why societies don’t need dissent (as such)”,

Tushnet (2012) counterargued Sunstein's book "Why Societies need dissent" (2003) by sustaining that societies need dissent of the right kind, rather than dissent as such.

A problem with the use of those dualistic qualifications when referring to dissent is the inherent difficulties to define or find any broad consensus about what "positive" or "right" dissent is. Who is to define that and how that can be defined in practice? Governments can adopt and promote this sort of classification. By doing so, they can promote or silence (by repression) certain dissenting perspectives. That is not truly desirable, though, and that may have an impact on democratic ideals and people's fundamental rights.

An additional challenge to the classification of dissent in dualistic categories of moral substance is the fact that dissent is a relational and contextual concept. An opinion or behavior might be divergent and more or less acceptable depending on their position within an expected order of things (political, social, cultural, legal...), within existing power struggles, and within the dimensions of time and space. Abrupt regime changes can convert conformist individuals, previously in favorable societal positions, into persecuted individuals and who could evolve to dissenters. Hence, political and legal regimes can make dissenters. People who believe and deploy violent means to advance their goals are considered terrorists in some contexts, while possibly being considered as freedom fighters in others. Dissenters, and for that matter, whistleblowers, can be seen both as heroes and as criminals. The following section further elaborates and illustrates this argument.

III. DISSENTERS AS POTENTIAL CATALYSTS OF CHANGES

Young's book (2015) cited in a previous section³ reflects the realization of a historian who noted the centrality of dissent in the context of U.S. history. Dissent is not "an American idea" though, and it has been a catalyst of changes in many places, settings, and time periods. Socrates, Galileo Galilei, and Joan of Arc are important historical examples suggesting that time and circumstances are important references to understand the concept of dissent and the

³ "Dissent: a foundational rather than a disputed concept".

role of dissenters (during their lives but also after their deaths). Joan of Arc, for one, was burnt alive as a heretic in 1431 and in 1920, almost 500 years later, was made a Saint by the same Church. These well-known historical illustrations bring to light the ways that the present and future may vindicate past dissent.

Other dissenters from across the world have paid high prices for speaking out when others silenced. Some led struggles that originated radical societal transformations. In important cases, what started as dissent became the new norm. A few dissenters have gained great notoriety, have fostered innovation, and entered history. Some became important leaders in their societies as well as in the world scene. Many Nobel Peace Prizes laureates exemplify the point. Among them, Aung San Suu Kyi from Myanmar, Nobel Peace Prize in 1991 and Nelson Mandela from South Africa, Nobel Peace Prize in 1993. Others left their relevant marks despite their premature and avoidable deaths, like Liu Xiaobo from China, Nobel Peace Prize in 2010. He died on July 13th, 2017 when serving his latest sentence of 11 years in prison for “inciting subversion of state power”. Finally, there are others who started leaving their mark from an early age. Malala Yousafzai, from Pakistan, is the youngest-ever Nobel Peace Prize laureate (at 17) in 2014. Yousafzai started her advocacy for girls’ education when still a child and, at fifteen, she was shot in the head for her activism.

The study of the dynamics of dissent, which includes the conditions of dissenting and the probable motivation of dissenters, allows us to perceive the different predominant grounds guiding their behavior. Those dissenters mentioned above had their courage and value-oriented conducts recognized. They stood against what they perceived as grave injustices or wrongdoings. Their dissent can be considered as ideological, based on values and convictions, and altruistic, based on selfless concern for the well-being of others and to reach social goals related to ideals of justice. On the other hand, there could be forms of egoistic dissent or dissenters. A politically weakened president of a country who dissented from a parliament launching impeachment procedures against him would likely have egoistic grounds (i.e. to maintain his position) as the immediate and most direct motivation to dissent.

IV. FINAL REMARKS AND THE WAY AHEAD FOR DISSENT AND WHISTLEBLOWING

The previous sections laid the initial theoretical notes for future comparative explorations between the concepts and phenomena related to dissent and whistleblowing. Those theoretical notes are useful to support related empirical investigations. There are important parallels between dissent and whistleblowing, and between dissenters and whistleblowers. Whistleblowers are examples of dissenters who for whatever reason or motivation (e.g. egoistic or altruistic) disclose and bring to the daylight what was not known by most. Even one dissenter or whistleblower can make a difference by disclosing data ignored by others, by changing hearts and minds, and by fostering important changes locally and globally. Sunstein has highlighted the important role of dissenters including those who “blow the whistle”:

Conformists are often thought to be protective of social interests, keeping quiet for the sake of the group. By contrast, dissenters tend to be seen as selfish individualists, embarking on projects of their own. But in an important sense, the opposite is closer to the truth. Much of the time, dissenters benefit others, while conformists benefit themselves. If people threaten to blow the whistle on wrongdoing or to disclose facts that contradict an emerging group consensus, they might well be punished. Perhaps they will lose their jobs, face ostracism, or at least have some difficult months. (Sunstein, 2003, p. 6)

Further, he sustains that, “When someone blows the whistle on government fraud or deceit, the real winners are members of the public, not the whistleblower. Legal protection of whistleblowing is an effort to ensure the free flow of information” (Sunstein, 2003, p. 98). The legal protection Sunstein mentions will never be comprehensive though, and to a large extent shall depend on the exact conduct undertaken by whistleblowers and on a range of issues that go beyond legal technicalities within legal norms. The evaluation of the behavior of dissenters depends on many factors and the same happens to that of whistleblowers. The value of whistleblowing and whistleblowers is conditioned by specific settings, time, and places, which have their own impact on the way relevant legal norms are interpreted or constructed. Legal cultures are embedded in broader societal contexts and they all interfere on the dynamics of whistleblowing – including the institutional reactions that it provokes.

Much can be learned through the analysis of events in which whistleblowers were either encouraged by the force of a protective regulatory framework or, on the other hand, restrained

(or eventually repressed) despite a supposedly protective regulatory framework. In other words, to investigate whether (or the extent to which) whistleblowers had to pay high prices for their actions even if not supposed to. Such events can demonstrate how conformity is valued in practice and how the dissent of whistleblowers can effectively meet strong resistance and repression.

In another work⁴, I have offered a classificatory framework that is useful for analyzing instances of dissent in different settings, times, and places. That framework can be useful also for building a typology for the study of whistleblowers. The classificatory framework for events of dissent, which can be borrowed by scholars focusing on whistleblowing, include the following factors or categories. The type (e.g. political, religious, judicial), motivation (e.g. altruistic, egoistic), goal (e.g. disruptive, constructive), form of expression (e.g. peaceful, violent, concealed, overt, by action or by omission), its promoter (e.g. individual, a movement, an institution, a minority or a majority), outcome (e.g. successful, non-successful), and reaction (e.g. suppressive, supportive).

Whistleblowers are often conscious and aware of the risks and probable losses they are likely to have in their careers, personal lives, freedoms, physical integrities, and even to their own existence when choosing to break their silence. But they still do so. Whistleblowers can foster relevant changes when offering evidence that was unknown and by raising divergent or alternative viewpoints.

Besides potentially offering important alternatives to existing perspectives, dissenters and whistleblowers may strengthen the grounds of existing ones by questioning usual but thoughtless assumptions. Their behavior encourages conformist forces and people to justify their choices and re-evaluate their positions. Many dissenters and whistleblowers are likely to balance and outweigh the consequences of their behavior. Many are likely to silence themselves after such a process.

Interdisciplinary and legal scholarship must offer theoretical and empirical support to lawmakers and regulators to pass and amend laws and norms aimed at regulating dissent and whistleblowing. Scholars and officials have the common duty to challenge commonsensical negative views about dissenters and whistleblowers. Times of crisis seem to and do require

⁴ The work's title is "Digitalization and dissent in legal cultures. Chinese and other perspectives". See: Halis, 2020.

unity and consensus. Such unity and consensus, however, must not disregard diversity and must value divergence.

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Data de Submissão: 15/07/2021

Data de Aceite: 27/07/2021