

The whistleblower as the personification of a moral and managerial paradox

Unplugged - Society

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Management should be above all a societal concern if we want to avoid management practices to spiral out of control. Society is a sub-section of Unplugged which aims to publish some provocative essays addressing or renewing our understanding of the relation between society and management. These essays may also highlight theoretical "boundary objects" between society and management or suggest a theoretical perspective to approach new empirical phenomena.

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Abstract. The purpose of this essay is to identify those paradoxes personified by the whistleblower. An analysis of the recent evolution of the French and international legislative framework concerning whistleblowers helps us understand what a moral paradox actually is. The general discourse around corporate ethics, the encouragement of initiative-taking and the increasing responsibility of employees, explains, in turn, a managerial paradox. The article explains how the whistleblower embodies both a moral and managerial paradox for the company. We analyze this dual paradox, in the light of recent legal developments which, to a certain extent, reinforce this state of affairs despite their existence. The article aims to better understand the reasons behind the ambiguous discourse of companies on whistleblowers, since this discourse is upheld by the very measures designed to collect and deal with warnings, which in the end... are implemented in the hope that they do not serve their purpose!

Keywords: whistleblower, paradox, ethics, management, morals

INTRODUCTION¹

As of 1985, Miceli & Near (1985: 525) offered a definition for whistleblowing, as follows: *"The disclosure by organization members (former or current) of illegal, immoral and illegitimate practices under the control of their employers to parties and organizations that may be able to effect action"*.

As such, whistleblowers may be internal to the company (an employee) or external (an ex-employee, a journalist, a non-governmental organisation or a researcher). They may make their disclosures through

1. We would like to thank Stephen R. Platt for his kind help in copy-editing the English version of this paper.

internal and/or external channels, which may or may not be provided for by the management structure in place.

The 14th edition of Ernst & Young's Global Fraud survey carried out in 2015 provides insights from 2,825 senior executives in 62 countries across the world. According to the survey, more than one third considered bribery and corruption to happen widely in their country, with almost half able to justify unethical behaviour to meet financial targets (Ernst & Young, 2016). These figures are a clear illustration of the tensions that exist within companies between possible deviancies and their being disclosed through whistle blowing. As illustrated by Huyghe (2016), we are irrevocably in an era of revelations where secrets are to be made public.

As a consequence, any attempt to reduce the development or influence of whistleblowers is useless since it is no longer possible (Miceli & Near, 1995) and certain researchers even believe it is not desirable to do so (Liyanarachchi & Newdick, 2009). If until recently whistleblowing was a rare and individual act, such peculiarity has become more frequent over recent years. Indeed, it can potentially involve any employee within a company. Its impact has ended up going well beyond the permeable framework of the company in question to reach civil society. In revealing organisational deviancies (Cappelletti, 2010), whistleblowers henceforth personify the look-out post that denounces the irregular words and practices of companies (Bournois & Bourion, 2008).

Other than a small number of investigative journalists (Denis Robert in the *Clearstream* affair) or whistleblowers themselves (Stéphanie Gibaud in the *UBS* case, or Irène Frachon in the *Médiator* affair), very few French researchers in the field of the management sciences have shown any interest in whistleblowing and the way it is dealt with, even though it is a very popular area of research in the English-speaking world². In the wake of the pioneering work undertaken in 1999 by Chateauraynaud & Tornay (2013), a small number of research articles written in French have examined the genesis and figure of whistleblowers (de Bry, 2008; Bournois & Bourion, 2008; Charreire Petit & Surply, 2012), their career paths and level of resilience (Charreire Petit & Cusin, 2013). Some of the work has concentrated on the impact of warning systems put in place in companies following the Sarbanes-Oxley Law (Charreire Petit & Surply, 2008; Mauduit, 2008), whilst other researchers have dug deeper through the analysis of a certain number of high-profile media figures (Frachon, 2015; Musiani, 2015).

However, it would appear that none of this work has seriously researched the question of whistleblowing from a management perspective. In effect, little consideration has been given to the legal framework (whistleblowing systems and processes) and the eventual treatment of whistleblowers, even though the tensions created by whistleblowing is a rich subject and opens up new possibilities for future research. As such, the question of whistleblowers is a dual paradox for companies.

On the one hand, there is a moral paradox. The law surrounding whistleblowing (in countries where such legislation exists) requires companies to set up systems and to protect whistleblowers using these if

2. Since 1981, in the *Journal of Business Ethics* alone, there have been a considerable number of papers, as follows: 273 for *whistleblowing* and 405 for *whistle-blowing*, which is the equivalent of between 7 and 11 papers per year referring to the subject or entirely dedicated to it (EBSCO, September 2016). See also the non-exhaustive list of papers and books written by the American specialists Miceli & Near in the bibliography.

they belong to the organisation and/or to answer accusations if the whistleblower is external to the organisation (and not simply by taking libel action). In doing so, the Law requires companies concerned by whistleblowing to protect those that may destabilize or weaken them. This means that companies are required to protect the individuals that attack them, i.e. to provide confidential data, for instance, to those that finish by denouncing the organisation and who may actually be their own employees.

On the other hand, there is a managerial paradox. Senior managers are required to be totally dedicated (Igalens, 2004), but at the same time to be the guardians of the ethical values of their employers (Peretti, 2010). In addition, we are now working in liberated companies (Carney & Getz, 2009), which value the freedom of responsible, demanding and innovative individuals. Finally, the increase in the number of Ethics Charters (Pereira, 2009) and the pressure put on major companies' CSR policies only goes to reinforce the phenomenon and in turn ends up being applicable to all other parts of the organisation. The astonishment of professionals faced with the increasing importance of whistleblowers is surprising, since it is simply a direct result of the requirement to increasingly integrate ethical values (repeated each time there is a new economic crisis) in higher education programmes right through to the day to day work of employees.

The objective of this paper is therefore to illustrate how whistleblowers are a moral and managerial paradox for their companies. We analyze this dual paradox, in the light of recent legal developments which, to a certain extent, reinforce this state of affairs despite their existence. The article aims to better understand the reasons behind the ambiguous discourse of companies on whistleblowers (Larue, 2007), since this discourse is upheld by the very measures designed to collect and deal with warnings, which in the end... are implemented in the hope they do not serve their purpose!

THE MORAL PARADOX THAT THE LAW CANNOT SOLVE

The work of Miceli & Near has clearly shown that the essential difference between a whistleblower and an "*inactive observer*" (1985) is the interest of the individual for the activity of the organisation, rather than for the organisational framework enabling change and internal communications (existence of communication channels for whistleblowing, supervision by managers, etc.). It would appear that individual characteristics (Miceli & Near, 1985; 1988) prevail over the transition from employee to the "*status*" of whistleblower. You are not born a whistleblower, but you become one (Charreire Petit & Cusin, 2013; Cailleba, 2016a) through a "*subjectively rational' decision process*", which refers back to the decision-taking schema already described by March et al. (1958). De facto, the individually-made moral choice solves the paradox of the issue of loyalty: should one be loyal to one's employer or rather to one's own values (and very often those of Society)? This question is also raised by Charreire Petit & Surply (2011) in their analysis of the fundamental decision of a potential whistleblower to speak out or to remain silent in terms of loyalty to the organisation and hierarchical obedience. Recent evolutions in French legislation as regards the protection of whistleblowers³ (cf. The Sapin Law II, 2016) invite us to revisit these

3. Cf. Appendix 1 for an international comparison.

questions. So doing, we see that in spite of real improvements in their protection, whistleblowers and also companies still find themselves faced with pressures that are difficult to overcome. The ambiguity of the situation is illustrated by the moral paradox of whistleblowing for whistleblowers and company directors referring back to a similar opposition between individual moral values and loyalty to one's company and one's job. From an etymological perspective⁴, the moral paradox is also ambiguous for companies because it makes its mark on both whistleblowers and managers, whilst at the same time creating confusion given that each side comes up with a different or at least contrary solution.

THE MORAL PARADOX FOR WHISTLEBLOWERS

Following the Enron scandal in December 2001, the American government decided to legislate through the *Sarbanes-Oxley Law* (SOX, 2002) requiring internal notification: from that point on, whistleblowers were required in the first instance to inform their line manager within the company. This law had to be applied by all Wall Street listed companies (Nasdaq or AMEX) with an annual turnover of more than \$75 million. It was extended to companies based in or operating out of France. De facto, the extra-territorial nature of this American law raised and still raises numerous questions (Assemblée Nationale, 2016a). The original legislative framework included an ethical early reporting system, the creation and overhaul of internal Ethics Committees, Audit Committees, Remuneration Committees, Nominating Committees, etc, as well as new rules concerning conflicts of interest. Although applying this law proved difficult in France for both legal and cultural reasons (de Bry, 2008; Charreire Petit & Surply, 2008a & b), an initial ethical early reporting system was put in place, even if this was done in a “*very heterogeneous and disparate*” way (Mauduit, 2008: 133).

Several years later in 2014, the Committee of Ministers of the European Council adopted a recommendation to protect whistleblowers, defined as: “*any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector*” (European Council, 2014). As a result, the European definition became less precise (it no longer only concerned wrongdoings classed as being illegal, immoral or illegitimate) but more universal (any disclosure concerning a threat or harm to the public interest).

Up until 2015, whistleblowers were not “*obliged to disclose information internally*” (Bourdon, 2015). In October 2016, the *Sapin II Law for transparency, the fight against corruption and the modernisation of the economy* proposed a general framework in line with the recommendations of the European Council. By simplifying them, it brought together all the sector-based laws and regulations produced by the French legal system since 2007⁵. Indeed, the Sapin II Law gave Parliament a new definition of a whistleblower. According to Article 6 adopted by the French Parliament (Assemblée Nationale, 2016b), officially a whistleblower is: “*any person who reveals or reports, acting selflessly and in good faith*.”

4. *Ambiguous*, from *ambigere*, to doubt, from *amb*, around (vowel. AMBE), and *igere*, for *agere*, to push (vowel. AGIR); word for word, which pushes from both sides. Littré dictionary (<https://www.littre.org/>).

5. Until recently, the French legal arsenal was considered to be « *incomplete* » (*Transparency international*, 2013). Cf Appendix 1 for French texts concerning the status of whistleblowers.

A crime or an offence,

- *A serious and clear violation of:*
 - an international commitment which has been ratified or approved by France,*
 - a unilateral act of an international organisation adopted on the basis of such commitment, or a serious breach of a law or regulation,*
- *Or a serious threat or harm to the public interest of which the individual has had personal knowledge.”*

The formal disclosure of a criminal affair was confirmed, and at the same time so was the breach of a commitment to the French State by itself or by an international organisation. The way the Law is written means a whistleblower can be internal or external to an organisation. This was considered to be major progress given that until then whistleblowers had been linked to their employers by a past or present work-based relationship. The Law also included what can be considered to be the current risk (“harm”) and future risk (“threat”) to public interest. This provides for a wide scope going from financial issues to health and safety and the environment (Meyer, 2016).

However, the Sapin II Law did not go as far as to give the status of whistleblower to legal entities, which in turn raised a number of difficulties⁶. Likewise, some researchers have underlined the limited nature – even if it appears to be more precise – of the French definition in relation to the European one, which widens the scope of disclosure “*to any disclosure made in the public interest*” (Foegle, 2016). Furthermore, it has been mentioned that to limit disclosure to “*good faith*” or to a selfless act is too vague (Foegle, 2016), which may in turn discredit the whistleblower and stifle the initiative taken by them: “*are we still shooting the messenger?*” (Ashton, 2015).

Three lines can be drawn to the object of a disclosure, since nothing can be reported concerning classified military information, doctor-patient confidentiality or the confidential nature of the relationship between lawyers and their clients. Even if the arguments in favour of protecting classified military information are commonly known, without always being justified, (Grasset, 2001), the framework for medical secrets when applied to the work of laboratories in the pharmacological industry leaves room to be sceptical. Indeed, the potential seriousness of excesses caused by ignoring health risks cannot be under-estimated (Brisard & Beguin, 2016).

Over and above any new definition of a whistleblower, and before this has even been put into practice, it would appear necessary to bring special attention to the moral paradox the current laws do not solve, even if the powers-that-be recognising a more protective status is a welcome step in the right direction.

Although considered by some to be the man, or rather the woman⁷ who knew “*really too much*” (Gibaud, 2014), or simply the enemy from within, whistleblowers are individuals whose loyalty and values push them to act not only in the interest of their company, but also in the interest of Society (Cailleba, 2016). The clash of diverging interests exposes obvious

6. The films made in 2016 by the L214 association showing the degrading treatment of animals and the non-compliance with certain rules and regulations in certain French slaughterhouses, or even the actions undertaken by the FUDA (Force Unies pour le Droit des Animaux) or PETA France associations, points to current and future difficulties in the recognition of legal entities as whistleblowers.

7. Reading mainstream and specialist western media reveals that there are just as many, if not more, female whistleblowers as there are men. Examples include: Erin Brockovitch (PG&E), Irène Frachon (Médiator), Stéphanie Gibaud (UBS), Nicole Marie Meyer (Ministère français des Affaires Etrangères), Sherron Watkins (Enron), Cynthia Cooper (WorldCom) and Coleen Rowley (FBI).

tensions between the economic interests of companies and the collective interests of Society. Consequently, the whistleblower's value system is put to the test by the employer and by Society in general, which are two separate yet equally legitimate sources. Once informed of a potential offence, the State is required to take action on the disclosure. When organisational ethics are not enough to settle issues internally, the Courts are called in through the questioning of the collective conscience. This then raises a moral paradox that is heightened by the confrontation of the company's employees with the managers in charge of applying the law.

As far as France was concerned in 2008, ethical whistleblowing systems did exist, but were "*random and only relatively recently introduced*" (de Bry, 2008: 144). One of the reasons for being so far behind other countries is certainly due to French culture (de Bry, 2008; Charreire Petit & Surply, 2012) and the tormented history of the Second World War, during which "*the French Resistance saw the reporting of events as treason and silence as an act of heroism*" (Bournois & Bourion, 2008: 34). Even today in France, people are reluctant to blow the whistle on a work colleague (Larue, 2007). These cultural reticences are even noticeable in the negative connotations carried by the way the term whistleblower is translated into certain other European languages (*Transparency International*, 2013: 19-21). Indeed, "*denunciation*" is put forward as a term without specifying "*divulgation*", "*révelation*" or "*signalement*" as in the new law. This can be confirmed by considering the case of Quebec, which was not occupied by the German army. In Quebec the terms "*dénonciateur*" and "*lanceur d'alerte*" are freely employed⁸.

Before disclosing or reporting an irregular or illegal act, a person naturally asks questions about the very nature of something that incriminates another person or entity. Cultural dimensions arise beyond the actual object of the disclosure and the influence of Society or History may be an obstacle to it. The individual is faced with a moral dilemma, hesitating between breaking the organisational silence in the name of truth on the one hand, and on the other hand remaining true to an employer and colleagues in the name of loyalty (Cailleba, 2016a & b). The dilemma of an employee-whistleblower can be represented as follows in figure 1.

8. Office Québécois de la langue française, Grand dictionnaire terminologique (viewed 18 April 2016 : <http://www.granddictionnaire.com/Resultat.aspx>).

THE EMPLOYEE	Speak Up	Stay Silent
Obedience	Obeying the Ethics Charter / the Code of Good Practice, etc.	Obedience as misconduct
Loyalty	Towards the organisation	Towards one's managers

Figure 1 - The Whistleblower's Dilemma
(Adapted from Charreire, Petit & Surply, 2012)

According to French Labour Law, an employee may be dismissed for three types of reason⁹:

- Misconduct or negligence ("*faute*"): the error committed by the employee does not necessarily justify the classification of serious misconduct. However, it can be a real and serious cause for dismissal. An employee can be accused of simple misconduct, for example, in the event of an error or negligence committed by them in the course of their work;
- Gross misconduct or negligence ("*faute grave*"): the error is considered as gross misconduct when it makes it impossible to keep the employee in the company. The error(s) must be directly attributable to the employee;
- Willful misconduct or negligence ("*faute lourde*"): the error is considered as willful misconduct when it is committed with the intention of harming the employer. It is up to the employer to prove any intention to harm. Failing that, the employee may be accused of willful misconduct.

If to obey is to "*modify one's behaviour so as to comply with the orders of legitimate authority*" (Allard-Poesi, 2006), 'obedience as misconduct' ("*faute d'obéissance*") therefore means taking a decision and/or adopting behaviour to divest oneself of any responsibility concerning its consequences. The employee then stays silent, whereas they should have spoken up and informed their line manager. They can end up being blamed for the intention to harm the employer (willful misconduct) as well as the desire to protect colleagues (gross misconduct), for example. Obedience as misconduct involves professional misconduct just as much as it involves moral failings. Whistleblowers overcome this by emphasizing the moral aspect whilst at the same time hoping to eventually invoke their professional integrity. Even if the number of whistleblowing cases has increased over the last few years in France, this individual and moral dilemma still remains present.

THE MORAL PARADOX FOR THE COMPANY AND ITS DIRECTORS

A second moral paradox can be added to the first classical one already discussed above. It covers what company directors go through; in other words, why should an employee be protected (in the case of an internal whistleblower), when the disclosure harms the future of the organisation or at least damages its reputation?

In this way, beyond the individual moral paradox there is an organisational one too. Through its managers, the company is confronted with a paradoxical situation from a moral point of view. The company finds itself at odds, on the one hand, with the legitimate protection of its economic interests (Friedman, 1970). And on the other hand, it is not only at odds with reinforced legal requirements to protect the whistleblower, but also at odds with a new requirement to ensure the disclosure is made public (at least internally) and appropriately dealt with.

Firstly, article 7 of the Sapin II Law renders the whistleblower criminally liable "*as long as the disclosure is necessary and proportional to the protection of the interests in question*" (Assemblée Nationale, 2016b)

9. See official French Labour Law website: <https://www.service-public.fr/particuliers/vosdroits/F1137>.

and as long as the previously mentioned legal guidelines are followed (cf. above). Even if the Law leaves open the question of civil liability and the fact that a whistleblower can be prosecuted for libel (article 13), organisations are now fully aware of the limits to the legal action they can take against a whistleblower.

Next, according to article 8, companies are required to implement procedures and make other arrangements which provide channels for the disclosure: in other words, *“appropriate disclosure procedures (...) are to be set up by public or private entities with more than 50 employees”* (Assemblée Nationale, 2016b). These procedures are legal requirements for any public or private organisation, and for any national, regional or local authority.

As a result, it is stipulated that disclosures can be *“made by their members of staff or by external or casual collaborators”* (Assemblée Nationale, 2016b). Once a line manager has been informed, the organisation is required to verify the acceptability of the disclosure *“within a reasonable period of time”* that is to be defined. Failure to do so may lead to *“a legal, administrative or other professional body”*¹⁰ being directly informed of the disclosure. Finally, in the case of the disclosure not being dealt with by one of these organisations *“within a period of 3 months the disclosure can be made public”*.

In any case, according to article 8 once again, the disclosure may be made public or brought to the attention of the organisations mentioned above *“in the case of a serious or imminent danger or in the presence of a risk that would cause irreversible damage”* (Assemblée Nationale, 2016b). Companies should therefore deal quickly and efficiently with a disclosure in order prevent the situation being made aware of too soon beyond its own confines. In addition, preventing a disclosure can be punished by a jail sentence and by a fine (article 13). The Ombudsman can provide a whistleblower who requests their help with support, including financial assistance (article 8 & 14). As we have already seen, a company may be accused of obstructing a disclosure and see the whistleblower assigned the help of the Ombudsman.

Throughout the procedure, the confidentiality of the identity of the whistleblower is guaranteed, failing which a prison sentence and a €30,000 fine can be applied (Assemblée Nationale, 2016b). Even the legal authority is only allowed to reveal the identity of the whistleblower with their permission, and only *“once the disclosure has been fully justified”* (article 9). The company is therefore required to keep the identity of the whistleblower secret. Yet the whistleblower is the person through whom a scandal starts and who, by definition, may jeopardise the reputation and even the future of the company. Even so, the Law does not explain how the identity should be kept secret: should the disclosure be paper-based to avoid any electronic trace left by a professional email? Or on the contrary, shouldn't the use of an anonymous email help with keeping identities secret? In which case, it is pointless to send the email to one's direct line manager! Similarly, the Law does not make it clear about who should guarantee keeping the identity of a whistleblower secret. Being responsible for keeping an identity secret is a difficult task for an individual, as it is for a department. It therefore becomes necessary to train managers, executive

10.It should be noted that Trade Unions are not included in this law. This does not prevent them being informed, but it does not give them any official power or failing that any influence.

managers and in particular the members of the Human Resources department to do this.

A legal framework for actions that put to the test individual morals and ethics within a company (Cuevas & Cailleba, 2015) is destined to produce a paradoxical situation for those who are supposed to enforce it or who are quite simply directly concerned by it. This law is unique in that it also creates a moral paradox for the company. As such, it puts pressure on senior managers for whom it is equally moral to defend and promote the economic interests of their company as it is to defend their employees whose disclosures or revelations risk damaging these very same interests. This puts a strain on the company and its senior managers because the law may open the door to potential risks for the organisation. The traditional moral paradox of the employee, who may hesitate between loyalty and obedience (see Table 1) is consequently exasperated by the moral paradox of senior managers, who have a dual legal obligation to:

- Reinforce the protection of employees (if they are internal) accusing them of a misdemeanour, a crime, or a violation of the law that is likely to cause serious prejudice to the general interest;
- Set up channels for disclosures and for dealing with them, which in turn might undermine confidence in Management and in the company itself.

The problem raised for companies by the management of whistleblowers (and not just the management of the disclosure) is a managerial one when each member of staff is asked to both promote and defend the values of their company (Kraakman, 1986; Bournois & Bourion, 2008). As a consequence, it has become necessary to understand this fundamental managerial paradox personified by whistleblowers, in order to explore avenues to overcome it in the interest of a range of stakeholders (whistleblowers, companies, Society). What is the point of protecting an individual who damages the reputation and even the future of a company? Wouldn't a law that provides too much protection, indirectly aim to weaken companies by guaranteeing certain rights to the "*enemy from within*"?

THE MANAGERIAL PARADOX FORCED ON THE COMPANY BY WHISTLEBLOWERS

It is no coincidence that whistleblowers have become a research topic. Employee initiatives (Peters & Waterman, 1983), the delegation of responsibility throughout the organisation via managerial practices such as empowerment (Spreitzer, 2007) and the promotion of the liberated company (Carney & Getz, 2009) have ended up by being established as mainstream discourse in companies. New means of communication and the desire for transparency have accelerated the phenomenon via information exchange and interaction between all the members of the organisation (Barlatier, 2016). In addition, the increased complexity of organisations in the areas of financial controlling (Mériade & Mainetti, 2013), risk management (Guillon, 2011) and management (Mattei, 2012), whether they be public or private, has brought about the need for greater autonomy and the call for both managers and their staff to act more responsibly.

In such a context, to regret the rising influence of whistleblowers would be a true managerial paradox. On what grounds is it right to criticise

employees who exercise their freedom of speech about their profession in light of their ethical values, whereas they were recruited because they could incarnate these, among other values, in their work? As a consequence, it can be noted that there is a conflict between the logic of compliance specific to each company and the need for each organisation to protect itself by containing within its walls the manifestation of ills by whistleblowers.

THE LOGIC OF COMPLIANCE AND OPEN SUPPORT FOR WHISTLEBLOWERS

The French organisation *Le Cercle de la Compliance* defines compliance as follows: “*all processes that contribute to ensuring that employees and managers apply the rules of the company, but also the values and the ethical spirit generated by the senior management team*”. Compliance is not a simple matter of course, but “*is to be structured (...) around an organisational arrangement set-up throughout the company or the organisation*”¹¹. By creating an ethical culture supported by an organisation-wide policy, compliance underpins any initiative that works to limit (or internally denounce through specific channels) occurrences of malpractice within the organisation (Liyanarachchi & Newdick, 2009). Putting into place an Ethical Code of Conduct contributes to this approach, as well as setting up internal committees, hotlines or other arrangements designed specifically for whistleblowing, among other things. In fact, most companies initially draw up and issue ethics charters and codes of conduct to ensure compliance aligned with what is sometimes an extra-territorial legal framework (cf. above, the Sarbanes-Oxley Law). As a general rule, it is not the extra-territorial nature of compliance that is advanced in management discourse, but more the matching of compliance actions with the CSR standards adhered to by the company or that it claims in a CSR strategy. But, what about actually putting words into practice? Does staking a claim to compliance really mean there are no tensions between CSR declarations and practice that cannot be observed?

Up until the introduction of the Sapin II Law, it was “*much more preferable to make disclosures to third parties (journalists, elected representatives, trade unions, prosecutors)*” (Bourdon, 2015) because in practice, cases were almost systematically stifled from within. As of now, the law recommends first of all an internal publication of the disclosure, with the possibility of outside publication if required (in the case of a long process or the serious nature of the prejudice). Be that as it may, it is in the total interest of companies to take measures to prevent the effects of “*a future time-bomb*” (Charreire Petit & Surply, 2008: 122). It does not mean that disclosures should be avoided, but rather any wrongdoings that may give rise to a disclosure should be. At the same time, any potential disclosures should also be channelled effectively.

Thus, the managerial paradox is based upon a contradictory injunction that requires managers to be both:

- A senior member of staff with impeccable ethical behaviour working in an autonomous but constantly changing professional framework, and;
- A member of staff whose performance (*ipso facto* their career) is

11. The *Cercle de la Compliance* is an association of French lawyers, company lawyers and ethics professionals. Its mission is to promote, publish, advise, train and raise awareness of those working in business, politics, the press and compliance: <http://www.cercedelacompliance.com/>.

assessed according to mainly quantitative objectives (often financial), which must be improved each year.

It is for this reason that compliance is translated by a set of procedures aimed at supporting and protecting potential whistleblowers through principles (applying the law) and also through values (promoting ethical values). By calling on “*gatekeepers*” (Bournois & Bourion, 2008; Vandekerckhove & Tsahuridu, 2010), *i.e.* employees whose job it is to “*guarantee that relevant regulations are followed*” but also by promoting ethical values or codes of conduct within the company, the organisation controls and limits irregular professional practice that may otherwise lead to disclosures.

PROTECTING THE COMPANY OR THE IMPORTANCE OF CONFINING DISCLOSURES

Whatever the sector of activity of a company, wanting to keep a check on and limiting disclosures, or even threateninig potential whistleblowers with retaliatory measures is counter-productive for the work atmosphere (Parmerlee & al., 1982; Miceli & Near, 1994b) and for trouble-shooting (Miceli & Near, 1989; Near & Miceli, 1996; Charreire Petit & Cusin, 2013). In situations where the disclosure has been stifled from within the company, whistleblowers may be tempted to speak out *urbi and orbi*. The new French Sapin II Law supports this type of initiative. However, making an open disclosure runs the risk of being even more violent and damaging for the company, if not for its turnover in any case for its reputation (Rayner, 2004).

As far as companies are concerned, it would appear necessary to retain disclosures within its own walls for two reasons. Firstly, disclosures should be internally controlled and confined efficiently to prevent them getting out. Secondly, in the respect of compliance, disclosures within the company should be sincerely and ethically brought to the attention of the person(s) authorized to deal with them and confirm their serious nature. Since organisational entropy (Cappelletti, 2010) explains that deviance is inherent to human activity, and *a fortiori* to any human collectivity, setting up systems to channel disclosures is vital for companies.

Confining the disclosure also involves the legal obligation to protect whistleblowers against any reprisals. Identified as the traitor who breaches the moral contract with their employer (Near & al., 2004; Cailleba, 2016 a), whistleblowers are put under all sorts of direct and indirect pressure, which are part and parcel of their state (Charreire Petit & Cusin, 2013) and which are apparently linked to a post-traumatic stress syndrome for them (Bourdon, 2015).

CONCLUSION

This article has identified a dual (moral and managerial) paradox for the management of whistleblowers. This dual paradox is fractal in its moral dimension. In this dimension, there is firstly a classical individual moral paradox to which the new French Sapin II Law then adds a moral organisational paradox. The ambiguity of the moral paradox highlighted here reaches its highest due to the pressures placed on whistleblowers and senior managers. On the one side there is the defence of moral individual values, and on the other the defence of the company. These

pressures are equally powerful and end up by creating a permanent divide between the different parties.

Firstly, anybody who hesitates to *report* something, as defined by the Sapin II Law, finds himself at odds with the principle of loyalty to their employer on the one hand, and with being true to their own ethical principles, on the other. This is the *first individual moral paradox*. In parallel, the company is required to set up suitable systems to deal with this kind of disclosure, whilst at the same time keeping confidential the identity of the whistleblower whose very actions might bring down the reputation and even the economic welfare of the company. This is the *second moral paradox*, which is *organisational*. Finally, the *managerial paradox* is characterised by the fact that companies require their employees, and in particular their senior managers, to be more autonomous, to take more responsibilities and to defend its values. At the same time, companies are increasingly wary of their employees' freedom of speech and of their potentially negative impact in case they detect a misalignment of the strategic discourse with the everyday behaviour of their colleagues.

Up until recently, very few studies had dealt with the dual paradox of the nature of whistleblowing. The main limitation to our work could lead one to believe that whistleblowers are simply just an ethical figure among others. However, becoming a whistleblower means acquiring - often in spite of oneself - a status that does not really offer any protection and which it subsequently becomes difficult to get rid of in the eyes of a present or future employer, or in the eyes of Society. In the same way as business leaders, whistleblowers represent a dynamic socio-economic construction as well as a political and cultural one. This construction is made necessary by companies themselves and their stakeholders.

If Society is to promote democratic ideals and individual commitment, it is crucial to stand up for whistleblowers, who are the very incarnation of this (Hauserman, 1986). *Whistleblowing* does not give protection status in companies. *Whistleblowing* has truly become part and parcel of the job description of each and every employee.

Finally, our work rings true with that done in the field of *Critical Management Studies* (CMS), which has put forward an *anti-performative* dimension of a certain organisational culture (Fournier & Grey, 2000). The paradoxical nature of whistleblowing we have illustrated is a reflection of the constraints generated by certain managerial practices in organisations (Alvesson, 2008; Spicer *et al.*, 2009). In fact, by setting up management systems (either *early warning* or *whistleblowing*), whilst at the same time concentrating their efforts on making sure they are not used, aren't companies searching for anti-performativity concerning the question of whistleblowing? To be considered...

APPENDIX 1: HISTORY OF WESTERN WHISTLEBLOWING SYSTEMS

At the international level, the first *whistleblowing* acts appeared just before the end of the 20th Century (de Bry, 2008), and mainly in Anglo-Saxon countries:

- 1998: United Kingdom (*Public Interest Disclosure Act* or Pida);
- 1999: South Africa (*Protected Disclosures Act*), Australia (*Federal Public Service Act*); Northern Ireland (*Public Interest Disclosure Ordre*); European Union (*Statut des fonctionnaires des Communautés Européennes*, modified in 2004);
- 2000: New Zealand (*Protected Disclosures Act*);
- 2001: South Korea (*Anti-Corruption Act*);
- 2004: Canada (*Public Servants Disclosure Protection Legislation*); Netherlands (*Corporate Governance Code of Conduct*); etc.

However, less than 10 years after the SOX law, the 2008 subprime crisis in the United States of America has exposed a certain number of its limits. Obviously, internal ethical disclosures would appear to no longer be enough (Vaughn, 2014). Modifications to the 1863 *Civil False Claims Act* were made in 2008 and voted through in 2009 in order to toughen up the sanctions against companies found guilty of fraud (SEC, 2011). In particular, the *qui tam* procedure was clarified under the two mandates of President Obama (2009-2012 & 2013-2016), by giving more prerogatives and protection to whistleblowers who speak up externally. Under the framework of the Dodd-Frank Act (2010), whistleblowers can take advantage of a “*bounty*” or reward system, which can go as far as to giving them a part of the money recuperated (via tax adjustments) or the fines paid to the State via this procedure¹² (Rashty, 2015). Through their studies on the impact of this law on professional practice, as well as the application of different regulatory systems, certain researchers have mentioned the benefits of increased efficiency (Feldman & Lobel, 2010; Pope & Lee, 2013), and even the heightened “*moral autonomy*” (Mogielnicki, 2011; p.74) of company employees. Other researchers have been less categoric by giving a reminder of the risk that this has on the morale of those involved (Vandekerckhove & Tsahuridu, 2008; 2010), as well as on the trend for disempowerment (Cailleba, 2016a).

In France, the legal texts regulating the status of whistleblowers have, up until now, been considered to be “too sparse” (Masounave, 2015):

- Law of 13th November 2007: private sector employees may disclose cases of corruption;
- Law of 29th December 2011 for the reinforcement of the health safety of health products;
- Law of 16th April 2013 on “*the independent nature of the appraisal of health and environmental issues and of whistleblowers*”;
- Law of 11th October 2013 (n° 2013-907) on transparency in public matters;
- Law of 6th December 2013-1117 on tax evasion and serious economic and financial crime. In particular; article 40 of the penal code of procedure requires civil servants to report any criminal offences;
- Article L. 1161-1 of the Labour Law: employees who in good faith make disclosures about corruption are protected against any reprisals.

11. Anglo-Saxon legal procedure dating from the Middle Ages for which the full title in 14th Century Latin is “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*”, translated as “*[one] who sues in this matter for the King [as well as] for oneself*”. In France, since 1st January 2017 and for a trial period of 2 years, the amendment to the Finance Bill adopted by the National Assembly on 7th November 2016 officially allows international tax fraud informants to be remunerated. The texts do not explicitly mention whistleblowers or informants, but “*any person who does not work for a public authority*”. Web site consulted 9 December 2016 at: http://www.assemblee-nationale.fr/14/amendements/4061C/CIION_TOUTE/CF275.pdf.

REFERENCES

- Allard-Poesi, F. (2006), *Management d'équipe*, 2e édition, Paris : Dunod.
- Alvesson, M. (2008). The future of critical management studies. In D. Barry, & H. Hansen (Eds.), *The Sage Handbook of New Approaches in Management and Organization*, (pp.11-30). New York: Sage Publication.
- Ashton, J. (2015). 15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1988: Are We Still Shooting the Messenger? *Industrial Law Journal*, 44 (1), 29-52.
- Assemblée Nationale (2016a). Rapport d'information sur l'extraterritorialité de la législation américaine. Enregistré le 5/10/2016. Mission d'information constituée le 3 février 2016. Consulted on 28 January 2017. <http://www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf>
- Assemblée Nationale (2016b). Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Texte adopté n°830. Consulted on 7 December 2016. <http://www.assemblee-nationale.fr/14/ta/ta0830.asp>.
- Barlatier, J.-P. (2016). Management de l'innovation et nouvelle ère numérique. *Revue Française de Gestion*, 1, 55-63.
- Boatright, J. R. (2007). Reluctant Guardians: The Moral Responsibility of Gatekeepers, *Business Ethics Quarterly*, 17(4), 613-632.
- Bourdon, W. (2015). Ethique : Les lanceurs d'alerte en mal de statut. *Revue Banque*, Avril 2015, n°783.
- Bournois, F. & Bourion, C. (2008). Les nouveaux gardiens de l'éthique. Ou la vigilance citoyenne. *Revue internationale de psychosociologie*, 234(14), 31-38.
- Brisard, J.-C. & Beguin, A. (2016), *Effets secondaires : Le scandale français*, Paris : Editions First.
- Cailleba, P. (2009). L'entreprise face au risque de réputation. *Responsabilité & Environnement*, 55(3), 9-14.
- Cailleba P. & Cuevas F. (2015). Analyse de la différence entre éthique et morale. *[Im]pertinences, Revue de l'Académie de l'Ethique*, 5(Eté), 19-28.
- Cailleba, P. (2016a). Le lanceur d'alerte : entre loyauté et liberté. *[Im]pertinences, Revue de l'Académie de l'Ethique*, 6(Eté), 37-50.
- Cappelletti, L. (2010). Vers un modèle socio-économique de mesure du capital humain ? *Revue française de gestion*, 8(207), 139-152.
- Charreire Petit, S. & Surply, J. (2008). Du Whistleblowing à l'américaine à l'alerte éthique à la française : Enjeux et perspectives pour le gouvernement d'entreprise, *M@n@gement*, numéro spécial « Ethique et Gouvernance », 11(2), 113-135.
- Charreire Petit, S. & Surply, J. (2012). Parler ou se taire ou le dilemme du salarié lanceur d'alerte. Analyse critique à l'aune de sa liberté. *Revue Economies et Sociétés, série Etudes critiques en management*, 9, 1789-1813.
- Charreire Petit, S. & Cusin, J. (2013). Whistleblowing et résilience : Analyse d'une trajectoire individuelle, *M@n@gement*, 16(2), 142-175.
- Chateauraynaud, F. & Tornay, D. (2013), *Les sombres précurseurs*, 2ème édition, Paris : EHESS.
- Carney, B.M. & Getz, I. (2009) *Freedom, inc.: Free your employees and let them lead your business to higher productivity, profits, and growth, Liberté & Cie*, New York: Crown Business.
- Conseil de l'Europe (2014). Recommandation CM/Rec(2014)7 adoptée par le Comité des Ministres du Conseil de l'Europe le 30 avril 2014 et exposé des motifs. Editions du Conseil de l'Europe. Consulted on 27 April. [https://www.coe.int/t/dghl/standardsetting/cdcj/CDJC%20Recommendations/CMRec\(2014\)7F.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDJC%20Recommendations/CMRec(2014)7F.pdf)
- de Bry, F. (2008). Salariés courageux oui, mais héros ou délateurs ? Du Whistleblowing à l'alerte éthique. *Revue internationale de psychosociologie*, 34(14), 135-150.
- Dodd-Frank Act (2010). Dodd-Frank Wall Street Reform and Consumer Protection Act. 2010. 12 USC 5301, § 922 et. seq.
- Enron (2010). Code of Ethics. July. Consulted on 31 May 2016. <http://www.thesmokinggun.com>
- Ernst & Young (2016). Enquête internationale sur la fraude 2016. 14ème édition. Consulted on 28 June 2016. <http://www.ey.com/FR/fr/Newsroom/News-releases/ey-communique-de-presse-enquete-internationale-ey-sur-la-fraude-2016>
- Feldman, Y. & Lobel, O. (2009). The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality. *Texas Law Review*, 88(6), 1151.
- Foegle, J.-P. (2016). Le projet de loi 'Sapin II' : une protection illusoire des lanceurs d'alerte. The Conversation FR. Consulted on 28 January 2017. <http://theconversation.com/le-projet-de-loi-sapin-ii-une-protection-illusoire-des-lanceurs-dalerte-65693>
- Fournier, V. & Grey, C. (2000). At the critical moment: conditions and prospects for critical management studies. *Human Relations*, 53(1), 7.
- Frachon, I. (2015). Figure du lanceur d'alerte : le cas du Mediator. *Hermès, La Revue*, 3(73), 146-150.
- Friedman, M. (1970). The social responsibility of business is to increase its profits, *New York Times Magazine*, September ,13(32-33), 122-124.
- Gibaud, S. (2014), *La femme qui en savait vraiment trop*, Paris : Le Cherche midi.
- Grasset, B. (2001). Secrets défense. *Pouvoirs*, 2(97), 63-66.
- Guillon, B. (2011). Mises en pratique de la gestion des risques. *Management & Avenir*, 1(41), 66-69.
- Hassink, H. de Vries, M. & Bollen, L. (2007). A Content Analysis of Whistleblowing Policies of Leading European Companies. *Journal of Business Ethics*, 75(1), 25-44.
- Hauserman, N.R. (1986). Whistle-Blowing: Individual Morality in a Corporate Society. *Business Horizons*, March-April, 4-9.
- Huyghe, F.-B. (2016), *La désinformation : les armes du faux*, Paris : Armand Colin.
- Igalens, J. (sous la direction de) (2004), *Tous responsables*, Paris : Editions d'Organisations.

- Kraakman, R. H. (1986). Gatekeepers: The Autonomy of a Third-Party Enforcement Strategy, *Journal of Law, Economics and Organization*, 2(1), 53-04.
- Larue, M.-H. (2007). Les ambiguïtés des systèmes d'alerte éthique. *Gérer et Comprendre*, n°89, p. 24-32.
- Liyanaarachchi, G. Newdick, C. (2009). The Impact of Moral Reasoning and Retaliation on Whistle-Blowing: New Zealand Evidence. *Journal of Business Ethics*, 89, 37-57.
- March, J. G., Guetzkow, H. & Simon H. (1958), *Organizations*, New York: John Wiley & Sons.
- Mattei, G. (2012). Sur le management à l'épreuve de la complexité et du paradoxe ou les avatars du management scientifique et technocratique. *Humanisme et Entreprise*, 2(307), 17-28.
- Masounave, A. (2015). Législation : Lanceurs d'alerte en Europe : où en est-on ? *Revue Banque*, n°783.
- Mauduit, A. (2008). Alerte éthique et salariés d'entreprise. S'agit-il d'un mariage forcé ? *Revue internationale de psychosociologie*, 14(34), 127-133.
- Mériade, L., Mainetti, N. (2013). La réflexivité des acteurs face à la complexité des organisations publiques : un levier interactif de contrôle de la performance universitaire ? *Gestion et management public*, 1(3), 3-23.
- Meyer, N.M. (2016). La loi Sapin II est une très grande avancée pour les lanceurs d'alerte. Entretien avec Mathilde Régis. Le Lanceur. 10 Novembre 2016. Consulted on 28 January 2017. <http://www.l lanceur.fr/nicole-marie-meyer-la-loi-sapin-ii-est-une-tres-grande-avancee-pour-les-lanceurs-dalerte/>
- Miceli, M.P. & Near, J.P. (1985). Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-Blowing Decisions. *Personnel Psychology*, 38(3), 525-544.
- Miceli, M.P., Near, J.P. (1988). Individual and Situational Correlates of Whistleblowing. *Personnel Psychology*, 41(2), 267-281.
- Miceli, M.P. & Near, J.P. (1989). The Incidence of Wrongdoing, Whistle Blowing, and Retaliation: Results of a Naturally Occurring Field Experiment. *Employee Responsibilities and Rights Journal*, 2(2), 91-108.
- Miceli, M.P. & Near, J. P. (1994a). Listening to Your Whistle-Blowers can be Profitable! *Academy of Management Executive*, 8(3), 65-72.
- Miceli, M.P. & Near, J. P. (1994b). Relationships Among Value Congruence, Perceived Victimization, and Retaliation Against Whistle-Blowers. *Journal of Management*, 20(4), 773-794.
- Miceli, M.P. & Near, J. P. (1995). Effective Whistle-Blowing. *Academy of Management Review*, 20(3), 679-708.
- Miceli, M.P., Near, J.P. & Dworkin, T.M. (2008), *Whistle-Blowing in Organizations*, New York: Psychology/Taylor & Francis.
- Miceli, M.P., Near, J.P. & Dworkin, T.M. (2009). A Word to the Wise: How Managers and Policy-Makers Can Encourage Employees to Report Wrongdoing. *Journal of Business Ethics*, 86(3), 379-396.
- Miceli, M.P. & Near, J.P. (2013). An International Comparison of the Incidence of Public Sector Whistle-Blowing and the Prediction of Retaliation: Australia, Norway, and the US. *Australian Journal of Public Administration*, 72(4), 433-446.
- Mogielnicki, M.S. (2011). Hunting for 'Bounty' and Finding 'Moral Autonomy': The Dodd-Frank Act Expansion of Whistle Blower Protections. *Academy of Business Research Journal*, 2, 74-84.
- Musiani, F. (2015). Edward Snowden, l'« homme-controverse » de la vie privée sur les réseaux. *Hermès, La Revue*, 3(73), 209-215.
- Near, J.P. & Miceli, M.P. (1985). Organizational Dissidence: The Case of Whistleblowing. *Journal of Business Ethics*, 4(1), 1-16.
- Near, J.P. & Miceli, M.P. (1996). Whistleblowing: Myth and Reality. *Journal of Management*, 22(3), 507-526.
- Near, J.P., Rehg, M.T., Van Scotter, J.R. & Miceli M.P. (2004). Does type of wrongdoing affect the whistle-blowing process? *Business Ethics Quarterly*, 14(2), 219-242.
- NEBS (2013). 2013 National Ethics Business Survey. NEBS of the US Workforce. Document consulted on 28/6/2016. <https://www.ethics.org/eci/research/eci-research/nbes/nbes-reports/nbes-2013>
- Parmerlee, M.A., Near J.P. & Jensen, T.A. (1982). Correlates of Whistle-Blowers' Perceptions of Organizational Retaliation. *Administrative Science Quarterly*, 27, 17-34.
- Peretti, J.-M., Delaye, R. (sous la dir. de) (2010), *Tous Vertueux*, Paris : Editions d'Organisation.
- Pereira, B. (2009). Chartes et codes de conduite : le paradoxe éthique. *Management & Avenir*, 1(21), 26-43.
- Peters, T. & Waterman, R. (1983), *Le prix de l'excellence*, Paris: InterEditions.
- Pope, K.R. & Lee, C.C. (2013). Could the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 be Helpful in Reforming Corporate America? An Investigation on Financial Bounties and Whistle-Blowing Behaviors in the Private Sector. *Journal of Business Ethics*, 112(4), 597-607.
- Rashty, J. (2015). Corporate Ethics and the Rights of Whistleblowers. *The CPA Journal*, 85(2), 48-50.
- Rayner, J. (2004), *Managing Reputational Risk*, Chichester: John Wiley & Son Ltd.
- SOX (2002). Sarbanes-Oxley Act of 2002. 2002. 15 U.S.C. 7201, § 301.
- SEC (2011). Final Rule. Securities Whistleblower Incentives and Protections, 17 CFR 240, 249.
- Spicer, A., Alvesson, M., & Kärreman, D. (2009). Critical performativity: The unfinished business of critical management studies. *Human Relations*, 62(4), 537.
- Spreitzer, G. (2007). Participative Organizational Leadership, Empowerment, and Sustainable Peace, *Journal of Organizational Behavior*, 28(8), 1077-1096.

Transparency International (2013). Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU. Consulted on 31 May 2016. http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_wistleblowers_in_the_eu

Vandekerckhove, W. & Tsahuridu, E.E. (2008). Organisational Whistleblowing Policies: Making Employees Responsible or Liable? *Journal of Business Ethics*, 82(1), 107-118.

Vandekerckhove, W. & Tsahuridu, E.E. (2010). Risky Rescues and the Duty to Blow the Whistle. *Journal of Business Ethics*, 97(3), 365-380.

Vaughn, R.G. (2014), *The Successes and Failures of Whistleblowers Laws*, New York: Edward Elgar Publishing Ltd.

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