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▶ **To cite this version:**

Olivier Leclerc. Overarmed or underdressed? Whistleblowers between anti-discrimination law and freedom of expression. International Journal of Discrimination and the Law, 2023, 23 (3), pp.265-282. 10.1177/13582291231154161 . hal-03952850

**HAL Id: hal-03952850**
**https://hal.science/hal-03952850**

Submitted on 27 Jan 2023

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# Overarmed or Underdressed? Whistleblowers between Anti-discrimination Law and Freedom of Expression

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Published in: *International Journal of Discrimination and the Law*, 2023 (Online first 27 Jan. 2023)

The final authenticated version is available online at:
DOI: https://doi.org/10.1177/13582291231154161

**Abstract:** *Does retaliation against a whistleblower qualify as discrimination or an infringement of freedom of expression? In France, whistleblowing legislation has built whistleblower protection on the model of discrimination. The transposition of the European Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of EU law, reinforced by domestic case law, shifts the balance towards freedom of expression. Standing at the crossroads of discrimination and freedom of expression, the protection of whistleblowers is in urgent need of conceptual clarification, which this article seeks to provide. To this end, the article proposes to consider the status of whistleblower as a layered legal regime, in addition to an underlying legal status such as employee, civil servant, journalist or other. The articulation between discrimination and freedom of expression thereby gains a strategic dimension that is essential to it. This understanding helps to clarify how discrimination law and freedom of expression can benefit whistleblowers and thus strengthen rather than weaken their protection*.

**Keywords:** Whistleblowers; Disclosure; Discrimination; Freedom of expression; Secrets; Immunity

European countries' legislation on whistleblower protection is being given a boost by the entry into force of 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 European Union law. With regard to whistleblower legislation, the situation of European states varies greatly (Apaza and Chang, 2017; Fasterling, 2014; Lewis, 2010a; Skupień,

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2021; Thüsing and Forst, 2016; Transparency International, 2013). Some countries like the United Kingdom (Gobert and Punch, 2000; Lewis 1998, 2001, 2010b; Middlemiss, 2017), Australia (Dworkin and Brown, 2013; Hardy and Williams, 2014), Ireland (Keating and Keating, 2013; Kierans, 2015) have developed detailed legislation. In other countries, the protection afforded to whistleblowers is significantly lesser, if not non-existent. While the Directive will provide an opportunity for the countries with advanced whistleblower protection to adjust their legislation to some degree, its transposition represents a major step forward for others.

This opportunity to strengthen whistleblowing legislation also provides an occasion for much-needed conceptual clarification. Whistleblowing legislation indeed encompasses two main objectives. On the one hand, it implies granting special protection against reprisals to people who disclose wrongful acts (whose scope depends on legislation, but typically involves the violation of the law and risks to health or the environment). On the other hand, it entails collecting and processing the information disclosed by whistleblowers so as to verify and to stop, and possibly sanction, the facts reported (Savage and Hyde, 2015). Both facets are key features of an effective whistleblowing legal regime: the whistleblower must be effectively protected, and a proper processing of the reported facts must be provided so that the disclosure is not simply covered up.

This article examines how these two constituent aspects of whistleblowing are reconciled in French law. France stands out as one of the countries with comprehensive whistleblower protection legislation, particularly since the law 2016/1691 of 9 September 2016 "on transparency, the fight against corruption and the modernisation of economic life" came into force (Adam, 2017). In line with what has happened in other countries (Lewis, 2005), the French legislation on whistleblowers has been built on the model of protection against discrimination (Leclerc, 2017). Be it for employees, civil servants or, under certain conditions, military and intelligence officers (Foegle, 2015), retaliation against whistleblowers has been conceptualized as prohibited differential treatment. Whistleblowing is thereby treated as a case of discrimination in its own right. Just as no one may be treated disadvantageously because of their gender, sexual orientation or origin, to name just a few prohibited grounds of discrimination, no one can be victimized because they have blown the whistle. The Directive of 23 October 2019 provides a much-awaited rebalancing of the legal regime for whistleblowing by providing for both the protection of whistleblowers and the collection, treatment, and monitoring of reports. The transposition of the Directive has then allowed for a reorientation of French law, which until then had focused on the protection of whistleblowers and only contained sparce and allusive provisions on the handling of reports. The law of 21 March 2022[2] and its related decrees[3] intended to transpose the European Directive into French law now include new provisions on the "collection and processing" of reports on whistleblowing (Leclerc, 2022a). These provisions reflect the realization that the purpose of the whistleblower law cannot only be to protect whistleblowers from reprisals, but also to support the expression

[2] Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
[3] Decree no. 2022-1284 of 3 October 2022; Decree no. 2022-1686 of 28 December 2022.

of any person acting in the public interest (Toubon and Lagasse, 2019). In doing so, the new legislation shifts the balance of the legal regime of whistleblowing. The latter is no longer collapsed solely into the discrimination regime but now stands at the crossroads of discrimination law and the protection of freedom of expression. This creates an urgent need for a better understanding of the conceptual distinction between the two components of whistleblowing, i.e. discrimination law and freedom of expression, than has previously been the case in legal research.

Both discrimination and freedom of expression have their own long and complex histories, which go far beyond the realm of whistleblowing and which this article does not intend to trace. Drawing on French whistleblowing law, EU law, and the European Convention on Human Rights, this article conceptualizes the articulation of these notions in the field of whistleblowing. It underlines the complexity of their relationship and endeavours to explore the paradoxes and the back-and-forth that underpin it. While discrimination and freedom of expression have operated in a largely fragmented way, their more recent convergence, under the notable influence of European legislation but also of domestic case law, raises the question of whether the effectiveness of whistleblower protection should be based on the resources of discrimination and equality law, or on those of freedom of expression, or possibly on a combination of the two yet to be fleshed out. In a nutshell, are discrimination and freedom of expression, in the field of whistleblowing, reluctant bedfellows or two sides of the same coin?

To address this question, this paper conceptualizes the legal regime of whistleblowing as a regime of superposition, i.e. a legal regime that is available to whistleblowers and offers them specific legal resources that they may or may not decide to mobilize in addition to or instead of another possible legal status. Thus, the advantages and disadvantages of whistleblower status must be weighed against other legal qualities that the whistleblower may possess (what protection does each offer and under what conditions?). For example, an employee whistleblower who suffers retaliation may choose to invoke either the protective rules they derive from whistleblower legislation or other protective rules (e.g. their status as a trade union representative), whichever is more favourable. Similarly, a journalist who suffers retaliation following the reporting of certain facts may choose between the protection offered by whistleblowing law and that offered by press law, weighing up the conditions of application and the rights conferred by each. Conceiving whistleblower status as a layered status, in addition to one or more other possible legal statuses, first of all helps us to understand why the identification of whistleblowers is so often controversial. Indeed, the status of whistleblower does not usually appear to be the only legal characterization available, and claiming whistleblower status appears to be primarily a choice by the persons concerned who thereby expect certain legal benefits. Similarly, this conceptualization helps us to understand why the status of whistleblower is widely used in various fields, in particular by associations or individuals who denounce the existence of health or environmental risks: when no other qualification than that of whistleblower offers equivalent protection, since no other underlying qualification such as that of employee, civil servant, journalist or scientist is at hand, claiming such a qualification thus becomes particularly attractive for the persons concerned. A correlative advantage of this conceptual construction is therefore that it

allows for a renewed focus on litigation situations in which whistleblower status is invoked and thus restores its essentially strategic character.

Based on the evolution of French whistleblowing law, section 1 describes how French law initially built whistleblower protection on the model of discrimination, defining whistleblowing in such a way that it was forbidden to discriminate on its basis. Section 2 then highlights the subsequent progressive alteration of this rationale through the reference to freedom of expression, ultimately raising the question of the possible emancipation of whistleblowing from discrimination law. Section 3 examines the merits and drawbacks of this development and argues for the need for a better distinction between anti-discrimination and freedom of expression as legal regimes in the context of whistleblowing. The hope, ultimately, would be to avoid the danger that the difficulties in articulating these legal regimes should be to the detriment of whistleblowers, and to avoid the correlative danger that the benefits of the use of one regime should be undermined by the limitations of the other.

## Section 1. Protecting whistleblowers through anti-discrimination law

In France, several laws have been adopted over the years to protect whistleblowers who report or testify in court about certain facts, including but not limited to: mistreatment or deprivation inflicted on a person in a social or medico-social institution;[4] an anomaly or operational failure in air transportation;[5] corruption;[6] risks related to medical or cosmetic products;[7] serious risks to public health or the environment;[8] conflicts of interest;[9] or a crime or misdemeanour.[10] In addition, special provisions have been made for military[11] and intelligence officers.[12] France has thus progressively equipped itself with a robust legislative arsenal for the protection of whistleblowers. However, this legislation has also been criticized for being fragmented and insufficiently coherent, as the conditions required for whistleblowers to be protected vary slightly depending on the facts reported (Alt, 2014). In response to these criticisms, the law of 9 December 2016 aimed to unify and bring coherence to the legislation: it repealed most of the previous provisions and introduced a broad definition of whistleblowing meant to encompass all situations previously covered by specific texts. The 2016 law was revised on the occasion of the transposition of the European Directive of 23 October 2019. As amended by the law of 21 March 2022, it now provides:

4 Code of social action and families, art. L. 313-24.
5 Transportation Code, art. L. 6223-2.
6 Labour Code, art. L. 1161-1.
7 Public Health Code, art. L. 5312-4-2.
8 Law no. 2013-316 of 16 April 2013 on the independence of expertise in health and environmental matters and the protection of whistleblowers.
9 Law no. 2013-907 of 11 Oct. 2013 on the transparency of public life, art. 25.
10 Law no. 2013-1117 of 6 Dec. 2013 on the fight against tax fraud and serious economic and financial crime.
11 Defence Code, art. L. 4122-4.
12 Internal Security Code, art. L. 861-3.

> A whistleblower is a natural person who reports or discloses, without direct financial compensation and in good faith, information concerning a crime, an offence, a threat or harm to the general interest, a violation or an attempt to conceal a violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organisation taken on the basis of such a commitment, of the law of the European Union, or of the law or regulations.

Beyond the differences that may have existed between the various whistleblower protection laws adopted in France, they nevertheless had in common that they modelled the protection of whistleblowers on discrimination law. They provided only for the nullity of unfavourable measures taken against persons who reported certain facts in good faith ("no person" shall be subject to a discriminatory sanction or measure for having "reported or testified in good faith" to certain facts), without even mentioning the words "whistleblowing" or "whistleblower", let alone explicitly creating a right for persons to issue such alerts. During the discussion of the law of 16 April 2013 on risks to public health and the environment, the rapporteur of the Senate's Sustainable Development Committee, Romain Dantec, who rewrote some of the amendments to the bill, made it clear that he was seeking to integrate whistleblower protection into the already existing anti-discrimination framework: "this rewriting amendment uses the wording as it already exists for the denunciation of corruption (Article L. 1161-1 of the Labour Code) and facts relating to the safety of health products (Article L. 5312-4-2 of the Public Health Code)". It was not until the law of 9 December 2016 that the above legal definition of whistleblowers was included in French legislation, alongside provisions protecting them from retaliation.

The incorporation of whistleblower protection into discrimination law is of particular relevance where whistleblowers are employed under a contract of employment. There, whistleblowers are subject, pursuant to their employment contract, to the employer's authority and are exposed to sanctions in case of alleged breach. Thus, an employee who has disclosed in good faith a breach of the law or a risk to health or the environment is exposed to reprisals, which may go as far as dismissal, either explicitly (the employer may claim, for example, that the facts reported are inaccurate or that the report was made in an insulting or slanderous manner), or implicitly (the employer may allege, for example, a "loss of confidence" in the employee or their "professional inadequacy" so as to obscure the actual reason behind the sanction). Given the reality that employees do indeed suffer retaliation for whistleblowing, most whistleblower protection provisions in France were first adopted for the benefit of employees, later extended to civil servants. For the latter, the law followed, with minor variations, the structure of the provisions protecting employees against discrimination. Unlike in the UK (Hand, 2015), the law of 21 March 2022 lays the cornerstone for the integration of whistleblower protection into discrimination law by formally listing whistleblowing among the prohibited grounds for discrimination. According to the new Article L. 1132-1 of the Labour Code resulting from this law,

> No person may be excluded from a recruitment or appointment procedure or from access to an internship or a period of training in a company, no employee may be

> sanctioned, dismissed or subjected to a direct or indirect discriminatory measure [...], on the grounds of his or her origin, sex, morals, sexual orientation, gender identity, age, family situation or pregnancy, genetic characteristics, particular vulnerability resulting from his or her economic situation, apparent or known to the perpetrator, his actual or supposed ethnicity, political opinions, trade union or mutualist activities, the exercise of an elective mandate, religious beliefs, physical appearance, family name, place of residence or bank domiciliation, or because of his or her state of health, loss of autonomy or disability, ability to express oneself in a language other than French, his or her status as a whistleblower, facilitator or person in contact with a whistleblower, within the meaning [given to these terms by Law no. 2016-1691 of 9 December 2016]. (Labour code, art. L. 1132-1)

The protection of whistleblowers in France has been significantly influenced by European Union law and in particular by the Equal Treatment Directives. Directive 2000/43 of 29 June 2000 explicitly states that "the effective implementation of the principle of equality requires adequate judicial protection against victimisation".[13] It therefore demands that Member States protect employees who denounce a violation of equality within the company or bring it before a court. The European Directives on equal treatment have been taken up in French law which has extended whistleblower protection not only to persons bound by a contract of employment but also to candidates for recruitment, trainees, and persons in training. Similarly, just as EU law protects whistleblowers not only against dismissal but also against "any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment",[14] French law protects employee whistleblowers against any sanction, dismissal, or direct or indirect discriminatory measure. Finally, following the example of the mechanism put in place by Directive 97/80/EC of 15 December 1997 and extended by Directive 2000/78, French law facilitates the proof that the unfavourable measure suffered by an employee is an act of retaliation due to a report they have made. In order to prove that the measure taken is intended as retaliation, it is sufficient for the employee to "present [to the court] factual elements suggesting the existence of direct or indirect discrimination"; "In view of these elements, it is up to [the employer] to prove that his decision is justified by objective elements unrelated to any discrimination".[15]

Interestingly, the alignment of whistleblower protection with discrimination law also reflects an awareness that freedom of expression does not offer sufficient protection to whistleblowers. At a time when there were no specific protective provisions for whistleblowers, their protection against reprisals had indeed been sought by invoking freedom of expression. The argument was that whistleblowing in the public interest is a

[13] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, recital 20. See also Directive 75/117/CEE of 10 February 1975 on equal pay for men and women (art. 5); Directive 76/207/CEE of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (art. 7).

[14] Council Directive 2000/43/EC of 29 June 2000, art. 9 ("victimization").

[15] Labour code, art. L. 1134-1.

matter of freedom of expression; retaliatory measures against whistleblowers therefore violate a fundamental right and can only be valid if duly justified by a reason other than the disclosure and if proportionate to the aim pursued (Leclerc, 2007).[16] But this argument left a wide margin of interpretation as to the justification for action against whistleblowers, exposing them to considerable uncertainty as to whether or not they would be protected, as a case decided in 1997 by the highest civil court in France illustrates. Two technicians employed in a laboratory manufacturing blood bags had informed the anti-AIDS association Act Up that their employer was carrying out HIV tests using a method that they believed was unreliable and a potential health hazard. Following this reporting, Act Up initiated a press campaign that eventually resulted in the administrative closure of the laboratory. The two employees were then dismissed. Both raised a wrongful dismissal claim under French labour law, but to no avail, the Cour de cassation finding that "the employees had actively participated in a smear campaign against their employer, which had led to the administrative closure of the laboratory" and that "the employees had abused their freedom of expression".[17] This judgment was a clear example of the limits of using freedom of expression to protect whistleblowers. As freedom of expression can be abused – the courts find that employees abuse their freedom of expression when they use offensive, defamatory, or excessive language[18] – employees are exposed to the possibility that their actions should be interpreted as wrongful. In this particular case, although the purpose of the disclosure was clearly public interest, the court found that the employees had chosen methods of disseminating the information (speaking to an activist NGO rather than to the employer) that were not compatible with the duty of loyalty arising from their employment contracts. The protection afforded to whistleblowers then depends on how the information was provided (to whom, in what terms, when), questions which leave much to the discretion of judges (Dabosville, 2012).[19] The tension between employees' freedom of expression and the duty of loyalty arising from the employment contract is even more acute in the case of civil servants, who are bound by a duty of discretion; the reconciliation between that duty and the responsibility to speak out is subject to ongoing discussion, and the outlook for whistleblowers therefore remains uncertain.

It is the limitations of freedom of expression as a means of protecting whistleblowers that led associations involved in the prevention of health and environmental risks and corruption to advocate for the adoption of specific legislation to

[16] The Labour Code states that "No one may impose restrictions on the rights of individuals and on individual and collective freedoms which are not justified by the nature of the task to be performed or which are not proportionate to the aim pursued" (art. L. 1121-1). See also Cass. Soc. 20 Apr. 2022, no. 20-10.852 (Fabre and Adam 2022).

[17] Cass. Soc. 4 Feb. 1997, no. 96-40678. See also Cass. Soc. 14 Apr. 2016, no. 14-29.769.

[18] Cass. Soc. 28 Apr. 1988, no. 87-41.804; Cass. Soc. 14 Dec. 1999, no. 97-41.995; Cass. Soc. 29 June 2022, no. 20-16.060.

[19] E.g. The Court of Cassation ruled in 2006 that a report made by an employee responsible for "ensuring compliance with ethics in the context of medical coordination" was not at fault, provided that the report had been sent to the company's CEO in a confidential envelope (Cass. Soc. 8 Nov. 2006, no. 05-41.504; see also Cass. Soc. 21 Sept. 2010, no. 09-42.382). Conversely, a disclosure by mail "to the members of the management" and to the company's staff representatives was deemed abusive (Cass., Soc., 21 June 2006, no. 04-44.786).

protect whistleblowers. In contrast to freedom of expression, which is limited by concerns about abuse and lends itself to a subjective assessment of the motives pursued by whistleblowers, whistleblowing legislation provides more objective and hence more favourable conditions for whistleblowers. Indeed, the 2019 directive requires that the reporting person "had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive" (art. 6). The French law of 21 March 2022 also removes any reference to the motives of the whistleblowers by substituting the condition set by the 2016 law that they acted "in a disinterested manner" by that of an "absence of direct financial compensation". Admittedly, the 2022 law still require that the report be made "in good faith", but this condition relates to the knowledge available to the whistleblowers rather than to their motives. Indeed, courts have ruled that the inaccuracy of the facts reported does not in itself characterise bad faith: a whistleblower should only be considered to be acting in bad faith, and therefore possibly sanctioned, if it is demonstrated that they were aware of the inaccuracy of the facts disclosed.[20] As, under French law, good faith is presumed, the burden of proving the whistleblower's bad faith lies on the employer; a condition difficult to meet, to say the least. Against this background, it is interesting, and at first sight paradoxical, to witness the return of freedom of expression as a relevant instrument for the protection of whistleblowers.

## Section 2. Protecting whistleblowers through freedom of expression

The law of the European Convention on Human Rights played an important role in the revitalization of freedom of expression in French whistleblowing law. The Parliamentary Assembly[21] and the Committee of Ministers[22] of the Council of Europe both place the protection of whistleblowers in the ambit of the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (Omtzigt, 2009; Stephenson and Levi, 2012). The recommendation (2014)7 poses "whistleblowing [as] a fundamental aspect of freedom of expression and freedom of conscience".[23] Whistleblowing is therefore not considered from the sole point of view of protection against retaliation (although this also falls within the scope of the recommendation), but essentially as an aspect of freedom of expression relating to "information concerning threats or harm to the public interest".[24] The ECtHR also assesses the action of whistleblowers in the light of the freedom of expression guaranteed by Article 10 of the European Convention (Lewis and Bowers, 1996; Middlemiss, 2017) and the justification of interference with the freedom of expression pursuant to §2 of Art 10. The Court grants protection to whistleblowers whether they be employees in the private or the public sector: although bound by a duty of loyalty and discretion, both groups must be protected when they report illegal behaviour or the existence of a risk. In relation to public officials, the Court ruled in *Guja v. Moldova* that interference with whistleblowers' freedom of

[20] Cass., Soc., 7 Feb. 2012, no. 10-18.035.
[21] Recomm. 1916 (2010) and Resol. 1729 (2010), Protection of "whistle-blowers"; Resol. 1954 (2013).
[22] CM/Rec(2014)7.
[23] CM/Rec(2014)7, recitals, § 1.
[24] CM/Rec(2014)7, Annex, Principles.

expression must be proportionate.[25] To that effect, the Court asks that it be tested whether there was available to the applicant any other effective means of remedying the wrongdoing which they intended to uncover; the public interest involved in the disclosed information; the authenticity of the information disclosed; whether the damage suffered by a public authority as a result of the disclosure outweighed the interest of the public in having the information revealed; the motive behind the actions of the reporting employee; the penalty imposed on the applicant and its consequences. The ECtHR also grants protection to citizens who notify to competent State officials the unlawful conduct of civil servants,[26] provided that the right to report irregularities is reconciled with the necessity that civil servants should enjoy public confidence in conditions free of undue disturbance.[27] Further, the ECtHR attaches a high level of protection to freedom of expression when the reporting person pursues the legitimate aim of the protection of health.[28] The ECtHR thus offers substantial protection to whistleblowers under Article 10 of the Convention, but calls for a case-by-case assessment of the proportionality of the interference with the freedom of expression of the whistleblower subject to reprisals. This concrete examination of the circumstances of the case exposes whistleblowers to the risk that the measures taken against them should ultimately be found to be justified[29] (Blay-Grabarczyk, 2018; Junod, 2022).

In France, a first attempt to encapsulate the protection of whistleblowers in freedom of expression resulted from the law of 16 April 2013, which provided that "any natural or legal person has the right to make public or to disseminate in good faith information concerning a fact, data or action, when disregard of this fact, data or action appears to them to present a serious risk for public health or the environment" (art. 1). As Trebulle (2013) points out, "article 1 of the law, insofar as it refers to the fact of making public or disseminating information, is resolutely placed in the field of freedom of expression". In addition, the law affirmed for the first time a right to disclosure of information, without requiring compliance with any particular procedure. This approach can be explained by the fact that the whistleblower protection regime introduced by the law was intended not only for employees and civil servants but for "any person", including legal persons in addition to natural persons. Indeed, alerts about health and environmental risks are often raised by consumer associations or citizens' groups, outside of the employment relationship. For the latter, freedom of expression offers more effective protection than discrimination law. Despite the undeniable progress it allowed for the protection of whistleblowers, Article 1 of the law of 16 April 2013 was repealed by the law of 9 December 2016. The later discussions in Parliament suggest that this

[25] ECtHR, 12 Feb. 2008, no. 14277/04, *Guja v. Moldova*, § 70; the test applies to whistleblowers employed under private law: ECtHR, 21 July 2011, no. 28274/08, *Heinisch v. Germany*.

[26] ECtHR, Gd Chamber, 27 June 2017, no. 17224/11, *Medžlis Islamske Zajednice Brčko and o. v. Bosnia and Herzegovina*, § 82 and cases cited.

[27] ECtHR, 21 Jan. 1999, no. 25716/94, *Janowski v. Poland*, §33. The complaints should therefore be addressed "by way of private correspondence" (ECtHR, 5 Oct. 2006, no. 14881/03, *Zakharov v. Russia*, §26).

[28] ECtHR, 25 Aug. 1998, *Hertel v. Switzerland*, no. 59/1997/843/1049; 7 Nov. 2006, *Mamère v. France*, no. 12697/03.

[29] ECtHR, 17 Sept. 2015, no. 14464/11, *Langner v. Germany*.

provision was considered by some to be too favourable to environmental associations, hence exposing companies to an unacceptable reputational risk.

It was the Court of Cassation that finally developed the most original and interesting conception of freedom of expression for the protection of whistleblowers. For the first time, in a case decided on 30 June 2016, it granted protection on the basis of Article 10.1 of the European Convention to an employee who had disclosed unlawful behaviour he had witnessed at the workplace. When asked to examine the legality of the whistleblower's dismissal, the Court ruled that "*because of the infringement of freedom of expression, in particular the right of employees to report unlawful conduct or acts which they have observed in the workplace*, the dismissal of an employee for having reported or testified, in good faith, to facts of which they were aware in the performance of their duties and which, if established, would be of such a nature as to characterise criminal offences, is null and void".[30] The Court most recently ruled along the same lines in favour of employees who had been sanctioned for having denounced a breach of ethical obligations provided for by the law or regulations[31] and, more broadly still, for having expressed disagreement with an economic operation decided by the employer.[32]

In these cases, the Court of Cassation expressly stated that the protection of whistleblowers is a matter of freedom of expression. This approach highlights both the practical problems and the conceptual difficulties faced by the Court. Protecting whistleblowers through freedom of expression allows the Court to resolve a practical difficulty related to the entry into force of the laws. Indeed, in these cases, the facts had occurred before the entry into force of the 2013 law protecting whistleblowers against reprisals and this law was therefore not applicable. However, by the time the Court decided the case, the law had evolved significantly and afforded whistleblowers broad protection from retaliation. Therefore, given the impossibility of using discrimination law to protect these individuals, freedom of expression has arisen as a relevant resource, offering subsidiary protection to those who are not protected by the applicable law. Yet freedom of expression is not merely a useful ground in a case where whistleblower protection was not available under anti-discrimination law; it also has a distinct scope that goes far beyond whistleblowing. For example, in the above case, the Court of Cassation overturned the reprisals against an executive who had expressed disagreement to his hierarchy concerning an economic operation decided by the company, on the grounds of infringement of his freedom of expression, even though the expression of disagreement does not fall within the scope of the legislation protecting whistleblowers. The relationship between discrimination law and freedom of expression in the field of whistleblowing ultimately proves to be more complex than a mere subsidiary application of the latter.

[30] Cass. Soc. 30 June 2016, no. 15-10.557. See also Cass. Soc. 7 July 2021, no. 19-25.754.
[31] Cass. Soc. 19 Jan. 2022, no. 20-10.057.
[32] Cass. Soc. 16 Feb. 2022, no. 19-17.871.

## Section 3. Articulating anti-discrimination law and freedom of expression in the protection of whistleblowers

The coexistence of whistleblower protection under both discrimination law and freedom of expression is arguably an inherent feature of whistleblowing. Ultimately, it is the exercise of freedom of expression that justifies whistleblowers' protection against retaliatory discriminatory measures. This duality entails both advantages and risks.

Freedom of expression provides valuable resources to whistleblowers to compensate for gaps in whistleblowing legislation. Indeed, a report is only protected if it relates to one of the objects mentioned in the law (according to the law of 21 March 2022: "a crime, an offence, a threat or an attack on the general interest, a violation or an attempt to conceal a violation of an international commitment properly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law of the European Union, of the law or of the regulations"), and if it was carried out under the subjective ("without direct financial consideration and in good faith") and procedural conditions (via an internal or external reporting channel) provided for by the law. For instance, the Court of Cassation turned down the claim of a dismissed employee to benefit from the status of whistleblower on the grounds that it had not been proven that the facts reported constituted a crime or an offence, a condition that had to be fulfilled in order to benefit from the legislation then in effect.[33] Conversely, freedom of expression is not subject to such limitations and applies even when the facts reported do not fall within the list of those affording protection against discrimination. Therefore, freedom of expression can function as a backstop to compensate for the absence of legislation specifically dedicated to the protection of whistleblowers. Moreover, freedom of expression allows for the protection of employees who have not complied with the procedures that the whistleblower protection law requires them to follow. This is of particular importance given that, in its original version, the law of 9 December 2016 required employees to go through an internal whistleblowing procedure first before they could report to administrative or judicial authorities or make the disclosure public. While promoting the use of the internal whistleblowing channel as a first step, the 2019 Directive instead allows whistleblowers to choose between internal and external reporting. The French law of 21 March 2022, adopted to transpose the Directive, also allowed whistleblowers to choose either channel of reporting. This change raises questions about the application of the law over time. Indeed, individuals who reported before the entry into force of the law of 21 March 2022, i.e. 1 September 2022, and who did not use an internal reporting channel first, would not be granted protection against retaliation. Instead, they would be able to claim the protection of freedom of expression. Thus, by deciding that employees subject to the former version of the 2016 law were entitled to freedom of expression, the Court of Cassation allowed, if not an early application of the law of 21 March 2022, at least a greater homogeneity of the protection of whistleblowers, regardless of the law applicable to the alert they had made.

[33] Cass. Soc. 4 Nov. 2020, no. 18-55.669.

However, freedom of expression itself is hardly unrestricted. Section 2 has shown that the ECtHR is quite open to restrictions on the freedom of expression of whistleblowers. The criteria for assessing the proportionality of interference with freedom of expression open a margin of interpretation that is far from systematically favourable to whistleblowers. The same applies to French law, which recognizes that freedom of expression is limited by the possibility of abuse, which implies assessing whether the whistleblower has used offensive, defamatory, or excessive language, and whether the publicity given to the report has been as limited as possible. Moreover, freedom of expression is limited by offences such as insult or defamation. In this respect, the protection offered by freedom of expression is much weaker than that afforded by whistleblower legislation. Whistleblowers indeed receive protections against criminal prosecution that are not afforded to those prosecuted for exercising their freedom of expression. In order to deter criminal prosecution of whistleblowers, French law punishes malicious prosecution of whistleblowers for defamation (offenders face a higher civil fine than under ordinary law – €60,000 instead of €15,000). In addition, if, in the course of a civil or criminal proceedings, the person being prosecuted presents evidence to suggest that the purpose of the proceedings brought against them is to obstruct their reporting or public disclosure, they may ask the judge to grant them, at the plaintiff's expense, an advance on the costs of the proceedings or, where their financial situation has seriously deteriorated as a result of the report or disclosure, an advance to cover their maintenance. The judge may, moreover, decide, at any time during the procedure, that this advance remains definitively in the whistleblower's hand (Article 10-1 of the Law of 9 December 2016, amended by the Law of 21 March 2022).

Another difficulty for the articulation of discrimination law and freedom of expression in the field of whistleblowing is the way in which both have to be reconciled with secrets protected by law. Indeed, the violation of certain secrets may constitute an obstacle to persons seeking to benefit both from the whistleblower protection regime and from appeal to freedom of expression. However, the two legal regimes differ, which opens up key issues of judicial strategy, as parties may have an interest in framing the legal debate in terms of discrimination or freedom of expression in order to benefit from one exclusionary regime rather than the other. The differences appear first of all with regard to the secrets that hinder disclosure. Article 10.2 of the European Convention on Human Rights accepts the possibility of limiting freedom of expression "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". The secrets excluding protected disclosures do not have the same scope. The Law of 21 March 2022 states that "national defence secrecy, medical secrecy, the secrecy of judicial deliberations, the secrecy of judicial investigations and the professional secrecy of lawyers are excluded from the whistleblowing regime" (art. 6 II). The limitations laid down by the Law of 21 March 2022 are to be interpreted strictly. Only those secrets listed in Article 6 II may restrict disclosures. Accordingly, these do not include trade secrets. Directive 2016/943 of 8 June 2016 clarifies that the protection of trade secrets is set aside where disclosure is made "for revealing misconduct, wrongdoing or illegal activity, provided that the

respondent acted for the purpose of protecting the general public interest" (art. 5). Article 3 of the 2016 Directive also states that "The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law." The latter case include the disclosures provided for in the 2019 Directive.[34] However, a dispute has arisen in France as to whether whistleblower protection derives solely from the act of reporting or disclosing information, or whether it also applies to the act of obtaining information. The Court of Cassation initially accepted the validity of a sanction imposed on a whistleblower, not due to the disclosure of information per se, but due to "violation of professional secrecy and concealment of confidential documents", as the information provided to the whistleblower had been fraudulently obtained by an employee.[35] This ruling contrasted with the more protective position of the 2019 Directive, which states that "reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed" (art. 21.3). However, the Directive sets two limits here. First, it states that this applies "provided that such acquisition or access did not constitute a self-standing criminal offence". As criminal liability remains governed by domestic law, the actual protection afforded to whistleblowers for obtaining the information revealed ultimately depends on the transposition in each Member State. The second limitation is that whistleblowers are only granted immunity if "they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive" (art. 21.2). The requirement of "necessity" for reporting allows for a margin of interpretation and therefore carries risks for whistleblowers – as the ECtHR ruling in the LuxLeaks case illustrates.[36] In France, the law of 21 March 2022 clearly restricts the ability of secrets other than those mentioned in Article 6 II of the law of 9 December 2016 to deter disclosures. It gives whistleblowers criminal immunity, "provided that the disclosure is necessary and proportionate to the safeguarding of the interests at stake, that it has taken place in compliance with the reporting conditions defined by the law and that the person satisfies the definition of a whistleblower provided by the law". Criminal immunity extends not only to disclosure but also to misappropriation or concealment of documents or any other material containing information of which the whistleblower had lawful knowledge. Criminal immunity is supplemented by civil immunity, which removes the liability of whistleblowers for damages caused by their report if they had reasonable cause

[34] The 2019 Directive states that "disclosures of trade secrets are to be considered allowed by Union law within the meaning of Article 3(2) of Directive (EU) 2016/943". Both Directives should therefore "be considered as being complementary" (recital 98).

[35] Cass. Crim. 3 March 2021, no. 19-87.125.

[36] ECtHR, 11 May 2021, *Halet v. Luxembourg*, no. 21884/18 (referred to the Grand Chamber). In this case, to exclude a violation of Article 10 ECHR, the Court stated that "Regard being had to the Contracting States' margin of appreciation in this sphere, the Court concludes that the domestic courts [which concluded that the documents disclosed by the applicant were not of sufficient interest to justify acquitting him] struck a fair balance […] between, on the one hand, the need to protect the rights of the applicant's employer and, on the other, the need to protect the applicant's freedom of expression" (§112). The fact that, in the same case, another whistleblower was protected against retaliatory measures (Cour de cassation du Grand-Duché de Luxembourg, 11 Jan. 2018, no. 3912) does not seem to the ECtHR to be problematic: "the fact that, in contrast, A.D. was acquitted in application of the same criteria in the Court's case-law confirms that the national authorities carried out a detailed examination in weighing up the respective interests" (§110).

to believe that the reporting or public disclosure of the full information was necessary to protect the interests at stake. The supportive legal regime for whistleblowing contrasts sharply with the recent decision of France's highest administrative court that trade secrets can impede the right of access to documents of public interest, even though this right is inherent in the freedom of expression.[37]

## Conclusion

The current situation in French law may seem paradoxical: while the law protecting whistleblowers was built on the model of discrimination in order to escape the limits of freedom of expression, the latter is now making a dramatic resurgence as a means of protecting whistleblowers. Yet the paradox is only superficial. It mainly arises from the fact that French law, under the influence of the European Directive of 23 October 2019, is no longer entirely focused on protecting whistleblowers against reprisals, but increasingly takes into account disclosures in themselves. Thus, whereas the protection of whistleblowers has been acknowledged for several years as a necessity in a democratic society, it now extends to the handling of their disclosures. The law of 21 March 2022 and the decree of 3 October 2022 describe in much greater detail than before how information is to be collected, processed, and documented (Leclerc, 2022b). The law now opportunely contemplates both the protection of the whistleblower – which is based on discrimination law – and the possibility of disclosure in the pursuit of the public interest – which refers to freedom of expression.

However, while discrimination and freedom of expression are two equally necessary pillars of the legal regime of whistleblowing, reconciling them is far from simple. They partially overlap, creating a space where litigants are allowed to choose between different procedural strategies, weighing the advantages and disadvantages of engaging in one ground rather than another. Indeed, discrimination law offers stronger protection to whistleblowers, albeit subject to a material scope limited to certain protected disclosures and observance of procedural requirements. In contrast, the protection offered by freedom of expression is often much weaker, subject to limitations appealing to abuse and secrecy, but has a much wider material scope than that covered by whistleblowing legislation and benefits a wider range of people than envisaged by whistleblowing legislation. This interplay between discrimination and freedom of expression regimes can benefit whistleblowers by broadening their range of options, but it may also confuse and ultimately weaken their position.

These concerns call for conceptual clarifications. Indeed, freedom of expression has acquired an even greater importance in French whistleblowing law since, as a result

[37] Conseil d'État, 8 Apr. 2022, Société éditrice du Monde, no. 447701: While recognising that "trade secret, insofar as it aims to prevent the disclosure of a company's commercial strategy with regard to the products it plans to market, cannot justify the refusal to disclose an administrative document after the [medical devices] have been placed on the market", the Council of State ruled that trade secret precluded the disclosure of the information requested with regard to medical devices that had not yet been placed on the market.

of the law of 21 March 2022, whistleblower protection is no longer granted only to persons subject to a reporting relationship exposing them to reprisals (employees and civil servants). In contrast, the ECtHR considers the hierarchical bond between the whistleblower and his employer, which entailed a duty of loyalty, reserve, and discretion, to be "a particular feature of the concept of whistle-blowing".[38] The ECtHR thus assumes a more stringent view of the protection of whistleblowers than of the exercise of freedom of expression in general. The emphasis on loyalty to the employer on the part of whistleblowers overlooks that many reports are driven by loyalty to society and the public interest (Ash, 2016: 113; Roberts, 2014). Following the Directive of 23 October 2019, French law now protects "any person", whether or not they are bound by a contract of employment, whether they are personally at the origin of the whistleblowing or whether they have simply facilitated it.[39] Thus, a company's suppliers or customers who report violations of the law are protected against adverse action. To cope with this situation, the 2019 Directive has extended the list of prohibited retaliation from measures that presuppose the existence of an employment relationship ( e.g. dismissal or disciplinary measures) to measures that do not relate to an employment relationship (e.g. damage to a person's reputation, including in social media, or financial loss, including loss of business and loss of income; blacklisting; early termination or cancellation of a contract for goods or services; cancellation of a licence or permit; psychiatric or medical referral).

Understanding whistleblower protection as an overlapping regime, as proposed in this article, is therefore a valuable insight. Both the whistleblowers and the persons being reported may choose to place the legal action in the field of discrimination or in that of freedom of expression, depending on what they consider to be their interest. A range of situations thus emerges. In some situations, discrimination law and freedom of expression are alternative resources and cannot be combined. For example, military and intelligence officers, subject to a strict duty of reserve dramatically limiting their freedom of expression, may find valuable protection in the specific regimes set up by law to protect them as whistleblowers. Conversely, for those who are neither employees nor civil servants, and who benefit only marginally from discrimination law insofar as the 2019 Directive only grants them limited protection against specific measures, freedom of expression stands as a primary source of protection. This is the case, for example, for NGO officials who would disclose a risk to health or the environment. These situations where discrimination law and freedom of expression apply in a distributive manner contrast with those where they are cumulative. For employees and civil servants, who benefit from both freedom of expression in the workplace and whistleblower protection legislation, both regimes are equally applicable and can be mobilized according to which appears more likely to be in their favour in the context of a legal action. Thus, an employee may have an interest in invoking the whistleblower protection regime in order to benefit from criminal immunity in the event of a violation of legally protected secrecy[40].

[38] ECtHR, 11 May 2021, *Halet v. Luxembourg*, no. 21884/18, §91.

[39] The 2019 Directive protects the facilitators, defined as "a natural person who assists a reporting person in the reporting process in a work-related context, and whose assistance should be confidential" (art. 5(8)).

[40] Even in the infrequent case where whistleblowing would be mandatory for an employee under his or her contract of employment (or for a civil servant through a statutory duty), the specific regime for

Conversely, they may prefer to invoke freedom of expression in order to benefit from protection following a whistleblowing report made before the entry into force of the whistleblower protection legislation or when they have failed to make a prior internal report, as required by the law of 9 December 2016. In the situations of possible cumulation of protection regimes, a key concern is ensuring that whistleblowers benefit from the best of both. Thus, the growing role of freedom of expression in French law to protect whistleblowers will only be beneficial for them if it is added to the specific protection of whistleblowers, and in no case replaces it, at the risk of weakening this protection.

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whistleblowers could still be more protective than that derived from the execution of the contract of employment or from the freedom of expression. On the impact of the existence of an obligation or a sense of obligation to speak out, see Miceli, Near and Schwenk, 1991; Olsen, 2014: 188.

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