European Union and its Neighbours
in a Globalized World 3

Hava Charlotte Lan Yurttagül

Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union

An Emerging Consensus

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Brussels, Belgium Hava Yurttagül
19 April 2021

Contents

Abbreviations

AFCO	Committee on Constitutional Affairs of the European Parliament
APA	Accredited Parliamentary Assistant
CJEU	Court of Justice of the European Union
CM	Committee of Ministers of the Council of Europe
CoE	Council of Europe
CONT	Committee on Budgetary Control of the European Parliament
COVID-19	Coronavirus disease 2019
CPQS	Preparatory Committee for Matters relating to the Staff Regulations
CULT	Committee on Culture and Education of the European Parliament
EASA	European Aviation Safety Agency
ECA	European Court of Auditors
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECON	Committee on Economic and Monetary Affairs of the European Parliament
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EESC	European Economic and Social Committee
EIB	European Investment Bank
EMPL	Committee on Employment and Social Affairs of the European Parliament
EMSA	European Maritime Safety Agency
ENVI	Committee on the Environment, Public Health and Food Safety of the European Parliament
EO	European Ombudsman
EP	European Parliament
EPPO	European Public Prosecutor's Office
EU Charter	Charter of Fundamental Rights of the European Union
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo

FRA	European Union Agency for Fundamental Rights
GDPR	General Data Protection Regulation
GIP	General Implementation Provision
GRECO	Group of States against Corruption
HRC	UN Human Rights Committee
IBA	International Bar Association
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCom	International Chamber of Commerce
IDOC	Investigation and Disciplinary Office
ILO	International Labour Organization
IPW	Implementing Provisions on Whistleblowing
JURI	Committee on Legal Affairs of the European Parliament
LIBE	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships
MEP	Member of the European Parliament
MLC	Maritime Labour Convention
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OOPEC	Office for Official Publication of the European Community
OPC	Open Public Consultation
PA	Parliamentary Assembly of the Council of Europe
Paris MoU	Paris Memorandum of Understanding on Port States Control
PIDA	Public Interest Disclosure Act
RSB	Regulatory Scrutiny Board
SARS	Severe acute respiratory syndrome
SOP	Standard operating procedure
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TI	Transparency International
UCITS	Undertakings for Collective Investment in Transferable Securities
UN	United Nations
WBG	World Bank Group

List of Figures

List of Tables

Chapter 1
Introduction

1.1 An Aura of Mystery

Whistleblowers. Individuals cloaked in an aura of mystery. Recent film productions illustrating their stories or the scandals sparked by their disclosures have added a touch of glamour to their persona, the leading roles often played by la crème de la crème of Hollywood.[1] Heroes for some, traitors for others, whistleblowers leave no one indifferent. Criminal or altruistic, the act of blowing the whistle has inflamed passions and sparked fierce controversy over the last few decades, raising the recurrent question: Secrecy at what cost? By revealing unpalatable truths, whistleblowers challenge the status quo, shake up the implicit consensus of what should remain secret, and by doing so, disrupt an existing harmony. "Conflicts over secrecy . . . are conflicts over power: the power that comes through controlling the flow of information".[2] Often member of a small group of individuals with privileged access to information, a whistleblower calls into question the very control of that flow, and aims to recalibrate the established power dynamic. However, dissent against an established order generally meets with strong opposition. Whistleblowing being a form of dissent, opposition against whistleblowers often translates into acts of retaliation for having dared to question the existing status quo. In order words: "snitches get stitches".

[1] Gavin Hood, *Official Secret*, 2019 film, starring Keira Knightley; Scott Z. Burns, *The Report*, 2019 film, starring Adam Driver; Steven Soderbergh, The Laundromat, 2019 film, starring Maryl Streep, Antonio Banderas and Gary Oldman; Steven Spielberg, The Post, 2017 film, starring Maryl Streep and Tom Hanks.

[2] Bok (1989), p. 19.

H. C. L. Yurttagül, *Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union*, European Union and its Neighbours in a Globalized World 3, https://doi.org/10.1007/978-3-030-78059-3_1

1.1.1 A Legal Perspective

This situation sets the stage for what can be called the whistleblower's dilemma: Remaining silent in the face of misconduct, or blowing the whistle at the risk of suffering retaliation? The dilemma raises a myriad of scholarly issues in a wide variety of academic fields, from psychology to sociology and philosophy, business management to political science and economics, culture to history and law. This book will analyze the different aspects of whistleblowing through a legal lens, and focus on the different considerations in the development of whistleblower laws in Europe.[3] First introduced in the United States (U.S.), whistleblower laws are a decisive stand for whistleblowing as an important contribution to a democratic society. In recent decades, other countries have gradually introduced similar laws, an international trend which reveals the general recognition of whistleblowers as key players in democratic societies.

Notwithstanding this evolution, a number of legal conflicts renders the development of effective whistleblower laws especially arduous. It is particularly evident in the U.S. where, despite a set of leading whistleblower regulations, an increasing number of whistleblowers have been criminally prosecuted in the last decade, thereby emphasizing the blurred lines which define the legal status of whistleblower. Indeed, the complexity of whistleblowing as a legally protected act lies on two main aspects: On the one hand, the qualifying criteria of the status of whistleblower under the law, on the other hand, the formalities and extent of the mechanism established.

1.1.2 Key Questions

Those different elements of a whistleblower law evolve around key questions and related issues: Who can be defined as whistleblower under the law? Could an individual like Julian Assange be considered a whistleblower, for example? What kind of wrongdoing can be the object of a whistleblower report? Does it have to be acts and omissions prohibited by law or can it also include reprehensible conduct which is not per se illegal? What kind of mechanisms should be put in place to receive whistleblower reports? Should the law aim to protect whistleblowers against retaliation or also encourage whistleblowing through different incentives, such as financial incentives? Should individuals be under a legal duty to blow the whistle? Should leaks or anonymous reporting be included in a whistleblower framework? What about disclosures of classified information which posed a potential threat to national security interests? Should individuals who made those disclosures fall

[3] If certain parts of the book touch upon other fields of research, it will do so in general terms without seeking to reflect the complexity of the subject of whistleblowing within those respective disciplines.

within the scope of application of whistleblower laws? To provide context, those questions will be discussed in Part I of this book.

1.1.3 An International Angle

In consideration of the foregoing, the legal ramifications of the balancing exercise around those questions have led to diverging conceptions of the nature of whistleblower laws around the world. However, while heated debates persist, the growing number of countries to adopt whistleblower laws has prompted Non-governmental organizations (NGOs) and intergovernmental organizations to identify best-practices in order to guide countries in the adoption of their national whistleblowing regulations. Notwithstanding those international efforts, the legal protection coverage offered to whistleblowers remains uneven and fragmented worldwide. However, the sensational disclosures made by whistleblowers over the last decade, which revealed international personal data abuses, complex tax-avoidance schemes, and international law violations, brought growing public awareness of the role of whistleblowers for democracies and shifted the debate, from a niche topic to a pop culture issue. This subtle yet unequivocal change of attitude towards whistleblowing is nowhere more evident than in Europe.

1.2 The European Context

Indeed, the European historical background, with the methods used by the Nazi regime, the spying age of the Cold War, as well as the surveillance state in the former Soviet Union, has created a deeply rooted and understandable hostility against so-called 'informers'.[4] Because of this history, we Europeans "have not yet attained even the American level of pro-whistle-blowing rhetoric",[5] and have much to learn from the American experience.[6] Until recently, the act of whistleblowing did not seem to enjoy widespread recognition in Europe.[7] This is particularly well illustrated by the diversity of translations or the lack of equivalence of the term *whistleblowing*,[8] some European countries referring to their laws on witness

[4]Vaughn (2012), pp. 253–254; see also Dehn (1996), p. 10.

[5]Committee on Legal Affairs and Human Rights of the Council of Europe [hereinafter "Committee on Legal Affairs"], *Report on the protection of "whistle-blowers"*, Explanatory memorandum, Doc. 12006, 14 September 2009, para 1.

[6]Ibid., para 97.

[7]Ibid., para 16.

[8]Ibid., para 26.

protection when asked about their whistleblowing regulations,[9] which reveals a general misunderstanding in regard to whistleblower protection.

While certain European countries have kept the terms whistleblower/whistleblowing, others have translated the terms in a variety of ways, evoking different ideas: France uses *lanceur d'alerte* ("the alert launcher"), Germany uses *Hinweisgeber* ("person giving information"), in Latvia, it is *trauksmes cēlējs* ("alarm builder"), in Sweden *visslare* ("whistler"), in Slovenia, *notranji informator* ("internal informant") or in Malta, the term *informatur* ("informant") is used.[10] The act of whistleblowing is also differently defined around Europe, which demonstrates the diversity of understanding of the term. In some European countries, the concept of whistleblowing can be closely related to denunciation or the act of an informant, which can have a particularly negative connotation.[11] This diversity underlines how "the question of whistle-blowing is closely intertwined with the countries' legal cultures in general".[12] While in the U.S., "the term whistleblower was coined as an alternative to these negative epithets",[13] the plurality of European definitions and terms emphasizes how, at least until recently, Europe was lagging behind in regard to the protection of whistleblowers.

1.2.1 An Emerging European Consensus

In the last decade, however, a fundamental shift took place in Europe. Starting in the early 2010s, European initiatives tried to identify common grounds in regard to whistleblowing, which created a positive momentum for change. This book will examine those international and supranational efforts undertaken by the Council of Europe (CoE), the European Court of Human Rights (ECtHR), and the European Union (EU) and analyze their positions in respect to the different issues around whistleblower legislation. This analysis will bring to light an emerging European consensus.

1.2.2 The Position of the Council of Europe and the ECtHR

Since the beginning of the 2010s, the different organs of the CoE started to draw particular attention to the different aspects of whistleblowing, thereby initiating a

[9]Ibid., para 27.

[10]Eurovoc. *Whistleblowing*, EU Vocabularies.

[11]Committee on Legal Affairs, *Report on the protection of "whistle-blowers"*, Explanatory memorandum, para 28.

[12]Ibid., para 28; see also Vaughn (2012), pp. 255–258.

[13]Vaughn (2012), p. 256.

new European dynamic towards stronger whistleblower laws. The Parliamentary Assembly (PA) of the CoE was the first to adopt dedicated recommendations and resolutions on the protection of whistleblowers, laying the groundwork for the development of common European standards (Sect. 3.2). The Committee of Ministers (CM) of the CoE responded with the adoption of its own recommendations, which became leading principles for the establishment of a unified vision of whistleblowing across Europe (Sect. 3.3). On the judicial front, the ECtHR fostered this shared understanding through its case-law on whistleblowing under Article 10 of the European Convention on Human Rights (ECHR).[14] (Chap. 4) The different criteria developed by the ECtHR under Article 10 ECHR, especially in regard to the conflicting relationship between professional loyalty and whistleblowing, underline the determinant role of the judiciary which, with its interpretative authority, can greatly influence the level of protection afforded to whistleblowers (Sect. 4.4). The analysis of the ECtHR's case-law on whistleblowing will also highlight the responsibilities incumbent on the courts in respect to the delicate balancing exercise they must undertake between the competing interests at stake.

While the ECtHR's jurisprudence and the different resolutions and recommendations of the CoE aim to foster a harmonized protection for whistleblowers across Europe through the adoption of national laws established on the basis of common standards, a groundbreaking proposal by the PA called for the adoption of a legally binding Convention, thereby internationalizing the protection coverage for whistleblowers. Such an international legal instrument would truly be revolutionary and seems long overdue (Sect. 3.5.1). Indeed, in an ever more globalized and interconnected world, the cross-border effects of cover-ups have made the need for consistent and coherent whistleblower protection mechanisms increasingly pressing, especially in the security sector (Sects. 2.3.2 and 3.4). The global and deadly consequences of a lack of national whistleblower laws became painfully evident during the Covid-19 pandemic (Sect. 2.3.3).

1.2.3 The European Union Whistleblower Directive

The EU made the first step towards that goal. Indeed, the European patchwork approach hitherto followed (Chap. 7) and lack of "convergence based on uniform standards"[15] between EU Member States encouraged the EU legislator to adopt in 2019 an EU Directive on the protection of persons who report breaches of Union

[14]Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, ETS No. 005.

[15]EU Commission, *Commission Staff Working Document : Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law*, SWD(2018) 116 final, 23 Avril 2018, p. 3.

law[16] (hereinafter referred to as "EU Whistleblower Directive"), to remedy the fragmented nature of measures dedicated to whistleblower protection in the EU (Chap. 8). Contrary to the resolutions and recommendations of the CoE, the newly adopted EU Whistleblower Directive is legally binding and imposes an obligation upon EU Member States to transpose the Directive's provisions into national law, a historical step towards a more harmonized legal protection of whistleblowers across Europe. This EU Directive laid down the first stone for the future adoption of an international convention on whistleblowing, which would put an obligation on every country to adopt common rules and establish centralized organs competent to receive reports on wrongdoing. It could also be an opportunity to give international and supranational bodies the ability to intervene and prevent the risk of cover-ups.

1.3 A Long Way Ahead

However, despite a decisive step towards stronger whistleblower laws across Europe, those European initiatives remain to be transposed into national law. The arduous part is therefore still ahead of us. Considering the fragmented scope of application of the EU Whistleblower Directive, it remains to be seen whether EU Member States will go beyond that scope and adopt extensive provisions in regard to their national whistleblower laws. While certain non-EU Balkan countries have already adopted extremely ambitious whistleblower protection frameworks, it is highly uncertain whether other European countries will follow this lead. On an international and supranational level, the European institutions themselves need to address the shortcomings in regard to their own internal rules on whistleblowing to avoid being accused of hypocrisy. Indeed, while they promote stronger whistleblower protection mechanisms within their Member States, the CoE and the EU remain far behind in regard to their own whistleblower protection policies. While the World Bank Group (WBG) and the United Nations (UN) have long established internal whistleblowing regulations, taking into account the particularities in regard to their special legal status as intergovernmental organizations (Sect. 2.6), the Staff regulations within the CoE (Sect. 3.5.3) and the EU (Chap. 5) remain to be reformed in order to comply with the minimum standards those same institutions have imposed on their Member States so as to reflect the new European consensus they helped to define.

[16]Directive (EU) *2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law*, OJ L 305, 26.11.2019, p. 17.

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Part I
International Perspective

Chapter 2
Introduction to Whistleblower Laws

2.1 The Genesis of "Whistleblowing"

The origin of the concept of "whistleblowing" is unclear. Some credit Ralph Nader, others a British practice.[1] What is certain, however, is that as early as January 1971, the New York Times reported on Mr. Nader's new initiative to promote 'responsible whistleblowing' by scientists, engineers and other professional employees of corporations and government". According to Mr. Nader, "Employed professionals . . . are too often the silent instruments of private and public policies which contravene the public interest, destroy the environment and defraud the taxpayer and consumer.. . . Those professionals who have spoken out, within and beyond their organizations, have too often been demoted, ostracized, discharged or suppressed when in fact they frequently may be heroic figures".[2]

The Conference on Professional Responsibility that followed, "which brought together some of the leading exponent of 'whistle blowing' . . . and some of the individuals who in different circumstances have felt compelled to speak out against the activities of their organizations",[3] resulted in the 1972 published report entitled *Whistle Blowing*, also known as the Nader Report,[4] which illustrates a common narrative of individual responsibility through whistleblowing.[5] From then on, U.S. newspapers started to use the term,[6] revealing the growing public recognition and acceptance for the notion of whistleblowing.

[1] Vaughn (2012), p. 256.

[2] Morris (1971, 27 January), p. 32.

[3] Nader et al. (1972), p. vii.

[4] Ibid.

[5] Ibid., p. 38.

[6] e.g. Morris (1971, 27 January); Dudar (1977, 30 October 1977), p. 201; Jensen (1978, 19 May), Section D, p. 1.

H. C. L. Yurttagül, *Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union*, European Union and its Neighbours in a Globalized World 3, https://doi.org/10.1007/978-3-030-78059-3_2

According to the Nader Report, whistleblowing can be defined as "the act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent, or harmful activity".[7]

2.1.1 The Pioneering Role of the U.S.

As a pioneer in the field,[8] the U.S. has followed a rather sectorial "piecemeal approach" in regard to whistleblower protection, creating "an inconsistent legislative patchwork".[9] To remedy this situation, the U.S. federal legislator gradually introduced more comprehensive whistleblowers laws.

2.1.1.1 The Sarbanes-Oxley Act

While remaining sector specific, these pieces of legislation introduced some of the most ambitious whistleblowing mechanisms, with a sphere of influence stretching far beyond U.S. borders. The Sarbanes-Oxley Act[10] for example, adopted in response to U.S. corporate scandals, applies to companies listed on U.S. stock exchanges and was praised for being "the most important whistleblower protection law in the world".[11] It establishes both anti-retaliation measures, including criminal charges against individuals who retaliate against whistleblowers,[12] and anonymous reporting channels.[13] Despite its shortcomings,[14] the extraterritorial impact of the Sarbanes-Oxley Act, which may find its legal justification in the voluntary recourse to the U.S. capital market,[15] has greatly enhanced its international relevance as a legal transplant.[16]

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[7] Nader et al. (1972), p. vii.

[8] Committee on Legal Affairs and Human Rights of the Council of Europe [hereinafter "Committee on Legal Affairs"], *Report on the protection of "whistle-blowers"*, Explanatory memorandum, Doc. 12006, 14 September 2009, para 98.

[9] Boyne (2016), pp. 280–283.

[10] Pub. Law 107-204, 116 Stat. 745 (2002).

[11] Vaughn (2005b), p. 73.

[12] 18 U.S.C. § 1513 (e).

[13] 15 U.S.C. § 78j-1(m)(4)(A) (Supp. 2004).

[14] See e.g. Moberly (2006), pp. 1107–1180; Moberly (2007), pp. 65–155.

[15] Gerdemann (2018), pp. 366–367.

[16] On U.S. corporate compliance mechanisms as legal transplants, see e.g. Gerdemann (2018), pp. 366 et seq.; Hertel (2019), pp. 56 et seq.

2.1.1.2 The Whistleblower Protection Act

On the public side, the Whistleblower Protection Act[17] represents the ambitious attempt of the U.S. Congress to address the "legal system's schizophrenic perspective on dissent reveal[ing] the inherent consequences of secrecy - sharp contradictions between policies set in the public eye and those implemented outside it".[18] It is the key piece of federal legislation in the field of whistleblower protection[19] and covers public employees who work for federal bodies, with the exception of, inter alia, the Central Intelligence Agency (CIA) and the National Security Agency (NSA).[20] Employees working for these agencies, together with any employee in a position which is "excepted from the competitive [federal] service because of it confidential, policy-determining, policy-making, or policy-advocating character"[21] or "excluded ... by the President based on a determination by the President that is it necessary and warranted by conditions of good administration"[22] thus fall outside the scope of application of the Whistleblower Protection Act. As will be demonstrated below, such exceptions can be particularly detrimental to the effective protection of whistleblowers who disclose classified national security information revealing misconducts committed by the State and its intelligence services.[23]

2.1.1.3 The *Garcetti v. Cebellos* Case

The *Garcetti v. Cebellos* judgment of the U.S. Supreme Court[24] in particular illustrates the vulnerability of public employees when blowing the whistle, some calling it the virus of job duties exclusion.[25] The U.S. Supreme Court indeed held that a public employee does not enjoy constitutional protection for speech "that owes its existence to [his] professional responsibilities"[26] and thus concluded that disciplinary measures adopted because of such speech cannot be considered a violation of the First Amendment. However, with this constitutional background, the wide scope of laws protecting classified national security information[27] and the restrictive application of federal whistleblowers laws thus leave public whistleblowers mostly

[17] 5 U.S. Code §§ 1201 et seq. (1989).

[18] Devine (1999), pp. 535–536.

[19] Committee on Legal Affairs, Report on the protection of "whiste-blowers", *Explanatory memorandum*, para 100.

[20] 5 U.S.C. § 2302(a)(2)(C)(ii)(I).

[21] 5 U.S.C. § 2302(a)(2)(B)(i).

[22] 5 U.S.C. § 2302(a)(2)(B)(ii).

[23] On the conflict between whistleblowing and national security see Sect. 2.3.2.

[24] 547 U.S. 410 [2006].

[25] Modesitt (2012), pp. 161–208.

[26] 547 U.S. 410, at 421 (majority opinion).

[27] e.g. 18 U.S.C. § 793(d).

unprotected against retaliation if their disclosure relate to classified national security information.[28]

The existing legal loophole in the U.S. whistleblower protection system gained international attention after the revelations by and prosecution of Edward Snowden, a case presented further below.[29] It will also be particularly interesting to contrast the U.S. Supreme Court's position with that of the ECtHR, which afforded protection to a public official who disclosed classified national security information.[30]

2.1.2 The Whistleblower's Dilemma

2.1.2.1 The Challenge of Bureaucracy

The underlying challenge with regard to whistleblowing can be described as follows: "The bureaucracy is a Goliath, and the machinery available to enforce its will is immense".[31] "As the power becomes coagulated, it becomes lazy and entrenched. From there, it is a short step to its becoming corrupt and predatory . . . In this way, whistle-blowing has moved into a breach left by the failure of the traditional methods of institutional control".[32] However, as a form of bureaucratic opposition, the act of whistleblowing can face strong resistance from the hierarchy[33] and lead to a clash between different bonds of loyalty.[34] In those circumstances, " the possibility of dissent within the hierarchy . . . become[s] so restricted that common candor requires uncommon courage".[35] This is the reason why, despite the diversity of circumstances in which whistleblowers can find themselves, early commentators identified common experiences:[36] Whistleblowers faced great hardship[37] in the form of dismissal, transfers or harassment for having "breached the etiquette of hierarchical management".[38]

[28] Vladeck (2008), p. 313.

[29] See Sect. 2.3.2.2.

[30] On the *Bucur and Toma* ruling of the ECtHR see Sect. 4.4.2.4.

[31] Dudar (1977, 30 October 1977).

[32] Peters and Branch (1972), pp. 293–294.

[33] Weinstein (1979), p. 58.

[34] Elliston (1982b), p. 25.

[35] Nader (1972), p. 3.

[36] Near and Jensen (1983), p. 4.

[37] Ibid., p. 25.

[38] Nader et al. (1972), p. 155.

2.1.2.2 Retaliation

"'Bureaucratic genius for retaliation' . . . is at its most creative in devising reprisals against those who mount oppositions".[39] Retaliation, in relation to whistleblowing, can thus be defined "as undesirable action taken against a whistleblower – in direct response to the whistleblowing – who reported wrongdoing internally or externally, outside the organization".[40] In practice, retaliation in the form of harassment appeared to be particularly common "because it is difficult to prove and quite often the employee has not done anything technically improper to justify formal action".[41] Early studies on retaliation against whistleblowers seem to suggest that acts of retaliation follow different patterns.[42] While retaliatory measures against high-ranking whistleblowers may follow a damage-control reasoning,[43] retaliation against less powerful employees may be motivated by their limited influence in the company and thus increased vulnerability.[44] The likelihood of retaliation was also increased through a situation of power dynamic combined with a lack of support from middle and top management.[45] A 1978 U.S. congressional report on whistleblowing underlined the chilling effect of retaliation, which can deter future potential whistleblowers from reporting wrongdoing.[46] As a consequence, employees, who are amongst the first to become aware of wrongdoing or dangerous dysfunctions within their organization and hierarchy,[47] thus remain silent or suffer serious personal prejudice for having expressed their concerns.[48]

It leads to the crystallization of the whistleblower's dilemma: an employee "motivated by a personal or professional code of ethics, attempts to correct a problem at the risk of his or her career, financial security and reputation".[49]

[39]Weinstein (1979), p. 108.

[40]Rehg et al. (2008), p. 222.

[41]Committee on Governmental Affairs of the United States Senate, *The Whistleblowers: A Report on Federal Employees who Disclose Acts of Governmental Waste, Abuse and Corruption* [hereinafter "The Whistleblowers report"]. U.S. Government Printing Office, 1978, p. 27.

[42]Parmerlee et al. (1982), p. 31.

[43]Ibid., p. 30.

[44]Near and Jensen (1983), pp. 23–24.

[45]Near and Jensen (1983), Miceli and Near (1986), Miceli and Near (1989), Near et al. (1993) and Parmerlee et al. (1982).

[46]Committee on Governmental Affairs of the U.S. Senate, *The Whistleblowers report*, p. 2.

[47]Weinstein (1979), p. 62.

[48]Morris (1971, 27 January).

[49]Committee on Governmental Affairs of the United States, *The Whistleblowers report*, p. 6.

2.1.3 *The Essence of Whistleblower Laws*

As the act of whistleblowing gained public recognition, considerations over the need to develop dedicated laws became increasingly relevant.[50] This followed the primary idea that "[b]ureaucracies are not rigid and static but dynamic".[51] Accordingly, organizational culture influences the likelihood of wrongdoing being reported and addressed.[52] In other words, to promote organizational responsibility and accountability, "organizational power must be insecure".[53]

2.1.3.1 Protection vs. Incentives

Different conceptions of whistleblowing emerged during its early development into a fully-fledged legal notion. According to a prevailing view, the main difficulty arising from whistleblowing evolved around the conflict between the duty to society and the duty of loyalty to the employer. In this sense, blowing the whistle brings forward a professional and individual responsibility[54] not to the organization but to society as a whole[55] and represents "the last line of defense ordinary citizens have against the denial of their rights and the destruction of their interests by secretive and powerful institutions".[56] According to this understanding, whistleblowing raises "a tension between an employee's private loyalty to his employer and his public loyalty to the community. . . . The fact that his disclosure would be of "incalculable damage" to his employer can hardly be thought to reduce that duty of disclosure".[57] This conception promotes a utilitarian approach to whistleblowing, putting the emphasis on the public interest of the disclosure. Another view of whistleblowing contradictes this position and places the focus on the balance "between the individual's interest in acting according to his conscience and the employer's interests in his employee's silence",[58] and by extension, loyalty.[59]

Distinguishing those conceptions of whistleblowing helps one understand the different elements at play in the legal reasoning behind whistleblower laws. While the former reasoning offers a broader vision of whistleblowing, underlining the societal contribution of whistleblowers, the latter position emphasizes the difficulties

[50] Ibid.

[51] Vaughn (1977), p. 293.

[52] Miceli and Near (1986), p. 137.

[53] Nader (1972), pp. 10–11.

[54] Nader et al. (1972), p. 140.

[55] Nader (1972), p. 7; see also Elliston (1982a), p. 169.

[56] Nader (1972), p. 7.

[57] *Yellow Cab of California*, 65-1 ARB Par. 8256,44 LA 174-445 (164) (Edgar A. Jones, Arbitrator).

[58] Malin (1983), p. 318.

[59] Ibid., p. 278.